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Protection of property rights  
under the European Convention  
on Human Rights and the  
Russian national legislation

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# Summary

The importance of property in everyday life of people is obvious. Although sometimes it looks like property does not fit into the human rights context, the author believes that the right to property as any other human right needs protection. The fact that 20 percent of all violations found by the European Court of Human Rights in the last eight years are connected with property rights illustrates the importance of property rights. This thesis evaluates and compares property rights protection under the European Convention on Human Rights and Russian national legislation.

The thesis consists of three main parts. The first Chapter looks into the international model of the protection of property rights. After mentioning the main international instruments containing protection of the right to property, the thesis is focused on the protection model under the European Convention on Human Rights. The history of the property clause is looked into. Article 1 of Protocol № 1 of the European Convention on Human Rights is examined in detail. In order to understand the property rights clause, the basic case-law of the European Court of Human Rights and the European Commission of Human Rights are covered. First, the author illustrates the concept of property rights, by giving numerous examples of rights which fall under the protection of Article 1 of Protocol № 1. Second, the content of property rights is explained and the description of three main rules, deprivation of property, control of the use of property and the peaceful enjoyment of possession are given. Since the right of property is not absolute and is subject to restriction, the author examines under which conditions interference with property rights is justified. According to the case-law of the Strasbourg bodies, interference with property rights by a state is allowed only if three conditions - lawfulness, public and general interest and proportionality – are fulfilled cumulatively. At the end of Chapter I, the connection between the right to property and the right to a fair trial is touched upon.

After the description of the European standards, the thesis shifts into the Russian national framework of property rights protection. The domestic legislation is explained and analyzed and problems in the legislation are pointed out. The author starts the Chapter with important historical remarks about the country and with the relevant constitutional provisions concerning property rights protection. After explaining the concept of property in the domestic system, the thesis examines the content of property rights. According to the Russian model, everybody have the right to own, to possess, to use and to dispose of property. However, these rights are not absolute, they are subject to limitations; a person can even be deprived of property. Under the Russian law, confiscation, nationalization, requisition and expropriation are the main forms of deprivation of property. After pointing out the existing problems with all of these forms of deprivation of property the thesis turns to the question of justification of the deprivation of property. In Russia, as a post-communist country, a lot of problems with property rights over land exist, the most relevant of them are touched upon in this thesis. At the end of Chapter II, the system of the domestic judicial protection of property rights by the Constitutional Court of the Russian Federation and by the ordinary federal courts is illustrated.

The last Chapter represents the analysis between the European and the Russian models of property rights protection. It starts with statistical information about the number of property rights violations found by the European Court of Human Rights in general and against the Russian Federation in particular. Differences in the concept of property rights and justifications for the interference with property rights are pointed out. The author makes an analysis of the case-law with the Russian Federation as a respondent state and concludes that the majority of the cases against Russia concern non-enforcement of court decisions and violation of property rights by the way of supervisory review. The author mentions the reasons for this situation with property rights in Russia and suggests some possibilities of solving the existing problems. Chapter 3.7 of the thesis covers the questions about the necessity to apply the case-law of the European Court of Human

Rights in the Russian Federation, the problems and the positive practice of this application.

At the end of the thesis, the author makes some concluding remarks about existing problems with property rights protection in Russia and gives some recommendations.

# Preface

This thesis represents the final stage of the Master's Programme in International Human Rights Law in the Lund University, Sweden.

First of all, I would like to thank the Raoul Wallenberg Institute for the opportunity to attend this Masters' Programme and the Swedish Institute for the financial support.

I would like to thank the professors of the RWI and the Faculty of Law in the Udmurt State University from whom I have gained the necessary knowledge. Especially, I would like to express deep gratitude to my Supervisor, Professor Karol Nowak, for his guidance and helpful advice while writing my thesis.

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# Abbreviations

Art.	Article
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
ECHR	European Convention on Human Rights
EcomHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
P1-1	Article 1 Protocol № 1
RF (РФ)	Russian Federation (Российская Федерация)
RSFSR (РСФСР)	Russian Soviet Federative Socialist Republic (Российская Советская Федеративная Социалистическая Республика)
UDRH	Universal Declaration of Human Rights



# Introduction

The importance of property in the everyday life of human beings is obvious. Every day people are involved in various property relations. A majority of states have a market economy for which property is a vital element. Property is closely connected with the domestic legal system; it has links with constitutional, civil and even criminal law. Besides this, property is also connected with international law in general and international human rights law in particular. From the first sign, it looks like property does not easily fit into the human rights context. Property rights are often considered to be less important than other human rights. However, in the last century, several of the worst violations of human rights were connected to property. For example, collectivisation of land in Ukraine and China has led to the death from starvation of around 30 million people. This proves that property rights, as any other human rights, deserve protection.

Property is a complex and controversial right. There were many debates about the right to property. At the global level no consensus about property rights protection has been reached, while at a regional level property rights protection has received substantial development. The European Convention on Human Rights (ECHR) included a property rights guarantee in Article 1 of Protocol № 1 (P1-1).

A lot of research have been carried out into property rights; however, it seems that property rights did not get enough attention from the human rights perspective. The importance of property rights protection can be illustrated by the fact that property rights are among the most violated rights (at least in the European system). Around 20 percent of all violations found by the European Court of Human Rights (ECtHR) are connected with property rights (See Supplement I).

For Russia, property was always considered as a foundation stone in the legal order. In the last two centuries the attitude towards property changed several times, together with the political regime of the country. The last of these changes happened less than two decades ago,

when Russia started to build a market economy. Almost nine years ago, Russian citizens gained access to the ECtHR for the protection of their rights. The author is familiar about the poor situation with human rights in Russia in general. However, the fact that 51.27 percent of all violations against Russia found by the ECtHR during last five years are connected with property rights has generated interest in finding out the reasons for such a situation. The question arose: Is European protection of property rights stronger than the Russian one?

The purpose of this thesis is the evaluation and comparison of property rights protection under the ECHR and Russian national legislation. The ECHR has been chosen as the most developed human rights protection system in general and in connection with property rights in particular. Besides this, the ECtHR is the only international body in which Russian citizens can make a claim about the violation of their property rights. The choice for the Russian system is quite obvious – the author, being a Russian lawyer, has the necessary knowledge for the comparison of the Russian legislation obtained during five years of study and some practical experience. Russia has incorporated the ECHR into the domestic legal system and the provisions of the ECHR as well as the case-law of the ECtHR have become binding for Russia. The author considers that for the harmonic integration of Russia into the European space it is necessary to examine the European standards of property rights protection, to determine contradictions between the Russian and the European model, and to try to solve them.

The main method used in this thesis is the traditional method of legal research. The author describes relevant international and national legislation and the case-law as well as legal doctrine. A lot of attention is given to the domestic legislation due to the fact that without explaining the national legislation it is not possible to point out the problems with it and to make a further comparison with the European standards. The method of comparative legal analysis is also used in the thesis in order to analyze the European and the Russian models of property rights protection.

The remainder of this thesis is divided into three Chapters. In the first Chapter the protection of property rights under P1-1 is examined. In the beginning the historical background is touched upon. Next, the concept of property and the content of the right to property are covered. Further, the author looks into justifications of the interference with property and mentions relations between P1-1 and Art. 6 of the ECHR.

The second Chapter covers property rights protection under the Russian legislation. It provides some Russian historical background for a better understanding of the current situation in the country. The author refers to the Constitutional provisions of property rights protection as the most important ones. The concept, the content of property rights and justifications of the interference with property rights are examined from theoretical and practical points of view. Further, existing problems with property rights of land are looked into. And lastly, the domestic judicial system for the protection of property rights is described.

In the third Chapter the comparison between the European and the Russian models is made. The similarities and differences of both models are mentioned. Further, the case-law of the ECtHR with Russia as a respondent state is analyzed and the problems with the application of this case-law in Russia are pointed out. And finally, the conclusion about the findings of the research is made.

# 1 Chapter I - Property Rights under the ECHR

## 1.1 Background of the right to property under the ECHR

Before evaluating the protection of property rights under the ECHR it is useful to examine the other instruments containing such protection. Property rights already appeared in the eighteenth century in such early bills of rights as the Virginian Declaration of Rights (1776), the French Declaration of the Rights of Man and of the Citizens (1789)<sup>1</sup> and the Fifth Amendment to the US Constitution (1791).<sup>2</sup> Such rights were introduced as a means to reduce governmental power.<sup>3</sup>

Furthermore, the protection of property rights was included in the Universal Declaration of Human Rights (UDHR), the first international human rights instrument. Art. 17 of the UDHR reads as follows:

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

There were a lot of debates about the property rights protection clause. Some states such as the United Kingdom, Australia and India were against the inclusion of the property clause at all. Other states insisted on different formulations. For example, the Soviet Union proposed a weak formulation.

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<sup>1</sup> Art. 17 sets forth that "property, being an inviolable and sacred right, none can be deprived of it, except when public necessity, legally ascertained, evidently requires it, and on condition of a just and prior indemnity". See in J. Bell, *French Constitutional Law* (Oxford, 1992).

<sup>2</sup> It is stated that "[n]o person shall... be deprived of...property, without due process of law; nor shall private property be taken for public use, without just compensation". See at <<http://www.usconstitution.net/const.html#Am5>>, visited on 23 October 2007.

<sup>3</sup> A. R. Çoban, *Protection of Property Rights within the European Convention on Human Rights* (Dartmouth, 2004), p. 125.

It argued that the right to own a property should be in conformity with the law of the state and wanted to change the term “arbitrary” to “unlawfully”.<sup>4</sup> The final property clause in the UDHR is very general and not strong. It has been interpreted as a general capacity to own property rather than the right to actually obtain property.<sup>5</sup> Art. 17 (2) can be interpreted, as a general rule, as a prohibition of taking a property without just compensation.<sup>6</sup>

Unfortunately, neither the ICCPR nor the ICESCR contain property guarantee clauses. However, this does not mean that property rights were denied during the drafting process. Property guarantees were discussed but state parties could not reach an agreement on the formulation of the right to property. The non inclusion of property rights in the International Covenants proves how controversial the rights are and how unwilling states are to give international protection to such rights.<sup>7</sup>

The right to property has been included in Art. 5 of the ICERD, Art. 16 (1) of the CEDAW and in some other Conventions of specific nature. All regional human rights instruments also contain the right to property.

The right to property is not among the original rights of the ECHR. Such a right was introduced at later stage and was included in the First or the Additional Protocol. The reason for this late introduction was not the rejection of property rights during the drafting process. Just the opposite - the right of property was one of the most controversial issues for the drafters and it took a long time to reach an agreement on the formulation of the right to property.<sup>8</sup> The following questions were at stake during the drafting process:

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<sup>4</sup> G. Alfredsson and A. Eide (eds.) *The Universal Declaration of Human Rights: a common standard of achievement* (The Hague, 1999) p. 363

<sup>5</sup> A. Rosas, ‘Property Rights’ in A. Rosas et al (eds.), *The Strength of Diversity: Human Rights and Pluralist Democracy* (The Hague, 1992) p. 137.

<sup>6</sup> Ibid.

<sup>7</sup> G. Alfredsson and A. Eide (eds.), *supra* note 4, p. 367.

<sup>8</sup> A. R. Çoban, *supra* note 3, p. 124.

- Should the protection be offered only for personal belongings, or should it be extended to all the property rights with respect to any kind of property?
- Should member states be allowed to take private property? If yes, under which conditions such power can be exercised?
- When private property is expropriated, does the owner have the right to compensation? If yes, according to which standards should such compensation be calculated?
- If a right to compensation in the case of deprivation is guaranteed, should the level of compensation be the same for nationals and foreigners?
- Within which period of time should states be obliged to pay the compensation to the dispossessed owner?
- To what extent should member states be afforded a right to impose limitations on the use of property?<sup>9</sup>

In order to understand better the context of property rights under the ECHR it is useful to examine preparatory works or *Travaux Preperatories*.

Originally, it was proposed to include the right to property in the form of reference to Art. 17 of the UDHR.<sup>10</sup> This proposal was rejected for several reasons. The wording of Art. 17 of the UDHR was thought to be too uncertain and imprecise. Another reason was that the right to property was a social and economic right and could not be distinguished from other social and economic rights. Since rights of such a nature were not supposed to be covered by the ECHR, the right to property should not be included.<sup>11</sup> Some members of the Committee of Ministers were of the opinion that it would not be possible to confer on an international body the right to control the lawfulness of the limitations imposed on property, because such limitations depended on the economic and social conditions of the country

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<sup>9</sup> A. M. Aronovitz, 'Individual Patrimonical Rights under the European Human Rights System: Some reflections on the Concept of Possession and Dispossession of Property', *International Journal of Legal Information* (1997), p. 91.

<sup>10</sup> Collected Edition of the '*Travaux Preparatories*' of the European Convention on Human Rights (M. Nijhoff, Dordrecht, 1985) Vol.I p. 230.

<sup>11</sup> A. R. Çoban, *supra* note 3, p. 129.

in question.<sup>12</sup> A number of political reasons were given to support the exclusion of property rights.<sup>13</sup> Ongoing nationalization programmes in some states caused hesitation.<sup>14</sup> However, the majority of the Committee of Ministers was of the opinion that since the right to property plays an important role in the independence of the individual and of the family, it should be included in the ECHR.<sup>15</sup> On 17 August 1950, the Consultative Assembly, after long discussions and some amendments adopted the following formulation of the property rights:

Every natural and legal person is entitled to the peaceful enjoyment of his possessions. Such possessions can not be subjected to arbitrary confiscation. The present measures may not, however, be considered as infringing, in any way, the right of a state to pass necessary legislation to ensure that the said possessions are utilized in accordance with the general interest.

However, this proposal was not approved and not included in the Convention. Instead it was referred to the Committee of Experts for further consideration and for the preparation of a Protocol.<sup>16</sup>

In addition to the Assembly's text, two other drafts were suggested by the British and Belgian representatives. The Committee of Experts worked on these three texts. After several meetings the final text was adopted and included as Article 1 of the First Protocol (P1-1) to the ECHR signed on 20 March 1952.<sup>17</sup> It entered into force on 18 May 1954 after 10 ratifications by member states. P1-1 reads as follows:

Every natural and legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

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<sup>12</sup> *Travaux Préparatoires*, Vol.I p. 198.

<sup>13</sup> *Travaux Préparatoires*, Vol.II p. 76.

<sup>14</sup> *Travaux Préparatoires*, Vol.II p. 86.

<sup>15</sup> *Travaux Préparatoires*, Vol.I p. 200.

<sup>16</sup> W. Peukert, 'Protection of Ownership under Article 1 of the First Protocol to the European Convention on Human Rights', *Human Rights Law Journal* (1981), p. 40.

<sup>17</sup> *Travaux Préparatoires*, Vol.VIII p. 212.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest and or to secure the payment of taxes or other contributions or penalties.<sup>18</sup>

Currently, the Protocol is in force for 44 member states. All member states signed the Protocol but 3 of them (Andorra, Monaco and Switzerland) did not ratify the Protocol yet.<sup>19</sup>

## 1.2 The concept of property under the ECHR

P1-1 does not mention directly a right to property. In its wording it uses the phrase “peaceful enjoyment of possessions”. The term “property” is used only in the second paragraph of the article. However, in the *Marckx* case the ECtHR pointed out that “Article 1 (P1-1) is in substance guaranteeing the right of property”.<sup>20</sup> For the better understanding of P1-1, it is very important to determine what does constitute ‘property’ or ‘possession’.

The concept of property is defined differently in various European countries.<sup>21</sup> Therefore, the Convention organs needed to elaborate on an autonomous meaning of the concept of ‘possession’ which does not depend on the formal classification in the domestic law.<sup>22</sup> The question was whether such a definition should be limited to the traditional concept of property (*rights in rem*), or whether it should be defined more broadly as it is done in public international law and some national constitutional law, in

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<sup>18</sup> See <<http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm>>, visited on 24 October 2007.

<sup>19</sup> See <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=009&CM=7&DF=10/24/2007&CL=ENG>>, visited on 24 October 2007.

<sup>20</sup> *Marckx v. Belgium*, 13 June 1979, Judgment of the ECtHR, app. no. 6833/74, para. 63.

<sup>21</sup> G. Samuel, ‘Are Property Rights so Simple in Europe?’ In P. Jackson and D.C. Wilde (eds.) *Property Law: Current Issues and Debates* (Dartmouth, 1999), p. 161.

<sup>22</sup> A. Grgic et al., *The right to property under the European Convention on Human Rights: a guide to the implementation of the European Convention on Human Rights and its protocols* (Strasbourg, 2007), p. 7.



which property is equated with vested rights.<sup>23</sup> Convention bodies preferred the second approach. As follows from the ECtHR case-law, ‘possession’ includes not only the right of ownership but also a whole range of pecuniary rights.<sup>24</sup> Apart from ownership of immovable and movable property, rights arising from shares, arbitrational awards, intellectual property rights, established entitlement to a pension, entitlement to a rent and even rights arising from running a business also qualify as ‘possession’ within the meaning of P1-1.<sup>25</sup> It is not possible to determine clear limits of P1-1 protection, because the case-law on this point is still developing. Nevertheless, existing case-law offers some general pointers.<sup>26</sup>

In the *Gasus Dosier* case the ECtHR ruled that:

“the notion “possession”...is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as “property rights” and thus as “possession”.”<sup>27</sup>

P1-1 protects only existing property, it does not guarantee the right to acquire property. For this reason, the ECtHR stated that the expectation of inheritance did not constitute a ‘possession’.<sup>28</sup> However, as it was ruled in the later case, when the person providing the inheritance has died, heirs gain the ownership of the estate jointly and it constitutes possession.<sup>29</sup>

Intellectual property rights, such as copyrights, patents, publishers’ rights, trademarks and other protective rights, also constitute possessions within the meaning of P1-1.<sup>30</sup> Intellectual property as a specific

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<sup>23</sup> A. R. Çoban, *supra* note 3, p. 145.

<sup>24</sup> A. Grgic et al., *supra* note 22, p. 7.

<sup>25</sup> *Ibid.*

<sup>26</sup> P. van Dijk (ed.) *Theory and Practice of the European Court on Human Rights*, 4th edition (Antwerpen, 2006) p. 866

<sup>27</sup> *Gasus Dosier- und Födertechnik GmbH v. the Netherlands*, 23 February 1995, Judgment of the ECtHR, app. no. 15375/89, para. 53.

<sup>28</sup> *Marckx v. Belgium*.

<sup>29</sup> *Inze v. Austria*, 28 October 1987, Judgment of the ECtHR, app. no. 8695/79, para. 38.

<sup>30</sup> See for example, *Smith Kline and French Laboratories Lld v. The Netherlands*, 4 October 1990, Admissability Decision of the EComHR, app. no. 12633/87; *Lenzing AG v. The United Kingdom*, 9 September 1998, Admissability Decision of the EComHR, app. no. 38817/97; *Aral, Tekin and Aral v. Turkey*, 14 January 1998, Admissability Decision of the EComHR, app. no. 24563/94.

type of property constitutes a subject of different research and is not covered by this thesis.

In some of the states *rights in personam* are not accepted as property. However, from the beginning the Convention organs have recognized that such rights are covered by P1-1.<sup>31</sup> Both private and public law claims constitute possession within the meaning of P1-1. In early applications the European Commission on Human Rights (EComHR) decided that debts constitute possession<sup>32</sup> but the applicant must prove that he/she is entitled to enjoy such assets through a document, judicial decision, etc.<sup>33</sup> In the *O.N. v. Bulgaria* case the EComHR ruled that restitution claims arising from unjust enrichment constituted possession.<sup>34</sup> Company shares, since they have economic value, also constitute a possession.<sup>35</sup> Contractual rights of employees that have an economic character such as salary constitute possession as well.<sup>36</sup> As mentioned above, P1-1 protects only existing rights, due to this reason in the *X v. Germany* case the EComHR decided that a notaries' expectation in respect of fees did not constitute a possession.<sup>37</sup>

There were a number of cases in which goodwill was considered as a property right. For instance, in the *Van Marle* case the ECtHR decided that the right to use the title "accountant"

"...may be likened to the right of property embodied in Article 1 (P1-1): by dint of their own work, the applicants had built up clientele; this had in many respects the nature of a private right and constituted an asset and, hence, a possession within the meaning of the first sentence of Article 1 (P1-1)".<sup>38</sup>

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<sup>31</sup> A. R. Çoban, *supra* note 3, p. 150.

<sup>32</sup> *A., B., C., and D. v. The United Kingdom*, 29 May 1967, Admissibility Decision of the EComHR, app.no. 3039/67.

<sup>33</sup> A. R. Çoban, *supra* note 3, p. 151.

<sup>34</sup> *O. N. v. Bulgaria*, 6 April 2000, Judgment of the ECtHR, app. no. 35221/97.

<sup>35</sup> *Lithgow and Others v. UK*, 8 July 1986, Judgment of the ECtHR, app. no. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81.

<sup>36</sup> See for example, *De Santa v. Italy*, 2 September 1997, Reports 1997 – V, p. 1663.

<sup>37</sup> *X v. the Federal Republic of Germany*, 13 December 1979, Admissibility Decision of the EComHR, app. no. 8410/78.

<sup>38</sup> *Van Marle and others v. The Netherlands*, 26 June 1986, Judgment of the ECtHR, app. no. 8543/79, 8674/79, 8675/79, 8685/79, para. 41.

Similarly, in the *H v. Belgium* case the ECtHR found that the lawyer's clientele came within the ambit of property rights.<sup>39</sup>

Although public law claims do not constitute property under domestic law of the majority of contracting states, the Convention organs established that all public law claims which have economic value constitute possession.<sup>40</sup> Statutory claims based on perceived individual efforts or losses suffered because of the actions of the government are considered as possessions.<sup>41</sup> In the *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society* case the ECtHR recognized the restitution claims as a possession within the meaning of P1-1.<sup>42</sup>

Pensions and social benefits claims are highly debated before the Convention bodies.<sup>43</sup> With regard to pension schemes and social security systems the Commission has differentiated between two systems.<sup>44</sup> According to the first one, "by the payment of contributions, an individual shares in a fund is created, the amount of which can be determined at each particular moment".<sup>45</sup> According to the second one, "the relation between the contributions being paid and the later benefit is much looser, which makes the object of the possessions less adequately definable".<sup>46</sup> In general, claims under the first system constitute possessions, while the claims under second system do not.

In a number of cases the Convention organs examined if a licence for carrying out certain economic activities could give a licence holder some property rights. According to the EComHR:

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<sup>39</sup> *H. v. Belgium*, 30 November 1987, Judgment of the ECtHR app. no. 8950/80, para 47.

<sup>40</sup> A. R. Çoban, *supra* note 3, p. 156.

<sup>41</sup> P. van den Broek, 'The Protection of Property Rights under the European Convention on Human Rights', *Issues of European Integration* (1986) p. 52

<sup>42</sup> *The National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. United Kingdom*, 23 October 1997, Judgment of the ECtHR, Collection of judgments and decisions, 1997-VII, No.55

<sup>43</sup> A. R. Çoban, *supra* note 3, p. 157.

<sup>44</sup> P. van Dijk (ed.) *supra* note 26, p. 867.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

“the answer will depend *inter alia* on the question whether the licence can be considered to create for the licence-holder a reasonable and legitimate expectation as to the lasting nature of the licence and as to the possibility to continue to draw benefits from the exercise of licensed activity”.<sup>47</sup>

In the EComHR view, the rights of a licence holder can not be protected if the licence is withdrawn in accordance with the provisions of the law which was in force when the licence was issued, or if the licence holder no longer meets the conditions of the licence.<sup>48</sup> In the *Tre Traktörer Aktiebolag* case, the ECtHR ruled that the applicant’s licence to serve beer, wine and other alcoholic beverages constitutes possession. Since the maintenance of the licence was an important element of the running of the restaurant and the applicant company could legitimately expect to keep the licence as long as it did not infringe the conditions thereof, the withdrawal of the licence had adverse effect on the goodwill and value of the restaurant and thus, interfered with the company’s rights under P1-1.<sup>49</sup>

To conclude, economic interest of any kind resulting from relations between individuals constitutes possession within meaning of P1-1. While goodwill of a business or a profession amounts to possession, mere expectation about the income does not constitute possession. Any kind of compensation or restitution claims that have a pecuniary value can be considered as possession. A licence can constitute possession if a licence holder gets an economic interest from it.

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<sup>47</sup> *Batelaan and Huiges v. The Netherlands*, 3 October 1984, Admissibility Decision of the EComHR, app. no. 10438/83.

<sup>48</sup> *Ibid*; see also *Størksen v. Norway*, 5 July 1994, Admissibility Decision of the EComHR, app. no. 19819/92.

<sup>49</sup> *Tre Traktörer Aktiebolag v. Sweden*, 7 July 1989, Judgment of the ECtHR, app. no. 10873/84, para.53

## 1.3 The content of property rights

### 1.3.1 Introductory remarks

The ECtHR had held in its case-law that P1-1 comprises three distinct rules. This was stated for the first time in the case of *Sporrong and Lönnroth*,<sup>50</sup> which is considered to be one of the most important decisions of the ECtHR in relation to P1-1.<sup>51</sup> The ECtHR formulated these rules in the following manner:

“[t]he first rule, which is of the general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, among other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph”.<sup>52</sup>

When considering a complaint, firstly, the ECtHR shall examine the existence of property right within the scope of P1-1, secondly, it shall consider whether there has been interference with that right and the nature of that interference (i.e. which of the three rules applies).<sup>53</sup> However, it should be kept in mind that these rules are not “distinct” in the sense of being unconnected. The ECtHR ruled that,

“[t]he second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule”.<sup>54</sup>

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<sup>50</sup> *Sporrong and Lönnroth v. Sweden*, 23 September 1982, Judgment of the ECtHR, app. no. 7151/75; 7152/75.

<sup>51</sup> A. Grgic et al., *supra* note 22, p. 10.

<sup>52</sup> *Sporrong and Lönnroth v. Sweden*, para. 61.

<sup>53</sup> A. Grgic et al., *supra* note 22, p. 10.

<sup>54</sup> *James and Others v. United Kingdom*, 21 February 1986, Judgment of the ECtHR, app. no. 8793/79, para. 37.

Before inquiring whether the first general rule has been complied with, the ECtHR shall determine whether the last two are applicable.<sup>55</sup> Therefore, following the logic of the ECtHR, in this thesis the first rule is examined after the second and the third rules.

### 1.3.2 Deprivation of property (second rule)

The essence of deprivation of property is the dispossession of the subject of property, or the extinction of the legal rights of the owners.<sup>56</sup> It is not always unproblematic to decide which interference constitutes deprivation.<sup>57</sup> Generally, deprivation of property includes transfer of property.<sup>58</sup> In the *Handyside* case the ECtHR stated that the sentence “deprived of his possession” applies only to someone who is “deprived of ownership”.<sup>59</sup> However, in more recent cases neither the ECtHR nor the EComHR have been using such strong terms of interpretation.<sup>60</sup> For example, in the previously mentioned *James and Others* case the ECtHR stated that a law which obliged an owner to sell his property to a leaseholder was a measure involving the deprivation of property.<sup>61</sup> Indirect deprivation was recognised by the ECtHR in the *Håkansson and Sturesson* case, concerning forced sales. The applicant had bought farming land at an auction but had been obliged to resell it, since the authorities did not grant him the necessary permit.<sup>62</sup> Nevertheless, it is necessary to point out that temporary dispossession can not be regarded as deprivation; it constitutes control of the use of property.<sup>63</sup>

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<sup>55</sup> *Sporrong and Lönnroth v. Sweden*, para 61.

<sup>56</sup> A. Grgic et al., *supra* note 22, p. 10.

<sup>57</sup> A. R. Çoban, *supra* note 3, p. 175.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Handyside v. the United Kingdom*, 7 December 1976, Judgment of the ECtHR, app. no. 5493/72, para.62.

<sup>60</sup> G. Gauksdóttir, *The Right to Property and the European Convention on Human Rights: a Nordic Approach* (Lund University, 2004) p.158.

<sup>61</sup> *James and Others v. United Kingdom*, para. 40.

<sup>62</sup> *Håkansson and Sturesson v. Sweden*, 21 February 1990, Judgment of the ECtHR, app. no. 11855/85.

<sup>63</sup> *Handyside v. the United Kingdom*, para.62.

Cases of expropriation fall into ambit of the second sentence of paragraph 1 of P1-1. Expropriation can be defined as “transfer of property rights to a governmental department or other public body institution for the purpose of public use”.<sup>64</sup> In the *Bramelid and Malmström* case the EComHR stated that although there is no explicit reference to “expropriation” as such in the P1-1, its wording shows that it is intended to refer to expropriation.<sup>65</sup> The case of *Zubany*, concerning the forced taking of land in order to build houses for disadvantaged persons, is a clear example of expropriation.<sup>66</sup> It should be borne in mind that the ECtHR not only takes into account whether there has been a formal expropriation or transfer of ownership but it also examines a situation in order to decide whether there has been a *de facto* expropriation.<sup>67</sup>

The situation of *de facto* expropriation can be illustrated by the following cases. In the *Papamichalopoulos* case the applicants’ agricultural land had been taken by the state during the dictatorship regime and transferred to the Navy Fund which then established a naval base. After that time the applicants were unable to make a use of their property or to sell, bequeath, mortgage or make a gift of it. Although, the applicants’ property had not been formally expropriated and they remained the titled owners of the land, they lost all ability to dispose of the land concerned. This situation was recognised by the ECtHR as *de facto* expropriation which constitutes violation of P1-1.<sup>68</sup> Similarly, in the *Vasilenscu* case the ECtHR considered that the unlawful seizure of valuables (gold coins) in 1966 which had led to the loss of all ability to dispose of the property concerned, taken together with the failure of the attempts to have the situation remedied by the national authorities and courts, amount to a *de facto* confiscation, incompatible with the applicant’s right to property.<sup>69</sup>

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<sup>64</sup> G. Gauksdóttir, *supra* note 60, p. 159.

<sup>65</sup> *Bramelid and Malmström v. Sweden*, 12 October 1982, Admissibility Decision of the EComHR, app. no. 8588/79 & 8589/79.

<sup>66</sup> *Zubany v. Italy*, 7 August 1996, Judgment of the ECtHR, app.no. 14025/88.

<sup>67</sup> A. Grgic et al., *supra* note 22, p. 10.

<sup>68</sup> *Papamichalopoulos and Others v. Greece*, 24 June 1993, Judgment of the ECtHR, app. no. 14556/89.

<sup>69</sup> *Vasilenscu v. Romania*, 22 May 1998, Judgment of the ECtHR, Collection of judgments and decisions, 1998-III, No.53.

As has been illustrated by the *Lithgow* case, nationalization, *i.e.* transfer of property title from a private entity to a public one, also falls within the ambit of the deprivation rule.<sup>70</sup>

In most cases deprivation of property under P1-1 involves a transfer of the property from a private owner to a public body. However, in a number of cases the Convention bodies recognised that the transfer of property rights from one individual to another individual can also amount to deprivation of property.<sup>71</sup>

### 1.3.3 Control of the use of property (third rule)

The second paragraph of P1-1 allows states almost unlimited power “to impose restrictions on the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”<sup>72</sup> The scope of the control rule is very wide; it embraces all measures taken by public authorities to regulate use of property which do not amount to deprivation.<sup>73</sup>

Sometimes it is not easy to differentiate between deprivation of property from one hand, and the imposition of limitation on use of property on the other hand. The existence of such problem can be illustrated by the *Sporrong and Lönnroth* case. In this case expropriation permits were issued for properties located in Stockholm and remained in force for a period over 20 years, but actual expropriation never took place. The ECtHR considered whether such situation amounted to *de facto* expropriation. It stated that the right lost some of its substance but did not disappear, thus, this situation did not fall within the ambit of the deprivation rule.<sup>74</sup> The case-law seems hesitant on the precise definition on the degree of limitation which is needed for interference “to be qualified as being so substantial as to

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<sup>70</sup> *Lithgow and Others v. UK*.

<sup>71</sup> See for example, *James and others v. the United Kingdom*.

<sup>72</sup> P. van Dijk (ed.), *supra* note 26, p. 887.

<sup>73</sup> A. R. Çoban, *supra* note 3, p. 180.

<sup>74</sup> *Sporrong and Lönnroth v. Sweden*, para.63.



amount to a taking of property.”<sup>75</sup> Scholars have suggested different parameters. For example, according to Sermet, a double parameter should be applied, namely, the intensity of interference and the duration of the limitation measures.<sup>76</sup>

Not every interference with property, short of deprivation, falls within the ambit of the control rule. Some of the measures constitute interference with the first rule. Similarly with the situation described above, the criteria to distinguish when an act amounts to control of the use of property or interference with substance of property is also not clear.<sup>77</sup> In the *Sporrong and Lönnroth* case the ECtHR stated that prohibition of construction amounted to control of the use of property. However, expropriation permits constituted interference with the substance of property, because they neither fall within the ambit of the deprivation rule, nor were they intended to control the use of property.<sup>78</sup> Such border-line cases make the differentiation between the three rules of P1-1 vague.

There are a lot of cases which fall within the ambit of the control rule. Two main objectives for imposing restrictive measures are: to serve “the general interest” and “to secure the payment of taxes or other contributions or penalties”.

The concept of “general interest” is very wide.<sup>79</sup> A variety of aims expressed by the public authorities have been considered to be in “the general interest” such as town planning, alcohol consumption, protection of the environment, housing policy, rent control, the seizure of property for legal proceedings, import and export law.<sup>80</sup>

It is not surprising that in the area of taxation states enjoy a wide margin of appreciation, since levying tax is recognised as one of the features of state sovereignty.<sup>81</sup> In its older case law the EComHR held that

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<sup>75</sup> A. M. Aronovitz, *supra* note 9, p.103.

<sup>76</sup> *Ibid.*

<sup>77</sup> A. R. Çoban, *supra* note 3, p. 182.

<sup>78</sup> *Sporrong and Lönnroth v. Sweden*, para. 65.

<sup>79</sup> The concept of “general interest” is examined in Chapter 1.4.3.

<sup>80</sup> P. van Dijk (ed.), *supra* note 26, p. 888.

<sup>81</sup> A. R. Çoban, *supra* note 3, p. 182.

this provision does not prescribe any limitation, either of form or of size.<sup>82</sup>

Under this approach

“the power of the national authorities to levy taxes, to impose penalties, to make social security contributions compulsory and to impose other levies was deemed to be in accordance with Article 1 as long as it had a legal basis, no discrimination was involved, and power was not used for a purpose other than that for which it had been conferred”.<sup>83</sup>

Later the EComHR changed its interpretation and provided wider protection. The EComHR has taken the position that P1-1 is violated if a state, by imposing taxes or other contributions “places an excessive burden on the person or the entity concerned or fundamentally interferes with his or its financial position”.<sup>84</sup> In the *WASA Ömsesidigt and Others* case the EComHR states that “any legislation which introduces some sort of fiscal obligation will as such deprive the involved of a possession, namely, the amount of money which must be paid”.<sup>85</sup> However, paragraph 2 of P1-1 expressly secures for the states “the right to enforce such law as they deem necessary to secure the payment of taxes or other contributions”. Accordingly, the EComHR will first consider

“whether the interference with the applicants’ right under Article 1 of Protocol No. 1 (P1-1) is justified by the second paragraph before considering, if necessary, whether the requirements set out in the second sentence of the first paragraph are fulfilled”.<sup>86</sup>

It is not very clear what the EComHR means by this statement. Often cases of taxation create difficulties with the classification of interference. This had led to the opinion of some scholars that taxation is neither taking nor

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<sup>82</sup> Ibid.

<sup>83</sup> P. van Dijk (ed.), *supra* note 26, p. 891.

<sup>84</sup> *WASA Ömsesidigt and Others v. Sweden*, 14 December 1988, Admissibility decision of the EComHR, app. no. 13013/87.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

police power regulation and should be considered as a distinct interference with property.<sup>87</sup>

As was mentioned above, states have a very wide margin of appreciation in the area of taxation and consequently there are not a lot of cases which have gone beyond the admissibility stage. In cases which are declared admissible, the ECtHR generally examines the fulfillment of the requirements of proportionality and “fair balance”. In the *Gasus Dossier* case the ECtHR recognised the seizure of the third party’s assets in the debtor’s possession to recover the tax debts as control of the use of property.<sup>88</sup> However, it stated that:

“legislature must be allowed a wide margin of appreciation, especially with regard to the question whether – and if so, to what extent – the tax authorities should be put in a better position to enforce tax debts than ordinary creditors are in to enforce commercial debts. The Court will respect the legislature’s assessment unless it is devoid of reasonable foundation”.<sup>89</sup>

Examining the case on the ground of “fair balance” and proportionality, the ECtHR did not find a violation of P1-1. As far as author is aware till now the Convention bodies have never decided taxation to be in violation with the ECHR.

Other cases concerning paragraph 2 of P1-1 cover confiscation and imposition of other contributions.<sup>90</sup> Similarly with cases of taxation, Convention bodies also recognise a wide margin of appreciation of states in these areas.

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<sup>87</sup> A. R. Çoban, *supra* note 3, p. 184.

<sup>88</sup> *Gasus Dossier- and Fördertechnik GmbH v. the Netherlands*.

<sup>89</sup> *Ibid.*, para 60.

<sup>90</sup> See for example, *Agosi v. the United Kingdom*, 24 October 1986, Judgment of the ECtHR, app. 9118/80, *Air Canada v. United Kingdom*, 5 May 1995, Judgment of the ECtHR, app. no. 18465/91.

### 1.3.4 Peaceful enjoyment of possessions (first rule)

The first rule is often recognised as one of a general nature. It includes all situations with property rights interference which do not constitute deprivation of property or control of its use.<sup>91</sup> Thus, this general rule is not only a guideline principle but if it has been violated it constitutes an interference with the substance of property. Unlike the previous two rules, which are deduced from the letter of P1-1, this rule is a purely judicial construction.<sup>92</sup>

Sometimes it is difficult to distinguish between “deprivation of possession” and “control of the use of property”. In such cases the ECtHR bases its decision on the first rule, namely, interference with the substance of property.<sup>93</sup> In the *Beyeler* case the ECtHR stated that the complexity of the factual and legal situation prevents the case being classified in a precise category, “the Court therefore considers that it should examine the situation complained of in the light of general rule.”<sup>94</sup>

In the already examined *Sporrong and Lönnroth* case the ECtHR ruled that long-term expropriation permits did not constitute deprivation of property because the applicants could continue to utilize their possession and had the possibility to sell it. Such permits had neither been intended to limit nor to control use of property. Furthermore, the ECtHR found that expropriation permits violated rights of “peaceful enjoyment of possessions”.<sup>95</sup> By this judgment the ECtHR has created a new type of interference with property and it followed this precedent in many other cases.

In a number of cases concerning planning regulations the ECtHR stated that construction prohibitions imposed over applicants’ property without paying compensation constitute a violation of “peaceful

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<sup>91</sup> A. Grgic et al., *supra* note 22, p. 11.

<sup>92</sup> L. Sermet, *The European Convention on Human Rights and property rights*, (Strasbourg, 1998), p. 22.

<sup>93</sup> P. van Dijk (ed.), *supra* note 26, p. 873.

<sup>94</sup> *Beyeler v. Italy*, 5 January 2000, Judgment of the ECtHR, app. no. 33202/96, para. 98.

<sup>95</sup> *Sporrong and Lönnroth v. Sweden*.

enjoyment of possessions”.<sup>96</sup> However, in the already mentioned *Sporrong and Lönnroth* case the ECtHR found that such construction prohibitions constitute control of the property.<sup>97</sup> So, it is not very clear why the ECtHR applies different rules to similar situations.

In the *Papamichalopoulos* case the ECtHR had found *de facto* expropriation. However, it did not specify which rule applied and simply stated that:

“[t]he loss of all ability to dispose of the land in issue, taken together with the failure of the attempts made so far to remedy the situation complained of, entailed sufficiently serious consequences for the applicants *de facto* to have been expropriated in a manner incompatible with their rights to the peaceful enjoyment of their possession”.<sup>98</sup>

It is not clear if the ECtHR applied the first, the second or a combination of both rules.

In the *Greek Refineries* case the ECtHR stated that retroactive annulment of arbitration awards by legislation fell within the ambit of the first rule.<sup>99</sup> However, in the later case *Pressos Compania Naviera*, the ECtHR found that retrospective annulment of compensation claims arising from tort constitute deprivation of applicants’ property.<sup>100</sup>

The ECtHR has also ruled that unreasonable delays in payment of compensation for expropriation amounted to interference with the substance of property.<sup>101</sup> In the *Solodiyuk v. Russia* case the applicant’s pension was paid late in the situation of very high inflation of the Russian ruble, so the actual value of the money received after a long delay had

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<sup>96</sup> See for example, *Katte Klitsche de la Grance v. Italy*, 27 October 1994, Judgment of the ECtHR, app. no. 12539/86, para. 40, *Phacas v. France*, 23 April 1996, Judgment of the ECtHR, app. no. 17869/91, para. 52. The Court did not find violation of P1-1 in any of these cases.

<sup>97</sup> *Sporrong and Lönnroth v. Sweden*, para. 61.

<sup>98</sup> *Papamichalopoulos and Others v. Greece*, para. 45.

<sup>99</sup> *Greek Refineries v. Greece*, 9 December 1994, Judgment of the ECtHR, app. no. 13427/87.

<sup>100</sup> *Pressos Compania Naviera S.A. and Others v. Belgium*, 20 November 1995, Judgment of the ECtHR, app. no. 17849/91.

<sup>101</sup> See for example, *Almeida Garrett, Mascarenhas Falcão and Others v. Portugal*, 11 January 2000, Judgment of the ECtHR, app. no. 29813/96 and 30229/96, para 48.

significantly decreased. The ECtHR ruled that the delay in payment in the described circumstances amounted to interference with the general rule.<sup>102</sup>

After the ECtHR determines which rule applies, it turns into the question of whether there are any justifications for interference with property.

## **1.4 Justification of interference with property**

### **1.4.1 Introductory remarks**

As mentioned above, the right to property is not absolute and subject to restrictions prescribed in P1-1. Interference with the right to property shall be allowed only if:

- it is prescribed by law;
- it is in the public or general interest; and
- it is proportionate to the aim pursued.

Only if all three conditions are fulfilled cumulatively can the interference with property rights be justified.

One should also remember that Art. 15 of the ECHR allows states at time of war or other public emergency to take measures derogating from its obligation to respect a number of rights, including the right to peaceful enjoyments of possessions. However, such measures are allowed only to the extent strictly required by the exigencies of the situation and should be consistent with the other obligations of states under international law.

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<sup>102</sup> *Solodyuk v. Russia*, 12 July 2005, Judgment of the ECtHR, app. no. 67099/01.

## 1.4.2 Lawfulness of Interference

The requirement of lawfulness is a general condition for all measures limiting human rights. Its aim is to protect individuals from arbitrary actions of states.<sup>103</sup> The ECtHR stated that the “rule of law, one of the fundamental principles of a democratic society, is inherent to all the Articles of the Convention...”,<sup>104</sup> therefore the requirement of lawfulness must be satisfied in all situations of interference with property rights.

To be recognised as legal any interference with property rights of nationals of state should be based on domestic law. However, not all acts of a state based on domestic law are recognised as lawful. In the *James and Others* case the ECtHR rules that:

“[t]he Court has consistently held that the terms “law” or “lawful” in the Convention do not merely refer back to the domestic law but also relate to the quality of the law, requiring it to be compatible with the rule of law.”<sup>105</sup>

So, the law must be accessible to citizens and its provision should be formulated with such sufficient precision, that it enables persons to foresee the consequences that a given action may entail.

The domestic law should also provide adequate safeguards against arbitrary interference. One of the most important cases in this area is the already mentioned *Hentrich* case. The French Tax Code contained a provision, which gives tax authorities a right to take property by way of pre-emption. The ECtHR found that Art. 668 of the General Tax Code did not sufficiently satisfy the requirements of precision and foreseeability implied by the concept of lawfulness within the meaning of the ECHR. Furthermore, since French tax authorities often exercised their right arbitrary, selectively

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<sup>103</sup> A. R. Çoban, *supra* note 3, p. 195.

<sup>104</sup> *Belvedere Alberghiera S.r.l. v. Italy*, 30 May 2000, Judgment of the ECtHR, app. no. 31524/96, para. 56.

<sup>105</sup> *James and Others v. United Kingdom*, para. 67.

and in an unexpected way, the ECtHR ruled that there were no procedural safeguards to prevent the unfair use of power.<sup>106</sup>

In the *Belvedere* case the applicant company's land was expropriated by the authorities in order to build a road. The competent domestic court found the decision of expropriation unlawful but later it declared that the transfer of property had become irreversible and applicants' request to return the land was dismissed. The ECtHR ruled that the denial of the restitution of land had been in breach with P1-1.<sup>107</sup>

Generally, in cases of *de facto* expropriation the interference is unlawful.<sup>108</sup> For instance, in the *Vasilescu v. Romania* case the ECtHR found that interference of public authorities with property rights amounted to a *de facto* confiscation and thus violated P1-1.<sup>109</sup> The ECtHR examines not only the lawfulness of deprivation but sometimes the lawfulness of the control measures as well.<sup>110</sup>

It should be mentioned that the Strasbourg bodies have interpreted the provision "by the general principles of international law" as a principle valid only for the taking of alien property. This provision does not apply to the expropriation of property belonging to nationals of the state.<sup>111</sup>

Once the ECtHR establishes that interference with property rights is not in accordance with the principle of legality, there would be a violation of P1-1 and the ECtHR does not need to consider compliance or non-compliance with any other principles. If the ECtHR finds that the principle of lawfulness is fulfilled, it turns to the examination of other justifications.

### 1.4.3 Public and General Interest

As follows from the wording of P1-1, the deprivation rule requires that interference should be "in the public interest", and the control rule requires

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<sup>106</sup> *Hentrich v. France*, 22 September 1994, Judgment of the ECtHR, app. no.13616/88, para. 42. See also *Carbonara and Ventura v. Italy*, 30 May 2000, Judgment of the ECtHR, app. no. 24638/94, para.56; *Belvedere Alberghiera S.r.l.v. Italy*, para. 58.

<sup>107</sup> *Belvedere Alberghiera S.r.l. v. Italy*, para 61-63.

<sup>108</sup> A. R. Çoban, *supra* note 3, p. 198.

<sup>109</sup> *Vasilescu v. Romania*, para. 53.

<sup>110</sup> See for example, *Fredin v. Sweden*, 18 February 1991, Judgment of the ECtHR, app.no. 12033/86.

<sup>111</sup> *James and Others v. UK*, para. 66.



that measures should be “in accordance with the general interest”. The question arises: what is the difference between public and general interest? The answer is given in the case-law, according to which there is no fundamental distinction between public and general interest and “any interference with property rights, irrespectively of the rule it falls under, must satisfy the requirement of serving a legitimate public or general interest”.<sup>112</sup>

The concept of public or general interest is very wide. Unlike Articles 8-11 of the ECHR, P1-1 does not determine what the permissible aims of a restriction are. Furthermore, P1-1 does not comprise any reference that restrictions must be “necessary in a democratic society”. In its report the EComHR stated that:

“[a] comparison with the right of Member States to act in the public or general interest as distinguished from acts “necessary in a democratic society” as described by Article 10, reveals that the discretion afforded to states by Article 1 of Protocol No. 1 is wider in scope... Clearly, the public or general interest encompasses measures which would be preferable or advisable, and not only essential, in democratic society”.<sup>113</sup>

States have an extensive margin of appreciation when it comes to determination what the “public interest” is. In the *James and Others* case the ECtHR stated that the national authorities are in principle in a better place to appreciate what is in the public interest.<sup>114</sup> For this reason, the ECtHR “will respect the legislature’s judgment as to what is in the general interest unless that judgment be manifestly without any reasonable foundation.”<sup>115</sup> The ECtHR based this approach on the following considerations: national authorities have a better knowledge of their society and its needs; law which allows interference with property involves consideration of political, economical and social issues on which opinions within a democratic society

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<sup>112</sup> A. Grgic et al., *supra* note 22, p. 14.

<sup>113</sup> *Handyside v. The United Kingdom*, 30 September 1975, Report of the Commission, B.22 (1976), para. 50.

<sup>114</sup> *James and Others v. UK*, para 46.

<sup>115</sup> *Mellacher and Others v. Austria*, 19 December 1989, Judgment of the ECtHR, app. no. 10522/83, 11011/84, 11070/84, para.45

may reasonably differ widely.<sup>116</sup> Thus, since understanding of public and general interest varies from country to country, the supervision of the Strasbourg bodies in this area is very limited.<sup>117</sup>

In some cases the ECtHR was sceptical about the reasons of a government, claiming to act “in the public interest” but it abstained from direct ruling that the aim for interference was not in the public interest.<sup>118</sup> For example, in the case of *The Former King of Greece and Others*, members of the former royal family claimed that deprivation of their ownership of some land in Greece violated their property rights. The government argued that the aims of such deprivation were protection of the forest and archaeological sites within the contested estate and preservation of the constitutional status of the country as a republic. The ECtHR rejected the first argument since it did not find any evidence to support it. It also had some hesitation about the second argument, since the contested law was enacted almost 20 years after Greece had become a republic. However, it ruled that this doubt could not suffice to deprive the overall objective of the expropriation of its legitimacy as being in the public interest.<sup>119</sup> This decision illustrates, that the power of states to determine what is in the public interest, is almost unlimited.

A deprivation of property can be in the public interest even in the cases when property transfers not to state but to private individuals. In the *James and Others* case, the ECtHR ruled that, “the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate means for promoting the public interest.”<sup>120</sup> Furthermore, it stated that the notion “in the public interest” can not be understood as implying “that the transferred property should be put into use for the general public or that the community generally, or even a substantial proportion of it, should directly benefit from the taking.”<sup>121</sup>

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<sup>116</sup> *James and Others v. UK*, para 46.

<sup>117</sup> See generally, J. Frowein, ‘The Protection of Property’ in Macdonald et al (eds.) *The European System for the Protection of Human Rights* (London, 1993).

<sup>118</sup> A. R. Çoban, *supra* note 3, p. 202.

<sup>119</sup> *The Former King of Greece and Others v. Greece*, 23 November 2000, Judgment of the ECtHR, app. no. 25701/94, para. 88.

<sup>120</sup> *James and Others v. UK*, para 40.

<sup>121</sup> *Ibid*, para 41.

To summarise, states have a wide margin of appreciation in connection with the “public interest”. It means that, firstly, they can decide what aims are authorized under P1-1 and, secondly, what kind of measures may be taken to achieve those aims.<sup>122</sup> As far as the author is aware, the ECtHR has never ruled that the aim pursued by interference by national authorities was not in the public interest. However, the ECtHR applied the proportionality test to determine whether interference measures were suitable and necessary to achieve this aim.<sup>123</sup>

#### 1.4.4 Proportionality of the interference

Although the principle of proportionality is not directly mentioned in the ECHR and its Protocols, the ECtHR has used its judicial power to establish that the idea of proportionality is present in the provisions of the ECHR in general.<sup>124</sup> If interfering with the Convention rights, national authorities shall always maintain a fair balance between the means employed and the aims sought to be realised.<sup>125</sup>

The ECtHR referred to the supervision of the proportionality principle in a number of property rights cases. For example, in the *Sporrong and Lönnroth* case, the ECtHR stated that:

“[t]he Court had to determine whether a fair balance was struck between the demands of the general interests of the community and the requirement of the protection of the individual’s fundamental rights... The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1 (P1-1)”.<sup>126</sup>

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<sup>122</sup> Y. Winisdoerffer, ‘Margin of Appreciation and Article 1 of Protocol No. 1’, *19:1 Human Rights Law Journal* (1998), p.18.

<sup>123</sup> A. R. Çoban, *supra* note 3, p. 204.

<sup>124</sup> *Ibid.*

<sup>125</sup> See more in M. Eissen, ‘The Principle of Proportionality in the Case-law of the European Court of Human Rights’ in Macdonald et al (eds.) *The European System for the Protection of Human Rights* (Dordrecht, 1993).

<sup>126</sup> *Sporrong and Lönnroth v. Sweden*, para. 69.

So, in all types of interference with property the principle of proportionality must be respected. However, the EComHR clarified in the *Gillow* case that the measures of proportionality differ in the application of different rules since “a deprivation of property is inherently more serious than the control of its use, where full ownership is retained.”<sup>127</sup> Therefore, the proportionality shall be assessed with reference to the “severity of the restriction imposed”.<sup>128</sup>

In applying the proportionality test in property rights cases, the ECtHR takes into account whether national authorities act arbitrarily, whether legitimate expectations are respected, whether procedural guarantees are provided, and whether compensation is provided. The conduct of the applicant should also be taken into account.<sup>129</sup> However, states have a wide margin of appreciation in applying the proportionality principle. For example, in the *Tre Traktörer* case, the ECtHR ruled that “the “burden” placed on TTA as a result of a contested decision, though heavy, must be weighed against the general interest of the community. In this context, the States enjoy a wide margin of appreciation.”<sup>130</sup> In the *Mellacher* case the ECtHR stated that the existence of alternative solutions did not itself render the contested legislation unjustified.<sup>131</sup> In the *Van Marle* case, the ECtHR consider whether legitimate expectations were respected and ruled that:

“a fair balance between the means used and the intended aim was at any rate insured by transitional provisions which enabling the former unqualified accounts to gain entry to the new profession on prescribed conditions”.<sup>132</sup>

However, in several cases the ECtHR found that the principle of proportionality was not insured by the national authorities. In the *Scollo v. Italy* case the applicant’s flat was occupied by a tenant. Even though the

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<sup>127</sup> *Gillow v. the United Kingdom*, Report of the EComHR, 3 October 1984, para. 148.

<sup>128</sup> *Ibid*, para. 157.

<sup>129</sup> A. R. Çoban, *supra* note 3, p. 206.

<sup>130</sup> *Tre Traktörer Aktiebolag v. Sweden*, para. 62.

<sup>131</sup> *Mellacher and Others v. Austria*.

<sup>132</sup> *Van Marle and Others v. The Netherlands*, para.43.

applicant made it clear to the national authorities that he, as an unemployed and disabled person, needed the flat for himself, state authorities did not undertake any actions to evict the tenant. The ECtHR ruled that the principle of proportionality was breached and found violation of P1-1.<sup>133</sup> In the already mentioned *Hentrich* case, the ECtHR found that pre-emption was operated arbitrarily, selectively and was hardly foreseeable. Moreover, the applicant, bearing individual and excessive burden, could not even challenge the measures taken against her.<sup>134</sup> All these proved non-consideration of the proportionality principle by the French authorities, therefore, the ECtHR declared violation of P1-1.

Strasbourg bodies consider the right to compensation as a requirement of proportionality or fair balance. A total lack of compensation can be justifiable only in exceptional circumstances.<sup>135</sup> In the *Holy Monasteries v. Greece* case the ECtHR disagreed with the EComHR about the existence of such exceptional circumstances and stated that since no compensation was paid to the applicant, the requirement of proportionality was not fulfilled and thus, the property rights of the applicant had been violated.<sup>136</sup>

However, according to the ECtHR, the principle of proportionality does not imply that full compensation shall be paid in all circumstances. Legitimate objectives of public interest may call for compensation lower than the full market value, but in some cases for the fulfilment of the proportionality principle compensation shall also include loss of income. For example, in the *Lallement* case the ECtHR found that a compensation which did not cover the loss of applicant's source of income as a result of expropriation of the land plot created an excessive burden to the farmer.<sup>137</sup> As a result, the ECtHR found violation of P1-1.

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<sup>133</sup> *Scollo v. Italy*, 28 August 1995, Judgment of the ECtHR, app. no. 19133/9.

<sup>134</sup> *Hentrich v. France*.

<sup>135</sup> *Holy Monasteries v. Greece*, 9 December 1994, Judgment of the ECtHR, app. no. 13092/87, 13984/88.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Lallement v. France*, 11 April 2002, Judgment of the ECtHR, app. no. 46044/99, para. 24.

In the early case-law Convention organs stated that, unlike in cases of deprivation, in instances of control of the use of property “a right to compensation is not inherent”.<sup>138</sup> However, in the *Chassagnou* case, the ECtHR stated that the case fell within ambit of the control rule but at the same time recognised the applicants’ right to compensation.<sup>139</sup> After this decision it can not be assumed anymore that in cases of control compensation is not required.<sup>140</sup>

## 1.5 The connection between P1-1 and Article 6 of the ECHR

When the right to the peaceful enjoyment of a possession is at stake, other rights set forth in the ECHR and its Protocols may also come into play.<sup>141</sup> Following provisions are most often raised together with P1-1: Art. 6 guaranteeing the right to fair trial, Art. 8 guaranteeing respect for private and family life, Art. 14 prohibiting discrimination. Other articles, such as Art. 3 prohibiting inhuman or degrading treatment, Art. 10 guaranteeing freedom of expression, Art. 13 guaranteeing right to effective remedy may also come into consideration together with P1-1. In the present thesis only the connection between P1-1 and Art. 6 will be examined.<sup>142</sup> In many cases against Russia the ECtHR found violations of both P1-1 and Art. 6, so understanding of the connection between these articles is important for further examination.

Art 6 (1) protects the right to fair hearing by an impartial tribunal in the determination of civil rights and obligations. One of such civil rights is the right to property. While P1-1 sets the requirements for admissible interference with property rights, Art. 6 (1) guarantees the right

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<sup>138</sup> *Banér v. Sweden*, app. no. 11763/85, 60 D. R. 128 at 142 (1989).

<sup>139</sup> *Chassagnou and others v. France*, 29 April 1999, Judgment of the ECtHR, app. no. 25088/94, 28331/95, 28443/95.

<sup>140</sup> C. Harpum, ‘Property Law – the Human Rights Dimension: Part 2’, *Landlord & Tenant Review* (2000) p.35.

<sup>141</sup> A. Grgic et al., *supra* note 22, p.16.

<sup>142</sup> Relations with other articles is not examined due to space limit of the present thesis.

to fair trial in establishing whether such interference was justified and whether property rights were determined fairly.<sup>143</sup> The availability of access to a court and the opportunity to challenge lawfulness of interference with right to property is an important element of the right to property and the right to fair trial.<sup>144</sup> It is important to remember that in order to apply Art. 6 and P1-1, the right which was interfered with should exist, since P1-1 does not guarantee the right to acquire property. If the applicant has no possession, the ECtHR does not examine a case under P1-1 but may examine it under Art. 6 (1).<sup>145</sup> It is not always clear when examination of one of the article makes the examination of the other article unnecessary and when the application should be examined under both articles.<sup>146</sup> However, there are several types of cases which are usually examined under both P1-1 and Art.6.

If domestic administrative, judicial or enforcement proceedings take an unreasonably long time, leaving the status of the applicant's property uncertain, the ECtHR examines the case under both articles. In many cases concerning the above mentioned situation the ECtHR found violations of P1-1 and Art. 6 (1).<sup>147</sup> Since the execution of judgment forms an integral part of a fair trial, non-enforcement of court decisions violates both P1-1 and Art. 6 (1).<sup>148</sup> The principle of legal certainty also form an integral part of the right to fair trial. When a court decision which entered into force is challenged by review, the ECtHR usually finds violation of P1-1 and Art. 6 of the ECHR. For example, such violation was found in the *Brumarescu* case, in which after the final judgment had been executed, it was appealed by the Public Prosecutor to the Supreme Court and the Supreme Court annulated the judgment.<sup>149</sup>

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<sup>143</sup> A. Grgic et al., *supra* note 22, p.17.

<sup>144</sup> *Hentrich v. France*.

<sup>145</sup> See for example, *Malhous v. Czech Republic*, 13 Desember 2000, Admissibility Decision of the EComHR, app. no. 33071/96.

<sup>146</sup> A. R. Çoban, *supra* note 3, p. 247.

<sup>147</sup> See for example, *Pialopoulos and Others v. Greece*, 15 February 2001, Judgment of the ECtHR, app.no. 37095/97.

<sup>148</sup> See for example, *Prodan v. Moldova*, 18 May 2004, Judgment of the ECtHR, app.no. 49806/99.

<sup>149</sup> *Brumarescu v. Romania*, 28 October 1999, Judgment of the EctHR, app. no. 28342/95.

To conclude, violations of property rights can be examined under both P1-1 and Art. 6. Examination of the case-law shows that many cases concern not only substantive right to property but also its procedural aspects and that procedural guarantees can be significant in securing the respect of property rights .<sup>150</sup>

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<sup>150</sup> G. Gauksdottir, *supra* note 60, p.320.



# 2 Chapter II – Property Rights under Russian Legislation

## 2.1 Historical remarks

The Soviet system of property rights was dominated by the concept of state property, formulated as the right of the state to exclude all others from property.<sup>151</sup> There were two basic forms of property in the Soviet Union – community property<sup>152</sup> and individual property. Individual property was strictly limited to consumer goods and items for personal use. The postulate of state property was based on the Marxist principle of the importance of the relationship to means of production in determining social relations.<sup>153</sup> According to the communist theory, means of production could not be individually owned. Moreover, individualist and particularistic interests were proclaimed to be incompatible with the community concept.<sup>154</sup>

It is not surprising that, at the time of Soviet Union, non-community property rights even in the situation of their formal protection, were almost indefensible in courts. As stated above, the right of individual property was very limited. For example, Art. 106 of the Civil Code of the Russian Soviet Federative Socialist Republic (RSFSR) provided that spouses living together and their minor-children might own only one house or part of one. The maximum size might not exceed 60 square meters. If a family owned more than one house, it was obliged to sell it within one year. In case they could not find a purchaser, the house would pass into state ownership without any payment.<sup>155</sup> In practice, it was almost impossible to

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<sup>151</sup> F. Feldbrugge, 'Russian Law: The End of the Soviet System and the Role of Law', 45, *Law in Eastern Europe* (1993), p.230.

<sup>152</sup> Community property basically amounted to state property.

<sup>153</sup> K. Malfliet, 'Property rights as human rights: A post-communism Paradigm?' in F. Feldbrugge and W.B. Simons (eds.), *Human Rights in Russia and Eastern Europe. Essays in honour of Ger P. van den Berg* (The Hague, 2002), p. 168.

<sup>154</sup> *Ibid*, p. 169.

<sup>155</sup> The Civil Code of the RSFSR, 11 June 1964, GARANT (database which provides texts of all legislation of the RF and commentaries of thereto; it also contains some articles

find a purchaser and houses were usually passed to the state without payment of any compensation.<sup>156</sup>

Liberal reforms after the 1990s brought many changes, including changes in property ownership. Post-communist law equally protected all forms of property. In the Law of the RSFSR “О собственности в РСФСР” (On property in the RSFSR) for the first time the right of private property without any limitation to the amount and value of such property was ensured.<sup>157</sup>

The introduction of new property relations was not easy; it took place in the framework of the old institution and the old ideology. Moreover, there was a big clash between new and old legislation. It is not surprising, that in such situation a high risk of abuses of property rights existed.<sup>158</sup> However, there has been a progressive trend in the protection of property rights for the last two decades.

## 2.2 Relevant Provisions of the Russian Constitution

The Constitution of the Russian Federation (RF) was adopted by an all-people referendum on 12 December 1993.<sup>159</sup> It contains many important provisions which are new for the Russian legal system. Only the relevant provisions are examined.

Art. 8 (2) states that “[i]n the Russian Federation recognition and equal protection shall be given to the private, state, municipal, and other forms of ownership.” Further, Art. 9 (2) provides that “[l]and and other

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published in the Russian legal journals). All further Russian legislation referred to can be found in the system GARANT.

<sup>156</sup> There were a number of other provisions which allowed taking of private property without any compensation. However, examination of property rights provisions of the Soviet Union falls outside the scope of this thesis.

<sup>157</sup> Закон РСФСР «О собственности в РСФСР» (Law of RSFSR “On Property in RSFSR”), 24 December 1990, N 443-1.

<sup>158</sup> K. Malfliet, *supra* note 153, p.173.

<sup>159</sup> The official English translation of the Constitution of the RF can be found on [www.constitution.ru/en/10003000-01.htm](http://www.constitution.ru/en/10003000-01.htm).

natural resources may be in private, state, municipal and other forms of ownership.” The most important provision concerning protection of property is sets forth in Art. 35 of the Constitution. It states that:

1. The right of private property shall be protected by law.
2. Everyone shall have the right to have property, possess, use and dispose of it both personally and jointly with other people.
3. No one may be deprived of property otherwise than by a court decision. Forced confiscation of property for state needs may be carried out only on the proviso of preliminary and complete compensation.
4. The right of inheritance shall be guaranteed.

It should be noticed that there are some inaccuracies in the translation. In order to follow the literal Russian wording, the phrase “private property” in paragraph 1 shall be translated as “private ownership” as it is done in Art. 8.<sup>160</sup> The phrase “to have property” in paragraph 2 shall be translated as “to own property”. The phrase “forced confiscation of property” shall be translated as “forced deprivation of property”. This difference is important because confiscation is only one form of deprivation of property. However, Art. 35 (3) covers all forms of forced deprivation of property. Moreover, usually confiscation, opposite to that stated in the Art. 35 (3) does not require any payment of compensation.

Art. 36 protects property rights over land by stating that:

1. Citizens and their associations shall have the right to possess land as private property.
2. Possession, utilization and disposal of land and other natural resources shall be exercised by the owners freely, if it is not detrimental to the environment and does not violate the rights and lawful interests of other people.
3. The terms and rules for the use of land shall be fixed by a federal law.

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<sup>160</sup> In the Russian version both articles use the same term, however for some reasons in the translation the different terms are used.

It also should be mentioned that according to Art. 34 (1) of the Constitution “[e]veryone shall have the right to a free use of his abilities and *property* for entrepreneurial and other economic activities not prohibited by law” (emphasis added).

From the first sign it looks like the protection of property under Art. 34 and Art. 35 of the Constitution have an almost absolute character but in reality it is not like this. Property rights are limited by virtue of Art. 55 (3) and Art. 56, which contain limitations for all human rights, embodied in the Constitution, for public purposes and in case of emergencies. The Constitution provisions concerning property rights are clarified and elaborated in the Civil Code of the RF.

## 2.3 The concept of property rights

In Russia the understanding of property rights is limited to a traditional concept of property, namely *rights in rem*. Moreover, sometimes property is understood only as physical goods, and the right of property equalized to the ownership of physical goods. According to Professor G. F. Shershenevich, only physical goods can be objects of ownership rights.<sup>161</sup> Art. 128 of the Civil Code states that property includes physical goods, including money and securities, and property rights. At the same time the Constitutional Court understands property more broadly. In several Resolutions the Constitutional Court stated that property rights cover not only the right of ownership but also limited property rights.<sup>162</sup> Later, the concept of property rights was broadened in the Resolutions of the Constitutional Court. Some rights which are considered as *rights in personam* were also recognised as property rights. The Constitutional Court ruled that claims of creditors amounted to property and stated that this corresponded with the opinion of

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<sup>161</sup> G. F. Shershenevich, *Курс гражданского права (Civil Law course)*, (Tula, 2001), p. 219.

<sup>162</sup> See for example, Resolution of the Constitutional Court of the RF, 13 December 2001, N 16-II.

the ECtHR.<sup>163</sup> Company shares were also recognised as property.<sup>164</sup> Intellectual property rights are regulated by a separate part of the Civil Code of the RF.<sup>165</sup>

In general, Russian legislation adhered to the traditional concept of property, which is different to the one used by the ECtHR. This difference shall be taken into account while examining the content of property rights under Russian legislation.

## 2.4 The content of property rights

### 2.4.1 Introductory remarks

By stating that the right of private property shall be protected by law, the provision of Art. 35 (1) of the Constitution elaborates on the more general provision of Art. 8 about equal recognition and protection of all forms of property. It may also be considered as a provision, which implies a positive obligation of Russia towards property owners to maintain free development of private property relations and to ensure that property rights are not violated by others. Such obligations should be fulfilled by enacting laws, which establish protective measures of a civil, administrative and criminal character.<sup>166</sup>

Art. 212 of the Civil Code of the RF repeats the provision of the Constitution about equal protection of all forms of property. Such repetition may be explained by the fact that equal protection of all forms of property was not provided by the old Civil Code. Furthermore, equal protection of private property is a new phenomenon in the Russian legal system which appeared only after the economic reforms in the 90s.

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<sup>163</sup> Resolution of the Constitutional Court of the RF, 16 May 2000, N8-II.

<sup>164</sup> Resolution of the Constitutional Court of the RF, 10 April 2003, N5-II.

<sup>165</sup> The Civil Code of the RF, 18 December 2006, N 230 – ФЗ, Part IV, entered into force 1 January 2008.

<sup>166</sup> V.V. Lazarev (ed.) *Научно-практический комментарий к Конституции Российской Федерации (Commentary to the Constitution of the Russian Federation)*, 2003, GARANT.

## **2.4.2 The right to own property, to possess, to use and to dispose of it**

Constitutional provisions about the right to own property have been further elaborated on in Art. 213 of the Civil Code of the RF, which provides that citizens and legal persons may own any property. The quantity and value of property in the ownership of citizens and legal persons shall not be limited. These provisions have importance, especially in the light of the fact that before the economic reforms citizens or legal persons could be owners of only limited types of property and if they had more than allowed the state had almost unlimited power to take it without paying any compensation.

While the Constitution does not mention any limits to the right to own property, the Civil Code contains some limitations. It excludes particular types of property from private ownership, namely, property which is withdrawn from civil circulation and property with restricted circulation capacity. If a citizen or legal person has a type of property which by virtue of law can not belong to him/her, he/she is obligated to alienate it within one year from the day the right of ownership arose (Art. 238 of the Civil Code). In instances when the property has not been alienated by the owner within the mentioned period, such property shall be, by decision of a court, subject to a compulsory sell done by state bodies with a transfer to the former owner of the amounts received. It can also be transferred to the state or to municipal ownership with compensation of the value of property determined by the court. The types of property which can not belong to citizens or legal persons are those which are the most important for the national economic, security of the country and social sphere. The exclusion of such property from private ownership is justified by public interest.

In Russia the right of ownership was traditionally determined as the right to possess, use and dispose of property.<sup>167</sup> This understanding is reflected in the provisions of the Constitution and the Civil Code of the RF. According to Art. 209 (1) of the Civil Code, the owner has rights of the

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<sup>167</sup> Ibid.

possession, the use and the disposal of his/her property. Moreover, as stated in Art. 209 (2):

“[t]he owner shall have the right at his/her own discretion to perform with respect to the property in his/her ownership any actions, including the alienation of his/her property into the ownership of the other persons, the transfer to them, while remaining the owner of the property, of the rights of its possession, use, and disposal, the putting of his/her property in pledge and its burdening in other ways, as well as the disposal thereof in a different manner.”

Not only ownership rights are covered by the protection of Art. 35 (2) of the Constitution but also other limited property rights which give persons different property entitlements. This also follows from the Civil Code of the RF, which in addition to the fullest right of ownership sets forth the rights of the estate of persons who are not the owners, such as: the right to servitude (Art. 274, 275); the right of lifetime inheritable possession of a land plot (Art. 265); the right of permanent (perpetual) use of a land plot (Art. 268); the right of economic management over property (Art. 294) and the right of operative administration of property (Art. 296). Such rights are often called limited property rights. The transfer of the right of ownership of the property to another person shall not be a ground for the termination of these types of property rights (Art. 216).

The right to servitude exists in many countries. It was introduced by ancient Roman law. It is not worth going into details because this right does not have anything specific in Russian legislation. However, all other limited property rights are quite unique in the Russian context. The right of lifetime inheritable possession of a land plot consists of entitlements to possess, use and transfer by inheritance a land plot, owned by state or municipality. The right of permanent use of land is similar to the right of lifetime inheritable possession. In general, it is the right of natural and legal persons to possess and use land with the right to dispose it in any way, except of transfer by inheritance, with the permission of the owner.<sup>168</sup> The

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<sup>168</sup> These limited property rights and existing problems with them are examined below.

right of economic management and the right of operative administration are quite complex phenomena. Briefly, it is the right of state-created enterprises to manage state or municipal property. By this way the state participates in the Russian economy.<sup>169</sup> Since only state-created enterprises may have property on such rights, they do not amount to private property rights.

However, not only rights mentioned in Art. 216 of the Civil Code are protected by the Constitution. The Constitutional Court of the RF ruled that in cases when non-owners have some property rights, based on legal grounds, their rights are also subject to protection of Art. 35 of the Constitution. It concluded that protection of Art. 35 of the Constitution also covers the rights of *bona fide purchasers*.<sup>170</sup> Some Russian scholars have the opinion that after this Resolution of the Constitutional Court the list of limited property rights was broadened and now also includes the rights of *bona fide purchaser*.<sup>171</sup> The Constitutional Court did not express a direct opinion about how disputes should be solved between the owner and the *bona fide purchaser*. It stressed that in taking decisions the courts shall ensure a fair balance among the rights and the lawful interests of all participants of the civil circulations.<sup>172</sup> It suggested to courts to use two main principles: the principle of proportionality and the principle of stability of civil circulation. It seems that in each case judges shall look into circumstances of the case and, taking into consideration principles of proportionality and stability, solve the case. Furthermore, the Constitutional Court addressed to the legislature by stating that the protection of property rights not only of owner but also of the *bona fide purchaser* should be ensured on the legislative level.<sup>173</sup>

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<sup>169</sup> D. Lametti, 'Rights of Private Property in the Civil Code of the Russian Federation and in the Civil Code of Quebec', *30:1 Review of Central and East European Law* (2005), p. 32.

<sup>170</sup> Resolution of the Constitutional Court of the RF, 21 April 2003, N 6-П.

<sup>171</sup> G. A. Gadzhiev, 'Конституционные основы современного права собственности (Constitutional basics of the modern property rights)', № 12, *Журнал Российского права (Journal of Russian law)*, (2006), ConsultantPlus (database which like GARANT provides texts of all legislation of the RF and commentaries of thereto; it also contains some articles published in the Russian legal journals)

<sup>172</sup> Resolution of the Constitutional Court of the RF, 21 April 2003, N 6-П, para. 2 (4).

<sup>173</sup> *Ibid*, para. 6 (2).



There are no doubts that the limited property rights, mentioned above as well as rights of a *bona fide purchaser* are covered by Art. 35 of the Russian Constitution. However, until now the Constitutional Court did not clarify some questions, for example whether rights of leaseholder are also protected by Art. 35. As follows from judicial practice, Art. 35 of the Constitution usually applies to the protection of the lessor but not the leaseholder.

The other important question in Russian reality concerns property rights on unauthorized structures. Currently, the state owns large territories of land. There are a lot of cases where people construct houses or other buildings on state land. The question arises whether the property rights of a person who builds a house on a land plot owned by the state and then uses it for some years are protected by law. An examination of the existing legislation leads to a negative answer. If a person erected a house or other immovable property on a land plot on which he/she did not have any property rights, it amounts to an unauthorized structure and he/she is obliged to destroy it on the request of the land owner. Before June 2006, according to the Civil Code of the RF, the person had the right to apply to an administrative body with the request to grant him/her land on the limited property rights, and after this the person had the right to legalize the unauthorized structure. With the changes in the Land Code of the RF these provisions of the Civil Code were abolished. Nowadays, according to Art. 222 (3) of the Civil Code, only the land-owner can apply to a court for recognition of his right over such immovable property, while the person who erected the unauthorized structure does not have any rights over it. Furthermore, even if the person constructed the building on his/her land plot, which was not allowed for that purpose or without obtaining the necessary permit for the construction works or with the violations of town-development or construction norms and rules, such construction is considered to be unauthorized and the person does not have any property rights over it. He/she can not even apply to the court for the protection of his/her rights over this unauthorized construction. These situations often happen in practice. The Russian legislation does not consider such

unauthorized structure as property and consequently, does not allow any protection to it. It seems that these situations are in collision with international standards.<sup>174</sup>

### **2.4.3 Limitations of the right to possess, to use and to dispose property**

Art. 35 of the Constitution does not contain any limitation on property rights and from the first sight it looks like the protection of property under Art. 35 of the Constitution has an almost absolute character. Some Russian scholars seem to believe that such strong protection of property rights is necessary in the weak Russian society in order to develop a strong market economy.<sup>175</sup> The constitutions of many European countries contain provisions of protection of property rights together with imposing certain limitations on such rights. Such construction of property rights provisions could be problematic in Russian reality. It should be taken into consideration that for a very long time private property was not protected by law and the state had almost unlimited power to interfere with property rights. After economic reforms, the inclusion to the Constitution provisions limiting property rights might be seen as a return to totalitarianism, the limitation of economic activity.<sup>176</sup>

However, the right to property is not unlimited; it has the same limits as all other human rights enshrined into the Constitution. Such limitations are set forth in Art. 55 (3), which reads as following:

“[t]he rights and freedoms of man and citizens may be limited by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defence of the country and security of the State.”

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<sup>174</sup> See more about this in the next Chapter.

<sup>175</sup> V. D. Karpovich (ed.) *Постатейный комментарий к Конституции Российской Федерации* (Commentary to the Constitution of the Russian Federation), GARANT.

<sup>176</sup> *Ibid.*

Art. 209 (2) of the Civil Code also contains limitations on owner's rights: they shall not be contrary to the laws and other legal acts and shall not violate the rights and the interests of other persons protected by law. As can be seen, certain limits are imposed because of the necessity to protect the rights and freedoms of others, which is consistent with the classical liberty theory.

Two conditions of limitations follow from the wording of Art. 55 (3) of the Constitution: lawfulness and public interest in the form of the mentioned purposes. The other conditions – fairness and proportionality were elaborated by court practice. Russian scholars in general agree that limitations on property rights are justified only if they are based on federal law, serve public interests and the principle of fairness.<sup>177</sup>

The condition of lawfulness means that any limitations on property rights should be based on valid Law, no other legislative acts such as a Decree of the President, a Resolution of the Parliament or any other subordinate legislation can contain limitations on human rights, in general, and property rights, in particular. In addition, only Federal Laws can contain such limitations. Subjects of federation can not limit any property rights by Regional Laws. Therefore, only the Federal Parliament, as a representative body has the power to limit property rights. The Land Code of the RF is an example of a Federal Law, consisting of limitations on property rights. Provisions of the Land Code limit the use of land by stating, for example, that any actions which may lead to environmental damages, degradation of land or violation of interest of other people are forbidden. Another example of Federal Law, containing limitations on property rights is the Tax Code.

In the meaning of Art. 55 (3) the term 'public interest' is strictly limited by the list of purposes. In a number of decisions the Constitutional Court pointed out that human rights, including the right to property, may be limited *only* for the purposes, mentioned in Art. 55 (3) of

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<sup>177</sup> See for example, I. L. Ivachev, 'Ограничение права собственности в решениях Конституционного Суда Российской Федерации (The limitation of Property Rights in the Decisions of the Constitutional Court of the Russian Federation)', *N 5, Юрист (Lawyer)* (2006), p. 34

the Constitution (emphasis added).<sup>178</sup> For example, examining Federal Law “Об обязательном страховании гражданской ответственности владельцев транспортных средств” (On the obligatory insurance of civil liability of owners of transport vehicles) the Constitutional Court stated that the provisions of this law does not violate property rights. It reaffirmed that property rights can be limited only by the purposes mentioned in the Constitution. It further ruled that obligations of all owners of transport vehicles to pay an insurance fee to insure the risk of civil liability in case of damaging property or health of others serve the purpose of protecting interests of other people and therefore is justified.<sup>179</sup> Taxation is considered to be an unquestionable justification for the limitation of property rights.

The Constitutional Court stated that limitation of property rights must satisfy requirements of fairness, be rateable to the purpose of protecting lawful rights and interests of others and be based on Laws.<sup>180</sup> Later, the Constitutional Court elaborated its position further and ruled that limitations on property rights shall satisfy requirements of fairness, be adequate, proportionate, rateable and necessary for the protection of the constitutional values, including protection of lawful rights and interests of others. Such limitations shall have a general and an abstract character, can not be retroactive and shall not interfere with the essence of the right.<sup>181</sup>

## **2.4.4 Deprivation of property**

### **2.4.4.1 Introductory remarks**

Art. 35 (3) sets forth the deprivation rule. The only necessary requirement for all types of deprivation, mentioned in this article, is a court decision. The phrase “court decisions” covers any decision of a court accepted in both a civil and a criminal procedure. All types of forced deprivation can be classified into several groups:

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<sup>178</sup> See for example, Resolution of the Constitutional Court of the RF, 6 June 2000, N 9-II; Resolution of the Constitutional Court of the RF, 1 April 2003, N 4-II.

<sup>179</sup> Resolution of the Constitutional Court of the RF, 31 May 2005, N 6-II.

<sup>180</sup> Resolution of the Constitutional Court of the RF, 6 June 2000, N 9-II, para.2.

<sup>181</sup> Resolution of the Constitutional Court of the RF, 1 April 2003, N 4-II.

- a) confiscation;
- b) requisition;
- c) nationalization;
- d) expropriation.

All types of forced deprivation, except confiscation, require the payment of compensation.

#### **2.4.4.2 Confiscation**

Art. 243 (1) of the Civil Code provides the legal ground for confiscation by stating that:

“In the instances provided for by a law property may be withdrawn without compensation from the owners by decision of a court or in an administrative procedure in the form of a sanction for the commission of a crime or other violation of law.”

The institute of confiscation of property has existed for a long time in criminal law. Confiscation of property was recognised as a separate type of punishment in Art. 35 of the Criminal Code of the RSFSR.<sup>182</sup> With the adoption of the new Criminal Code in 1996 this institute was kept. Chapter 9 of the Criminal Code of the RF listed confiscation of property as one of the types of punishment. Art. 52 provided that the confiscation of property consisted of the compulsory seizure and transfer to the state, without compensation, of all or part of the property of the convicted person. Although this punishment was established only for grave and especially grave crimes committed for mercenary motives, it was not justified in many cases. This provision allowed the possibility to confiscate all property of the accused person without taking into consideration the level of harm of the crime towards the other people and society. In many cases the confiscation of all property of the convicted person was disproportionate.<sup>183</sup> This

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<sup>182</sup> The Criminal Code of the RSFSR, 27 October 1960.

<sup>183</sup> S. Vodolagin, ‘Защита права собственности в России в свете требований статьи 1 Протокола № 1 к Европейской конвенции о защите прав человека и основных свобод (Protection of the right to property in Russia in the light of requirements of Art. 1 of

provision did not comply with the principles of necessity and proportionality and was violating the right to property protected by the Constitution of the RF and P1-1 of the ECHR. Art. 52 of the Criminal Code was abolished by the Federal Law of the RF on 8 December 2003. As can be seen, it only happened 5 years after Russia ratified the ECHR.

However, with the abolishment of Art. 52 of the Criminal Code the institute of confiscation did not disappear as such. It still remains in the Code of Criminal Procedure, which provides that property, money and other valuables gained as a result of criminal action or shall be acquired in a criminal way shall be returned to the entitled owner or confiscated. The institute of confiscation was returned back to the Criminal Code by the Federal Law on 27 July 2006.<sup>184</sup> Art. 104.1 contains a similar provision to the one from the Code of Criminal Procedure. The new provision of confiscation is reasonable since it permits only confiscation of property acquired as a result of criminal activities. The confiscation measures are also mentioned in the Code of Administrative Offence.<sup>185</sup> Changes in the institute of confiscation can be considered as one of the positive improvements of national legislation in the light of the requirements of P1-1.

#### **2.4.4.3 Nationalization**

Nationalization is recognised as a type of deprivation of property which leads to the transfer of property from private into public ownership. The Civil Code requires that in cases of nationalization the value of property and other losses are subject to compensation (Art. 235(2)). Disputes concerning compensation shall be settled by a court (Art. 306). The above mentioned provision is in formal collision with Art. 35 of the Constitution, which requires a court decision in all cases of deprivation, while Art. 306 of the

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Protocol 1 of the ECHR', in *Роль конституционных судов в обеспечении права собственности. Сборник докладов (The role of the Constitutional Court in the ensuring property rights. Compilation of reports)*, (М: Институт права и публичной политики, 2001), p. 146.

<sup>184</sup> The necessity and the reasons for these changes subject to separate discussion and are not covered by this thesis.

<sup>185</sup> The Code of Administrative Offences, 30 December 2001, N 195 – ФЗ.

Civil Code requires a court decision only in case of a dispute over the amount of compensation. Moreover, Art. 235 stated that questions of nationalization are to be settled by the Federal Law but until now such an act has not been adopted. In the case of *ZAO "Dietka na Pushkinskoy"* the applicant claimed that his property rights were violated by the Government of Moscow. On 12 July 2002 the Moscow Government issued Resolution N 1013 – PII, by which it required to vacate a certain office building of all occupants (including the owner!), reconstruct it, and transfer it to the Moscow State Academy of Art. The court of first and appeal instance upheld the claim of the applicant by stating that the taking of the building was not allowed without the consent of the owner, however, the court of cassation rejected the applicant's claim. The Presidium of the Supreme Arbitrazh Court<sup>186</sup> examined the case by the way of supervisory review and ruled that in the absence of the Federal Law on nationalization, any acts of nationalization are contrary to the provisions of Art. 235 of the Civil Code.<sup>187</sup> It is surprising that in this decision, the Supreme Arbitrazh Court did not make any reference to Art. 35 of the Constitution. This Resolution lead to the conclusion that nationalization is not allowed until the necessary Federal Law is adopted. The *ZAO "Dietka na Pushkinskoy"* case demonstrates the arbitrariness of state and municipal organs. Unfortunately, similar arbitrary acts very often happen in practice. Even though courts usually protect owners from such arbitrariness, it may take a long time before such violation is found.<sup>188</sup>

#### **2.4.4.4 Requisition**

Art. 242 of the Civil Code sets forth such type of taking of property as requisition. It states that:

“[i]n case of the natural disaster, the accidents, the epidemics, the epizootic, and *other circumstances* of an extraordinary character property may, in the

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<sup>186</sup> See more about Russian court system in the Chapter 2.7

<sup>187</sup> Resolution of the Presidium of the Supreme Arbitrazh Court, 14 December 2004, N 11992/04 (*ZAO "Dietka na Pushkinskoy"* case).

<sup>188</sup> For example, in the present case it took around two years.

interest of society and *by decision of state bodies*, be withdrawn from the owner in accordance with *the procedure and on the terms, laid down by the law* with the cost of the requisitioned property paid out to him (emphasis added).”

The person whose property has been requisitioned shall have the right to claim through the court the return to him of the preserved property, if the circumstances, in connection with which the requisition was performed, have ceased to operate (Art. 242 (3)).

There are two necessary requirements for requisition<sup>189</sup>:

1. The circumstances of extraordinary character shall exist. However, it is not very clear who can decide about the existence of circumstances of extraordinary character.
2. Property shall be taken in public interest. In this context it means that property should be used for prevention or abatement of the negative effect of such extraordinary events. Hence, requisition shall be distinguished from taking property for public purposes. The example of such confusion was the provision of Art. 119 (1) of the Land Code of the Republic of Tatarstan, which did not made any difference between the taking of property for public purposes and requisition.<sup>190</sup> It should be borne in mind that not any public purpose can justify requisition but only those which have a direct connection with existing extraordinary events. This is the main difference between requisition and the ordinary taking of property for public needs.

There are many problems with the provision on requisition. The Civil Code of the RF does not determine which bodies have the right to accept decisions on requisition. It is not very clear what level of extraordinariness

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<sup>189</sup> М. Maleina, ‘Реквизиция. Комментарий к статье 242 Гражданского Кодекса Российской Федерации (Requisition. Commentary to Art. 242 of the Civil Code of the Russian Federation)’, *N 8, Журнал Российского права (Journal of Russian Law)*, (2006), p.120.

<sup>190</sup> This provision was abolished by the Supreme Court of the RF on 14 July 2003.



may justify the taking of property and what situations are included in the “other circumstances”, mentioned in the article. The provisions of Art. 242 of the Civil Code formally contradicts Art. 35 of the Constitution which permits deprivation of property only on the basis of a court decision. Many Russian scholars doubt the constitutionality of requisition in light of Art. 35 of the Constitution.<sup>191</sup> However, until now there were no applications to the Constitutional Court with the request to check the constitutionality of those provisions. The other important problem is that Art. 242 of the Civil Code states that the procedure and the terms of requisition shall be determined by the Law but until now no Law concerning requisition has been adopted.<sup>192</sup>

The provisions on requisition do not put any limits on the objects of requisition. They do not forbid, for example, taking a house in which people are living or taking away from legal persons their means of production.<sup>193</sup> There are no provisions about the necessity to take into account the balance between private and public interest. Non-consideration of such balance may lead to a violation of property rights. It could be happening that authorities abuse their rights of imposing requisition. It seems that the provisions on requisition require further clarification, for example, some Russian scholars suggested to list objects which can not be subject to requisition.<sup>194</sup>

The author agrees with Professor Shennikova that it is necessary to adopt a Law on the procedure of requisition, to determine a list of bodies which have the power to make the decision about requisition and to clarify the meaning of “other circumstances”.<sup>195</sup> Adoption of such a law is essential in order to satisfy the requirements of clarity and foreseeability and to comply with international obligations. In addition, like in cases of nationalization, no acts of requisition shall be allowed before the law on requisition has been adopted.

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<sup>191</sup> M. Maleina, *supra* note 189.

<sup>192</sup> L. V. Shennikova, ‘О реквизиции в гражданском праве: гимн или реквием’ (Requisition in the civil law: the anthem or the requiem), № 6, *Журнал Законодательство (Journal Legislation)*, (2006), p. 11.

<sup>193</sup> M. Maleina, *supra* note 189, p.121

<sup>194</sup> *Ibid.*

<sup>195</sup> L. V. Shennikova, *supra* note 192, p. 12.

#### **2.4.4.5 Expropriation**

The Civil Code uses the terms confiscation, nationalization and requisition but not expropriation. The author is of the opinion that all cases of deprivation, mentioned below amount to expropriation.

The Civil Code includes several norms concerning deprivation of property due to misbehavior. Art. 240 of the Civil Code regulates the redemption of the mismanaged cultural property. In cases when an owner of cultural valuables carelessly maintains them, as a result of which they may lose their importance, such valuables may be withdrawn from the owner in accordance with the court decision through purchase by the state or by the mean of a public sale. According to Art. 241 of the Civil Code, similar rules apply to cases in which the owner treats domestic animals in glaring contradiction with the rules of the human attitude towards the animals, established on the grounds of the rules and norms accepted in society.

The Civil Code and the Land Code of the RF contain provisions on forced redemption of a land plot due to violation of certain rules by the owner. According to the Civil Code, a land plot may be withdrawn from the owner if he/she uses it with crude violations of the rules for the rational use of the land, for example, if its use leads to a material reduction of the fertility of agricultural land or to a significant worsening of the ecological situation (Art. 285). Besides, a land plot may be withdrawn from an owner in the case when its purpose is agricultural production or for housing or another kind of construction, but is not used for the corresponding purpose for a period over three years (Art. 284). In addition, if an owner of a house continues to use it for not intended purposes, systematically violates the rights and interests of others, mismanages the house by allowing its destruction despite the warning of the state body to stop such misbehavior, such a house can be sold in an open auction by virtue of a court decision with subsequent transfer to the former owner of the purchase price (Art. 293).

Both the Civil Code and the Land Code of the RF regulate questions about deprivation of a land plot for the state needs. In general, a land plot can be withdrawn for the state or municipal needs by the way of purchase. The decision concerning withdrawal of a land plot for the state or municipal needs shall be adopted by the federal executive power bodies, by the executive power bodies of the subject of federation, or by the local self-governmental bodies at least one year before taking of the land plot takes place. The payment for a land plot withdrawn for the state and municipal needs, the terms and other conditions of redemption shall be defined in the agreement with the owner. While determining the purchase price, the following shall be included: the market value of the land plot and of the immovable property situated thereon; all losses suffered by the owner by the withdrawal of the land plot, including losses which he/she bears in connection with the termination before time of his/her obligations to third persons, including missed profits. If the owner does not agree with the decision on the withdrawal of his/her land plot for the state or municipal needs, or he/she does not agree with the redemption price or if agreement was not reached within one year, the state body which adopted the decision on deprivation of land may bring suit for forced purchase of the land plot to the court. In such cases the court decides about the lawfulness of the decision and determines the purchase price (Chapter VII of the Land Code and Chapter XVII of the Civil Code). The one year notice period and the necessity of a court decision in case of disagreement between the land owner and the state authorities represent quite strong guarantees.

The Land Code of the RF provides the list of purposes which may justify the taking of a land plot for state and municipal needs. Art. 49 thereof states that deprivation of property for state and municipal needs can be performed exclusively in cases, related to:

- Performing of international obligations of the RF;
- Placement of the following objects of state or municipal importance is cases where there is no alternative: objects of energy systems; objects of atomic power; military objects; transports and communication lines; objects of information and communication;

objects, necessary for outer-space activities for protection of external borders of State; objects of power, gas, heat and water supply; highways and other roads.

The same article further rules that other purposes can be established only by the Federal Law or by the Law of subject of federation. The Land Code sets forth more limitations on taking land. Art. 79 of the Land Code states that agricultural land can only be taken for use for agricultural purposes but not for any other purposes. These provisions can be considered as guarantees against arbitrary acts of deprivation of property by states and municipal officers. Nevertheless, situations of abuse often happen in practice.

The above mentioned procedure, including all guarantees, covers not only the owners of a land plot but also land possessors who have a land plot on limited property rights, namely, the right of a lifetime inheritable possession of a land plot and the right of permanent (perpetual) use of a land plot. The court practice provides some examples of violation of rights of land possessors. For example, in the *Rostovenrgo* case, the municipal body issued the order to take certain gardening land parcels from land possessors for the building of an energy power station. In the court of first instance the plaintiff did not provide any evidence that the energy power station could be built only on the place of the gardening land. Besides this, the court did not determine the amount of compensation for the land possessors. Appellant and cassation courts accepted the ruling of the court of first instance.<sup>196</sup>

In the case the land plot was taken for state or municipal needs, the following question arose: what happens with the buildings and other immovable property situated on the taken land plot? This situation is regulated by the Civil Code. Art. 239 sets forth the provisions about the alienation of immovable property in connection with the withdrawal of the land plot on which it is situated. It stated that in the case when the

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<sup>196</sup> Reference to this case is made in I. V. Avsjuk, 'Изъятие недвижимости как основание принудительного прекращения права собственности (Deprivation of real estate property as a ground for termination of the property rights)', *N 7, Журнал Право и экономика (Journal of Law and economics)*, (2006), ConsultantPlus.

withdrawal of the land plot for the state or municipal needs is impossible without the termination of the right of ownership in a building, installation, or other immovable property, situated on the particular land plot, this property may be withdrawn from the owner by means of purchase by the state or public sale. However, the claim for the withdrawal of the immovable property shall not be liable to satisfaction if the state body or the local self-government body does not prove that the use of the land plot for the purposes, for which it is being withdrawn, would be impossible without terminating the right of ownership to the particular immovable property. For example, in the *Korvet* case the appellant was the owner of a building situated on the land plot. The municipal body issued a decision to withdraw this land plot for the municipal purposes (building of a sport – health center and a cultural – entertainment centre). The court finds that the mentioned purposes amount to a municipal need and that it was not possible to use the land plot without the termination of the rights of the owner of the building situated on the land plot. Consequently, the court declared that the decision of the municipal body of Ufa was lawful and found no violation of property rights<sup>197</sup>.

The above mentioned case concerns the taking of a commercial property as a result of the withdrawal of the land plot for municipal needs. However, the Housing Code also permits the deprivation of a house situated on a land plot if this land is to be taken for state or municipal needs. Taking the only house from the family due to withdrawal of the land plot for the state or municipal needs will put in danger not only property rights but also the right to home. According to many Russian scholars, it is necessary to adopt provisions which put more limits to the right of taking a house, if it is the only place where the person can live.<sup>198</sup> The other important question concerns the amount of compensation. It was

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<sup>197</sup> Judgment of the Federal Arbitrazh Court of the Ural Region on 31 July 2007, N Ф09 - 6036/07 – С6 (*Korvet* case).

<sup>198</sup> See for example, E. V. Unina, 'О праве собственности граждан на жилое помещение (About property rights on houses)', *NI, журнал Правоведение (Journal Jurisprudence)*, (1999), ConsultantPlus; O. G. Alekseeva, 'Прекращение право собственности на жилое помещение связи с изъятием земельного участка (Termination of the property rights on a house in case of the taking of a land plot', *N 8, журнал Закон (Journal Law)*, (2006), p. 46.

suggested that the amount of compensation should be not less than the amount which the deprived owner has to pay in order to buy an equivalent house plus all other expenses concerning the movement to the other house.<sup>199</sup>

## **2.5 Justifications for deprivation of property**

As follows from constitutional provisions, in order to be justified, deprivation of property should satisfy several requirements: it should be based on a court decision, serve state interest and be subject to preliminary and complete compensation.

A court decision is necessary in all cases of the taking of property. The requirement of a court decision is a strong guarantee, protecting against abuses by state officials. As mentioned above, state officials often act arbitrary and do not always respect the law, so in the present Russian reality only courts, which must base their decisions on valid laws, can secure effective protection of property. Moreover, it seems that the requirement of a court decision includes not only lawfulness but also the fulfillment of principles of fairness and proportionality. The Constitutional Court in its Resolution stated that in cases of the deprivation of property for the state needs a fair balance between private and public interest to be taken into account.<sup>200</sup> However, in the Resolution of Plenum of the Supreme Court “О судебном решении” (On court decision) there is no requirement to consider the principle of proportionality while deciding the case.<sup>201</sup> It seems that the lack of any provision about the necessity to consider the principle of fairness and proportionality is a big defect of the mentioned Resolution.

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<sup>199</sup> E. A. Suxanov, U. Mattei (eds.) *Основные положения права собственности (Main provisions about property rights)* (Moscow, 1999), p.289.

<sup>200</sup> Resolution of the Constitutional Court of the RF, 16 May 2000, N8-II.

<sup>201</sup> Resolution of the Plenum of the Supreme Court of the RF, 19 December 2003, N 23.

Despite the direct requirement about the necessity of a court decision in all cases of deprivation, prejudicial and extrajudicial deprivation of property was in existence for a very long time after the adoption of the Constitution of the RF. In contradiction with the Constitution, Art. 243 (1) of the Civil Code allowed confiscation by an administrative procedure. This contradiction was dissolved by several Resolutions of the Constitutional Court. In its early Resolution the Constitutional Court ruled that the provisions of Art. 244 (4) and Art. 244 (6) of the Custom Code which allowed confiscation of certain types of property by custom organs did not violate Art. 35 (3) of the Constitution. It stated that since the deprived owner had the right to appeal to the court, the requirement of Art. 35 (3) was satisfied.<sup>202</sup> In a later Resolution the Constitutional Court changed its position and found that provisions of Art. 266 of the Customs Code and of Art. 85 (2) and 222 of the Code of Administrative Offences, which allowed custom and administrative authorities to confiscate certain property without a court decision, violated Art. 35 (3) of the Constitution.<sup>203</sup> This decision has led to changes in the legislation. According to the new Custom Code of the RF,<sup>204</sup> custom organs do not have the right to confiscate property any more. It is stated that only courts can make decisions about confiscation. In addition, the new Code of Administrative Offences was adopted and entered into force 1<sup>st</sup> of July 2002. Art. 3.7 regulates the confiscation of property which was gained as a result of an administrative offence, or was an instrument thereto and states that only courts can make a decision about confiscation. Art. 3.6 regulates the forced sale of property which was gained as a result of administrative offence, or was an instrument thereto and states that only courts can make a decision about the forced sale of property. Analysis of these norms shows that a court, taking into account the circumstances of each situation, will make decision if certain property shall be confiscated or sold with transfer of the purchase price to the former owner. Such changes illustrate that new legislation provides stronger

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<sup>202</sup> Resolution of the Constitutional Court of the RF, 20 May 1997, N 8-II.

<sup>203</sup> Resolution of the Constitutional Court of the RF, 11 March 1998, N8-II.

<sup>204</sup> The Custom Code of the RF, 28 May 2003, N 61 – Φ3.

guarantees than the old one and prove that the legislator tries to put all norms in accordance to the constitutional provisions.

In one of its Decisions the Constitutional Court stated that the right of investigators of a criminal case to authorize the seizure of property which is considered being material evidence of the alleged crime without a court decision did not violate Art. 35 of the Constitution. It ruled that such seizure did not constitute deprivation of property since it did not lead to changes of the titled owner of the property but only prevented the owner from using and disposing of it. Moreover, acts of an investigator might be appealed to a court. In case of a final seizure of the property the decision of the court is a necessary condition. In taking a decision about the lawfulness of the actions of an investigator the courts shall consider not only the fulfillment of his/her formal requirements but also examine the fact of considering by the investigator the gravity of the crime, the particularities of the property, its money value and the value for the owner and society and the consequences of the seizure of such property.<sup>205</sup> Customs and Administrative authorities also have powers to seize property. It corresponds with the position of the ECtHR that a temporary dispossession does not amount to deprivation of property.

Although it seems that the term ‘state needs’ used in the Constitution is quite narrow, the practice proves the opposite. While the Constitution directly mentions only state needs, the Civil Code and the Land Code also name municipal needs as a justification for a deprivation. Scholars agree that the term ‘state needs’ covers not only state and municipal interests but also public interests.<sup>206</sup> It is not always easy to define what the state’s needs are.

The examination of constitutional provisions helps to determine the scope of state interests. It seems that the provision of Art. 55 (3) of the Constitution about permissible limitations on human rights also applies in situations of deprivation of property. There is no evidence that the concept of public needs in cases of deprivation of property differ from the

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<sup>205</sup> Decision of the Constitutional Court of the Russian Federation, 10 March 2005, N 97-O.

<sup>206</sup> See for example, V.V. Lazarev (ed.) *supra* note 166; V. D. Karpovich (ed.) *supra* note 175.



concept of public interest in cases of limitations. According to Art. 56 (3) of the Constitution, in both cases state interests cover protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, ensuring defence and security of the country. Analysis of the fundamental principles of the constitutional system shows that state interests cover protection of democracy, sovereignty, social policy, economic integrity, land and natural resources.

Although legislation only mentions state needs in connection with deprivation of a land plot for state or municipal needs, analysis of all other grounds for deprivation shows the existence of state interest in them as well. For example, forced taking of cultural valuables serves the purpose of the maintenance of the cultural heritage of the country. Moreover, Art. 44 (2) of the Constitution states that everybody has the right to use cultural establishments and to access cultural valuables. So, maintenance of cultural values also serves lawful interests of other people. In cases of confiscation public purpose constitutes the protection of economic safety of the country, in cases of degrading use of land – protection of the rights and interest of future generations. So, all cases of deprivation are based on state interests.

Almost everything can amount to “state interest”, so it is very important to determine the borders of state interest. Some examples of what can be considered as state needs can be taken from court practice. For example, the maintenance and building of a social infrastructure is considered to be in the state interests.<sup>207</sup> In many countries a transfer of property from one private individual to another one is considered to be in state interest.<sup>208</sup> Fortunately, it seems this it is not the case in Russia. The illustration of this is the *Martovskij* case in which the Federal Arbitrazh Court found a violation of property rights. The appellant was deprived from his property (the building situated on the land plot) due to the decision of the municipal body on the withdrawal of the land plot for municipal needs.

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<sup>207</sup> See for example, Resolution of the Constitutional Court of the RF, 16 May 2000, N8-II; Judgment of the Federal Arbitrazh Court of the Ural Region, 31 July 2007, N Ф09 - 6036/07 – C6 (*Korvet* case).

<sup>208</sup> See for example, the famous *Kelo v. New London* case of the Supreme Court of the USA, <http://www.supremecourtus.gov/opinions/04pdf/04-108.pdf>, visited on 15 November 2007.

In the decision of the municipal body it was stated that this land plot would be leased to a commercial organisation for building houses, shops and a parking house. The court of first instance refused the complaint and found no violation of property rights. The court of appeal instance found a violation of the right to property by stating that the purpose of leasing the land plot to a certain commercial organisation does not amount to state needs.<sup>209</sup> After this judgment of the Federal Arbitrazh Court of the Ural Region, all lower courts of the Ural Region consider that the transfer of property from one individual to the other one does not amount to state needs. Unfortunately, the author does not have any information about situations with this question in the other regions of Russia. As practice shows, opinions of courts in different regions concerning similar cases may differ. There are no guarantees that other courts will agree with the position of the Federal Arbitrazh Court of the Ural Region, considering that decisions of the Federal Arbitrazh Court of the Ural Region are not binding for courts of other regions.

The Constitution of the RF requires the payment of complete and preliminary compensation in cases of taking property for state needs. As follows from existing legislation, compensation is necessary in all cases of takings, except confiscation. As follows from the provisions of the Civil Code such compensation should cover not only the market value of the property but also losses of the former owner. Such losses include losses which he/she bears in connection with anticipatory repudiation of contracts with third parties and losses of profits.<sup>210</sup> Usually compensation is made in the form of the payment of a certain amount of money but it can also be in the form of granting an equivalent property. However, the latter form of compensation is possible only with the consent of the former owner.

Despite of the wording in the Constitution about “complete compensation”, the court practice shows that complete compensation is not always a necessary requirement. In its Resolution N 8-II, the Constitutional Court ruled that the compliance with fair balance between private and public

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<sup>209</sup> Judgment of the Federal Arbitrazh Court of the Ural Region on 18 November 2004, N Ф09 – 3835/04 – ГК (*Martovskij* case).

<sup>210</sup> I. V. Avsjuk, *supra* note 196.

interest can justify the payment of non-complete compensation. In this Resolution the Constitutional Court referred to the decision of the ECtHR in the *James and Other* case.

The author thinks that this position of the Constitutional Court is not correct in the light of the following:

- P1-1 requires “payment of compensation” while the Constitution of the RF directly requires payment of “preliminary and complete compensation”;
- the ECHR contains minimum guarantees while national authorities can provide stronger guarantees. This was done by the Russian authorities by stating in the Constitution that compensation should be complete. So, in all cases the amount of the compensation shall include both market value of property and all losses of the former owner.

To conclude, in order to be justified under Russian legislation the interference with property rights shall be based on a court decision, to serve public interest and be proportionate, which among other things implies the necessity of preliminary and complete compensation in all cases.

## **2.6 Some problems with property rights on land in Russia**

### **2.6.1 Introductory remarks**

Land can be considered as one of the most important types of property. Land is more than a possession; it also gives us food, work and a home. Art. 9 of the Russian Constitution states that land is “the basis of life and activity of the people living in the corresponding territories”. The property rights on land in the Russian context have special importance in the light of the fact that unlike in the Western-European countries, in Russia private ownership over land is a relatively new phenomenon. Therefore, some of the numerous problems with property rights on land in Russia are quite unique. At the

moment most of the problems with land exist due to the communist past of the country and the non-consideration of private interests. Only some of the problems are examined in the present thesis.

## **2.6.2 Problems with limited property rights on land**

For a long time all the land was in ownership of the state and the municipality. Natural and legal persons could not be owners of land; they could only have limited property rights on land such as the right of lifetime inheritable possession of a land plot and the right of permanent (perpetual) use of a land plot. As mentioned above, these rights allow to possess and to use a land plot, however, any act of disposal (except by way of inheritance) is permitted only with the agreement of the owner. Furthermore, these rights allow building houses or other immovable property on the land plot, as well as obtaining ownership over such immovable property. This may lead, and actually already has led, to complicated situations. A person does not own the land but does own the immovable property on this land which can not be used without this land plot, nor moved from it. So, on the one hand, the person as the owner has the right to sell immovable property but on the other hand he/she can not dispose the land plot owned by the state or municipality on which the immovable property is situated. Realization of this complexity has led to changes in the legislation. During the economic reforms the institute of private property of land was recognised. With the adoption of the Land Code of the RF, this institute was developed. The new Land Code contains provisions that land could not be granted to natural and legal persons on limited property rights' title after 21 October 2001,<sup>211</sup> with the exceptions of state organisations and state and municipal bodies. Nevertheless, currently limited property rights on a land plot still prevail among others, so it is important to analyse them.

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<sup>211</sup> At this date the the Land Code of the RF entered into force.

The *Blizinskaya* case is very important in understanding the place of limited property rights and the possibilities of their judicial protection. Blizinskaya has been living in a house situated on a land plot of 0,2291 hectare in the Moscow region. In 1963 she became the owner of the house and obtained the right of permanent use of the land plot. Her family had had the right of permanent use of this land plot since 1824.<sup>212</sup> In 1996, by a decision of the Land Commission of the Eastern Administrative District of the Moscow region, she was given the right of permanent use of 0,06 hectare of the land and was offered to lease the remaining land plot. She had appealed this decision to the court of first instance which rejected her claim. The court had based its decision on the norm of the Municipal Law of Moscow “Об основах платного землепользования в Москве” (On Basics of Pay Land Tenure in Moscow).<sup>213</sup> Under Art. 16 of this Law, citizens who permanently live in owned houses situated on a land plot within the Moscow region have the right of permanent use of this land plot. However, the size of such land plot was limited to 0,06 hectare if the land plot was situated within the Moscow encircling highway and 0,12 if a land plot was situated outside the Moscow encircling highway. The remaining land plots should be leased. Blizinskaya appealed the court decision to the appeal court and afterwards to the Supreme Court of the RF; both of them rejected the claim as well.

Blizinskaya brought the claim to the Constitution Court of the RF, stating that the provisions of the Municipal Law of Moscow have violated her right to property, protected by Art. 35 of the Constitution. The Constitutional Court started its analysis with the history of land reform. It stated that before the 90s when all land was a state property, citizens could possess land only on limited property rights. During the land reform, with acceptance of the Law of the RSFSR “О собственности в РСФСР” (On property in the RSFRS), 1991 and the new Constitution, 1993, the right of private property over land was recognised. However, citizens had a choice either to obtain the ownership title over the land plots in their possession or

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<sup>212</sup> The existence of this right was documentary proven since year 1913.

<sup>213</sup> The Law of Moscow «Об основах платного землепользования в городе Москве» (On Basics of the Pay Land Tenure in Moscow), 16 July 1997.

to remain existing limited right over the plots. According to the President Decree of the 7<sup>th</sup> of March 1996,<sup>214</sup> independently of whether citizens had obtained ownership rights over land plots or remained limited rights they could possess such land plot without any limitation of size.

Further in the Resolution the Constitutional Court underlined that Art. 35 of the Constitution protected property rights. It noted that the term “property rights” included not only ownership rights but also limited property rights,<sup>215</sup> including the right of permanent use of a land plot. The Constitutional Court ruled that a land plot being a ‘possession’ could be taken only on the basis of a judicial decision and with payment of compensation. The Court concluded that the municipal Law of Moscow, which obligated people having a land plot over a certain size to lease it, violated property rights guaranteed by the Constitution and, consequently, should be recognised as unconstitutional.<sup>216</sup>

The Land Code of the RF obligates natural and legal persons to change title from limited property right to ownership or to lease the used land plot. While Art. 20 (3) of the Land Code states that natural and legal persons who possessed a land plot prior to entering into force of the new Land Code maintain limited property rights of the land, Art. 3 of the Introductory Law states that legal persons must purchase or lease the occupied land plot until the 1<sup>st</sup> of January 2010.<sup>217</sup> There is no time limit for natural persons; in addition, they have the right to obtain ownership over the occupied land free of charge once. However, citizens who use land for entrepreneurship, for examples farmers, do not have the right to obtain ownership free of charge.<sup>218</sup>

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<sup>214</sup> Decree of the President of the RF «О реализации конституционных прав граждан на землю» (On realization of the constitutional right of citizens to have land), 7 March 1996.

<sup>215</sup> In a number of other cases the Constitutional Court came to the same conclusion. See for example, Resolution of the Constitutional Court of the RF, 16 May 2000, N 8-П, para. 3.

<sup>216</sup> Resolution of the Constitutional Court of the RF 13 December 2001, N 16-П.

<sup>217</sup> Previously, this time limit was established until 1<sup>st</sup> January 2004, then 1<sup>st</sup> January 2006 and later until 1<sup>st</sup> January 2008.

<sup>218</sup> This provision was widely criticised. One of the arguments was non-possibility to determine which part of a land plot is used by a farmer for private purposes and which one is used for the economic activities.

The provisions of the Introductory Law have led to many complaints about violations of property rights.<sup>219</sup> The Constitutional Court declared such complaints inadmissible. It stated that provisions which obligate legal persons to purchase or lease occupied land do not provide any grounds for deprivation of land, just the opposite, they give the right to privatization of a land plot. They also give the choice whether to purchase the land plot or to lease it. The Constitutional Court referred to the provisions of Art. 20 of the Land Code, stating that limited property rights remained in force.

Many scholars argue that despite the established time-limit, limited property rights will remain even after 2010, which ensures the possibility to use land without changing title over it and thus, prevent from any violations of property rights.<sup>220</sup> However, state bodies are putting a lot of pressure on legal persons to purchase or lease land. Furthermore, on 24 July 2007 the Law introduced a new administrative offence – violation of time limit of purchasing or leasing occupied land.<sup>221</sup> So, the following questions arise: Is it lawful to force legal persons to buy or lease land? Does it violate their property rights? The Constitutional Court already answered to those questions in the mentioned *Blekinskaya* case, ruling that the law obligating people to lease land violates property rights. It seems that the law, obligating to purchase or lease land also violates property rights. The author believes that the law shall give the possibility to change legal title over a land plot but can not force natural and legal persons to do so.

The Constitution provides that property rights can be limited only for public purposes. Can the aim to change limited property rights to title of ownership or to lease amounts to the public purpose, considering that this institute still remains in the Russian legal system? And if yes, did the legislator consider fair balance between public and private interest? Why

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<sup>219</sup> See for example, Decision of the Constitutional Court of the RF, 25 December 2003, N 512-O.

<sup>220</sup> G. L. Adamovich et al., 'Проблемы переоформления права постоянного (бессрочного) пользования на землю (Problems of the right of permanent (perpetual) use of a land plot', № 5, *Бюллетень нотариальной практики (Bulletin of notarial practice)*, (2005), ConsultantPlus.

<sup>221</sup> These acts will be punishable from year 2011.

does the Law distinguish between ordinary citizens and citizens enrolled in entrepreneur activities? All these questions are to be answered by the Constitutional Court in the future.

### **2.6.3 Olympic unfairness**

Strong disagreement in the Russian community has arisen because of adoption of a new bill, concerning deprivation of land for the purpose of holding the Olympic Games 2014 in Sochi.<sup>222</sup> In this thesis the main problems are shortly pointed out. The act allows taking of all land necessary for building facilities for the Olympic Games from the present holders of the land plots. The value of such land and the amount of compensation is to be estimated by a special Commission. The composition of this Commission was determined in a closed meeting without presence of any mass media and was widely criticized due to the fact that it consists only of state officials and does not include any independent experts. Experts believe that the holders of land will not get full compensation for their land. While the Land and the Civil Code of the RF require one year notice prior to deprivation, the new act provides for 3,5 months notice. Moreover, it seems that this act is unconstitutional since it does not require a court decision prior to the deprivation but only gives the right to appeal the decision of administrative bodies to a court. However, in case a court finds the decision on the deprivation void, the land will already be used for the constructions.

Another big problem concerns the destruction of unauthorized structures. As examined above, persons who erected unauthorized structures do not have any property rights over them. State authorities even have the right to destroy unauthorized structures. As practice of last months shows, a lot of such illegally-built houses were destroyed in the Sochi region, even though for some people they were their only homes. Usually the value of immovable property situated on the land plot is included into the amount of compensation for the deprivation of land. However, when determining the

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<sup>222</sup> It the moment of writing this thesis (end November 2007), due to the re-election of the Parliament of the RF, this act passed out one of three stages and did not become final yet.



price of a land plot, the state authorities do not take into consideration the value of the unauthorized structures situated on the land plots. This situation with unauthorised structures leads to the destruction of houses of some people and non-inclusion of the value of these houses into the amount of compensation. So, in general, people whose “unauthorized houses” are destroyed are not able to buy any other house with the amount of compensation they receive.

It is difficult not to agree that taking land for construction facilities for the Olympic Games account to taking property for public needs but there always should be a fair balance between private and public interests. The mentioned Bill does not consider private interests seriously. The author is of the opinion that deprivation of land and often home from thousands of people without just compensation and other guarantees, is not-lawful and not fair in a democratic state, which Russia claims to be. The author relies on common sense of the new Parliament not to enforce the discussed act.

Author’s recommendations in this situation are the following:

- to follow the standard procedure of deprivation of land for public needs, set forth in the Land Code and the Civil Code of the RF including all guarantees;
- to create an independent Commission of Experts for the evaluation of the purchase price of a land plots, which shall include independent representatives from the local population;
- to include into the compensation for a land plot the value of the “unauthorized structures”, situated on it;
- to ensure that the compensation is paid before the deprivation of the property takes place;
- to set forth additional guarantees for the owners of land such as possibilities to re-purchase their land after the end of the Olympic Games, if possible. The price in this case shall be equal to the amount of compensation paid for deprivation.

## **2.7 Domestic judicial protection of property rights**

### **2.7.1 Introductory remarks**

The Constitution of the RF sets forth the new judicial system. There are three kinds of federal courts: the Constitutional Court of the RF, the federal courts of general jurisdiction, headed by the Supreme Court of the RF, and the federal arbitrazh courts, headed by the Supreme Arbitrazh Court of the RF. In addition there are courts of the subjects of the RF but they are not created in all subjects.<sup>223</sup> All federal courts have jurisdiction to examine cases which invoke violation of property rights but the conditions are different.

### **2.7.2 The role of the Constitutional Court**

The Constitutional Court of the RF is a judicial body of constitutional control. The Constitution gives it important power. According to the Federal Constitutional Law “О Конституционном Суде Российской Федерации”(On the Constitutional Court of the Russian Federation)<sup>224</sup>, the main purpose of the Constitutional Court is to ensure the supremacy and direct effect of the Constitution of the RF in its entire territory. Among others, the Constitutional Court has following authorities:

- to resolve cases concerning the conformity with the Constitution of the RF of Federal Laws, normative acts of the President, Federation Council, State Duma, Government of the RF, the constitutions of republics, charters, Laws and other normative acts of subject of the RF, international agreements of the RF which have not entered into force;

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<sup>223</sup> Further only the federal courts system is examined.

<sup>224</sup> The Federal Constitutional Law “О Конституционном Суде Российской Федерации”(On the Constitutional Court of the Russian Federation), 21 July 1994, N 1-ФКЗ.

- to test the constitutionality of a Law applied or applicable in a specific case in response to the complaints against the violation of constitutional civil rights and liberties and in response to the requests of other courts;
- to give the interpretation of the Constitution of the RF (Art. 3).

The grounds for the examination of a case by the Constitutional Court are discovered uncertainty regarding the conformity with the Constitution of the RF of a law or other normative acts, international agreement, or uncertainty in the understanding of provisions of the Constitution (Art. 36).

The Constitutional Court plays an important role in the clarification of the constitutional rights in general and the right to property. For example, in a number of Resolutions it clarified the meaning of the term “property”.

Natural and legal persons who believe that their constitutional rights, including property rights, have been violated may apply to the Constitutional Court. While considering a complaint, the Constitutional Court can only rule on constitutionality or unconstitutionality of the examined provision of law. It does not have the power to rule on the merits, or the power to declare that a particular law provision was misused.

The Constitutional Court often uses principles and norms of international law in its decisions. It uses international norms for a variety of reasons: for the purpose of coordination with international obligations of RF, to enrich the reasoning of the decisions, to elaborate fully the meaning of constitutional provisions, and to influence the perfection of the legislation. However, the Constitutional Court can not base its decision only on norms of international law; it should always use norms of the Constitution as well. Moreover, it doesn't have the power to decide if certain national norms contradict international ones.

The decisions of the Constitutional Court of the RF are binding throughout the territory of Russia for all representative, executive and judicial bodies of the state authority, bodies of local self-government, enterprises, institutions, organisations, officials, citizens and their

associations (Art. 6). The problem with the Constitutional Court is that, since it can not rule on the merit, there is no direct mechanism for enforcement of its judgments in concrete cases. In case the Constitutional Court found applied provision unconstitutional, the case should be reconsidered by the ordinary court on the ground of newly-discovered circumstances.

### **2.7.3 Ordinary Courts**

There are two types of ordinary courts: the federal courts of general jurisdiction and the federal arbitrazh courts. The main difference between them, concerns the applicants. Courts of general jurisdiction consider cases with participations of natural persons and arbitrazh courts (or commercial courts) consider cases with participations of legal persons. Thus, if property rights of a natural person have been violated, the situation falls within the ambit of the courts of general jurisdiction, which uses the Civil Procedure Code; if a legal person's property rights have been violated, the case will be examined by the arbitrazh courts, which uses the Arbitrazh Procedure Code.

Unlike in countries with the common-law system, precedent is not considered as a formal source of law in Russia.<sup>225</sup> However, judicial practice is not ignored completely in the Russian legal system; it is playing an important role in the implementation and the development of the law. Courts can not create legal norms, they can only interpret them. Although formally judges are not obliged to use decisions of higher courts in solving similar cases, in practice they often do so to avoid reversal of their judgment by the higher court. In addition, the Supreme Court and the Supreme Arbitrazh Court have the right to issue "guiding explanations" which are binding for lower courts of general jurisprudence and lower arbitrazh courts respectively. In such "guiding explanations" they give interpretation to certain norms of national and international law; make recommendations to

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<sup>225</sup> There are ongoing discussions among scholars whether judicial practice should be recognized as a source of law in Russia or not; however, this question falls outside the scope of the thesis.

apply certain international provisions and clarify their meaning; inform courts about international practice. The best example of an act concerning the protection of property rights is the Informative Guideline of the Supreme Arbitrazh Court “Об основных положениях, применяемых Европейским судом по правам человека при защите имущественных прав и права на суд” (On the main principles used by the ECtHR in protecting the right to property and the right to a fair trial), issued after the ratification of the ECHR.<sup>226</sup> In this Guideline the Supreme Arbitrazh Court points out the main principles of the ECHR used in cases for the protection of property rights and the right to a fair trial. In connection with property rights it mentioned the principles of lawfulness and fair balance between public and private interest. This Guideline was very important for Russian judges because in 1999 most of them were not familiar at all with the provisions of the ECHR. However, this Guideline of the Supreme Arbitrazh Court is obligatory only for the lower arbitrazh courts but not for the courts of general jurisdiction, which led to situations that in general, judges working in the courts of general jurisdiction did not take into consideration this Guideline.

The Supreme Court did not issue any separate resolutions on the application of the provisions of the ECHR; the most relevant is the Resolution of the Plenum of the Supreme Court “О применении судами общей юрисдикции общепризнанных принципов и норм международного права и международных договоров Российской Федерации» (On application of commonly-recognized principles and norms of international law and international agreements of the Russian Federation by the courts of general jurisdiction).<sup>227</sup> This Resolution states that the courts should take into consideration the practice of the ECtHR while

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<sup>226</sup> Guideline of the Supreme Arbitrazh Court of the RF “Об основных положениях, применяемых Европейским судом по правам человека при защите имущественных прав и права на суд” (On the main principles used by the ECtHR in protecting the right to property and the right to a fair trial), 20 December 1999, N C1-7/СМП – 1341.

<sup>227</sup> Resolution of the Plenum of the Supreme Court of the RF “О применении судами общей юрисдикции общепризнанных принципов и норм международного права и международных договоров Российской Федерации» (On application of commonly-recognized principles and norms of international law and international agreements of Russian Federation by the courts of general jurisdiction), 10 October 2003, №5.

deciding cases concerning violations of human rights.<sup>228</sup> However, the practice of the ECtHR on property rights violations were not touched upon in the Resolution. Considering that at the end of the year 2003 the ECtHR found violations of property rights in numerous cases, this Resolution should have consisted an observation of property rights practice. In another Resolution “О судебном решении” (On court judgment) the Plenum of the Supreme Court ruled that all courts while deciding cases concerning human rights *shall consider* judgments of the ECtHR (emphases added). It seems that the phrase “shall consider” means that courts are not obliged to follow judgments of the ECtHR in similar cases.<sup>229</sup>

So, in cases of violation of property rights, natural and legal persons can protect their rights at the national level by applying to the ordinary court or by making a complaint to the Constitutional Court of the RF. In cases they are not satisfied with the decision of the domestic courts; a claim to the ECtHR can be lodged. It is important to remember that application to the Constitutional Court of the FR is not considered as an “effective domestic remedy”,<sup>230</sup> so it is possible to use the European mechanism of protection alongside with the procedures in the Constitutional Court, which often is done in practice. Moreover, since the ECtHR states that “supervisory-review application is akin to an application for retrial” the procedure of supervisory review in the domestic courts is also not considered as an “effective domestic remedy”.<sup>231</sup>

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<sup>228</sup> Ibid, para.10.

<sup>229</sup> L. A. Gumerov, S. A. Gumerov, ‘Некоторые аспекты применения постановлений Европейского суда по правам человека в Российской Федерации (Some aspects of the application of judgment of the European Court on Human Right in Russia)’, № 2, журнал *Российский судья (Journal Russian Judge)*, (2007), ConsultantPlus.

<sup>230</sup> V. D. Zorkin ‘Конституционный суд России в европейском правовом поле (The Constitutional Court of Russia in the European legal area), № 3, журнал *Российского права (Journal of the Russian Law)*, (2005), ConsultantPlus.

<sup>231</sup> See for example, *Denisov v. Russia*, 6 May 2004, Admissability decision of the EComHR, app. no. 33408/03; *Berdzenishvili v. Russia*, Admissability decision of the EComHR, 29 January 2004, app. no. 31697/03.

# 3 Chapter III – The ECHR within the Russian framework

## 3.1 Introductory remarks

The process of joining the Council of Europe was not easy for the RF. On the 21<sup>st</sup> of February 1996, after numerous debates the Russian State Duma approved the membership of the Council of Europe and adopted the Federal Law of the RF “О присоединении Российской Федерации к Уставу Совета Европы” (On the Russian Federation joining the Council of Europe).<sup>232</sup> At that time the international experts were extremely critical about the situation with human rights in Russia. Some of them argued that if Russia became a party of the ECHR, this would mean that the legal standards developed by the EComHR and the ECtHR would have to be watered down.<sup>233</sup> Another view was that it would be better for Russia to become a party of the ECHR, since the Convention can be used to improve the system of human rights protection in Russia.<sup>234</sup>

After long debates, with 165 votes in favor, 35 against and 15 abstention Russia became a full member of the Council of Europe on the 28<sup>th</sup> of February 1996. Two years later, on the 28<sup>th</sup> of February 1998, the Russian’s Minister of Foreign Affairs, Evgenij Primakov, signed the ECHR and 3 other Council of Europe Conventions.<sup>235</sup> The ECHR was ratified by the Russian Parliament and the Federal law of the RF “О ратификации Конвенции о защите прав человека и основных свобод и протоколов к ней” (On Ratification of the Convention for the Protection of Human Rights

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<sup>232</sup> The Federal Law of the RF “О присоединении Российской Федерации к Уставу Совета Европы” (On the Russian Federation joining the Council of Europe ), 21 February 1996, N 19 – ФЗ.

<sup>233</sup> M. Ferschtman ‘Russia’ in R. Blackburn and J. Polakiewicz (eds.), *Fundamental Rights in Europe. The European Convention on Human Rights and its Member States, 1950-2000*, (Oxford, 2001), p.731.

<sup>234</sup> Ibid.

<sup>235</sup> Namely, the European Convention Against Torture, the European Charter on Local Self-Government, and the Framework Convention on Protection of National Minorities.

and Fundamental Freedoms and the Protocols to it), entered into force on the 30<sup>th</sup> of March, 1998.<sup>236</sup> On the 5<sup>th</sup> of May 1998, Evgenij Primakov officially deposited the instruments of ratification of the ECHR and its Protocols N 1, 4, 7, 9, 10, and 11 at the Council of Europe.<sup>237</sup> So, on the 5<sup>th</sup> of May 1998 the ECHR legally entered into force in respect to Russia. While ratifying the ECHR, Russia had also recognised the right of individual petitions. According to the Law of Ratification, the ECHR is applicable only to violations which arose after its entry into force.

Russia has incorporated the ECHR into its domestic law. According to the Law of Ratification – the ECHR become part of Russian legislation. Moreover, as stated in the Law on Ratification, the RF recognises *ipso facto* the jurisdiction of the ECtHR on the question of interpretation and application of the ECHR in case of alleged violation of the RF provisions thereof. Besides, Art. 17 (1) of the Russian Constitution provides that "[t]he basics rights and liberties in conformity with the commonly recognised principles and norms of the international law shall be recognised and guaranteed in the Russian Federation".

## 3.2 Some statistical information

After the ratification of the ECHR by Russia its natural and legal persons gained access to the ECtHR for the protection of their rights and they started to use this opportunity. According to statistics of the Information Center of the Council of Europe in the RF, from May 1998 till the end of 2002 more than 10,000 applicants were lodged by Russian natural and legal persons. Around 3,500 were rejected due to the poor quality of the applications and

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<sup>236</sup> The Federal Law of the RF "О ратификации Конвенции о защите прав человека и основных свобод и протоколов к ней" (On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols to it), 30 March 1998, N 54 – ФЗ.

<sup>237</sup> Russia made a number of reservations during ratification but non of them concerned protection of property rights.



violations of the admissibility criteria.<sup>238</sup> As follows from the Annual Report of the ECtHR for the year 2006, 50,463 applications were lodged by Russian natural and legal persons during November 1998 – 2006. According to the statistics of the Information Center of the Council of Europe in the RF, around 64% of these applications alleged violation of property rights.

During the last 5 years the ECtHR accepted many decisions in which it found violation of human rights of citizens of Russia. The first two judgments were delivered only in 2002, in 1 of them a violation of property rights was found. During 2002 – 2006, in 197 out of 207 judgments against Russia at least 1 violation was found, in 101 cases, the right to property was violated (See Appendix I). This shows that 51.27% of all violations constitute violation of property.

The only countries in which violation of the right to property was found in more cases are:

- Turkey - in 353 out of 1076 cases, which amounts to 32.81%;
- Italy - in 255 out of 1264 cases, which amounts to 20.17%; and
- Ukraine - in 149 out of 258 cases, which amounts to 55.04% (See Appendix I).

In Romania, the amounts of violations of property rights are almost the same as in Russia – 96 cases. However, it amounts to 63.16%. In Moldova violations of property rights were found only in 24 cases, but they amount to 57.14% (See Appendix I).

In other European countries the amount of property rights violations is much lower. In Germany, for example, it is only 1 out of 53 cases (1.89%), in the UK it is 2 out of 141 cases (1.42%).

In general, during 1999-2006, in 1,079 out of 5,400 judgments violation of P1-1 was found, which amounts to almost 20% (See Appendix I). The only other article violated more often is Art. 6 of the ECHR.

This statistic shows that in general property rights are among the most violated rights in the ECHR. The situation in Russia is even worse

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<sup>238</sup> А. Р. Фокон 'Защита имущественных прав в Европейском суде (Protection of property rights in the European Court)', *N 7, журнал Российский судья (Journal Russian judge)*, (2005), p. 3

– property rights are violated more often than any other rights. Mr. E. Jurgens, rapporteur on the implementation of judgments of the ECtHR, stated that there are three main categories of cases against Russia: 1) non-enforcement of court judgments; 2) poor conditions in Russian jails; and 3) quashes of final court decisions.<sup>239</sup> Two out of three categories of the cases are connected with property rights violations.

### 3.3 Differences in the concept of property rights

As stated in the previous Chapter, Russian legislation understands property as *right in rem*. In Russian civil law only money, securities and other physical things are considered as objects of property rights. Immaterial goods are not recognised as objects of property rights. At the same time, constitutional law understands property broader. It includes into property such *right in personam* as claim rights of creditors. While most of the Russian scholars support the classical theory of property,<sup>240</sup> there are some of them who criticize it and recognise that the classical theory understanding is very narrow and not always appropriate in the modern reality.<sup>241</sup>

According to the European model, property rights are understood as any kind of rights of an individual which he/she acquires in connection with property, for example, contractual rights or any kind of commercial law rights.<sup>242</sup>

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<sup>239</sup> N. Kvitko 'Суд – Европейский, проблемы - Российские (The Court is European but the problems are Russian), *N 1, журнал Законность (Journal Lawfulness)*, (2007), ConsultantPlus.

<sup>240</sup> See for example, E. A. Suxanov (ed.) *Гражданское право (Civil law)*, (Moscow, 2002); K. I. Sklovskiy *Собственность в гражданском праве (Property in the civil law)*, (Moscow, 2002); G. F. Shershenevich *Курс гражданского права (Civil law course)*, (Tula, 2001).

<sup>241</sup> See for example, O. S. Ioffe, *Гражданское право. Избранные труды (Civil law. Selected works)*, (Moscow, 2001); U. K. Tolstoy, A. P. Sergeev (eds.), *Гражданское право: Учебник (Civil Law: University book)*, Part I, (Moscow, 1996).

<sup>242</sup> A. M. Aronovitz, *supra* note 9.

As mentioned many times in the Russian legal literature,<sup>243</sup> in the Russian legislation the understanding of the concept of property is different from the one accepted by the ECtHR. Comparison of Russian understanding with the European one leads to the conclusion that under the European model the concept of objects of property rights is wider. This fact was pointed out by Professor G.A. Gadzhiev who stated that the scope of property rights recognised by the Strasbourg bodies is much wider than the scope of property rights, recognised by the Russian legislation.<sup>244</sup> It also can be noticed that civil and constitutional law of the RF understands differently the scope of property rights. If understanding of property in the constitutional law is similar to the one of the ECtHR, such understanding in civil law is much narrower. The narrow definition of property in the Russian legislation leads to the situations that many important objects, such as claims and other immaterial rights, do not fall under the property rights protection. Moreover, it leads to situations of breaching of international obligations by Russia. Analysis of cases against Russia proves this fact. For example, in the *Burdov* case the ECtHR found that a court decision amounts to property and should be protected which was not done by the Russian national authorities. In the *Rusatomet* case the ECtHR recognises claims to the government as property.<sup>245</sup>

Uniformity in understanding of property by all branches of the Russian law is necessary for effective regulation and protection of property rights. Such understanding shall be based on recognition that economic interest of any kind resulting from relations between individuals constitutes property. This understanding of property is not new in the history of Russian law. Prerevolutionary law of Russia recognised all material and immaterial

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<sup>243</sup> See for example, G. Gadzhiev *Защита основных прав и свобод предпринимателей за рубежом и в Российской Федерации* (Protection of the fundamental rights and freedoms of entrepreneurs in the Russian Federation and abroad, (Moscow, 1998); T. N. Neshataeva *‘Защита собственности в Европейском Суде по правам человека и арбитражных судах РФ* (The protection of property rights in the European Court and in the Arbitrazh courts of the RF), *N 3 журнал Арбитражная практика (journal of Arbitrazh Practice)*, (2006), p. 93.

<sup>244</sup> G. A. Gadzhiev, *Комментарий к Конвенции о защите прав человека и основных свобод* (Commentary to the Convention on human rights and practice of its application), (Moscow, 2002), p. 283.

<sup>245</sup> See analysis of these cases below.

objects as property. The Civil Code of the RSFRS, 1922 recognised as property both *rights in rem* and *rights in personam*.<sup>246</sup> It seems that the present understanding of property shall be reconsidered and the same concept of property shall exist in all branches of the law, for the following reasons:<sup>247</sup>

- 1) Objects of legal regulation in international, constitutional and civil law constitutes relations of economic character, relations between individuals and property. The economical concept of property is invariable.
- 2) The necessity of a common concept is dictated by the interests in having uniformity and clearness of the legal categories in the legal system. A situation when the same concept has a different meaning in various branches of law is unsatisfactory. First of all, civil law shall reconsider the concept of property, since it is the main branch of the law, regulating property rights.
- 3) There are no solid argumentations to exclude some important objects, such as compensation or restitution claims, goodwill and other immaterial objects, from the property rights protection.
- 4) Last, but not least, the Russian national legal system can not ignore the approach of the ECtHR towards property rights. For the integration into the European system Russia shall unify and broaden the concept of property.

In the Russian system, only possessions over which the person has legal title amount to property and can be protected. Due to this fact, such possession as unauthorized structure is not recognised as property and thus, is not subject to any property rights protection. As examined in the previous Chapter, keen problems exist with unauthorized structures in Russia. In order to find the answer whether such rights can be protected by the ECtHR the author examined the existing case law and found the case which

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<sup>246</sup> М. И. Брагинский, В. В. Ветрянский (eds.), *Договорное право. Книга первая: Общие положения (Contract law. Part one: General Provisions)*, (Moscow, 1999), p. 286.

<sup>247</sup> These reasons are mentioned in V. V. Starzheneckij, *Россия и Совет Европы: право собственности (Russia and the Council of Europe: property rights)*, (Gorodets, 2004), p. 101.

concerns a similar situation. In the case of *Öneryildiz v. Turkey* the Government of Turkey claimed that unauthorized dwelling is not recognised as property under the domestic law.<sup>248</sup> However, the ECtHR stated that the concept of ‘possession’ has autonomous meaning which is not independent from the formal classification in domestic law. Further, the ECtHR ruled that notwithstanding the fact that the applicant erected a building in breach of the law, such building represented a substantial economic interest and consequently amounted to ‘possession’ within the meaning of P1-1.<sup>249</sup> The ECtHR concluded that the destruction of the applicant’s house due to wrong actions of state authorities amounted to interference with his property rights, set forth in paragraph 1 of P1-1.

In this case, despite the facts that the building: 1) was erected in treasury land; 2) was erected in breach of town – planning regulations; 3) did not comply with the relevant technical standards, the ECtHR recognised it as being a ‘possession’. As illustrated above, in Russia, if a person erects a building on state land or with the breach of town – planning rules or technical standards he/she does not have any property rights over it and is obliged to destruct it. The author believes that cases of destruction of unauthorized structures by the Russian authorities can be brought into the ECtHR. The chance that the ECtHR will find violations in such cases is high.

It is also necessary to point out some differences in subjects of property rights. According to the Russian legislation, both natural and legal persons can have property rights. Art. 8 and Art. 19 of the Constitution state that all forms of property have equal protection which also implies the equality of all holders of property rights. However, there are some differences between natural and legal persons in the Russian legislation. In general, more strict rules apply to legal persons. The Constitutional Court stated that legal persons as professional participants of economic relations shall bear all risks of such activities. It concluded that more strict rules

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<sup>248</sup> *Öneryildiz v. Turkey*, 30 November 2004, Judgment of the ECtHR, app. no. 48939/99.

<sup>249</sup> *Ibid*, para. 129.

towards legal persons are justified and shall be considered as differential treatment but not discrimination.<sup>250</sup>

The noticeable difference between natural and legal persons exists in connection with non-pecuniary damages. According to the Russian legislation, legal persons can not claim in court payment of non-pecuniary damages in cases of violations of their rights. However, they can make such claim in the ECtHR which may award payment of non-pecuniary damages to legal persons.<sup>251</sup> Such differences between the Russian and the European models lead to the situation that Russian legal persons do not claim in the ECtHR non-pecuniary damages on behalf of legal persons but do it on behalf of company founders. For example in the case of *OOO PTK “Mercuriy” v. Russia* the ECtHR found violation of the company’s property rights. However, it did not award payment of non-pecuniary damages for the reason that the claims in respect of non-pecuniary damages were submitted by the applicant company’s founders. The Court stated that since the violation was found in respect of the company, which was the only applicant but not in respect of company’s founders, their claim must be dismissed.<sup>252</sup> This mistake was made by the Russian legal person because of non-consideration of differences between treatment of legal persons by Russian courts and the ECtHR. So, while both the Russian and the European system use the principle of equality among holders of property rights, the Russian legislation in opposition to the European one, makes some differentiations between natural and legal persons.

### **3.4 Content of property rights**

For a better understanding of differences between the European and the Russian models the content of property rights under the ECHR and the Russian Constitution shall be compared. As was illustrated in Chapter I, P1-1 consists of three interrelated provisions: peaceful enjoyment of property,

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<sup>250</sup> Resolution of the Constitutional Court of the RF, 27 April 2001, N7-II.

<sup>251</sup> See for example, *Comingersoll S. A. v. Portugal*, 6 April 2000, Judgment of the ECtHR, app. no. 35382/97.

<sup>252</sup> *OOO PTK “Mercuriy” v. Russia*, 14 June 2007, Judgment of the ECtHR, app. no. 3790/05, para. 36.

deprivation provision and control provision. At the same time only two provisions follow from the wording of Art. 35 of the Constitution of the RF: rights to possess, use and dispose of property and deprivation provision. Provision about control of the use of property is not directly mentioned in Art. 35 of the Constitution but it is set forth in Art. 55 of the Constitution. So, in general, the content of the property rights is determined by three similar provisions in both the ECHR and the Russian Constitution. However, there are some differences in the context of such provisions.

While P1-1 recognises that a holder of the property rights can perform any action towards his/her property which are not contrary to the law, in the Russian legislation the owner traditionally has three entitlements: the right to possess, to use and to dispose property. Such "triad of powers" is not always enough if property is understood as vested rights.<sup>253</sup> It is clear that the meaning of the European construction of "peaceful enjoyment of possession" is wider than the Russian one of "rights to possess, use and dispose of property". The author agrees with those Russian scholars who suggest to broaden the scope of property rights in Russia and to accept the content of property rights used by the ECtHR.

When it comes to the deprivation rule, protection against such deprivation is stronger in the Russian Constitution. Only the court can make a decision about deprivation of property while this requirement is not necessary in the European model. Moreover, the Russian Constitution directly provides that the compensation for deprivation shall be "preliminary and complete", while P1-1 mentions only the necessity of compensation without elaboration about the character of compensation. Despite the strong guarantees contained in the Constitution of the RF some provisions of other legislation permit deprivation of property without a court decision. As was illustrated in the previous Chapter, arbitrary deprivation of property sometimes happens in practice. Moreover, often the amount of compensation for the deprived property, awarded by the domestic court, is whether not paid at all or paid with substantial delays. In such situations the ECtHR can offer protection under P1-1.

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<sup>253</sup> V. V. Starzheneckij, *supra* note 247, p.102.

## **3.5 Some remarks about justifications of interference with property rights**

### **3.5.1 Introductory remarks**

The main differences between understanding of justifications of interference with property rights between the Russian and the European models exist in connection with the principle of lawfulness and the principle of proportionality or fair balance. As stated in Chapter I, the ECtHR recognises very wide margin of appreciation of states in connection to the determination of “public interest”. The ECtHR does not determine what is included in public interest and always leaves for the national authorities to decide in each particular case about the existence of such interest. So, only the principles of lawfulness and proportionality are examined below.

### **3.5.2 Lawfulness**

The principle of lawfulness is widely recognised in Russia. The legal regulations of the property rights are performed on the ground of dozens of normative acts. However, sometimes law fails to regulate certain important relations which lead to the existence of deficiency of law. Deficiency of law, as such, does not violate the requirement of lawfulness. In such situations a court shall solve a case using customs, principles of law and court practice. However, taking into consideration the existence of traditions of strong positivism in Russia, regulations of the relations on the ground of legal principle is often problematic. Courts sometimes even reject to rule on the merit in situations when certain relations are not directly regulated by the legal provisions.<sup>254</sup> In other cases existence of strong legalism often lead to situations when courts decide cases only on the ground of a certain legal norm and do not consider requirements of fairness and proportionality. As was stressed by Professor G. A. Gadzhiev, it is necessary to reconsider the

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<sup>254</sup> Ibid, p. 133.



role of the legal principles and to realise that legality is not the only ground on which a court decision shall be based.<sup>255</sup>

As was stated by the ECtHR, the term ‘lawful’ means not only based on valid law but also implies compatibility with the rule of law. In Russia, as well as in Europe, the necessary requirement of lawfulness is based on the accessibility of legal acts to the citizens. Art. 15 (3) of the Constitution of the RF states that all laws shall be officially published; any normative legal acts concerning human rights may not be used, if they were not officially published for general knowledge. Russian courts several times rejected to use laws which did not satisfy criteria of accessibility.<sup>256</sup>

The ECtHR reaffirmed in several cases that in order to satisfy the requirement of rule of law, provisions of laws shall be formulated with such sufficient precision, which enable persons to foresee the consequences which a given action may entail. Rule of law also implies non-retroactivity of laws and non-possibility to annul enforceable court decisions.<sup>257</sup> While the Russian legislation sets forth the provisions of non-retroactivity of laws, no requirements on the clarity of law is mentioned anywhere in the legislation. In practice, Russian laws are often imprecise and ambiguous. This fact is recognised by Russian scholars<sup>258</sup> as well as by the Constitutional Court of the RF. For example, in its Resolution the Constitutional Court recognised as unconstitutional the Law “Об основах налоговой системы в РФ” (On basics of the tax system in the RF), because this Law contained imprecise and ambiguous provisions about grounds for tax offences, objects and subjects of taxation.<sup>259</sup>

In cases of existence of imprecise and ambiguous provisions it is important to have adequate means to correct them. One of such means is alteration or amendment of such provisions by the organ which accepted the law. Another mean is judicial interpretation, which is widely used in the

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<sup>255</sup> G. A. Gadzhiev, *Конституционные принципы рыночной экономики (Constitutional principles of the market economy)*, (Moscow, 2002), p 10.

<sup>256</sup> See for example, Resolution of the Constitutional Court of the RF, 24 November 1996, N 17-II.

<sup>257</sup> V. V. Starzheneckij, *supra* note 247, p. 109.

<sup>258</sup> See for example, A. B. Vengerov, *Теория государства и права (Theory of the state and the law)*, (Moscow, 1998), p. 506.

<sup>259</sup> Resolution of the Constitutional Court of the RF, 15 June 1999, N 11-II.

European system. Judicial interpretation can be effectively used in Russian reality as well; there are some positive examples of such interpretation. One of them concerns non-payments of internally held public debts. In 1992 Russia issued state bonds with a maturity date of 15 May, 1999. Such bonds were not retired in time. The Government of Russia issued the Regulation in which it provided that old state bonds may be novated by new ones. The Regulation contained ambiguous provisions about the conditions and the terms of such novation. Executive authorities were rejecting to satisfy claims of citizens who did not want to novate state bonds. They interpret provisions of the Regulation and stated that it introduced an obligatory novation. Many claims were brought into the courts. It had led to the issuance of the Resolution by the Presidium of the Supreme Arbitrazh Court of the RF, in which it stated that it is unlawful to alter conditions of bonds agreements unilaterally.<sup>260</sup> The Supreme Arbitrazh Court ruled that citizens can not be forced to exchange old state bonds into new ones. This case is the clear example of the removal of ambiguity by the means of judicial interpretation.

The author is of the opinion that some provisions of the Land Code of the RF and the Introductory Law, examined in Chapter II, do not satisfy the requirements of sufficient precision. The provisions concerning obligations of legal persons to change legal title from limited property rights into ownership or lease the land plot need clarification. As stated before, executive authorities often force legal persons to alter the legal title over land plots. Moreover, the Code of Administrative Offences of the RF includes punishment for non-performance of such obligations by the legal persons. However, in its earlier Resolution concerning a similar case the Constitutional Court ruled about non-possibility to force a person to change legal title over land. It seems that ambiguity of provisions of the Land Code and the Introductory Law shall be solved as fast as possible. The author considers that judicial interpretation as the most flexible and quick way could be the best mean for removal of such ambiguity.

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<sup>260</sup> Resolution of the Presidium of the Supreme Arbitrazh Court of the RF, 13 February 2002, N 2453/00.

### 3.5.3 The balance between public and private interests

The principle of balance between public and private interests is new for the Russian legal system. As was noticed above, before the economic reforms in the 90s public interest was always prevailing over private interest. At the present, Russia as a democratic state is obliged to consider this balance in all cases. The court practice shows that the principle of proportionality gains importance. In a number of Resolutions the Constitutional Court declared provisions of certain Laws unconstitutional because they violated the principle of fair balance. For example, provisions of the Law “О государственном материальном резерве” (On State material resources), obliging citizens to keep such stocks without any remuneration for it were recognised unconstitutional since they did not consider fair balance. The Constitutional Court declared that the provision of Art.104 (4) of the already mentioned Law “О несостоятельности (банкротстве)” (On Insolvency (Bankruptcy)),<sup>261</sup> permitting the transfer of objects of social infrastructure to state or municipal ownership without paying any compensation to the creditors violated the fair balance between public and private interest and therefore, should be considered as unconstitutional.

Despite the positive trend, it is too early to talk about the existence of a clear approach to the evaluation of the balance between public and private interests in Russia.<sup>262</sup> Prevalence of a public interest over a private one can be illustrated by the situation with factories performing underwater works. Such factories were privatized at the beginning of the 90s. At the end of the 90s such privatization was recognised as unlawful by the state bodies only on the ground of public interest. Owners of such factories argued that they abide law existing at the time of privatization and that they were bearing a lot of losses to maintain the underwater fleet for almost 10 years. No arguments were taken into consideration, since it was

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<sup>261</sup> The Federal Law of the RF “О несостоятельности (банкротстве)” (On Insolvency (Bankruptcy)), 8 January 1998, N 6-ФЗ.

<sup>262</sup> V. V. Starzheneckij, *supra* note 247, p. 113.

necessary for the state to return state control over specialised underwater fleet.<sup>263</sup> More situations with deprivatization due to existence of public interest happened during last years.

Analysis of the court practice also proves that fair balance is not always taken into consideration by state officials. For example in the already mentioned case about non-payment of state bonds, the Government did not consider private interests seriously. The Regulation of the Government *de jure* introduced the possibility to novate the bonds but *de facto* it introduced moratorium on any payments. The Presidium of the Supreme Arbitrazh Court recognised acts of executive authorities which were forcing people to exchange old bonds into new ones as unlawful.<sup>264</sup>

The other case concerns non-payment of regional debts. The Regional Arbitrazh Court issued judgment in which it awarded payment of 33 994 000 rubles from the budget of the Saratov region.<sup>265</sup> The Saratov executive authorities rejected to pay the debts due to lack of funds and at the same time were negotiating with the applicants about reduction of the amount of debt by 70%. In this situation people could not influence anything. The only choice at that moment was to get 30% of the debt or nothing. It is a clear example of non-consideration of fair balance by the Russian authorities.

There are many examples when court decisions are not enforced due to lack of funds in the state or regional budget. This had led to a significant amount of claims from Russian citizens to the ECtHR, alleging violations of their property rights by the non-enforcement of court decisions.<sup>266</sup>

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<sup>263</sup> К. Sklovskij, 'Вопросы о пределах вмешательства государства в частную собственность в судебной практике (The questions about the interference of a state into private property in court practice)', *№ 6 журнал Хозяйство и право (journal Economy and Law)*, 2002, ConsultantPlus.

<sup>264</sup> Resolution of the Presidium of the Supreme Arbitrazh Court of the RF, 13 February 2002, N 2453/00.

<sup>265</sup> Judgement of the Saratov Regional Arbitrazh Court, 13 March 2001, N A40-4652/01-62-26.

<sup>266</sup> See analysis of such cases below.

## **3.6 Analysis of case-law with Russia as a respondent state**

### **3.6.1 Non-enforcement of court decisions**

On 7 May 2002 in the case of *Burdov* the ECtHR made the very first judgment against Russia in which it found violation of P1-1<sup>267</sup>. Since the *Burdov* case is considered to be one of the most important cases, circumstances of it are covered and some comments are done in this thesis. Other cases of non-enforcement of court decisions are examined as well.

During October 1986 – January 1987, the applicant took part in Chernobyl emergency operations and suffered from extensive exposure of radioactive emission. Subsequently in 1991, he was awarded compensation. The compensation was not paid. In 1997 the applicant started proceedings against the Shakhty Social Security Service and was awarded compensation by the decision of the court. Later, in 1999 he brought to the court another claim against the Social Security Service challenging a reduction in the amount of the monthly payment; the court ruled in his favor. Shakhty Bailiff's Service instituted enforcement proceedings for both judgments. In October 1999 Burdov was notified that the two judgments could not be enforced because the Social Security Service did not have sufficient funds. He complained about non-enforcement of the judgments. In March 2000 Burdov got an answer that compensation to Chernobyl victims would be financed from the federal budget. After this the applicant was notified a number of times that judgment could not be enforced due to lack of funding.

On 20 March 2000 Burdov lodged an application against the RF to the ECtHR. On March 2001 the Ministry of Finance made a decision and the Shakhty Social Security Service paid the debt to the applicant. Subsequently, the Russian Government claimed that since debt was paid, the applicant ceased to be a victim of the alleged breach of the ECHR. The ECtHR stated that the payment was made only after application had been

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<sup>267</sup> *Burdov v. Russia*, 7 May 2002, Judgment of the ECtHR, app. no. 59498/00.

communicated to the Government and did not involve any acknowledgment of the violations alleged. Moreover, it did not afford the applicant adequate redress and thus, the ECtHR considered that the applicant could claim to be a victim of a violation.

The ECtHR ruled that a ‘claim’ can constitute a ‘possession’ within the meaning of P1-1 if it is sufficiently established to be enforceable.<sup>268</sup> The court decision provided the applicant with enforceable claims and not simply a general right to receive support from the state. The impossibility for the applicant to obtain enforcement of judgments constitute an interference with his right to peaceful enjoyment of his possessions, as set out in the first sentence of the first paragraph of P1-1.<sup>269</sup> By failing to comply with the judgments of the court, the national authorities prevented the applicant from receiving the money he could reasonably have expected to receive.<sup>270</sup> The reason for non - enforcement of court decisions was lack of funds, however, the ECtHR ruled that lack of funds can not justify non-enforcement of judgment.<sup>271</sup> Since enforcement of a judgment constitutes part of the civil procedure, the ECtHR also found violation of Art. 6 of the ECHR.<sup>272</sup>

After the decision of the *Burdov* case the Government of the RF provided the information to the Committee of Ministers about individual and general measures taken by the Russian authorities to comply with the judgment of the ECtHR. Such information was provided by the Appendix to the Resolution ResDH (2004)85 adopted on 22 December 2004 by the Committee of Ministers.<sup>273</sup> Russia declared that 5,128 domestic judgments, concerning payment of compensation to the victims of Chernobyl, were executed by national authorities. The Government stated that necessary budgetary means were allocated to social security bodies (around 2 – 2,5

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<sup>268</sup> Ibid, para. 40.

<sup>269</sup> Ibid, para.41

<sup>270</sup> Ibid.

<sup>271</sup> Ibid, para. 42.

<sup>272</sup> Violations of Art. 6 of the ECHR constitute separate discussion and are not covered by this thesis.

<sup>273</sup> Resolution ResDH (2004)85 concerning the judgment of the European Court of Human Rights of 7 May 2002 in the case of *Burdov* against the Russian Federation, adopted by the Committee of Ministers.

millions rubles in years 2003, 2004, 2005). The Russian Government also stressed that adopted measures successfully resolved a lot of similar cases lodged with the ECtHR, which struck out many of them under Art. 37 of the ECHR.<sup>274</sup>

However, Russia accepted the measures only with respect to natural persons. At the same time legal persons were also victims of similar violations. For example, in the case of *OOO Rusatommet* the applicant company alleged that Russia had failed to honour a judgment debt.<sup>275</sup> The applicant's company sued the Government for the debt. After almost three years of litigation the commercial court ordered the Government to pay the applicant company 100,000 US dollars. The Ministry of Finance three times asked the court to stay the enforcement of the judgment because there were no funds in the state budget. In all cases the court refused to stay the enforcement because the Ministry of Finance had failed to prove either that it did not have sufficient funds, or that the funds would become available later. The judgement was never enforced.

The ECtHR repeated that a 'claim' constitutes a 'possession' and non-enforcement of the judgement violates the right to property.<sup>276</sup> After this decision the amount of 100,000 US dollars was paid to the applicant. For some reason the ECtHR did not take into consideration the actual interest accrued during a long period of non-enforcement (almost three years). The author thinks that in the mentioned case the ECtHR should have followed the approach of the case *Akkus v. Turkey*<sup>277</sup> and award to the applicant payment of compensation for the long non-enforcement of the court judgement, taking into consideration the level of inflation.

Analysis of above mentioned cases leads to the conclusion about the existence of a number of problems with the enforcement of court decisions in Russia.

First, a final court judgment is not considered in Russia as a 'possession'. Enforcement of court decisions are considered only as part of

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<sup>274</sup> See for example, *Aleksentseva and 28 others v. the Russian Federation*, Decision, 4 September 2003, app. No. 75025/01 and others.

<sup>275</sup> *OOO Rusatommet v. Russia*, 14 June 2004, Judgment of the ECtHR, app. no. 61651/00.

<sup>276</sup> *Ibid*, para. 28, 29.

<sup>277</sup> *Akkus v. Turkey*, 9 July 1997, Judgment of the ECtHR, app. no. 19263/92.

fair trial rights. A clear example of such approach is reflected in the Resolution of the Constitutional Court of the RF.<sup>278</sup> In this Resolution the Constitutional Court declared unconstitutional certain provisions of the Ruling of the Government of the RF on 9 November 2002, N 666 "О порядке исполнения Министерством финансов Российской Федерации судебных актов по искам к казне Российской Федерации на возмещение вреда, причиненного незаконными действиями (бездействиями) органов государственной власти либо должностных лиц органов государственной власти" (On the process of enforcement by the Ministry of Finance of the Russian Federation of court decisions against the Russian Federation in cases of harm caused by actions (ommissions) of state bodies and the officials thereof". Nevertheless, the Constitutional Court considered the problem of non-enforcement of the court decisions only from the 'fair trial' point of view. The Constitutional Court did not recognise that non-enforcement of court decisions also violate property rights.

Second, Russian authorities underestimate the importance of court decisions. As practice shows, court decisions are not always respected by the state officials. Decisions which award payment of money from the federal or regional budget remain non-enforced for a long time. State officials often claim that there are no sufficient funds to enforce a court decision and they consider it as a valid excuse for non-enforcement. For example, state budget of 1997-2002 did not contain funds for enforcement of court decisions against Russia. In 2003 only 2.152 billions rubles were allocated for such purposes despite the fact that the amount of debt at that time constituted around 6 billions rubles.<sup>279</sup>

Third, there is no domestic organ in Russia which can force the state to pay awarded debts. In general, Bailiff's Service is empowered to execute court decisions but this organ doesn't have any power to execute court decisions against the state.

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<sup>278</sup> Resolution of the Constitutional Court of the RF, 14 July 2005, N 8-П.

<sup>279</sup> N. Getman 'Право собственности (Property rights)', *N 47:12, эж - Юрист (journal Lawyer)*, (2004), ConsultantPlus.



Finally, there are no means to punish state officials for non-execution of court decisions. In no cases were state officials held liable for non-execution of court decisions, while often due to their acts of omissions court decisions were not enforced for years.<sup>280</sup>

In the *Burdov* case, the *OOO Rusatommet* case, and several other cases the ECtHR criticised the approach of the RF toward court decisions. Representative of the RF before the ECtHR, P. Laptev stated that the judgment of the *Burdov* case would help state officials and the rest of the population to show more respect towards court decisions.<sup>281</sup>

It seems that the decision of the *Burbov* case should have led to the acknowledgment by Russia of the obligation to enforce court decisions in all cases. However, as was stated by the Minister of Finance, A. Kudrin, at the beginning of 2003 around 34,000 court decisions were not enforced. The amount of debts was around 6 billions rubles (around 1.714 millions euros). Only during the first quarter of 2004 this debt increased by 1.2 millions rubles (around 34,300 euros).<sup>282</sup> As can be noticed, the judgment of the ECtHR did not change the situation on the Russian national level. Moreover, during five years after the first judgment of the ECtHR against Russia there were a lot of other cases concerning similar situations (only in November 2005 12 out of 14 judgments of the ECtHR against Russia concerned non-enforcement of court decisions).<sup>283</sup> The ECtHR already accepts judgments in respect to several applicants, by calling them “repetitive cases”.<sup>284</sup> One of the last judgments was accepted on the 21<sup>st</sup> of September 2007 in respect to four applicants. They lodged their applications

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<sup>280</sup> V. V. Starzheneckij ‘Неисполнение судебных актов – нарушение Россией своих международных обязательств (Non-enforcement of the court decisions is a violation of the international obligations by Russia)’, *N 1, журнал Законодательство и экономика (journal Legislation and economics)*, (2006), ConsultantPlus.

<sup>281</sup> А. Р. Фоков, ‘Современный мир и судебная защита имущества в практике Европейского Суда: вчера, сегодня, завтра (Modern world and judicial Protection of property rights in practice of the European Court: yesterday, today, tomorrow)’, *N 10, журнал Юрист (journal Lawyer)*, (2003), p. 31.

<sup>282</sup> N. Getman, *supra* note 279.

<sup>283</sup> N. Kvitko, *supra* note 239.

<sup>284</sup> S. Patrakeev, ‘Системные нарушения: новые тенденции в практике Европейского суда по правам человека по жалобам против России’, (Systematic violations: new trends in the practice of the European Court of Human Rights based on cases against Russia), *N 2 Сравнительное конституционное обозрение, (Comparative constitutional review)*, (2006), GARANT.

in 2002 and 2003, already after the judgment of the *Burdov* case. Moreover a lot of applications concerning similar violations are still pending. All this can be considered as proof that Russia continues to violate its international obligations. The author agrees with the S. Patrakeev, that this kind of violations of property rights should be considered as systematic violations of international obligations by Russia.<sup>285</sup>

The situation with non-enforcement of judgments also creates problems on national level. It should be mentioned that in the majority of similar cases, finding the violation of the right to property, applicants were awarded payment of pecuniary and non-pecuniar damages. This had lead to the situation that the amount of payment from the Treasury of the RF significantly increased. The author supports the opinion of T.N. Neshataeva, that in order to improve the situation and to make state officials perform their obligations better, Russia shall consider the possibility to bring to a court recourse actions against its state officials who as a result of guilty actions (or ommissions) did not perform their obligations to enforce court decisions propely.<sup>286</sup> Moreover, since the existing procedure of enforcement of court decisions does not satisfy international standards, it is necessary to review it.

### **3.6.2 Violation of property by the way of supervisory review**

The other important problem with court decisions concerns the ”*nadzor*” procedure or supervisory review of final court decisions. In the *Brumarescu v. Romania* case the ECtHR for the first time directly stated that quashing of an enforceable judgment amounts to interference with property rights.<sup>287</sup> Similar violations of property rights were found in many cases against Russia.

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<sup>285</sup> Ibid.

<sup>286</sup> T. N. Neshataeva, *supra* note 243, p. 95.

<sup>287</sup> *Brumarescu v. Romania*, para.73

For example, the case of *Kot* concerns quashing of the judgment in favor of the applicant by the way of supervisory review.<sup>288</sup> Similarly with the *Burdov* case, the applicant also took place in the Chernobyl emergency operations and was awarded compensation for health damage. On 30 November 2000 the applicant sued the Military Service Commission of the Tambov Region requesting an increase of the monthly compensation due to high inflation rate. Decisions of the courts of first instance were quashed on appeal twice. Finally, on 20 January 2003 (after 6 judicial sittings) judgment had become final and enforceable. However, on 26 June 2003 the Presidium of the Tambov Regional Court quashed the judgment by way of supervisory-review on the ground of incorrect application of the substantive law by the court of first instance. *Kot* lodged the application to the ECtHR, complaining that the quashing of the judgment by the way of supervisory review had violated his right to a court (Art. 6 (1) of the ECHR) and his right to peaceful enjoyment of possessions (P1-1).

The ECtHR stated that a debt confirmed by a binding and enforceable judgment constitutes the beneficiary's 'possession'. The quashing of the enforceable judgment frustrated the applicant reliance on a binding judicial decision and deprived him of an opportunity to receive the money he had legitimately expected to receive. The ECtHR concluded that quashing of the judgment by way of supervisory review placed an excessive burden on the applicant and therefore is incompatible with P1-1. Similar violations were found by the ECtHR already in the year 2005 in the case of *Kutepov and Anikeyenko* and the case of *Androsov*.<sup>289</sup> On 8 February 2006 the Committee of Ministers adopted the Interim Resolution ResDH (2006) concerning the violations of the principle of legal certainty. As stated in the Resolution, the "nadzor" procedure violates the principle of legal certainty. The Committee of Ministers called upon the Russian authorities to reform civil procedure. Despite some changes in the legislation the situation did not change. Chapter IV of the Code of Civil Procedure recognises the right to

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<sup>288</sup> *Kot v. Russia*, 18 January 2007, Judgment of the ECtHR, app. no. 20887/03.

<sup>289</sup> *Kutepov and Anikeyenko v. Russia*, 25 October 2005, Judgment of the ECtHR, app. no. 68029/01; *Androsov v. Russia*, 6 October 2005, Judgment of the ECtHR, app. no. 63973.

supervisory-review of the enforceable judgment. In addition, Chapters 35 and 36 of the Code of Arbitrazh Procedure set forth the possibility to review the final judgment by the way of cassation review and supervisory review respectively. In its Resolution the Constitutional Court did not find that the procedure of “*nadzor*” violates the constitutional right to a fair trial. However, it recommended the legislator to reform civil procedure and to ensure that judicial errors are corrected before a decision enters into force as it is requested by international standards.<sup>290</sup> No question was raised about violation of the right to property by the way of quashing of the enforceable judgment. The author considers that if the procedure of “*nadzor*” will not be changed, similar applications to the ECtHR will happen more and more often. It also shall be noticed that despite the absence of any case-law, provisions of the Code of Arbitrazh Procedure about the possibility to review final court decisions by the way of cassation review and supervisory review violate the right to property and the right to fair trial.

Thus, it is necessary to change the provisions concerning the supervisory review system of both the Code of Civil Procedure and the Code of Arbitrazh Procedure in order to avoid decisions of the ECtHR finding violations of property rights and the right to fair trial by Russia and in order to comply with international obligations.

## **3.7 Application of the ECtHR case-law in Russia**

### **3.7.1 The necessity to know and apply the ECtHR case-law**

There are a number of reasons why it is necessary for the Russian domestic courts to know and to apply the norms of the ECHR and the case-law of the ECtHR.

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<sup>290</sup> Resolution of the Constitutional Court of the RF, 5 February 2007, N 2-II.

First, according to the Russian Constitution international law is recognized as part of the Russian legal system. As provided in Art. 15 (4):

“[t]he commonly recognised principles and norms of international law and international treaties of the Russian Federation shall be an integral part of the legal system of the Russian Federation.”

Such international principles and norms are not only incorporated into the domestic Russian law, the Constitution gives them the priority over the domestic law by stating in Art. 15 (4) that:

“[i]f an international treaty of the Russian Federation stipulated other rules than those stipulated by the law, the rules of international treaty shall apply.”

However, norms of the ECHR have a very abstract character and in order to apply norms correctly, it is necessary to know the case-law, which interprets provisions of the ECHR. Actually, since norms of the ECHR already have been incorporated into the Russian legal system, the most important task for the Russian courts now is to know and to apply the case-law of the ECtHR.<sup>291</sup>

Second, according to the Law “О ратификации Европейской Конвенции о защите прав человека и основных свобод” (On Ratification of the ECHR) the RF recognises interpretation and application of the ECHR norms by the ECtHR in cases of alleged violations by the RF provisions of the ECHR. The question about the meaning of other case-law is not solved in the Law. Although according to the law, the Russian judges are not formally obliged to take into consideration the case-law in which Russia is not a respondent state, they shall know and apply it. If the judges will apply only the Russian legislation without taking into consideration differences between the Russian understanding of property and protection of it and the

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<sup>291</sup> A. S. Fedina ‘Значение решений Европейского суда по правам человека в реализации принципа законности в гражданском судопроизводстве (The importance of the practice of the European Court of Human Rights for the realisation of the principle of legality in the Russian civil jurisprudence)’, *N 3, журнал Юрист (journal Lawyer)*, (2007), ConsultantPlus.

one of the ECtHR it may lead to violations of international obligations by Russia. So, interpretation of the provisions of the ECHR by the ECtHR shall be obligatory for Russian judges independent of the state party to the case and always should be taken into consideration while deciding a case alleging violation of human rights in general and property rights in particular.<sup>292</sup>

Finally, as follows from Art. 15 (4) of the Constitution, parties of the dispute can use international norms, including norms of the ECHR in their arguments. Russian judges have an obligation to evaluate all arguments made by parties, so they should be ready to use provisions of the ECHR and its Protocols, including P1-1,<sup>293</sup> as well as relevant case-law of the ECtHR. The author thinks that judges will not be able to perform their obligations correctly without knowledge of the case-law of the ECtHR.

Not only Russian courts shall have knowledge of the ECtHR case-law. Since Russian citizens have the right of individual petition, it is necessary for them and their legal representatives to know the case-law of the Strasbourg bodies. While deciding cases, the ECtHR usually follows its previous practice, so it is not possible to make a reasonable claim and to win the case without knowledge of the relevant case-law. Absence of such knowledge has led to the situation that considerable numbers of applications from Russian natural and legal person were rejected. Moreover, for a long time Russian legal persons did not use the European mechanism for the protection of their rights due to the mistaken belief that only natural persons can use it.

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<sup>292</sup> Ibid.

<sup>293</sup> В. Л. Зимненко 'Защита права частной собственности юридических лиц согласно Европейской Конвенции по правам человека 1950' (Protection of private property of legal persons under the ECHR) *№ 9, Вестник Высшего Арбитражного Суда Российской Федерации (Journal of the Supreme Arbitrazh Court of the RF)*, (2001), p. 120.

### **3.7.2 Problems with knowledge and the application of ECtHR case-law**

There are several problems with the application of the ECtHR case-law in Russia. A lot of difficulties in the application of the case-law arise due to substantial differences of the European and the Russian legal system. As noticed before there are some theoretical differences in the concept of property and the scope of property rights protection between the Russian and the European models. As practice shows, Russian judges often prefer to use the concept they are more familiar with.

As mentioned in the previous Chapter, precedent is not considered as a formal source of law in Russia. Russian judges decide cases on the ground of certain legal provisions, contained in normative acts. So, another big problem with the application of the ECtHR case-law by the national courts is the absence of any practice to use precedents in deciding cases. It is much easier for Russian judges to use norms of domestic law in deciding a case rather than trying to find relevant precedents of the ECtHR. Moreover, the judges are not familiar with the entire body of ECtHR case-law. It seems that it is impossible for the Russian judges to know all precedent of the ECtHR. They are already busy enough in attempting to follow ongoing changes in the Russian domestic legislation. However, since Russia have positive obligations to ensure that human rights are not violated, it should take necessary steps to inform all courts about main provisions and principles used by the ECtHR. The author thinks that the Supreme Court and the Supreme Arbitrazh Court should issue special informative resolutions with information about the main decisions of the ECtHR and with the request for lower courts to use the reasoning of the ECtHR in deciding similar cases.

Another big problem is that the population of the RF is not informed enough about the procedure and the case-law of the ECtHR. The clear proof of this is the fact that many cases do not go further the admissibility stage. Even though the amount of applications from Russian citizens is high, the number of applications per persons in Russia is quite

small, considering that the population of the RF is around 150 millions. Russia has an obligation to ensure the possibility for Russian citizens to have access to the judgments of the ECtHR in Russian language and to provide basic information to all categories of citizens. Moreover, the author thinks that a course about the ECtHR case-law shall be introduced in Russian Law Universities.

### 3.7.3 Positive practice

Despite the existing problems, some positive practice in the application of the ECtHR case-law also exist. The Constitutional, the Supreme and the Supreme Arbitrazh Courts of the RF have referred several times to the provisions of the ECHR in their judgments.

By using international norms in its decisions the Constitutional Court demonstrates that international law is an important integral part of the Russian legal system with which both the national legislation and the domestic court practice shall comply.<sup>294</sup> The Constitutional Court often uses norms of the ECHR and the case-law of the ECtHR in its Resolutions in order to make the correct decision and to base its findings. For example, in its Resolution from 19<sup>th</sup> of June 2002, checking the constitutionality of the Law “О социальных гарантиях граждан, подвергшихся воздействию радиации вследствие катастрофы на Чернобыльской АЭС” (On Social guarantees to people who took place in emergency operations at the site of the Chernobyl nuclear plant disaster) the Constitutional Court repeated the position of the ECtHR in the *Burdov* case and stated that absence of necessary funds can not justify non-enforcement of court decisions.<sup>295</sup> In general, the Constitutional Court of the RF always coordinates its decisions with the ECtHR case-law, adherent to it and guided by it.<sup>296</sup> References to

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<sup>294</sup> V. D. Zorkin, *supra* note 230.

<sup>295</sup> Resolution of the Constitutional Court of the RF, 19 June 2002, N 11-II.

<sup>296</sup> V. D. Zorkin, *supra* note 230.



the ECtHR practice were made at around 100 Resolutions of the Constitutional Court of the RF.<sup>297</sup>

The Chairmen of the Constitutional Court, V. Zorkin claimed that the ECtHR has never criticised practice of the Constitutional Court of the RF.<sup>298</sup> During a visit to the Constitutional Court of the RF on 10-11 May 2007 the President of the ECtHR, Jean – Paul Costa, did not criticise practice of the Constitutional Court and expressed a desire for further cooperation.<sup>299</sup>

The Supreme Court also made references to the practice of the ECtHR in about 20 of its Resolutions, while the Supreme Arbitrazh Court has done it only in seven Resolutions.<sup>300</sup>

To conclude, at the national level, the Constitutional Court plays the most important role in protecting property rights according to international standards. So, it can be seen that at the highest judicial level the efforts are being made to ensure proper human rights protection. It seems that all lower courts shall follow the positive examples of the highest courts.

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<sup>297</sup> This is the result of the search, made by the author in the legal system ConsultantPlus.

<sup>298</sup> V. D. Zorkin, *supra* note 230.

<sup>299</sup> Speech of the President of the European Court, Jean – Paul Costa, see at: [http://www.echr.coe.int/NR/rdonlyres/CB4A0EEF-931F-4131-92C1-DF1844472D73/0/2007Costa\\_Moscow\\_1011May.pdf](http://www.echr.coe.int/NR/rdonlyres/CB4A0EEF-931F-4131-92C1-DF1844472D73/0/2007Costa_Moscow_1011May.pdf), visited on 2 December 2006.

<sup>300</sup> This is the result of the search, made by the author in the legal system ConsultantPlus.

# Concluding remarks

The right to property is an important human right, which needs protection. Traditionally, this right is subject to more limitations than other human rights. Nevertheless, limitations of the right to property can not be arbitrary, they shall satisfy certain established criteria. Every state has the right to determine the scope of these limitations. The ECtHR usually recognises a wide margin of appreciation of a state in the area of property rights. Nevertheless, during years Strasbourg bodies elaborated several important principles to ensure protection of property rights.

As statistics show the right to property is the most violated right in Russia. In this thesis the European and the Russian models of protection were compared, the main problems were underlined and some suggestions were made.

Comparison of the European and the Russian models has led to dual conclusions. On one hand, Art. 35 of the Constitution of the RF represents a strong property rights protection clause. In fact, some guarantees contained in the Russian Constitution are stronger than those contained in P1-1. First of all, unlike P1-1, Art. 35 of the Constitution requires a court decision in all cases of deprivation. Second, Art. 35 states that in cases of deprivation preliminary and complete compensation shall be paid, while P1-1 simply requires payment of compensation. Third, while the scope of public or general interest is very wide under P1-1, under the Russian Constitution this concept has clearer limits. Contrary to P1-1, under the Russian Constitution only restrictive measures which are necessary in a democratic society are allowed.

On the other hand, in many cases the Russian model offers less protection for a number of reasons. Although the understanding of property is similar in both models, there are some substantial differences between them. The Russian model adheres to the traditional concept of property which is narrower than the concept of property used by the ECtHR. These differences lead to the situation when not every 'possession' within the

meaning of the P1-1 is covered by the domestic property rights protection in Russia. In fact, some property rights fall outside the scope of protection under Art. 35 of the Constitution and remain unprotected. The other problem is that the guarantees of Art. 35 of the Constitution are often not ensured in practice. Difficulties with the protection of the property rights exist on both legislative and judicial levels.

As practice shows, provisions of various federal and regional Laws and other normative acts sometimes contradict the constitutional norms. Collisions between the constitutional requirements and the norms of secondary legislation, of both the federal and the regional levels, make the protection of property rights weak. Moreover, some domestic legislation does not satisfy the requirements of the rule of law, often Laws and other normative acts contain imprecise and ambiguous provisions. Furthermore, a fair balance between public and private interests is not always assured in the Russian legislation. In fact, the existence of a state interest is still considered as an indisputable justification for not taking into account private interest. This problem can be explained by the historical reason that for a long time state interest prevailed over everything. Many state officials with a communist background were taught for years that the individual interest may be sacrificed for the achievement of a public aim; and even nowadays it is not easy for them to change their attitude towards a fair balance between the public and the private interests.

At the judicial level, the influence of positivism traditions leads to a situation where judges understand their role in finding a solution of disputes only on the ground of applicable legal provisions without taking into consideration the principles of fairness and proportionality. In Russia, the establishment of fairness and proportionality is considered to be the job of legislature organs.

Undoubtedly, the case-law of the ECtHR has influenced the practice of the Russian domestic courts. For example, the case-law of the ECtHR has led to the broadening of the concept of property in the constitutional law. In general, the Constitutional Court of the RF in many cases concerning protection of property rights follows the Strasbourg

approach, using principles elaborated by the EComHR and the ECtHR and tries to decide cases on the ground of national and international norms. However, at the present moment the impact of the Strasbourg case-law can only be seen from the practice of the courts of the highest level. The author believes that it is necessary that the Strasbourg case-law will be considered by the courts of all instances. For this purpose Russia shall take steps to inform all judges about existing case-law. However, it is important to bear in mind that the ECHR and its Protocols establish only minimum standards of protection. Thus, in cases in which the Russian legislation establishes stronger protection, the case-law of the Strasbourg bodies can not serve as a base for the reduction of the domestic protection.

The analysis of substantial case-law with Russia as a respondent state led to the conclusion that the majority of cases concedes non-enforcement of court decisions and quashing of enforceable court decisions by the way of supervisory review. The repetition of similar cases shows that Russia does not perform the necessary actions to fulfill its international obligations. It also proves the fact that many state officials and courts are not familiar with the case-law of the ECtHR.

Together with the recommendations already mentioned in the thesis, a number of following recommendations can be suggested for the better fulfillment of the international obligations by Russia and for the stronger protection of property rights in the RF.

- The concept of property should be changed in all branches of law, first of all, in the civil law. The broad definition of property will ensure protection for all property rights.
- It is necessary to resolve collisions between the constitutional provisions and the provisions of the secondary legislation of a federal and a regional character, concerning property rights protection. In cases of collision, judges shall directly use constitutional guarantees.
- Judges should insure protection of property rights using the principles of fair balance and proportionality along with the legal norms of the domestic legislation.

- All domestic courts should be familiar with the main practice of the ECtHR. For this reason the Supreme Court and the Supreme Arbitrazh Court shall issue guidelines for the lower courts.
- The population of the RF should be better informed about the possibility of protection of property rights under the European mechanism. Decisions of the ECtHR should be published in numerous sources on the Russian language.
- It is necessary to change the mechanism for enforcement of court decisions and to empower some organ to enforce court decisions against the RF.
- More budgetary funds should be appropriated for the payment of the state debts.
- The possibility of recourse actions against state-officials non-performing their obligations properly should be provided.
- The provisions of the Civil Procedure Code and the Arbitrazh Procedure Code of the RF on the procedure of supervisory review should be revised in order to satisfy the principle of legal certainty and in order to fulfill international requirements.

All these are only the initial steps for the ensuring of the strong protection of property rights in Russia.

# Supplement I

## Violations of P1-1 by country, 1999 – 2006

Country	Judgments finding at least one violation	Judgments finding violation of P1-1	% of judgments finding violation of P1-1
Albania	3	1	33.33%
Andorra*	1		
Armenia			0
Austria	111		0
Azerbaijan	1		0
Belgium	50		0
Bosnia and Herzegovina	1	1	100%
Bulgaria	109	9	8.26%
Croatia	72	2	2.78%
Cyprus	29	2	6.89%
Czech Republic	106	4	3.77%
Denmark	5		0
Estonia	9		0
Finland	47	2	4.26%
France	431	14	3.25%
Georgia	9	2	22.22%
Germany	53	1	1.89%
Greece	258	39	15.12%
Hungary	84		0
Iceland	4	1	25%
Ireland	7		0
Italy	1264	255	20.17%
Latvia	16		0
Liechtenstein	4		0
Lithuania	23	2	8.69%

Luxembourg	11		0
Malta	14	3	21.43%
Moldova	42	24	57.14%
Monaco*			
Netherlands	36		0
Norway	8		0
Poland	318	8	2.52%
Portugal	74	7	9.46%
Romania	152	96	63.16%
Russia	197	101	51.27%
San Marino	8	1	12.5%
Serbia	1		0
Slovakia	104	2	1.92%
Slovenia	188		0
Spain	24		0
Sweden	13	3	23.08%
Switzerland*	27		
"The former Yugoslav Republic of Macedonia"	11	2	18.18%
Turkey	1076	353	32.81%
Ukraine	258	142	55.04%
United Kingdom	141	2	1.42%
<b>Total</b>	<b>5400</b>	<b>1079</b>	<b>19.98%</b>

\* Did not ratify the P1-1.

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