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Problems of implementation of the
ECtHR' judgements in the practice of
Russian Courts

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Summary

The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention) is the basic European treaty, which was adopted on the 4th of November 1950 by the Council of Europe and came into force on the 3- rd September 1953.

To ensure compliance with international legal obligations assumed by the member states (hereinafter - Contracting Parties) to the Council of Europe, the Convention established the European Court of Human Rights (hereinafter - the ECtHR). The Convention gave the ECtHR jurisdiction to decide “all cases concerning the interpretation and application of the present Convention.”¹

The Convention for the Protection of Human Rights and Fundamental Freedoms, which came into force in respect of Russia on 5 May 1998, is now incorporated into the Russian legal order. It was stated in the declaration made at the time of ratification of the Convention that Russia “recognizes *ipso facto* and without a special agreement that the jurisdiction of the European Court of Human Rights is obligatory regarding the questions of interpretation and application of the Convention and its Protocols in cases of an alleged violation of these treaties’ provisions by the Russian Federation, when an alleged violation is committed after entry into force of these treaties with respect to the Russian Federation”. Being one of the High Contracting Parties to the Convention, Russia is bound to execute final judgments of the European Court in any case to which it is a party. Similarly, Russia adheres to self-imposed restrictions, and abides by human rights and the principles of the rule of law and democracy.²

Therefore, rights and freedoms provided for in the European Convention on Human Rights, since it is an international treaty, and the judgments and decisions of the European Court of Human Rights, in so far as they express generally recognized principles and norms of international law, form an integral part of the Russian legal order.³ The main goal of this research is to evaluate the impact of the Convention on the Russian legal system, specifically – to evaluate the extent of the implementation of the article 1 of the Protocol 1 to the Convention which provides for the protection of property rights. This goal can be achieved by means of examination of the judicial practice of domestic courts (mainly the Supreme Court of the Russian Federation and the Supreme Court of Arbitration of the Russian Federation) in order to define to what extent the article 1 of the Protocol 1 to the Convention (hereinafter – P1-1) and the judicial practice of the ECtHR where the interpretation and understanding of this article is given, are implemented in the practice of Russian Courts.

¹ European Convention on Human Rights, Nov. 4, 1950, art. 32 [hereinafter - Convention].

² Annual report 2004 of the European Court of human rights Council of Europe, accessed at: http://www.echr.coe.int/NR/rdonlyres/B870F33E-10C0-442B-A914-A62177397C32/0/Annual_Report_2004.pdf, p.36

³ Ibid.

This thesis consists of three main parts. The first chapter gives description of the process of joining of the Russian Federation the Council of Europe and ratification of the Convention; then the judicial system of the Russian Federation is described along with indication of main features of Soviet judicial system and the influence of the Soviet legacy on the Russian judiciary. Next the question of the place of the Convention and the ECtHR judgments within the structure of national legislation is clarified.

Chapter two gave analysis of the cases on the ground of which the conclusion about the extent of the implementation of the Convention on the practice of Russian Courts has been made. Chapter two also gives reasoning of problems Russian Court face when implementing the Convention and the judicial practice of the ECtHR.

The third chapter gives remedies and recommendations which could improve the implementation of the Convention by Russian Courts.

At the end of the thesis the author makes some concluding remarks.

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 express deep gratitude to my Supervisor, Markus Gunneflo, for his guidance and helpful advice while writing my thesis. I would like to thank my classmates for the knowledge I have gained from them and for the wonderful time in Lund. Finally, I would like to thank my family and my friends for their love, support and encouragement during my study.

Abbreviations

ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
P1-1	Article 1 Protocol № 1
RF (РФ)	Russian Federation (Российская Федерация)
RSFSR Republic	(РСФСР) Russian Soviet Federative Socialist Republic
CoE	Council of Europe

Introduction

Since the Russian Federation recognized the jurisdiction of the European Court on Human rights (hereinafter-the ECtHR or the Court) in 1998, the number of complaints against Russia before the ECtHR has increased.

In 2000, for instance, the ECtHR registered 1,323 applications to hear cases (i.e., claims of human rights abuses) against Russia. It accepted none that year.⁴ This situation repeated in 2001. In contrast in 2002⁵ there were 12 (of 578) admissible applications against Russia, in 2003⁶ - 15 (of 753), in 2004⁷ - 64 (of 830), while in 2005⁸ - 110 (of 1036), in 2006⁹ there were 151 (20 %) (out of 1634 for all countries). In recent years the ECtHR has become overwhelmed with cases from Russia. In 2007¹⁰ 26% of cases of the ECtHR were directed against the Russian Federation. In the years 2008¹¹ and 2009¹² this figure grew up to 28 %.

What is interesting is that the applications from Russian heard by the Court every year are analogous to those which have been already judged by the ECtHR and in which violations of the Convention have been found. The largest group of such cases is formed by cases connected with long-term non-enforcement of decisions of domestic courts. A lot of applications from Russia are also connected with the duration of trials. Some of them last

⁴ Goldstein, Leslie, & Ban, Cornel. (2003). *The Rule of Law and the European Human Rights Regime*. UC Berkeley: Center for the Study of Law and Society Jurisprudence and Social Policy Program. Retrieved from: <http://escholarship.org/uc/item/2q59x006>

⁵ Annual report 2002 of the European Court of human rights, Council of Europe, accessed at: http://www.echr.coe.int/NR/rdonlyres/D613A24C-5F38-4E3F-9263-1904FEF39C0C/0/Annual_Report_2002.pdf

⁶ Annual report 2003 of the European Court of human rights, Council of Europe, accessed at: http://www.echr.coe.int/NR/rdonlyres/6B93E29C-36E0-42C7-B982-721440881AC7/0/Annual_Report_2003.pdf

⁷ Annual report 2004 of the European Court of human rights Council of Europe, accessed at: http://www.echr.coe.int/NR/rdonlyres/B870F33E-10C0-442B-A914-A62177397C32/0/Annual_Report_2004.pdf

⁸ Annual report of the European Court of Human rights, Council of Europe, 2005, accessed at: http://www.echr.coe.int/NR/rdonlyres/0434BA79-65A5-4F74-8390-87574DD3EDE3/0/Annual_Report_2005.pdf

⁹ Annual report 2006 of the European Court of Human rights, Council of Europe. Accessed at: http://www.echr.coe.int/NR/rdonlyres/4729C3F9-D38F-42AC-8584-BCA56E26BC5C/0/Annual_Report_2006.pdf

¹⁰ Annual report 2007 of the European Court of human rights, Council of Europe, accessed at: http://www.echr.coe.int/NR/rdonlyres/59F27500-FD1B-4FC5-8F3F-F289B4A03008/0/Annual_Report_2007.pdf

¹¹ Annual report 2008 of the European Court of human rights, Council of Europe, accessed at: http://www.echr.coe.int/NR/rdonlyres/D5B2847D-640D-4A09-A70A-A1BE66563BB/0/ANNUAL_REPORT_2008.pdf

¹² Annual report of the European Court of human rights, Council of Europe, accessed at: http://www.echr.coe.int/NR/rdonlyres/C25277F5-BCAE-4401-BC9B-F58D015E4D54/0/Annual_Report_2009_versionProv.pdf

for more than 10 years.¹³ The problem of a great number of analogous and similar applications from Russia is the problem of similar violations which tend to recur periodically and involve plenty of people. Cases from Russia are often called clone-cases meaning analogous violations.¹⁴

As far as it is provided for by the Conventions for the Protection of Human Rights and Fundamental Freedoms (hereinafter- the Convention) that the necessary condition of the application to the ECtHR is the exhaustion of all of the domestic remedies and the domestic remedies are considered to be the legal proceedings in national courts¹⁵, it becomes clear that the problem of rapidly increasing backlog of applications from the Russian Federation can be solved on the national level by means of successful implementation of the ECtHR' judgments in the practice of Russian Courts of all instances.¹⁶

In this connection the topic of this thesis is highly relevant for the Russian Federation as far as its research question is the examination of how the rules of the Convention and the judicial acts of the ECtHR are implemented in the practice of the Supreme Court of the Russian Federation and the Supreme Court of Arbitration of the Russian Federation. This goal can be achieved through the examination of the judicial practice of abovementioned courts in order to define to what extent the rules of the Convention the judicial practice of the ECtHR where the interpretation and understanding of these rules are given are implemented in the practice of Russian Courts.

The results of the research will help to make a conclusion about existing problems in the sphere of implementation of the judicial practice of the ECtHR and give reasons of such problems and formulate recommendations and remedies that are aimed at the improvement of the situation.

It is necessary to explain that the focus of this thesis is only those judgments and decisions¹⁷ of the Supreme Court of the Russian Federation and the Supreme Court of Arbitration of the Russian Federation that were delivered on the cases where the violation of property rights was claimed and where Russian Courts or the parties of legal proceedings referred to the legal positions of the ECtHR concerning the interpretation and application of the article 1 of the Protocol 1 to the Convention (hereinafter – the P1-1) for substantiating of their arguments and conclusions.

The importance and relevance of the property rights cases for the Russian Federation could be illustrated by the following statistics: according to the figures of the Information Center of the Council of Europe in the Russian Federation, around 64% of these applications alleged violation of property rights.

¹³ Elena Variychuk, The implementation of the judgments of the European Court of Human Rights in Russia, accessed at: <http://www.demos-center.ru/>

¹⁴ Ibid.

¹⁵ The Convention, article 35 paragraph 1

¹⁶ Appendix to Recommendation Rec(2004)5 of the Committee of Ministers to member states on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights, paragraph 2

¹⁷ The terms “judgment” and “decision” are used as synonyms in this thesis

During the last 7 years the ECtHR delivered many decisions in which it established violation of human rights of Russian citizens. The first two judgments were delivered only in 2002, there were 12 (of 578) admissible applications against Russia and in 1 of them a violation of property rights was established. During 2002 – 2009, in 106 out of 207 judgments against Russia the right to property was violated. This shows that 51% of all violations of the Convention by the Russian Federation considered by the ECtHR constitute violation of property.

In general, during 1999-2009, in 1,079 out of 5,400 judgments violation of P1-1 was found, which amounts to almost 20%. This statistic shows that in general property rights are among the most violated rights within the scope of the Convention.

The situation in the Russian Federation is very complicated - property rights are violated more often than other human rights.

Here is the statistics of consideration of the property rights cases by the federal courts in the Russian Federation:

- A number of cases where the violation of property rights was established by the arbitration courts constituted 58% from the total amount of all submitted applications to the arbitration courts of the Russian Federation in 2009¹⁸;
- A number of cases where the violation of property rights was established by the courts of general jurisdiction of the Russian Federation constituted 65% in 2009¹⁹

As for the main method used in this thesis, it is the traditional method of legal research.

For this thesis the author has examined the judicial practice of the Supreme Court of the Russian Federation and the Supreme Court of Arbitration for the period from 2001 – 2009.

In total there have been examined 500 of judgments of the Supreme Court of the Russian Federation delivered by this Court as the Court of supervisory instance where the reference to the Convention and the judicial practice of the ECtHR can be found. From this number of cases only those cases where the Convention or/and judicial acts of the ECtHR was/were mentioned that are connected with property rights violations have been chosen. For eight years examined under this research the Supreme Court of the Russian Federation applied to the rules of the Convention only in twelve cases, six of which are represented in this research. Each of these six cases represents an independent type of problematic application of the Convention and the judicial acts of the ECtHR. Concerning the practice of Arbitration Courts, the number of cases considered by the Supreme Court of Arbitration as the court of supervisory instance which has been examined for this research is 500 for the same period. Taking into consideration the fact that in accordance with the article 8 of the Code of Arbitration Procedure of the Russian Federation, mainly cases connected with violations of property rights of legal persons and entrepreneurs fall within the scope of the

¹⁸ Analytical note to the statistical report on the work of arbitration courts on the Russian Federation in 2009, can be reached at: www.arbitr.ru.

¹⁹ Statistical report on the work of the courts of general jurisdiction in 2009, can be reached at: www.supcourt.ru.

jurisdiction of Arbitration Courts of the Russian Federation, it is quite obvious that all examined cases are connected with property rights. Only six from all cases examined by the Supreme Court of Arbitration as the Court of supervisory instance contain the reference to the rules of the Convention or case-law of the ECtHR.

These cases have been analyzed with relation to problems Russian Courts face when implementing the Convention and the corresponding practice of the ECtHR where the rules of the Convention are interpreted. These problems have been identified in the thesis and the recommendations for elimination of these problems have been given.

This thesis is divided into three Chapters. In the first Chapter the historical review of the accession of the Russian Federation to the Council of Europe and ratification of the Convention for the protection human rights and fundamental freedoms is examined along within influence of the Soviet legacy on the modern judiciary and its attitude to the application of the judicial practice of the ECtHR as grounds for judgments and decisions.

The second chapter is devoted to the description of the case law of the Supreme Court of the Russian Federation and of the Supreme Court of Arbitration as examples of application of ECtHR case-law with a view to analyze to what extent the practice of the European Court is used in the judicial practice of these two Russian Courts and give explanation why the Russian Federation has difficulties with implementation of the case-law of ECtHR.

The third chapter is devoted to the recommendations and remedies which could improve situation and help Russian judges to implement successfully case-law of the ECtHR.

And finally a conclusion about findings of the research is made.

Russia's accession followed an extensive debate within the Council of Europe about the suitability of the applicant for membership, and occurred despite an unfavorable Eminent Lawyers²⁶ Report prepared at the request of the Bureau of the Parliamentary Assembly. The Report²⁷ concluded “that the legal order of the Russian Federation does not at the present moment, meet the Council of Europe standards as enshrined in the Statute of the Council and developed by the organs of the Council of Europe.

In the ad hoc report it was emphasized that such a political accession is troubling for the future of compliance with Strasbourg law, because, inter alia, given Russia's lack of experience in protecting human rights at the level of municipal law, it is likely that many violations of European Human rights law will be committed there, and that they will not be remedied domestically.

It is interesting that the same estimation of Russian legal system was given by representatives of Russian legal community. The head of the legal department of the Ministry of International affairs Aleksandr Khodakov in the explanatory report from 30 January 1996 on the question of ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention) from 4 November 1950 paid attention to the fact that Russian legislation apart from the Constitution and law-enforcement practice do not conform to the standards of the Council of Europe.²⁸

At that time there were two different points of view concerning the question of human rights situation in Russia and its accession to the Council of Europe – from extremely harsh, asserting that if Russia became a party of the ECHR, this would mean that the legal standards developed by the European Commission on Human rights and the ECtHR would have to be watered down²⁹ to diametrically opposite point of view that Russia's

²⁶ Eminent Lawyers Group – group of experts which was established by the Council of Europe for defining if legal order in the Russian Federation complied with the standards of the Council of Europe with a view to consider the possibility for the Russian Federation to join the Council

²⁷ Council of Europe, Parliamentary Assembly, Report on the Conformity of the Legal Order of the Russian Federation with Council of Europe Standards Prepared by Rudolf Bernhardt, Stefan Trechsel, Albert Weitzel, and Felix Ermacora, 7 October 1994. 15:7 Human Rights Law Journal (1994), at 287

²⁸ Vinokurov G.V., Rihter V.V., Chernishev M., The European Court of human rights and defense of the freedom of speech in the Russian Federation: precedents, analysis and recommendations, Journalism and law, p.583-584, can be accessed in Russian at: www.medialaw.ru/article10/7/2.htm.

²⁹ Mark Janis argued that “the same political importance of Russia that has prompted the Council of Europe to accept its admittance will make it especially difficult for Strasbourg to force the Russian government to comply with adverse findings”. Janis foresaw the possibility of the Strasbourg institutions permitting a two-tier legal order, with lesser expectations relating to Russia (M. Janis, "Russia and the 'Legality' of Strasbourg Law" (1997) 1 European Journal of International law 93-99, p.94). Similar concerns were expressed by Kahn, who, at the time when the first judgments against Russia were being issued, questioned whether Russia's democratic and legal institutions would be strengthened by its membership of the Council of Europe, or whether ongoing violations in Russia would merely bring the efficacy of the system into doubt and diminish the Council of Europe's reputation (J. Kahn, "Russian Compliance with Articles Five and Six of the European Convention of Human Rights as a Barometer of Legal Reform and Human Rights

accession to the Council of Europe would be useful for this state as far as the Convention can be used as the tool for improvement of the system of human rights protection³⁰.

On 28 February 1998, the Russian Minister of Foreign Affairs of that time, Evgeniy Primakov, signed the Convention along with three other Conventions of the Council of Europe.³¹ The Russian Federation ratified the Convention by means of adoption and coming into force by the Federal Assembly (the Russian Parliament) of the Federal law of the Russian Federation "On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols to it".³² On May 1998 Evgenij Primakov officially deposited the instruments of ratification of the Convention and its Protocols №1, 4, 7, 9, 10, 11 at the Council of Europe. On 5 May 1998 the Convention for the protection of human rights and fundamental freedoms legally entered into force in respect to Russia.

Having ratified the Convention, Russia declared that it recognizes ipso facto and without special agreement the jurisdiction of the European Court of Human Rights with regard to the interpretation and implementation of the Convention and its Protocols in the cases of alleged breaches of the Convention by Russia (when the alleged breach occurred after the ratification of the Convention). Consequently, on May 5, 1998 Russia formally accepted the obligation to "secure to everyone within [its] jurisdiction the rights and freedoms"³³ provided by the Convention. Furthermore, by signing the Convention, Russia recognized the right of its individual citizens to hold Russia responsible for alleged breaches of its international obligations.³⁴

With Russia's ratification, both the critics and the supporters of Russia's transition to a more democratic legal system hoped that the ratification, submission to the jurisdiction of the ECtHR and implementation of the ECtHR judgments were the necessary steps towards Russia's progress to establishing itself as a state subject to the rule of law.³⁵ Indisputably, the

in Russia" (2001-02) *University of Michigan Journal of Law Reform* 641-694). Writing at the same time as Janis, Magnusson was pessimistic about Russia's capacity to comply with international human rights agreements, primarily because of the inability of the federal government to enforce compliance with domestic law by its republics (M-L. Magnusson, *Russia's Capacity to comply with International Agreements on Human Rights* (South Jutland University Press, 1998).

³⁰ 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.

³¹ The European Convention Against Torture, the European Charter on Local Self-Government, and the Framework Convention on Protection of National Minorities.

³² The Federal Law of the Russian Federation "O ratifikacii konventsii o zachite prav cheloveka i zachite osnovnih svobod i protokolov k nei" (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.

³³ Jeffrey Kahn, *Russian Compliance With Articles Five and Six of the European Convention of Human Rights as a Barometer of Legal Reform and Human Rights in Russia*, 35 U. MICH. J.L. REFORM 641, 642 (2002).

³⁴ L.J. Clemens ET AL., *European court of human rights: taking a case under the Convention* 13 (2d ed. 1999).

³⁵ Bill Bowring, *Russia's Accession to the Council of Europe and Human Rights: Compliance or Cross-Purposes?* 6 EUR. HUM. RIGHTS L. REV. 628 (1997).

enforcement³⁶ of a Strasbourg judgment is a complex legal and political process, requiring cumulative and complementary measures implemented by several state organs. But there is no doubt that the most important organs which are responsible for implementation of the rules of the Convention and the judicial practice of the ECtHR are national courts.³⁷

In this connection it is highly relevant to describe the judicial system of the Russian Federation and its position within the state apparatus.

1.2 The judicial system of the Russian Federation

The structure of the judicial system of the Russian Federation and the sphere of activities of its various parts are determined by the Constitution and federal constitutional laws:

- Paragraph 3 of the article 118 of the Constitution of the Russian Federation;
- Law on Judges Status;
- Law on judicial system of the Russian Federation.

The judicial system of the Russian Federation consists of:

- The Constitutional Court of the Russian Federation and constitutional courts of the republics and other subjects of the Russian Federation. The Constitutional Court of the Russian Federation considers cases relating to the compliance of the federal laws, normative acts of the President of the Russian Federation, the Council of the Federation, the State Duma, the Government of the Russian Federation, constitutions of republics, charters and other normative acts of the subjects of Russian Federation with the Constitution of the Russian Federation (Article 125 of the Constitution);³⁸

- Four-tiered system of courts of general jurisdiction. The first tier comprises all general jurisdiction *rayon* (district) courts-city, intermunicipal and equal to them - acting on the territory of Russia. Middle tier of general jurisdiction courts includes the supreme courts of the republics, *kray* (regional), *oblast* (provincial) courts, city courts of Moscow and St.-Petersburg, courts of autonomous provinces and autonomous districts;

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³⁶ The terms "implementation" and "enforcement" will be used as synonyms in this thesis.

³⁷ Resolution 1516 (2006), *Implementation of judgments of the European Court of Human Rights*, adopted by the Assembly on 2 October 2006, paragraph 2; *Implementation of judgments of the European Court of Human Rights: Introductory Memorandum*, E. Jurgens, document AS/Jur (2005) 35, of 20 June 2005 (declassified by the Committee on 21 June 2005).

³⁸ The Subjects (federal units) of the Russian Federation may establish their own constitutional, or "Charter", courts, which have jurisdiction to review the compatibility of Subject legislation and sub-legislative acts with Subject Constitutions or Charters. William Burnham, Peter B. Maggs, and Gennady M. Danilenko, *Law and Legal System of the Russian Federation*, 41 (3rd ed., 2004: Juris Publishing, New York).

- Three-level system of arbitration courts with the Supreme court of Arbitration of the Russian Federation as a supreme judicial body competent to settle economic disputes and other cases considered by arbitration courts, exercise judicial supervision over their activities according to the federal law-envisaged procedural forms. The system of the arbitration courts comprises: arbitration courts of the subjects of the Russian Federation; courts of arbitration districts (10) and the Supreme Court of Arbitration.

1.2.1 The Supreme Court of the Russian Federation

The Supreme Court of the Russian Federation is the supreme judicial body for civil, criminal, administrative and other cases under the jurisdiction of courts of general jurisdiction, carries out judicial supervision over their activities according to the federal law-envisaged procedural forms and provides clarifications on the issues of court proceedings (Article 126 of the Constitution of the Russian Federation). It heads the judicial system of general jurisdiction, representing a supreme tier of this system.

The Supreme Court of the Russian Federation acts as a court of first instance for cases of special importance or special public interest when it accepts them for consideration according to the legislation. The law determines a category of cases which are included in the sphere of activities of the Supreme Court of the Russian Federation as a court of first instance.

The Supreme Court of the Russian Federation is a cassation instance in relation to the federal courts of general jurisdiction of republics or oblast. The Supreme Court of the Russian Federation supervises legality, validity and substantiality of sentences and other decisions of courts of lower level.

The Supreme Court of the Russian Federation has the following structure:

The Plenum of the Supreme Court on the basis of studies and generalization of the judicial practice and judicial statistics, provides its guidance to courts on the issues of proper application of the legislation of the Russian Federation. Apart from consideration of cases by way of supervision and upon newly discovered evidences, the Presidium of the Supreme Court considers and hears issues relating to the organization of activities of judicial chambers, examines materials of the studies and generalization of judicial practice, analyses judicial statistics, assists lower courts in correct application of the legislation.

1.2.2 Soviet legal system

The above-mentioned structure of judicial system was formed and is being developed as a result of a judicial reform carried out in Russia from the end of the 80s till the beginning of the 90s with the purpose to create and maintain the judicial power in the state apparatus as an independent branch

of power, free from political and ideological bias, independent in its activities from the executive and legislative branches of power. Shortly before the collapse of the Soviet Union for leaders of the state became clear that the judicial system had become outdated and needed to be urgently reformed. The necessity of those changes was dictated by the fact that the Soviet judicial and legal systems were not adapted for the building of the democratic regime due to the following reasons:

- Soviet jurisprudence for years had been based on the principles of Marxism-Leninism one of the main provisions of which is that law is an instrument of class domination and considered to be a product of the political process.³⁹ Soviet legal theory didn't recognize the concept of a law-governed state and classified it as a form of bourgeois law.⁴⁰
- Weak position of the judiciary under the Soviet legal system was predetermined by the fact that there was no accepted doctrine of separation of powers on the legislative level in the USSR. The judiciary was not independent from the other branches of government. The courts in the USSR were avowedly an arm of the policy of the communist party. The Supreme Court supervised the lower courts and applied the law as established by the Constitution or as interpreted by the Supreme Soviet⁴¹.
- During the period of the Soviet Union, judges had not been viewed as protecting individuals' rights in court, but rather as a lever of the Communist Party dominating the executive branch. The Soviet model of judges incorporated an educational and political role for judges. In addition to resolving disputes, judges were expected to use cases as a way of inculcating the Soviet values. They could sidestep the law when it conflicted with the interests of the State and/or the Communist party.⁴²
- The system of telephone law was wide-spread in the Soviet Union. "Telephone law" or "telephone justice" is a practice by which outcomes of cases allegedly come from orders issued over the phone by high-ranking officials with political power rather than by means of the application of law.⁴³
- The former Soviet Union never considered international law, especially international law of human rights, as something that might be invoked before, and enforced by, its domestic courts.

³⁹ Gennady M. Danilenko & William Burnham, *law and legal system of the Russian Federation* (2d ed. 2000).

⁴⁰ Krasnov, Mikhail. "The Rule of Law" in McFaul, Michael, Nikolai Petrov, and Andrei Ryabov (Eds.) *Between dictatorship and democracy: Russian post-communist political reform* (Washington, DC: Carnegie Endowment for International Peace) 2004.

⁴¹ The Supreme Soviet (*Verkhóvnyj Sovét*) was the common name for the legislative bodies (parliaments) of the Soviet socialist republics (SSR) in the Soviet Union

⁴² Kathryn Hendley, *Are Russian judges still Soviet*, accessed at: http://www.law.wisc.edu/m/hztrh/russian_judges.pdf

⁴³ Kathryn Hendley, *Telephone law and the rule of law, the Russian case*, accessed at: <http://journals.cambridge.org>, visited at: 20.03.2010

The 1977 USSR Constitution⁴⁴ did not allow the direct operation of international law within the domestic setting.

- Although the Constitution proclaimed that the relations of the USSR with other states should be based on the principle of “fulfillment in good faith of obligations arising from the generally recognized principles and rules of international law, and from international treaties signed by the USSR” (art. 29), this broad clause was never interpreted as a general incorporation of international norms into Soviet domestic law. The application of international norms was envisioned in some exceptional cases of statutory references to international treaty law, but as a matter of general constitutional principle the Soviet legal order remained closed to international legal norms.⁴⁵
- The Soviet legal system was protected from any direct penetration of international law by its conception of international law and municipal law as two completely separate legal systems. As a result of this dualist approach, the international obligations of the Soviet state would be applicable internally only if they were transformed by the legislature into a separate statute or administrative regulation. By relying on the doctrine of transformation, the Soviet Union was able to sign numerous international treaties, including treaties on human rights, and still avoid implementing some or all of their provisions in the domestic legal order.

The attempt to reform existed legal system began only with the advent of *perestroika*. The leaders of the Soviet Union realized that the country would have no prospects for further economic and social development on the ground on those principles on which Soviet society was based.⁴⁶

In October 1991 the “Concept of Judicial Reform in the Russian Federation” (*Kontseptsia Sudebnoy Reformy v Rossiiskoi Federatsii* (hereinafter – the Concept)), was approved by the Russian legislature. This concept stipulated for a plan of reforms of the judicial system of the Russian Federation. This document, which was drafted by nine radical reformers in Moscow, set forth the unprecedented goals of creating an independent court system to enforce the law and cure the problem of “a cynical and condescending attitude toward law.”⁴⁷ Though this plan was not legally binding, the Russian legal community warmly embraced the principles it enumerated.⁴⁸ Article 10 of the 1993 Constitution⁴⁹ provided for principle

⁴⁴ See *Konstitutsia (Osnovnoy zakon) Soiuzu Sovetskikh Sotsialisticheskikh Respublik* (Constitution (Fundamental Law) of the Union of Soviet Socialist Republics), 1 *Svod zakonov USSR* 14 (Code of the Laws of the USSR).

⁴⁵ G.M. Danilenko, Soviet Constitutional Reforms and International Human Rights Standards, 1(2) *Collected Courses of the Academy of European Law* 211, 239-240 (1992).

⁴⁶ *Ibid.*

⁴⁷ *Supra* note 33 at 53.

⁴⁸ *Supra* note 38. at 11

of independency of judiciary, stipulating that “the organs of legislative, executive and judiciary power are independent”. Constitutional Law of the Judicial System from 1996 further reaffirmed this judicial independence by eliminating the traditional system of oversight of the inferior courts by the Ministry of Justice.⁵⁰ Before 1996 the Ministry of Justice provided logistical support to the inferior courts. Because the courts depended on the Ministry of Justice for office space and other needs, the courts were vulnerable to pressure from the Ministry.⁵¹

Besides, the most important feature of the concept of judicial reform in the Russian Federation is the principle of rule of law established in the article 120 of the 1993 Constitution, in accordance with which “judges shall be independent and shall obey only the Constitution of the Russian Federation and federal law”.

Another important feature of the concept of judicial reform is that in 1993 the Russian Federation became the first country of the Commonwealth of Independent States (hereinafter – CIS)⁵² which introduced far-reaching reforms with regard to relationship between international and domestic law.

The “opening” of the Russian domestic legal system to international law became one of the most important elements of the ongoing constitutional reform.⁵³ In November 1991 the Congress of People's Deputies adopted the Declaration of the Rights and Freedoms of Person and Citizen⁵⁴ (hereinafter- the Declaration) which was in a huge part based on the recognized principles and norms of international human rights law. One of the most interesting provisions of the Declaration was an article that stipulated incorporation of international norms with regard to human rights into Russian domestic law.

In accordance with article 1 of the Declaration, “the generally recognized international norms concerning human rights have priority over laws of the Russian Federation and directly create rights and obligations for the citizens of the Russian Federation.”

In April 1992, the 1991 Declaration, including article 1, became part of the Constitution that was then in force.⁵⁵ Thus, for the first time in its

⁴⁹See Konstitutsiya Rossiyskoy Federatsii, Constitution of the Russian Federation (hereinafter – Constitution 1993) 12 December 1993, accessed at: www.constitution.ru

⁵⁰ Federal Constitutional Law No. 1 - FKZ on the Judicial System (1996, last amended in 2005), available at <http://www.russianlife.com/article.cfm?Number=605> [hereinafter 1996 Constitutional Law]. One of the key traditional structural means of undermining the independence of the lower courts in the Soviet political order was a system of oversight of the courts by the Ministry of Justice, an agency within the executive, whereby the courts were completely dependent on the Ministry for logistical support. Danilenko & Burnham, *supra* note 45, at 53.

⁵¹ See Danilenko & Burnham *supra* note 39, at 53.

⁵² “Rezolutsiya Verhovnogo Soveta” (RSFSR Resolution of the Supreme Soviet of RSFSR) №1920-1 from 22 November 1991 “On creation of the Commonwealth of Independent States”, accessed in Russian at: www.consultant.ru

⁵³ *Supra* note 39 at 54

⁵⁴ Deklaratsiya prav i svobod cheloveka i grazhdanina (Declaration of the rights and freedoms of Person and Citizen), adopted on 12 December 1991, accessed in Russian at: www.consultant.ru

⁵⁵ *Konstitutsia (Osnovnoy zakon) Rossiiskoy Federatsii - Rossii* (Constitution (Fundamental Law) of the Russian Federation - Russia) (1978) (as amended in 1992).

history, Russia adopted a general constitutional principle incorporating certain international norms into its domestic law.

1.3 International treaties under the Constitution of the Russian Federation (including the domestic status of the European Convention in Russian law)

Before the factual examination of the national courts' decisions it is necessary to analyze the status of the Convention and judicial practice of the ECtHR under the national legislation.

The Russian Federation establishes a monist system, in sharp contrast to the dualist approach, employed by the Soviet Union. The following articles of the Russian Constitution are relevant:⁵⁶

Part 4 of the article 15 states that: "The generally recognized principles and norms of international law and international treaties of the Russian Federation shall constitute an integral part of its legal system." If an international treaty establishes rules other than those established by the law the rules of international treaty shall apply". Article 17 paragraph 1 states: "The rights and freedoms of the human being and citizen shall be recognized and guaranteed in the Russian Federation in conformity with the generally recognized principles and norms of international law and in accordance with this Constitution". Article 46 paragraph 3 states: "Everyone shall have the right, in accordance with the international treaties of the Russian Federation, to apply to international organs concerned with the protection of human rights and freedoms if all available domestic remedies have been exhausted". Article 55 paragraph 1 and 2 state: "The enumeration of fundamental rights and freedoms in the Constitution of the Russian Federation shall not be interpreted to deny or diminish other generally recognized rights and freedoms of human being and citizen". "No laws denying or diminishing the rights and freedoms of human being and citizen may be issued in the Russian Federation".

These provisions of the Constitution of the Russian Federation allow making several conclusions.

At first, article 17 and 55 may be interpreted to mean that international law is superior to the Russian Constitution. Second, article 15 incorporates all international law into Russian domestic law, not only the law created by ratified treaties, but also generally recognized principles and norms of international law, in other words, customary international law. Third, treaty norms are considered to be superior with respect to domestic federal, republican and municipal law, customary international law, however, is not given superiority.⁵⁷

⁵⁶ Kahn, *supra* note 33 at 655.

⁵⁷ Kahn, *supra* note 33, at 656.

In addition, Russian law has been passed with regard to the domestic use of international law. The 1995 law on international treaties⁵⁸ requires the immediate and direct application of officially published treaties if no enabling legislation is required. This indicates, that the Russian Federation treats self-executing and non self-executing treaties differently, which could have substantial impact on the use of different treaties by the courts. Treaties that are deemed to require domestic enabling legislation may not be used by the courts. However, European Convention on human rights does not require domestic enabling legislation.⁵⁹

On the grounds of the facts given above, it becomes clear that it is not necessary to transform international treaties into the domestic legal system in order for a judge to apply the provisions of international law.⁶⁰ The most important conclusion is that there is no prohibition to the domestic use of the interpretation of the Convention. The case law of the European Court of Human Rights (the Court) may thus be gradually transformed into Russian domestic jurisprudence.⁶¹

According to the last paragraph of article 1 of the Federal Law of the Russian Federation ‘On the Ratification of the Convention for the Protection of Human rights and fundamental freedoms’, the Russian Federation recognizes the compulsory jurisdiction of the Court with regard to the interpretation and application of the Convention.

In compliance with the provisions of the article 15 part (4) of the Constitution, there is a priority of an international treaty over national statutes. This provision stipulates that “[i]f an international treaty of the Russian Federation provides for other rules than those stipulated by the law, the rules of the international treaty shall apply.” The conclusion that can be made after reading of the first and second clauses of article 15(4) together is that in cases where an international treaty to which Russia is a party, i.e., the Convention, conflicts with Russia's domestic law, the international treaty will supersede local law as the governing law in the Constitutional Court's decision-making⁶². Thus, theoretically there is no difference between any legislative act, for example Federal law and the Convention terms of their implementation in national courts. Therefore, the Convention is placed in between the Constitution on the one side and federal constitutional laws and federal laws on the other side. These Constitutional provisions concerning the status of international law were reaffirmed in the 1996 Federal Constitutional Law⁶³ “On the Judicial System of the Russian Federation”.⁶⁴

⁵⁸ Federal'niy Zakon Rossiyskoy Federatsii “O prave mezhdunarodnih dogovorov” , Federal law №101 from 15.07.1995 “On international treaties”, published in the Russian Newspaper (Rossiyskoy Gazete) №140 from 21.07.1995 (hereinafter – 1995 Law).

⁵⁹ Kahn, *supra* note 33, at 656.

⁶⁰ Anton Burkov, The domestic status of the European Convention on Human rights in Russian law, Bulletin of the European Human rights advocacy center, winter 2007, issue 8, p.12-13

⁶¹ Danilenko, “Implementation of International Law in CIS States: Theory and Practice,” European Journal of International Law 10:1 (1999): 68.

⁶² Kahn, *supra* note 33, at 655.

⁶³ Federal'niy Konstitucionniy Zakon “O Sudebnoy sisteme v Rossiyskoy Federatsii” (Federal Constitutional law “On judicial system of the Russian Federation”) №1 adopted on

In conformity with the article 3 of the above-mentioned law, all Russian courts must apply generally recognized principles and norms of international law and international treaties of the Russian Federation. The most unusual element of the machinery for implementing domestic law within the Russian legal system is the practice of issuing ‘Resolutions’ (*postanovleniia*) or ‘guiding explanations’ (*rukovodiaschie raziasneniia*) passed by the Plenum of the Supreme Court and the Plenum of the Supreme Court of Arbitration of the Russian Federation.⁶⁵

Firstly, the Supreme Court of the Russian Federation⁶⁶ passed resolution regarding application of international law in 1995. Article 5 of the Regulation “On Some Questions Concerning the Application of the Constitution of the Russian Federation by Courts”⁶⁷, states that lower courts should apply international law. It is worth of mentioning that in this Resolution the Supreme Court instructed lower courts to apply international law, however it did not explain how exactly the law should be applied.

The first and the only one Resolution of the Supreme Court which was fully devoted to the implementation of international law was the Resolution “On the Application by Courts of General Jurisdiction of the Generally-recognized Principles and Norms of International Law and the International Treaties of the Russian Federation”⁶⁸ adopted in 2003 - five and a half years after the Convention entered into force (hereinafter – 2003 Resolution). Although still limited, this Resolution was more advanced in terms of clarifying for judges their obligation to apply international law provisions - the Convention in particular. With respect to the Convention, there are several points to emphasize.⁶⁹ Firstly, the Supreme Court underlined duty of courts to apply directly international treaties of the Russian Federation and in particular - the Convention, and pointed at the priority of international treaties, including the Convention, over the norms of national laws. The Supreme Court stated that in accordance with the article 31 (3) b of the Vienna Convention on the Law of Treaties⁷⁰, when applying the Convention judges should interpret the treaty by taking into account any subsequent practice of a treaty body. For the first time it was

31.12.1996, published in the Russian Newspaper (Rossiyaskaya gazeta) №3 from 06.01.1997

⁶⁴Burkov Supra note 60, p.12

⁶⁵ Ibid.

⁶⁶ In accordance with the article 19 of Federal Constitutional law of the Russian Federation “On judicial system of the Russian Federation” №1 issued 31.12.1996, the Supreme Court of Arbitration is the highest judicial body on civil, criminal and administrative and other cases under the jurisdiction of the courts of general jurisdiction.

⁶⁷“O nekotoryh voprosah kasayuschihsya primeneniia sudamy Konstitutsii Rossiyskoy Federatsii” (O some questions concerning the application of the Russian Constitution by Russian Courts), №8 Adopted by the Plenum of the Supreme Court on 31.10.1995, published in the Russian Newspaper (Rossiyaskaya gazeta) №244 from 08.12.1995

⁶⁸“O priminenii sudami obschey iurisdiktsii obschepriznannih norm i principov mezhdunarodnogo prava i mezhdunarodnih soglasheniy Rossiyskoy Federatsii” (On the Application by Courts of General Jurisdiction of the Generally-recognized Principles and Norms of International Law and the International Treaties of the Russian Federation) № 3 adopted by the Plenum of the Supreme Court on 10.10.2003, published in Russian Newspaper (Rossiyaskaya gazeta) № 244 from 02.12.2003

⁶⁹ Burkov Supra note 60, p.12

⁷⁰Vienna Convention on law of treaties from 23 May 1969

stressed that non-application of an international treaty (including non-application of the treaty itself, the application of a treaty that is not applicable under particular circumstances, and the incorrect interpretation of a treaty) can bear the same consequences as non-application of the domestic law – namely, the quashing or altering of a judgment.⁷¹ Another feature of the 2003 Regulation is that it gave a brief review of European Court case law on articles 3, 5, 6, and 13 of the Convention, without mentioning any specific cases of the ECtHR.

With respect to the Supreme Court of Arbitration of the Russian Federation⁷², its Plenum has not passed Regulations on the domestic implementation of the Convention yet. Albeit, there is informational letter signed by the Chief Justice of the Supreme Court of Arbitration which was wholly devoted to this issue: “On the Main Provisions Applied by the European Court of Human Rights for the Protection of Property Rights and Right to Justice”⁷³. It consists of brief summaries of the main provisions applied by the European Court on the issues of the protection of property and right to justice, and it advises on applying the Convention in the administration of justice at the domestic level. However, the document is very brief. There are no citations to the particular cases that served as a basis for this decision. The value of such a letter explaining the interconnection between the jurisdiction of the arbitration courts and the jurisdiction of the Convention, and informing arbitration judges about some provisions of the case-law of the ECtHR, even in this brief form, cannot be overestimated. From December 1999 to October 2003 (in October the abovementioned Regulations of the Supreme Court were issued), this document was the only official document providing judges with information on the domestic implementation of the Convention.⁷⁴

⁷¹ Burkov Supra Note 60, p.12

⁷² In accordance with the article 23 of Federal Constitutional law of the Russian Federation “On judicial system of the Russian Federation” №1 issued 31.12.1996, the Supreme Court of Arbitration- is the highest judicial body on settlements of economic disputes and other cases considered by the arbitration courts.

⁷³ Informatsionnoe pis'mo predsedatelya arbitrazhnogo suda Rossiyskoy Federatsii “Ob osnovnih polozheniyah, primenuyaemih Evropeiskim sudom po pram cheloveka o zachte imuschestvennih prav I prava na dustup k pravosudiyu”, (Informational letter of the Supreme Court of Arbitration “On the Main Provisions Applied by the European Court of Human Rights for the Protection of Property Rights and Right to Justice issued on 20.12.1995 №C1-7/CMP1341, Vestnik Vyysschego arbitrazhnogo suda Rossiyskoy Federatsii (Bulletin of the Supreme Court of Arbitration) №2, 2000.

⁷⁴ Burkov, Supra note 60 p.13

1.4 The Constitutional Court of the Russian Federation'⁷⁵ Interpretation of Article 15(4)

In accordance with article 32 of the Convention, each High Contracting Party automatically submits itself to the jurisdiction of the ECtHR in any case brought to the court addressing the Convention. The same article states that the jurisdiction of the ECtHR applies to all issues concerning the interpretation and application of the Convention. Article 46 provides for that all judgments issued by the ECtHR are final and binding upon any signatory that is a party to the case at issue. Although Russia ratified the Convention in 1998, the Constitutional Court of Russia did not address the legal status of the Convention in the Russian domestic legal system until 2001, when it considered the validity of a Civil Code provision in the case of *Bogdanov and Others*.⁷⁶ In the case the Constitutional Court stated that “the Russian Federation accepted the jurisdiction of the ECtHR and undertook to bring its law enforcement practice, including judicial, in full correspondence with the obligations under the Convention.”⁷⁷

The Constitutional Court underlined the Russian Federation’s obligations to fulfill requirements flowing from its membership in the Council, namely to abide by the norms of the Convention as interpreted by the ECtHR. The Constitutional Court also emphasized that the provisions of the Civil Code of the Russian Federation in that case must “be considered and applied in consistent normative unity with the exigencies of” the Convention.⁷⁸

It becomes clear that the Constitutional Court in the *Bogdanov* case stipulated the following rule, in accordance with which, the Russian Federation having ratified the Convention, undertook to create a “legal obligation to adopt or make laws, secondary legislation and judicial decisions in conformity with the Convention”.

This broad interpretation of Russia’s obligations under the Convention was limited by the Constitutional Court in its judgment of 5

⁷⁵ In accordance with the article 18 of Federal Constitutional law of the Russian Federation “On judicial system of the Russian Federation and in accordance with the article 1,3 Federal’nogo Konstitutsionnogo Zakona “O Konstitutsionnom Sude Rossiyskoy Federatsii (the Federal Constitutional law “On the Constitutional Court of the Russian Federation” №1 adopted on 21 July 1994, published in the Russian Newspaper (Rossiyaskaya Gazeta) №138-139 from 23 July 1994), The Constitutional Court is a court of specialized jurisdiction, empowered to consider cases on the conformity of legislative acts with the Constitution of the Russian Federation, arbitrate disputes between the executive and legislative branches and between Moscow and the regional and local government, and authorized to rule on violations of constitutional rights, to examine appeals from various bodies, and to participate in impeachment proceedings against the president

⁷⁶ *I.V. Bogdanov and Others*, judgment of 25 January 2001 No. 1-P; for analysis of the case, see Kirill Koroteev and Sergey Golubok, *Judgment of the Russian Constitutional Court on Supervisory Review in Civil Proceedings: Denial of Justice, Denial of Europe*, 7 Human rights law Review 619, 622 (2007).

⁷⁷ Ibid.

⁷⁸ Ibid.

February 2007.⁷⁹ In this judgment the Constitutional Court pointed out that there are two possible ways of application of the Convention by Russian judges.

First, the Constitutional Court held that ECtHR cases have an effect, if at all, on the Russian domestic legal system, only “insofar as on the basis of generally recognized principles and norms of international law that give interpretation of the provisions of the Convention concerning guaranteed rights”.⁸⁰

Second, even if the Constitutional Court determines that the particular ECtHR judgment may be applicable, it is within the discretion of the Constitutional Court to determine whether or not to abide by that judgment; no actual binding obligation exists under the Russian Constitution to follow the court's judgment.⁸¹

Thus, this decision gives Russian domestic courts only non-binding guidelines for determining whether the Convention or ECtHR case-law should be applied in any given case.⁸² This process of deciding whether the Convention should be used in particular case supposes three steps. At first, a judge should determine whether the relevant ECtHR case interprets a provision under the Convention that guarantees substantive rights⁸³. Secondly, the judge should define if the ECtHR judgment interprets the Convention based on the “generally recognized principles and norms of international law”.⁸⁴ Thirdly, if both of the abovementioned conditions are met, the judge then has to decide whether the relevant ECtHR judgment should have any legal effect on the Russian federal law at issue before the domestic court.⁸⁵

The abovementioned information allows making the conclusion that the Decision of the Constitutional Court of the Russian Federation of February 5, 2007 on case “Cabinet of Ministers of Tatarstan Republic and others...” provides for a limited approach for determining the applicable ECtHR case-law and the broad discretion of judges to define whether to give effect to this case law in their decisions. This judgment, in other words, permits the Russian Federation to disregard any and all judgments from the ECtHR.

1.5 Concluding remarks

While article 15 part 4 of the Constitution of the Russian Federation provides for the necessity of strict implementation of European legal norms, as defined by the ECtHR in its interpretation of the Convention, this

⁷⁹ Cabinet of Ministers of Tatarstan Republic of the Russian Federation and others, judgment of the Constitutional Court of the Russian Federation of 5 February 2007, www.consultantplus.ru.

⁸⁰ Kirill Koroteev *supra note* 76 at 623

⁸¹ *Ibid.* at 624

⁸² *Ibid.* at 623

⁸³ *Ibid.* at 623

⁸⁴ *Ibid.* at 624

⁸⁵ B.L. ZIMNENKO, *INTERNATIONAL LAW AND THE RUSSIAN LEGAL SYSTEM* 253 (William E. Butler ed. & trans., Eleven International Publishing 2007) at 262-263.

provision was not fully realized in practice. This failure to implement the legal norms promulgated by the ECtHR can be attributed to the Constitutional Court's excessively narrow construction of Russia's obligations under the Convention and the relative inexperience of the Russian judiciary with the application of international law.

In this respect, examination of judicial practice of two main Russian Courts – the Supreme Court of the Russian Federation and the Supreme Court of Arbitration is very important from a technical perspective. For making necessary recommendations that serve to improve situation with absence of strict implementation of Convention' norms and practice of the ECtHR, it is essential to investigate how the courts ascertain applicable international law (and whether there is any executive's intervention in the process) or whether the courts develop judicial doctrines aimed at avoiding direct application of international norms.

The following chapter of this thesis will consider the question of how exactly the judicial practice of the ECtHR is used in the practice of Russian Courts and examples of concrete cases where the variants of implementation of the norms of the Convention and judgments of the ECtHR are showed ECtHR will be given. The structural obstacles to implement successfully of the European Court practice will also be considered.

2 Analysis of implementation of the article 1 of the Protocol 1 to the Convention and decisions of the ECtHR with regard to property rights in the practice of the Russian Supreme Court and the Supreme Court of Arbitration

2.1 Quality of the implementation of the Convention norms and judicial practice of the ECtHR

As it was already stated in the introduction, the author has examined the judicial practice of the Supreme Court of the Russian Federation and the Supreme Court of Arbitration for the period from 2001 – 2009.

In total there have been examined 500 of judgments of the Supreme Court of the Russian Federation where the reference to the Convention and the judicial practice of the ECtHR can be found. From this number of cases only those cases where the Convention or/and judicial acts of the ECtHR was/were mentioned that are connected with property rights violations have been chosen. For eight years examined under this research the Supreme Court of the Russian Federation applied to the rules of the Convention only in twelve cases, six of which are represented in this research. Each of these six cases represents the independent type of problematic application of the Convention and the judicial acts of the ECtHR.

Concerning the practice of Arbitration Courts, the number of cases considered by the Supreme Court of Arbitration which has been examined for this research is 500 for the same period. Taking into consideration the fact that in accordance with the article 8 of the Code of Arbitration Procedure of the Russian Federation, mainly cases connected with violations of property rights of legal persons and entrepreneurs fall within the scope of the jurisdiction of Arbitration Courts of the Russian Federation, it is quite obvious that all examined cases are connected with property rights. Only six from all cases examined by the Supreme Court of Arbitration as the Court of supervisory instance contain the reference to the rules of the Convention or case-law of the ECtHR.

All above-mentioned cases have been found in the officially recognized and certified in the Russian Federation legal base Consultant-

Plus⁸⁶. The base contains special section of judicial practice for the period from 1980 till nowadays including decisions of the Supreme Court of Arbitration and lower arbitration courts, the Supreme Court of the Russian Federation and lower courts within the system of general jurisdiction. The selection of cases was exercised on the grounds of key words “European Court on Human Rights” and “European Convention on Human Rights” pointed out in the search column. All of the 500 cases that were found in the legal base were cases considered by the Supreme Court of the Russian Federation as the Court of supervisory instance for the period since 2001 till 2009. It is necessary to say that as the court of supervisory instance the Supreme Court of the Russian Federation delivers annually approximately 100 cases. All of these cases uploaded into the legal base were analyzed from the point of view of reference to the rules of the Convention or/and the judicial practice of the ECtHR. From all of the cases considered by the Supreme Court as the supervisory instance (more than 900) 500 were chosen where the Convention and/or the judicial practice of the ECtHR had been mentioned. From this number of cases only twelve cases were chosen. These twelve cases are connected with violation of property rights and in these twelve cases the article 1 of the P1-1 of the Convention or/and the judicial practice of the ECtHR where this rule was interpreted had been mentioned. Then, after the analysis of these twelve cases the author decided to describe under this thesis six cases as far as the author found that in the Russian judicial practice there are only six types of application of the rules of the Convention. Each case considered by the Supreme Court of the Russian Federation and described under this research represents one of these six types.

As for the Supreme Court of Arbitration of the Russian Federation, this Court as the Court of supervisory instance considers annually approximately 60-70 cases. All of them were analyzed under this research. As far as the Supreme Court of Arbitration and the whole system of arbitration courts consider only those cases that are connected with property rights violations, all 500 examined cases are connected with property rights. In this amount of cases only six contained reference to the article 1 of the P1-1 of the Convention or/and judicial practice of the ECtHR and were chosen for this research.

Before starting analysis of cases, it is necessary to describe the methods of examination of the judicial practice of the Supreme Courts of the Russian Federation and the Russian Supreme Court of Arbitration.

While examining the case-law of the Supreme Court of Arbitration and the Supreme Court of the Russian Federation the author has analyzed the cases on the ground of the following criteria:

- Compliance of the decision of the court with the rules of national legislation, in other words, whether problematic implementation of the Convention and the judicial acts of the ECtHR entails the violation of the rules of national legislation;
- Compliance of the decision of the court with the rules of the Convention. Whether the problematic implementation of the

⁸⁶ Official web-page www.consultantplus”

Convention or the judicial acts of the ECtHR entail the breach of this international treaty, in other words, whether the problematic application of the Convention entail the adjudication of unlawful decision in the context of the ECHR.

In this connection it is necessary to state that in accordance with the articles 167, 168, 170 of the Code of Arbitration Procedure of the Russian Federation and the articles 195, 196, 198 of the Code of Civil Procedure of the Russian Federation, section 13 of the Resolution of the Supreme court of the Russian Federation “On the court judgment” №23 from 23 December 2003, the decision of the Courts of both tiers should be grounded on the rules of national legislation. All circumstances of the case, arguments of the parties and the conclusions of the court along with the rules of law on which such conclusions and findings are based should be stated in the decision. In other words, the decision of the court should be lawful, valid and clear for the participants of the legal proceedings as far as for officials who are responsible for execution of this decision (bailiffs). The clearness of the decision for the parties of legal proceedings is extremely important in the Russian Federation. It was stated above that in the Soviet Union that one of the main functions of the Court along with the settling of disputes was education of participants of legal proceedings. Nowadays the Courts still realize this function. Despite the fact, that there is no judicial precedent in the Russian Federation as officially recognized source of law, nevertheless, the court’s decision that was not quashed in higher instances is considered by the natural and legal persons as an example of how the concrete rules of national law should be interpreted and applied, non-quashed judicial act serves to be an example of what articles it is necessary to apply for the concrete claims to be satisfied and what articles are non-applicable and could lead to dismissal of the claims. So, the courts still fulfill educational function at least for lawyers. That is why it is extremely important for the decision to be clear and understandable.

Despite the fact that the above-mentioned articles do not contain the provision that court’s decision should be taken in compliance with the rules of international law, it is obvious, taking into consideration part 4 of the article 15 of the Constitution of the Russian Federation which states that “the generally recognized principles and norms of international law and international treaties of the Russian Federation shall constitute an integral part of its legal system.” If an international treaty establishes rules other than those established by the law the rules of international treaty shall apply”.

Thus, the decisions of the examined Courts should be in compliance not only with the rules of national legislation, but in the rules of the Convention, the norms of which are interpreted in the judicial acts of the ECtHR.

The following analysis of judicial acts of Russian Courts will make possible to get an answer on the question whether the Russian Courts fulfill their obligations stipulated by the abovementioned rules of national

legislation and entailed from the membership in the Council of Europe and recognition of the jurisdiction of the ECtHR.

2.2 Problems that the Russian Courts face when dealing with the Convention and judicial practice of the ECtHR

The following analysis contains description of six cases considered by the Supreme Court of Arbitration and only six cases considered by the Supreme Court of the Russian Federation as far as below there will be presented six types of problematic implementation of the article 1 of the P1-1 and judicial practice of the ECtHR. Thus, each case represents the independent type of problematic implementation.

The analysis of case-law of national courts leads to conclusion that the problematic implementation of the Convention and judicial practice of the ECtHR (hereinafter – problematic implementation or application)⁸⁷ includes the following situations:

- 1) Reference to the case-law of the ECtHR without any reference to the rules of the Convention;
- 2) Mentioning of the ECtHR without any reference to its legal positions and case-law where such positions was elaborated;
- 3) Single reference to the Convention without pointing out the number of the article applied in the specific case;
- 4) Reference to the Convention without indication of the number of the article but with reference to the ECtHR-case-law;
- 5) Single reference to specific the rule of the Convention with the number of the article (in our case – article 1 Protocol 1 of the Convention) in isolation from the judicial practice of the ECtHR where such rule is interpreted;
- 6) Non-application of the Convention by the national courts despite the fact that the parties of the legal proceedings claimed the Convention to be applied.

2.2.1 Reference to the case-law of the ECtHR without any reference to the rules of the Convention

1) *The Supreme Court of the Russian Federation* delivered decision from 17 October 2003 N ГКПД03-958 on the case D. versus Government of the Russian Federation on vitiation of the Regulation of the Government of the Russian Federation “On order of the compensation of deposits of some

⁸⁷ As far as the scope of this research is property rights violations the protection of which is provided for by the article 1 of the Protocol 1 to the Convention, the term inappropriate application of the Convention in this research means inappropriate application of the article 1 of the Protocol 1.

categories of citizens of the Russian Federation placed in the Provident Bank (Savings bank) before 20 June 1991”.

The facts of this case can be summarized as follows. Before the Soviet Union collapsed in 1991, a lot of soviet citizens deposited their money in the Savings Bank of the Russian Federation. After the collapse of the Soviet Union and consequent inflation the deposited sums of millions of Russian citizens were frozen. After the renewal of process of compensation to citizens of their bank deposits as a result of the inflation and denomination of ruble, the Savings Bank began to pay to people their sum of money without any indexations. Such absence of indexations and impossibility of recalculation of people’s deposits as for the date of the redemption was provided for by the governmental order of the Russian Federation № 222 from March, 19th, 2001 established “An order of preliminary indemnification (compensation) in 2001 of deposits of separate categories of citizens of the Russian Federation in Savings bank of the Russian Federation as of June, 20th, 1991 and by the Federal law “On restoration and protection of savings of citizens of the Russian Federation” provisions of which established the categories of the citizens having the right to compensation of their bank deposits and rates of such compensation.

Thus, having deposited one sum of money before 1991 people claiming the compensation of their deposits got insignificant sums without any recalculations and indexations. A plaintiff did not agree with this governmental order and applied to the Supreme Court of the Russian Federation with the claim on vitiation of this document. The Supreme Court of the Russian Federation dismissed his claims and used the following reasoning with the reference to the judicial practice of the ECtHR: “The court has not found the grounds in the given decision for satisfaction of claims on the basis of the arguments taken from the decision of the European court on human rights on the case Apolonov against the Russian Federation where the ECtHR stated that the article 1 of the Protocol 1 to the Convention does not make a duty to the state to support purchasing capacity of the sums of money placed in financial institutions (see The decision of the European Commission on business X. against Federal Republic Germany» V. Federal Republic of Germany) from March, 6th, 1980, the complaint № 8724/79, Decisions and Reports, p. 226; the decision of the European Court on business «Rudzinska against Poland». (V. Poland) from September, 7th, 1999, the complaint № 45223/99, ECHR 1999-VI; or in Quality of fresher precedent - the decision of the European Court on business «Gajduk and Others against Ukraine » (Gajduk and v. Ukraine) from July, 2nd, 2002, the complaint № 45526/99, ECHR 2002)”.

There was not violation of the Convention in this case as far as the Court used the reasoning of the ECtHR stated in the analogous case.

As for the violation of national legislation, it cannot be concluded that in the described case a poor justification took place. The Court pointed out all of the circumstances and all arguments of the parties. But still this decision cannot be considered as valid within the meaning of the article 198 of the Code of Civil Procedure of the Russian Federation as far as this decision could not be considered clear for the parties of legal proceedings.

It is quite obvious that in this decision of the Supreme Court it was necessary not only to make reference to the case-law of the ECtHR, it was necessary to state the whole provision contained in the article 1 of the Protocol 1 and indicate that this article understood property rights in a wider way than the Russian national legislation does. The Supreme Court of the Russian Federation in examined decision should have pointed out that the right to monetary claims falls within the scope of this article and can be protected in the ECtHR. This position is confirmed by the ECtHR in the case *Mellacher v. Austria*, judgment of 19 December 1989. The absence in the decisions of this necessary information made it non-understandable for the participants of the legal proceedings due to the fact that there are some differences between concepts of property rights under the national Russian legislation and under the judicial practice of the ECtHR, and these differences are unknown for most people who do not have specific education or legal experience. Consequently, the participants of legal proceedings could not understand why the Supreme Court of the Russian Federation referred in its decision to the practice of the European Court on Human Rights and what this reference meant.

2) The next example is the case considered by the *Supreme Court of Arbitration* where Limited Liability Company “Thomesto Terminal” made a claim against Regional Tax inspectorate on St. Petersburg on dept collection. The claims of the applicant were based on the fact of illegal deduction by the Regional Tax Inspectorate on St. Petersburg of the overrated sum of value added tax from the bank draft of the plaintiff.

The claim of the applicant was satisfied by the decision of the Supreme court of Arbitration from 19 December 2006 №13584/06. The decision of the Supreme Court of Arbitration made reference to the judicial practice of the European Court on Human rights having said that the refusal of the Inspectorate to return sum of money which had been mistakenly deducted from that bank draft of the applicant violated his property rights as was established by the judgment of the ECtHR from 9 March 2006 on the case “Joint-stock company “Eko-Elda Ave” v. Greece. There is no violation of the Convention in the mentioned case due to the fact that the reasoning of the Court concurred with the reasoning of the ECtHR delivered on the case with similar circumstances.

As for the poor justification which is a violation of the article 170 of the Code of Arbitration Procedure of the Russian Federation, it can be concluded that the rules of this articles were almost observed in this case. The only one detail prevents this decision from being considered lawful with relation to the rules of national legislation. This detail is unclearness of this act for participants of legal proceeding. In mentioned case the Supreme Court of Arbitration made the same mistake as the Supreme Court in the previous example. Instead of giving reasons why the Court referred to the case-law of the ECtHR, pointing out the article that is interpreted by the referred case, clarifying the meaning of this article for the participants of the proceedings, the Supreme Court of Arbitration did not go beyond the simple mentioning of the case of the ECtHR, thus having made a decision unclear for the legal persons to which it is addressed.

2.2.2 Mentioning of the ECtHR without any reference to its legal positions and case-law where such positions was elaborated

The second type of the problematic implementation could be presented by the case of the Supreme Court of the Russian Federation which is analogous to the first described case. The facts of this case are the same, a person attempted to invalidate the governmental order which stipulated the rates in accordance with which it had been established to compensate to the citizens of the Russian Federation their deposits made by them before 1991 in the Savings Bank.

By the decision of the Supreme Court of the Russian Federation from 18 May 2004 № KAC04-183 the claims of the applicant were dismissed. The reasoning of the Court was not as detailed as in the first example. The Court simply pointed out that the legal positions of the European Court on Human rights made impossible the satisfaction of the applicant's claim without any indication on the article or on the concrete case-law where such legal positions on which the Supreme Court referred, were expressed. So, the Supreme Court of the Russian Federation simply made reference to the European Court on human rights positioning the ECtHR as the indisputable authority the simple mentioning of which in the judgment is enough for the decision being lawful and understandable for participants of legal proceedings.

This judicial act was delivered by the Court in compliance with the Convention despite the fact that the article of the P1-1 and applicable to this case judicial practice were not mentioned. As was already stated, the circumstances of this case were given above within the description of the first case illustrated the first type of problematic implementation, but in contrast to the first situation, in the present case the Court did not refer to the case-law of the ECtHR in substantiating of its position. The Court did not mention that its reasoning was based on the case *Apolonov v. Russia*. Despite the fact of poor justification the Court's decision was delivered in compliance with the Convention as far as the essence of the judicial act would not have been changed in case the Court had referred to the above-mentioned case-law.

But with regard to national legislation, this decision cannot be considered as well-grounded within the meaning of the article 198 of the Code of Civil Procedure as far as the parties of the proceedings were not able to understand why the Court's reasoning were based mainly on the mentioning of the ECtHR without any reference to the particular judgment along with the rule of the Convention.

The same situation is in the Supreme Court of Arbitration. Decision of the Supreme Court of Arbitration of the Russian Federation 20 November 2007 №33451/05, Limited Liability Company "Ecktan" v. the Governor of Primorskiy region on vitiation of the governmental resolution "on expropriation of the ground area for needs of the Primorskiy region".

The facts of this case can be summarized as follows. In 2006 the limited liability company “Ecktan” was given the ground area for building of a shopping centre. The applicant firstly possessed this ground area as the tenant on the terms of the contract which was signed between the applicant and the administration of Vladivostok’s city as far as before 2008 in Vladivostok city the administration (municipal body) exercised property rights with regards to all ground areas that were not subject to the procedure of demarcation and that were situated within the limits of Vladivostok city. Afterwards, when “Ecktan” began building the shopping centre, the applicant as the owner of a construction situated on the ground area (preparedness 89%) registered the property on this ground area. In 2009 the governor of Primorskiy region issued a resolution in accordance with which the ground area that belonged to the applicant should be expropriated for public needs. Specifically, this ground area was planned to be used for building of church.

The Arbitration Court of the first instance and of the second instance dismissed applicants claims, having considered that the actions of the governor of Primorskiy region were in compliance with the Code of Civil Procedure of the Russian Federation and that the building of church (despite the fact that the Russian Federation is constitutionally secular state) fell within the scope of public interest. The Supreme Arbitration Court supported position of lower courts with the same arguments.

This decision violates rules of national legislation. For example, the article 14 of the Constitution of the Russian Federation stating that the Russian Federation is a secular state, which means that the building of church cannot be considered as public interest, the article 35 of the Constitution of the Russian Federation stating that the property rights should be protected by law and that the person can be deprived of property only on the ground of the court’s decision and with the equivalent compensation, the article 219 of the Civil Code of the Russian Federation, stipulating that the expropriation of property is possible in the Russian Federation, but in the particular case the Court should establish the real necessity of expropriation of the property in favor of public interests, besides the Court should clearly establish the extent of public interest.

Besides, this decision violates rules of the Convention. It is clear in that case that if the Court had applied the article 1 of the P1-1, the decision would have been the opposite and that the claims of the applicants would have been satisfied. The Court should have not only applied that article but established its meaning with regard to the context of the considered situation. The Court should have referred to the case *Sporrong and Lönnroth* where all of the provisions of the article 1 of the P1-1 were clarified. The reference to the mentioned case was extremely important taking into consideration the fact that the ECtHR established in this case that there should be a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights⁸⁸.” The Supreme Court of Arbitration on the ground of legal position of the ECtHR stated in the mentioned case should have

⁸⁸ *Sporrong & Lönnroth v. Sweden*, 52 Eur. Ct. H.R. (ser. A) at 26 (1982).

defined the possibility for the State to have recourse to other means for achieving the aim and the consequences of the measures for the person affected. Besides, the court could refer to the legal positions of the case *Carbonara and Ventura v. Italy* where the circumstances of the case were similar to the circumstances of the case considered by the Supreme Court of Arbitration and where ECtHR pointed out that the article 1 of the P1-1 provided for the right of free exercise of property rights and that the cases of limitations of the property right should be clearly established by law. In other words, the Court should have applied legal positions of mentioned judgments of the ECtHR and established whether in this case the public interests really took place. Besides, the court could refer to the case of ECtHR *Belvedere Alberghiera v. Italy* where the ECtHR established that there should be a balance between the private and public interests. In the previously mentioned case the actions of local authority on expropriation of the land area from the applicants' company were considered to violate article 1 of the P1-1.

But instead of giving the above-mentioned reasoning, the Court in support of its position referred to the ECtHR having mentioned that the ECtHR in the similar cases (without indication what cases were meant) expressed the same position as the Supreme Court of Arbitration in the above-mentioned decision. There was no indication of the articles of the Convention or the Convention in general. It is clear that the Court used the mentioning of the ECtHR as the incontestable authority the referring to which could make the judgment lawful and valid instead of factual using of the ECtHR reasoning in the similar case. The national Court not only breached the Convention by this decision, but pointed out the false argument about the position of the ECtHR allowing unjustified expropriation of property.

2.2.3 Single reference to the Convention without pointing out the number of the article applied in the specific case

The similar situation as described in the second type is the case represented under the third type. But unlike those decisions that fall within the scope of the second type (that contains those judicial acts where the ECtHR is mentioned in isolation from the rule of the Convention and without any reference to the concrete case-law), the decisions that fall within the third type are characterized by mentioning of the Convention in general without reference to the articles and case-law of the ECtHR. The third type of the problematic application could be exemplified by the decision of the Supreme Court of Arbitration from 25 July 2006 №2718/06, on the case Limited liability company "Building and Construction Company" v. Joint-Stock Commercial Bank "Ak Bars" on dept collection. The court satisfied the claims of the applicant on dept collection from the defendant with simple reference to the Convention without indication of the article. In this case as in the previous one the Court used the phrase "Such opinion of the Court complies with the European legal standards including the Convention

for the protection of human rights and fundamental freedoms” for explanation of dismissal of applicant’s claims.

Despite the poor justification of the conclusions of the Courts, this decision was taken in compliance with the Convention and judicial practice of the ECtHR. The Supreme Court of the Russian Federation in the case *K. v. Financial Ministry of the Russian Federation* from 24 of December 2004 №1236/04 on dept collection made the same mistake as the Supreme Court of Arbitration in the previously mentioned example. The court stated that the conclusions of the Court about the dismissal of the applicant’s claims coincide with the rule of the Convention. However, taking into consideration the fact that the circumstances of this case are similar circumstances of the case *Amceida Garret and others v. Portugal* where the ECtHR stated that the establishing by the national court’s decision of the right of a person to be granted the compensation as the result of expropriation of his or her property entailed the duty of the State to pay such a compensation. The applicant in this case obtained a right to get a public dept. In the case considered by the Supreme Court of the Russian Federation the applicant was deprived of his house as the result of necessity of widening the road. The local court stated that the public interests in this case allowed expropriating the applicant’s house and the land area where it was situated but the applicant had the right to compensation. This compensation was not made and the applicant applied to the Court with the claim on dept collection from the Russian Federation. Despite the fact that the right of the applicant of being granted the compensation is provided for by the rules of national legislation, this right was stipulated by the above-mentioned case of the ECtHR. Thus, the Court violated not only the rules of national legislation (article 35 of the Constitution and the article 219 of the Civil Code, article 198 of the Code of Civil Procedure because of poor justification of the decision), but the article 1 of the P1-1 of the Convention.

The above-mentioned examples of the second and the third types if inappropriate application of the Convention where judges just mentioned the Convention and ECtHR as incontestable authority allow making two possible explanations:

-The judges themselves do not have sufficient knowledge about appropriate application of the Convention and the judicial practice of the ECtHR that is why they consider that simple reference of the Convention or the mentioning of the European Court on human rights in the decision is enough for fulfilling Russia’s obligations resulting from ratification of the Convention;

-Taking into considerations the wide-spread mistaken opinion among population of the Russian Federation that the ECtHR is a panacea from all of the juridical problems people faced and another fallacious opinion that the ECtHR is a superior instance with the regard to the national courts and has a right to quash decisions of national courts, the Supreme Court of the Russian Federation and the Supreme Court of Arbitration often used such wording in their decisions for making their judicial acts stable and lawful. For most people the Convention and the ECtHR are indisputable authorities, if they see in the decisions of national courts such wording where

mentioning of the Convention and the ECtHR is made, they would consider that these judicial acts conform to the rules of national and international law. As far as people in most cases do not have specific knowledge about the role of the Convention within the system of national legislation, consequently they do not have understanding of how the rules of the Convention and the judicial practice of the ECtHR should be used in the decisions of national courts and they consider that if the court mentions the Convention and/or the practice of the ECtHR it means that this decision is lawful. In other words, for judges delivered concrete decision the formal mentioning of the Convention and/or the ECtHR is a guarantee of irrevocability of the decision by the upper instances or non-application people and legal persons whose rights are touched by this act to the ECtHR.

2.2.4 Reference to the Convention without indication of the number of the article but with reference to the ECtHR-case-law

The fourth type can be presented by the decision of the Supreme Court of the Russian Federation 31 October 2006 N 77-B06-18 – 4 on the case F. versus Financial Ministry of the Russian Federation, Department of Federal Treasure on Lipetsk Oblast on dept collection. The facts of the case can be summarized as follows. The applicant was a holder of the state obligation which was the negotiable paper giving right to its holders to buy cars. The point is that as for the 1994 there was the system of emission of state obligations that were acquired by natural persons. These obligations gave right to its holders to buy a car within the concrete period of time. The applicant acquired such obligation in 1994 and tried to exchange this obligation for a car but was unsuccessful. The state instead paid him partial sum of obligation price with the promise to compensate him the remaining sum of money later. The applicant did not get remaining sum of money that induced him to make an application to the court with the claim to get compensation of obligation price in the remaining part. His claims were satisfied. The Supreme Court of the Russian Federation when reconsidering this case as supervisory instance on the defendant's appeal (Finance Ministry of the Russian Federation and Federal Treasure of Lipetsk Oblast) stated that its reasoning concerning the satisfying of applicant's claims were based on the Convention and its Protocols and the position of the ECtHR given in the case "Ryabyuh against the Russian Federation". So, in this example it could be seen that the Supreme Court of the Russian Federation did not define concretely what rule of the Convention and its Protocols it referred to. This allows making a conclusion about unclearness of this decision for people and legal persons to whom it was addressed.

Despite the fact that this decision is poorly justified with relation to the article 198 of the Code of Civil Procedure of the Russian Federation as far as the arguments of the Court were based on the ECtHR position but the rule of the Convention which is interpreted by the case which the Court

referred to were not indicated, this decision was taken in compliance with the Convention. If the Supreme Court of the Russian Federation had applied the article 1 of the P1-1 along with the case *Ryabyuh against the Russian Federation*, the essence of the decision would have been the same, the claims of the applicant would have been satisfied.

So, in the presented case the poor justification did not influence the conclusions of the Court and did not entail the breach of the Convention.

2.2.5 Single reference to specific the rule of the Convention with the number of the article (in our case – article 1 Protocol 1 of the Convention) in isolation from the judicial practice of the ECtHR where such rule is interpreted

The fifth type of the inappropriate application could be presented by the case *Z. v. the administration of the Pensionary Fund of the Russian Federation in the Ryazan city on money collection*. The decision of the Supreme Court of the Russian Federation from 2 November 2007 N 6-B07-28 satisfied the claims of the applicant who demanded re-calculation of the basic rate of her pension on the ground of her disability acquired as the result of her mission in the Chernobyl catastrophe and collection of money that is underpaid to her for the period when she became disable till the time of the application to Court. The claims of the applicant were satisfied. The reasoning of the Court contained a reference to an article 1 of the Protocol 1 to the Convention in isolation why this article should be applied in this case.

Obviously, the Court's position was based in the *Burdov v. Russia* case considered by the ECtHR. The circumstances of this case are the same as the case described. The absence of the reference to the case-law of the ECtHR did not entail the delivering of unlawful judicial act.

However, this decision entailed misunderstanding of legal participants of the case in question because of the fact already mentioned previously. The point is that the Court in described case extended the article 1 of the Protocol 1 to the legal situation arisen from the legal relationship between the Russian Federation in the person of Finance Ministry but did not explain the reasons of the application of this article. Taking into consideration existing difference between the concept of property rights under the national legislation and under the judicial practice of the ECtHR, it becomes obvious that the participants of the legal proceedings were not able to understand this decision as far as the right to get money does not constitute property right under the national civil legislation and consequently could not be protected under mechanism that is provided for by the Civil Code of the Russian Federation. On the contrary, the right to get money including pension constitutes the property right under the article

1 of the Protocol 1 to the Convention the protection of which could be claimed under this article to the ECtHR.

So, this decision does not create understanding among participants of legal proceedings the mechanism by means of which the Court applied the rule of international law instead of national law taking into consideration that the rule of international law contradicts national law.

2.2.6 Non-application of the Convention by the national courts despite the fact that the parties of the legal proceedings claimed the Convention to be applied

Such situation as non-application of the Convention by the national courts despite the fact that the parties of the legal proceedings claimed the Convention to be applied deserves attention as well. This is not a rare case in the Supreme Court of Arbitration and the Supreme Court of the Russian Federation. There is a difficulty in defining a number of such cases where the participants (plaintiff, defendant or a third person) point at the specific rule of the Convention for substantiation of their positions due to the fact that the courts often in their decision do not indicate the whole positions and arguments of participants of legal proceedings. This is a violation of the requirements that are made by the Code of Civil procedure and the Code of Arbitration Procedure to the court judgment. Despite the fact that the necessity to reflect all claims and arguments of the parties in court judgment is provided for by the mentioned laws, the courts violate this rule. This results in the situation that when reading national court judgment it is impossible to understand what arguments the parties made and what rules of law they claimed to be applied in solving of their disputes. That is why very often references of natural and legal persons on the rule of the Convention and practice of the ECtHR are not reflected in decisions of national courts. The absence of these arguments exempts courts from necessity to reply to the claim of the parties about application of the Convention in the decision and explain why the particular rule of the Convention cannot be applied in the specific case. This way of deliberate omission of some arguments of the parties especially those that are based on the Convention and judicial practice of the ECtHR is very convenient for the courts if the dispute is of political character (for example in cases when dispute touches property interests of big state companies and corporations).

Sometimes the non-application of the rule of the Convention and judicial practice of the ECtHR is expressed in another way. There are some decisions that have been found and analyzed under this research where the parties of proceedings referred to the rules of the Convention, namely article 1 of the Protocol 1 to the Convention, but the courts made a formal reply to this argument and did not give any evaluation to the position about the necessity to apply the Convention.

The most wide-spread wording by means of which courts usually reply to the claim of the parties of the proceeding to apply the rule of the Convention can be exemplified by the following cases:

-Decision of the Supreme Court of the Russian Federation from 2 March 2007 N 4-B07-1 N. versus Main Department of the Pensionary Fund of the Russian Federation in Moscow city on re-calculation of labor pension assigned to plaintiff.

The facts of this case can be presented as follows. The applicant applied to the court with the claims of recalculation of the pension of the ground of her disability. The applicant referred to an article 1 of the Protocol 1 to the Convention having stated that her right to recalculate pension fell within the scope of the mentioned rule and thus should have protection under this article. The Supreme Court of the Russian Federation in its decision about dismissal of the applicant's claims pointed out the following argument about the impossibility of application of the Convention "The legal relationship arisen between a person eligible to get pension on reaching of the special age fixed in law and between the Russian Federation in the person of Pensionary Fund of the Russian Federation are regulated sufficiently by the national legislation of the Russian Federation; that is why there is no necessity to apply in this case the Convention for the Protection of human rights and fundamental freedoms or the judicial acts of the ECtHR".

It is obvious that this wording used by the Supreme Court of the Russian Federation constitutes non-application of the Convention and the judicial practice of the ECtHR. Besides, the Court violated the rules of national legislation already mentioned above, in accordance with which the court when delivering judgment should give evaluation to all of the arguments presented by parties. Moreover, non-application of the article 1 of the Protocol 1 of the Convention by the Court in this case possibly resulted in the dismissal of applicant's claims. Perhaps, if the Court had applied the mentioned article in accordance with the interpretation given by the ECtHR in the case "Ryabyh v. Russia" with similar circumstances, the decision would have been the opposite. This allows making a conclusion that this decision is unlawful and violated not only the property right of the applicant but the right to a fair trial guaranteed by the article 6 of the Convention.

Even assuming the there were no grounds for satisfaction of applicant claims and the decision of the Court is correct in essence but still it is incorrect from the point of validity of the court judgment. The judgment as it was mentioned should be understandable and clear for people to whom it is addressed. In the examined case the Supreme Court of the Russian Federation having refused to apply the article 1 of the Protocol 1 of the Convention, should have indicated the reasons for it. The Court should have pointed out the rules of national legislation that were subject to application in this particular case and should have compared those rules with an article 1 of the Protocol 1 with regard to the right to pension and then made conclusion that these rules did not contradict each other and that is why it was not necessary to apply the rules of international law.

Taking into consideration that fact the applicant was elderly woman without any experience in understanding the mechanism of protection of her rights by means of the Convention and judicial practice of the ECtHR and the other fact that applicant because of mentioned features considered the ECtHR as incontestable authority for national courts, it becomes clear that this woman would not bring her case to the ECtHR, due to the fact that the simple mentioning of the Convention instilled into her a false feeling of lawfulness of the examined decision of the Supreme Court.

The examined case is a good example of how the judges by means of problematic application or non-application of the Convention and by means of still existing people's trust to the judiciary and educational functions of courts mislead people and prevent them from further protection of their rights in the ECtHR. Such decisions give rise misunderstanding amongst population concerning questions of interaction of the rules of national and international law.

The next example of the wording that national courts often use for substantiating the non-application of the Convention and judicial practice of the ECtHR despite the fact that the parties of the legal proceeding claimed to apply these international instruments is contained in the case Decision of the Supreme Court of Arbitration of the Russian Federation delivered on 28 April 2008 №6439/05, at the suit of the entrepreneur Fursov v. Administration of the Sal'sk city on dept collection. The circumstances of the case can be presented as follows. Mr. Fursov M.V. applied to the Arbitration Court of the Rostov Oblast with the claim on dept collection. His claims were dismissed by the Arbitration Court of the first instance and by the Arbitration Court of the Cassation instance. The entrepreneur applied to the Supreme Arbitration Court of the Russian Federation with the application about supervisory revision of decisions of lower courts. For substantiation of his claims he referred to the judgment of the European Court on Human rights from 01.12.2005 on case №55885/00 (*Skachedubova v. Russia*). The Supreme Court of Arbitration did not even consider the application on supervisory revision of decisions of lower courts in essence and returned it to the applicant. The Supreme Court of Arbitration pointed out the following: "In accordance with article 75 of the Code of Arbitration Procedure, the written evidence delivered in foreign language before presenting them in the Arbitration proceedings should be translated. The compliance of the original version of the document with the translated into another language version should be notary certified in a proper way. The notary certified translation of judgment of the European Court on human rights to which Mr. Fursov referred to in support of his arguments has not been attached to the application on supervisory revision of the decisions of arbitration courts of lower instances. Consequently, a violation of the article 75 of the Code of Arbitration Procedure took place in this case; that is why the application of Mr. Fursov cannot be satisfied". Besides, the Supreme Court of Arbitration mentioned that the case of the ECtHR which the applicant referred to could not be used as the argument as far as the judicial precedent was never considered to be a source of law in the Russian judicial and legal systems.

The Arbitration Court in the presented case violated the rules of national legislation, namely the article 296 of the Code of Arbitration procedure that clearly provides for the grounds in the presence of which the Arbitration Court of the Russian Federation has a right to return the application to the applicant only. Such grounds are when the application has been signed by unauthorized person or when the application has been brought to the court with the violation of rules of the jurisdiction (to the court of wrong instance). The reasoning of the Court is not provided by the arbitration procedural law of the Russian Federation as a ground for returning the applicant's claim. The article 75 which the Court cited in support of its position about returning of the application is unrelated to this case as far as the judgment of the ECtHR to which the applicant referred to cannot be considered as written evidence. The legal position stated in the judgment of the ECtHR should have been analyzed by The Supreme Arbitration Court not as written evidence but as the legal position which should have been taken into account by the Court taking into consideration the fact the jurisdiction of the ECtHR is obligatory for the Russian Federation as the State Party to the Convention.

Taking into consideration the fact that the decisions of the ECtHR are published under the official web-site and the fact that those decisions where the Russian Federation has been a party are always translated into Russian language by the Representative of the Russian Federation in the ECtHR⁸⁹ and sent to the Supreme Court of the Russian Federation and to the Supreme Court of Arbitration and these courts usually bring those decisions to the notice of lower courts, it is obvious that the reasoning used by the Supreme Court of Arbitration in described case and based on this reasoning a dismissal of applicant's claim are ill-founded unjustified, violates the national legislation and the right of the applicant to a fair trial.

With regard to the violation of article 1 of the P1-1, it is necessary to note that if the Court had applied this article and the case of the ECtHR which the applicant claimed to be applied (*Scachedubova v. the Russian Federation*), the claims of the applicant would have been satisfied due to the fact that Mr. Fursov claimed to collect from the administration of the Sal'sk City the compensation for long non-enforcement of the previously taken judicial act (on collection from the administration of money that were unnecessarily paid by the applicant on account of rent for using of the non-residential premise). The ECtHR in the case *Scachedubova v. Russian* established that the municipal bodies were responsible for enforcement of the court's decision within the time defined by the national legislation. In the described case the ECtHR awarded to the applicant the just satisfaction for long-term non-enforcement of the court's decision. The circumstances of the Fursov case are the same, that entails the right of Mr. Fursov of being

⁸⁹ Edict of the President of the Russian Federation "On commissioner of the Russian Federation at the European Court on Human Rights – deputy of the Minister of justice of the Russian Federation" from 29.03.1998 №130 (Ukaz presidenta Rossiyskoy Federatsii "Ob upolnomochennom pri Evropeyskom Sude po pravam cheloveka – zamestitele ministra yustitsii Rossiyskoy Federatsii") published in the Russian Newspaper (Rosyaskya Gazeta) №68 8.04.1998

granted the compensation. Thus, the Court violated not only above-mentioned rules of national law, but the article 1 of the P1-1.

The next example of non-application of the Convention and the judicial practice of the ECtHR is the decision of the Supreme Court of the Russian Federation on the case Limited Liability Company “Vitaka” v. Government of the Russian Federation on vitiation of the Regulation of the Russian Government “On the Government inspectorate on trade, quality of goods and rights of consumers” from 18 September 2001 № ГКПИ 2001-1117. In this case the applicant, being a limited liability company which was created for exercising an entrepreneur activity, applied to the Supreme Court of the Russian Federation with the claim to declare invalid the above-mentioned regulation of the Government of the Russian Federation. In support of its claims the applicant referred to the article 1 of the Protocol 1 to the Convention and pointed out that this regulation did not comply with the Constitution of the Russian Federation.

The debatable regulation stipulated for that the right of the inspectorate to expropriate goods in case of their incompliance with the standards of quality of goods. The applicant decided that such a right of an inspectorate violated the property rights of the company and constituted a violation of the article 1 of the P1-1.

The claims of the applicant were dismissed. The court evaluated the debatable regulation from the point of compliance with the Constitution of the Russian Federation but did not state anything about the arguments of the applicant about necessity to apply in the described case the article 1 of the Protocol 1 to the Convention. So, the Court simply ignored this argument of the applicant.

Despite the fact that the Court violated article 170 of the Code of Arbitration Procedure and ignored the applicants’ main argument, this decision was delivered in compliance with the rules of the Convention, as far as the article 1 of the P1-1 does not provide for limitation of the authorities of government bodies when it comes to the control of the quality of goods.

The last case which is interesting from the point of view of the forms of Courts’ evasion from application of the Convention is the case considered by the Supreme Court of Arbitration on the claims of Malisheva N., Medvedeva Y. v. “YukolaNef” and “Bogorodskneft” on vitiation of the decision of Stockholders meeting (Decision of the Supreme Court of Arbitration from 21 May 2007 3708/07).

The Supreme Arbitration Court considered the decisions of lower courts on dismissal of applicant’s claims in supervisory order. The applicants in support of their position referred to the article 1 of the Protocol 1 of the Convention, having pointed out that expulsion of them from participating in the stockholders meeting and refusal to pay them the price of their shares constituted a violation of the indicated article. The Supreme Arbitration Court simply pointed out without any explanation or argument that the decisions, delivered by the lower courts complied with the law and did not constitute the violations of national legislation or of international law.

The circumstances of the case can be summarized as follows. The limited liability companies “YukolaNeft” and “Bogorodskneft” were the companies where the Russian Federation had overwhelming majority of shares. Other shareholders were legal and natural persons including the applicants. On the stakeholders meeting the decision on expulsion of the applicants from the list of stakeholders of the companies was taken. No compensation of the price of shares was provided for. The circumstances of the case are quite similar to the case *Ruiz-Mateos v. Spain*. If the Court had referred to this case, it can be assumed that the applicant’s claims would have been satisfied. So, it can be concluded that the article 1 of the P1-1 was violated in the described case.

Furthermore, the Court made this conclusion without examination of the circumstances of the case and going into details and without establishing if the rules of international law could be applied in the described situation. The author underlines that if the Court does not see any ground for application of the rule of international law, it should describe the reasons. It should describe how the debatable situation is regulated by the national legislation and define how national legislation correlates with the rules of international law which regulate legal analogous relationships. Otherwise, the decision could not be considered as the judicial act delivered in accordance with law and could not be understandable and clear for natural or legal persons to whom it is addressed.

2.2.7 Concluding remarks

Taking into account the statistical information given in the introduction that more than half of all civil cases considered by the Supreme Court of Arbitration and the Supreme Court of the Russian Federation annually constitute property rights’ cases and the fact that from all examined cases (500) considered by the Supreme Court of the Russian Federation where the Convention and/or the judicial practice of the ECtHR was/were mentioned for the period from 2001 to 2009 only twelve are property rights cases (the same situation concerning the Supreme Court of Arbitration is six property rights cases where the Convention or/and the judicial practice of the ECtHR was/were mentioned), it becomes clear that the cases of implementation of the article 1 of the Protocol 1 to the Convention and the corresponding legal positions of interpretation of mentioned provision by the European Court are rare. Twelve cases for nine years considered by the Supreme Court of the Russian Federation and six cases considered by the Supreme Court of Arbitration (taking into account the fact that annually the Supreme Court of the Russian Federation as the supervisory instance considers more than 70 decisions of lower courts delivered on civil cases more than half of which constitute property rights cases and that fact that the same figure for the Supreme Court of Arbitration is 80 and all of them are property right cases) where the article 1 of the P1-1 and/or corresponding judicial acts of the ECtHR was/were mentioned cannot be considered sufficient. The given statistics leads to the conclusion that the judicial practice of the Russian

Supreme Court and the Supreme Court of Arbitration resembles an attempt to demonstrate to the Council of Europe that the Convention is being formally applied rather than actually implemented.

Furthermore, problematic implementation of the Convention by the Supreme Court of Arbitration in three cases entailed a delivering of the judicial act which contradicted article 1 of the P1-1 and violated property rights of applicants.

A number of unlawful judgments delivered as the result of problematic application of the Convention by the Supreme Court of Arbitration was two from six examined cases.

Summing up the analysis of cases it becomes clear that the national courts of the Russian Federation that head two systems of federal courts of the country formally apply the Convention instead of real implementation. The highest courts of the country, having issued special documents (above-mentioned resolution of the Supreme Court on application of generally recognized rules and principles of international law and the informational letter of the Supreme Court of Arbitration on the main provisions applied by the ECtHR on the property rights cases) that direct all inferior courts to apply the Convention by taking into account ECtHR case law, do not follow these documents themselves in their practice.

The Courts simply make concise and inexact reference to the Convention or the judicial practice of the ECtHR. The manner in which the Convention or the judicial practice of the European Court is implemented is brief and imprecise. Judges either cite the number of the article without referring to the case-law of the ECtHR or refer to the case-law of the ECtHR without any application of the rule of the Convention. There are situations when the ECtHR or the Convention is formally mentioned in the national courts' judicial acts with a view to give participants of legal proceedings a false feeling that the rules of international law are observed in national courts. In some cases courts mention the Convention in isolation of the concrete article and then refer to the judicial practice of the ECtHR.

The non-application of the article 1 of the Convention and judicial practice of the ECtHR where this rule is interpreted despite the fact that the parties of the legal proceeding claimed the Convention to be applied is a widespread situation on Russian Courts as well. The Court merely ignores the reference and arguments of the parties to the rules of international law, refuses giving any evaluation to these arguments in judicial acts and violates in that way natural and legal persons' right to a fair trial.

It is necessary to note that the judicial practice is an instrument by means of which natural and legal persons can understand the judicial mechanism of protection of their rights. The absence of appropriate application of the Convention and judicial practice of the ECtHR in the decisions of national courts distort the main point of the legal mechanism of judicial protection of legal and natural persons' rights in the ECtHR. Selective application of the rules of the Convention and judicial acts of the ECtHR by national courts create legal uncertainty in judicial practice of the Russian Courts and a feeling of illegality, impossibility of legal protection and lack of prospects with regard to application to the ECtHR for the purpose of protection of natural and legal persons' rights.

The reasons of difficulties connected with implementation of ECtHR judgments in practice of the two main courts of the Russian State will be considered as follows.

2.3 Reasons for problems of poor justifications of decisions of the Russian Courts with regard to the implementation of the Convention and the judicial acts of the ECtHR

There are several problems with the application of the ECtHR case-law in Russia.

1) Dependency of the national courts on the state and its entities. Because the viability of the judiciary depends on the willingness of the executive and the legislature to adhere to the courts' judgments, courts are unwilling to issue judgments that would be condemned by state officials.⁹⁰ As a result, there are a relatively small number of domestic court judgments where the Convention or the ECtHR function as the driving force in the opinion of the court.⁹¹ Furthermore, the absence of a significant number of cases addressing the Convention and the ECtHR provides little insight into the domestic courts' reluctance to give greater weight to the Convention. This reason can be exemplified by the case Limited liability company "Ecktan" versus the Governor of Primorskiy region where the Court deliberately delivered an unlawful judicial act because the interests of public authority were touched in this case. It is interesting to note that in the case with similar circumstances where the Convention or the judicial acts of the ECtHR were not applied and the parties of the legal proceeding did not claim the Convention to be applied (the case considered by the Supreme Court of Arbitration in 2005; Limited Liability Company "Stroysvyazkompleks" v. the administration of the Vladivostok city on expropriation of the land area belonged to the applicant for the public needs (the building of the cinema) the Supreme Court of Arbitration decided that the actions of the defendant contradicted the civil law of the Russian Federation and invalidated the municipal act that provided for the expropriation of the land area. Such discrepancies in the judicial practice can be explained only by the fact of different political status of defendants.

⁹⁰ European Commission for the Efficiency of Justice (CEPEJ), Examination of Problems Related to the Execution of Decisions by National Civil Courts Against the State and its Entities in the Russian Federation, Dec. 9, 2005, available at [https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ\(2005\)8&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=clcb6](https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ(2005)8&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=clcb6) [hereinafter CEPEJ Russia Report]

⁹¹ Anton L. Burkov, *Implementation of the Convention for the Protection of Human Rights and Fundamental Freedoms in Russian Courts*, 1 Russ. L.: THEORY AND PRACTICE 68, 70 (2006).

2) Some of difficulties in the application of the case-law arise due to substantial differences concept of property rights under Russian legal system and the concept of property rights under the ECtHR case-law. As practice shows, Russian judges often prefer to use the concept they are more familiar with.

It is necessary to note that Russian legislation understands property as *right in rem*⁹². In Russian civil law only money, securities and other physical things can be considered as objects of property rights. Immaterial goods are not recognized as objects of property rights. At the same time, constitutional law understands property broader.⁹³ In several Resolutions the Constitutional Court stated that property rights cover not only the right of ownership but also limited property rights. 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 recognized as property rights. The Constitutional Court ruled that claims of creditors amounted to property and stated that this corresponded with the opinion of the ECtHR.⁹⁴ Intellectual property rights are regulated by a separate part of the Civil Code of the Russian Federation.⁹⁵ Company shares were also recognized as property.⁹⁶ In general, Russian legislation adhered to the traditional concept of property, which is different to the one used by the ECtHR. From the concept of property rights developed by the ECtHR, 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.

These differences have substantial meaning. For example, if the Supreme Court of the Russian Federation in the examined case N. versus Main Department of the Pensionary Fund of the Russian Federation in Moscow city on re-calculation of labor pension assigned to the applicant had used the concept of property rights under the article 1 of the P1-1 instead of concept of property right developed under the national legislation, the applicants claims would have been satisfied as far as the ECtHR in the Ryabih v. Russia case with similar circumstances established that pension rights fell within the protection of the article 1 of the P1-1.

The same situation is with the abovementioned case considered by the Supreme Court of Arbitration Fursov v. Administration of the Sal'sk city on dept collection when non-application of the mechanism of protection of property rights provided for by the article 1 of the P1-1 entailed the violation of the property rights of the applicant.

3) Russian judges evaluate the judicial practice of the ECtHR as the judicial precedent which is not considered as a formal source of law in Russia. Russian judges decide cases on the ground of certain legal provisions, contained in laws and other acts. Another big problem with the application

⁹² The article 128 of the Civil Code of the Russian Federation

⁹³ See for example, Resolution of the Constitutional Court of the RF, 13 December 2001, N 16-II.

⁹⁴ Resolution of the Constitutional Court of the RF, 16 May 2000, N8-II.

⁹⁵ The Civil Code of the RF, 18 December 2006, N 230 – Ф3, Part IV, entered into force 1 January 2008.

⁹⁶ Resolution of the Constitutional Court of the RF, 10 April 2003, N5-II.

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.

Once again it is necessary to refer to the case *Fursov v. Administration of Sal'sk city* where the Court pointed out that the case-law of the ECtHR could not be applied as far as judicial precedent was never considered to be an officially recognized source of law.

4) 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.

5) Another big problem is that the population of the Russian Federation 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 person 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.

5) Still existing judiciary's attitude towards international Law and national law as two separate systems, in other words, existing Soviet perception of national law as law protected from any direct penetration of international law;

6) Absence of sufficient knowledge in understanding of how the Convention should be interpreted and used during the legal proceedings. It is important to note that in the Russian Federation there are serious shortcomings in the recruitment, enumeration and training of judges. For example, the Russian judiciary has lost many experienced judges who left the bench for private practice. The competence of judges to implement the Constitution and new laws is also affected by the fact that the values of many Russian judges were formed during the Soviet era. While both "ordinary" and arbitration judges receive some training in the legal principles of a market-oriented and "open" system, experience indicates that this training is far from adequate. Because judges lack experience in applying international law, special training is required with respect to direct application of international treaty and customary law;⁹⁷

⁹⁷ Introductory memorandum prepared by the Committee on legal affairs and human rights of Parliament Assembly of Council of Europe on Implementation of judgments of the ECtHR from 28 May 2008 accessed at: http://assembly.coe.int/CommitteeDocs/2009/ejdoc36_2009.pdf

3 Remedies and Recommendations

3.1 Introductory remarks

The author believes that effective protection of human rights and fundamental freedoms of Russian citizens which is provided for by the Convention could be possible only under the condition of change in Russian law, judicial practice and existing law enforcement policy. The present chapter provides for remedies and recommendations for improving the situation.

Analysis of Russia's recent legal history as well as legal developments in the 1990s demonstrates willingness, at least in words if not in actions, on the part of Russian authorities, especially in the judicial branch, to execute the judgments of the ECtHR. Russia's Constitutional Court and Supreme Court decrees directing lower courts to "take into account" ECtHR practice are certainly a sign that international norms are slowly finding their way into Russia's legal system.⁹⁸ Notably, both the executive and the legislative branches have taken specific action in recognition of certain ECtHR cases.⁹⁹ As a general matter, however, "no measures are taken to bring the Russian judicial practice in accordance with the ECtHR judgments".¹⁰⁰ The author believes that the main reason for this unresponsiveness to the ECtHR's judgments stems from the historical deficiencies in the position of the judiciary in Russia's legal system and Russia's totalitarian past, which result in judicial unwillingness to support any norms not actively supported by state officials. More importantly, the practical consequence of a traditional absence of the rule of law and the imposition of the will of the political elite on judicial determinations is that Russia's judiciary tends to defer to domestic law, rather than international legal norms, in its decision-making. Furthermore, because the Court has no practical means of enforcing its own judgments, there is no pressure on the Russian judiciary to incorporate the Court's precedent. Accordingly, I propose that the most appropriate solutions to this problem would have to involve two levels of reforms. First, on a domestic level, the legislature must explicitly direct the courts to base relevant judgments on the norms of the Convention and ECtHR case law.

Despite the fact that part 4 of article 15 of the Constitution of the Russian Federation stipulates that the international law constitute the integral part of the legal system of the Russian Federation, it is necessary to

⁹⁸ See Burkov, *supra* note 90.

⁹⁹ See, e.g., Demos Center, "European Court of Human Rights (ECtHR) Judgments Implementation in Russia: A Need to Create Effective Mechanisms of Execution," available at <http://www.demos-center.ru/projects/6B3771E/6B377BD/9C8ED85/1190380959> [hereinafter Demos Briefing Paper]; Shadow Report, *supra* note 126.

¹⁰⁰ *Ibid*

note that in the Russian Federation the Constitution is more of declarative character than the legal act really provided by the legal force.

The historically inferior position of the judiciary suggests that the only effective means of compelling courts to act in contravention of the executive's preference is by ordering them to do so explicitly. Second, on international stage, the ECtHR and the Council of Europe have to take steps to reframe the position of the Court Russia, to create incentives for Russian courts to give credence to international law.

3.2 Legislative Action to Strengthen Russian Judiciary

The judiciary's reluctance to implement the rules of the Convention norms, set forth in ECtHR decisions, stems from the traditionally weak status of the judiciary within the framework of the Russian government and a traditional lack of respect, by the state and the citizenry, for the Constitution and judicial authority.¹⁰¹

The author thinks that the only way to overcome this general disregard and distrust of the judiciary is to permit judges the full exercise of their authority as granted by the Constitution, especially where they are supposed to be bound by norms of international legal order. Thus, in order to address this judicial reluctance, the main objective of domestic reforms should be to improve the status of the judiciary relative to the executive and the legislative branches by providing specific means for efficient enforcement of the courts' judgments.

Despite the fact that Article 10 of the 1993 Constitution 148 and the 1996 Constitutional Law on the Judicial System 149 established strong legal guarantees for judicial independence, these proclamations have not been put into practice. Although constitutional guarantees and numerous attempts at reform of the judicial system,¹⁰² operation of the judicial system continues to depend on the will of state officials. Excessive bureaucratization of the appointment process, insufficient funding and¹⁰³ a failure to provide for an effective mechanism for execution of domestic court judgments against state officials all impede realization of judicial independence. Judges understand that their careers depend on the favorable opinion of the officials in the

¹⁰¹ PETER H. SOLOMON & TODD S. FOGLESONG, COURT AND TRANSITION IN RUSSIA: THE CHALLENGE OF JUDICIAL REFORM 8 (2000). The Council of Europe recognized that popular distrust inherited from the Soviet era undercuts efforts to instill the judiciary with a sense of political legitimacy, stating that Russia should concentrate on development of "a broad awareness of and respect for, the rule of law in all its aspects: political, legal and administrative - and at all levels: national, regional and local."

¹⁰² See, e.g., DANILENKO & BURNHAM, *supra* note 39, 1991 Concept of Judicial Reform; 1996 Constitutional Law, *supra* note 54; Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 1998, No. 7, available at <http://www.cdep.ru/uploaded-files/english-version/Federal%20law%20%D0%A4%D0%97-7.doc>. See generally PETER H. SOLOMON, JR., REFORMING JUSTICE IN RUSSIA, 1864-1996: POWER, CULTURE, AND THE LIMITS OF LEGAL ORDER (1997).

¹⁰³ See Demos Briefing Paper, *supra* note 98

legislative and the executive branches, resulting in undue influence by the state authorities on judicial decision-making. Although both the Constitutional Court and the Supreme Court repeatedly raise this issue in their opinions and reform proposals,¹⁰⁴ neither court has succeeded in compelling authorities in the executive and legislative branches to adopt these proposals. As referenced above, where politically sensitive issues were of concern, government resisted any attempts at effective reform and dismissed harsh criticisms in ECtHR decisions as unwarranted hostility.

The author thinks, that for improving of the effectiveness of the judicial system in Russia, the legislature should take advantage of its historically dominant position relative to the judiciary. The State Duma should make it clear by express statutory mandate to the executive and the judiciary that judges' rulings invoking international law require compliance by state officials. Furthermore, any such statutory mandate must be accompanied by a system of sanctions against state officials for failure to implement the judgments of courts. With respect to implementation of international law pursuant to the Constitution, the legislature must clearly state the meaning of the language of the accession act of 1998 and compel courts to base their judgments on the principles of the Convention and ECtHR precedent.¹⁰⁵ The Constitutional Court interpreted Russia's accession agreement very narrowly because of its recognition that any broad interpretation of Russia's obligations is likely to be disregarded by the authorities. It is incumbent on the legislature to demonstrate that Russia is genuinely committed to respecting its international obligations. It can do so by clarifying the language of the accession act. Courts are more likely to incorporate ECtHR precedent into their decision-making when they know that the legislature will accord international law decisions the same level of respect as it does domestic law judgments. It should be noted that the "express legislative mandate" proposal should be effective in compelling the courts to start implementing the substantive judgments of the ECtHR into their opinions in the shortest time practicable. However, in the long run, successful integration of Convention principles into Russia's political order will require a far more expansive list of social and legal reforms. Furthermore, Russia's judiciary must be freed of its historical distrust of international law and hostility toward the West. Any chance for that outcome requires affirmative actions by the Council of Europe and the ECtHR.¹⁰⁶

Furthermore, it is extremely important to stipulate in the Code of Civil Procedure of the Russian Federation as well as in the Code of Arbitration Procedure of the Russian Federation that courts should deliver judgments on the ground of international legislation, namely the Convention for the Protection of Human Rights and Fundamental Freedoms and the

¹⁰⁴ On February 6, 2007, for instance, the Supreme Court introduced a bill to the State Duma, proposing amendments to the Civil Procedural Code to address the problem of violations of the legal certainty principle. *See* Resolution of the Plenum of the Supreme Court of the Russian Federation No. 4 of 6 February 2007, "On introduction to the State Duma of the Federal Assembly of the Russian Federation of the project of the federal law 'On Changes and addendums to the Civil Procedure Code of the Russian Federation.'"

¹⁰⁵ Yulia Dernovsky *Overcoming of Soviet legacy*, *Cardozo J. Int'l & Comp. L.* 471 2009

¹⁰⁶ *Ibid*

judicial practice of the ECtHR where the rules of the Convention are interpreted.

Both these two Codes should be supplemented with the provision stipulating that the decision of the ECtHR where the breach of the Convention has been established should be the ground for the reconsideration of the case (the participants of which applied to the ECtHR) in national courts on the newly discovered circumstances.

The Presidential Edict “On the Representative of the Russian Federation in the ECtHR” should be amended. The apparatus of this person should be widened; the professional translators should be included in it for making official translation into Russian language of all of the decisions of the ECtHR. The translated decisions should be directed to the Judicial Department of the Russian Federation¹⁰⁷ which should be responsible for informing of national courts about decisions of the ECtHR. The official bulletin with officially translated decisions of the ECtHR should be issued in the Russian Federation annually. Besides, it is extremely important to make round-tables, seminars and lectures for judges of all tiers of the judicial system of the Russian Federation for giving them necessary information about the rules of application of the Convention, understanding of the position of the Convention within the system of national legislation, giving them guiding explanations on the question of application of the ECtHR judicial practice.

The Supreme Court of the Russian Federation and the Supreme Court of Arbitration of the Russian Federation should issue separate resolutions for lower courts about the necessity to apply the Convention and the judicial practice of the ECtHR and give explanations of how this international instrument should be applied.

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.

The concept of property should be changed in all branches of law, first of all, in the civil law. The broad definition of property as developed by the ECtHR will ensure protection for all property rights.

After more than a decade of Russian membership in the Council of Europe, the passive expectation of the Council that Russia's mere accession to the Council should significantly improve its human rights record is far from realized. When Russia applied to become a member of the Council of Europe in May 1992, its primary objectives were to give itself a sense of global

¹⁰⁷ Federal law from the 8 February 1998 “On the judicial department of the Russian Federation (Federal’nyy zakon “O sudebnom departamente Rossiyskoy Federatsii) published in the Russian Newspaper from 25 February 1998.

In accordance with the article 1 of this law the judicial department is a federal body which is responsible for organization of the activity of national courts. The judicial department has its branches in the subjects of the Russian Federation.

political legitimacy and to create for itself a European identity.¹⁰⁸ Less abstract and more selfish reasons for seeking admission were to strengthen Russia's economic and trade ties with Europe, ensure institutional connection with the former Soviet satellites, and facilitate closer ties with the European Union.¹⁰⁹

The rapidly growing ECtHR docket of complaints against Russia and Russia's failure to remedy its human rights violations indicate that the Council's passive hopes are simply not enough to effectuate any substantive change in Russia's policies. The principal challenge that the ECtHR faces in Russia is how to persuade judges at all levels of Russia's domestic judicial system to incorporate ECtHR jurisprudence in their decisions. As demonstrated by Russia's persistent reluctance to redress its human rights violations in Chechnya' and its increasing resentment toward the Court,¹¹⁰ the growing number of ECtHR rulings against Russia have not had the desired effect. Although, in theory, Russian authorities are undertaking certain general measures to address several critical issues addressed by the ECtHR, most of those measures have not resulted in actual resolution of the problem of implementing the ECtHR's substantive rulings. Even though the mechanism for implementation has been created through legislative reform, judicial decisions penalizing state officials for violation of those reforms frequently remain unenforced.¹¹¹

Russia's failure to effectively implement ECtHR judgments necessarily implies the need for a more forceful intervention by the Council of Europe and/or the ECtHR. The more recent attempts by the Council to improve the effectiveness of the ECtHR judgments in contracting states received negative treatment from Russian authorities.¹¹² As discussed above, the incorporation of the Convention into Russia's domestic law and the subsequent obligation to execute ECtHR judgments had little practical effect on Russia's adherence to the Convention norms. While attempts at domestic reform are certainly a step in the right direction, systematic violations of the Convention by the state authorities combined with the absence of an effective mechanism for enforcement of domestic judicial remedies require a more assertive interventionist role for the ECtHR.¹¹³ To overcome Russia's judiciary's reluctance to enforce the ECtHR's decisions, the Council must adopt two sets of measures to forge stronger ties between Russia's domestic judiciary and the ECtHR. First, the Council should develop reforms to expand ECtHR power to exact greater control over the admissibility of applications for ECtHR review. Second, the Council should defer to the ECtHR to develop a method of ensuring Contracting States'

¹⁰⁸ Yelena Biberman, *A Match Made in Heaven of a Marriage of Convenience?*, RUSSIA PROFILE, Jan. 30, 2008, available at <http://www.russiaprofile.org/page.php?pageid=politics&articleid=a1201692981>.

¹⁰⁹ Ibid.

¹¹⁰ Uwe Klausmann, *Moscow Irked by Tide of Lawsuits: Russians Seeking Justice in European Court*, SPIEGEL ONLINE INT'L, July 30, 2007, available at <http://www.spiegel.de/international/europe/0,1518,497462,00.html>.

¹¹¹ Supra note 104

¹¹² Leach, *Strasbourg Oversight*, supra note 102, at 651. As of March 17, 2008, Russia was the only member state to refuse to ratify the protocol. Protocol No. 14 Signatory Chart, supra note 172.

¹¹³ Supra note 104

compliance with its judgments. By linking the ECtHR to the domestic courts at the initial application review process, the Council can ensure that domestic courts are cognizant of the potential international embarrassment that they will suffer under the close scrutiny of the ECtHR during admissibility reviews. Further, enabling the ECtHR to monitor compliance and condition its judgments on such compliance permits the ECtHR to exact greater influence on the Contracting States' legislative process (without aggrandizing it), which is particularly important in Russia's case, where the legislature's compliance is likely to result in subsequent compliance by Russia's courts.¹¹⁴

3.3 The Council Should Expand the ECtHR's Role in Applications Admissibility Review

The most effective approach to compel Russia's courts to modify their jurisprudence is for the ECtHR to be permitted to interpret its powers in such a manner, within reasonable boundaries, as to send clear signals to the domestic courts that failure to adhere to the Convention will not be tolerated. More specifically, the key area of ECtHR activity that the Council should modify is the ECtHR's role in determination of which cases are admissible for review. Currently, determination of admissibility, a cumbersome multi-step process that takes many months to resolve, primarily turns on the issue of whether the applicant had exhausted all domestic remedies prior to filing an application with the court.

Under this system, the ECtHR is required to interpret domestic laws of the Contracting State party to the claim, rather than the Convention. This reliance by the ECtHR on domestic national law of the Contracting States in the screening process diminishes ECtHR credibility in the eyes of the governments of those states and provides for additional objections to the ECtHR rulings. In the new admissibility criteria introduced in Protocol No. 14, the Council made the first significant step in giving the ECtHR a means for exercising indirect control over the national courts.¹¹⁵ Under Article 12 of Protocol No. 14, the ECtHR may reject an application as inadmissible where the claimant "has not suffered a significant disadvantage, *unless* respect for human rights as defined in the Convention and the Protocols requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal."¹¹⁶ The admissibility rule announced in Protocol No. 14 provides a guiding standard, i.e., a showing of "significant disadvantage," for screening applications, which the ECtHR can use to

¹¹⁴ Supra note 104

¹¹⁵ Protocol No. 14 Explanatory Report

¹¹⁶ Ibid.art.12

exercise an indirect power to review domestic court decisions. For instance, in a case where the ECtHR has developed prior jurisprudence concerning an issue, but where there is no evidence of substantial harm, the ECtHR should consider the case as inadmissible *unless* the record indicates that the domestic tribunal that reviewed the case did not take into account ECtHR precedent. In those cases, the ECtHR could legitimately ground its determination of admissibility on the theory that the application "has not been duly considered by a domestic tribunal."¹¹⁷ This interpretation of the words of the new admissibility rule would incentivize Russia's domestic court judges to become more rigorous in their application of the Convention and the ECtHR's case law.¹¹⁸ Grounding the admissibility determination on the language of an international treaty rather than on the ECtHR's interpretation of the applicable domestic law gives greater legitimacy to the ECtHR's determinations in the eyes of the domestic courts. Instead of interpreting domestic national laws to determine whether exhaustion requirements were satisfied, the ECtHR would simply be interpreting the meaning of the prescribed admissibility factors within the meaning of the Convention. Because the role of interpreting the Convention is accorded to the ECtHR, domestic courts are likely to show more deference and less resistance to ECtHR determinations on this issue.¹¹⁹ Furthermore, some commentators argue that the capacity of the ECtHR to admit cases where the domestic tribunals did not properly review them would increase the chances for embarrassing reversal of the Russian domestic courts' decisions by the ECtHR. The potential for reversal, usually highly publicized by the media anytime Russia is the state party under scrutiny, would likely boost domestic courts' willingness to adhere more closely to ECtHR case law.¹²⁰ Therefore, under this theory, where the ECtHR can consistently exercise an indirect check on domestic courts' Convention jurisprudence, Russia's "national courts [will be] more ready to internalize the duty to guard fundamental rights [under the Convention]."¹²¹

To prevent international embarrassment, both the national courts and the political branches feel that it is better to protect rights 'at home,' as it were. However, the recent growing resentment in Moscow of ECtHR judgments against Russia suggests that this theory does not provide a correct assessment of Russia's position. The more realistic view of Russia's response to unfavorable decisions is that, on highly sensitive matters, such as national security, i.e., the Chechnya conflict, Russia will angrily resist any attempt at external pressure.¹²² As more Chechen cases are brought before the ECtHR, Russia's government has become less cooperative with the ECtHR's demands for disclosure of domestic case files, and evidence of intimidation of civilians seeking redress has come to light. Russia is aware that its position in the Council of Europe is firmly intact, despite the short-lived

¹¹⁷ Supra note 104

¹¹⁸ Supra note 104

¹¹⁹ Ibid

¹²⁰ Ibid

¹²¹ Ibid

¹²² Ibid

suspension of its voting privileges and international awareness of Russia's continued violations of the rights under the Convention. Therefore, it is unlikely that either the government or the judiciary would consider it a particular embarrassment for domestic courts' judgments to be overturned.¹²³

3.4 The Council Should Defer to the ECtHR to Adopt Measures To Ensure Compliance

Because the domineering position of the legislature vis-à-vis the Russian judiciary significantly impedes the judiciary's enforcement of ECtHR rulings, the second set of measures would encourage compliance from the judiciary by first compelling compliance from the state legislative bodies. Furthermore, because complaints against Russia can be grouped into several major categories addressing substantively similar facts, they could be efficiently addressed in bulk numbers. The ECtHR recognized this potential for a quicker disposition of many cases on its docket, through its adoption of issuing so-called "pilot judgment" procedure. Pursuant to this procedure, which resembles a class action mechanism for international law cases, the ECtHR could review one case out of many with substantially similar facts at issue, identify the violation, and specify the measures the condemned state could take to remedy the systemic defect addressed in the judgment.¹²⁴

As discussed above, Russian courts are reluctant to issue decisions requiring state authorities to comply with the ECtHR's judgments or condemning the government for human rights violations under the Convention, because of the judiciary's awareness that the legislature does not have to comply, nor is it likely to comply. It necessarily follows that in order to overcome such a judicial weakness, it is imperative for the Council to encourage the ECtHR and Russia to utilize the "pilot judgment" procedure in alleviating both the excessively large ECtHR docket of complaints against Russia and Russia's persistent failure to remedy its numerous human rights violations. Application of this mechanism creates significant benefits for both the ECtHR and Russia itself. For the ECtHR, it provides assurance that its recommendations will be complied with and significantly lightens its caseload.¹²⁵ For Russia, however, the implications could be more far-reaching in several respects. First, if the legislature complies with the recommendations of the ECtHR, Russia will have substantially more control in resolving claimants' applications at the domestic level, subject to approval by the court. Second, the number of

¹²³ See generally, *Council of Europe Readmits Russia*, BBC NEWS, Jan. 26, 2001, available at <http://news.bbc.co.uk/1/hi/world/europe/1137382.stm>; Peter Baker, *Europe Council Restores Russia Rights*, WASH. POST., Jan. 26, 2001, at A20.

¹²⁴ Supra note 104

¹²⁵ Ibid

complaints against Russia would significantly diminish, and so would the number of judgments against Russia.¹²⁶

If pilot judgments are initiated in Russia's cases and the legislature cooperates with these judgments, the courts are likely to recognize that cooperation as a sign that the legislature will also respect Convention norms when applied by the domestic courts.¹²⁷

¹²⁶ Ibid

¹²⁷ Ibid

4 Conclusion

Russia's leadership wants to create an appearance that Russia is making good faith efforts to perform its obligations under the Convention. However, implementation of legislative reforms is futile where the state is not willing to force its officials to abide by those reforms. Russia's poor record at the ECtHR reflects years of isolationist and repressive politics during the tsarist and Soviet periods. This thesis reasoned that the reluctance by Russia's judiciary to effectively implement ECtHR judgments and Convention norms in domestic court judgments is a result of different problems.¹²⁸ To address the problem of implementation, this thesis proposes both internal domestic reforms and external ECtHR reforms, designed to increase the security of the Russian courts that their judgments will be accorded respect by the legislature as well as to increase institutional links between Russian domestic courts and the ECtHR. Proposals brought forth in this thesis depend on Russia's willingness to maintain its objectives of establishing a strong European and democratic identity by aggressively developing the rule of law in Russia. Russia's increasingly authoritarian track record indicates that Russia's aspiration to be a successful democracy on the European front might no longer be the primary objective,¹²⁹ replaced by the desire to attain international recognition as powerful force on the international stage.¹³⁰ Increasingly hostile responses by the Russian authorities to the ECtHR's judgments and pressure from the Council to adhere to the Convention's requirements underscores the urgency for action by the Council and the ECtHR to encourage closer institutional ties between the Council, the ECtHR, and Russia. Furthermore, in light of anti-democratic trends in the Russian political environment, it is imperative that the Council also make efforts to preserve its presence in the Russian legal community. The Council should also recognize that Russia is struggling with its Soviet legacy, where notions of rule of law and rights of individuals had no place until very recently. While this thesis offers short-term legal reforms that Russia and the Council could undertake, in the long run the Council should encourage social reforms, most importantly in education, to overcome social and historical obstacles to Russia's path to true democracy. To garner more acceptances for international legal norms, the Council and the ECtHR could provide educational tools for lawyers and students of law faculties to learn about the Convention, the ECtHR. In providing these tools for the Russian legal community to be actively involved in the legal system of the CoE, the Council can more effectively assure the presence of European human rights norms in Russia. Whether or not Russia completely abandons its desire to become a European democracy, it is clear that neither Europe nor Russia is

¹²⁸ Ibid.

¹²⁹ Yelena Biberman, *A Match Made in Heaven of a Marriage of Convenience?*, RUSSIA PROFILE, Jan. 30, 2008, available at

<http://www.russiaprofile.org/page.php?pageid=politics&articleid=a1201692981>.

¹³⁰ Ibid.

ready to renounce their relationship. For as long as Russia is willing to be a partner, whether hostile or not, the Council of Europe and the ECtHR should maintain efforts to integrate the Russian legal community into Europe's international legal environment. Any plan to the contrary would be democracy's admission of defeat.

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