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‘DICTATORSHIP’ OF STRASBOURG LAW IN RUSSIA: TRANSFORMING RUSSIA TOWARDS THE RULE OF LAW

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INTRODUCTION

Early in the campaign to become Russia's second democratically elected president, still Acting President Vladimir Putin introduced a curious term into the political lexicon – 'the dictatorship of law' (*diktatura zakona*). This, he described is 'the only form of dictatorship to which Russia is oblidged to subordinate itself'.[1] Putin repeatedly used the phrase in his speeches and writings on democracy and law. His use of this pronouncement, however, left unclear in what manner he thought it to be best applied. Note that, Putin did not use law as *pravo*, but law as *zakon*, which means enacted law, statutes and other normative acts. Did the then Russian president intend to stress 'new Russia's' path towards the rule of law, or a more frightening bureaucratized rule *through* law?[2] If applied in Russia, did Putin simultaneously seeking closer ties to Europe, extend this phrase to meet the demands of Russia's membership in the Council of Europe? In other words, was the 'dictatorship of law' intended to empower Strasbourg human rights crusaders – the European Convention on Human Rights[3] and its enforcement mechanism, the European Court of Human Rights too? And if so, is this undertaking that was meant to help to transform Russia towards the rule of law followed or more likely risks to be ignored and is eventually becoming a dead letter?

On 5 November 2008, the President Dmitrii Medvedev addressed to the Federal Assembly of the Russian Federation by emphasizing that a fifteen-year-old Russian 1993 Constitution[4] bolsters international law and therefore helps to strengthen the national mechanism for the application of the European Convention on Human Rights.[5] It is undeniable that the Russian

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[1] Выступление Владимира Путина на расширенном заседании коллегии Министерства юстиции. 31.01.2000. Available at: www.kremlin.ru (as of 09.05.2009).

[2] J. D. Kahn. Russia's 'Dictatorship of Law' and the European Court of Human Rights. Review of Central and East European Law, No. 1, 2004, p 2.

[3] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 with Protocol No. 1, 4, 6, 7, 12 and 13, adopted 4 November 1950. Available at: www.echr.coe.int (as of 10.03.2009).

[4] Конституция Российской Федерации от 12 декабря 1993 г. Available at: www.garant.ru (as of 01.03.2009).

[5] Послание Дмитрия Медведева Федеральному Собранию Российской Федерации. 05.11.2008. Available at: www.kremlin.ru (as of 09.05.2009).

Federation has formally become a *Rechtsstaat*[6] on the international legal model, as alone demonstrated by the Constitution's proclamation of the supremacy of international treaties, like the European Convention on Human Rights over contrary domestic legislation.[7] What impact such constitutional and legal reforms have had on the actual operation of the Russian legal system and judiciary remains to be explored.

By examining the accessibility, applicability and developments of Strasbourg law[8] in Russia I hope to make a contribution to a more specific discussion, namely to how far one can speak today of a Strasbourg law 'dictatorship' in Russia and its influence on Russia's transformation towards the rule of law. The concern here is whether and if, then how is the protection of human rights given by the Convention and its case-law implemented in Russia. What's more, does Russia have the means – and more the will – to act according to Strasbourg guidelines regarding the protection of human rights?

Mounting critical voices about the domestic and foreign policy of the Russian Federation, but also sharp critiques raised by the human rights activists in every new report on human rights record in Russia, would straightaway suggest that the answer to these questions is clear Russian 'nyet'![9] However, the overall image of Russia regarding human rights appears to be unsatisfactory, I incline to doubt it to be that pessimistic.

To that end, in Chapter 1 I will analyze the accessibility of Strasbourg law in Russia. I will trace the way that Russia had started in order to return to the European-based 'civilization'. After exploring the post-Soviet Russia's incentives to undertake reforms towards the rule of law and the impediments it met to the accession to the 'Big European House', I will focus on the status of international norms at the domestic level. In particular, I will identify an existing

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[6] Hereinafter used as a synonym of the state under law entailing a governance of state officials under the rule of law.

[7] M. Maclaren, M. Frei. A 'Common European Home'? The Rule of Law and Contemporary Russia. GLJ, No. 10, 2004. Available at: http://www.germanlawjournal.com/article.php?id=513 (as of 01.03.2009).

[8] Hereinafter used to mark the European Convention on Human Rights and the interpretations of the Convention advanced by the European Court of Human Rights, *i.e.* its case-law.

[9] See for example: Resolution of a Joint Meeting of Moscow Association of Voluntary Organizations of Retail Depositors and Shareholders. Russia's Membership in the Council of Europe Must Be Suspended. 05.01.2005. Available at: http://www.orc.ru/~komitet/Haag1e.htm (as of 09.05.2009); Amnesty International Report 2008. Russian Federation. Available at: http://www.amnesty.org/en/region/russia/report-2008 (as of 09.05.2009).

mechanism in the Russian legal system for the implementation of the norms formulated by the Council of Europe in the European Convention on Human Rights and its case-law.

Since the theoretical part of the issue is established, in Chapter 2, I will proceed to assess the applicability of Strasbourg law in Russia. I will examine the quality and methods of Strasbourg law execution in three Russian higher courts – the Constitutional Court, the Supreme Court and the Supreme Arbitration Court. I will assess the current situation regarding the implementation of Strasbourg law and will identify the possible linkage or mismatch between Russia's obligations under the Convention and its factual fulfillment on the domestic level. I will also try to provide suggestions to possible obstacles to the execution of Strasbourg law in Russian higher courts.

When the means of the accessibility and the current situation of the applicability of Strasbourg law in Russia are examined, the developments of Strasbourg law in Russia will be explored in Chapter 3. I will start by assessing Russia's will and motivation to comply with the commitments of the Council of Europe. I will look for the main tendencies of opinions and comments delivered by the Russian authorities about Strasbourg. I will proceed by highlighting the attitudes concerning Strasbourg law developments within Strasbourg. Finally, I will intend to predict some potential future developments of Strasbourg law in Russia.

By the end of this analysis, I expect to clear up the questions raised about the 'dictatorship' of Strasbourg law in Russia. I also look forward to be able to take the dictatorship out of the quotation marks and indeed state that Russia has positive experience in transforming it towards the rule of law.

The following study is an example of an interdisciplinary research project demonstrating the strength and limits of different approaches. A broad topic as the 'dictatorship' of Strasbourg law in Russia calls for combined legal, historical, political, sociological, as well as philosophical explanations.

1 Accessibility of Strasbourg law in the Russian legal system

1.1 Stimuli to undertake reforms towards the Rechtsstaat

The debate about the 'New-Old Europe' and the extent of Russian inclusion in it is an old theme which was heated up once again after the Soviet hiatus. When the Soviet Union collapsed at the end of 1991 and the Russian Federation under Boris Yel'tsin donned the mantle of major successor state, the state initially took up and undiluted liberal position embracing 'the market and democracy', but not only.[10] The leaders of 'new Russia' understood that the state would have no prospects for further economic and social development unless they start to play by other rules than those set in the 'Soviet box'. The longstanding isolationist tendency in the Soviet society desired changes for the better on the well-known principle – 'let us renounce the old world!'.

Under Yel'tsin's leadership the state's political atmosphere shifted in the direction of advocating good foreign relations. The stress was no longer on a 'true' Europe as opposed to a 'false', but on Europe as a cultural whole of which Russia was a part. Such position did not receive common endorsement, as skeptics of the new state's position argued Russian person to be culturally and spiritually different to Europeans.[11] A Russian saying: 'what is good for Russian, is the death for German'[12] and *vice versa* illustrates this attitude well. However, the new Russian leaders did not see Russia as somehow superior nor a hanger-on and a slave for Europe as Fyodor Dostoevsky (1821-1881) did, but as an apprentice seeking for as much integration with Europe as speedily possible in order to return to the European-based 'civilization'. Above all, they saw a shared cultural heritage that had long been denied by conservative Russophiles and Communists alike.

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[10] I. B. Neumann. Russia and the idea of Europe. London/New York, 1996, p 158-160.

[11] Е. Харламова. Воплощение Европейской конвенции по правам человека - почему это невозможно в условиях России. - Воплощение европейской конвенции по правам человека в России. Философские, юридические и имперические исследования: материалы международной конференции в Екатеринбурге с 6 по 7 апреля 2001 г. Штудгард, 2005, с 53.

[12] Что для русского хорошо, то для немца смерть.

For the 'closed' Soviet legal system began legal *perestroika*, the keystone of which was a modern society based on the idea of the *Rechtsstaat* (*pravovoe gosudarstvo*), where – to use Spinoza's classical formulation – the King's documents should take precedence over the King's will. In other words, the state should guarantee and implement a state of law where written, non-retrospective rules regulate relations between as well as within state and society. The individuals constituting society should have rights guaranteed by the *Rechtsstaat*, and should have the opportunity to participate in the organization of civil society.

Such an idea of the *Rechtsstaat* as a European 'bourgeois' law was previously banned from use with regard to Soviet law.[13] Although many Russian philosophers including Nikolai Berdyaev (1874-1948) held that bourgeois ideology never ruled Russia and have no chances to conquer Russian hearts, the leaders of the Russian Federation saw the concept of *Rechtsstaat* as a fresh start to break with many previous practices.

An important element of the overall political and legal innovation in the early 1990s was the recognition that Russia would not be fully integrated into Europe and the whole World community if it did not ensure the observance of the internationally accepted norms, in particular concerning human rights.

The 'closed' Soviet legal system never considered international law, especially international law on human rights, as something that might be invoked before, and enforced by its domestic courts. The USSR 1977 Constitution[14] did not allow direct operation of international law within domestic setting. Article 29 of the Soviet Constitution proclaimed that:

> … [t]he 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 norms of international law, and from international treaties signed by the USSR.

This broad clause, however, 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

[13] D. D. Barry (Ed.). Toward the Rule of Law in Russia? Political and Legal Reform in the Transition Period. London, 1992, p XIII.

[14] Конституция СССР от 7 октября 1977 г. Available at: www.garant.ru (as of 01.03.2009).

general constitutional principle the Soviet legal order remained closed to international legal norms. 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 there were transformed by the legislature into a separate statute or administrative regulation.[15]

By relying on the doctrine of dualism, the Soviet Union committed itself to numerous international legal obligations that in municipal law remained meaningless. For example, the USSR ratified various human rights treaties and was accordingly bound by international law to keep to them. These were, however, never considered as directly applicable, which prevented individuals from bringing internationally guaranteed rights before domestic courts, tribunals and administrative agencies.[16]

The new liberal Russian Constitution prescribed a system change. The 'opening' of the Russian legal system to international law became one of the most important elements of ongoing constitutional reform.[17]

In contrast to 'Brezhnev Constitution', the Russian Federation had provided itself with a model constitution as regards the rule of law. The Russian 1993 Constitution[18] opened up the Soviet legal system by introducing the monist solution to the relationship of international and domestic law, which is placed in the chapter entitled 'Foundations of the Constitutional System'. This chapter enjoys a special status in the constitutional structure in the sense that an amendment to the provisions of this chapter is possible only following special procedures of Article 135 of the constitution. The new constitution is also stipulated to have 'direct effect', which in principle at least means that its provisions are capable of being applied as such, without the need to enact implementing legislation (Art 15 § 1).[19] Article 15 § 4 of the Constitution provides that:

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[15] G. M. Danilenko. Implemetation of International Law in Russia and Other CIS States. Detroit, 1998, p 2-3.

[16] M. Maclaren, M. Frei. *Supra* note 7.

[17] G. M. Danilenko. *Supra* note 15, p 7.

[18] Конституция Российской Федерации. *Supra* note 4.

[19] T. Långström. Transformation in Russia and International Law. Leiden/Boston, 2004, p 375-377.

> … [t]he commonly recognized principles and norms of the international law and the international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty shall apply.

It is worth noting that in addition to Article 15 § 4, there are several other provisions in the constitution referring to international law. For instance, the preamble provides that:

> … [w]e, the multinational people of the Russian Federation […] asserting human rights and liberties […] proceeding from the commonly recognized principles of equality and self-determination of the peoples approve the Constitution of the Russian Federation.

Article 17 § 1 states that:

> … [b]asic rights and liberties in conformity with the commonly recognized principles and norms of the international law shall be recognized and guaranteed in the Russian Federation and under this Constitution.

Article 46 § 3 that:

> … [i]n conformity with the international treaties of the Russian Federation, everyone shall have the right to turn to interstate organs concerned with the protection of human rights and liberties when all the means of legal protection available within the state have been exhausted.

Article 55 § 1 that:

> … [t]he listing of the basic rights and liberties in the Constitution […] shall not be interpreted as the denying or diminishing other universally recognized human and civil rights and liberties.

Article 62 §§ 1 and 3 that:

> … [a] citizen of the Russian Federation may have the citizenship of a foreign state (dual citizenship) in conformity with the federal law or international agreement of the Russian Federation. […] Foreign nationals and stateless persons shall enjoy in the Russian Federation the rights and bear the obligations of citizens of the Russian

> Federation, except for cases envisaged by the federal law or the international agreement of the Russian Federation.

Article 63 that:

> … [t]he Russian Federation shall grant political asylum to foreign nationals and stateless persons according to the universally recognized norms of international law. […] The extradition of people accused of a crime […] shall be carried out on the basis of the federal law or the international agreement of the Russian Federation.

Article 67 § 2 that:

> … [t]he Russian Federation shall possess sovereign rights and exercise the jurisdiction on the continental shelf and in the exclusive economic zone of the Russian Federation according to the rules fixed by the federal law and the norms of international law.

Article 69 that:

> … [t]he Russian Federation shall guarantee the rights of the indigenous small peoples according to the universally recognized principles and norms of international law and international treaties and agreements of the Russian Federation.

These direct references to international law in the Russian 1993 Constitution are a remarkable novelty compared to the Soviet Constitution, which offers formal proof that the international legal obligations entered into have all been adopted by Russian law. This undoubtedly represents a step in the direction of establishing the rule of law. In itself, however, the text in the constitution does not guarantee that Russia will perform according to the standards set in it. The question here is whether these constitutional undertakings are fully realizable or ignored and eventually becoming a dead letter.[20]

1.2 Problematic accession to the Council of Europe

Legal reality made itself apparent in exemplary fashion as Russia applied for admission to the Council of Europe.

[20] M. Maclaren, M. Frei. *Supra* note 7.

Under the presidency of Yel'tsin, Russia applied to join the Council of Europe for the first time in May 1992, after its Parliament was granted special guest status with the Parliamentary Assembly in January 1992. Applying for membership Russia mainly pursued the aim of rebuilding lost ties with Europe by joining the group of states with democratic values and to make other members believe that it truly wanted to share the identity with full compliance to certain norms and rules.

However, the concern over Russia's slower reform pace, particularly the lingering problems tied to rule of law and human rights abuses in Chechnya, kept it from entering the Council in the early 1990s. The Council ultimately allowed Russia to join in 1996.[21] Russia acceded to the Statute of the Council of Europe, becoming the Council's thirty-ninth member.

To many observers, the Council of Europe's decision to invite Russia was a surprise. The worries of many coincided with what Rudyard Kipling once wrote:

> … [t]he Russian is a delightful person till he tucks his shirt in. As an Oriental he is charming. It is only when he insists upon being treated as the most easterly of Western peoples, instead of the most westerly of Easterns, that he becomes a racial anomaly extremely difficult to handle. The host never knows which side of his nature is going to turn up next.[22]

In consequence, Russia's accession followed an extensive debate within the Council of Europe about the suitability of the applicant membership, and occurred despite an unfavorable *ad hoc* Eminent Lawyers Report prepared at the request of the Bureau of the Parliamentary Assembly. The Report 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 European Convention on Human Rights'. [23] The same evaluation of the Russian legal system was given by the Director of the Legal Department of the Russian Ministry for Foreign Affairs, Alexander Khodakov, in the

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[21] P. A. Jordan. Russia's Accession to the Council of Europe and Compliance with European Human Rights Norms. Demokratizatsiya, No. 11/2, 2003, p 285. Available at: http://www.demokratizatsiya.org/Dem%20Archives/DEM%2011-2%20Jordan.PDF (as of 10.03.2009).

[22] R. Kipling. The Man Who Was. Available at: http://kipling.thefreelibrary.com/Man-Who-Was (as of 20.02.2009).

[23] R. Bernhardt et al. Report on the Conformity of the Legal Order of the Russian Federation with Council of Europe Standards. HRLJ, No. 15/7, 1994, p 287.

Explanatory Note on the Issue of Signing the European Convention for the Protection of Human Rights and Fundamental Freedoms by the Russian Federation dated 30 January 1996. Khodakov stated that 'at the present moment Russian legislation, with the exception of the Constitution of the Russian Federation, and law enforcement practice do not comply fully with the Council of Europe's standards'.[24]

It had become clear to many that Russia was not ready to accede to the Council of Europe in the short term, but political will, or maybe necessity to allow Russia to the 'Big European House' did prevail in the end.[25] A month before Russia's accession in 1996, the *rapporteur* Ernst Muehlemann filed a report in which he concluded that 'Russia does not yet meet all Council of Europe's standards. But integration is better than isolation; cooperation is better than confrontation'.[26]

One way to present Russia's accession to those who were not in favor is to argue that the Council of Europe acted in a Constructivist way. The Constructivist theory of human rights politics argues explicitly that the identities that determine state interests and behavior may be transformed through sustained participation in international society and contacts with international norms. If a state identifies strongly with 'universal human values' as leaders of the Soviet Union did in the mid-late 1980s when signing the Helsinki Final Act, their response to international human rights norms will be guided by a Constructivist theory's logic of appropriateness institutionalizing human rights protections because that is what 'normal' states do. Back in 1975, the transformation of the identity of the Soviet state set in motion by Helsinki Final Act norms paved the way for democratic revolutions that swept across Eastern Europe and Soviet Union in 1989-1991.[27]

In 1996 the Council of Europe applied a flexible approach regarding Russia's membership. Despite its short standard of the rule of law and lack of experience in protecting human rights,

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[24] А. Ходаков. Пояснительная записка по вопросу о подписании Российской Федерацией Европейской конвенции о защите прав человека и основных свобод от 4 ноября 1950 г. и Протоколов к ней, 30.01.1996. Available at: http://www.medialaw.ru/article10/7/2.htm (as of 01.03.2009).

[25] M. Ferschtman. Reopening of judicial procedures in Russia: the way to implement the future decisions of ECHR supervisory organs? – R. Müllerson, M. Fitzmaurice, M. Andenas (ed.). Constitutional Reform and International Law in Central and Eastern Europe. Hague, 1998, p 126.

[26] PACE. Russia's Request for Membership of the Council of Europe. Doc. 7443 Addendum IV, 02.01.1996.

[27] D. C. Thomas. The Helsinki Effect. International norms, Human rights, and the demise of Communism. Princeton, 2001, p 275-281.

the Council of Europe invited Russia to join the 'club', so it sounded, hoping that membership would encourage Moscow to stay on 'the right path' of legal reform and that more influence could be exerted on Russia inside rather than outside the Council.[28] Moreover, once inside, Russia could be taken on a tow-line helping it to reach the required level. In other words, Russia's membership can be explained by the inclusive strategy of the Council of Europe that is directed to guide Russia to comply with certain standards while granting a membership, or theoretically - gradually socializing Russia.[29]

At a ceremony held in Strasbourg on 28 February 1996, to mark Russia's entry into the Council of Europe, the Russian Foreign Minister Yevgeny Primakov signed the Statute of the Council of Europe, which specifies, among other things, that Member States commit themselves to maintain a democratic system, to accept the principle of the rule of law and to ensure the enjoyment for all persons within their jurisdiction of human rights and fundamental freedoms. Together with signing the Statute, Russia signed the European Convention on Human Rights (the Convention) and undertook other obligations set out in PACE Opinion 193(1996) of 25 January 1996.

The commitments that Russia undertook could be basically divided into two parts, firstly regarding ratification of certain Council of Europe conventions and secondly implementation of reforms at domestic level. Among other conditions, it was required that Russia would ratify the European Convention on Human Rights within one year of its signature. This may indeed be considered unfair, because a small country like Estonia had needed three years to adapt its legislation before it was ready to ratify the Convention.[30] The two years after its accession, Russia did ratify the Convention and its additional Protocols (No. 1, 2, 4, 7, 11), except for Protocol No. 6, which abolishes the death penalty in times of peace. Besides that in following years Russia ratified the European Convention on Extradition, the European Convention on Mutual Assistance in Criminal Matters and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. After several years of deliberations, Russia

[28] M. Maclaren, M. Frei. *Supra* note 7.

[29] R. R. Babayev. The Council of Europe'anization of Russia. The Process of Compliance by Russia with the Standards of the Council of Europe. Budapest, 2006, p 9.

[30] See: CoE. Compatibility of Estonian law with the requirements of the European Convention on Human Rights. H (96) 20, 1997.

agreed to internalize the provisions of European Framework Convention for the Protection of National Minorities, which was one of the main requirements in the period of accession.[31]

Reform at the domestic level mainly concerned reforming the judiciary system, improving the penitentiary system, improving the condition in pretrial detention centers, establishment of the professional bar association, ensuring freedom of movement and residence and the adoption of alternatives to military services.[32] In 2000 the project of reform in the judiciary system was launched, which had a result of adoption new codes in criminal and civil matters. Subsequently the law on alternatives to service was adopted, the number of inmates in penitentiary institutions was decreased and the Convention on Transfer of Sentenced Persons was ratified.[33]

Although Russia showed significant progress regarding some obligations, there was and still is little progress regarding other outstanding commitments. A very important obligation was to sign within one year and ratify within three years from the time of accession, Protocol No.6 to the Convention on the abolition of the death penalty in time of peace, and to put into place a moratorium on executions with effect from the day of accession.

Accordingly, on 16 May 1996 President Yel'tsin issued a Decree 'The stepwise reduction in the application of the death penalty in conjunction with Russia's entry into the Council of Europe' ordering the government to present to the State Duma within one month a law on the ratification of Protocol No. 6, and on 2 August he announced an unofficial moratorium on executions. However, the State Duma refused to ratify Protocol No. 6, and also refused to enact a law on moratorium. In August 1999 the Russian Government once more submitted Protocol No. 6 to the State Duma for ratification. This met a similar fate.

The matter was resolved indirectly when on 2 February 1999 the Constitutional Court of the Russian Federation issued a temporary stay on any executions granting the moratorium an unquestionable legal status for the first time.[34] According to Article 20 of the Constitution, a death sentence may only be pronounced by a jury trial, which is not yet implemented in some

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[31] PACE. Honoring of obligation and commitments by the Russian Federation. Resolution 1277, 2002.

[32] PACE. On Russia's request for membership of the Council of Europe. Opinion 193, 1996.

[33] PACE. Honoring of obligation and commitments by the Russian Federation. Resolution 1455, 2005.

[34] Постановление Конституционного Суда РФ от 2 февраля 1999 г. N 3-П. Available at: www.garant.ru (as of 10.03.2009).

regions of the country. The Constitutional Court found that such disparity makes death sentences illegal in any part of the country, even those that do have the process of trial by jury implemented. According to the ruling, no death sentence may be passed until all regions of the country have jury trials. On 15 November 2006, the State Duma extended both the implementation of jury trials in the sole remaining region (Chechnya) and the moratorium on the death penalty by three years, until early 2010.

Although there are both an implicit moratorium established by the President and an explicit one, established by the Constitutional Court, the death penalty still remains codified in Russia. This extraordinary delay in abolishing the death penalty has not gone unnoticed in Strasbourg. On 10 December 2006 the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, expressed his regret that Russia is the only European state where the death penalty has yet to be abolished, despite Russia's promise to ban it ten years ago.[35]

Notwithstanding the critical voices that claim the Council of Europe is becoming too politicized to be able to uphold the ideals of democracy and the rule of law, there is no doubt over the positive influence on Russia thanks to the membership in the Council of Europe.[36] One of the significant changes in the legal sphere is Russia's constitutional framework set up for 'accommodating' international treaties like the European Convention on Human Rights. It will be interesting to explore what status does the Convention and its enforcement mechanism, the European Court of Human Rights (ECtHR), have in national legal system and

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[35] Death Penalty-Russia: Duma Leaves Punishment on Table. IPS news, 20.11.2007. Available at: http://ipsnews.net/news.asp?idnews=40145 (as of 10.03.2009).

[36] As for the legislative activity, one can mention, for instance, the recent amendments in the law 'On operative-search activity' made in July 2007. Amendments to the Article 5 of this law prohibited to police and law enforcement bodies to incite the citizens to commit offences during operative-search activities. These amendments also banned falsification of the results of the operative-search activity. In spring 2007 the Ministry of Interior, the Federal Security Service and some other executive bodies adopted an instruction, which provides detailed regulation on how to transfer the results of the operative-search activity to the investigation authorities and to courts. These amendments are to prevent repetition of the violations, stipulated in the ECtHR judgments *Vanyan v. Russia* (ECtHR, Application no. 53203/99, 13.05.2004) and *Khudobin v. Russia* (ECtHR, Application no. 59696/00, 26.10.2006), namely – conviction of the individuals, which have committed crimes as a result of a provocation on the part of the operative-search bodies.

It is also worth mentioning the Federal Program, called 'Development of the judicial system in Russia in 2007 – 2011' which was launched in 2007. The justification of the program provides analysis of the Russian judicial system problems. Among them non execution of the courts judgments and excessive length of the proceedings are stipulated. Both have been mentioned in a number of ECtHR judgments on Russia. The program offers a number of measures, aimed at resolving these problems, in particular – improvement of material and technical conditions of the judicial institutions and the bailiffs service performance.

how far such international treaty and court judgments are used to protect human rights and freedoms in Russia.

1.3 Status of ECHR and ECtHR in the Russian legal system

Under Article 1 of the European Convention on Human Rights (the Convention)[37], the Russian Federation has undertaken an obligation:

> … [t]o secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention.

Article 1 does not merely oblige High Contracting Parties to respect human rights and fundamental freedoms, but also requires them to protect and to remedy any breach at subordinate levels.[38] Though, it does not prescribe the manner in which Member States shall secure the rights in question. It also does not require States to give direct effect to the Convention within national law.

As aforementioned, since the accession to the Council of Europe the Russian Federation has begun to clarify the relationship between constitutional and statutory norms, and principles as well as mechanisms of international law. In the Soviet period, the USSR was perhaps the most assiduous ratifier of UN instruments, but never allowed these to have any serious internal effect.[39] Thus, the Russian 1993 Constitution confirmed the trend in Russian practice of giving a prominent place to international legal standards like those written down in the Convention in the domestic legal setting.

The status of international law provisions in municipal law is a starting point for the assessment of the impact of an international treaty on a national legal system.[40] There are the

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[37] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 with Protocol Nos. 1, 4, 6, 7, 12 and 13. *Supra* note 3.

[38] *Ireland v. UK*. ECtHR, Application no. 5310/71, 18.01.1978.

[39] B. Bowring. Russia in a Common European Legal Space. - Developing effective remedies for the violations of rights by public bodies: compliance with the European Convention on Human Rights. The Uppsala Yearbook of East European Law, 2005, p 95.

[40] А. Л. Бурков. Механизм применения Конвенции в российских судах. - А. Бурков (ред.) Применение Европейской конвенции о защите прав человека в судах России. Екатеринбург, 2006, с 18.

Russian 1993 Constitution and a number of statutory acts, subordinate legislation and even judicial practice and so-called guiding 'Explanations' of higher courts that regulate the domestic status of international law in general and the Convention in particular.

Unlike the Soviet Constitution, the first sentence of Article 15 § 4 of the Russian Constitution clearly identifies the Russian Federation as a monistic country, stating that:

> … [t]he generally recognized principles and norms of international law and treaties of the Russian Federation shall be constituent part of its legal system.

By virtue of this provision, generally recognized principles and norms of international law as well as treaties of the Russian Federation have entered (and will enter in the future) into the legal system of Russia. Hence, the provision, we are told, constitutes 'a constitutionally confirmed transformation […] automatic and general transformation […] which is realized by incorporation'.[41]

However, what is to be understood by 'treaties' of the Russian Federation is left undefined. Although it is reasonable to assume that what is meant are treaties in regard to which Russia has expressed its consent to be bound by and which have entered into force both internationally and specifically for Russia, it is less clear whether the clause covers all Russia's 'treaties'[42]. Leaving space for criticism, the prevailing opinion in Russian doctrinal writings, however, appears to be that Article 15 § 4 applies only to ratified treaties.[43]

Following the logic of Article 15 § 4 any international treaty becomes part of the Russian legal system upon its ratification, or, to be more precise, upon the official publication of a law on the ratification of the treaty (Article 15 § 3 of the Constitution). For example, the Convention entered into force for those under Russian jurisdiction upon the official publication of the Federal Law no. 54-FZ, 'On the Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms', in *Rossiiskaia Gazeta*[44] and the deposit of the ratification with the Secretary General of the Council of Europe (Article 59 § 3

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[41] T. Långström. *Supra* note 19, p 376-379.

[42] The Russian Treaty Law divides Russia's treaties into inter-state, inter-governmental and inter-departmental treaties.

[43] I. I. Lukashuk. Treaties in the Legal System of Russia. Ger. YIL, Vol. 40, 1997, p 152.

[44] Российская Газета, 07.04.1998.

of the Convention). Therefore, it is not necessary to transform the Convention into the domestic legal system in order for a judge to apply the provisions of international law. Thus, theoretically there is no difference between the Convention and, for example, the Russian Civil Procedure Code in terms of their implementation in national courts.

More than that, the apotheosis of this new relationship between international and national law seemed to have truly arrived with the Resolution of the Plenum of the Supreme Court of the Russian Federation of 10 October 2003[45].[46] The Resolution at last gave instructions to the lower courts as to how apply Article 15 § 4, and the Federal Law 'On International Treaties of the Russian Federation'[47], to the same effect. Thus:

> … [t]he rights and liberties of man in conformity with commonly recognized principles and the norms of the international law, as well as the international treaties of the Russian Federation shall have direct effect within the jurisdiction of the Russian Federation. They shall determine the meaning, content and application of the laws, and the activities of the legislative and executive branches and local governments, and shall be secured by the judiciary.

Furthermore, with respect to the Convention, the Plenum directed that:

> … [t]he courts within their scope of competence should act so as to ensure the implementation of obligations of the States stemming from the participation of the Russian Federation in the Convention on Protection of Human Rights and Basic Freedoms […] If the court in hearing a case has established the circumstances that contributed to the violation of the rights and liberties of citizens guaranteed by the Convention, the court has the right to issue its ruling (or decision) which would draw attention of relevant organizations and officials to the circumstances and facts of violation of the rights and liberties requiring that necessary measures be taken.

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[45] Resolution No. 5 adopted by the Plenum of the Supreme Court of the Russian Federation. 'On application by courts of general jurisdiction of the commonly recognized principles and norms of the international law and the international treaties of the Russian Federation'. 10.10.2003. Available at: http://www.supcourt.ru/EN/resolution.htm (as of 10.03.2009).

[46] B. Bowring. *Supra* note 39, p 95-96.

[47] Федеральный закон № 101-ФЗ от 15 июля 1995 г. «О международных договорах Российской Федерации». Available at: www.garant.ru (as of 10.03.2009).

It should be safe now to say that at present Russian law allows the penetration of conventional norms into the domestic legal system without the need to enact specific acts of transformation.

The next step brings us to the question of the hierarchical status of the Convention in the domestic legal system. In monist states the constitutional provision usually also determines which normative rank international treaties have. The second part of Article 15 § 4 of the Russian Constitution provides that:

> … [i]f an international treaty or agreement of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty shall apply.

It seems that the legal framework set by the Constitution is more favorable towards the international treaties. Though, there are still contradictory opinions among Russian scholars regarding the Convention's position in national law.

For example, according to Margarita Zanina 'the objective of the Convention can be achieved only if granting it the supreme legal force of any rule of national law, including the Constitution'.[48] Other scholars, including the Chief Justice of the Constitutional Court of the Russian Federation Valerii Zorkin, appear to place the Convention in between the Constitution on the one side and federal constitutional laws[49] and ordinary federal laws on the other side establishing a higher hierarchical status of treaties with respect to contrary domestic law.[50] Although there were assertions that due to Article 17 § 1 of the Constitution, which provides that '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', international norms had a priority over the Constitution, this idea was called a very bold proposition, which to date has not found confirmation in judicial practice.[51]

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[48] М. А. Занина. Коллизии норм национального права и Европейской конвенции о защите прав человека и основных свобод. Российская юстиция, № 11, 2005.

[49] A federal constitutional law must be approved by at least three-quarters of the total number of the Federal Council and at least by two-thirds of the total number of deputies of the State Duma. These laws are adopted only in regard to matters belonging to federal jurisdiction.

[50] В. Д. Зорькин. Конституционный Суд России в европейском правовом поле. Журнал российского права, № 3, 2005, с 4-5.

[51] G. M. Danilenko. Implementation of International Law in CIS States: Theory and Practice. EJIL, No. 10, 1999, p 68.

It also appears safe to conclude that international law is not capable of overriding the Constitution due to the following provision of Article 22 of the Law 'On International Treaties of the Russian Federation'. The provision has it that:

> … [i]f a treaty contains rules requiring the change of individual provisions of the Constitution of the Russian Federation, the decision concerning to be bound by such a treaty shall only be possible in the form of a federal law only after making the respective amendments to the Constitution […] or a revision of its provisions in the established procedure.

According to this, in cases when treaties contain rules that require amendments to the Constitution an appropriate amendment to the Constitution must precede ratification of the treaty. Thus, the first question regarding Convention's status in Russia's constitutional framework should be answered as follows: by signing the Convention, Russia has agreed to adopt an international set of legal standards and norms as its own, prioritizing them above the legislation passed by its own Federal Assembly.

As to the question of the status of the European Court of Human Rights (ECtHR) in Russia, we should be reminded that the Convention and the ECtHR are inextricably linked. Because the Convention is now over 50 years old some of the language that it uses is quite outdated. The ECtHR has often stressed that the Convention is a 'living instrument'[52]. This means that as society and attitudes change, the meaning of conventional norms will change and develop the way in which the ECtHR interprets them. Hence, it is not possible to apply the Convention without looking at the corresponding case-law of the ECtHR. Using the phrase of the Chief Justice Charles Evans Hughes, who once said that 'the Constitution means what the judges say it means'[53], it may be boldly claimed, that the Convention means what judges of the European Court of Human Rights say it means.[54]

Although the text of the Constitution states that international agreements to which Russia is a party are binding internally in the Russian legal system, it does not address the general question of the legal effect of external interpretations of binding treaty norms. The Russian

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[52] See for example: *Loizidou v. Turkey*. ECtHR, Application no. 15318/89, 23.03.1995.

[53] D. J. Danelski, J. S. Tulchin (ed.). The Autobiographical Notes of Charles Evans Hughes. New York, 1973, p 144.

[54] А. Л. Бурков. *Supra* note 40, с 16.

Law on Treaties also is silent on the matter. The Russian Parliament did, however, addressed the question to some extent in regard to the ECtHR in the Federal Law no. 54-FZ, 'On the Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms', which Article 1 stated in relevant part that:

> … [t]he Russian Federation as a High contracting Party in keeping with Article 46 *ipso facto* and in the absence of a special agreement the jurisdiction of the European Court of Human Rights to be binding as regards the issues of interpretation and application of the Convention and Protocols thereto in cases of supposed violation by the Russian Federation of the provisions of those contractual acts when a supposed violation has taken place after their entry into effect as applicable to the Russian Federation.

This text, however, is ambiguous. One reasonable reading would suggest that in the specific case of the Convention there is formally no obstacle to the domestic usage of the interpretations of the Convention advanced by the European Court of Human Rights in cases with the Russian Federation. The status of the ECtHR is also depicted in one of the most important decisions of the Russian Constitutional Court in the field of application of international treaties. The case was concerning Articles 371, 374 and 384 of the Criminal Procedural Code. In this involve a very innovative interpretation of Article 46 of the Russian Constitution which establishes an obligation to give direct domestic effect to decisions of international human rights bodies, including those of the European Court of Human Rights. The ECtHR case-law thus may be gradually transformed into domestic law.[55]

Though, the question of the nature of legal effect of external interpretations of binding treaty norms is one of increasing visibility and acuity in domestic legal systems. In the United States, it has arisen in the context of litigation concerning the effect of the International Court of Justice decisions interpreting the Vienna Convention on Consular Relations.[56] As to the ECtHR interpretations of the Convention, it has been addressed, for example, in the United Kingdom[57]. The problem of determining what is meant by the 'ECtHR case-law' remains also

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[55] Постановление Конституционного Суда РФ от 2 февраля 1996 г. N 4-П.

[56] P. Krug. Internalizing European Court of Human Rights Interpretations: Russia's Courts of General Jurisdiction and New Directions in Civil Defamation Law. 32 Brook. J. Int'l L, 2006, p 28.

[57] See for example: I. Sinclair. National Treaty Law and Practice. United Kingdom. Hague, 2005, p 742.

the most controversial in the Russian domestic literature. According to Mihhail Marchenko, Article 1 of the Federal Law 'On the Ratification of the Convention' gives the ground for the recognition of:

- the binding force of the ECtHR decisions made on the merits of the case against Russia;
- the priority and not the substitution of the ECtHR over national courts;
- the power of the ECtHR in each case, when necessary, to clarify the rights and duties of the State Parties;
- the right of the ECtHR to declare the State responsible for violations of the rights and freedoms guaranteed by the Convention and its Protocols;
- the right of national judges and the dispute parties to use the interpretations of the Convention made by the ECtHR;
- the incorporation of the ECtHR practice into the Russian legal system if they comply with generally recognized principles and norms of international law and do not contradict the Russian Constitution.[58]

According to Vladimir Kanashevskiy and Pavel Laptev, this provision of the Federal Law stipulates the binding force of those ECtHR decisions of which Russia is a part rather than the whole practice of the ECtHR.[59] Hence, the ECtHR case-law can be divided into two types. The first type - rulings of the ECtHR decided against Russia. They belong to the Russian legal system and are obligatory for all state and municipal authorities. The second type - judgments made against other State Parties that are not part of the Russian legal system.

Discussions about the possible interpretations of the 'ECtHR case-law' position in the Russian legal system were also heated up at the IXIth International Students' Law Conference 'European Court of Human Rights and national legislation' held in St. Petersburg in March

[58] М. Н. Марченко. Юридическая природа и характер решений Европейского суда по правам человека. Государство и право, № 2, 2006, с 13.

[59] В. А. Канашевский. Прецедентная практика Европейского суда по правам человека как регулятор гражданских отношений в Российской Федерации. Журнал российского права, № 4, 2003; П. Лаптев. Роль постановлений Европейского суда для России. Отечественные записки, № 2 (11), 2003.

2009[60]. The spellbinding debates between participants, once and again, indicated the discord over this issue. The possible answers appeared to range from treating such interpretations as binding precedent, to giving them some less intense legal effect, to making its use totally permissive and to denying its recognition in any manner.

In the personal interview with Vitaliy Ivanenko, the Head of Chair of International Law in St. Petersburg State University, he admitted that there have been rarely any directions given by the constitutional authority or a clear directive from the legislature to solve this controversy. According to Ivanenko the ECtHR decisions, both judgments and admissibility determinations are required to set forth not only operative parts, but also the ECtHR reasons. So, the ECtHR case-law should be understood broader and include the reasoning in the Strasbourg case-law that cover all cases and not only those in which Russia was/is a party.[61]

Thus, the second issue raised in the beginning should receive a doubting diagnosis. Normatively, there is no bar to the domestic use of the case-law of the Convention advanced by the European Court of Human Rights. The other thing is the problematic interpretation of the notion of the 'case-law' that raises suspicions about factual implementation of the Convention in Russia.

Having concluded that, the next question to answer is whether the Russian legal system is as truly 'open' as it claims to be. As is well known, practice is quite different from theory with respect to the effective implementation of constitutional provisions declaring international law to be part of domestic law. The application of Strasbourg law on the national level depends on various factors, which are to be discussed in Chapter 2 after assessing the relevant case-law of higher courts of the Russian Federation.

[60] See for example: http://islaco.jurfak.spb.ru/en/default.htm (as of 25.03.2009).

[61] Interview with Vitalii Ivanenko, the Head of Chair of International Law in St. Petersburg State University. St. Petersburg, 20.03.2009.

2 Applicability of Strasbourg law in Russian higher courts

So far, the present examination has covered the accessibility of Strasbourg law in Russia. Russia's new state position and the transplantation of Russian law and doctrines relevant to domestic implementation of international law were discussed. To make this analysis complete, it appears necessary to look more closely at Strasbourg law 'in action' in Russia.

It is worth reminding the reader that as a general constitutional law principle, the Soviet legal system remained insulated from international law. Soviet courts rarely applied international law; in those cases that they did, it was a matter of interpreting clauses of international shipping or transportation agreements. Thus, the international human rights commitments of the Soviet Union remained also theoretical.[62]

Now, the question would be whether 'new Russia', 11 years on, is in a position to provide effective legal remedies, in line with its obligations to the Council of Europe? To put the same question another way - whether the conventional human rights are applied by Russian courts as frequently as the Constitution and federal laws and to what extent (if any) do Russian judges treat decisions of the European Court of Human Rights as binding precedents.

Before proceeding to assess actual jurisprudence of Russian higher courts on this issue, general remarks about the Russian judicial system should be made.

2.1 Allocation of judicial competence

The existing judicial system of the Russian Federation was formed and is being developed as a result of a judicial reform carried out in Russia from the beginning of the 1990s. For the first time the Russian 1993 Constitution contained a Chapter VII 'Judiciary' according to which the state power in the Russian Federation should be exercised on the basis of its division into legislative, executive and judicial powers, and all these branches of power should be independent. 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 (Article 118 § 3 of the Constitution).

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[62] T. Långström. *Supra* note 19, p 396-397.

The judiciary in Russia is not a single whole. It is divided into three branches: the regular court system with the Supreme Court (SC) at the top, the arbitration court system with the Supreme Arbitration Court (SAC) on top, and the Constitutional Court (CC) as a single body with no courts under it. With certain exceptions not relevant to this article, all courts in Russia are part of the federal judiciary.[63]

The system of general jurisdiction courts includes the Supreme Court of the Russian Federation, regional level courts, district level courts and justices of the peace. The Supreme Court of the Russian Federation is the supreme judicial body for all courts of general jurisdiction, both civil and military. The SC does not have the right of judicial review but has the right of legislative initiative and may submit its conclusions conceding the interpretation of laws. The highly authoritative view of the SC is always taken into consideration by lawmakers. Apart from this, the SC issues guiding instructions for lower courts on specific matters of law based on the analysis of the administration of justice in a particular field of law (Art. 126 of the Constitution, Art. 19 of the 1996 Federal Constitutional Law 'On the judicial system of the Russian Federation' no. 1-KFZ). Such guiding instructions have a binding effect upon all courts as well as upon those state agencies and officials who use the law in their work. The guiding instructions of the SC for all practical purposes can thus be treated as a source of law in Russia.[64]

The SC 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 SC as a court of first instance. The SC is a cassation instance in relation to the federal courts of general jurisdiction of republics or oblast. The SC also supervises legality, validity and substantiality of sentences and other decisions of courts of lower level.

Whenever there is a dispute between business entities, the case is taken for trial by the courts of arbitration. The Supreme Arbitration Court of the Russian Federation is the highest judiciary body resolving economic disputes and other cases considered by arbitration courts,

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[63] 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. In addition, the Subjects may establish 'Justice of the Peace' courts, which occupy the lowest level of the ordinary court system.

[64] See for example: http://www.supcourt.ru (as of 01.04.2009).

and shall carry out judicial supervision over their activity in line with federal legal procedures and shall offer explanations on questions of judiciary practice (Art. 127 of the Constitution, Art. 23 of the 1996 Federal Constitutional Law 'On the judicial system of the Russian Federation' no. 1-KFZ). But if a party to a civil case is a private citizen, not involved in business activities, the dispute has to be handled by a court of general jurisdiction.[65]

The Constitutional Court of the Russian Federation is a court of limited subject matter jurisdiction. The Article 125 of the Russian 1993 Constitution empowers the CC to arbitrate disputes between the executive and legislative branches and between Moscow and the regional and local governments. The court also is authorized to rule on violations of constitutional rights, to examine appeals from various bodies, and to participate in impeachment proceedings against the president. The 1994 Federal Constitutional Law no. 1-FKZ 'On the Constitutional Court' prohibits the court from examining cases on its own initiative and limits the scope of issues the court can hear. The CC is vested with the power of constitutional review, i.e., it can, upon motion of an interested governmental organization, hold a statute or an executive enactment unconstitutional, or give its interpretation of the Constitution. It is also the rule that whenever an issue of constitutionality of an act involved in a case is raised during proceedings before a regular court, such an issue is automatically referred to the Constitutional Court.[66]

2.2 Quality and methods of Strasbourg law execution

2.2.1 Practice of the Constitutional Court

As far as the implementation of Strasbourg law is concerned, it should be borne in mind, that, since the Constitutional Court (CC) mostly considers applications concerning human rights granted by the Constitution, which contains an extensive catalogue of human rights based on the generally recognized international human rights standards, theoretically the Convention and its interpretations given by the European Court of Human Rights (ECtHR) can be applied in almost every case.[67]

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[65] See for example: http://www.arbitr.ru (as of 01.04.2009).

[66] See for example: http://www.ksrf.ru (as of 01.04.2009).

[67] G. M. Danilenko. *Supra* note 51, p 62.

It is true that the CC referred to the Convention as binding before 5 May 1998, when Russia ratified this document. According to Alexei Trochev, the CC did not wait for political branches to ratify certain international treaties or declarations and resolutions of international organizations, but 'implied' its constitutional authority to determine which norms were generally recognized in international law and thus were binding on Russia.[68]

The first judgments citing the Convention dated back to 4 April 1996[69]; 16 March 1998[70]; and 29 April 1998[71]. In these judgments, the CC had not invoked any of the ECtHR case-law and its appeal to the Convention was limited only to citing the articles of the Convention. For example, in the judgment of 4 April 1996, the CC invoked article 2 of Protocol No. 4 (the Right to Freedom of Movement) in conjunction with Article 12 of the International Covenant of Civil and Political Rights (ICCPR) by explaining the content of the articles and stating that those provisions are part of the Russian legal system due to their relation to the generally recognized principles and norms of international law according to Article 15 § 4 of the Constitution.

As time passed and with the ratification of the Convention, the practice of the Convention's implementation ought to change. Hence, the manner and frequency with which factually the CC invokes the Convention and the ECtHR case-law must be questioned. Valerii Zorkin, the Chief Justice of the Russian Constitutional Court, stated in his article, that after eight years of Russia's membership in the Council of Europe, the CC referred to the Convention and the ECtHR case-law in more than 90 decisions.[72] Some time later, the Chief Justice indicated 60 cases where the CC used the Convention and the ECtHR practice[73], meanwhile Trochev, in his book speaks about around 200 decisions referring to the Convention and about 90 using

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[68] A. Trochev. Judging Russia: The Role of the Constitutional Court in Russian Politics 1990-2006. New York, 2008, p 175.

[69] Постановление Конституционного Суда РФ от 4 апреля 1996 г. N 9-П. Available at: www.garant.ru (as of 13.04.2009).

[70] Постановление Конституционного Суда РФ от 16 марта 1998 г. N 9-П. Available at: www.garant.ru (as of 13.04.2009).

[71] Постановление Конституционного Суда РФ от 29 апреля 1998 г. N 13-П. Available at: www.garant.ru (as of 13.04.2009).

[72] В. Д. Зорькин. *Supra* note 50, с 8.

[73] В. Д. Зорькин. Выступление на VIII Международном форуме по конституционному правосудию «Имплементация решений Европейского суда по правам человека в практике конституционных судов стран Европы». Available at: www.ksrf.ru/News/Speech/Pages/ViewItem.aspx?ParamId=16 (as of 17.04.2009).

the ECtHR interpretations to the Convention[74]. Pursuant to the GARANT database[75] results, the CC mentioned the Convention between the date when the Convention came into force after the date of the deposit of the Russian instrument of ratification and December 2008 in about 82 cases out of 170 decisions, and referred to the judgments of the ECtHR in some 43 decisions.

As aforementioned[76], already in 1996, the CC introduced an innovative interpretation of Article 46 of the Russian Constitution which establishes an obligation to give direct domestic effect to decisions of international human rights bodies, including those of the ECtHR. As, then yet, the CC Justice Boris Ebzeev held:

> … [i]gnoring the jurisprudence of the Strasbourg Court is not acceptable when it comes to the protection of basic rights and societal values that make these rights work.

In one of the striking examples to date, the CC achieved a significant breakthrough in the implementation of international jurisprudence in the case of *Maslov*[77], decided on 27 June 2000. The case concerned the constitutionality of Articles 47 and 51 of the Criminal Procedural Code, and the issue at stake was the right to defense counsel following detention. According to the Code, a person in detention as a 'suspected person' or an 'accused', was entitled as of right to the presence of a defender. But this was not the case for a person brought to a police station to be interrogated as a 'witness', even though attendance was compulsory, and might well lead to transformation into a suspect or accused. The CC not only referred to Article 14 of the ICCPR and Articles 5 and 6 of the Convention, but for the first time cited the jurisprudence of the ECtHR. The CC used the same method of the Convention interpretation as the ECtHR did and referred to six cases, which were *Quaranta v. Switzerland*[78], *Imbrioscia v. Switzerland*[79], *John Murray v. United Kingdom*[80], *Deweer v.*

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[74] A. Trochev. *Supra* note 68, p 175.

[75] One of the largest networks operating in the Russian market of information and legal services. Available at: www.garant.ru (as of 17.04.2009).

[76] See: part 1.3, p 11.

[77] Постановление Конституционного Суда РФ от 27 июня 2000 г. N 11-П. Available at: www.garant.ru (as of 17.04.2009).

[78] *Quaranta v. Switzerland*. ECtHR, Application no. 12744/87, 24.05.1991.

[79] *Imbrioscia v. Switzerland*. ECtHR, Application no. 13972/88, 24.11.1993.

Belgium[81], *Eckle v. Federal Republic of Germany*[82], and *Foti v. Italy*[83]. Such a method of using the Convention was also in line with Article 31 § 3 b of the Vienna Convention[84] on the Law of Treaties, stating that when applying an international treaty judges shall interpret it by taking into account any subsequent practice of a treaty body. Reliance in reasoning in *Maslov* on the ECtHR judgments, which involved other countries, shows that the CC justices took these judgments seriously and indeed treated the European Convention of Human Rights and the European Court of Human Rights as integral parts of the Russian legal system.

In consequence, the CC is applying not only the Convention but the case-law of the ECtHR as well. Underling the importance of the Convention and the ECtHR practice, the CC, once and again, in the decision of 5 February 2007 emphasized:

> … [T]hus, as provisions of the Convention on the Protection of Human Rights and Fundamental Freedoms, so are the decisions of the European Court of Human Rights - in that part, which on the basis of universally recognized principles and norms of international law is interpreting the contents of the Convention, - are an integral part of the Russian legal system, and therefore should be considered by the law enforcement agencies including courts.[85]

Though, the exemplary decisions, like the *Maslov*, form just a half of the cases, where the CC relied on the Convention. Such statistics lead me to the suspicion that the CC holds the typical attitude of a court in a civil law country where there is no case-law, but statutes and subordinate legislation, and therefore no custom of interpreting statute's provisions by using case-law.[86] My suspicion is supported by Gadis Gadzhiev's statement, according to which

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[80] *John Murray v. United* Kingdom. ECtHR, Application no. 18731/91, 08.02.1996.

[81] *Deweer v. Belgium*. ECtHR, Application no. 6903/75, 27.02.1980.

[82] *Eckle v. Federal Republic of Germany*. ECtHR, Application no. 8130/78, 11.12.1980.

[83] *Foti and others v. Italy*. ECtHR, Application no. 24299/94, 15.12.1995.

[84] Vienna Convention on the Law of Treaties, 1969. Available at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (as of 18.04.2009).

[85] Постановление Конституционного Суда РФ от 5 февраля 2007 г. N 2-П. Available at: www.garant.ru (as of 18.04.2009).

[86] Т. Н. Нешатаева. Уроки судебной практики о правах человека: европейский и российский опыт. Москва, 2007, с 17-18.

deep-rooted Soviet legal positivist traditions still haunt in Russia.[87] My doubt about the understanding of the phenomenon of the precedent in Russia should be discussed more thoroughly in part 2.3.2 of this paper.

Moreover, it seems that the CC uses the Convention in its decisions merely as an additional argument made in order to support previously existing arguments based on Constitutional provisions.[88] The Convention is usually cited in the main body of the decisions and not in the operative part and therefore plays a role complementary to the Constitution. On the one hand it sure is that the ECtHR jurisprudence helps Russian judges to find the way out of the conflict between countervailing constitutional principles and, sometimes, serves as 'the last straw' in both helping to secure a majority opinion on a divided bench and in resisting political pressure, but on the other hand it may be, that the CC has not explored in depth the legal and political problems occurring in the course of direct implementation of international law.[89]

As Zorkin personally explained to President Putin, the work of the CC is similar to the work of the electrician, whose job is to connect carefully the ends of a malfunctioning electrical network.[90] It seems to me, that to get the electrical network run, it is not enough simply to quote provisions of the Convention and to use the ECtHR case-law from time to time. It may even do more harm than good to deliver a judgment based on the Convention without revealing the true meaning of a particular provision, which can lead to the incorrect adjudication of a case.[91] In addition, such practice does not provide a good example for other courts to follow. If we draw an overall sketch of the CC's practice by evaluating the statistics available on the GARANT database, a less optimistic picture emerges than that depicted by Trochev, who claims that:

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[87] Г. А. Гаджиев. Конституционный принципы рыночной экономики. Москва, 2002, с 9.

[88] G. M. Danilenko. *Supra* note 51, p 62.

[89] A. Burkov. The Impact of the European Convention on Human Rights on Russian Law: Legislation and application in 1996-2009. Stuttgart, 2007, p 40.

[90] Начало встречи Владимира Путина с судьями Конституционного Суда Российской Федерации. 11.12.2006. Available at: http://www.kremlin.ru/text/appears/2006/12/115196.shtml (as of 19.04.2009).

[91] A. Burkov. *Supra* note 82, p. 41.

> … [t]he Russian Constitutional Court is perceived as the 'engine' that drives its nation towards European legal order.[92]

It seems to me that, in order to approach the 'destination' – the European legal order (as Trochev puts it), this 'locomotive' should overcome the hangover of an old Soviet policy and add some more fuel to make the 'engine' run.

2.2.2 Practice of the Supreme Court of General Jurisdiction

All the previously discussed norms of the Constitution and federal laws which provide normative basis for a broader implementation of international law apply to the courts of general jurisdiction as well. Moreover, the Supreme Court (SC) has issued special decrees that direct all inferior courts to apply the Convention by taking into account the ECtHR case-law. In an affirmation of the availability of international norms and their accessibility, the SC utilizing its power to issue interpretations of legislation took the lead in 1995 by issuing a special ruling on the matter in the form of an Explanation[93]. The 1995 Explanation 'On some Questions Concerning the Application of the Constitution of the Russian Federation by Courts' provides:

> … [w]hen administering justice courts shall take into account that the generally recognized principles and norms of international law, laid down in international covenants, conventions and other documents (particularly in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights) and the international treaties of the Russian federation are, under Article 15 § 4 of the Constitution of the Russian Federation, an integral part of Russia's legal system.[94]

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[92] A. Trochev. *Supra* note 68, p 275.

[93] Explanation is an abstract opinion that is binding on all lower courts.

[94] Постановление Пленума Верховного Суда РФ № 8 от 31 октября 1995 г. «О некоторых вопросах применения судами Конституции Россиийской Федерации при осуществлении правосудия». Available at: www.garant.ru (as of 22.04.2009).

This wording is no more than a paraphrase or even restatement of the content of Article 15 § 4 of the Russian Constitution. Therefore, it can serve only as an instrument to stress the obligatory application of international law already provided in the Constitution.[95]

Another Explanation of 10 October 2003 addressed again the internalization question. The Explanation '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' entirely devoted to the implementation of the international law. The Explanation informed the lower courts that:

> … [t]he application by courts of the Convention should take into account the practice of the European Court on Human Rights to avoid any violation of the Convention on Human Rights and Basic Freedoms.[96]

Notwithstanding that the formulation 'take into account' does not sound as obligatory, the SC again stressed the direct applicability of international treaties and in particular the Convention, and its priority over national laws. Moreover, for the first time it was stressed that non-application of an international treaty (including incorrect interpretation of a treaty) may serve as a reason to repeal or amend a court act.[97] A positive feature of the 2003 Explanation is that it provided a brief overview of the ECtHR practice on Articles 3, 4, 5, and 13 of the Convention, albeit without mentioning any specific ECtHR judgments. It might be that such an overview was prompted by previous judgments by the ECtHR against Russia.[98]

On 24 February 2005, the SC issued an Explanation concerning 'Concerning Judicial Practice in Disputes Regarding Protection of Individual Honor and Dignity, as well as the Business Reputation of Physical and Legal Persons'. In this Explanation the SC reminded the courts to 'take into account' earlier Explanations in which it addressed in general the terms of the domestic incorporation of international norms. In conjunction with its adoption of external

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[95] A. Burkov. *Supra* note 82, p 28.

[96] Постановление Пленума Верховного Суда РФ № 5 от 10 октября 2003 г. «О применении судами общей юрисдикции общепризнанных принципов и норм международного права и международных договоров Российской Федерации». Available at: www.garant.ru (as of 22.04.2009).

[97] Section 9 of the Explanation.

[98] See for example: *Burdov v. Russia*. ECtHR, Application no. 59498/00, 07.05.2002; *Kalashnikov v. Russia*, ECtHR Application no. 47095/99, 15.07.2002; *Posokhov v. Russia*, ECtHR, Application no. 63486/00, 04.03.2003.

norms, the Explanation also specifically mandated adherence to the SC's 'take into account' requirement in the defamation law context, directing the courts to internalize the Court's interpretations of Article 10 in their adjudication of defamation disputes.[99]

While signaling to the lower courts their expected posture toward Article 10 of the Convention and the treatment of the ECtHR case-law, the SC's 'take into account' directive in the 2003 and 2005 Explanations is indeterminate as to its scope and to the nature of the legal effect to be given to the ECtHR practice or positions. For example, what does the phrase 'take into account' mean? Does it treat the ECtHR practice or positions as binding precedent, or something more akin to persuasive authority?

According to the GARANT database results, the SC as court of first instance, second instance (a court of cassation) and extraordinary appeal instance mentioned the European Convention on Human Rights between the date when the Convention came into force and December 2008 in 146 decisions, and referred to the judgments of the ECtHR in 44 decisions.

A brief analysis of randomly chosen 20 cases, where the SC refers to the Convention and the ECtHR case-law should give the reader an idea about the 'take into account' obligatoriness stipulated in the Explanations. Let me assume that the evidence of the SC's recognition of the Convention and the ECtHR case-law as a source of law is the quality of references to the provisions of the Convention and the ECtHR judgments cited in the decisions of the SC. The results of the assessed decisions are as follows:

- in 8 decisions[100] the SC refers to the specific article of the Convention;
- in 4 decisions[101] the SC appeals to the article of the Convention and the legal position of the European Court of Human Rights with reference to a specific judgment

[99] Постановление Пленума Верховного Суда РФ № 3 от 24 февраля 2005 г. «О судебной практике по делам о защите чести и достоинства граждан и юридических лиц». Available at: www.garant.ru (as of 22.04.2009).

[100] See for example: Постановление Пленума Верховного Суда РФ от 24 июня 2008 г. N 12; Определение СК по уголовным делам Верховного Суда РФ от 24 сентября 2001 г. N 2-О07-17СП; Постановление Пленума Верховного Суда РФ от 28 декабря 2006 г. N 63. Available at: www.garant.ru (as of 24.04.2009).

[101] Определение Судебной коллегии по гражданским делам Верховного Суда РФ от 21 мая 2004 г. N 49-Г04-48; Решение Верховного Суда РФ от 21 октября 2008 г. N ГКПИ08-1741; Решение Верховного Суда РФ от 14 ноября 2003 г. N ГКПИ03-1265; Определение СК по гражданским делам Верховного Суда РФ от 15 ноября 2005 г. N 4-Г05-36. Available at: www.garant.ru (as of 24.04.2009).

regarding foreign state (in particular, *Campbell and Cosans v. the United Kingdom*[102], *Omar v. France*[103], *Foti and others v. Italy*[104], *Sidiropoulos and Others v. Greece*[105]).

- in 3 decisions[106] the SC uses the position of the ECtHR with reference to the judgments, of which Russia is a party (for example, cases of *Posokhov v. Russia*[107], *Appolonov v. Russia*[108], *Ryabykh v. Russia*[109]);

- in 2 decisions[110] the SC mentions the Convention, without applying any concrete article and does not refer to the ECtHR at all;

- in 1 decisions[111] the SC refers to a specific article of the Convention and to the ECtRH, but does not mention any concrete judgment;

- in 1 decision[112] the SC uses the legal position of the ECtHR in cases, of which Russia was a party (in particular, *Appolonov v. Russia*[113]), along with the ECtHR positions held in judgments affecting other states (for example, *Rudzinska v. Poland*[114], *X. v.*

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[102] *Campbell and Cosans v. the United Kingdom*. ECtHR, Application no. 7511/76; 7743/76, 16.05.1980.

[103] *Omar v. France*. ECtHR, Application no. 24767/94, 29.07.1998.

[104] *Foti and others v. Italy*. *Supra* note 83.

[105] *Sidiropoulos and Others v. Greece*. ECtHR, Application no. 26695/95, 10.07.1998.

[106] Постановление Президиума Верховного Суда РФ от 31 мая 2006 г. N 208; Определение Кассационной коллегии верховного Суда РФ от 18 мая 2004 г. N КАС04-183; Определение СК по гражданским делам Верховного Суда РФ от 18 ноября 2008 г. N 18-В08-55. Available at: www.garant.ru (as of 24.04.2009).

[107] *Posokhov v. Russia*. *Supra* note 98.

[108] *Appolonov v. Russia*. ECtHR, Application no. 47578/01, 22.06.1999.

[109] *Ryabykh v. Russia*. ECtHR, Application no. 52854/99, 24.07.2003.

[110] Постановление Пленума Верховного Суда РФ от 12 февраля 2008 г. N 2; Решение Верховного Суда РФ от 7 декабря 1999 г. N ГКПИ99-848. Available at: www.garant.ru (as of 24.04.2009).

[111] Постановление Пленума Верховного Суда РФ от 24 февраля 2005 г. N 3. Available at: www.garant.ru (as of 24.04.2009).

[112] Решение Верховного Суда РФ от 17 октября 2003 г. N ГКПИ03-958. Available at: www.garant.ru (as of 24.04.2009).

[113] *Appolonov v. Russia*. *Supra* note 108.

[114] *Rudzinska v. Poland*. ECtHR, Application no. 45223/99, 07.09.1999.

Germany[115], *Gayduk and others v. Ukraine*[116]), and reference to a specific article of the Convention;

- in 1 decision[117] the SC mentions the Convention and the ECtHR without referring to any article or precise judgment;

What conclusions can be made? First of all, the references are of such quality that they rather make the understanding of their use difficult, especially when the SC refers to the Convention without specifying the article(s). Secondly, using the jurisprudence of the ECtHR, the SC in a number of its decisions refers to the ECtHR judgments without indicating the name and the date of the judgments. As an example, to highlight the latter:

> … [I]n support of the legality of the contested provisions of the normative acts of the Government of the Russian Federation, the Supreme Court referred to the legal position of the European Court of Human Rights, held in the judgment *A. v. Russian Federation* and other similar complaints.[118]

In order to look more closely at the way the SC uses in dealing with the Convention, let me analyze the case of *Gabidulina*[119], where the SC held that an Order of the Ministry of Internal Affairs, which had prohibited wearing a headscarf at the moment of taking a passport photo, did not infringe upon the UDHR, the ICCPR or the Convention's right to freedom of thought, conscience and religion, as it did not prohibit wearing a headscarf in general. Therefore it did not discriminate against Muslim women since the rule applies to everyone under the jurisdiction. Now, if the SC had studied the European Human Rights Court case-law on Article 9 § 2 of the Convention more closely, it might be that it would have come to a different conclusion. Article 9 § 2 of the Convention allows limitations of the right to freedom to manifest one's religion which are prescribed only by 'law' as this term is understood in the

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[115] *X. v. Germany*. ECtHR, Application no. 8518/79, 14.03.1980.

[116] *Gayduk and others v. Ukraine*. ECtHR, Application no. 45526/99; 46099/99; 47088/99, 02.07.2002.

[117] Постановление Пленума Верховного Суда РФ от 19 декабря 2003 г. N 23. Available at: www.garant.ru (as of 26.04.2009).

[118] Определение Кассационной коллегии верховного Суда РФ от 18 мая 2004 г. N КАС04-183. Available at: www.garant.ru (as of 26.04.2009).

[119] Решение Верховного Суда РФ от 5 марта 2003 г. N ГКПИ 03-76. Available at: www.garant.ru (as of 26.04.2009).

Court's case-law.[120] The same conclusion can be drawn from Article 55 § 3 of the Constitution. Moreover, the Constitution allows more protection in this regard as it considers 'law' to be any act of legislation. Further, the right not to be discriminated against would also be violated when the state without objective and reasonable justification fails to treat differently persons whose situations were significantly different (different religions), and Article 14 was therefore applicable.[121] The Supreme Court decision of 5 March 2003 might have been different if it had explored the case-law of the European Court of Human Rights. Thus, besides the fact that it implements the Convention on rare occasions and without addressing the case-law, the SC refuses to implement the Convention where there is justification.

Relying on the above analysis, I dare to conclude that the 2003 and 2005 Explanations of the SC do not speak in terms of the binding nature of the ECtHR practice, and there is nothing in the SC's practice to suggest that the Plenum had in mind such a mandatory effect. The 'take into account' guidance set in the directives is rather underestimated than taken as an obligatory requirement in the SC practice.

Practice of the European Court of Human Rights, both is required to set forth not only operative parts, but also the ECtHR reasons.[122] With this in mind, one may also speculate as to the intent of the SC in using the term 'practice' in the 2003 Explanation: (1) to limit it to the operative parts of judgments in cases in which Russia is a party, thereby excluding the ECtHR reasons; (2) to require or encourage the courts to reason by analogy from the ECtHR, whether or not they involve Russia as a party; or (3) give some level of legal effect to the ECtHR reasons, as reflected in its articulated 'positions' in all its decisions, not just those in which Russia is or was a party.[123] From the analyzed decision of the SC, it is evident that the SC intended the third of these options.

Howbeit, as far as the practice of the SC regarding the applicability of the Convention and the ECtHR case-law is concerned, I should conclude that to a great extent (unlike the

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[120] See for example: *Leyla Sahin v. Turkey*. ECtHR, Application no. 44774/98, 10.11.2005.

[121] See for example: *Thlimmenos v. Greece*. ECtHR, Application no. 34369/97, 04/12/1998.

[122] Article 45 § 1 of the Convention requires each Court decision, including admissibility decisions, to set forth 'reasons' as well as an operative part. The operative part of a judgment is that which states whether or not there has been a violation, and if there has, what the applicant's remedy is.

[123] P. Krug. *Supra* note 56, p. 32-33.

jurisprudence of the Constitutional Court), the SC resembles an attempt to demonstrate to the Council of Europe that the Convention is being formally applied rather than actually implemented. Otherwise, how can one characterize the situation, when the highest court of a country, having issued special documents (Explanations) that direct all inferior courts to apply the Convention by 'taking into account' the ECtHR case-law, does not follow these documents itself in its jurisprudence?

2.2.3 Practice of the Supreme Arbitration Court

As explained above, the jurisdiction of arbitral courts is the adjudication of economic disputes (Art. 127 of the Constitution). For that reason as far as the Convention is concerned, only a limited number of provisions of the Convention can be applied by these courts with the Supreme Arbitration Court of the Russian Federation (SAC) ahead, such as Articles 6 § 1, 13, 14 and Article 1 of Protocol No. 1.

Regarding the SAC, the Plenum of the SAC has also passed directive on the domestic implementation of the Convention. There is a document issued by the Chief Justice of the SAC, Veniamin Yakovlev, and entitled as Informational Letter 'On the Main Provisions Applied by the European Court of Human Rights for the Protection of Property Rights and Right to Justice' entirely devoted to this issue.[124] It should be noted, that this directive was passed the next year after the ratification of the Convention by the Russian Federation. It consists of quite short summaries of the main provisions applied by the ECtHR regarding the questions of the protection of property and right to justice. It also advises to apply the Convention in the administration of justice at the domestic level. Though, there are no references to any of the ECtHR judgments.

Moreover, the document such as Informational Letter does not have official status in national law. As mentioned in part 2.1 of this paper, the activity of the SAC is regulated by the Federal Constitutional Law 'On the Arbitration Courts in the Russian federation of 28 April 1995 no. 1-FKZ and the Arbitral Procedural Code, as well as the Federal Constitutional Law 'On the Judicial System of the Russian Federation'. Although, the Chief Justice calls for 'taking into

[124] Информационное письмо от 20 декабря 1999 г. N С1-7/СМП-1341 «Об основных положениях применяемых Европейским Судом по правам человека при защите имущественных прав и права на правосудие». Available at: www.garant.ru (as of 26.04.2009).

account' guidance written down in the Informational Letter when administrating justice, none of the mentioned laws contain any provision which authorizes the Chief Justice to put forth such documents on behalf of the SAC. That is why, evaluating the status of the Informational Letter, it does not appear to impose any obligation on judges to follow its recommendations.[125] To date, such directive on the implementation of the ECtHR case-law is the only official document providing arbitration courts with some information on the domestic application of the Convention.

According to the GARANT database results, the SAC mentioned the provisions of the European Convention on Human Rights between the date when the Convention came into force and December 2008 in around 30 decisions, without any assessment of the ECtHR case-law.

Therefore, the state of the arbitration court's jurisprudence in terms of its implementation of the Convention and the ECtHR practice can be overall estimated as not existing. Because the Convention cannot be accurately applied without reference to its interpretations advanced by the ECtHR, the way the Convention is being used by the SAC can be defined as unsatisfactory. More than that, it seems that the Informational Letter issued in 1999 is indeed a dead letter.

2.3 Possible obstacles to the execution of Strasbourg law

Practice of the implementation of the Convention and the ECtHR case-law by the Constitutional Court, the Supreme Court and the Supreme Arbitration Court of the Russian Federation, as seen in parts 2.2.1, 2.2.2 and 2.2.3 of this paper is to be characterized as unsatisfactory. Is it the lack of knowledge or experience, or maybe motivation that stops Russian judges from treating Strasbourg law on a par with national legislation and from applying it daily? Subsequently, some of the possible obstacles to the execution of Strasbourg law should be identified.

[125] A. Burkov. *Supra* note 82, p 30-31.

2.3.1 Impartiality and professionalism

Critical voices about the independent and professional judiciary of Russia have been raised every now and then. On 24 October 2004, Valerii Zorkin, the Chief Justice of the Constitutional Court of the Russian Federation marked the 13th anniversary of Russia's judicial reform by saying that:

> … [t]he country's judiciary is, in many aspects, worse now than it was in the Soviet era.[126]

Five years later, on 24 January 2009, Zorkin had to admit on the World Conference on the Constitutional Justice that:

> … [R]ussia struggles through to the accomplishment of the principle of the rule of law state overcoming legal nihilism, corruption, organized crime, as well as contradictions accompanying the creation of independent judiciary.[127]

Such statements give reasons to conclude that attitudes about Russian judiciary remain the same in the past years. It seemed that everything has changed - but, in many ways, nothing has changed.

Recent scandal of the Moscow City judge Ogla Kudeshkina heated up the discussion on this issue once again. Namely, Kudeshkina was dismissed from the Moscow City Court in May 2004 after a number of scandalous statements in mass media saying that the 'judiciary is as little more than a legal bazaar — an instrument, for settling political, commercial or simply personal scores' and that the Moscow City Court in particular had put pressure on her, forcing her to take a decision to his liking on a high-profile case. What's more, she said that this was the norm in the Russian judicial practice. As a result, she was dismissed from her post for the

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[126] Глава КС: в российских судах процветает коррупция. Новости России, 25.10.2004. Available at: http://pda.newsru.com/russia/25oct2004/zorkin.html (as of 03.05.2009).

[127] V. Zorkin. Human Rights within the Context of Global Jurisprudence. The World Conference on the Constitutional Justice. Cape Town, 2009. Available at: http://www.venice.coe.int/WCCJ/Papers/RUS_Zorkin_E.pdf (as of 03.05.2009).

purposeful belittling of the judicial power authority.[128] Russian courts rejected *Kudeshkina*'s complaints, and she filed her complaint in Strasbourg and won there.[129]

As to the judges' independence and its relation to the execution of Strasbourg law. It is obvious that judgments, if delivered on the basis of the Convention and the ECtHR case-law may lead to far reaching consequences in terms of changing practice in the application of law or challenging a statute itself.

The case of the Constitutional Court regarding the registration of the Moscow Branch of the Salvation Army, a religious organization, is a good example to depict the Constitutional Court's unwillingness to take into account the Convention and its ECtHR case-law and rule an important decision. The CC manipulated the subject rather than showed the courage to state that the contested Article 27 § 4 of the Religions Act which provides for dissolution of religious organizations that had failed to re-register before the time-limit, was unconstitutional.[130] As a result, the case was taken to Strasbourg, where the ECtHR held that there have been violations of applicant's rights.[131]

In order to rule according to the law in similar situations a judge has to be truly impartial. Yet the independence of the judiciary is dubious at this point. There are two sources of genuine independence of the courts from the other branches of government – structural and financial.[132] As far as structural independence is concerned, it was correctly noted in the Alternative NGO Report on the Observance of the ICCPR by the Russian Federation that:

> … [F]ederal Law 'On the Status of Judges' in Article 11.2 provides that federal judges shall be initially appointed for three years, and only upon completion of this term can the judge hold the office indefinitely. In practice it means that during their first years in office judges are absolutely powerless; the threat of being deprived of their status as judges is constantly looming over them, thus rendering them incapable of making

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[128] European Court Seems to Rankle Kremlin. NYTimes, 28.03.2009. Available at: http://www.nytimes.com/2009/03/29/world/europe/29russia.html?_r=1 (as of 03.05.2009).

[129] *Kudeshkina v. Russia*. ECtHR, Application no. 29492/05, 26.02.2009.

[130] Определение Конституционного Суда РФ от 7 февраля 2002 г. N 7-О. Available at: www.garant.ru (as of 05.05.2009).

[131] *The Moscow Branch of the Salvation Army v. Russia*. ECtHR, Application no. 72881/01, 05/10/2006.

[132] A. Burkov. *Supra* note 82, p.69-70.

independent decisions, because after three years their status as judges can be denied without explanation.[133]

This provision, however excludes the Constitutional Court, the Supreme Court and the Supreme Arbitration Court judges who are recommended by the Qualification Collegium of Judges and appointed for a life term by the Russian President. However, to elaborate on this idea regarding lower court judges, it is surely not clear whether judges rule more independently after they are appointed to hold the office indefinitely. Usually during the first three years, a judge is made either to give up the position, or to become loyal to the system. Otherwise he or she will not be appointed for a life term. In cases where a person not loyal to the system is appointed, there is a high probability that he or she will be discredited, and thereby forced to resign. In the worst case, the judge will be stripped of his or her status as a judge.[134] There is a well-known case of the Moscow City Court judge Sergey Pashin, who after serving three years in the court was removed from his position on the grounds of procedural irregularity. It was widely recognized that the real reason was his 'liberal' judgments and outspoken criticism of injustice.[135]

There have been also speculations about the assumption that there are still a lot of 'telephone judges' who have strong connections with the executive power, as the judiciary is mainly staffed by former procurators. This, obviously, does not facilitate the independence of the judges, because their previous professional experience may be rooted in their mindsets, as with the judiciary on the whole.

Russian courts also experience a number of serious problems with respect to its financial independence. Despite the fact that Russian law provides guarantees for judges' financial independence, including funding the judicial system from the federal budget, there are examples of gross violations of this principles. Part of a judge's salary and housing expenses as well as expenses for the offices and equipment of the courts are frequently paid from regional and municipal budgets, which inevitably leads to judicial dependence upon the local

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[133] The Alternative NGO Report on the Observance of the International Covenant on Civil and Political Rights (ICCPR) by the Russian Federation. Available at: http://www.mhg.ru/english/1F24FB3 (as of 06.05.2009).

[134] A. Burkov. *Supra* note 82, p 70.

[135] See: Judging the Country's One Judge. Moscow Times, 08.07.2000. Available at: http://www.cdi.org/russia/johnson/4394.html##9 (as of 06.05.2009).

authorities.[136] Greater financial independence supposedly would diminish the possibility that low or insecure judicial salaries and budgets would create incentives for judges to seek funding through corrupt means and for the most qualified lawyers to avoid judicial careers. But of course, even when such financial independence is maximized, decision-making independence is not guaranteed.

Along with the courts' impartiality issue, the question about the judges' professional skills also arises. It is obvious, that the operation of any court depends on the professional qualities of its judges. Hence, the sources of their knowledge should be assessed. The prime focus lays on the university education and the quality of legal education in terms of teaching international law in general and European human rights law in particular. Unfortunately there are no accessible university curricula of Soviet times, from which the majority of the present judges of Russian higher courts received their training and formed their value system. Even so, a glance over the present situation may be thrown.

According to the information provided on the official web-site of the Law Faculty of St. Petersburg State University, the curriculum does not include even any general themes concerning European human rights law, let alone specific topics on the Convention.[137] Nor The Moscow State University of International Relations, which is placed at number 66 in the list of the top 500 World universities[138], does not oblige its students to pass international human rights law courses. Although, it offers a special course on human rights and waits for students to show their interest in it.[139]

In consequence, as far as the current situation is concerned, lawyers and judges continue to receive training, not very different form that in Soviet Russia. Law schools do not include more or less comprehensive questions on European human rights law in the curriculum of international law courses, and sometimes do not include them at all.[140] So how can we expect

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[136] A. Burkov. *Supra* note 82, p 71.

[137] See: http://old.jurfak.spb.ru/science/cafedral/international_law/kaf2.htm (as of 06.05.2009).

[138] See: Top 500 World Universities. http://www.online-universities.us/top500universities.htm (as of 06.05.2009).

[139] See: http://www.mgimo.ru/study/faculty/mp/kmp/kurs/index.phtml (as of 06.05.2009).

[140] G. M. Danilenko. *Supra* note 51, p 56.

lawyers and judges to apply the Convention and the ECtHR case-law if they have never encountered, let alone read it?

2.3.2 Hangover of an old policy

By analyzing the Russian higher courts' frequency, quality and methods of applying the Strasbourg law I came to the conclusion that it is more than modest, especially that of the Supreme Court and the Supreme Arbitration Court. In part 2.3.1 I considered judges' independence and professionalism issues, which might contribute to the blank applicability of the Convention and the ECtHR practice. What's more, as discussed above, in part 1.1, the closed 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. Because most of the judges of Russian higher courts gained their legal education and formed their value system in Soviet period, it can be assumed that the dualist approach we are talking about might be deep-rooted in their mindsets. That is why they still tend to treat international treaties, like the European Convention on Human Rights as complementary, rather than main arguments in their decisions.

I do believe that another bottleneck of Strasbourg law execution in Russia is the confusion in judges' understanding of what ECtHR case-law is, *i.e*. precedent (and as a Russian saying goes: '… and what to eat it with?'[141]). Historically, Russia belongs to the continental legal system, and a codified law, which is passed under the established legislative procedure, is considered the main legal source.[142] As a general rule, court decisions are not considered to be sources of law in the Russian Federation.[143] That is why for most of the judges, the precedent of the ECtHR does not differ from that Anglo-Saxon. For this reason, the notion of the precedent itself makes judges ignore it. The attitude of judges seems to equal that:

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[141] Что это такое и с чем его едят?

[142] S. Marochkin. International Law in the Courts of the Russian Federation: Practice of Application. Chinese JIL, 2007, p 3.

[143] However, a decision to vacate a particular legal act proves to be a source of law, and the Constitutional Court indicated that its previous decisions shall be followed as *stare decisis.*

See: В. Д. Зорькин. Прецедентный характер решений Коституционного Суда Российской Федерации. Журнал российского права, № 12, 2004, с 3-12; Г. Гаджиев. Правовые позиции Конституционного Суда Российской Федерации как источник конституционного права. Конституционное право: восточноевропейское образование, № 3 (28), 1999, с 81-85.

> … [b]ecause precedent is not an official source of law in Russia, there is no need to know more about it.[144]

From the statistics, quality and methods of application of Strasbourg law by Russian higher courts assessed in parts 2.2.1, 2.2.2 and 2.2.3, it can be concluded that not all Russian judges know that the Convention is what ECtHR judges say it is. Therefore without using the ECtHR case-law, namely the ECtHR legal positions that interpret the Convention, the latter cannot be relied on. As we have also seen, the wording of the directions given by the Russian higher courts (2003, 2005 Explanations of the SC and 1999 Informational Letter of the SAC) is ambiguous and does not solve controversies of the applicability of the Convention and the ECtHR case-law in Russia. Though, such directives could be an effective means to explain to the courts the way the Convention and the ECtHR case-law should be applied. The Supreme Court and the Supreme Arbitration Court directives should have contained detailed explanations of the nature of the Convention and its case-law. These directives should have involved comprehensive explanations as to the basic precedents for each provision of the Convention including the main details of the judgments. This should have not been a problem since both the Supreme Court and the Supreme Arbitration Court are accustomed to issuing so-called bulletins of summaries of judicial practice (*obzory sudebnoi praktiki*) published in their official journals (*Bulleten' Verkhovnogo Suda Rossiiskoi Federatsii* and *Vestnik Visshego Arbitrazhnogo Suda*).

Unfortunately to date, in Russia – a civil law tradition, the case-law of the ECtHR is still considered as persuasive legal guidance, but is not binding.

2.3.3 Lack of motivation

In addition to the above mentioned factors, it seems that there is one more vital aspect of judges in their application of the Convention and the ECtHR case-law. That is motivation. Russian judges lack the motivation to apply Strasbourg law and therefore also study it, because the ECtHR is accessible via HUDOC database[145] in English or French only. As Pavel

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[144] М. В. Кучин. Прецедентное право Европейского суда по правам человека. Екатеренбург, 2004, с. 39.

[145] See: http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database (as of 07.05.2009).

Laptev, the former representative of the Russian Federation at the European Court of Human Rights, held:

> … [W]e have two types of lawyers. There are those who are strong in legal theory and practice, but do not speak any language of the Council of Europe. Others speak brilliant English and/or French, but do not know how to 'read' the case.[146]

It is true, that there are no official translations of the ECtHR judgments provided by the Russian Government. Available materials on the ECtHR case-law in Russian language are usually the initiative of the non-governmental organizations and human rights activists.[147] It is also understandable that the ECtHR case-law regarding Russia is the first in the row to be delivered. Due to the complex legal terminology, these texts accustomed to Russian may vary. There have been cases, when the disputing parties relied on the ECtHR judgments in domestic courts. Because the judge who was deciding the case was not aware of where to look for the referred ECtHR judgments, he asked the disputing party to present him notarially certified translation and only then agreed to weigh it as an argument.[148] It is also typical for judges to claim, that there is no need to invoke neither the Convention nor the ECtHR case-law, because there is sufficient national regulation to solve the dispute at stake. Therefore, unlike the Civil Procedure Code or any other Russian statutes, the Convention and the ECtHR case-law is not a priority to Russian judges.[149] It may even be that a judge somewhere in Vladivostok simply does not identify him or herself with Europe and that the Convention and its interpretations are alien to him or her, especially in the situation, when the higher courts deliver clear guidelines on this question and the state authorities do not encourage the use of Strasbourg law as seen in part 3.1. Such apathy gives reasons to suspect that Russian legal system is not as open in practice as it insists to be in theory.

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[146] П. А. Лаптев. Российское правосудие и Европейский суд по правам человека// Права человека в России и правозащитная деятельность государства. Санкт-Петербург, 2003, с 29.

[147] See: http://sutyajnik.ru/rus/echr/school/judg_v_russia.html (as of 07.05.2009).

[148] А. Д. Деменева, Л. М. Чуркина. Применение Конвенции о защите прав человека и основных свобод юристами Уральского центра конституционной и международной защиты прав человека: опыт и рекомендации.- А. Бурков (ред.) Применение Европейской конвенции о защите прав человека в судах России. Екатеринбург, 2006, с 88.

[149] A. Burkov. *Supra* note 82, p 78.

3 Developments of Strasbourg law in Russia

3.1 Attitudes about Strasbourg

Publications in mass media, especially those that include comments, provide us with information on how society, government representatives and lawyers see the role of the Convention and the ECtHR in relation to Russia. In general, the media are paying greater attention to those Strasbourg cases that are of social and political importance: such as the case of *Burdov*[150], *Kalashnikov*[151], *Gusinskiy*[152], *Ilaşcu*[153], *Slivenko*[154] etc. These cases were reflected in official, entertainment, as well as business media. It should be noted that the main commentators regarding Strasbourg's work appear to be the former and present representatives of the Russian Federation at the European Court of Human Rights, less frequently the judge in respect of Russia at the ECtHR and other high officials like the former and present president of the Russian Federation.

Until 2002, when the ECtHR ruled on the cases of *Burdov* and *Kalashnikov*, comments about Strasbourg were extremely positive and prospects of interaction with the ECtHR were seen in a favorable manner. Russian rulers wanted to impress their European colleagues by sharing their values of the rule of law and respect for human rights. In a speech on 24 January 2000, Vladimir Putin in his then capacity of Acting President made an explicit reference to the ratification by Russia of the European Convention on Human Rights, which had therefore become a constituent part of the Russian legal system. Above all, he said, the jurisdiction of

[150] *Burdov v. Russia*. *Supra* note 98.

[151] *Kalashnikov v. Russia*. *Supra* note 98.

[152] *Gusinskiy v. Russia*. ECtHR, Application no. 70276/01, 19.05.2004.

[153] *Ilaşcu and others v. Moldova and Russia*. ECtHR, Application no. 48787/99, 08.07.2004.

[154] *Slivenko v. Latvia*. ECtHR, Application no. 48321/99, 09.10.2003.

the European Court of Human Rights had been recognized.[155] As a President, Putin remarked in November 2001:

> … [W]e do not consider the European Human Rights Court as a competitor of our judicial system. On the contrary, this is the most important element of European values in the modern World and in Russia if we take into account its integration into the World community.

He added that Russia 'counts on constructive work' with the ECtHR and expressed the hope that possible 'imperfections of the Russian judicial system will be noted delicately and professionally. Russia, he said, will correct these mistakes and 'this will be useful for Russian country'.[156]

Back then, the representative of the Russian Federation at the European Court of Human Rights Pavel Laptev was also stressing the importance of the Convention and the ECtHR as a means to stimulate the development of the national legal and judicial system. Laptev emphasized that the number of applications received from Russia in no way means that there is a 'disastrous situation with the observance of laws'. He believed that the situation with the rule of law in Russia is not worse, but even better than in other European countries, such as Italy and France. However, he stressed the need to prepare Russian judges for the 'European standard', so they would have an excellent knowledge of European human rights law. He also advised judges to apply international law and especially the practice of the ECtHR in cases where a gap of domestic legislation is found.[157]

When the first ECtHR judgments on Russia's violations of human rights, along with positive feedback came along, some critical views started to come up. The ECtHR was addressed with a variety of pretentions and its judgments were received with a deep disappointment. Laptev held:

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[155] Выступление Владимира Путина на совещании руководителей республиканских, краевых и областных судов. 24.01.2000. Available at: http://www.kremlin.ru/text/appears/2000/01/28841.shtml (as of 07.05.2009).

[156] Владимир Путин встретился с председателями конституционных судов стран Европы и СНГ. 01.11.2001. Available at: http://www.kremlin.ru/text/news/2001/11/139418.shtml (as of 07.05.2009).

[157] С законностью в Росии дела не хуже. 29.01.2001. Available at: www.utro.ru (as of 07.05.2009).

> … [t]he entry into Strasbourg is 'revolutionary' for the judiciary of Russia. Decisions of the ECtHR, I believe are fair, though very painful. Russia, of course, will execute the judgment of *Kalashnikov*[158], but I regret that Strasbourg judges did not show sufficient willingness to establish the very truth in this case.[159]

Altogether, in the period 2002-2008, there have been 244 judgments of the ECtHR concerning Russia.[160] Not all of the rulings were reflected and given consideration in Russian media. In general, depending on the reactions in Russia, three categories of judgments that are commented on can be defined.

Politically sensitive judgments of the ECtHR against Russia form the first category. Giving comments on such rulings, Russia more likely criticizes not only the concrete judgment, but the ECtHR as an institution too. For example, commenting on the *Gusinskyi*[161] judgment Laptev immediately condemned the ruling, calling it 'defective both in theory and in fact'.[162] An opposite feedback on this case was given by the Russian Human Rights Commissioner Vladimir Lukin, who called on the Russia's authorities to abide by a ruling of the ECtHR stating that:

> … [W]e should treat the ECtHR ruling simply: the European court has issued this ruling and we need to carry it out. This is a qualified court, and its decision most likely points to the fact that our judicial agencies' actions were unqualified.[163]

The second type of the ECtHR judgments that usually are given an opinion on, are judgments that do not have political context, but of which Russia is a party. Such cases receive positive as well as negative feedback. Most positively evaluated judgments considered the failure of

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[158] *Kalashnikov v. Russia*. *Supra* note 98.

[159] Калашников выиграл в Европейском суде процесс против Российской Федерации. Новости России, 15.07.2002. Available at: http://palm.newsru.com/arch/russia/15jul2002/kalashnikov.html (as of 08.05.2009).

[160] European Court of Human Rights. Annual report 2008. Available at: http://www.echr.coe.int/NR/rdonlyres/B680E717-1A81-4408-BFBC-4F480BDD0628/0/Annual_Report_2008_Provisional_Edition.pdf (as of 08.05.2009).

[161] *Gusinskiy v. Russia*. *Supra* note 152.

[162] Human Rights Court Sides With Gusinsky. The St. Petersburg Times, 21.05.2004. Available at: http://www.sptimes.ru/index.php?action_id=2&story_id=553 (as of 08.05.2009).

[163] Russia should abide by ruling on Gusinsky. Interfax, 21.05.2001. Available at: http://www.eng.yabloko.ru/Publ/2004/Internet/01_06/040521_interfax_ru.html (as of 08.05.2009).

the execution of domestic court rulings in Russia. The positive assessment of these judgments is most probably delivered due to the fact that in such cases, the ECtHR did not criticize, but rather supported Russian courts. In addition, the circumstance that cases of non-execution of court decisions for the most part, are cases of pensioners and beneficiaries to which the public relates with compassion can also explain the positive comments. Laptev held on the case of pensioner *Pravednaya*[164]:

> … [t]he Russian authorities are aware of the severity of the problem of the non-execution of court judgments, and take all possible steps to ensure that payments will be released to the complainant as soon as possible.[165]

The third category of judgments that are positively discussed in Russian media are cases 'won' by Russia. These are judgments in which the violations of human rights by Russian authorities were not found (*e.g.* in the case of *Nikitin*[166]), but also cases against other states where the representative of the Russian Federation at the European Court of Human Rights performed on the side of the applicant, such as *Slivenko*[167] – a Russian resident in Latvia who filed her case to Strasbourg. Such triumphs of applicants are usually received as right and just rulings of the ECtHR. After the violation of Latvia was declared in the *Slivenko* case, Laptev held that:

> … [T]he Strasbourg Court just created a 'super precedent' and clearly defined the approach that should be followed by all States in dealing with cases of this type.[168]

Opinions delivered by the new representative of the Russian Federation in Strasbourg Georgii Matiushkin are not much different of those given by his predecessor. On the one hand he recognizes the work of the ECtHR, but then again states that the rulings of the ECtHR appear

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[164] *Pravednaya v. Russia*. ECtHR, Application no. 69529/01, 18.11.2004.

[165] Не надо падать в обморок. Время Новостей, 20.09.2005. Available at: http://www.vremya.ru/2005/173/51/134752.html (as of 08.50.2009).

[166] *Nikitin v. Russia*. ECtHR, Application no. 50178/99, 20.07.2004.

[167] *Slivenko v. Latvia*. *Supra* note 154.

[168] Уполномоченный при Страсбургском суде: Решение по делу Сливенко – «суперпрецедент». Риа Новости, 09.10.2003. Available at: http://grani.ru/Politics/World/Europe/m.46481.html (as of 08.05.2009).

to be weakly motivated and judges in Strasbourg biased when deciding on Russia.[169] The Kremlin also responded to the *Kudeshkina*[170] case by attacking the credibility of the ECtHR. The Minister of Justice Aleksandr Konovalov said that the decisions of recent months and even the last year give grounds for doubting the full objectivity and the impartiality of the ECtHR.[171]

All in all, it can be noted that both positive and negative evaluation of the outcomes of the ECtHR are usually based on the primitive emotional 'love-hatred' discourses about the ECtHR in Russia. Substantive assessment of judgments is simply non-existing. The ECtHR rulings that declare Russia 'guilty' are more likely have umbrage taken at them. In addition, Russian authorities try to find arguments to excuse and rehabilitate Russia, so to look a good member for the Council of Europe and the whole global community. Although in general, the ECtHR work is recognized, it is still skeptically treated by Russian authorities as an alien body that gives orders on how to bring 'human rights home', *i.e*. to Russia. It may be too far reaching to assume, but the overall feedback that the ECtHR receives in Russia may also have an impact on the attitudes of domestic judges, who so far lack a direct link to Strasbourg judges and fail to apply the Convention and the ECtHR case-law daily.

3.2 Attitudes within Strasbourg

While in Russia, the debate about Strasbourg remains within the scope of 'good-bad', 'fair-unfair' discussions, Strasbourg is distressed by a number of much more serious impediments that make the work and the progress of the ECtHR difficult.

Namely, following the accession of the former Soviet bloc states, including Russia, Strasbourg's reach has extended to more than 800 million people in 47 countries stretching the length and breadth of the continent and beyond, from Gibraltar to Vladivostok. It is no exaggeration to state that the Convention and its growing body of case-law have transformed Europe's legal and political landscape, qualifying the ECtHR as the World's most effective

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[169] Европейский суд пожаловался на Россию Конституционному. Коммерсантъ, 02.03.2009. Available at: http://www.kommersant.ru/doc.aspx?fromsearch=5e927b25-7cb7-4527-8e6f-1f2c57f509ac&docsid=1128309 (as of 08.09.2005).

[170] *Kudeshkina v. Russia*. *Supra* note 129.

[171] *Supra* note 128.

international human rights tribunal. However, recent news from the Council of Europe is not so good.

Powerful diatribes against the work of the ECtHR have come not only from Russia, but from other countries too. One of the sharpest critiques on the ECtHR was delivered by Lord Hoffmann of the House of Lords in his speech to fellow judges in the United Kingdom. In his lecture on 19 March 2009, Lord Hoffmann held:

> … [T]he shortcomings of the ECtHR arise largely from the lack of quality and inadequacies of too many of its judges, and by procedures which cannot cope with the torrent of cases coming before the ECtHR. Reforms are badly needed to arrest the ECtHR's declining reputation and effectiveness, but it is not an institution which can or should be discarded.[172]

To state the problem bluntly, the ECtHR is becoming a victim of its own success and now faces a docket crisis of massive proportions.[173] Thousands of individuals file complaints with the ECtHR. On 1 November 2008 there was a backlog of 100,000 applications pending, of which 60% were from 5 countries: Russia, Turkey, Romania, Ukraine and Italy. Compared to that, in 2008 24,200 petitions were declared inadmissible and 1,205 judgments were given.[174] So the backlog represents about 4 years work and it is growing. Indeed, it is something of an irony that the length of time cases remain pending before the ECtHR may sometimes exceed the maximum length of proceedings that the Convention allows in national courts.[175]

Thus, as the figures show, a very large proportion of petitions in 2008 were inadmissible, but the ECtHR has no summary mechanism for dealing with hopeless cases, so called repetitive 'cookie cutter' complaints. It is because the design of the procedure before the ECtHR is formative to its judicial discourse. Although initially there has been some resistance to the individual complaints procedure, which is apparent from the fact that no direct access for

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[172] L. Hoffmann. Judicial Studies Board Annual Lecture. 19.03.2009. Available at: www.jsboard.co.uk/downloads/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.doc (as of 08.05.2009).

[173] L. R. Helfer. Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime. EJIL, Vol. 19, No. 1, 2008, p. 126.

[174] European Court of Human Rights. Annual report 2008. *Supra* note 160.

[175] Article 6 § 1 of the Convention requiring a hearing to determine criminal charges and civil rights and obligations 'within a reasonable time'.

individuals to the ECtHR was provided for in the original Convention, it was clearly established by Protocols No. 9 and 11 that the individual petition and the human rights protection in concrete cases are the centrepiece of the Strasbourg supervisory system[176]. Therefore, every petition properly filled in must go before a committee of three judges and then, if admissible, before a committee of five.[177]

As the ECtHR only counts 47 judges and disposes of a minimal staff and budget[178], it is essential for it to deal with these applications in a highly efficient and effective manner, throwing out less important or hopeless cases as quickly as possible. This particular aspect of the ECtHR's problematic has absorbed almost all of its attention in the last years, and its judicial methods and approaches have undergone radical changes in order to let it cope with the increasing caseload. One of the greatest risks in this regard is that the ECtHR's increased focus on productivity and efficiency affects the quality and coherence of its case-law.[179] Therefore it is ineluctable, that there have been serious doubts expressed about the legitimacy of the ECtHR judgments.

First of all, as mentioned above, the ECtHR is overloaded and the procedure of the ECtHR remains complex and time consuming. In the light of the mountainous burden on the ECtHR, the Committee of Ministers' Deputies established an Evaluation Group[180] which was tasked with making proposals 'on the means of guaranteeing the continued effectiveness of the European Court of Human Rights. The Evaluation Group's report was published in September 2001 and made a series of proposals. The Evaluation Group argued:

> … [W]hat is required is a means of excluding from detailed treatment by the ECtHR not only applications having no prospects of success but also those, which, despite

[176] Protocols No. 9 and 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Available at: www.echr.coe.int (as of 10.03.2009).

[177] J. H. Gerards. Judicial Deliberations in the European Court of Human Rights. Leiden, 2008, p 8.

[178] S. Greer. The European Convention on Human Rights: Achievements, Problems and Prospects. New York, 2006, p 137.

[179] J. H. Gerards. *Supra* note 177.

[180] Comprising the President of the ECtHR, Luzius Wildhaber, the Deputy General Secretary of the Council of Europe, Hans Christian Krüger, and the Permanent Representative of Ireland to the Council of Europe, Justin Harman.

> their having such prospects, raise an issue that is, in the view of the ECtHR, of such minor or secondary importance that they do not warrant such treatment.[181]

Widespread concerns expressed, not least within Strasbourg itself, lead to the proposition to amend Article 35 of the Convention. Corresponding changes had to be implemented under Protocol No. 14[182]. In 2004 all Member States signed Protocol No. 14 which would enable a single judge to deal with admissibility cases and a committee of three to give final judgments in cases which are 'already the subject of well-established case-law of the Court'. The need for change is entirely pragmatic – the ever-rising case-load of the ECtHR. But questions remain as to whether the focus of this amendment is misconceived and therefore whether it will achieve its intended aim of significantly reducing the ECtHR's case-load.[183] As the ECtHR judge Nicolas Bratza had suggested:

> … [a]n amendment to the Convention designed to reduce the influx of cases or to speed up their processing by the ECtHR, will treat the symptoms but not the underlying disease, namely the continuing failure of national legal systems effectively to implement the Convention guarantees and to provide effective means of redress where breaches of the Convention rights have been found to have occurred.[184]

The promising Protocol No. 14 has not yet come into force because Russia's State Duma refuses to ratify it. The Russian State Duma Legislation Committee recommended against the ratification of the Protocol simply stating that 'the amendments are not in the interests of Russia'.[185] I am not altogether surprised. After all, what have the Russians to gain from

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[181] Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights. 22 HRLJ 308, 2001.

[182] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Available at: www.echr.coe.int (as of 10.03.2009).

[183] P. Leach. Access to the European Court of Human Rights – From a Legal Entitlement to a Lottery? HRLJ, 2006, p 24-25.

[184] N. Bratza. The Future of the European Court of Human Rights – Storm Clouds and Silver Linings. Thomas More lecture, 17.10.2002.

[185] Госдума сорвала реформу Евросуда. Коммерсантъ, 21.12.2006. Available at: http://www.kommersant.ru/doc.aspx?DocsID=732043 (as of 09.05.2009).

increasing the turnover of Strasbourg? To the contrary, according to Russian officials, the changes would tilt the ECtHR even more against Russia.[186]

Secondly, the recent judgments on merits and especially decisions on admissibility of the ECtHR are not always in conformity with the justification principle, in other words, are not very well-reasoned. Tom Barkhuysen and Michiel van Emmerik offer the case of *Morel*[187] as an example of the problems concerning the consistency of the ECtHR case-law. In this case, the ECtHR found that Article 6 under 'its criminal head' did not apply in respect of a 10% tax surcharge, because of the lack of severity of the penalty. This judgment did not correspond to established Strasbourg case-law and led to uncertainty. After more than three years, the ECtHR finally resolved the contradictoriness in the case of *Jussila*[188]. Such inconsistency and the lack of sound reasoning may indeed cause some serious problems for the national authorities that wish to fulfil their obligations flowing from the Convention and for domestic judges to apply the Convention and the ECtHR correctly in their decisions.[189]

Thirdly, the strictly case-by-case approach seems to have been made secondary and the more general approach illustrated by so called 'pilot-judgments' is preferred. The ECtHR especially makes use of the 'pilot judgment' procedure if it finds that there is a state practice or rule which will probably result in a large amount of individual cases that would have the same outcome.[190] In such cases the ECtHR chooses a 'pilot' case and decides in that specific instance, indicating not only what remedies are called for in the individual case, but also how the problem should be dealt with more generally by the country concerned. For instance, the ECtHR judgment of *Broniowski*[191] served as a 'pilot' for the 176 'Bug River' cases, which all concerned claims of applicants who disagreed with a Polish scheme set up to compensate people who had lost their belongings at the end of the World War II, when the boundaries between the Soviet Union and Poland were changed, causing more than 80,000 Poles to be

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[186] *Supra* note 128.

[187] *Morel v. France*. ECtHR, Application no. 34130/96, 06.06.2000.

[188] *Jussila v. Finland*. ECtHR, Application no. 73053/01, 23.11.2006.

[189] T. Barkhuysen, M. van Emmerik. Legitimacy of European Court of Human Rights Judgments: Procedural Aspects. Hague, 2009, p 442-444.

[190] J. H. Gerards. *Supra* note 177, p 14.

[191] *Broniowski v. Poland*. ECtHR, Application no. 31443/96, 19.12.2002.

forced to leave their homes. Although the 'pilot judgment' procedure appear a relatively efficient way to deal with at last part of the ECtHR's backlog of cases, the conclusions of 'pilot judgments' are sometimes applied in cases that are not identical in legally relevant respects.[192] The problematic of the 'pilot judgments' procedure leads us indirectly to the question about the ECtHR judges' activism. It seems that due to the enormous case-load, it has become more convenient for judges to accept its interpretations that are by now clearly established than a different legal approach in an individual case, because it would amount to overruling of precedent and would need a justification surmounting the facts of the case at hand.

Fourthly, the ECtHR has to deal with a wide variety of legal and cultural particularities of the State Parties. The eastern European states like Russia still wrestle with their communist past, which brings about fundamental rights claims that are hardly conceivable in western European states. In a state such as Turkey, difficulties with regard to the position of religion in a secular state occur which are not visible in most other member states.[193] Finally, even between western European states, there are important differences, for example with regard to the societal and legal role that is attributed to labour unions. It is thus an enormous challenge for the ECtHR to frame an adequate response to deal with complaints from such divergent states and to maintain and develop sufficient knowledge and understanding of each of the different legal systems and legal cultures to place a particular claim in context.[194]

Last but not least, the problematic of the ECtHR is shaped by its institutional setting. Although the Protocol No. 11 has provided the ECtHR with a system of internal appeal, the ECtHR does not have any co-equal branches functioning on the same level that may correct the effects of improper judgments. To put this issue together with weakly reasoned judgments, the respondent state's unwillingness to carry out the judgments and to use such arguments in the domestic judiciary is understandable. Beside this issue, a practical result of the lack of co-equal branches is that there are no coercion mechanisms to compel the states to

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[192] Compare: *Goudswaard-Van der Lans v. The Netherlands*. ECtHR, Application no. 75255/01, 22.09.2005 and the cloning case *Van den Born-Van de Wal and others v. The Netherlands*. ECtHR, Application no. 75241/01; 75266/01; 75263/01, 22.09.2005, in which the pilot judgment in the case of *Goudswaard-Van de Lans* is followed unconditionally with respect to Articles 6, 8 and 14 of the Convention, even though there were essential differences in this respect.

[193] See for example: *Leyla Sahin v. Turkey*. *Supra* note 113.

[194] J. H. Gerards. *Supra* note 177, p 15.

compliance. In national legal systems, government branches may be empowered to collect fines or penalties imposed by the courts, or even use force to ensure compliance. As is well known, no such mechanisms exist on the level of the Council of Europe. The Committee of Ministers only has the power to adopt resolutions in which it criticises a certain state for its lack of compliance with the ECtHR judgments. This means that the compliance with the ECtHR judgments depends on such factors as the perceived strength of international obligations and legal rules, and the quality and persuasiveness of their judgments.[195]

3.3 Future potential of Strasbourg law in Russia

After analyzing the attitudes about Strasbourg law delivered in Russia and within Strasbourg itself, do we dare to say 'Russia in Europe'? Has Russia really been 'added and stirred' in Europe and *vice versa*? It is true, this relationship started well. The Council of Europe invited the enthusiastic 'new Russia' to the 'club' hoping that Moscow would stay on the path towards the rule of law and that more influence would be exerted on Russia inside the Council. The happy marriage, however, did not happen.

In the past years Russia's relations with the Council of Europe have significantly deteriorated. On the one hand there is wide and slow post-Soviet Russia, still taking her first steps towards Europe - towards the rule of law, being very sensitive to losing cases in Strasbourg, but at the same time too proud to admit its failures and take real action to catch up with Europe. In a way, Russia is trapped: unwilling to quit one of the only European organizations willing to accept it as an equal member, the Russian government finds itself increasingly called to meet the requirement of membership. It is a carrot and a stick, all in once.[196] On the other hand there is Europe - the Council of Europe, whose high expectations to socialize Russia, do not seem to come true. On the contrary, this newcomer appeared to cause more head aches in Strasbourg than any other Member State of the Council. Russia's increasing contribution to the case-load of Strasbourg, its non-execution of the ECtHR judgments and finally Russia's State Duma's refusal to ratify Protocol No. 14 to the Convention was and still is, predictably, not very well received in Strasbourg.

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[195] L. R. Hefler, A.-M. Slaughter. Toward a Theory of Effective Supranational Adjudication. 107 Yale L.J. 273, 367, No.2, 1997, p 285.

[196] J. D. Kahn. *Supra* note 2, p 5-6.

However, this extremely strained 'Russia and Europe' relationship seems to have its solution in a so-called Protocol No. 14-Bis, that is still discussed by the Committee of Ministers.[197] The Protocol No. 14-Bis is meant to function as interim solution that would help Strasbourg to overcome the legitimacy crisis and institutional issues caused by the backlog of enormous number and the wide variety of cases filed to the ECtHR.

The proposed Protocol No. 14-Bis in effect takes two crucial elements from the broader reform package of Protocol No. 14, and seeks to give these a more immediate effect. The two elements are the possibility for a single judge to declare plainly inadmissible cases inadmissible. Secondly, committees of three judges would be allowed to issue judgments. Obviously, this would spare time and allow the sections to dedicate more time to the more important cases. The essential difference with Protocol No. 14 is, that Protocol No. 14-Bis would enter into force almost immediately for each Member State that ratifies it (and thus apply to cases against that state). Thus, it would no longer be possible for a state like Russia to block the entry into force for the other state parties. The Parliamentary Assembly reacted positively to the proposal, basing itself on a report on the issue by one of its members, the Dutch senator Klaas de Vries. De Vries estimated that:

> … [t]he introduction of the proposed measures would result in an increase of 20 to 25 per cent in the capacity of the ECtHR to process cases. The current situation is a *force majeure* for which Protocol No. 14-Bis could offer a solution in the short run and avoid the ECtHR becoming as crushed as the tomatoes in the can.[198]

It could be suggested, that in order to engage Russia with the implementation of the Convention and the ECtHR case-law there is a need for the political will to comply with Strasbourg. It may be, that the measures of parliamentary oversight; established co-ordinated, inter-ministerial governmental system for responding to the ECtHR judgments; an accurate legislation that ensure the openness and accountability in the implementation process or the

[197] PACE. Draft Protocol No. 14-Bis to the Convention for the Protection of Human Rights and Fundamental Freedoms. Doc. 11864. 22.04.2009. Available at: http://assembly.coe.int/Mainf.asp?link=/Documents/WorkingDocs/Doc09/EDOC11864.htm (as of 09.05.2009).

[198] PACE. Draft Protocol No. 14-Bis to the Convention for the Protection of Human Rights and Fundamental Freedoms. Opinion No. 271 (2009). Available at: http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta09/EOPI271.htm (as of 09.05.2009).

engagement with human rights stakeholder and experts would also help.[199] The question is, when and how will it happen?

The 'Bis'solution seems to be justified and realistic, although not entirely unproblematic way to address at least part of the ECtHR problems. The downside of taking this path is that the pressure on Russia to ratify Protocol No. 14 itself may decrease and Russia will be left out of the Council's socialization project. The good side of this solution is that citizens of 46 Member States get quicker answers to their complaints and the ECtHR will have more time to care about and deal with cases from Russia. So, maybe this risk is worth taking?

[199] P. Leach. Strasbourg's oversight of Russia – an increasingly strained relationship. 2007, p 7-8. Available at: www.westlaw.com (as of 03.05.2009).

CONCLUSIONS (to an inconclusive story)

It is true, after the Soviet Union collapsed, the leaders of 'new Russia' understood that the state would have no prospects for further economic and social development unless they renounce the longstanding isolationist policy and come out of the 'Soviet box'. While Russia's political atmosphere shifted to advocating good foreign relations, especially the integration with Europe, the new liberal Russian 1993 Constitution prescribed a system change. The Constitution opened up the 'closed' Soviet legal system by introducing the monist solution to the relationship of international and domestic law. I find a number of direct references to international law in the Constitution to be a remarkable novelty compared to the Soviet Constitution, which offers formal proof that the international legal obligations entered into have all been adopted by Russian law. In itself, however, the text in the constitution does not guarantee that Russia performs according to the standards set in it. The question here was whether these constitutional undertakings are fully realizable or merely symbolic.

Legal reality made itself apparent as Russia applied for admission to the Council of Europe. Notwithstanding the concerns over Russia's slower reform pace, particularly the lingering problems tied to rule of law and human rights abuses in Chechnya, the political will, or maybe necessity to allow Russia to the 'Big European House' did prevail in the end. Namely, in Chapter 1, I argue that the Council of Europe acted in a Constructivist way when invited Russia to join the 'club' hoping that membership would encourage Moscow to stay on 'the right path' of legal reform and that more influence could be exerted on Russia inside rather than outside the Council. Despite the critical voices that claim the Council of Europe was becoming too politicized to be able to uphold the ideals of democracy and the rule of law, but also Russia's unwillingness to comply with its commitments to the Council (*e.g.* death penalty still remains codified in Russia), even so, I find this relationship to have positive influence on Russia. In my view, one of the significant changes in the legal sphere is Russia's constitutional framework set up for 'accommodating' international treaties like the European Convention on Human Rights.

After assessing the relevant legislation and doctrinal writings regarding the status of the European Convention on Human Rights, I feel safe to conclude that at present, Russian law allows the penetration of conventional norms into the domestic legal system without the need to enact specific acts of transformation. In other words, theoretically there is no difference between the Convention and, for example, the Russian Civil Procedure Code in terms of their

implementation in national courts. Although there are still contradictory opinions among Russian scholars regarding the Convention's position in national law, I support the majority opinion and think that international law is not capable of overriding the Constitution. However, by signing the Convention, Russia had agreed to adopt an international set of legal standards and norms as its own, prioritizing them above the legislation passed by its own Federal Assembly.

As we know, the Convention is a 'living instrument' and it is not possible to apply the Convention without looking at the corresponding case-law of the European Court of Human Rights. By looking at the ECtHR position in the Russian legal system, I had to put a doubting diagnosis on this issue. Normatively, there is no bar to the domestic use of the case-law of the Convention advanced by the ECtHR. The other thing is the problematic interpretation of the notion of the 'case-law' that raises suspicions about factual implementation of the Convention in Russia. Notably, the possible answers appeared to range from treating ECtHR case-law as binding precedent only in matters where Russia was a party, to giving it some less intense legal effect, to making its use totally permissive and to denying its recognition in any manner. More than that, it turned out that there have been rarely any directions given by the constitutional authority or a clear directive from the legislature to solve this controversy.

While in Chapter 1, Russia's new state position and the transplantation of Russian law and doctrines relevant to domestic implementation of international law were discussed, it appeared necessary for me to look more closely at Strasbourg law 'in action' in order to make this analysis complete. Therefore, after the allocation of judicial competence, the actual jurisprudence of Russian three higher courts on this issue was assessed in Chapter 2.

Note, that since the Constitutional Court mostly considers applications concerning human rights granted by the Constitution, theoretically the Convention and its interpretations given by the ECtHR can be applied in almost every case. I had to admit, that there are some exemplary decision in which the CC implements not only the Convention, but also the ECtHR case-law. However, such decisions form just a half of the cases, where the CC relied on the Convention. So, if we draw an overall sketch of the CC's practice by evaluating statistics, quality and methods of applying the Convention and the ECtHR case-law, less optimistic picture emerges. The analysis of the practice of the CC lead me to the suspicion that the CC holds the typical attitude of a court in a civil law country where there is no case-law, but statutes and subordinate legislation, and therefore no custom of interpreting statute's provisions by using case-law. I had to conclude that the CC, which is expected to be a

‘locomotive’ that drives its nation towards the European legal order, in this respect, seems to be extremely modest and slow.

As far as the practice of the Supreme Court was concerned, I had to conclude that to a great extent (unlike the jurisprudence of the Constitutional Court), the SC resembles an attempt to demonstrate to the Council of Europe that the Convention is being formally applied rather than actually implemented. Otherwise, how can one characterize the situation, when the highest court of a country, having issued special documents (Explanations) that direct all inferior courts to apply the Convention by ‘taking into account’ the ECtHR case-law, does not follow these documents itself in its jurisprudence.

Even more pessimistic conclusion had to be made on the jurisprudence of the Supreme Arbitration Court. Because the Convention cannot be accurately applied without reference to its interpretations advanced by the ECtHR, the way the Convention is being used by the SAC can be defined as merely not existing. More than that, it seems that the Informational Letter issued by the Chief Justice in 1999, so called ‘take into account’ directive is indeed a dead letter.

After examining the relevant jurisprudence of the three Russian higher courts and characterizing it as unsatisfactory, I suggested that one of the possible obstacles that keeps domestic court judges from applying the Convention and its case-law daily are the impartiality and professionalism issues. There have been speculations about the assumption that there are still a lot of ‘telephone judges’ who have strong connections with the executive power, as judiciary is mainly staffed by former procurators. This, obviously, does not facilitate the independence of the judges, because their previous professional experience may be rooted in their mindsets, so in the judiciary on the whole. Russian courts also experience a number of serious problems with respect to its financial independence. Along with the courts’ impartiality, the question about the judges’ professional skills also arose. As far as the current situation is concerned, lawyers and judges continue to receive training, not very different form that in Soviet Russia. Law schools do not include more or less comprehensive questions on European human rights law in the curriculum of international law courses, and sometimes do not include them at all.

What’s more, I believe Russian judges still suffer from a hangover of an old policy. Because most of the judges of Russian higher courts gained their legal education and formed their value system in Soviet period, it can be assumed that the dualist approach might be deep-

rooted in their mindsets. That is why they still tend to treat international treaties, like the European Convention on Human Rights as a complementary, not the main argument in their decisions. I also believe that another bottleneck of Strasbourg law execution in Russia is the confusion in judges' understanding - what is ECtHR case-law, *i.e.* precedent. As a general rule, court decisions are not considered to be sources of law in the Russian Federation. That is why for most of the judges, the precedent of the ECtHR does not differ from that Anglo-Saxon. For this reason, the notion of the precedent itself makes judges to ignore it or at most consider as persuasive legal guidance, but not as a binding source of law.

Last but not least obstacle to the effective execution of Strasbourg law in Russian higher courts, in my opinion, may be the lack of motivation. I assume that Russian judges lack motivation to apply Strasbourg law, therefore studying it, because there are no official translations of the ECtHR judgments provided by the Russian Government. Due to the absence of knowledge of English and French, judges feel more confident when applying domestic norms.

Although there are legal mechanisms in the Russian legal system that make Strasbourg law easily accessible, the apathy of Russian judges in applying the Convention and the ECtHR case-law give reasons to conclude that Russian legal system is not that open in practice as it insists to be in theory. Hence, the 'dictatorship' of Strasbourg law has yet to be kept in the quotation marks. To date, the 'dictatorship' is rather an ironic figure which is ignored.

In Chapter 3, I tried to explore whether Strasbourg law is eventually becoming a dead letter. I looked for the main tendencies of opinions and comments delivered by the Russian authorities about Strasbourg and I have to conclude, that all in all both positive and negative evaluation of the outcomes of the ECtHR are usually based on the primitive emotional 'love-hatred' discourses about the ECtHR in Russia. Substantive assessment of judgments is simply non-existing. The ECtHR rulings that declare Russia 'guilty' are more likely taken umbrage. In addition, Russian authorities try to find arguments to excuse and rehabilitate Russia, so to look a good member for the Council of Europe and the whole World community. Although in general, the ECtHR work is recognized, it is still skeptically treated by Russian authorities as an alien body that gives orders on how to bring 'human rights home', *i.e.* to Russia. It may be too far reaching to assume, but an overall feedback that the ECtHR receives in Russia may also have an impact on the attitudes of domestic judges, who so far lack a direct link to Strasbourg judges and fail to apply the Convention and the ECtHR case-law daily.

While in Russia, the debate about Strasbourg remains within the scope of 'good-bad', 'fair-unfair' discussions, Strasbourg is distressed by a number of much more serious impediments that make the work and the progress of the ECtHR difficult – *e.g*. the increasing case-load; the lack of sufficient justification in judgments; the legitimacy of pilot-judgments; the differences between states and the lack of co-equal branches functioning on the same level that may correct the effects of improper judgments. What's more, Russia - the main contributor to this mountain burden of the ECtHR does not show any signs of enthusiasm to ratify Protocol No. 14. I am not altogether surprised. After all, what have the Russians to gain from increasing the turnover of Strasbourg? To the contrary, according to Russian officials, the changes would tilt the ECtHR even more against Russia.

The relationship of Russia and Europe is extremely strained and I do see the linkage between the attitudes about and within Strasbourg affecting the obligatoriness of Strasbourg law in Russia. It could be suggested, that in order to engage Russia with the implementation of the Convention and the ECtHR case-law there is a need for the political will to comply with Strasbourg. Might be, that the measures of parliamentary oversight; established co-ordinated, inter-ministerial governmental system for responding to the ECtHR judgments; an accurate legislation that ensure the openness and accountability in the implementation process or the engagement with human rights stakeholder and experts would also help.

However, the Strasbourg new solution still discussed in the by the Committee of Ministers – Protocol No. 14-Bis, seems to be one of the most realistic solutions, although not entirely unproblematic way to address at least part of the ECtHR problems. The downside of taking this path is that the pressure on Russia to ratify Protocol No. 14 itself may decrease and Russia will be left out of the Council's socialization project, not to mention the willingness of Russia to follow Strasbourg law that will simply extinct. The good side of this solution is that citizens of 46 Member States get quicker answers to their complaints and then Strasbourg will have more time to care about cases from Russia.

To date, my critical analysis of the 11-year-old 'dictatorship' of Strasbourg law in Russia give rise to the conclusion that a lot has changed, but at the same time, nothing has changed. This work makes me optimistic about the gradual changes in the Russian legal system that seems to pave the way towards the rule of law. At the same time I have more substantial grounds for pessimism about the factual application of the existing legal mechanisms and what's more, the authorities' will and motivation to 'bring human rights home', *i.e*. to Russia. On the one hand, it seems to me that Russia is just like Europe, only a little wider and slower and needs

more time to get on a track with her European sisters. On the other hand, it may be, that Russia is like that bear in the Anthony de Mello's story, who:

> … [m]easured his four-meter-wide cage: it was its length. In five years, the cage was removed, but the bear continued to walk four meters there and four meters back as if the cage was still there. And it was there. Only for him.[200]

Time will tell if Russia is ever able to get out of her imaginary cage …

[200] A. de Mello. The Prayer of the Frog. Sofia, 2003.

Strasbourgi õiguse ‘diktatuur’ Venemaal: Venemaa lähendamine õigusriigi põhimõtetele (Resümee)

Pärast Nõukogude Liidu lagunemist, mõistsid ‘uue Venemaa’ liidrid, et riigil ei ole lootust edasiseks majanduslikuks ja sotsiaalseks arenguks, kui nad ei loobu pikaajalisest riigi isoleerimise poliitikast ja ei tule ‘Nõukogude kastist’ välja. Samas kui Venemaa poliitiline eliit liikus heade välissuhete loomise poole, seda eriti Euroopaga, ennustas uus liberaalne Venemaa Föderatsiooni 1993. aasta põhiseadus muutusi Venemaa õigussüsteemis. Uus põhiseadus avas seni ‘suletud’ Nõukogude õigussüsteemi kehtestades monistliku lähenemise, mille järgi siduvad rahvusvahelised lepingud omavad vahetut riigisisest õigusjõudu. Põhiseaduses on mitmeid viiteid rahvusvahelisele õigusele, mis on omamoodi märkimisväärne uuendus võrreldes Nõukogude põhiseadusega. See on ka formaalseks tõendiks sellele, et jõustunud rahvusvahelised kohustused on saanud vene õigussüsteemi lahutamatuks osaks. Samas ei garanteeri põhiseaduse tekst ainuüksi, et Venemaa käitub vastavalt põhiseaduses sätestatud standarditele. Nimelt, on siin küsimus selles, kas need põhiseadusest tulenevad kohustused on täielikult realiseeritavad või omavad need vaid sümboolset jõudu.

Õiguslik tegelikkus tuli ilmsiks, kui Venemaa taotles liikmelisust Euroopa Nõukogus. Vaatamata Venemaa aeglasele reformitempole, mis oli eelkõige probleeme tekitav õigusriigi põhimõte juurutamise ja inimõiguste rikkumiste küsimuses (nt Tšetšeenias), poliitiline tahe või võib-olla ka teatud poliitiline vajadus otsustas Venemaa vastuvõtmise kasuks ‘Suurde Euroopa Majja’. Nimelt, asuti töö 1. peatükis seisukohale, et Euroopa Nõukogu käitus Venemaa vastuvõtmisel konstruktivistlikult, kutsudes Venemaad liituma nö ‘klubiga’, samas lootes, et liikmelisus julgustab Moskvat jääda püsima ‘õigele teele’ õigusliku reformi läbiviimisel ja et vajadusel saab Venemaad rohkem mõjutada sees ja mitte väljaspool Nõukogu. Kuigi kriitilised arvamused sellest, et Euroopa Nõukogu on muutunud liiga politiseerituks, et kaitsta selliseid ideaale nagu seda on demokraatia ja õigusriigi põhimõte, ka Venemaa soovimatus järgida Euroopa Nõukogu ees võetud kohustusi (nt surmanuhtlus on Venemaal endiselt kodifitseeritud) leiti, et Venemaa-Euroopa suhe oli avaldanud Venemaale positiivset mõju. Üheks olulisemaks muutuseks õiguse valdkonnas oli Venemaa põhiseaduslik raamistik, mis oli loodud selleks, et ‘kodustada’ selliseid rahvusvahelisi lepingud nagu seda on Euroopa Inimõiguste ja Põhivabaduste konventsioon (Konventsioon).

Olles analüüsinud asjaomaseid õigusakte ja mitmeid Venemaa õigusteoreetikute käsitlusi, mis puudutavad Konventsiooni staatust Venemaa õigussüsteemis, järeldati, et tänapäeval

võimaldab vene õigus konventsionaalsete normide sulandumist siseriiklikku õigussüsteemi, ilma et sellist siirdamist oleks vaja kinnitada mõne siseriikliku õigusaktiga. Teisisõnu, teoreetiliselt ei ole vahet Konventsioonil ja, näiteks, Venemaa tsiviilkohtumenetluse seadustikul nende rakendamisel siseriiklikes kohtutes. Kuigi vene õigusteoreetikute seas esineb vastuolulisi arvamusi Konventsiooni staatuse kohast vene õiguse hierarhias, asuti toetama enamuse arvamust ning leiti, et rahvusvahelised lepingud nagu Konventsioon ei ole võimelised asuma kõrgemale Venemaa põhiseadusest. Samas, oli Venemaa Konventsiooni allkirjastades nõustunud vastu võtma kogumi rahvusvahelisi õiguslikke standardeid ja norme kui enda omi, andes neile prioriteedi Föderaalse Assamblee õigusaktide üle.

Euroopa Inimõiguste Kohus (EIÕK) on mitmeid kordi rõhutanud, et Konventsioon on ‘elav instrument’ ja selle kohaldamine ei ole võimalik ilma vastava kohtupraktikaga arvestamist. Normatiivselt, ei ole Euroopa Inimõiguste Kohtu seisukohtade siseriiklikuks kasutamiseks takistusi. Probleeme on aga tekitanud mõiste ‘kohtupraktika’ vastuoluline tõlgendamine, mis tekitas kahtlusi Konventsiooni faktilisest rakendamisest Venemaal. Nimelt, varieeruvad ‘kohtupraktika’ tõlgendused rangelt siduva ja mittesiduva vahel. Ühed loevad ‘kohtupraktikaks’ vaid neid EIÕK otsuseid, mille pooleks on Venemaa, teised aga arvavad, et ka nendes otsustes väljendatud Kohtu seisukohad ei ole Venemaale järgimiseks kohustuslikud. Veelgi enam, ilmnes, et ükski põhiseaduslik institutsioon, ka mitte seadusandja ei ole heaks arvanud anda selgeid juhiseid kõnealuse vastuolulisuse lahendamiseks.

Lisaks 1. peatükis esitatud teoreetilistele käsitlustele Venemaa uuest riigi positsioonist, vene õiguse transformeerimisest ja vastavatest doktriinidest, mis puudutavad rahvusvahelise õiguse rakendamist Venemaal, asuti seisukohale, et tervikliku pildi loomiseks tuleb täpsemalt uurida, kas ja kui, siis kuidas kasutatakse Strasbourgi õigust õiguspraktikas. Pärast vastavate kohtute pädevuste määratlemist, asuti 2. peatükis hindama Konventsiooni ja EIÕK kohtupraktika rakendamist Venemaa kolme kõrgema kohtu poolt.

Märkigem, et enamasti lahendab põhiseaduses sisalduvaid inimõigusi puudutavaid kaebusi Venemaa Konstitutsiooni Kohus. Seega, teoreetiliselt saaks Konstitutsiooni Kohus kasutada Konventsiooni sätteid ja nendele EIÕK poolt antud tõlgendusi peaaegu igas asjas. Tuleb tunnistada, et Konstitutsiooni Kohus on teinud paar eeskujuliku otsust, milles rakendas lisaks Konventsiooni sätetele ka EIÕK otsustes sisalduvaid Konventsiooni tõlgendusi. Ometi moodustavad sellised otsused vaid poole neist kaasustest, milles Konstitutsiooni Kohus tugineb Konventsioonile. Seega, kui hinnata vastavat Konstitutsiooni Kohtu statistikat,

Konventsioonile ja EIÕK kohtupraktikale viitamise kvaliteeti ja Konstitutsiooni Kohtu rahvusvahelise õiguse rakendamise meetodeid, on saadud tulemus vähem optimistlik. Antud analüüsi tulemusena järeldati, et Konstitutsiooni Kohus, mis peaks vene õigusteoreetikute arvates olema vene õigusliku reformi 'veduriks', juhib seda protsessi äärmiselt tagasihoidlikult ja aeglaselt.

Hinnates Venemaa Kõrgema Kohtu praktikat ning selle arvestamist Strasbourgi õigusega järeldati, et kohtule meenub küll aeg-ajal, et Euroopa Nõukogule tuleb näidata, et Konventsiooni kasutatakse, seda tehakse aga üksnes formaalsel kujul, jättes kõrvale EIÕK seisukohad. Teisiti, kuidas saaks seletada Kõrgema Kohtu ükskõiksust Strasbourgi õiguse suhtes olukorras, kus ta on ise mitmel korral välja andnud spetsiaalsed juhised (*raziasnenia*), mis soovitavad alama astme kohtutele asjade lahendamisel 'võtta arvesse' EIÕK kohtupraktikat, kuid ise nendest juhistest kinni ei pea.

Veelgi pessimistlikuma järelduseni jõuti Venemaa Kõrgema Arbitraaži Kohtu osas. Kohus viitab vaid mõnes lahendis Konventsiooni sätetele. EIÕK seisukohtade rakendamise osas on kohtu praktika olematu. Veelgi enam, näib, et 1999. aastal kohtu esimehe välja antud Informatiivne Kiri (*informatsionnoe pismo*), mis kutsus üles nö 'arvestama' Konventsiooni sätete ja EIÕK praktikaga, on kõigest dokumendi surnud täht.

Pärast kolme Venemaa kõrgema kohtu vastavate kohtupraktikate hindamist mitterahuldatavateks arvati, et üheks võimalikuks põhjuseks, mis võib takistada siseriiklike kohtunike Konventsiooni ja EIÕK seisukohtade kasutamisest nende igapäevatöös on kohtunike erapooletuse ja professionaalsuse küsimus. Tihti spekuleeritakse nö 'telefoni kohtunike' üle, kellel on tugevad sidemed täidesaatva võimuga, kuna kohtusüsteemi töötajad on enamuses endised prokuratuuri ametnikud. Kui see vastab tõele, siis ei hõlbusta see kuigi palju kohtunike sõltumatust, sest varasem erialane töökogemus võib olla mõjutanud nende mõtteviisi, seega ka kohtusüsteemi tervikuna, mistõttu asutakse kergemini riigi positsioonile ning hoidutakse oluliste otsuste vastuvõtmisest üksikisiku kasuks.

Lisaks kohtute erapooletuse probleemile, tekkis küsimus ka kohtunike erialastest oskustest. Uurimise käigus selgus, et tänapäeva juristide väljaõpe ei erine väga sellest, mis oli Nõukogude Venemaal. Venemaa juhtivate ülikoolide õigusteaduskondade õppekavad ei sisalda kohustuslike ainekursusi Euroopa inimõigustest. Kuna enamus kohtunikest Venemaa kõrgemates kohtutes sai erialase väljaõpe ja olid kujundanud oma väärtussüsteemi nõukogude perioodil, siis eeldati, et dualistlik lähenemine võib olla sügavalt juurdunud nende

arusaamadesse. Seetõttu kiputakse endiselt käsitlema rahvusvahelisi lepinguid nagu Euroopa Inimõiguste ja Põhivabaduste konventsiooni kui täiendavaid ja mitte põhiallikaid. Teiseks kitsaskohaks Strasbourgi õiguse rakendamisel Venemaal leiti olevat kohtunike ebaselgust EIÕK kohtupraktika, st pretsedendi osas. Üldreeglina, ei peeta Venemaal kohtuotsuseid õiguse allikateks. See võib olla ka põhjuseks, miks enamike kohtunike jaoks ei erine EIÕK pretsedent Anglosaksi pretsedendist. Seetõttu, juba ainuüksi mõiste ebaselgus paneb kohtunikud sellesse suhtuma kahtlusega ning käsitlema EIÕK seisukohti kui toetavaid argumente, kuid mingil juhul kui siduvaid õiguse allikaid.

Veel üheks takistuseks Strasbourgi õiguse tõhusal rakendamisel arvati olevat kohtunike vähest motivatsiooni. Eeldati, et vene kohtunikel puudub tahe kohaldada Strasbourgi õigust, seega ka otsida ning uurida seda põhjusel, et Venemaal puudub EIÕK otsuste ametlike tõlgete süsteem. Kuna enamus kohtunike ei valda inglise ega prantsuse keelt, siis tunnevad nad end palju kindlamalt siseriiklike normide kui tundmatu Konventsiooni kohaldamisel.

Kuigi Venemaa õigussüsteemis on mehhanisme, mis muudavad Strasbourgi õiguse kergesti kättesaadavaks, annab Venemaa kohtunike apaatia Konventsiooni ja EIÕK kohtupraktika kohaldamisel põhjust järeldada, et vene õigussüsteem ei ole praktikas nii avatud kui ta seda teoorias väidab olevat. Seega, ei ole võimalik Strasbourgi õiguse ‘diktatuuri’ jutumärkidest välja tõsta vaid pigem tuleks jätta see kergelt irooniline kujund, iseloomustamaks Venemaa ebaõnnestunud rahvusvahelise kohustuse täitmist.

Töö 3. peatükis püüti ennustada Strasbourgi õiguse tulevikku Venemaal. Uuriti, millised on Venemaa ametivõimude valitsevad arvamused ja kommentaarid Strasbourgi kohta. Tuli tõdeda, et nii positiivsed kui ka negatiivsed arvamused Euroopa Inimõiguste Kohtust piirduvad reeglina primitiivse ja emotsionaalse ‘hea-halb kohus’ vaidlustega. Sisuline hinnang EIÕK otsustele puudub. EIÕK otsused, millega tunnistatakse Venemaa süüdi, võetakse vastu pahameele ja nördimusega. Lisaks püüavad vene ametivõimud leida Venemaa käitumisele vabandusi, et ikka Euroopa Nõukogule hea liikmena näida. Kuigi üldiselt tunnustatakse EIÕK tööd, suhtutakse sellesse endiselt teatud skeptilisusega ning koheldakse Strasbourgi kui välismaalast, kes annab kaugelt korraldusi, kuidas ‘tuua inimõigused koju’, st Venemaale. See võib olla liiga kaugeleulatuv oletus, kuid üldine EIÕK-le loodud maine võib mõjutada ka siseriiklike kohtunike hoiakuid, kellel tänaseks puudub otsene side Strasbourgi kohtunikega ja kes ei kiirusta kohaldada Konventsiooni ja EIÕK kohtupraktikat oma iga päeva töös.

Samal ajal, kui Venemaa arutelud Strasbourgist jäävad ‘õiglane-ebaõiglane kohus’ tasemele, püüab Strasbourg lahendada mitmed tõsiseid probleeme, mis on viimastel aastatel oluliselt raskendanud EIÕK tööd ja arengut - nt aina suurenev kaebuste arv; ebapiisavad kohtuotsuste põhjendused; piloot-kohtuotsuste legitiimsus; liikmesriikide erinevused jt. Seda enam, et Venemaa, kes on EIÕK institutsionaalse ja legitiimse kriisi üheks peamiseks põhjustajaks, ei näita üles ka soovi ratifitseerida protokolli nr 14.

Suhted Venemaa ja Euroopa vahel on pingelised. See võib olla ka negatiivsete hoiakute põhjuseks, mis puuduvad Strasbourgi õiguse järgimise ‘kohustuslikkust’ Venemaal. Kuid paistab, et Strasbourgil on varuks uus lahendus - protokoll nr 14-Bis, mis on veel arutamisel Ministrite Komitees. See tundub olevat üks kõige realistlikumaid lahendusi, kuigi mitte probleemidevaba viis lahendada vähemalt osa EIÕK-d vaevavaid küsimusi . Antud lahenduse oht võib seisneda selles, et selle tulemusena väheneb surve Venemaale protokolli nr 14 ratifitseerimiseks. Samuti võib ‘Bis’ lahendus Venemaad ‘Euroopa Suurest Majast’ ja Euroopa Nõukogude nn sotsialiseerimise projektist välja jätta. Teisalt, võib see protokoll pakkuda 46 liikmesriigi kodanikele kiiremaid ja efektiivsemaid lahendusi nende kaebustele ning Strasbourgil jääb rohkem aega, et tegeleda Venemaaga.

Tänaseks 11-aastat kestnud Strasbourgi õiguse ‘diktatuuri’ analüüs Venemaal annab alust järeldada, et palju on muutunud, kuid samal ajal ei ole mitte midagi muutunud. Venemaa õigussüsteemi järkjärgulised muutused, mis sillutavad tee õigusriigile annavad optimistlike märke. Siiski on rohkem alust pessimismiks, kuna õiguslike mehhanismide faktiline kasutamine ja mis enam, ametiasutuste tahtmatus ‘tuua inimõigused koju’, st Venemaale. Ühelt poolt, on Venemaa just nagu Euroopa, lihtsalt veidi laiem ja aeglasem, mistõttu vajab ka rohkem aega, et saavutada oma Euroopa kaaslaste kiirust. Teisest küljest on Venemaa justkui see karu Anthony de Mello jutustusest, kes:

> ... [m]õõtis oma nelja meetri laia puuri: see oli ka selle pikkus. Viie aasta pärast võeti puur ära, kuid karu kõndis jätkuvalt neli meetrit sinna ja neli meetrit tagasi, justkui puur oleks veel seal. Ja see oli seal. Ainult tema jaoks.

Aeg näitab, kas Venemaa vabaneb oma ettekujuteldavast puurist...

BIBLIOGRAPHY

Books and Articles

Babayev R. R. The Council of Europe'anization of Russia. The Process of Compliance by Russia with the Standards of the Council of Europe. Budapest, 2006.

Barkhuysen T., van Emmerik M. Legitimacy of European Court of Human Rights Judgments: Procedural Aspects. Hague, 2009.

Barry D. D. (ed.). Toward the Rule of Law in Russia? Political and Legal Reform in the Transition Period. London, 1992.

Bernhardt R. et al. Report on the Conformity of the Legal Order of the Russian Federation with Council of Europe Standards. HRLJ, No. 15/7, 1994.

Bowring B. Russia in a Common European Legal Space. - Developing effective remedies for the violations of rights by public bodies: compliance with the European Convention on Human Rights. The Uppsala Yearbook of East European Law, 2005.

Bratza N. The Future of the European Court of Human Rights – Storm Clouds and Silver Linings. Thomas More lecture, 17.10.2002.

Burkov A. The Impact of the European Convention on Human Rights on Russian Law: Legislation and application in 1996-2009. Stuttgart, 2007.

Бурков А. Л. Механизм применения Конвенции в российских судах. - А. Бурков (ред.) Применение Европейской конвенции о защите прав человека в судах России. Екатеринбург, 2006.

Danelski D. J., Tulchin J. S. (ed.). The Autobiographical Notes of Charles Evans Hughes. New York, 1973.

Danilenko G. M. Implementation of International Law in CIS States: Theory and Practice. EJIL, No. 10, 1999.

de Mello A. The Prayer of the Frog. Sofia, 2003.

Деменева А. Д., Чуркина Л. М. Применение Конвенции о защите прав человека и основных свобод юристами Уральского центра конституционной и международной защиты прав человека: опыт и рекомендации.- А. Бурков (ред.) Применение Европейской конвенции о защите прав человека в судах России. Екатеринбург, 2006.

Ferschtman M. Reopening of judicial procedures in Russia: the way to implement the future decisions of ECHR supervisory organs? – R. Müllerson, M. Fitzmaurice, M. Andenas (ed.). Constitutional Reform and International Law in Central and Eastern Europe. Hague, 1998.

Гаджиев Г. А. Конституционный принципы рыночной экономики. Москва, 2002.

Гаджиев Г. А. Правовые позиции Конституционного Суда Российской Федерации как источник конституционного права. Конституционное право: восточноевропейское образование, № 3 (28), 1999.

Gerards J. H. Judicial Deliberations in the European Court of Human Rights. Leiden, 2008.

Greer S. The European Convention on Human Rights: Achievements, Problems and Prospects. New York, 2006.

Харламова Е. Воплощение Европейской конвенции по правам человека - почему это невозможно в условиях России. - Воплощение европейской конвенции по правам человека в России. Философские, юридические и имперические исследования: материалы международной конференции в Екатеринбурге с 6 по 7 апреля 2001 г. Штудгард, 2005.

Helfer L. R. Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime. EJIL, Vol. 19, No. 1, 2008.

Hefler L. R., Slaughter A.-M. Toward a Theory of Effective Supranational Adjudication. 107 Yale L.J. 273, 367, No.2, 1997.

Hoffmann L. Judicial Studies Board Annual Lecture. 19.03.2009.

Jordan P. A. Russia's Accession to the Council of Europe and Compliance with European Human Rights Norms. Demokratizatsiya, No. 11/2, 2003.

Kahn J. D. Russia's 'Dictatorship of Law' and the European Court of Human Rights. Review of Central and East European Law, No. 1, 2004.

Канашевский В. А. Прецедентная практика Европейского суда по правам человека как регулятор гражданских отношений в Российской Федерации. Журнал российского права, № 4, 2003.

Kipling R. The Man Who Was.

Krug P. Internalizing European Court of Human Rights Interpretations: Russia's Courts of General Jurisdiction and New Directions in Civil Defamation Law. 32 Brook. J. Int'l L, 2006.

Кучин М. В. Прецедентное право Европейского суда по правам человека. Екатеренбург, 2004.

Långström T. Transformation in Russia and International Law. Leiden/Boston, 2004.

Лаптев П. А. Роль постановлений Европейского суда для России. Отечественные записки, № 2 (11), 2003.

Лаптев П. А. Российское правосудие и Европейский суд по правам человека// Права человека в России и правозащитная деятельность государства. Санкт-Петербург, 2003.

Leach P. Access to the European Court of Human Rights – From a Legal Entitlement to a Lottery? HRLJ, 2006.

Leach P. Strasbourg's oversight of Russia – an increasingly strained relationship. 2007.

Lukashuk I. I. Treaties in the Legal System of Russia. Ger. YIL, Vol. 40, 1997.

Maclaren M., Frei M. A 'Common European Home'? The Rule of Law and Contemporary Russia. GLJ, No. 10, 2004.

Marochkin S. International Law in the Courts of the Russian Federation: Practice of Application. Chinese JIL, 2007.

Марченко М. Н. Юридическая природа и характер решений Европейского суда по правам человека. Государство и право, № 2, 2006.

Нешатаева Т. Н. Уроки судебной практики о правах человека: европейский и российский опыт. Москва, 2007.

Neumann I. R. Russia and the idea of Europe. London/New York, 1996.

Sinclair I. National Treaty Law and Practice. United Kingdom. Hague, 2005.

Thomas D. C. The Helsinki Effect. International norms, Human rights, and the demise of Communism. Princeton, 2001.

Trochev A. Judging Russia: The Role of the Constitutional Court in Russian Politics 1990-2006. New York, 2008.

Занина М. А. Коллизии норм национального права и Европейской конвенции о защите прав человека и основных свобод. Российская юстиция, № 11, 2005.

Zorkin V. D. Human Rights within the Context of Global Jurisprudence. The World Conference on the Constitutional Justice. Cape Town, 2009.

Зорькин В. Д. Конституционный Суд России в европейском правовом поле. Журнал российского права, № 3, 2005.

Зорькин В. Д. Прецедентный характер решений Коституционного Суда Российской Федерации. Журнал российского права, № 12, 2004.

Treaties, Norms and Documents

CoE. Compatibility of Estonian law with the requirements of the European Convention on Human Rights. H (96) 20, 1997.

Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 with Protocol No. 1, 4, 6, 7, 12 and 13, adopted 4 November 1950.

Федеральный закон № 101-ФЗ от 15 июля 1995 г. «О международных договорах Российской Федерации». Конституция Российской Федерации от 12 декабря 1993 г.

Информационное письмо от 20 декабря 1999 г. N С1-7/СМП-1341 «Об основных положениях применяемых Европейским Судом по правам человека при защите имущественных прав и права на правосудие».

Конституция Российской Федерации от 12 декабря 1993 г.

Конституция СССР от 7 октября 1977 г.

PACE. Russia's Request for Membership of the Council of Europe. Doc. 7443 Addendum IV, 02.01.1996.

PACE. Honoring of obligation and commitments by the Russian Federation. Resolution 1277, 2002.

PACE. On Russia's request for membership of the Council of Europe. Opinion 193, 1996.

PACE. Honoring of obligation and commitments by the Russian Federation. Resolution 1455, 2005.

PACE. Draft Protocol No. 14-Bis to the Convention for the Protection of Human Rights and Fundamental Freedoms. Doc. 11864. 22.04.2009.

PACE. Draft Protocol No. 14-Bis to the Convention for the Protection of Human Rights and Fundamental Freedoms. Opinion No. 271, 2009.

Постановление Пленума Верховного Суда РФ № 8 от 31 октября 1995 г. «О некоторых вопросах применения судами Конституции Россиийской Федерации при осуществлении правосудия».

Постановление Пленума Верховного Суда РФ № 5 от 10 октября 2003 г. «О применении судами общей юрисдикции общепризнанных принципов и норм международного права и международных договоров Российской Федерации».

Постановление Пленума Верховного Суда РФ № 3 от 24 февраля 2005 г. «О судебной практике по делам о защите чести и достоинства граждан и юридических лиц».

Пояснительная записка по вопросу о подписании Российской Федерацией Европейской конвенции о защите прав человека и основных свобод от 4 ноября 1950 г. и Протоколов к ней, 30.01.1996.

Report 2008. Amnesty International. Russian Federation.

Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights. 22 HRLJ 308, 2001.

Resolution of a Joint Meeting of Moscow Association of Voluntary Organizations of Retail Depositors and Shareholders. 05.01.2005.

Resolution No. 5 adopted by the Plenum of the Supreme Court of the Russian Federation. 'On application by courts of general jurisdiction of the commonly recognized principles and norms of the international law and the international treaties of the Russian Federation'. 10.10.2003.

The Alternative NGO Report on the Observance of the International Covenant on Civil and Political Rights (ICCPR) by the Russian Federation.

Vienna Convention on the Law of Treaties, 1969.

Case-law

Constitutional Court of the Russian Federation

Определение Конституционного Суда РФ от 7 февраля 2002 г. N 7-О.

Постановление Конституционного Суда РФ от 2 февраля 1996 г. N 4-П.

Постановление Конституционного Суда РФ от 4 апреля 1996 г. N 9-П.

Постановление Конституционного Суда РФ от 16 марта 1998 г. N 9-П.

Постановление Конституционного Суда РФ от 29 апреля 1998 г. N 13-П.

Постановление Конституционного Суда РФ от 2 февраля 1999 г. N 3-П.

Постановление Конституционного Суда РФ от 27 июня 2000 г. N 11-П.

Постановление Конституционного Суда РФ от 5 февраля 2007 г. N 2-П.

Supreme Court of the Russian Federation

Определение СК по уголовным делам Верховного Суда РФ от 24 сентября 2001 г. N 2-О07-17СП.

Определение Кассационной коллегии верховного Суда РФ от 18 мая 2004 г. N КАС04-183.

Определение Судебной коллегии по гражданским делам Верховного Суда РФ от 21 мая 2004 г. N 49-Г04-48.

Определение СК по гражданским делам Верховного Суда РФ от 15 ноября 2005 г. N 4-Г05-36.

Определение СК по гражданским делам Верховного Суда РФ от 18 ноября 2008 г. N 18-В08-55.

Постановление Пленума Верховного Суда РФ от 19 декабря 2003 г. N 23.

Постановление Пленума Верховного Суда РФ от 24 февраля 2005 г. N 3.

Постановление Пленума Верховного Суда РФ от 28 декабря 2006 г. N 63.

Постановление Президиума Верховного Суда РФ от 31 мая 2006 г. N 208.

Постановление Пленума Верховного Суда РФ от 12 февраля 2008 г. N 2.

Постановление Пленума Верховного Суда РФ от 24 июня 2008 г. N 12.

Решение Верховного Суда РФ от 7 декабря 1999 г. N ГКПИ99-848.

Решение Верховного Суда РФ от 14 ноября 2003 г. N ГКПИ03-1265.

Решение Верховного Суда РФ от 5 марта 2003 г. N ГКПИ 03-76.

Решение Верховного Суда РФ от 17 октября 2003 г. N ГКПИ03-958.

Решение Верховного Суда РФ от 21 октября 2008 г. N ГКПИ08-1741.

European Court of Human Rights

Appolonov v. Russia. ECtHR, Application no. 47578/01, 22.06.1999.

Broniowski v. Poland. ECtHR, Application no. 31443/96, 19.12.2002.

Burdov v. Russia. ECtHR, Application no. 59498/00, 07.05.2002.

Campbell and Cosans v. the United Kingdom. ECtHR, Application no. 7511/76; 7743/76, 16.05.1980.

Deweer v. Belgium. ECtHR, Application no. 6903/75, 27.02.1980.

Eckle v. Federal Republic of Germany. ECtHR, Application no. 8130/78, 11.12.1980.

Foti and others v. Italy. ECtHR, Application no. 24299/94, 15.12.1995.

Gayduk and others v. Ukraine. ECtHR, Application no. 45526/99; 46099/99; 47088/99, 02.07.2002.

Goudswaard-Van der Lans v. The Netherlands. ECtHR, Application no. 75255/01, 22.09.2005.

Gusinskiy v. Russia. ECtHR, Application no. 70276/01, 19.05.2004.

Ilaşcu and others v. Moldova and Russia. ECtHR, Application no. 48787/99, 08.07.2004.

Imbrioscia v. Switzerland. ECtHR, Application no. 13972/88, 24.11.1993.

Ireland v. UK. ECtHR, Application no. 5310/71, 18.01.1978.

John Murray v. United Kingdom. ECtHR, Application no. 18731/91, 08.02.1996.

Jussila v. Finland. ECtHR, Application no. 73053/01, 23.11.2006.

Kalashnikov v. Russia, ECtHR Application no. 47095/99, 15.07.2002.

Khudobin v. Russia. ECtHR, Application no. 59696/00, 26.10.2006.

Kudeshkina v. Russia. ECtHR, Application no. 29492/05, 26.02.2009.

Leyla Sahin v. Turkey. ECtHR, Application no. 44774/98, 10.11.2005.

Loizidou v. Turkey. ECtHR, Application no. 15318/89, 23.03.1995.

Morel v. France. ECtHR, Application no. 34130/96, 06.06.2000.

Nikitin v. Russia. ECtHR, Application no. 50178/99, 20.07.2004.

Omar v. France. ECtHR, Application no. 24767/94, 29.07.1998.

Posokhov v. Russia, ECtHR, Application no. 63486/00, 04.03.2003.

Pravednaya v. Russia. ECtHR, Application no. 69529/01, 18.11.2004.

Rudzinska v. Poland. ECtHR, Application no. 45223/99, 07.09.1999.

Ryabykh v. Russia. ECtHR, Application no. 52854/99, 24.07.2003.

Quaranta v. Switzerland. ECtHR, Application no. 12744/87, 24.05.1991.

Sidiropoulos and Others v. Greece. ECtHR, Application no. 26695/95, 10.07.1998.

Slivenko v. Latvia. ECtHR, Application no. 48321/99, 09.10.2003.

Vanyan v. Russia. ECtHR, Application no. 53203/99, 13.05.2004.

Van den Born-Van de Wal and others v. The Netherlands. ECtHR, Application no. 75241/01; 75266/01; 75263/01, 22.09.2005.

The Moscow Branch of the Salvation Army v. Russia. ECtHR, Application no. 72881/01, 05/10/2006.

Thlimmenos v. Greece. ECtHR, Application no. 34369/97, 04/12/1998.

X. v. Germany. ECtHR, Application no. 8518/79, 14.03.1980.

Press

Court Seems to Rankle Kremlin. NYTimes, 28.03.2009. Available at: http://www.nytimes.com/2009/03/29/world/europe/29russia.html?_r=1 (as of 08.05.2009).

Death Penalty-Russia: Duma Leaves Punishment on Table. IPS news, 20.11.2007. Available at: http://ipsnews.net/news.asp?idnews=40145 (as of 10.03.2009).

European Court of Human Rights. Annual report 2008. Available at: http://www.echr.coe.int/NR/rdonlyres/B680E717-1A81-4408-BFBC-4F480BDD0628/0/Annual_Report_2008_Provisional_Edition.pdf (as of 08.05.2009

European Court Seems to Rankle Kremlin. NYTimes, 28.03.2009. Available at: http://www.nytimes.com/2009/03/29/world/europe/29russia.html?_r=1 (as of 03.05.2009).

Европейский суд пожаловался на Россию Конституционному. Коммерсантъ, 02.03.2009. Available at: http://www.kommersant.ru/doc.aspx?fromsearch=5e927b25-7cb7-4527-8e6f-1f2c57f509ac&docsid=1128309 (as of 08.09.2005).

Глава КС: в российских судах процветает коррупция. Новости России, 25.10.2004. Available at: http://pda.newsru.com/russia/25oct2004/zorkin.html (as of 03.05.2009).

Госдума сорвала реформу Евросуда. Коммерсантъ, 21.12.2006. Available at: http://www.kommersant.ru/doc.aspx?DocsID=732043 (as of 09.05.2009).

Human Rights Court Sides With Gusinsky. The St. Petersburg Times, 21.05.2004. Available at: http://www.sptimes.ru/index.php?action_id=2&story_id=553 (as of 08.05.2009).

Interview with Vitalii Ivanenko, the Head of Chair of International Law in St. Petersburg State University. St. Petersburg, 20.03.2009.

Judging the Country's One Judge. Moscow Times, 08.07.2000. Available at: http://www.cdi.org/russia/johnson/4394.html##9 (as of 06.05.2009).

Калашников выиграл в Европейском суде процесс против Российской Федерации. Новости России, 15.07.2002. Available at: http://palm.newsru.com/arch/russia/15jul2002/kalashnikov.html (as of 08.05.2009).

Начало встречи Владимира Путина с судьями Конституционного Суда Российской Федерации. 11.12.2006. Available at: http://www.kremlin.ru/text/appears/2006/12/115196.shtml (as of 19.04.2009).

Не надо падать в обморок. Время Новостей, 20.09.2005. Available at: http://www.vremya.ru/2005/173/51/134752.html (as of 08.50.2009).

Послание Дмитрия Медведева Федеральному Собранию Российской Федерации. 05.11.2008. Available at: www.kremlin.ru (as of 09.05.2009).

Russia should abide by ruling on Gusinsky. Interfax, 21.05.2001. Available at: http://www.eng.yabloko.ru/Publ/2004/Internet/01_06/040521_interfax_ru.html (as of 08.05.2009).

С законностью в Росии дела не хуже. 29.01.2001. Available at: www.utro.ru (as of 07.05.2009).

Top 500 World Universities. http://www.online-universities.us/top500universities.htm (as of 06.05.2009).

Владимир Путин встретился с председателями конституционных судов стран Европы и СНГ. 01.11.2001. Available at: http://www.kremlin.ru/text/news/2001/11/139418.shtml (as of 07.05.2009).

Выступление Владимира Путина на совещании руководителей республиканских, краевых и областных судов. 24.01.2000. Available at: http://www.kremlin.ru/text/appears/2000/01/28841.shtml (as of 07.05.2009).

Выступление Владимира Путина на расширенном заседании коллегии Министерства юстиции. 31.01.2000. Available at: www.kremlin.ru (as of 09.05.2009).

Зорькин В. Д.. Выступление на VIII Международном форуме по конституционному правосудию «Имплементация решений Европейского суда по правам человека в практике конституционных судов стран Европы». Available at: www.ksrf.ru/News/Speech/Pages/ViewItem.aspx?ParamId=16 (as of 17.04.2009).

Уполномоченный при Страсбургском суде: Решение по делу Сливенко – «суперпрецедент». Риа Новости, 09.10.2003. Available at: http://grani.ru/Politics/World/Europe/m.46481.html (as of 08.05.2009).