Comparative Analysis of Constitutional Law Mechanism for Human Rights Protection in Canada and Russia.

by

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Table of Contents

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Abstract

This thesis offers a comparative analysis of the Constitutional law mechanism for human rights protection in Canada and Russia. Russia is experiencing a transition from the former soviet regime towards democracy and civil society. Since the beginning of the transition in 1991 Russia has made three major steps in that direction: the adoption of *the Declaration of Rights and Freedoms of the Individual and Citizen of 1991, the Constitution of 1993 and* the ratification of *the European Convention on Human* Rights in 1998. However, the existent constitutional law mechanism for human rights protection is not fully effective due to its novelty for Russian society. A number of lessons can be learned from the Canadian and European experiences of human rights protection. Among them is the necessity to build the mechanism for human rights protection that will be based on the rule of law, direct application of the Constitution, and the creation of a human rights culture, supported by the people's trust in independent judicial institutions.

Résumé

Cette thèse a pour but d'offrir une analyse comparative des mécanismes de droit constitutionnel de protection des droits de l'homme au Canada et en Russie. Actuellement, la Russie est en train d'effectuer une transition en direction de la démocratie et de l'Etat de droit à partir de l'ancien régime soviétique. Depuis le début de cette transition en 1991, celle-ci à effectué trois pas en avant dans cette direction : l'adoption de la *Déclaration des droits et libertés de l'individu et du citoyen* de 1991, l'instauration de la *Constitution* de 1993 et la ratification de la *Convention européenne des droits de l'homme* en 1998. Cependant, du fait de leur nouveauté pour la société et la mentalité russe, ces mécanismes constitutionnels sont encore faibles et peu développés. A cet égard, de nombreuses leçons peuvent être retirées des expériences canadienne et européenne en matière de protection des droit de l'homme. Parmi les points à traiter figurent : la nécessité de développer un mécanisme de protection des droits de l'homme inspiré par le respect de la loi, une applicabilité directe de la Constitution et, la création d'une culture des droits de l'homme qui soit confortée par une authentique confiance en l'indépendance des institutions juridiques.

Introduction

Actuality of the thesis topic. One of the greatest concerns of international society today is the problem of Human Rights protection. This problem is even more actual for the Russian Federation, the country that is now in the process of the transition from communist styled government to democracy and civil society. The maintenance of the civil and political rights of the Russian citizens and foreign nationals is very important. Russia is a part of a world community which adopted the provisions *of the Universal Declaration on Human Rights, 1948; the International Pact on Civil and Political rights, 1966, the European Convention on Human Rights, 1950,* and other international legal acts; therefore, the level of security of main rights for Russian citizens and foreign nationals directly correlates to international relations and mutual understanding between the countries. The securement of civil and political rights of Russian citizens and foreign nationals constitutes a premise to international trade and market economy in Russia. Moreover, it forms the international authority of Russia. The presence or absence of the basic rights and freedom of the person is the brightest indicator of the level of development for both a civil society and legal state.

Justification. For a long period of time, Russia was not able to effectively protect civil and political rights of the individuals. Human Rights were not fully protected throughout the communist period. Under the communist doctrine, the observance of the civil and political rights was not considered important because the state owned the property and acted on behalf of its citizens. However, the leftovers of 70 years of communism in Russia still exist.

The right to life, liberty and security is not fully ensured. For example, during the last two months 20 foreign citizens from Zaire, France, Canada, Kenya, Tunis, Australia, Iran, Kuwait and Shri-Lanka were killed in Moscow and St. Petersburg. Many of the foreigners were slain because of their race and national origin. The killings and slayings were organized by an extremist organization, "Skinheads". On the territory of Russia in the Chechen republic, there still exist secret prisons where the foreign citizens have been kept by criminals. At the village of Duba-Urt the secret burial place of 2 French journalists was revealed.

The right to be secure against unreasonable search, seizure and arrest or detention is not fully enforceable. The detention of foreigners in some parts of Russia causes special worry. In many cases the relatives of the detained are unaware of their destiny and course of consequences.

Many foreign citizens factually were deprived the rights of due process of law and legal counsel. For example, last year a couple from Zaire was deprived of a court hearing in Saratov on the basis of their color. Only after Embassy intervention did foreign citizens exercise their right to due process of law.

A lot of citizens and foreigners were deprived of their right to freedom of religion. The organizational basis for performance of that right was not created. For example, in 2002 a group of people from India tried to profess their national religion but they were informed that if they continue to practice their religion, they will be prosecuted unless they complete the bureaucracy procedures of filing the documents and paying the fees.

Freedom of press sometimes is not protected too. The liquidation of a broadcasting company TV6, and property redistribution of a broadcasting company NTV raises certain questions. Both companies had huge foreign investments. A lot of shareholders were foreign citizens.

The aforenamed list of examples can be continued.

Hypothesis. The research proposes a hypothesis that:

Civil and political rights of Russian citizens and foreigners[1] are not fully protected regardless of their entrenchment in *the Russian Constitution (1993)* because Russia does not have very effective mechanism of protection for declared rights that is influenced by the following factors:

1. Some provisions of *the Russian Constitution* in fact do not have direct enforcement;
2. The Russian Federation has excessive amount of government agencies, having power of restriction for political, economic and welfare rights of citizens and foreigners declared in *the Constitution*;
3. The principle of power separation is not fully exercised (judicial branch is infirm);

[1] It shall be noted that political rights mostly applicable to Russian citizens

4. The major part of the Russian population does not believe in the realization of declared Constitution rights and freedoms and does not attempt to enforce them because according to former communist ideology the observance of the civil and political rights is not considered important, inasmuch as the state has the sole power to own property and blame individualism;
5. The dazzling array of social and economic rights declared *in the Russian Constitution* undermines basic political and civil rights. For example, it is very difficult to enforce the right to a dwelling or clean environment. If these rights are not subject to judicial enforcement, perhaps the same will become true of the right of free speech and due process of law;
6. Russia has an underdeveloped appeal mechanism to interstate and international organizations by citizens and foreigners;
7. Most Russian lawyers do not have sufficient theoretical and practical experience according to new economic and social conditions. They received professional education and practised in different legal provisions.

On the other hand, civil and political rights of Canadian citizens stated in *the Canadian Charter of Rights and Freedoms of 1982* and other constitutional acts are vigorously protected because *the Canadian Constitution* has direct enforcement; the number of government agencies having power of restriction for political, economic and welfare rights is limited; the judicial branch is independent from the executive and legislative; social and economic rights are not included in the Constitution. Canada has an effective appeal mechanism. It is very appealing that Canada is a multinational and multicultural state as is Russia and in fact, has its own sources for separatism; however in contrast to Russia there are no devastating social blow-ups in Canada and Canadian separatism is not incendiary.

In view of the above stated hypothesis it is essential to explore the legal traditions of Canada, the country that has a very effective mechanism for human rights protection and a rich democratic history along with European Human Rights tradition, for the purposes of *understanding* the nature of that mechanism, *reform* of it in Russia and *unification* of the Russian legislative base according to the world democratic standards.

The object of the research. The object of my scientific research is basic rights and freedoms, as guaranteed by *the Canadian and Russian Constitutions*.

The subject of the research. The subject of my research is the mechanism for realization of the above stated rights.

The tasks of the research (what I am going to research). The tasks of the research are: 1) *Constitutions of Russia and Canada*, European normative documents, constitutional legislature, judicial precedents, legislative history, relationship between legal regimes, legal development in Canada and Russia and Europe etc.) 2) public opinion on Human Rights and on the constitutional law mechanism of its protection and the socio-economic conditions in Canada and Russia; 3) professional opinion (judges, lawyers, legislators, government officials) on Human Rights and on the constitutional law mechanism of its protection. Studying of public opinion is essential because the mechanism of Human Rights Protection depends on the attitude of citizens to the Constitution, trust in governmental bodies and institutions. Inasmuch the object for researching constitutes a big part of society with significant numbers of interrogated, it is crucial to use the most effective, economical and reliable method.

With respect to public opinion I am going to use the following methods:

1. analysis of documents (personal and officials)
2. debriefing (questionnaire)
3. observation

Studying professional opinion is essential because the basic contents of *the Constitution* and other constitutional legal acts are prepared by a very limited group of professionals. But there are some provisions in *the Russian Constitution* that does not have and unlikely will ever have the mechanism for enforcement. In order to reveal the causes for that situation, the following methods for researching with respect to professionals are suggested:

1. debriefing (interview, conversation, discussion, dispute).
2. analysis of documents (personal and officials).
3. observation (with respect to this group observation can be "including", where I will be a part of the interrogated group and "excluding", where I will play the role of outside observer).

4. biographical method.

For adaptation and interpretation of received knowledge I will use methods of qualitative and quantitative analysis. Single phenomena will be interpreted by qualitative analysis, a method that is inherent to logical theoretical thought. Quantitative datum adaptation will be conducted by virtue of methods of primary datum cultivation (method of average bulk), method of double comparison, method of pointed grade, grading, scaling, multiple comparisons, method of factors, correlation, latent-structural analysis and mathematics modelling.

On this basis I can reach conclusions about real causes for underdevelopment of a mechanism for Human Rights protection (I will prove or disprove my hypothesis) and offer concrete methods and actions for maintenance of Human Rights in Russia.

Literature review. Human Rights constitutes the integral element of the human person and human life. Therefore the process of formation of the Human Rights concept has passed a long way and is closely connected to a history of the development of a society. The beginning of the process ascends to the first forms of the public life of the people which have been the cause of regulation of their behaviour in the environmental world. However, at all stages of a societal evolution, the concept of Human Rights was formed under the determining influence of the following factors: philosophical views and legal regulation. The dual character of the nature of Human Rights has caused the emergence of the natural and positive theories.

According to the Italian professor Cheroni, natural theory grasped the Human Rights from the area of morals and criteria of justice, regardless of the legal orders. Positive theory, in contrast, emphasized a positive nature of the contemporary law, and argued that rights are guaranteed to the individual by the state[2].

The ideas of natural equality of the people, that is equality of nature are very essential for understanding the concept of Human Rights. They were stated by the ancient Greek sophists (Protagor, Antiphon, Kiloton) and Chinese philosophers (Lao-Chi, Confucius) in c. VI B.C. to IV centuries c. A.D.[3]. In VI B.C. century the Greek

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[2] Черони, У. "Права человека. Демократия. Светская этика" (Права человека в истории человечества и в современном мире. М., 1989. С. 52).

[3] Нерсесянц, В. С. *Права человека в истории политической и правовой мысли* (Права человека в истории человечества и в современном мире. М., 1989. С. 25).

philosopher, Solon, developed the constitution that entrenched the principles of democratic organization for the state concerning the responsibility of the officials for arbitrariness in relation to citizens[4].

The ideas of equality of all people can be found in early Christianity. Such postulates are characteristic: "everyone receives the reward on the work; where there is no law, there is also no crime; what measurement you use to measure by, such will be measured also to you "[5].

Ancient Roman lawyers developed the concept for the subject of the law and equality before the law. "Everybody should fall under the action of the law", — asserted Cicerone[6]. It is necessary to note that the philosophical ideas did not receive adequate reflection in the legislation in Ancient Greece and the Roman state, because of the slavery doctrine.

The similar tendency is characteristic for the period of the Middle Ages, with its hierarchical structure, where Human Rights was the privilege of separate estates, and the equality of the rights was possible by belonging to the same estate. At the same time the class limitation of Human Rights does not belittle the value of the English document — *Magna Carta* in 1215 that for the first time has entrenched the right on inviolability of the person[7].

However the key role in the formation of the natural concept of Human Rights was played by the philosophers of XVI — XVIII cc: the Englishman, John Locke, Americans, Thomas Paine and Thomas Jefferson; the French, Jacques Rousseau, Charles Montesque, Francois Voltaire; the Dutch Hugo Groceus. Their ideas concerning equality of the people, the inherent nature of such rights as the right to life, freedom and safety, which are granted from birth, have received the ensurance in constitutional and other legislation of different countries: in Canada – in *the Constitution Act 1867* and in *the Canadian Charter of Rights and Freedoms, 1982*; in England — in the *Petition on Rights, 1628,* and *the Bill of Rights, 689*; in America — in *the Declaration of the Rights of Virginia of 1776* and *the Declaration of Independence of USA, 1776, the Bill of Rights,*

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[4] *Общая теория прав человека* / Под ред. Е. А. Лукашевой. М., 1996. С. 69.
[5] *Supra* note 3 at 25.
[6] Цицерон. "Диалоги". (М., 1966. С. 139).
[7] *Международное сотрудничество в области прав человека: Документы и материалы.* (М., 1993. С. 7).

1791; in France — in *the Declaration of the Rights of Individual and Citizen, 1789.* Unfortunately, these principles did not find massive support and effective protection in Russia. Therefore the problem of the constitutional law mechanism for Human Rights protection is more undeveloped in Russian constitutional literature. Many soviet scholars justified Human Rights violations by virtue of works of Karl Marx, Friedrich Engels, and Vladimir Lenin. However, after the collapse of the communism some Russian legal scholars highlighted the Human Rights protection issues in their works. Among them: Алексеев С.С., Зиновьев А.В., Ирбе К.Ж., Радугин А.А., Баглай М., Полян П..М., Земсков В.Н., Даниленко Г.М., Верещетин В. С., Миллерсон В.А.,Золотухин Б., Ковалев С.

In contrast, Canadian constitutional literature has very solid and mature discussions on Human Rights protection. The following authors devoted their works to Human Rights protection issues: Anderson G, Ben-Dor Oren, Bobbit P, Bushell A, Chevrier, M, Clyde J, Dicey A, Gosselin J, Elliot R, Hogg P, Hutchison A, Iacobucci F, Magnet J, Magnusson D, Manfredi C, Monahan P, Petter A, Polin R, Robin E, Schneiderman D, Webber J, Weiler, Weinrib L.

The thesis is based on the comprehensive and well grounded research of the above stated literature.

Thesis structure. Thesis consists of introduction, three chapters, conclusion, and bibliography. Chapter one outlines political, cultural and constitutional law reality for emerging of Human Rights in Russia. The chapter also focuses on the genesis of Russia's liberal transition from the Communist system into Democracy and Civil Society. This chapter also reviews the emerging and the current status of the Human Rights in the Russian Federation. Chapter two looks at the Constitutional law mechanism for Human Rights protection in Canada. It highlights the Human Rights entrenchment the in the Canadian Constitution; the role of the Judiciary in the process of Human Rights protection and the Enforcement of Human Rights. The third chapter reviews the European mechanism for Human Rights protection and emphasize some lessons that can be learned from Canadian and European Constitution models for Human Rights protection. The chapter intends to give theoretical and practical recommendations for improvement of the mechanism of Human Rights protection in Russia.

Chapter 1. Political, Cultural and Constitutional Law Reality for the Emerging of Human Rights in Russia: Theoretical Approaches.

1.1. Genesis of Russia's liberal transition from the Communist system into Democracy and Civil Society.

The collapse of the Soviet Union in 1991 some 70 years after the dominance of the communist ideology was an unforeseen event not only for the world community, but also for the Russian population of the USSR.

The twelve - year transition period from communism to democracy showed large loopholes in the doctrine presupposing that the Russian transformation into civil society and the respecting of Human Rights will be automatic with the erasing of communism. In order to fully understand the nature of the Russian transition process from communism to democracy, Russian historical development should be exposited.

An exposition of Russian historical development reveals that authoritarian and totalitarian regimes governed the Russian people for certain periods in their history[8]. In the course of this governance, the Russian people did not enjoy the concept of Human Rights associated with Western style government[9]. More specifically, the rule of law in the Russian state, which by definition means that no individual or body is above the law, was often not defined and followed by those who governed[10]. Historically, both Russian Monarchs and Soviet Secretaries of Communist Party (leaders of the state) stood above the law[11].

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[8] "Autocratic" governments are those that are ruled by a monarch or leader of uncontrolled authority, governing with absolute power and responsibility to no one. 1 OXFORD ENGLISH DICTIONARY 802 (2d ed. 1989).

"Totalitarian" forms of government tolerate only one political party, subordinating all other institutions and individual members of the society to the will of the state, and thus to the will of the party's leaders. 18 OXFORD ENGLISH DICTIONARY 287 (2d ed. 1989).

[9] See Korkeakivi, Antti. "The Reach of Rights in the New Russian Constitution" (1995) 3 CARDOZO J. INT'L & COMP. L. 229, 231 . The author points out that the new Russian constitution does not omit any essential right in the civil or political rights domain recognized in Western democracies.

[10] See Lien, Molly Warner. "Red Star Trek: Seeking a Role For Constitutional Law in Soviet Disunion" (1994) 30 STAN J. INT'L L. 41, 43 .

[11] *Ibid.* at 44

The birth of the Russian state is chronologically linked to the process of the state formation which occurred in territories of Northern, Central and Eastern Europe during IX – X centuries[12]. Until the XIV century, the Russian state was called "Kievskaia Rus'" and was governed by Kniazs. Tsarist control and the following Imperators control began in the fifteenth century and continued to govern until the first part of the twentieth century[13].

A common characteristic that prevailed in Russia under the Monarch ruling was intolerance of any political or legal systems other than absolute authority[14]. Only few of the Monarch did draft legal systems[15]. However, even in those cases, the effect of the above stated systems was to ensure the absolutism of the government rather than to protect rights of the citizenry. Russian legal doctrine under the Monarchs completely rejected the notion that the sovereign could be bound by law[16]. Following this type of governmental policy, the Russian Monarchs prevented the role of law from becoming an inherent component of Russian society and culture. Because of the slavery conditions of major part of the Russian population and the ineffective government by the Imperator Nikolai II at the beginning of the twentieth century, Bolsheviks were able to organize the revolution on November 7, 1917[17]. Following a short period of months under a temporary provisional government, the Communist Party took control of Russia.

With the change of form of Russian state and policy, the substance for the meaning and understanding of the rule of law in Russia remained unchanged. The powers to govern the state were transferred to the uneducated, marginalized and poor part of the society that did not have even vague idea about the Human Rights. The situation was aggravated by such fact that according to Marxist doctrine that served as a cornerstone of communism, the law did not play a meaningful role in society. Law and state according to Marxist historical-materialistic doctrine are the appendixes that were

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[12] See Ирбе, К.Ж., *Киевская Русь – лекция 4; История России с древнейших времен до второй половины XIX века. Курс лекций* Под ред. проф. Б.В.Личмана (Екатеринбург: Урал.гос.тех. ун-т.1995) at 38.

[13] Радугин, А.А. *История России. Россия в мировой цивилизации. Курс лекций.* (Москва, 2001) at 25.

[14] Lien, *supra* note 10 at 49-50.

[15] For example, in 1649, Tsar Aleksei drafted the Code of Laws.

[16] Lien, *supra* note 10 at 48.

[17] Weisman, J. Amy. "Separation of Powers in Past-Communist Government: A Constitutional Case Study of the Russian Federation" (1995) 10 AM. U. J. INT'L L. POL'Y 1365,

predetermined by basis – economic relationships. Marx defined law as the will of the economically dominating class that is covered by normative acts. Legal relationships (and law as a whole) – were seen as class phenomena that appeared from the private property relationship and served them. The goal of the Bolsheviks government was to build a non-class communist society. The belief was that once the society of that kind emerges, the state and law will automatically dissolve. Hence any laws that were adopted were for temporary needs since law would dissolve along with the state. Despite the fact that the revolution could and did bring about the abolition of bourgeois property, it could not and was not intended to bring about the immediate abolition of the state or law[18]. As Lenin expressed it, the fading away of the state and the substitution of habit for law at the highest phase of communism would indeed come, but, like the Messiah, only in the indefinite future[19]. For the interim, the state and law were to function as instruments of the proletarian dictatorship[20]. Because communist society was built on the principles of Marxism-Leninism that undermined the rule of law, the attitude of government towards Human Rights was hostile. That attitude was mirrored in the first communist

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1369.

[18] See Marx K. "Critique of the Gotha Program" in The Marx-Engels Reader, *ibid.* at 530-31; V.I. Lenin, "The State and Revolution: The Marxist Theory of the State and the Tasks of the Proletariat in the Revolution" in R.C. Tucker, ed., The Lenin Anthology (New York: Norton, 1975) 311 [hereinafter "The State and Revolution"] Lenin stated: [I]t has never entered into the head of any socialist to "promise" that the higher phase of the development of communism will arrive; as for the great socialists' forecast that it will arrive, it presupposes not the present productivity of labour and not the present ordinary run of people, who, like the seminary students in Pomyalovsky's stories, are capable of damaging the stocks of public wealth "just for fun" and of demanding the impossible. Until the "higher" phase of communism arrives, the socialists demand the strictest control by society and by the state over the measure of labour and the measure of consumption; but this control must start with the expropriation of the capitalists, with the establishment of workers' control over the capitalists, and must be exercised not by a state of bureaucrats, but by a state of armed workers ("State and Revolution", *ibid.* at 380).

[19] Lenin characterized the disappearance of law at the higher stage of communism in this way: For when all have learned to administer and actually do independently administer social production, independently keep accounts and exercise control over the parasites, the sons of the wealthy, the swindlers and other "guardians of capitalist traditions," the escape from this popular accounting and control will inevitably become so incredibly difficult, such a rare exception, and will probably be accompanied by such swift and severe punishment (for the armed workers are practical men and not sentimental intellectuals, and they will scarcely allow anyone to trifle with them), that the necessity of observing the simple, fundamental rules of the community will very soon become a habit ("The State and Revolution", *ibid.* at 383- 84). See also Waelde T.W. & J.L. Gunderson, "Legislative Reform in Transition Economies: Western Transplants--A Short-Cut to Social Market Economy Status?" (1994) 43 I.C.L.Q. 347 at 348.

[20] See also Janda, R. "Something Wicked That Way Went: Law and the Habit of Communism" (1995) 41 McGill L.J. 253.

constitutions. During its seventy years of a totalitarian regime, the Soviet Union adopted four constitutions: in 1918, 1924, 1936, and 1977. As it was already mentioned, constitutions, drafted by the communist governments did not preserve the rights of individuals like Western constitutional philosophy. All these constitutions reflected Marxist doctrine.

For example, Article II, paragraph 3 of the first *Constitution, 1918*, stated Marxist principles for the organization of Soviet Union and annulled the private property in the Russian State[21]. The drafters of the Constitution referred to *the Manifesto of the Communist Party of 1848*, where Karl Marx and Friedrich Engels deride and attack bourgeois property and bourgeois law. They address their enemy directly, in the name of the proletariat: *Don't wrangle with us so long as you apply, to our intended abolition of bourgeois property, the standard of your bourgeois notions of freedom, culture, law ... Your very ideas are but the outgrowth of the conditions of your bourgeois production and bourgeois property, just as your jurisprudence is but the will of your class made into a law for all, a will, whose essential character and direction are determined by the economical conditions of existence of your class*[22]. Another feature of this constitution is total distrust of international law that was explained by the prevailing ideology, which aimed at destroying the existing world order. *The 1918 Constitution* reflected these attitudes by proclaiming that the goal of the Russian Socialist Federative Soviet Republic was to establish " a socialist organization of society and the victory of socialism in all countries." (Art. 3)

The second *Constitution of 1924*, as well as *the Constitution 1918* did not even include the indication that Russian citizens possess some inalienable Human Rights[23]. Because of the governmental policy directed towards the ignoring of Human Rights and nationalization of private property five millions Soviet people died of hunger in 1932 after the terrible drought[24]. The Constitution did not care at all about Human Rights of the

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[21] *Конституция СССР 1918.* Издательство ВЦИК, Москва, 1918.

[22] Marx, K & F. Engels. "Manifesto of the Communist Party" in R.C. Tucker, ed., The Marx-Engels Reader, 2d ed. (New York: Norton, 1978) at 487 [hereinafter The Marx-Engels Reader]. See also Janda, *supra* note 20.

[23] *Конституция СССР 1922.* Издательство Коммунист, Москва, 1922.

[24] Wheatcroft, S.C. *Famine and Factors Affecting Mortality in the USSR: The Demographic Crises of 1914-1922 and 1930-1933.* Birmingham University 1981. Reported in

citizens, instead it spoke of "the capitalist encirclement" of the Soviet republics, and the new state broadcast its intention to promote the emergence of Soviet republics in other countries. The founding of the Soviet Union was considered a new decisive step on the way to uniting the working people of all countries in a World Socialist Soviet Republic.

The third *Constitution of 1936*, however, was considered by communists as very progressive, innovative and democratic. Indeed, *the Constitution* had the Chapter X that was entirely devoted to "Basic Rights and Duties of the citizens". Priority was given to socio-economic rights, including: right to labor (Art. 118), right to recreation (Art. 119), right to pension (Art. 120), that were followed by civil rights: equality (Art. 122, 123), freedom of religion (Art. 124), freedom of expression, freedom of press and freedom of association (Art. 125), right to liberty and security of the person (Art. 127). Political rights were stated in chapter XI, which was devoted to the election system. Along with the rights, the Constitution imposed the duties to the citizens of Soviet Union, including: the duty to obey the Constitution, soviet laws, and the rules of soviet society (Art. 130); the duty to care and secure socialistic property as a sacral and untouchable basis for the soviet regime (Art. 131); the duty to universal military service (Art. 132); and the duty to protect the motherland (Art. 133)[25].

However, despite the entrenchment of a truly dazzling array of Human Rights in the soviet *Constitution of 1936*, Soviet citizens never had the chance to feel that the rights declared in *the Constitution* can be really protected. Moreover, the adoption of *the Constitution* was followed by massive large-scale repressions. According to datum gathered by the Russian researcher, Dmitrii Volkogonov, during the political repressions of 1937-39, three to four millions of citizens and foreigners were sent to concentration camps. Six hundred and fifty thousands were executed. Many of the repressed died in camps of hunger, diseases and tortures.

After the end of World War II, mass reprisals have increased again and proceeded till 1953[26]. Continuous and total deportations of the peoples including: German, Finn, Greek and "punished" peoples – Charatchaevs, Chechen, Ingushes,

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Vevey, Switzerland. July 1981. Symposium The Famine History; Андреев Е.М., Дарский Л.Е. Харькова Т.Л. *Население Советского Союза 1922-1991*. Москва, 1993.

[25] *Конституция СССР 1936*. М., Юридическое издательство НКЮ СССР, 1938.

[26] Mass reprisals were weakened by the death of Dictator Stalin I.V., who died in 1953.

Balkars, Crimea Tatars, and Turk-Meshetins included three million people[27]. A hundred thousand soviet citizens who have come back home after captivity or compulsory works in Germany during World War II were sent to concentration camps[28]. The "usual" reprisals proceeded also. The general number of soviet citizens kept in prisons and camps in the beginning of the fifties has come nearer to 2, 8 million[29].

The fourth *Constitution of the USSR, 1977* established the succession of principles indicated in *Constitutions 1918, 1922, 1936*[30]. Among the above stated principles was the communist concept, indicating that international norms on Human Rights never considered as something that might be invoked before, and enforced by, its domestic courts. The *1977 Constitution* did not allow the direct operation of international law in the domestic setting. Although *the Constitution* proclaimed that the relations of the USSR with other states should be based on the principle of "fulfillment in good faith of obligations arising from the generally recognized principles and rules of international law, and from international treaties signed by the USSR," this broad clause was never interpreted as a general incorporation of international norms into soviet domestic law[31]. The application of international norms was envisaged in some exceptional cases of statutory references to international treaty law, but as a general constitutional principle the soviet legal order remained closed to international legal norms[32].

Summing up the studying of soviet Constitutions, it can be concluded that beginning from 1936 they contained a number of individual rights written in the text of the documents. However, these guarantees of rights were without substance since they could be overridden by the purpose of the government, which was attached to

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[27] "Punished peoples" included peoples, who, by the opinion of Stalin helped the Nazi regime during World War II.

[28] Полян, П.М. *Жертвы двух диктатур. Остарбайтеры и военнопленные в Третьем Рейхе и их репатриация.* Москва, 1996

[29] Земсков, В.Н. "Демография заключенных, спецпоселенцев и ссыльных (30-ые - 50-ые годы)". Мир России, 1999, № 4, с. 115.

[30] See preamble to *the Constitution 1977.*

[31] See *KONSTITUTSIIA (Osnovnoy zakon) (Soiuza Sovetskikh Sotsialisticheskikh Respublik)* [Constitution (Fundamental Law) of the USSR] (1977), 1 Svod zakonov SSSR [Code of the Laws of the USSR] 14 (1988), as amended in 1981, 1988, 1989, 1990, translated in CONSTITUTIONS, supra note 1, HISTORIC CONSTITUTIONS, Union of Soviet Socialist Republics (1990), and BASIC DOCUMENTS ON THE SOVIET LEGAL SYSTEM 3 (W. E. Butler ed., 2d ed. 1991).

[32] For details, see Danilenko, Gennady. *Soviet Constitutional Reforms and International Human Rights Standards*, in 1 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN

communism. In the soviet reality the concept of the "law-based state" meant that the totalitarian state promulgated law to control and manage every aspect of an individual' interaction with the state and with other individuals[33]. The principle of power separation and civil society was never maintained[34]. The communist party has the untouchable, sole power in state governance. The soviet legal system was protected from any direct penetration of international law by its conception of international law and soviet law as two completely separate systems. As a result of this dualist approach, the international obligations of the soviet state would be applicable internally only if they were transformed by the legislature into a separate statute or administrative regulation. By relying on the doctrine of transformation, the Soviet Union was able to sign numerous international treaties, including treaties on human rights, and still avoid implementing some or all of their provisions in the domestic legal order[35].

Concluding all the above, it can be mentioned that the communist political and economic systems not only dominated the area for years, but also became deeply rooted in the mentality of the society and in the culture[36] of Eastern Europe.

The situation with Human Rights in Russia changed only with the appointment of Gorbashev M.S. in 1985, establishing Russia's first law-based state. That period is

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LAW (1990), bk. 2, at 211, 239-40 (1992).

[33] Lien, *supra* note 10

[34] - Principle of power separation presupposes division of power into three branches: legislative, executive, and judicial;
- Three different features of civil society are usually emphasized: (1) it is a public sphere of activity notionally prior to and autonomous from the state; (2) it comprises a collection of voluntary associations; and (3) it is characterized by virtues of civility. See Shils, E. "The Virtue of Civil Society" 26 Gov't & Oppos 3. Following Shils, Richard Janda employed the term loosely as combining these three features, although they stand in some tension with each other. See also C. Taylor, "Modes of Civil Society" (1990) 3 Public Culture 95, where he masterfully traces these elements through history and unearths tensions between Locke's "autonomous public sphere" and Montesquieu's "corps intermédiares".

[35] See Danilenko, G.M. "The new Russian Constitution and international law" 88 Am. J. Int'l L. 451.

[36] Culture, is usually defined as the way of life, especially the general customs and beliefs, of a particular group of people at a particular time. See Cambridge Advanced Learner's Dictionary. If defined as "collective subjectivity" or as the sum of achievements and practices of a particular collectivity, tends to be understood as a given determinant of conduct. The more traditional definition of culture, as training or refinement of the mind, reinforces the notion that culture is not only a condition determining behavior but also derives from creative acts. We make and shape our culture, we are not simply made and shaped by it. Nor is culture a homogeneous phenomenon in a collectivity; it is composed of sometimes rival and contradictory traditions, expressions and teachings. As different cultural strands are followed in the public imagination,

considered as a beginning of transition from the communist system into Democracy and Civil society. The leaders of the Soviet Union realized that the country would have no prospects for further economic and social development unless a modern society based on the rule of law was built in the USSR. An important element of the overall political and legal reform was the recognition that the country would never be fully integrated into the world community if it did not ensure compliance with internationally accepted norms, in particular with norms concerning human rights. As a result, constitutional guarantees begun to gain some true meaning and enforceability. Russian scholar Gennady M. Danilenko in his research, devoted to the process of Russia's transition from communism to democracy, indicates the interesting phenomenon of numerous international commitments regarding human rights that the USSR had assumed in previous years, had suddenly become a source of political argumentation and legal innovation designed to effect profound changes in the prevailing restrictive laws and practices. International human rights standards emerged as an important normative yardstick for measuring the proposed legal reforms. International law thus became a critical catalyst in the drive for democracy and human rights.

The focus on international law was motivated by several politico-legal considerations, some of which retain their validity for Russia today. First, there was a consensus among policy makers and citizens that soviet internal law lagged behind legal standards that had been developed at the international level. Second, the reliance on international law indicated that international institutions were accorded more trust than national institutions which had lost much of their legitimacy after the failure of the communist idea and revelations in the media about the totalitarian state's gross violations of human rights. Third, international standards, in particular human rights standards, enjoyed a high degree of legitimacy, not only because of their prior (even if only "verbal") acceptance by the Soviet Union, but also because of their general recognition and implementation by "the civilized nations." The legitimacy attributed to international human rights standards was also based on the general perception that they expressed "universal human values" shared by the majority of the international community[37].

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habits change, traditions are re-interpreted, and culture is transformed. See also Janda, *supra* note 20.

[37] See Danilenko, *supra* note 35.

Many Human Rights activists and scholars in their works indicated the necessity for general review of soviet law in order to void some provisions that are inconsistent with International Human Rights Law. However, this task cannot be easily accomplished because of the political, bureaucratic and cultural barriers. Therefore many politicians and experts argued that the gradual transformation of international standards into new legislative acts should be accompanied by a radical constitutional change that would "open" the domestic legal system to direct penetration of international principles and norms[38]. That kind of a reform required that the Soviet Union accept a general constitutional principle proclaiming international law as part of the law of the land. But such a task was never achieved because the influence of communist ideology at that time was too strong. What was achieved was the adoption of *the Act on Constitutional Supervision in 1989*[39]. For the first time in soviet history, this law provided a mechanism for the direct incorporation of various international rules into the domestic legal system: it gave the Committee of Constitutional Supervision the power to review domestic laws by reference to the USSR's international obligations, specifically those concerning human rights. By introducing the concept of direct relevance of international law to the internal legal process, the country took a giant step from the previous isolationist stand, which had prevailed for more than seventy years of its history[40]. However, internal antilogy and unwillingness to follow the democratic innovations resulted in the following Committee dissolution. Despite its very short term of service, the Committee relied on international law as a source of applicable law, which made a significant contribution to the process of Human Rights protection at that time[41].

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[38] See, e.g., V. S. Vereshchetin, G. M. Danilenko & R. A. Mullerson, Konstitutsionnaya reforma v SSSR i mezhdunarodnoe pravo [Constitutional Reform in the USSR and International Law], SOVETSKOE GOSUDARSTVO I PRAVO, No. 5, 1990, at 13.

[39] *Zakon SSSR o konstitutsionnom nadzore v SSSR [Law of the USSR on Constitutional Supervision in the USSR],* Vedomosty Siezda Narodnykh Deputatov SSSR i Verkhovnogo Soveta SSSR [Official Gazette of the Congress of People's Deputies and Supreme Soviet of the USSR] [Vedomosty SSSR], Issue No. 29, Item No. 572 (1989), as amended in 1990, see Vedomosty SSSR, Issue No. 12, Item No. 189, para. 14 (1990).

[40] See Danilenko, *supra* note 35.

[41] For example: In its first decision, which declared unconstitutional several legislative acts that excluded certain labor disputes from the jurisdiction of the courts, [See Vedomosty SSSR, Issue No. 27, Item No. 524 (1990)] the committee invoked, among other things, Articles 7 and 8 of *the Universal Declaration of Human Rights* [GA Res. 217A (III), UN Doc. A/810, at 71 (1948).] and Article 2(3) of *the International Covenant on Civil and Political Rights*, [Dec. 16, 1966,

The Gorbatshev era lasted for a short period and ended in 1991 with the collapse of the Soviet Union, Communist Party's government and the ascent of Boris Yeltsin as a leader of the Russian Federation.

The transfer of power from the Communist Party to the democratically elected government brought a hope towards the further protection of Human Rights. For the first time in Russian history there was an opportunity to define the rule of law. A number of scholars have written about the role of law in the period of transition to democracy and market economies and note that differing legal cultures or traditions play roles in facilitating or impeding the transformation of the law[42]. As for the Russian Federation, dramatic changes were incurred in the structure of government. There was an unprecedented tendency to power separation between the judicial, executive, and legislative branches. The unique organ for Russian history, devoted to Human Rights protection was created, which was named as the Constitutional Court. The Constitutional Court was granted a supervisory role of enforcing constitutional norms after the

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999 UNTS 171.] concerning the right of all persons to an effective remedy for the violation of their rights. Another decision of the committee challenged the existing norms of criminal law and criminal procedure, which violated the presumption of innocence. In this case, the committee cited in support of its ruling Article 14 of *the Covenant on Civil and Political Rights*, as well as Article 11 of *the Universal Declaration*, which states the right of every accused person to be presumed innocent until proven guilty according to law in a public trial. [See Vedomosty SSSR, Issue No. 39, Item No. 775 (1990)] The committee's last decision, handed down just before the collapse of the Soviet Union, concerned the constitutionality of the infamous regulations requiring residence permits. In declaring all such regulations unconstitutional, the committee gave special weight to such international instruments as *the Universal Declaration* and *the Covenant on Civil and Political Rights.* [See Vedomosty SSSR, Issue No. 46, Item No. 1307 (1991)]

[42] See e.g. C.R. Sunstein, "On Property and Constitutionalism" (1993) 14 Cardozo L.Rev. 907, commenting on the role of constitutions in Eastern Europe. Sunstein asserts that "[a] dramatic legal and cultural shift, creating a belief in private property and a respect for markets, is indispensable" (*ibid.* at 922 [emphasis added]). He goes so far as to claim the following: It is often said that constitutions, as a form of higher law, must be compatible with the culture and mores of those whom they regulate. In one sense, however, the opposite is true. Constitutional provisions should be designed to work against precisely those aspects of a country's culture and tradition that are likely to produce harm through that country's ordinary political processes (Sunstein, *ibid.*). Waelde and Gunderson assert that "[l]aws become effective by social forces and pressures interested in and working for implementation" (Waelde & Gunderson, supra note 3 at 360) and that "legal reform must be carried out carefully so that it nurtures development of a capitalist 'mind set' rather than incites nationalist rejection" (*ibid.* at 362). They suggest that any legal transplants take careful account of indigenous legal cultures. B. Rudden, "Civil Law, Civil Society, and the Russian Constitution" (1994) 110 L.Q.Rev. 56, draws attention to the "strident Soviet tradition of stern virtue which assigned to the law a function fulfilled in other epochs by the sermon ..." (*ibid.* at 82). See also Janda, *supra* note 20.

dissolution of the Soviet Union and attempted to obtain declared independence from other branches of government[43].

However, during the struggle for power, the conflict arose between Boris Yeltsin and the Russian Legislature. Yeltsin also had disagreements with the Constitutional Court over decisions the Court had rendered against some of his appointees. During these confrontations, two variants of new Russian Constitutions were drafted. The first variant was prepared by Yeltsin's team and viewed Russia as the "Presidents Republic"[44]. Another variant was drafted by the Russian Legislature and viewed Russia as "Parliamentary Republic"[45]. In October, 1993, as these conflicts reached the highest point, Yeltsin dissolved the legislature and judiciary using armed force and announced the forthcoming adoption of the new Russian *Constitution.* As a result, Yeltsin's variant of *the Constitution* was offered to the public and not the variant that was lobbied by Legislature. Russian citizens did not have the chance to express their democratic will and choose between two variants of Constitutions. This action mirrored the past Russian rulers' conduct of ignoring the rule of law. By using force to override laws, Yeltsin's actions mirrored the authoritarian actions of past communist rulers[46]. Those actions collapsed the idea that Russian transformation towards democracy will be automatic with the dissolution of the communism.

Accordingly, the question arises: Why is Russia's liberal transition to democracy and civil society so slow? Trying to answer this question, prominent scholar Richard Janda[47] analyzed and compared the genesis of experience for Russia and other states of the post-communist block in the transition period. He mentioned that post-communist societies have experienced the transition to a democracy, civil society and market economy with different results. The author argues that differences in experience and outcomes can be partly explained by the role of habit, culture, and tradition in the process of legal transition to democracy. The scholar identifies two reasons for the more difficult

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[43] See *RSFSR Constitutional Court Act* and *Decree of RSFSR Congress of People's Deputies Enacting the SFSR Constitutional Court Act,* 1991 WL 496580.

[44] This Constitution presupposed strong power of President

[45] This Draft gave strong powers to Russian Parliament

[46] Ordower, Jonathan: Why Russia's liberal transition to democracy and a free market economy so slow? 5 J.Int'l L. & Prac. 365

[47] Richard Janda is a professor at the Faculty of Law, McGill University

transition to the market economy as experienced by Russia and other countries: first, the presence of individual opportunistic behavior, distrust, and mafia behavior, which are largely endangered by the deeply rooted habit of Stalinism/communism; and second, the destruction of civil society under communist ideology. In contrast, the author points to a parallel culture nurtured by dissidents and anchored in a pre-communist tradition as a factor explaining the relative success of other post-communist societies' transition. Janda indicates that because this parallel culture fostered trust it was an important factor in the successful transition to democracy, market economy and the emergence of coincident legal institutions[48].

The research conducted by Janda certifies that the Czech Republic, Hungary, Poland, the Slovak Republic and Slovenia are placed in the top economic tier of Central and Eastern European countries, while others are faring less well[49]. He also tries to

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[48] Janda, *supra* note 20.

[49] This "ranking" follows the discussion in P.H. Rubin, "Growing a Legal System in the Post-Communist Economies" (1994) 27 Cornell Int'l L.J. 1 at 25-26.
See also, I.M.F., World Economic Outlook, World Economic and Financial Surveys (Washington: I.M.F., October 1994) at 8, noting progress in the Czech Republic, Hungary, the Slovak Republic, Slovenia, Albania, the Baltic countries and Mongolia, which have all resumed growth after pursuing policies of macroeconomic stabilization and structural reform. In contrast, there has been contracting output in most of the other countries in transition (*ibid.* at 9). Of the countries of the former Soviet Union, only Armenia, Mongolia and Turkmenistan showed growth in 1994, and Mongolia stands alone as having had relatively sustained growth (*ibid.* at 65-66). Albania, Poland, Hungary, the Czech Republic, the Slovak Republic and Latvia all have close to or in excess of 50% of G.D.P. accounted for by the private sector (*ibid.* at 65). On the other hand, unemployment has been in the double digits everywhere except for the Czech Republic (4%), Estonia (7%), Latvia (6%) and Russia (6%) (*ibid.* at 68), and inflation has been in the double digits or more (10,000% in Georgia!) in all countries except the Czech Republic (9%). Moderate rates were also achieved in Hungary (19%), the Slovak Republic (14%) and Slovenia (18%) (*ibid.* at 66). "In the group of countries with the most advanced reforms, the Czech Republic stands out as the only country that has pursued tight financial policies and bold liberalization while avoiding a sharp rise in open unemployment" (*ibid.* at 68). It is also the only country with a positive trade balance (see OECD, Economic Outlook, N° 55 (Paris: OECD, 1994) at 118). For another review of the economic performance of transition countries, see W.C. Philbrick, "The Paving of Wall Street in Eastern Europe: Establishing the Legal Infrastructure for Stock Markets in the Formerly Centrally Planned Economies" (1994) 25 Law & Pol'y Int'l Bus. 565 at 568-71.
See also, M. Wierzbowski, "Eastern Europe: Observations and Investment Strategies" (1991) 24 Vand.J. Transnat'l L. 385; C.M. Cole, "Poland, Hungary, and the Czech and Slovak Federal Republic: An Examination of the Evolving Legal Framework for Foreign Investment" (1992) 7 Am.U.J. Int'l L. & Pol'y 667. Cheryl Gray, Senior Economist with the World Bank, has coordinated a series of studies of evolving legal frameworks in Eastern Europe. For accounts of the legal changes in the Czech Republic, Hungary, Poland and Slovenia, see: C.W. Gray, "The Legal Framework for Private Sector Activity in the Czech Republic" (1993) 26 Vand.J. Transnat'l L. 271; C.W. Gray, R.J. Hanson & M. Heller, "Hungarian Legal Reform for the Private Sector" (1992) 26 Geo.Wash.J. Int'l L. & Econ. 293; C.W. Gray et al., "The Legal Framework for Private Sector Development in a Transitional Economy: The Case of Poland" (1992) 22 Ga.J. Int'l & Comp.L.

answer the question: What characterizes the favorable moral traditions that underpin the market? The reference was made to Mark Casson, who has attempted to answer this question by describing "the cultural determinants of economic performance"[50]. He identifies one characteristic that has special significance for the former communist countries: high levels of trust[51]. Given that widespread opportunistic behavior, for example - cheating on contracts, can undermine contracting itself "[t]he question then arises as to whether people can be trusted to honor contracts even when it is not in their material interests to do so[52]." Nikolas Luhmann generalizes the role of trust and confidence: "*Lack of confidence and the need for trust may form a vicious circle. A system--economic, legal, or political--requires trust as an input condition. Without trust it cannot stimulate supportive activities in situations of uncertainty or risk. At the same time, the structural and operational properties of such a system may erode confidence and thereby undermine one of the essential conditions of trust.*[53]" The opposite term to trust is distrust that is often a result of an opportunistic behavior, which is widespread in

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283; C.W. Gray & F.D. Stiblar, "The Evolving Legal Framework for Private Sector Activity in Slovenia" (1993) 14 U.Pa.J. Int'l Bus.L. 119. The former German Democratic Republic (East Germany) is a special case given the wholesale substitution of West German legal and economic institutions. This comes, perhaps, at the price of a demoralizing sense of colonization in the east and of resentment at an unmanageable level of subsidization in the west (see: N. Horn, "The Lawful German Revolution: Privatization and Market Economy in a Re-Unified Germany" (1991) 39 A.M.J.Comp.L. 725; H. Seibert, H. Schmieding & P. Nunnenkamp, "The Transformation of a Socialist Economy: Lessons of German Unification" in G. Winckler, ed., Central and Eastern Europe Roads to Growth (Washington: I.M.F., 1992) 62).

[50] Casson, M. "Cultural Determinants of Economic Performance" (1993) 17 J.Comp.Econ. 418.

[51] See also: Luhmann, N. *Trust and Power* (Chichester: Wiley, 1979); B. Barber, *The Logic and Limits of Trust* (New Brunswick, N.J.: Rutgers University Press, 1983); D. Gambetta, ed., *Trust: Making and Breaking Cooperative Relations* (New York: Blackwell, 1988). In characterizing his understanding of trust, Barber notes: "Luhman [sic] and I regard trust primarily as a phenomenon of social structural and cultural variables and not, as it has been treated in the social-psychology work ... as a function of individual personality variables" (Barber, ibid. at 5).

[52] Casson, *supra* note 50 at 426. On opportunistic behaviour in post- communist countries, see Rubin, *supra* note 49 at 13-16. On the theory of opportunistic behaviour, see O.E. Williamson, The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting (New York: Free Press, 1985).

[53] N. Luhmann, "Familiarity, Confidence, Trust: Problems and Alternatives", in Gambetta, ed., *infra* note 56. Luhmann distinguishes between confidence and trust as two forms of faith in the fulfillment of expectations. Trust is engaged where that faith depends upon conscious undertaking of risk--for example, hiring someone. Confidence is reposed where a relationship is understood as unavoidable--for example, relying on the police. In Luhmann's terms, relationships of trust can transpose into relationships of confidence and vice versa (see Luhmann in Gambetta, ed., *ibid.* at 97-98). See also Janda, *supra* note 20.

Russia[54]. It can be concluded that the most dramatic manifestation of generalized distrust is the emergence of mafia behaviour touching upon large portions of the economy[55]. I would also add to this phenomenon of large scale corruption and bureaucracy of governmental bodies in Russia. A parallel can be made between the concept of distrust in Russia and Southern Italy. In this respect, reference can be made towards Diego Gambetta's work that raises the question of distrust during his analysis of the social phenomena in Southern Italy. He indicates that secrecy, duplicity, information betrayal serve as "self-reinforcing behavioral expressions"[56] of distrust and were systematically employed by the communist regime[57]. Gambetta compares the situation in Southern Italy and in Russia and suggests that just as mafia behavior would appear to have emerged with the removal of the force that had destroyed civil society in Southern Italy and flourished under democracy, so too mafia behavior and corruption have gained pre-eminence with the fall of communism[58]. Unfortunately, twelve years of a Russian transition period

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[54] See: Rubin, *supra* note 49 at 17-18; I. Bird, "The Unique Challenges of Practicing Law in the Russian Federation" (Faculty of Law, McGill University, 1995) [unpublished].

[55] See: Janda, *supra* note 20.

See also, the survey, conducted by Professor Yakov Gilinskij of the European University of St. Petersburg, where has conducted interviews with businesspersons in that city and has managed to trace out the scope of mafia behaviour. He cites the following opinion offered by an interviewee: 100% of commercial structures are embraced by [the] racket, except the ones located in the premises of large-scale state-owned enterprises, or the ones ... which have not yet begun making profit. [The] [r]acket [has] penetrated all the enterprises except those of [the] military-industrial complex and some foreign firms (Y. Gilinskij, " 'Black Market' and Organized Crime in Russia" (European University, St. Petersburg, 1993) at 5 [[[[unpublished]). Gilinskij's own conclusion is that "criminalization of the entire national economy has occurred" (*ibid.*). Also, see generally S. Handelman, Comrade Criminal: The Theft of the Second Russian Revolution (London: Michael Joseph, 1994).

[56] See Gambetta, D. "Mafia: the Price of Distrust", in Gambetta, ed. www.sociology.ox.ac.uk/papers/gambetta158-175.pdf

[57] Casson also indicates: Low trust is a legacy of Stalinism. The overcentralization of planning discredited the planner and, by implication, top enterprise managers too. The rigidity of senior officials in maintaining technically unrealistic production targets to maximize the output of obsolete consumer goods left considerable cynicism at lower levels of the enterprise system. Furthermore, the privileges conferred on party activists and the widespread use of informers discouraged the open expression of dissenting views and hence disabled group-centered problem solving (Casson, *supra* note 50).

[58] Gambetta notes that for mafia behaviour to emerge, absence of trustworthy legal institutions and commercial relations must be conjoined with opportunities for social mobility ("The Price of Distrust" in Gambetta, ed., *supra* note 56). This provides incentives for monopolistic rent-seeking and results in prominent mafiosi affecting middle class respectability. Russian economist Evgenii Starikov has elaborated the dangers of tolerating the mafia as a precursor to the development of a market economy (E. Starikov, "A Bazaar, Not a Market" (1994) 37:2 Probs.Econ. Transition 14).
See also, Janda, *supra* note 20.

proved the above stated along with the fact that "distrust" became a common characteristic of the Russian society.

Another interesting recollection with respect to the transition process was made by Eric Pozner. He argues that in order to make transformation from communism to democracy some kind of transitional justice is required. Pozner defines transitional justice as something different from the successful accomplishment of a political or economic transition: it means a political and economic transition that is consistent with liberal and democratic commitments. In his research, Posner links the concept of transitional justice to the answers on following questions: Should the new regime use retroactive criminal and civil law to punish officials or collaborators of the old regime? Should it undertake a campaign of "lustration," or the attempt to impose disenfranchisement, ineligibility for office, or other legal disabilities on the old regime's adherents? What of reparation and restitution to redress pre-transition violations of civil rights or property rights? [59]

In his work, Pozner makes two linked claims. First, that there is the relevance or utility of comparisons and analogies between regime transitions, on the one hand, and the wide variety of transitions that occur in the legal systems of consolidated democracies, on the other. Pozner's second claim results from the first. Given that transitional justice is continuous with ordinary justice, there is no reason to treat transitional-justice measures as presumptively suspect, on either moral or institutional grounds, unless we are to treat the justice systems of nontransitional liberal democracies as suspect as well[60].

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[59] Posner A. Eric & Vermeule Adrian: Transitional Justice as Ordinary Justice (unpublished) In the literature, writers generally understand transitional justice as backward looking: compensating victims for their losses; punishing wrongdoers and forcing individuals to disgorge property that was wrongfully acquired; and revealing the truth about past events. But transitional justice can also be understood in forward looking terms: providing a method for the public to recapture lost traditions and institutions; depriving former officials of political and economic influence that they could use to frustrate reform; signaling a commitment to property rights, the market, and democratic institutions; and establishing constitutional precedents that may deter future leaders from repeating the abuses of the old regime.

Pozner believes that regime change should involve a minimum of violence and instability, and should respect rights. People should either retain their property rights, or be compensated for their loss. Officials and supporters of the old regime should not be punished for legal acts. They should not be mistreated and humiliated, or denied trials. They should not be scapegoated, and instead they should be invited to participate as equal citizens in the new regime. Supporters of the new regime should not profit from the transition, or manipulate it for personal ends.

[60] *Ibid.*

It is obvious that during the transitional period, some kind of transitional justice is unavoidable. However, which form the transitional justice will take and to what degree the transitional justice will influence the transition process highly depends on the culture and the society of a particular country. The culture and society of a particular state also influence on the tools of transitional justice in that state, which include trials, truth commissions, reparations, apologies, and purges[61]. The criteria for evaluating transition include the evaluation of its goals and the results. Every transition seeks changes that can include political and economic reform. Therefore, transition can be judged by the quality of political and economic reforms achieved. In comparison to the East European countries of post soviet block, Russian transition towards the respect of Human Rights and market economy was not so successful. In order to find the reason for the above stated, it is useful to implement the sociological approach to the Human Rights in Russia. The reason for the slow transition results, I believe, lies in three major flaws. First claims that the Revolution of 1917, that provided the basis for the soviet regime, was pure Russian heritage. In contrast, the regime, that governed most East European countries was build in these countries with the help of the Soviet Union and therefore was a Russian transplant. The second claim comes from the first and indicates that the Soviet regime was deeply rooted in the Russian legal, political and cultural system[62]. And the third reason for the slow transition temps refers to the nature of the transition in Russia itself. The analysis of political transition in Russia emphasizes that this transition was lead by the elite of the old soviet regime[63]. Because elite lead the Russian transition, the

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[61] Trials are usually public proceedings in which legal forms are used as much as possible. Perpetrators from the old regime are charged with crimes, are often given lawyers and a chance to defend themselves. Purges occur when the perpetrators are thrown out of office, with or without a trial. Lustration, usually involves the public exposure of collaborators who were otherwise not know as such, along with a prohibition against their serving in office for a period of time. A condition for amnesty sometimes includes the formal admission of past crimes after testimony before a truth commission. See. Ronald C. Slye "The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible" 43 Va. J. Int'l L. 173, 194 (2002).

[62] See also Janda, *supra* note 20.

[63] Among the transitions that are led by the elite of the old regime (Russia, 1991; Hungary, 1989; Chole, 1989; Bulgaria, 1992; Chile, 1989) Pozner distinguishes the transitions that are forced on the elite by the opposition (Portugal, 1976; Argentina 1983), those that are bargains between the elite and the opposition (Poland, 1989), and those that are imposed by a foreign nation (Germany, Japan and Italy after World War II).

transitional justice is limited[64]. Therefore trials, lustration and purges were not part of the transitional justice in Russia. There were also no restitution programs with respect to nationalized private property in 1917. However, politically repressed citizens (victims of political crimes) were announced rehabilitated and were given very small compensation.

The transition process inevitably reveals a personnel issue: whether the individuals involved in the old regime system of management should be barred from public offices. In solving this problem, the Russian elite took the view that in the case of barring qualified officials that collaborated with the old regime, Russia will turn into paucity of personnel. Another argument they proposed was that it will be too difficult to make proper moral distinctions necessary for justice to be done. The third argument matches Havel's argument that nearly everyone was implicated in the old government regime[65]. For the above stated reasons, transitional justice in Russia did not use most of its tools.

Taking into consideration that transitional justice used only a small percentage of its resources, the next step in the discussion is to determine whether Russian society is capable of continuing democratic reforms towards the real and not declaratory system of Human Rights protection. It shall be noted that Human Rights protection in Constitutional documents in most cases symbolizes the real law enforcement process that is already occurring in the society. Therefore, it is obviously not enough to merely declare the Human Rights protection in *the Constitution* without linking it to practice in society. Michael Ignatieff[66] argues that human beings are at risk of their lives if they lack a basic measure of free agency; that the agency itself requires protection through internationally agreed standards; that these standards should entitle individuals to oppose and resist unjust laws and orders within their own states; and finally, that when all other remedies have been exhausted , these individuals have the right to appeal to other peoples, nations,

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[64] It shall be noted that where the opposition or a foreign nation leads the transition, transitional justice is significant. Where the elite and the opposition enter a bargain, transitional justice is moderate. In short, transitional justice declines as the influence of the elite increases. The explanation for this pattern is that elites try to shield themselves from post-transitional punishments when they lead the transition, and to extract concessions when the transition is the result of bargaining. Powerful opposition groups resist these efforts; weak opposition groups submit to them. See Pozner , *supra* note 59.

[65] Michnik, Adam and Vaclev Havel "Confronting the Past: Justice or Revenge?, 4 J. Democ". 20 (1993). See also Pozner, *supra* note 59.

and international organizations for assistance in defending their rights. By agency, Ignatieff means more or less what Isaiah Berlin meant by "negative liberty", the capacity of each individual to achieve rational[67] intentions without let or hindrance[68].

By other words I will say that the state will have progress in the Human Rights protection policy only if the society inside the state itself is ready to accept the Human Rights concept and push governmental structures to protect and enforce the declared rights[69]. In fact, Russian transition from a centralized administrative-command political and economic system to democracy and civil society requires more than formal destruction of the communism system. It will require the disassembling of an aspect of Eastern European culture and building the institute of "trust" [70].

Is Russian society ready and does it have the internal resources to accept the Human Rights concept? In order to answer this question it is important to evaluate the content of the enforcement process and future potential of two major constitutional documents*: the Declaration of Rights and Freedoms of the Individual and Citizen, 1991* and *the Constitution of the Russian Federation, 1993.*

In concluding all the above, it can be mentioned that:

1. Russia does not have very long history of effective protection for Human Rights. From the moment of the emergence of the Russian State until the 1990's, Russian citizens were not able to effectively protect their civil and political rights and did not enjoy freedoms or protected liberties associated with the Western style of government.

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[66] Michael Ignatieff is director of the Carr Center for Human Rights Policy at Harvard University.

[67] By rational, Ignatieff do not necessarily means sensible or estimable, merely those intentions that do not involve obvious harm to other human beings.

[68] Ignatieff, M. *Human rights as politics and idolatry.* (Princeton University Press, Princeton, New Jersey, 2001, p. 53-57)

[69] The vivid example of the readiness of the society to accept changes in Human Rights concept is Brown vs. Board of Education case that becomes a canonical case in American constitutional law. That case involved a claim from African-American, whose children were denied access to the school because of their race. In this case "separate but equal" doctrine was overruled because separate, segregated educational facilities were inherently unequal under the Fourteenth Amendment as a violation of the equal protection of the laws, regardless of equality of the facilities. See 347 U.S. 483 (1954)

[70] See also Greenspan, Alan S. "Thoughts About the Transitioning Market Economies of Eastern Europe and the Former Soviet Union" 6 DEPAUL BUS. L.J. 1, at 14 n.4 (1993). Chairman Greenspan acknowledged that "[t]he dismantling of the central planning function of a communist economy does not automatically establish a free market entrepreneurial system."

Because the essential characteristic of Western ideology – freedom – was often suppressed by the Russian rulers, the basic principles of democracy and free markets are new to the Russian people.

2. The ignorance of the concept of rule of law by the Russian monarchs which was aggravated by the emergence and dominating of a communist regime for seventy years made a continuous precedent of permissiveness from the side of the government. The notion of disrespect for Human Rights is rooted into the culture and mentality of the society as the normal course of life.

3. The countries of post-soviet block experienced different results in the process of transition from communism to democracy and civil society because the degree of the rooting of communism in each society is different. Many countries developed their own parallel culture that viewed communism as a hostile transplant from USSR even during its dominance. However, the Bolsheviks revolution in 1917 was the Russian invention that reflected the highest degree of communism rooting into the culture in comparison with countries of Eastern Europe[71].

4. Russia will have progress in the Human Rights protection policy only if the society inside the state itself is ready to accept Human Rights concept and push governmental structures to protect and enforce the declared rights. In fact, Russian transition from a centralized administrative-command political and economic system to democracy and civil society requires more than formal destruction of communist system. It will require the disassembling of an aspect of the Eastern European culture and building the institute of "trust".

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[71] See also Janda, *supra* note 20.

1.2. Emerging of the Human Rights in the Russian Federation

A. The Declaration of Rights and Freedoms of the Individual and Citizen, 1991

In a country like Russia, the emergence of Human Rights concept was very important. The significance of recent constitutional innovations concerning Human Rights can be fully appreciated against the background of the previous experience of the Soviet Union. Although, the beginning for the emergence of the Human Rights concept in Russia refers to Gorbatshev's era which is the sunset of communism; the major changes occurred only after the dissolution of the Soviet Union. Among them was the adoption of *the Declaration of Rights and Freedoms of the Individual and Citizen in 1991*[72].

In the second half of 1991, the Russian Parliament made the unprecedented steps in the area of human rights: it passed a law creating a Constitutional Court[73] along with the elections of its judges; it adopted *the Conception for Judicial Reform*[74] in the Russian Soviet Federated Socialist Republic, which supposed to serve as the outline for future reform of the justice system; and what is most outstanding, it adopted *the Declaration of Rights and Freedoms of the Individual and Citizen, 1991.*

These three legal documents show a good overview of the emergence for the Human Rights concept and the supposed mechanism for its protection in the post - soviet Russian Federation. Other Russian Federation laws, such as legislation regarding the

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[72] *Deklaratsiia prav i svobod cheloveka i grazhdanina* [Declaration of Rights and Freedoms of the Individual and Citizen], Nov. 22, 1991, [hereinafter *Declaration*], adopted by *Postanovleniie Verkhovnogo Soveta RSFSR O Deklaratsii prav i svobod cheloveka i grazhdanina* [Resolution of the RSFSR Supreme Soviet on the Declaration of Rights and Freedoms of the Individual and Citizen], Nov. 22, 1991 [hereinafter Resolution], publ.Ross.Gaz. Dec. 25, 1991 at 1. On April 21, 1992, at the conclusion of the Sixth RSFSR Congress of People's Deputies, some sections of this Declaration were amended to the existing Constitution, making them binding law.

[73] *Zakon RSFSR O Konstitutsionnom Sude RSFSR [RSFSR Law on a Constitutional Court of the RSFSR], no. 1599-1,* July 12, 1991, [hereinafter *Law on Constitutional Court*], adopted by *Postanovleniie S'ezda Narodnykh Deputatov Ob Utverzhdenii Zakona RSFSR O Konstitutsionnom Sude RSFSR [Resolution of the Congress of People's Deputies on Adoption of the RSFSR Law, on a Constitutional Court of the RSFSR*], no. 1598-1, July 12, 1991 [hereinafter *Resolution on a Constitutional Court*].

[74] Boris Zolotukhin. *Kontseptsiia sudebnoi reformy v RSFSR* [Conception of Judicial Reform in RSFSR], Oct. 1991, at 1 [hereinafter Conception of Judicial Reform] adopted by *Postanovleniie S'ezda Narodnykh Deputatov O Konseptsii sudebnoi reformy v RSFSR* [Resolution of the Congress of Peoples' Deputies on a Conception of Judicial Reform in RSFSR], Oct.24, 1991 [hereinafter Resolution on Judicial Reform]. Boris Zolotukhin is the Chairman of the Supreme Soviet Subcommittee on Judicial Reform.

militia, state of emergency, and economic reform, may also have a substantial impact on individual rights and their protection. While these laws are significant, however, they lack the systemic importance of *the Declaration of Rights and Freedoms, the Conception of Judicial Reform,* and *the law on the Constitutional Court*[75].

The prevailing view among the commentators indicates that the emerging concept for Human Rights at the beginning of 90's in the Russian Federation emanates from four basic sources[76]. One such source is the rejection of communism as promulgated by *the RSFSR Constitution*[77], a transitional document that governed the Russian Federation from 1989 till 1993. This rejection, however, by no means indicates a total abdication of the Communist legacy. The new ideology still highlights some of the social and economic rights, which were fundamental under the socialist Constitution. A second motivating source is the government's attempt to bring Russia's laws into compliance with international legal standards of civil and political rights. In a broader sense, this is part of a general strategy to have Russia, including its legal system, rejoin the European tradition. A third source for the development of the new concept is the re-emergence of a pre-revolutionary legal tradition, particularly in the area of judicial reform. Finally, a fourth key source of inspiration grew out of the Russian dissident movement between the 1960's 1980's[78].

As it was mentioned, *the Declaration of the Rights and Freedoms of the Individual and Citizen* was the major stage in emergence of the Human Rights concept in post-soviet Russia. Although not legally binding, this document demonstrated dedication to the democratic concept of inalienable human rights. It was adopted by the Supreme

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[75] Holland, M. "An emerging of fundamental rights in contemporary Russia" 1 New Eur. L. Rev. 1

[76] Members of Parliament such as Sergei Kovalev, Chairman of the Human Rights Committee and Boris Zolotukhin, Chairman of the Subcommittee on Judicial Reform of the Legislation Committee, are among those most responsible for drafting and advocating this concept of individual rights. They were persecuted for their human rights activism under the Soviet regime. Sergei Kovalev was one of the founders of the human rights movement in the 1960's and, in 1974, was sentenced to seven years hard labor and three years exile for his work in publishing a periodical on human rights. Boris Zolotukhin, a lawyer, was disbarred in 1968 as a result of his courtroom defense of Aleksandr Ginzburg, a dissident.

[77] *Konst. RSFSR [RSFSR Constitution*], (Oct. 27, 1989). Its served as a transition document, that governed Russian state after the collapse of the Soviet Union and until 1993.

[78] Holland, *supra* note 75.

Soviet of the Russian Federation on November 22, 1991. *The Declaration* consists of preamble and forty articles. In view of the passive mass violations of Human Rights, the drafters of *the Declaration of Rights and Freedoms of the Individual and Citizen of 1991* relied heavily on international human rights standards[79] and in particular, on *the International Covenant on Civil and Political Rights*[80]. Indeed, several articles in the Declaration are very similar to articles in the *International Covenant on Civil and Political Rights* (hereinafter ICCPR). These include articles on equality before the law[81], prohibition of torture[82], the right to participate in state and society[83], and the right to freely choose work[84]. It shall be noted, that although in many cases the Declaration's language is drawn directly from *the ICCPR*, the substance of these documents is different. For example, the Declaration has a very large section devoted to positive rights, which *ICCPR* does not have. The economic and social rights stated in *the Declaration* correspond largely to those granted under *the RSFSR Socialist Constitution* as well as to recognized rights under *the International Covenant on Economic, Social and Cultural Rights*[85]. These rights are: (1) the right to vacation[86], (2) medical care[87], (3) social security[88], (4) housing[89], and (5) education[90]. It should be mentioned that socio-economic rights in all previous soviet constitutions, including *the Constitution of RSFSR (1989),* preceded civil and political rights. By contrast, the drafters of the Declaration made the first step and posted economic and social rights well below civil and political rights in the list.

A general clause that incorporated international norms concerning human rights into Russian domestic law is considered as important and innovative element of the

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[79] See preamble to *the Declaration.*

[80] *International Covenant on Civil and Political Rights*, G.A.Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6546 (1966) [hereinafter *ICCPR*].

[81] Compare the Declaration, supra note 72, art. 3 with the *ICCPR*, *supra* note 80, arts. 3 and 26.

[82] Compare the Declaration, *supra* note 72, art. 8 with the *ICCPR*, *supra* note 80, art. 7.

[83] Compare the Declaration, *supra* note 72, art. 17 with the *ICCPR*, *supra* note 80, arts. 16 and 25.

[84] Compare the Declaration, *supra* note 72, art. 23 with the *ICCPR*, *supra* note 80, art. 22.

[85] *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6546 (1966).

[86] *Ibid.* art. 7.

[87] *Ibid.*, art. 12.

[88] *Ibid.* art. 9.

[89] *Ibid.* art. 10, 11.

declaration: Article 1 § 2 provided that "the generally recognized international norms concerning human rights have priority over laws of the Russian Federation and directly create rights and obligations for the citizens of the Russian Federation." The significance of this first step cannot be overestimated.

Among the provisions that correlate to international norms we can find the articles that do not directly correspond to those specified in international norms. Many of these nonconforming declared rights formally reject the former soviet conception of those rights. Article 1 §1 of the Declaration states that rights and freedoms of the individual are inherent from birth. This assertion is a fundamental rejection of the soviet legal tradition. Under *the RSFSR Constitution*, no rights are inalienable; implicitly, all rights and freedoms are contingent upon the state[91]. Placing the notion of inalienable rights first and foremost in *the Declaration* underscores the supremacy of individual rights in the ideology of the new Russian Federation[92].

Article 2, like Article 1, is not explicitly patterned on international legal documents. It states that the rights granted in *the Declaration* are not exhaustive and in no way limit other rights and freedoms. This article too, seems to rectify injustices profound to the soviet past; it reinforces the concept that rights are inherent and that the state does not have the power to grant fundamental rights[93]. *The Declaration*, at its outset, charges the state and society with the protection of the individual, not the reverse, as is the case in the former soviet constitutions and *the RSFSR Constitution*[94].

As it was already mentioned, *the Declaration* includes not only a group of civil and political rights, but also a list of socio-economic rights. Among civil and political rights it will be useful to emphasize:

- *right to life*[95], It shall be noted, that the soviet constitutions did not grant this right to an individual.

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[90] *Ibid.* art. 13.

[91] *Konst. RSFSR* art. 48, *supra* note 77.

[92] Holland, *supra* note 75.

[93] On the contrary, the Preamble to the Declaration states, "rights and freedoms of the individual, and his honor and dignity, are the highest value of the society and the state."

[94] *Konst. RSFSR* art. 60 states: "A citizen of the RSFSR shall be obliged to safeguard the interests of the Soviet state and to further the strengthening of its might and authority."

[95] See art. 7 of *the Declaration, supra* note 72 (this article corresponds to Art. 6 *of the ICCPR*)

- *right to liberty and security*[96]; More specifically, *the Declaration* grants the right to *habeas corpus*[97] and states that interference with privacy, regarding correspondence, telephone, or other communication as well as search of a home[98] may only occur on the basis of a judicial warrant[99]. While these articles draw significantly on analogous international standards[100], they go beyond *the ICCPR* in their insistence on judicial review of state action which interferes with individual liberty and privacy[101]. Because the provisions of *the Declaration* were too broad, at that time it mostly relied on the *RSFSR Constitution, 1989*. While *the RSFSR Constitution* grants security of person[102], home[103], and communication[104], it has no mechanisms to insure these rights. Consequently, security of home and communication exist in name only[105].

- *mobility rights*[106], *The Declaration* also grants individuals freedom of movement, freedom to choose a residence within the Russian Federation, and the right to freely leave and reenter the country. This provision complies with the relevant international standard and is established in order to eliminate the soviet restrictions on movement. However, the permit to establish residence continues to exist as a part of the Russian Federation legal system. This regulation undermines the declared mobility rights.

- *political rights*[107], Political rights included rights to participate in government, especially a responsible one. Those rights included representation and voting.

- *right to property*[108], Property rights entrenched in *the Declaration* is a fundamental departure from the soviet concept. With the nationalization of all private

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[96] See art. 8 of *the Declaration, supra* note 72 (this article corresponds to Art. 9 of *the ICCPR*)

[97] Habeas corpus is the right to appeal the lawfulness of detention before a court. Black's Law Dictionary 709 (6th ed. 1990).

[98] See art. 11 of *the Declaration, supra* note 72.

[99] See *above*, Art. 9

[100] See the *ICCPR, supra* note 80, arts. 9 and 17.

[101] The *ICCPR* does not explicitly require a judicial warrant or judicial remedy against interference with privacy, family, home, or correspondence. Rather it merely declares that the individual "has the right to the protection of the law against such interference." (Art. 17 (2)).

[102] *Konst. RSFSR* art. 52, *supra* note 77.

[103] *Ibid.* art. 53.

[104] *Ibid.* art. 54

[105] Holland, *supra* note 75.

[106] See Art. 12 of *the Declaration, supra* note 72; (this article corresponds to Art. 12 of *the ICCPR*)

[107] See Art. 17 of *the Declaration, supra* note 72; (this article corresponds to Art. 25 of *the ICCPR*)

[108] See Art. 22 and Art. 29 for Intellectual Property of the Declaration, *supra* note 72.

property in 1917, the Soviet Union continued to support the policy of antagonistic objection of any kind of property save for socialistic property[109]. By contrast, the Declaration grants individuals, alone or with others, the right to own, use, and distribute property according to law. The same article also guarantees the right to entrepreneurial activity not prohibited by law.

- *right to privacy*[110], *The Declaration* provisions on privacy are a response to human rights violations during the soviet era.

- *equality rights*[111], These rights basically state that no one should be discriminated because of race, sex, language, religion, national or social origin, property, convictions or other circumstances.

- *legal rights*[112]; These rights include the statement that every individual can protect his(her) rights in court, get qualified legal help (in certain cases for free) and more significantly, *the Declaration* explicitly grants the right to the presumption of innocence. According to the document and Russian Criminal Law, presumption of innocence includes three elements: a) an accused must be considered innocent until guilt has been proven according to law, and until the sentence, rendered by a competent, independent, and impartial court, has been entered into force b) all unresolved doubts about the accused's guilt must be held in that person's favor c) no one may be tried or punished twice for the same crime. Moreover, *the Declaration* grants the right of appeal to a higher court and asserts that evidence illegally obtained must be excluded[113]. *The Declaration* also guarantees the right against self-incrimination, incrimination of one's spouse, and

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[109] For example, Under *the RSFSR Constitution* (Art. 13), individual property rights were sharply limited in the interests of building a socialist state. Socialist ownership of means of production was mandated, and personal ownership was limited to "labor income," a home, and articles of personal consumption. Personal property could not serve to derive non-labor income or be used to the detriment of the interests of society.

[110] See Art. 9 of *the Declaration, supra* note 72; (this article corresponds to Art. 17 of the *ICCPR*).

[111] See Art. 3 of *the Declaration, supra* note 72; (this article corresponds to Art. 14 of the *ICCPR*).

[112] See Art. 32-38 of *the Declaration, supra* note 72.

[113] Under Soviet law there is no prohibition against the use of illegally obtained evidence. Law enforcement officials in theory and practice have carte blanche, utilizing evidence seized without a warrant. However, even eleven years after the adoption of the Declaration, Russian law-enforcement agencies in many cases don't bother themselves by obtaining a court order for operative detective activities...

incrimination of close relatives[114]. [115]

- *language rights*[116] *and rights with respect to nationality specifications*[117], Although *the ICCPR* does not have such provision, the emergence of the latter in *the Declaration* was made in response to the obligatory requirement to indicate the nationality in the internal soviet passport. Soviet people were also prohibited to use and receive education in many languages. With respect to citizenship, *the Declaration* reassures an analogous international standard[118] that serves against mass abuses occurred during the communist era. *The Declaration* grants individuals the right to acquire and terminate Russian citizenship and states that a citizen of Russia may not be denied citizenship, or sent into exile outside the country[119]. The soviet practice of denying dissidents their citizenship and sending them abroad is therefore unacceptable under *the Declaration.*

- *freedom of expression*[120], *freedom of religion*[121], *freedom of association*[122], *freedom of peaceful assembly*[123]. The meaning of the above-stated rights is totally different in comparison to their entrenchment during the dominance of communism. Soviet constitutions made these rights only subject to compliance with the interests of the people and for the purpose of the strengthening and development of the socialist order[124]. In fear of reverse communist insurgence, the drafters of *the Declaration* included the provision prohibiting advocacy of violent change of the constitutional order and

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[114] See Art. 36 of *the Declaration supra* note 72.

[115] These rights are often recognized as international standards. For example, art. 14(g) of the *ICCPR* states: everyone shall be entitled "not to be compelled to testify against himself or to confess guilt. However these rights have never been formally recognized under Soviet law. Famous Pavlik Morozov's case, 1932 certifies that in Soviet practice, defendants, spouses, and close relatives were often called upon to testify against their interests.

[116] See art. 16 of *the Declaration supra* note 72.

[117] *Ibid.* Article 16 states that no one may be forced to specify or give information about one's national origin, thereby granting citizens the right to freely determine their nationality.

[118] *ICCPR, supra* note 80, art. 12.

[119] See art. 5 of the Declaration, *supra* note 72.

[120] See art. 13 of *the Declaration, supra* note 72 (this article corresponds to Art. 19 of the *ICCPR*).

[121] See art. 14 of *the Declaration, supra* note 72 (this article corresponds to Art. 18 of the *ICCPR*).

[122] See art. 20 of *the Declaration, supra* note 72 (this article corresponds to Art. 22 of the *ICCPR*).

[123] See art. 19 of *the Declaration, supra* note 72 (this article corresponds to Art. 21 of the *ICCPR*).

[124] Even the *Constitution RSFSR* had this provision. See the *Konst. RSFSR*, art. 48, *supra* note 77.

incitement of class hatred.

In some cases, *the Declaration* goes beyond the requirements of international standards. For example, Art. 15 states that any citizen whose convictions prevent him from carrying out military service has the right to alternative civilian service. In contrast, soviet Constitutions did not have such a provision. Because military service was considered as the "honourable duty of each soviet citizen"[125] thousands of people who could not take up arms due to religious or moral convictions were criminally prosecuted and convicted of insubordination each year[126].

In addition to civil and political rights, *the Declaration* includes a list of socio-economic rights: right to labour[127], right to recreation, vacation[128], right to medical care[129], right to pension[130], right to education[131], right to social security[132], right to housing[133], freedom of creativity and culture[134].

Taking into consideration all the above, it can be concluded that the concepts described in this Declaration reject many dimensions of the soviet conception of individual rights and embrace most internationally recognized human rights standards. As a normative document, the *Declaration of Rights and Freedoms of the Individual and Citizen of 1991* can be viewed as very progressive and innovative step towards democracy and civil society. However that does not mean that the rights stated in the Declaration have very effective enforceability.

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[125] See art. 63, the *Constitution of USSR, 1977.*

[126] However, with the adoption of *the Declaration*, nothing changed in practice. Today thousands of young men are forcefully pushed to serve in the army despite this provision.

[127] See art. 23 of *the Declaration, supra* note 72.

[128] See art. 24, *Ibid.*

[129] See art. 25, *Ibid.*

[130] See art. 26, *Ibid.*

[131] See art. 27, *Ibid.*

[132] See art. 28, *Ibid.*

[133] See art. 10, *Ibid.*

[134] See art. 29, *Ibid.*

B. The Constitution of the Russian Federation, 1993

The new Russian *Constitution*[135] is considered as a second major step to Democracy after the adoption of *the Declaration of Rights and Freedoms of the Individual and Citizen, 1991*. The Constitution was adopted by referendum on December 12, 1993. The collapse of the Soviet Union made it clear that an independent country of Russia needed a new constitutional text. *The Constitution* consists of two divisions that include nine chapters and 137 articles. Human Rights of the citizen and individual are entrenched in Chapter 2, articles 17 – 64 of *the Constitution*. Mostly these rights are identical to the rights that are indicated in the *Declaration of Rights and Freedoms of the Individual and Citizen, 1991*[136]. However, the value of this constitution is very difficult to overestimate since *the Declaration* does not have the force of law and conveys only recommendatory character. Instead, *the Constitution of the Russian Federation* has the power of the highest law in the country and replaces the old soviet *Constitution, 1978*.

The new Russian *Constitution* protects the following civil and political rights and freedoms: equality rights[137], right to life[138], rights to human dignity[139], right to liberty and security[140], right for national identification[141], mobility rights[142], freedom of conscience and religion[143], freedom of thought and speech[144], freedom of association[145], freedom of peaceful assembly[146], freedom of creativity[147], political rights[148], rights to entrepreneur activity[149], right to private property[150], legal rights[151]. Along with civil and political rights, *the Constitution of 1993* includes certain socio-economic rights such as:

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[135] *KONSTITUTSIIA ROSSIIKOI FEDERATSII, CONSTITUTION (1993),* http://www.constitution.ru/

[136] See *the Declaration, supra* note 72.

[137] See art. 19, *the Constitution of the Russian Federation, 1993, supra* note 135.

[138] See art. 20, *Ibid.*

[139] See art. 21, *Ibid.*

[140] See art. 23, *Ibid.*

[141] See art. 26, *Ibid.*

[142] See art. 27, *Ibid.*

[143] See art. 28, *Ibid.*

[144] See art. 29, *Ibid.*

[145] See art. 30, *Ibid.*

[146] See art. 31, *Ibid.*

[147] See art. 44, *Ibid.*

[148] See art. 32, *Ibid.*

[149] See art. 34, *Ibid.*

[150] See art. 35, *Ibid.*

right to labor[152], right to childcare[153], right to pension[154], right to housing[155], right to medical care[156], right to clean environment[157], and right to education[158].

The distinctive feature of the new Russian *Constitution*, as well as old soviet constitutions is the inclusion of the section on citizens' duties. However, the list of obligations in the new *Constitution* is considerably shorter and milder than the obligation array in the communist-era constitutions. According to *the Constitution of 1993*, Russian citizens have the duties: to pay tax[159], to care about the environment[160] and to have the obligation to defend the homeland and to serve in the military[161].

The new Russian *Constitution* possesses both negative and positive features when compared with previous soviet Constitutions.

One of the most important features of the manuscript is the outright rejection that individual rights are subordinate to the dictates of the government[162]. This declaration signaled a significant advancement in the entrenchment of Human Rights in Russian normative documents. It categorically rejects the conventional socialist doctrine that human rights were granted to individuals by the state, thereby putting individuals at the mercy of their governments[163]. Instead, the new *Constitution* relies on the language of international human rights instruments by declaring, "Basic human rights and liberties are inalienable and belong to everybody from birth."[164] The new relationship between state and human rights is affirmed in article 2 which states, "Human beings and their rights are the supreme values. The recognition, observance and protection of rights and freedoms of

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[151] See art. 46-54, *the Constitution of the Russian Federation, 1993, supra* note 135.
[152] See art. 37, *Ibid.*
[153] See art. 38, *Ibid.*
[154] See art. 39, *Ibid..*
[155] See art. 40, *Ibid.*
[156] See art. 41, *Ibid.*
[157] See art. 42, *Ibid.*
[158] See art. 43, *Ibid.*
[159] See art. 57, *Ibid.*
[160] See art. 58, *Ibid.*
[161] See art. 59, *the Constitution of the Russian Federation, 1993, supra* note 135. However, this duty is followed by a clause guaranteeing the right to an alternative civil service
[162] See Korkeakivi, *supra* note 9. The author points out that the new Russian Constitution does not omit any essential right in the civil or political rights domain recognized in Western democracies.
[163] See, i.e. Dean, N. Richard. "Beyond Helsinki: The Soviet View of Human Rights in International Law" 21 VA. J. INT'L L. 55, 57-60 (1980).
[164] T*he Constitution of the Russian Federation, 1993*, art. 17(2), *supra* note 135.

man and citizen are the obligation of the state."[165] In addition to asserting the supremacy of human rights at the theoretical level, the new *Constitution* elevates its rights provisions in practical terms by making them exceptionally difficult to amend[166]. Another positive feature of *the Constitution* is that the document confirms current the perspective tendency of giving spectacular place to international legal standards in the domestic legal application.

The manuscript contains a special clause with respect to the relationship between international law and the Russian legal system. Article 15(4) provides: The generally recognized principles and norms of international law and the international treaties of the Russian Federation shall constitute part of its legal system. If an international treaty of the Russian Federation establishes other rules than those stipulated by the law, the rules of the international treaty shall apply[167]. Moreover, the new language suggests that even treaties that have not been approved by parliament might be considered part of the Russian domestic legal system thereby overrule contrary provisions of internal legislation. Furthermore, *the Constitution* uses the phrase "part of its legal system" instead of "part of its law," which appeared in the commission's draft. This alteration seems to be in line with the first one: in Russian legal doctrine the notion of "legal system" is traditionally considered to be much broader than the notion of "law."[168] Thus, "legal system" encompasses not only proper law which is often identified with legislation, but also other legal categories, such as administrative acts and legal practice[169]. Moreover, some articles include more specific standards than corresponding international norms, such as a 48-hour maximum for detention without court decision[170]. The list of non-derogable rights is more inclusive than the one in the *ICCPR* and one can again see a "pendulum effect" in play. For instance, the state must not--without consent--gather, store, use, or disseminate information about a person's private life even in the time of

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[165] *Ibid.* art. 2.

[166] *The Constitution* states that a revision of human rights provisions requires: 1) a three-fifths vote in both houses of the legislature and 2) a two-thirds vote in a Constitutional Assembly or a majority vote in a referendum. *Above*, art. 135.

[167] See art. 15 (4), *the Constitution of the Russian Federation, 1993, supra* note 135.

[168] See Danilenko, *supra* note 35.

[169] See 1 S. S. ALEXEEV, OBSCHAIA TEORIIA PRAVA [General Theory of Law] 70-82 (2002).

[170] See art. 22 (2), *the Constitution of the Russian Federation, 1993.* But see the discussion on the Yeltsin's anti-crime decree.

emergency[171]. Another positive trend is the diminishing emphasis on aspects of economic and social rights in the new *Constitution*. Unlike the *1978 Constitution*, social and economic rights are enumerated after civil and political ones.

However, a negative prospect of *the Constitution* is that it was adopted without any alternative to the initial variant. It was eltsin's constitution and the Russian people at that time were ready to vote for almost any constitution presented to them. In view of its "one choice" adoption, *the Constitution* vests huge power in the executive, which is reminiscent of Russia's past. For example, Article 11 of *the Constitution* states that the state power is divided among the President of the Russian Federation, the Federal Assembly, the Government of the Russian Federation and the Judiciary. From the language of this article it is assumable that the President of the Russian Federation is the separate branch of power. Moreover, taking into consideration the power vested in the President to form the Government of the Russian Federation[172] and dissolve the Federal Assembly,[173] it became obvious that the President stands above the executive branch and the legislature. Historically, Russian leaders represented the executive branch. Therefore, the substance of Article 11 dramatically increases the power of the executive branch. This provision differs from the traditional mechanism for checks and balances in a western-styled democratic state[174]. Moreover, during the last ten years Russia adopted several laws that created an excessive amount of governmental agencies having power on restriction of political, economic and welfare rights of citizens and foreigners that were declared in *the Constitution*.

In addition, according to *the Constitution*, the President of the Russian Federation has the power to appoint all the judges in Russia except the Chief Judges of the Supreme Court, Constitutional Court and Arbitration Court[175] respectively. The above stated judges are appointed by the Federal Assembly on the President's recommendation

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[171] See art. 24, *the Constitution of the Russian Federation, 1993, supra* note 135. See also Korkeakivi, *supra* note 9.

[172] See art. 83, *the Constitution of the Russian Federation, 1993, supra* note 135.

[173] See art. 111, 117, *Ibid.*

[174] Some scholars argue in favor of giving additional power to the President, because in their view, only the President can unite and stabilize Russia.

[175] See art. 128, *Ibid.* See also *О судебной системе Российской Федерации* см. *Федеральный конституционный закон от 31 декабря 1996 г. N 1-ФКЗ* See also *Федеральный конституционный закон от 21 июля 1994 г. N 1-ФКЗ "О Конституционном*

that is close to direct appointment[176]. The financing of the judges is vested in the executive branch of power[177]. Taking into consideration all the above and the legal practice in Russia, it can be concluded that the judicial branch is in fact not very strong and in some cases dependent on the executive[178]. The weakness of the judicial branch is aggravated by traditionally low influence of the judges during the soviet era and the composition of the judiciary itself[179]. Nowadays, Russian judges are mostly recruited from the law-enforcement agencies. The majority received legal education during the bloom of communism and made their name during the service for the executive branch of power where they held themselves as executive people sharing executive concerns. Furthermore, much of their professional time was spent catering to the needs of the executive branch. In short, there is little about the Russian judiciary to suggest that they possess the experience, the training or the disposition to comprehend the social impact of claims made to them after the fall of communism, let alone to resolve those claims in ways that promote, or even respect, the interest of the civil society. At a more fundamental level, the attitudes of the judges tend to reflect the values of the legal system in which they were schooled and to which they owe their livelihood. The subordinate position of the judiciary towards the other branches of government will allow a possible reversion to the historical totalitarian days of Russia if this power is used arbitrarily[180].

Another provision that raises many questions is a special regime at a time of emergency. This regime also gives additional powers to the executive to restrain certain Human Rights since the President is vested by power to impose the regime of emergency. Article 56 of *the Constitution* states that in case of emergency, certain rights and freedoms can be restricted. It is significant that, while the limitation clause warrants

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Суде Российской Федерации" See also *Об арбитражных судах в Российской Федерации см. Федеральный Конституционный закон от 28 апреля 1995 г. N 1-ФКЗ*

[176] The fact is that the executive branch has all the repressive mechanism in its hands (including militia, prokuratura, FSB etc.), which makes it easy to lobby whatever initiatives the executive intend to implement.

[177] See art. 124, *the Constitution of the Russian Federation, 1993, supra* note 135; See also *О финансировании судов Российской Федерации, Федеральный закон от 10 февраля 1999 г. N 30-ФЗ [Federal law on court financing],* http://law.rambler.ru/library/

[178] See *Закон РФ от 26 июня 1992 г. N 3132-1 "О статусе судей в Российской Федерации", [Law on the status of judges in Russian Federation],* http://law.rambler.ru/library/

[179] For example, during the Soviet era, judges were subordinate to communist party

[180] See also Petter A, " Immaculate deception: The Charter's Hidden Agenda" (1987), 45 The Advocate 857, at 857-63.

limitations on all rights, the provision on emergency powers does not allow restrictions on certain rights during a state of emergency. For instance, the state must not violate the right to life and dignity even in the time of emergency.

An additional weakness of *the Constitution* is the inclusion of the limitation clause in the text of *the Constitution*. That kind of provision often leaves room for government abuse which was particularly evident in the Soviet Union, where notorious qualifications served as an excuse for numerous violations of fundamental rights[181]. The limitation clause in the Russian *Constitution* covers all the enumerated rights and freedoms without any exception. It provides that "Human and civil rights may be restricted by federal law only to the extent necessary to protect the foundations of the constitutional system, morals, health, rights and lawful interest of other persons, and to ensure the defense of the country and the security of the state."[182] Though it is obvious that no constitution or international human rights instrument in force provides for absolute human rights,[183] the limitation clause of the Russian *Constitution* is a real cause for worry since it does not distinguish among different rights, but instead, requires the same qualifications from limitations on all of the rights[184]. This approach differs from the technique put forth in the most relevant international human rights treaties which explicitly allow limitations only on certain rights[185]. By not tailoring limitation clauses separately for each right, the drafters granted considerable leeway to the lawmaking body, unless the judiciary is willing to take a restrictive view on the provision[186]. Another feature of the limitation clause is the provision that the highest law of the country, which

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[181] For example, art. 50 of the Constitution, 1977 provided: "In accordance with the interests of the people and with a view to strengthening the socialist system, citizens of the USSR shall be guaranteed freedom of: speech, press, assembly, meetings, street procession, and demonstration." *KONSTITUTSIIA USSR (1977)*, translated in W.E. Butler, BASIC DOCUMENTS ON THE SOVIET LEGAL SYSTEM 3 (1983).

[182] See art. 55 (3), *the Constitution of the Russian Federation, 1993, supra* note 135.

[183] See, i.e. Nowak, Manfred. *Limitations on Human Rights in Democratic Society, in AUSTRIAN-SOVIET ROUND-TABLE ON THE PROTECTION OF HUMAN RIGHTS 169* (Franz Matscher & Wolfram Karl eds., 1990).

[184] See also Korkeakivi, *supra* note 9.

[185] See *the International Covenant on Civil and Political Rights*, adopted December 16, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976) [[[hereinafter the 1977 Constitution] and *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter *The European Convention on Human Rights*].

[186] For an article emphasizing the central role of courts in interpreting the limitation provision, see V. Zhuikov, "Novaia Konstitutsiia i sudebnaia vlast v Rossiiskoi Federatsii", 1

was adopted by the qualified majority of the population, can be overruled by the simple act of the legislature[187]. Moreover, the language of the limitation clause make it possible if "necessary" to violate such fundamental right as right to life[188] or, for example, restrict the scope of the article prohibiting torture[189]. Russian legal practice shows that inherent Human Rights can be violated by the Russian officials even without special indication in the federal law, which undermines the value of *the Constitution*. For example, in June 1994, President Yeltsin released *an anti-crime decree* that included blatant Human Rights violations and was in contradiction with *the Constitution*[190].

On the other hand, *the Canadian Constitution* has a similar limitation clause provision[191]. However, it shall be considered that Canada and Russia have totally different Human Rights background. From the moment of the formation of the Dominion, Canada is famous for its mechanism of Human Rights protection, where as Russia, in contrast, does not have a long history of effective protection for Human Rights.

However, article 55(3) of *the Constitution* is not the only provision authorizing limitations. With respect to certain rights, *the Constitution* does not seem to provide any checks on the legislature as to what type of limitations it is permitted to enact. For example, the obligation on state bodies and officials to ensure that everyone has an opportunity to become familiar with materials directly affecting his or her rights and liberties is to be implemented only "unless otherwise stipulated by law."[192]

The Constitution not only grants the legislature authority to pass laws limiting rights, but imposes some limits of its own. For instance, the article on the freedom of expression provides: "Propaganda or agitation that incites social, racial, national or religious hatred and enmity is not permitted. The propaganda of social, racial, national,

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ROSSIISKAIA IUSTITSIIA 2 (1994).

[187] Because of the high level of corruption and unfair election process, parliamentarians don't represent Russian society at large.

[188] See art. 20, *the Constitution of the Russian Federation, 1993, supra* note 135.

[189] See art. 43 (2), *Ibid.*

[190] The decree provides, for instance, that the police can hold certain suspects for 30 days without court order. For the text of the decree entitled "On Urgent Measures Aimed at Protecting Population from Banditry and other Manifestations of Organized Crime," see Prezident idet na chrezvychainye mery v bor'be protiv razgula prestuplnosti, IZVESTIIA, June 15, 1994, at 1.

[191] See art. 1 and 33 of *the Canadian Charter of Rights and Freedoms, 1982*, http://www.solon.org/Constitutions/Canada/English/

[192] See art. 24 (2), *the Constitution of the Russian Federation*, 1993, *supra* note 135; See also Korkeakivi, *supra* note 9.

religious or linguistic superiority is prohibited."[193] While the first part of the provision imposes a restriction that is clearly in line with international human rights standards--and is at least partly required by Russia's treaty obligations[194] --the latter component of this article is remarkably sweeping and, depending on how it is interpreted in the future, may conflict with the basic principles of free expression. Namely, it does not link propaganda with any potential effect, and therefore, it grants authorities broad powers to suppress speech[195]. Hypothetically, the singer singing a song including the collocation that "the singers are the core stone and the supreme class of the Russian society" could be charged and silenced because he or she propagates for "social superiority," in violation of *the Constitution.* There can be other examples, which, depending on the interpretation, can violate the freedom of expression.

Another important feature of the new *Constitution* is that this document limits the application of certain rights by considering only Russian citizens as their subjects. *The Constitution* includes a general provision indicating that foreign citizens enjoy same rights as Russians, but this provision does not furnish solid protection because it permits unlimited exceptions "established by federal law."[196] Though certain constitutional rights are traditionally vested only to the citizens, and although the new *Constitution* does not exclude foreigners from its guarantees nearly as extensively as its ancestor[197], the new manuscript still excludes foreigners from certain rights and freedoms. The right to peaceful assembly, for example, is granted only to "citizens,"[198] while the similar clauses

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[193] See art. 29 (2), *the Constitution of the Russian Federation, 1993, supra* note 135.

[194] See the *ICCPR*, *supra* note 80, art. 20(1).

[195] Note, however, that article 4 of *the International Convention on the Elimination of All Forms of Racial Discrimination*, to which Russia is a party, requires states to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred." *International Convention on the Elimination of All Forms of Racial Discrimination,* opened for signature March 7, 1966, 660 U.N.T.S. 195 (entered into force, Jan. 4, 1969). For more on the relations between this article and the freedom of expression, see Karl Josef Partsch, Racial Speech and Human Rights: Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination, in STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION (Sandra Coliver ed., 1992).

[196] See art. 62, *the Constitution of the Russian Federation, 1993, supra* note 135.

[197] On the approach adopted in the Russian Constitution, 1978. See Ger P. van den Berg, 'Human Rights in the Legislation and the Draft Constitution of the Russian Constitution" 18 REV. CENT. & E. EUR. L. 197, 210-11 (1992).

[198] Article 31 of *the Constitution provides*: "Citizens of the Russian Federation shall have the right to gather peacefully, without weapons, and to hold meetings, rallies, demonstrations, marches and pickets."

in international human rights instruments do not include this type of limitation[199]. Probably the most annoying clause from the foreigner's point of view is article 125, which indicates that the Constitutional Court shall review the constitutionality of laws "proceeding from complaints about violation of constitutional rights and freedoms of citizens."[200]

Another troublesome provision of *the Constitution* is article 32, which excludes, *inter alia*, those placed in confinement under court verdict from the right to vote in public office elections. This restriction is possibly in violation of the international human rights norms Russia has signed[201], which makes it particularly difficult to perceive why the drafters decided to award this limitation extreme strength by raising it to the constitutional level[202].

The next feature of the Russian *Constitution* that can seriously undermine the mechanism for Human Rights enforcement is the inclusion of many socio-economic rights in the text of the Constitution. Although the array of socio-economic rights in the new Russian Constitution is milder and shorter than in its communist predecessors and though civil and political rights preceded positive rights in the text, it can be said that inclusion of the positive rights in the text of *the Constitution* undermines basic civil and political rights. Taking into consideration Russian past authoritarian history, it is important to view *the Constitution* as precommitment strategy, in which Russian people can use the founding document to protect the most common problems in their usual political processes. *The Russian Constitution* should therefore work against a nation's most threatening tendencies. For centuries the most threatening tendency in Russian society was constant and continuous violation of civil and political rights – rights such as

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[199] Article 21 of the *ICCPR* states that "the right to peaceful assembly shall be ecognized". ICCPR, supra note 80, art. 21. *The European Convention on Human Rights* provides in its art. 11(1) that "[e]veryone has the right to freedom of peaceful assembly."

[200] See Art. 125, *the Constitution of the Russian Federation, 1993, supra* note 135.

[201] Article 25(b) of the *ICCPR* guarantees the right to vote. While certain restrictions on this right are considered acceptable, "convicts generally, irrespective of the duration of the penalty," should not be denied the right to vote. ICCPR, supra note 80, art. 25(b). See Karl Josef Partsch, Freedom of Conscience and Expression, and Political Freedoms, in *THE INTERNATIONAL BILL OF RIGHTS; THE COVENANT ON CIVIL AND POLITICAL RIGHTS 243* (Louis Henkin ed., 1981).

[202] The number of people affected by this provision is quite high. The Ministry of Justice reported about 1,740,000 inmates in the Russian prison system in 2002. See also Korkeakivi, *supra* note 9.

free speech, life, liberty etc. Thus, these rights should be vigorously protected from any undermining. Second, there is a big difference between what a proper society should provide and what a decent constitution should guarantee. It is obvious that a proper society should provide its members with socio-economic rights. One would not imagine a good society without giving its members medical care and the right to education. However, the task of the Constitution is different. A Constitution is a legal document with definite undertakings. Russian people should rely on the provisions of the Constitution and be able to protect their rights using the text of the Constitution. Accordingly, the question arises: How could the Russian citizen protect his right to clean environment[203] or housing[204]? It is obvious that the mechanism for protection of these rights, especially in Russia, is weak. Therefore, if the Constitution tries to specify everything that is required for the functioning of a proper society, it threatens to become a mere peace of paper. It is a well known fact that a constitution that purports to guarantee what a proper society must give, in the reality, guarantees nothing at all. The inclusion of positive rights into ordinary legislation will make more sense then leaving them in the Constitution. Consequently, *the Constitution of the Russian Federation* should focus its protection on civil and political rights and market economy. Third, Russian legal practice shows that courts are unwilling to enforce social and economic rights. Taking into consideration the fact that the judicial system is not very strong, it is unlikely that a Russian judge will interfere with any governmental program. That situation can create a precedent: "If it is impossible to enforce the rights to clean environment, the same can happen with the right to free speech and liberty." The existing facts of Human Rights violation speak in favor of the above stated[205].

While it is evident that Russian Courts are unwilling to enforce some provisions of the Constitution, Russian citizens and foreigners in most cases are also unable to rely on the constitutional provision, allowing them to apply international norms on Human Rights protection. Russia has an underdeveloped appeal mechanism to interstate, international organizations that is aggravated by the artificial barriers created by Russian

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[203] See Art. 42, *the Constitution of the Russian Federation, 1993, supra* note 135.

[204] See Art. 40, *Ibid.* According to recent statistics, the number of homeless citizens in Russia is over 4 million.

[205] Sunstein, C. "Against positive rights" East European Constitutional Review. Vol.. 2. No.1; 1993, 35-38

bureaucracy.

All the above stated found its confirmation during the sociological research that was held at Saint-Petersburg in May 2003. Two different pools of respondents participated in this research. The first group (300 people) was assorted with an intention to create a representative aggregate of the Russian society at large. The second group (150 people) was assorted with an intention to create a representative aggregate of the Russian legal community. During the questionnaire, both pools were asked to present their view on the causes of Human Rights violation in Russia. In the charts below you can find summarized and compiled attitude of the Russian society, where the columns reflect the percentage of affirmative answers on questions where:

A means: Some provisions of *the Russian Constitution* in fact do not have direct enforcement;

B: The principle of power separation is not fully exercised (judicial branch is infirm);

C: Russian Federation has an excessive amount of government agencies, having the power to restrict the political, economic and welfare rights of citizens and foreigners which are declared in *the Constitution*;

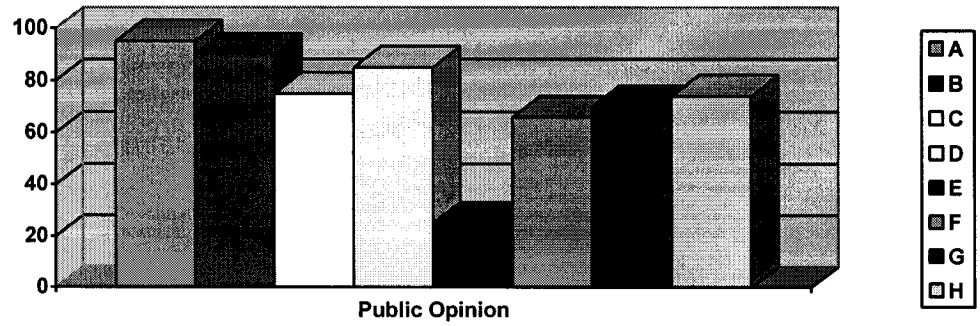
D: The major part of Russian population does not believe in the realization of declared in Constitutional rights and freedoms and does not attempt to enforce them because according to former communist ideology, the observance of the civil and political rights are not considered important inasmuch the state has the sole power to own property and to place individualism in a negative light;

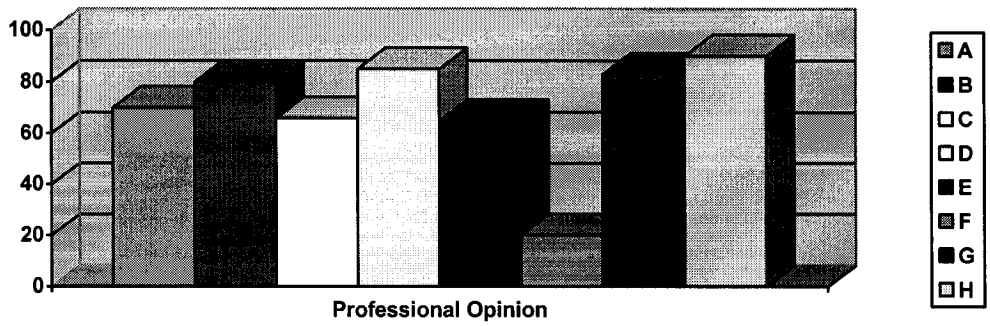
E: The dazzling array of social and economic rights declared in *the Russian Constitution* undermines the basic political and civil rights;

F: Most Russian lawyers do not have sufficient theoretical and practical experience according to new economic and social conditions. They received professional education and practiced in different legal provisions;

G: Russia has an underdeveloped appeal mechanism to interstate, international organizations that is aggravated by the artificial barriers created by Russian bureaucracy.

H: In order to strengthen the process of Human Rights protection, Russia should learn the lessons from the countries that have very extensive and effective legal tradition for Human Rights protection such as: Canada, Europe, and USA.





The qualified majority of the public and the professionals agreed with the above stated hypothesis "that civil and political rights of Russian citizens and foreigners are not fully protected regardless of their entrenchment in *the Russian Constitution (1993)* because Russia does not have very effective mechanism of protection for declared rights that is influenced by the enlisted factors"; with the exception that Russian lawyers do not want to admit their incompetence and the need for further professional development according to democratic standards. However, the qualified majority of the general public believes that Russian lawyers and judges are incompetent in the protecting for Human Rights of the ordinary citizens. On the other hand, the qualified majority of the general population believes in the importance of the entrenchment of the positive rights in *the Russian Constitution*. That is explained by the rigid communist mentality of the certain part of the population and the strong collectivism tendencies in the society. In contrary, legal professionals agree with the importance for the inclusion of the positive rights in ordinary legislation instead of constitution. Both public and professionals understand the

necessity of the exploring of legal traditions of the countries with longstanding democratic history.

All the above stated proves the hypothesis that civil and political rights of Russian citizens and foreigners[206] are not fully protected regardless of their entrenchment in *the Russian Constitution (1993)* because Russia does not have very effective mechanism of protection for declared rights that is influenced by the enlisted factors.

However, despite the above stated drawbacks, Russia made first significant steps in that direction by adopting *the Declaration of Rights and Freedoms of the Individual and Citizen of 1991* and *the Constitution of 1993*. That constituted the "declaratory revolution on Human Rights in Russia". However, in order to give the declared rights real meaning, Russia should make the second "enforcement revolution/evolution" where Russian society will play a significant role in pushing governmental institutions towards rights enforcement. In order for the rule of law to have meaning under the new Russian *Constitution*, it is imperative that the substance of the *Constitution* is honored by all, including the executive.

With Russia's history of autocratic forms of government, it is very important to learn the lessons from the Canadian Constitutional model for Human Rights protection for the purposes of *understanding* the nature of that mechanism, *reform* of it in Russia and *unification* of the Russian legislative base according to the world democratic standards.

[206] It shall be noted that political rights are mostly applicable to Russian citizens

Chapter 2. Constitutional Law Mechanism for Human Rights Protection in Canada.

2.1. Human Rights Entrenchment in the Canadian Constitution

A. Pre-Charter Protection

i. Common Law Constitution

During the last century, particularly after the World War II, the world entered the era of constitutionalism. An unprecedented number of culturally and historically diverse nations put their faith in Constitutional law and in particular in the human rights protection mechanism. These nations embraced Constitutional law as a way to ensure that a measure of integrity and legitimacy would exist within the workings of their governments. Among those states Canada is emphasized by its mechanism of human rights protection and the special attention that is paid to human rights in *the Canadian Constitution*. However, a long legal tradition and practice preceded the entrenchment of the human rights and freedoms in *the Canadian Charter of Rights and Freedoms, 1982.* Prior to *the Charter*'s enactment, three stances on the protection of human rights formed part of the Canadian political landscape. First was the notion that the protection of individual rights is at the heart of the British and Canadian Constitutions and hence that the fundamental right is liberty. The second stance discusses the extent to which a federal system of government can operate to safeguard rights and freedoms. The third stance discusses the extent to which legislation can protect fundamental rights. By the nineteenth century, the individual rights of lawyers and the rule of law were considered to be common law rights and thus made *the Constitution* a common law one[207].

The Common law constitution, created in the UK, was a major influence on Canadian constitutional developments. According to common law, a person is free to do anything that is not positively prohibited. Hence, human rights do not derive from positive law or government action, but from the absence of these two elements[208].

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[207] Elliot, Robin, et al., *Canadian Constitutional Law*, 3rd edition, (Toronto: Emond Montgomery, 2003), p. 668.

[208] Hogg P.W., *Constitutional Law of Canada*, Loose leaf edition 2002 (Toronto: Carswell, 2002)

By the late eighteenth century individual rights were usually divided into two groups: political rights and civil rights. Political rights included rights associated with the participation in responsible government such as representation and voting. Civil rights included the right of individuals to liberty from restraint by government, namely those freedoms of the person related to speech, religion and property.

The Common law constitution was based on the idea of the rule of law. The main element of this principle is that government and the people are equally bound by law while the government should always obey the law[209]. In addition, rule of law normally requires respect for the principle of legality and underscores the need for a limited government. Hence, all decision makers must present not only a legal authority for their actions but must also prove that their actions can be justified by reference to established law that includes constitutional values[210].

According to the British constitutional tradition, **rule of law** included at least the three following concepts:

1. That no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the Land;
2. Every man, whatever be his rank or condition, is subject to ordinary law of the Realm and amenable to the jurisdiction of ordinary tribunals;
3. *The Cons*titution is pervaded by the rule of law on the grounds that the general principles of *the Constitution* are with us, the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts[211].

Traditionally common law values the individual more than the community. Liberty was used to shield the established order from regulation and redistribution so as to permit exploitation through use of private power. In addition, liberty was used and to

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[209] Dicey, A, *Introduction to the Study of the Law of the Constitution* (London:Macmillan, 1885), at 167

[210] Clyde, J.J. *Judicial review* (Edinburgh: W Green, 2000)

[211] See Entick vs. Carrington (1765) 19 St.Tr. 1029 and Glasgow Corporation vs. Central Land Board 1956 S.C. (H.L.)1

protect the prestige and power of the courts from being encroached upon by administrative agencies.

A vivid example of the implementation of the rule of law is the *Roncarelli* case[212]. In this case, the plaintiff was a Jehovah's Witness who owned a high-class restaurant at which he had been legally selling liquor for over 30 years. The owner's problems began on December 4, 1946 when had had his license peremptorily cancelled by the manager of the Quebec Liquor Commission because he had furnished bail for nearly 400 fellow sect members who had been charged with breaking municipal by-laws governing distribution of literature. The plaintiff had always managed his restaurant in conformity with the law and it had never been used for the purposes of his religion. The manager of the Liquor Commission got in touch with the defendant, who was Premier and Attorney-General of Quebec, and it was at the latter's direction or instigation that plaintiff's liquor licence was cancelled. Moreover, the defendant announced publicly that plaintiff would be barred "forever" from obtaining a licence. The evidence showed that this was done to punish the plaintiff for acting as bondsman for the Witnesses and to warn others about possible loss of provincial privileges[213].

When the case came to court, Justice Rand J invoked both the rule of law and common law rights. In interpreting the statute, the court stated that actions of public administration should be conducted with complete impartiality and that the grounds, for refusing or cancelling the permit should lie solely in the plaintiff's compatibility or incompatibility with the purposes of the statute. Justice Rand J stated that a decision to deny or cancel such a permit lies within the "discretion" of the Commission but that the decision should be based upon a weighing of considerations pertinent to the object of administration. Moreover, Justice Rand J stated that "discretion" necessarily implies good faith in discharging public duty. Therefore, denying or revoking a permit, because citizen exercises an unchallengeable right which is irrelevant to the sale of liquor in a restaurant is beyond the scope of discretion conferred to the Commission. The above statement was aggravated by a declaration of future circumstance-the permanent disqualification of the appellant from the Liquor Commission. The Court concluded that Duplessis' actions were in violation of the Rule of Law and common law rights and interpreted the Liquor

[212] Roncarelli vs. Duplessis [1959] SCR 121; 16 DLR (2d) 689

License Act as not granting the authority to Duplessis to revoke the license in that particular situation[214].

In conclusion it can be said that the rule of law is the cornerstone upon which constitutional government is founded and the *sine qua non* of limited government.

ii. Implied Bill of Rights

Before the enactment of *the Canadian Charter of Rights and Freedoms*, *the Canadian Constitution* did not expressly limit the legislative powers of Parliament or of the provinces to interfere with fundamental rights and freedoms. Historically, the legislative authority to interfere with fundamental rights and freedoms was distributed between two levels of governments: federal and provincial, with the critical issue being whether the law in question related to a subject matter that was designated to the level of government that enacted it[215].

Canadian constitutional development differs from that of both the United States and Britain. After the federation of newly independent American colonies emerged in 1787, the American government entrenched various guarantees of human rights in their Constitution[216]. These "amendments" were named "Bill of Rights", which could not be altered except by further constitutional amendment. The situation is different in Canada. When the loyal British North American colonies federated in 1867, they did not include a bill of rights in their *Constitution.* As stated in the preamble to *the Constitution Act, 1867*, the Canadian federation was to have "a Constitution similar in principle to that of the United Kingdom". Therefore, the Canadian Parliament and Legislatures, guaranteed that they stayed within the limits of the federal distribution of powers and a few other restraints that are similar to constitutional development in the UK[217].

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[213] Canadian Abridgement.

[214] Roncarelli vs. Duplessis [1959] SCR 121; 16 DLR (2d) 689.

[215] Elliot, *supra* note 206.

[216] The first ten amendments to US Constitution, the original "bill of rights", were passed by Congress in 1789 and ratified by 75% of the states in 1791. Other Bill of Rights amendments, of which the fourteenth (1868) is the most important, were adopted later.

[217] Hogg P.W., *Constitutional Law of Canada*, Student edition 2002 (Toronto: Carswell, 2002) p. 775.

Civil liberties in Canada gradually received more direct statutory protection. In 1960, the Parliament adopted *the Canadian Bill of Rights*. The *Canadian Bill of Rights* differs greatly from its US analog. The main difference is that *the Canadian Bill of Rights* was simply a statute of Parliament, and was not entrenched, while the *Constitution* was. Because of this it only governs matters within the federal government's power. Consequently, it can be amended like any other statute. For aforementioned and for other reasons, *the Canadian Bill of Rights* made little change in Canada's mechanism for human rights protection.

Despite the absence of the entrenched Bill of Rights, the judgments of the Canadian judiciary decided the doctrine of the "implied bill of rights", which suggested that *the Constitution* itself, most probably as a result of the preamble to *the BNA Act*, implies that there is an area of liberty which the state must not unjustifiably violate regardless of whether the legislation in question is federal or provincial.

The most vivid and elegant judgments concerning the implied bill of rights doctrine resulted from four cases: *Alberta press case*[218], *Saumur vs. City of Quebec*[219], *Switzman vs. Elbling*[220], *AG Canada vs. Dupond*[221].

For example in *Alberta Press* judgement the judge made a link to the preamble of *the British North America Act*, emphasizing, that *the Canadian Constitution* is similar in principle to that of the United Kingdom and as a result that democracy cannot be ensured without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State within the limits set by the criminal code and the common law. In another judgment, Chief Justice Duff C.J. conceded finding in *the Constitution Act, 1867* an "implied bill of rights". Duff C.J.'s opinion could be read as intimating that *the Constitution Act, 1867* implied precluding both Legislatures and the Parliament from restricting political speech[222].

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[218] Reference re Alberta Statutes [1938] SCR 100; 2 DLR 81

[219] Saumur vs. City of Quebec [1953] 2SCR 299; [1953] 4DLR 641

[220] Switzman vs. Elbling [1957] SCR 825; 7 DLR (2d) 337

[221] AG Canada vs. Dupond [1978] 2 SCR 770; 84 DLR (3d) 420

[222] Re Alberta Statutes [1938] S.C.R. 100, 133-134. This passage was quoted with approval in Saumur vs. City of Quebec [1953] 2 S.C.R. 299 by J. Rand at 331, J. Kellock at 353 – 354 and J. Locke at 373-374; and J. Kellock at 354 and J. Locke At 363 each suggested the possibility of an implied Bill of Rights.

In the *Saumur* case, Justices J. Rand, J. Kellock, and J. Locke, all suggested the possibility of an implied Bill of Rights. For example, J. Rand mentioned that civil rights arise from positive law, but that freedom of speech, freedom of religion and the inviolability of the person are original liberties that are the necessary attributes and modes of self-expression of human beings as well as the primary conditions of their community life within a legal order.

In *Switzman v Elbling (1957)*, Justice J. Rand left open the possibility that Parliament as well as the Legislatures might be incompetent when faced with the task of limiting political speech. Abbott went further, saying explicitly that "Parliament itself could not abrogate this right of discussion and debate".

In the *Dupond* case (1978) J. Beetz concluded that not one of the fundamental freedoms that were inherited from the United Kingdom "is so enshrined in the Constitution as to be beyond the reach of competent legislation".

After having reviewed the aforementioned cases, it can be concluded that despite the absence of a formal entrenchment of the Bill of Rights in *the Canadian Constitution*, Canada has a good record of Human Rights protection. The latter is a result of implementation by Canadian judges of the doctrine of "implied Bill of Rights". This doctrine suggests that *the Constitution* itself, most probably as a result of the preamble to *the BNA Act*, implies that there is an area of liberty, which the state must not unjustifiably violate, regardless of whether the legislation in question is federal or provincial.

B. Charter protection

The Canadian constitutional landscape dramatically changed in 1982. The amendments that were made to the Canadian written *Constitution* in 1982 form the first major reconstruction since its inception in 1867. Chief among the changes was the adoption of *the Canadian Charter of Rights and Freedoms*, henceforth referred to as *the Charter.*

The adoption of *the Charter* was partly predetermined by the inadequacies *of the Canadian Bill of Rights*. Whereas the Bill had only the power of statute, *the Charter* is part of *the Canadian Constitution* and can only be changed by constitutional

amendment[223]. The enactment of the constitutional bill of rights constitutes a major extension in the reach of the rule of law. It means that all three branches of government – legislative, executive and judicial – must exercise their powers in accordance with the fundamental principles governing the concept of rule of law.

The Canadian Charter of Rights and Freedoms, like any other bill of rights[224] guarantees a list of human rights that are considered to be non-derogable and receive immunity or special protection from state action.

The Charter consists of 34 articles and guarantees:

- *freedom of expression, freedom of religion, freedom of association, freedom of peaceful assembly*[225].

- *democratic rights*[226].

These rights include the right to vote and the right to be a candidate for democratic office[227]. An interesting characteristic of the document is the inclusion of provisions regulating the terms and sittings of the legislative assemblies for both levels of government[228].

- *mobility rights*[229]

The entrenchment of mobility rights and language rights in *the Charter* served to advance national unity by granting individuals the right to live and work in the province of their choice "without discrimination based on previous province of residence"[230]

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[223] The "Constitution of Canada" is defined in s. 52(2) of *the Constitution Act, 1982*, and the definition includes "this Act" of which the Charter is Part I. By virtue of s. 52(3), the constitutional amending procedure must be employed to alter the Charter. By virtue of s. 38, the general (seven-fifty) procedure is the appropriate one. This procedure involves the concurrence of the federal Parliament and the Legislatures of two-thirds of the provinces having at least fifty percent of the population of all the provinces. See also Iacobucci, F, *Judicial Review by the Supreme Court of Canada under the Canadian Charter of Rights and Freedoms: the first ten years*, Human Rights and Judicial Review (Dordrecht, 1994) 93-133

[224] The purposes and effects of a bill of rights are the subject of a vast literature. Vivid Canadian contribution are Russell, "A Democratic Approach to Civil Liberties", 1969 19 U.Toronto L.J. 109; Smiley, "The Case against Canadian Charter of Human Rights" (1969) 2 Can. J. Pol. Sci. 277; Macdonald, "Postscript and Prelude – the Jurisprudence of the Charter" (1982) 4 Supreme Court L.R. 321; Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms" (1983) 61 Can. Bar. Rev. 30.

[225] See art. 2 of *the Charter.*

[226] See art. 2-5, *ibid.*

[227] See art. 3, *ibid.*

[228] See art. 4,5 *ibid.* For further discussion see Iacibucci, *supra* note 222.

[229] See art 6 of *the Charter.*

[230] The Hon. Jean Chretien, House of Common Debates, Oct. 6th, 1980 at 3286. Cited in Russel, *supra* note .

- legal rights[231]

The document lists basic legal rights including: the right not to be unreasonably searched or arbitraraly detained or imprisoned, the right to a fair trial, the right to counsel and the right to be presumed innocent until proven guilty.

- equality rights[232]

S. 15 of *the Charter* provides that everybody is equal before and under the law. First part of the article includes non-discrimination clause on the basis of race, national or ethnic origin, religion, sex, or mental or physical disability. The second part indicates that the first part does not preclude affirmative actions programs the purpose of which is to improve the condition of disadvantaged groups or individuals.

Equality rights are the subject of an ongoing discussion as to whether the state is obliged to interfere with the underogable list of rights that is entrenched in the Constitution, by applying the s. 15 of *the Canadian Charter of Rights and Freedoms*. On one hand, the government should ensure equal rights before the law. However, the danger of such a broad term such as equality is that governments can use it to interfere with other rights. The crucial issue in this discussion is the question: "who is to be equal to whom? With respect to what?" Scholars differ when it comes to deciding which groups to compare when discussing equal rights. Certain scholars compare people and groups while others compare treatment and consequences.

The choice of who to compare with whom heavily influences the final outcome of a case. For example, the outcome of a recent case discussion revolved in great part around whether gay and lesbian couples should be compared with married heterosexual couples, with common law heterosexual couples or with non-sexual relationships such as siblings living together. Another issue is whether the comparison should be conducted at the level of individuals or of groups. Section 15 of *the Charter* contains grounds for non-discrimination such as race, sex and disability. However, it has been suggested that race is an artificial construct. In that sense the non-inclusion of more objective components, such as age raises certain questions[233].

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[231] See art. 7-14 of *the Charter*.

[232] See art 15, *ibid.*

[233] Black, W and L. Smith, "The Equality Rights" in Gerald- A. Beaudoin and Erol Mendes, eds, The Canadian Charter of Rights and Freedoms, 3d. Ed (Scarborough, ON: Carswell, 1996), at 14-8 to 14-4

Martha Minow states that in selecting individuals or groups for comparison, we often oversimplify in that we select certain characteristics in when describing the individuals or groups being compared[234].

Another debating issue surrounding the discussion of equality rights is the discussion of the outcomes of government legal activity-what counts as equal treatment. The *Andrews* case shows us that the uniform application of a rule to people in different situations is not a useful test of the equality of treatment[235]. In many areas of life it is not clear what point there is in insisting that the same process be used for everybody, knowing that the consequences differ greatly from one person to another[236].

For the aforementioned and other reasons, Canadian courts are very cautious in interpreting equality rights and opening the door for broader human rights guarantees by virtue of s. 15 of *the Canadian Charter of Rights and Freedoms*.

- language rights[237]

The Charter entrenches English and French as the two official languages of Canada. In addition to custom language rights, S. 23, named "Minority Language Education Rights" guarantees children the right to be educated in the first language of their parents, whether it be English or French.

The above stated entrenchment of Human Rights is very similar to the constitutional guarantees of individual rights found in constitutional documents in other countries such as the American *Bill of Rights*, *the International Covenant on Civil and Political Rights*, and the *European Covenant for the Protection of Human Rights and Fundamental Freedoms*. However, *the Charter* has some unique features that are inherent only to Canadian constitutional development and predetermined by Canada's historic process, traditions and culture. Justice Frank Iacobucci indicates four distinctive features of *the Canadian Charter of Rights and Freedoms*:

1. The emphasis on the rights of minorities and groups.

Scholar suggests that many of the rights in *the Charter* are guaranteed to individuals as members of groups, rather than to groups themselves[238].

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[234] Minow, M. *Making all the Difference* (Ithaca, NY: Cornell University Press, 1990)
[235] Andrews v. Law Society of British Columbia, [1989] 1 SCR 143; 56 DLR (4th) 1.
[236] Black, *supra* note 232
[237] See art. 16-23 of the Charter.
[238] Reference re Alberta Public Service Employee Relations Act, [1987] 1 S.C.R. 313.

2. Absence of property right protection.

The constitutional document does not include the clause, guarding property rights. S. 7 reads as follows:

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

This section is very similar to the *Due Process* clause, found in the *American Bill of Rights*. However, the latter contains an explicit reference to the protection of property[239]. The Supreme Court stated that the intentional choice of wording *in the Canadian Charter of Rights and Freedoms* leads to the conclusion that property rights do not fall within the parameters of s. 7[240].

3. Provisions of the S.1 of the Canadian Charter.

S. 1 reads as follows:

> "*The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

The purpose of the s. 1 is to resolve the tension between conflicting rights. This section can be interpreted to mean that no one right is absolute and that all rights are subject to certain limitations[241].

4. Provisions of S. 33 of the Canadian Charter.

The provisions of s. 33 are known as "notwithstanding clause" in Canadian jurisprudence.

S. 33 reads as follows:

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[239] See the Vth and XIVth Amendments to the American *Bill of Rights*.

[240] Irwin Toy Ltd. v. Quebec (A.G.), [1989] 1 S.C.R. 927 at 1003.

[241] The Supreme Court in R v. Oakes provided a test to determine whether limits placed on rights are consistent with the values which must be protected to preserve a free and democratic society:

> "The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society".

See R v. Oakes [1986] 1 SCR 103; 26 DLR (4th) 200.

> "33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or section 7 to 15 of this Charter."

Consequently, by virtue of this clause Parliament or provincial legislature have the power to restrict the applicability of certain sections of *the Charter*[242].

Another important feature of the Canadian Charter of Rights and Freedoms is the absence of the entrenchment of socio-economic rights[243]. Canada is very cautious about the formal guarantees set forth in constitutional documents. That is predetermined by the fact that it is very difficult to enforce positive rights. As a result, the inclusion of unenforceable positive rights would undermine the basic and civil and political rights that the state is obliged to secure. Therefore, in order to save the Constitution as a supreme law the Canadian government has avoided to entrenching positive rights in its Constitution.

In conclusion, *the Canadian Charter of Rights and Freedoms* is a unique document with distinctive features, unique to the Canadian legal tradition. The adoption of *the Charter* added a new set of constitutional provisions that invalidated inconsistent laws. The document played a significant role not only as the mechanism for Human Rights protection but also as the mechanism for national unity binding French and English Canada into a single political entity. However, it must also be said that the rights that are entrenched in *the Canadian Charter of Rights and Freedoms are* not absolute and are subject to certain limitations.

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[242] Iacobucci, *supra* note 222.
[243] i.e. right to clean environment, right to a housing, education etc.

2.2. The role of the Judiciary in the process of Human Rights protection

A. General Overview

The judicial branch of the Canadian government plays a significant role in the process of Human Rights protection. Canadian judges actively participate in ensuring that constitutional rights and freedoms are protected. Beginning when Canada became a Dominion, judges played active roles in the process of enforcing constitutional rights and freedoms. That kind of activity was shaped by the doctrine of judicial review that refers to the power of the Canadian courts to determine, when necessary, whether action taken by a governmental body or legal actor – the Parliament of Canada, for example – is or is not in compliance with *the Canadian Constitution*, and if it is not, to declare it to be unconstitutional[244]. The concept of judicial review is based on the concept of the rule of law[245]. The purpose of judicial review is to ensure that legislation conforms to *the Constitution* of Canada.

The role of judges dramatically changed with the adoption of *the Canadian Charter of Rights and Freedoms*. This was predetermined by the fact that before 1982, judicial review in Canada dealt mostly with federal issues. The judiciary could strike a law only when it was enacted by a provincial government while the relevant subject matter of the law is under Federal jurisdiction or vice versa[246]. Since 1982 judicial review is also based on grounds of the Charter[247]. Judges can declare a law unconstitutional when it violates the *Charter of Rights and Freedoms*[248]. Thus, *the Charter* created a new group of constitutional provisions that allow judges to strike down inconsistent laws.

The main elements that grant this role to the judiciary can be found in s. 52 of the *Constitution Act, 1982* that states that "*the Constitution of Canada* is the supreme law of Canada" and in s. 24 of *the Charter* that guarantees the right of individuals to

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[244] The idea that government action has to comply with the requirements of the Constitution in order to become valid has become known as the principle of constitutionalism: see Reference re Secession of Quebec, [1998] 2 SCR 217

[245] See Roncarelli vs. Duplessis [1959] SCR 121; 16 DLR (2d) 689

[246] See division of power doctrine

[247] See Hogg P.W., *supra* note 216.

[248] See www.law.ualberta.ca/

challenge legislation which does not conform to *the Constitution* thereby giving Canadian courts the power to engage in 'judicial review' on the constitutionality of legislation.

The analysis of the history of the court judgements in Canada allows emphasis to be placed on certain aspects of its development. First, Canadian Courts have a history of finding legislation invalid. For example, in *Manitoba Language Reference*[249] the Supreme Court found that Manitoba's failure to meet the requirements for bilingual enactment and publication of its statutes constituted a violation of s. 23 of the constitution of the province, *the Manitoba Act, 1870.* As a result, most of the statutes enacted by the province between 1890 and 1985 were concluded to be invalid. Second, Canada is distinguished by the willingness of the Legislation to respect court decisions. Third, it is obvious that both Canadian society and Canadian government passed the *Marbury v. Madison* threshold, stating that the power of judicial review exists under the Constitution[250].

B. Arguments against the Judicial Review

However, the expansion of the 'judicial review' on *Charter* issues is often criticised as being illegitimate. Those who are opposed to *the Charter* and its accompanying judicial have three main arguments in favour of their position.

1. The first argument concerns the claim of the usurpation of the legislative power by the judiciary. Those who hold this view state that since judges are not democratically elected that the powers that are given to them within the doctrine of judicial review are too strong.

2. The second argument refers to process and insists that the best chance for a vigorous, responsive and respected democracy comes from elected representatives. This argument supports the proposition that for democracy to be successful, basic decisions affecting the people must be made by elected representatives.

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[249] Reference re Manitoba Language Rights, [1985] 1 SCR 721; 19 DLR (4th) 1.

[250] In the United States of America, at the early years of its existence, the real doubt occurred in the minds of some segments of the American society, as to whether the power of judicial review existed under the American Constitution. See Janda, Elliot, supra note 206.

3. The third argument relates to the nature of the judicial system. A. Petter highlights two elements of this argument: the cost of gaining access to the system and the composition of the judiciary itself. Peter argues that access to justice (litigation) is very expensive. He advocates the claim that no matter which meaning is chosen to interpret *the Charter*; only the rich and well organized can enjoy it. Regarding the composition of judiciary itself Petter states that judges are neither elected nor accountable and thus do not represent the community at large[251].

A few researchers support the idea that *the Charter* is vague and hence that any judicial interpretation is not objective[252]. However this argument easily works in reverse and is thus weak[253].

The criticism about the legitimacy of the judicial review, found in the above arguments is mentioned in the *Vriend* case[254].

C. Arguments for the Judicial Review

The opinion of Justice Iacobucci J. in the *Vriend* case is crucial for the purposes of determining the legitimacy of judicial review. He concluded that in performing their duties, courts are not usurping legislative powers, rather that they are upholding *the Constitution* and have been urged to perform that role by *the Constitution* itself. Iacobucci consequently refers to the article by Peter W. Hogg and Allison A. Bushell, which advocates that judicial review constitutes a dialogue between the judiciary and the legislature[255]. The article mentions that the courts don't have the last word in the "battle" with legislation. Accordingly, the possibility for a legislature to overcome a judicial

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[251] Petter A. "Immaculate Deception: The Charter's Hidden Agenda" (45 The Advocate 857, at 857-63, 1987)

[252] Hutchison A., *Waiting for Coraf: A critique of Law and Rights* (Toronto: University of Toronto Press, 1955), 57-58

[253] For example, precisely because the Constitution's language is ambiguous, it needs interpretation by an authoritative institution. For the reason that part of the purpose of the *Charter*, indeed of the entire Constitution, is to protect minority groups and individuals, it should not be enforced and interpreted by majoritarian institutions such as the legislature. Judges are not elected and are not accountable, and therefore they are best capable of interpreting the Constitution in a way that will protect minorities.

[254] Vriend v. Alberta [1998] 1 SCR 493; 156 DLR (4th) 385

[255] Hogg P.W. and A.A. Bushell, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" 1997, 35 Osgoode Hall Law Journal 75, at 79-91 and 104-5

decision by striking down the law because it breaches *the Charter* lies in the four features of *the Charter* itself: s.33, s. 1, qualified Charter rights and equality rights.

1. Section 33 relates to the power of legislative override. According to section 33, Parliament or a legislature need only insert an express notwithstanding clause into a statute to liberate any law from the provisions of sections 2 and sections 7-15 of *the Charter*. Once this declaration has been enacted, the law that it protects will not be affected by the overriding provision of *the Charter*. Override power extends to s. 2 (expression), ss. 7 to 14 (legal rights) and s. 15 (equality). It does not extend to ss. 3-5 (democratic rights), s. 6 (mobility), ss. 16 to 23 (language rights) or s. 28 (sexual equality)[256]. The power of legislation to override is regarded as the most apparent and clever way of overcoming a judicial decision that invalidates a statute for violation of *the Charter* rights. The notwithstanding clause demonstrates that the final word in Canadian constitutional structure is in fact left to the legislature and not to the courts.

2. Section 1 subjects the rights guaranteed by *the Charter* to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Generally, all guaranteed rights can be limited by a law that meets the standards judicially prescribed by section 1. The aforementioned standards, stated in the *Oakes* case include: (1) the law must pursue an important objective; (2) the law must be rationally connected with the objective; (3) the law must impair the objective no more than necessary to accomplish the objective; and (4) the law must not have a disproportionately severe effect on persons to whom it applies[257]. As a result of s. 1, judicial review of Charter grounds constitutes a two-stage process. The first stage refers to the determination as to whether challenged law derogates from a *Charter* right. If it does not, then the review is over and the law must be upheld. To the contrary, where the law is held to derogate a Charter right, then the review process goes to the second stage. The second step is to ascertain whether the law is justified under s. 1 as a "reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society."

3. Qualified Charter Rights. Part of the entrenched constitutional rights are conditioned by qualified terms. For example, section 7 guarantees the right to life, liberty, and security of the person, but only if deprivation violates "the principles of fundamental

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[256] See Hogg P.W., *supra* note 216.

justice". Section 8 guarantees the right to be secure against "unreasonable" search and seizure. Section 9 refers to the right not to be "arbitrarily" detained or imprisoned. Section 12 guarantees against "cruel and unusual" punishment. According to the existent case law the dominant view is that qualified rights are subject to s. 1. However, even if they are not subject to section 1, qualified rights allow for the possibility of corrective legislative action after a judicial decision has struck down a law due to a breach of one of these rights.

4. Equality Rights. Section 15 (1) of *the Charter* precludes enactment of laws, discriminating on the basis of nine enumerated grounds, including race, national or ethnic origin, colour, religion, sex, age, "mental or physical" disability, and laws that discriminate on analogous grounds. In sum, section 15(1) leaves room for dialogue between the court and the legislature[258].

Consequently, the Supreme Court recognised the necessity for judicial deference to legislature[259]. That position was reflected in the *Irwin Toy* case. The court in the *Irwin Toy* judgement decided that greater deference to legislative choice is appropriate in the following circumstances:

- where the government has sought to balance competing rights;
- to protect a socially vulnerable group;
- to balance the interests of various social groups competing for scarce resources;
- or to address conflicting social science evidence as to the cause of the problem

Irwin Toy made a distinction between those cases in which government seeks to mediate the interests of competing groups (where a more deferential application of s l. is appropriate) and those cases in which the government is the singular antagonist of the individual whose right has been infringed (where amore stringent application of s 1. is required)[260].

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[257] R v. Oakes [1986] 1 SCR 103; 26 DLR (4th) 200

[258] Hogg P.W. and A.A. Bushell, *supra* note 254.

[259] See Irwin Toy Ltd. V. Quebec (AG) [1989] 1 SCR 927; 58 DLR (4th) 577; Vriend v. Alberta [1998] 1 SCR 493; 156 (4th) 385

[260] E.g. the criminal justice context

In conclusion, despite those who criticize them, judicial decisions almost always leave space for a legislative response that they normally receive. In most cases the legislative objective will still be achieved though with some new safeguards to protect human rights. At the moment, when courts strike down the legislation that is inconsistent with *the Constitution*, they enforce this document, and not the judicial will. Judicial review can fill the gap in the weaknesses of democratic process and is not a "veto over the politics of the nation", but rather the beginning of a dialogue as to how best to reconcile the individualistic values of *the Charter* with the accomplishment of social and economic policies for the benefit of the community as a whole[261].

The stability of the mechanisms for Human Rights protection depends not only on a balance of power between legislatures and courts, but one that is imbued with a respect for the institutional integrity of the other. Legislatures and courts need each other, in order to make, administer and enforce fair and effective policy in the field of Human Rights protection. They should work in close cooperation, as partners, even in managing their rivalry.

[261] Elliot, *supra* note 206

2.3. Enforcement of Human Rights

A. Constitutional provisions, regulating the enforcement of Human Rights

Basic Human Rights and Freedoms are meaningless if there is no mechanism for their enforcement. The provisions of *the Canadian Constitution* have explicit clauses directed to Human Rights enforcement. S. 52 of the Constitution Act, 1982, also known as *supremacy clause* gives to the Canadian *Charter* overriding effect. S.52 reads as follows:

> *(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.*

The Canadian Charter of Rights and Freedoms is included into the term "*Constitution* of Canada" by virtue of s. 52(2)(a). Therefore, any law that is inconsistent with the Charter is "of no force or effect".

However, in addition to s.52 of *the Constitution Act, 1982*, the enforcement of Human Rights is ensured by virtue of explicit remedial provision, contained in s. 24 of *the Charter* itself. S. 24 (1) provides as follows:

> *1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.*

The prevailing view in Canadian constitutional literature is that declarations of legislative invalidity are normally granted consistent to s. 52, while s. 24 render for a wide array of individualized remedies, which include along with the exclusion of evidence clearly rendered by s. 24(2), declarations that individual or group rights have been violated, damages, injunctions (both prohibitory and mandatory). It shall be mentioned that while s. 52 relief is available only where laws are being challenged, s. 24 remedies are open in situations where *the Charter* violation is the result of the actions of

public officials, including the police, who are operating outside the legitimate - that is, constitutional – scope of their authority[262].

From the moment of establishing that *the Charter* right was violated and that violation cannot be justified by s. 1 or s. 33, the judicial focus moves to a determination of the appropriate remedy.

B. Remedies under s. 52 of the Constitution Act, 1982.

As a general practice, six kinds of possible remedies are authorized by the supremacy clause of s. 52(1). They are: nullification, temporary validity, severance, reading in, reading down, constitutional exemption[263].

1. *Nullification* assumes declaring invalid (striking down) the statute that is inconsistent with the Constitution;

2. *Temporary validity* also means declaring invalid (striking down) the statute that is inconsistent with the Constitution, but temporarily postponing the coming into force of the declaration of invalidity;

3. *Severance*, assumes the statement that only part of the act (statute), that is inconsistent with the Constitution should be declared invalid;

4. *Reading in* presupposes adding words to a statute, which is inconsistent with the Constitution in order to make the statute consistent with the Constitution, and, therefore, valid;
5. *Reading down*, that is when a statute that could be considered to be inconsistent with the Constitution is interpreted so that it is consistent with the Constitution; and
6. *Constitutional exemption*, creation of an exemption from a statute that is partly inconsistent with the Constitution in order to exclude from the statute the application that would be inconsistent with the Constitution[264].

The application of the above stated remedies is dependent on the results of the analysis that should be taken by the court when statute has been found to be

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[262] Elliot, *supra* note 206.
[263] Schachter v. Canada, [1992] 2 S.C.R. 679; D.L.R. (4th) 1, 27
[264] Hogg P, *supra* note 207.

unconstitutional. *Schauchter* establishes the framework for that analysis. First, the court must define the extent of the inconsistency in the legislation *the Charter* guarantees. This often depends on the portion of the *Oakes* test[265] that the legislation failed. This second part of the *Schauchter* framework requires that the court decide whether the inconsistency can be dealt with by severing it from the legislation, or reading in an extension to the offending provisions so that it comply with the stenosis of *the Charter*. Third, the court must determine whether the declaration of invalidity under s. 52 (1) must be temporarily suspended in order to give the legislature time to remedy the inconsistency between the statute and *the Constitution*[266].

C. Remedies Under S. 24 of the Canadian Charter of Rights and Freedoms

Section 24 (1) serves for the purpose of granting a remedy in order to enforce the rights entrenched in *the Charter*. This section applies only for a *Charter* violation. It is not a remedy for unconstitutional actions in general. In *Schachter*, the Court decided that where a law has been found to be unconstitutional, and s. 52 (1) is therefore engaged, s. 24 (1) would generally not apply. It will be available in cases where unconstitutional governmental action has been taken against an individual under a law that is itself constitutional[267].

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[265] The Supreme Court of Canada judgement in R v. Oakes, (*supra* note 256) constitutes the primary treatment of s. 1 of the Canadian Charter of Rights and Freedoms. As it was referred, constitutional right may be disregarded if it does not fall within "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

'Oakes test":

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the law must pursue an objective "of sufficient importance to warrant overriding a constitutionally protected right or freedom": R. v. Big M Drug Mart Ltd., [1985] 1 SCR 295 at 352, 18 DLR (4th) 321. Second, when a sufficiently significant objective is established, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. The above involves "a form of proportionality test", stated in R. v. Big M Drug Mart Ltd., *above.*

"Proportionality test" includes three components. First, the measures adopted must be carefully designed to achieve the objective in question (measures must be rationally connected to the objective). Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. Third, there must be proportionality between the effects of the measures that are responsible for limiting the Charter rights or freedom, and the objective that has been identified as of "sufficient importance". See Elliot, *supra* note 206.

[266] Iacobucci, *supra* note 222.

[267] *Ibid.*

Section 24 (1) remedies, in contrast to remedies under s 52 (1) may be granted only by a "court of competent jurisdiction". In this case, a superior court, that is a court of general jurisdiction, is always a court of competent jurisdiction[268]. A trial court, even if it is not a superior court, is considered to be a court of competent jurisdiction, and can consider the application for a remedy that relates to the conduct of a trial[269]. An administrative tribunal can serve as a court of competent jurisdiction if its constituent statute gives it power over a) the parties in the dispute, b) the subject matter of the dispute, and 3) *the Charter* remedy that is sought[270].

The range of remedies that are available under s. 24 (1) is very broad. The only limit, imposed is "such remedy as the court considers appropriate and just in the circumstances." The array of remedies includes "defensive" and "affirmative" remedies[271]. When the "defensive" remedy is applicable, the court normally nullifies or stops some law or act. It can be shaped by dismissing a charge , staying a proceeding, quashing a search warrant, a committal or a conviction, enjoining an act, or declaring a law to be invalid[272]. When the "affirmative" remedy is applicable, the court can order a province to provide state-funded counsel to an indigent litigant[273], order the return of goods improperly seized[274], order a mandatory injunction requiring positive action or the awarding of damages[275]. Because the range of remedies is open, the above examples can be supplemented on the court's discretion.

The remedies, available for the violations of human rights serve as a main component of the mechanism for human rights enforcement. Pilkington suggests that in order to make the mechanism for human rights enforcement more effective the court's

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[268] R. v. Rahey [1987] 1 S.C.R. 588; R. v. Smith [1989] 2 S.C.R. 1120.

[269] I.e. the exclusion of evidence that has been obtained in violation of the Charter or a stay proceedings that have gone on for an unreasonable time. See Hogg, *supra* note 207.

[270] Weber v. Ontario Hydro [1995] 2 S.C.R. 929.

[271] The distinction between defensive and affirmative remedies is made by Hill, "Constitutional Remedies" (1969) 69 Columb. L. Rev. 1109 and Dellinger, "Of Rights and Remedies: the Constitution as a Sword" (1972) 85 Harv. L. Rev. 1532.

[272] Hogg, *supra* note 207, at 37-28. The exclusion of evidence, obtained in violation of Charter also falls in this category. However, the exclusion falls into a special set of rules under s. 24 (2) of *the Charter*. See *ibid.*

[273] New Brunswik v. G.(J.) [1999] 3 S.C.R. 46

[274] E.g., Re Chapman (1984) 46 O.R. (2d)65 (C.A.); Lagiorgia v. Can. [1987] 3 F.C. 28 (C.A.)

discretion in granting a remedy should be governed by three elements: a) the redress of the wrong suffered by the applicant; b) the encouragement of future compliance with *the Constitution*; and c) the avoidance of unnecessary interference with the existence of governmental power[276]. Peter Hogg adds to this discussion, the ability to administer the remedy awarded[277].

In conclusion,

1. The Constitutional law mechanism for human rights protection in Canada is based on the idea of the rule of law. The core of the latter principle is that law bounds government and people equally, and that the government should always obey the law[278].

2. Despite the fact that the formal human rights code was entrenched in the Canadian *Constitution* in 1982; Canada has a very good record for Human Rights protection that is predetermined by the trust in judicial institutions and a long legal tradition of human rights culture.

3. The judicial branch of power in Canada plays very significant role in the process of human rights protection and is independent from the executive and legislative branches. Based on the idea of the rule of law, even before the enactment of *the Canadian Charter of Rights and Freedoms, 1982*, Canadian judges in some cases used the doctrine of an "implied bill of rights" that suggests that *the Constitution* itself, most probably as a result of the preamble to *the BNA Act*, implies that there is an area of liberty that the state must not unjustifiably violate, regardless of whether the legislation in question is federal or provincial.

4. The adoption of *the Canadian Charter of Rights and Freedoms* in 1982 added a new set of constitutional provisions that invalidated inconsistent laws. *The Charter* played a significant role not only as a mechanism for human rights protection but also as a mechanism for national unity binding French and English Canada into a single political entity. The major effect of *the Charter* has been the expansion of judicial review.

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[275] See Sharpe, "Injunctions and the Charter" (1984) 22 Osgoode Hall L.J. 473. As the author explains, in the US, despite the absence of any equivalent to s. 24, it has been held that the "civil rights injunction" is available to enforce the Bill of Rights. See Hogg, looseleaf at 37-28.1

[276] Pilkington, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984) 62 Can. Bar Rev. 517.

[277] Hogg, *supra* note 207.

[278] A.V. Dicey. *Introduction to the study of the Law of the Constitution* (London: Macmillan, 1885), at 167

5. Despite the large amount of criticism towards the expansion of the judicial review after *the Charter's* adoption, it must be mentioned that judicial review constitutes a dialogue between the judiciary and the legislature. It is usually possible to overcome a judicial decision by striking down a law for breach of *the Charter* by using one of the four features of the Charter: a) Section 33, b) Section 1, c) Qualified Charter Rights, d) Equality Rights.

6. The Constitutional law mechanism for human rights protection is supported by the provisions of *the Canadian Constitution* that have explicit clauses (s. 52, 24 of *the Constitution Act, 1982*), dealing with the enforcement of human rights. The direct enforcement of *the Canadian Constitution* allows for a wide variety of remedies for the individual or group whose rights have been violated.

A number of lessons can be learned from the aforementioned conclusion by Russia while building its own constitutional mechanism for human rights protection. First, the Constitutional law mechanism for human rights protection should be based on the idea of the rule of law-the idea that the government and the people should be equally bound by law while the government should always obey the law. Second, the mechanism for human rights protection should be supported by the human rights culture; it should be an inherent part of Russian society and should be coupled with the people's trust in judicial institutions. Russian society should play a significant role in pushing governmental institutions towards the enforcement of rights. Third, the judges should receive legal training that is in accordance with democratic standards and the most current methods of training. This will allow them to understand the notion of the "rule of law" and to subsequently use it to protect human rights. Russian judges should begin the precedents of proving the invalidity of unjust legislation and force the executive branch of power to obey the law. Accordingly, the judicial system should be independent from the executive and legislative branches of government. Fourth, the Constitution of the Russian Federation should become the supreme law *de facto*. The Canadian experience is of great value to Russia because it has a long democratic history and it does not have in its Constitution a clause that protects socio-economic rights that undermine the enforcement of basic civil and political rights. One section of *the Charter* that could use broader Human Rights guarantees is s. 15. This task proves to be extremely difficult.

While section 15 is being worked on, Canadian courts are very cautious in interpreting and applying the law. In contrast, Russia has a large group of unenforceable rights, entrenched in *the Constitution* that renders the document to be nothing more than a piece of paper. Finally, Russian courts should be more flexible in granting remedies and learn lessons from the variety of remedies and the history of their granting by Canadian courts.

Chapter 3. European Mechanism for Human Rights protection.

3.1. European Convention on Human Rights

A. General Overview.

The *European Convention on Human Rights*[279] (hereinafter the *Convention*) is a product of the period shortly after the Second World War, when the issue of international mechanism for the protection of Human Rights attracted a great deal of attention. After the Second World War the promotion of respect for Human Rights and fundamental freedoms became one of the aims of the United Nations. The adoption *of the Universal Declaration of Human Rights* predetermined the enactment of a similar document at the European level.

On November 4, 1950 *the Convention*, which according to its preamble was framed "to take the first steps for collective enforcement of certain rights stated in *the Universal Declaration*", was signed in Rome. The *Convention* was the creation of an international organization, the Council of Europe, and entered into force on September 3, 1953.

The document was adopted over the years in form of protocols. The amending protocols now have been incorporated into *Protocol 11*.

The Convention is a binding document on all the party states. The amending protocols, however, are considered to be separate treaties, therefore it is necessary for a state to ratify them separately in order to be bound by them.

Initially, the *Convention* created two independent bodies, the Commission and the Court. Both organs worked part-time in resolving Human Rights issues. Over the years, however, the amount of applications and complaints increased dramatically, therefore, amendments were made in order to expedite, simplify, and improve the effectiveness of the process. According to the amendments, incorporated into *Protocol 11*, the Commission and Court were abolished and were replaced with a single entity – the European Court on Human Rights (hereinafter the Court). Amendments established

[279] See http://www.hri.org/docs/ECHR50.html

the Court to be a full-time body with the exclusive jurisdiction. Under the new system, the right of individual application to the Court was made obligatory for both *the Convention* and *the protocols*, although states are only bound by the additional protocols they have ratified[280].

B. The structure of the Convention

The *Convention* is divided into three sections and begins with a preamble laying down the primary obligation undertaken by the contracting states with respect to the document. Section I entrenches the cornerstone rights and the limits that apply to them (Articles 2-18).

Article 1 of the *Convention* provides that the parties are bound "to secure to everyone within their jurisdiction the rights and freedoms" set forth in Section I of the document. The states, thus, have an obligation to amend domestic law and practices according to the standards established by the *Convention*[281]. The term "everyone" does not imply any limits on nationality.

The *European Convention on Human Rights* guarantees the following basic rights and freedoms:

- right to life[282];
- freedom from torture and inhuman or degrading treatment[283];
- freedom from slavery, servitude and forced labour[284];
- right to liberty and security of person[285];
- rights to a fair trial within a reasonable time[286];

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[280] See Cameron, I. *An Introduction to the European Convention on Human Rights,* 3rd ed., Iustus Forlag, Uppsala, 1998.

[281] It should be mentioned that the state is free to choose the way of amending the domestic legislation and practices.

[282] Art 2, *the European Convention on Human Rights, supra* note 278. See also Society for the Protection of Unborn Children Ireland Limited (SPUC) v. Grogan [1991] ECR I-4685.

[283] Art 3, *the European Convention on Human Rights, supra* note 278. See also Adoui & Cornuaille v. Belgian State [1982] ECR 1665; Konstantinidis v. Stadt Altensteig-Standesamt [1993] ECR I-1191

[284] Art 4, *the European Convention on Human Rights, supra* note 278.

[285] Art. 5, *ibid.* See also Adoui & Cornuaille v. Belgian State [1982] ECR 1665; Konstantinidis v. Stadt Altensteig-Standesamt [1993] ECR I-1191; Kremzow v. Austria [1997] ECR I-2405.

- freedom from retrospective effect of penal legislation[287];
- right to respect for private and family life, home and correspondence[288];
- freedom of thought, conscience and religion[289];
- freedom of expression[290];
- freedom of assembly and association[291];
- right to marry and found a family[292];
- right to an effective remedy before a national authority[293];
- freedom from discrimination[294].

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[286] Art. 6, *the European Convention on Human Rights*, *supra* note 278. See also Pecastaing v. The Belgian State [1980] ECR 691; Heintz van Landewyck, Federation Belgo-Luxembourgeoise des Industries du Tabac (Fedetab) v Commission [1980] ECR 3125; Procureur de la Republique (Comite National de Defense Contre L'Alcoolisme, partie civile) v Waterkeyn and Others [1982] ECR 4337; Musique Diffusion Francaise SA, C Melchers & Co, Pioneer Electronic (Europe) NV and Pioneer High Fidelity (GB) Limited v Commission [1983] ECR 1825; Intermills SA (Intermills-Industrie Andenne SA and Others) v. Commission [1984] ECR 3809; Johnston v. Chief Constable of Royal Ulster Constabulary [1986] ECR 1651.

[287] Art. 7, *the European Convention on Human Rights*, *supra* note 278. See also Hoffmann-La Roche & Co AG v. Commission [1979] ECR 461; Adoui & Cornuaille v Belgian State [1982] ECR 1665; R v. Kent Kirk [1984] ECR 2689; R v. MAFF and Others, ex parte FEDESA [1990] ECR 4023; Charlton v. Crown Prosecution Service [1993] ECR I-6755; Criminal proceedings against X [1996] ECR I-6609;

[288] Art. 8, *the European Convention on Human Rights*, *supra* note 278. See also Rutili v. Minister of the Interior [1975] ECR 1219; National Panasonic v Comission [1980] ECR 2033; Akzo Chemie BV and Akzo Chemie UK Limited v. Commission [1986] ECR 1586; X v. Commission [1992] ECR II-2195; A v. Commission [1994] ECR II-179.

[289] Art. 9, *the European Convention on Human Rights*, *supra* note 278. See also Rutili v. Minister of the Interior [1976] ECR 1219; Prais v. Council [1976] ECR 1589.

[290] Art. 10, *the European Convention on Human Rights*, *supra* note 278. See also Rutili v. Minister of the Interior [1976] ECR 1219; R. v. Henn & Darby [1979] ECR 3795; Ter Voort [1992] ECR I-5485; TV10 SA v. Commissariaat Voor De Media [1994] ECR I-4795; Commission v. Kingdom of Belgium [1996] ECR I-4115; Compagnie Maritime Belge Transports SA and Others v. Commission [1996] ECR II-1201; Reti Televisive Italiane SpA (RTI) and Others v. Ministero delle Poste e Telecomunicazioni [1996] ECR I-6471.

[291] Art. 11, *the European Convention on Human Rights*, *supra* note 278. See also Rutili v. Minister of the Interior [1976] ECR 1219; Union Royale Belge des Societes de Football Association v. Bosman [1995] ECR I-4921.

[292] Art. 12, *the European Convention on Human Rights*, *supra* note 278. See also Bergemann v. Bundesanstalt fur Arbeit [1988] ECR 5125.

[293] Art. 13, *the European Convention on Human Rights*, *supra* note 278. See also Johnston v. Chief Constable of Royal Ulster Constabulary [1986] ECR 1651; Union des Entraineurs et Cadres Techniques Professionnels du Football (UNECTEF) v. Heylens and Others [1987] ECR 4097; Parliament v. Council (Radioactive Food) [1991] ECR I-4529.

[294] Art. 14, *the European Convention on Human Rights*, *supra* note 278. See also Prais v Council [1976] ECR 1589; Gabrielle Defrenne v. Societe Anonyme Belge de Navigation Aerienne (SABENA) [1978] ECR 1365; Administrateur des Affaires Maritimes, Bayonne, and Procureur de la Republique v. Jose Dorca Marina [1982] ECR 3949; Procureur de la republique (Comite National de Defense Contre L' Alcoolisme, partie civile) v. Waterkeyn and Others [1982] ECR 4337; TV 10 SA v. Commissariaat Voor De Media [1994] ECR I-4795; P v. S and Cornwall Country Council [1996] ECR I-2143.

These rights were complemented by the following rights and freedoms, entrenched in *the Protocol 1*:

- protection of property[295];
- right to education[296];
- right to free elections[297].

Protocol 4 included:

- freedom from imprisonment for debt[298];
- freedom of movement[299];
- freedom from expulsion of nationals[300];
- freedom from collective expulsion of aliens[301];

Abolition of death penalty was added by *the Protocol 6*[302].

Protocol 7 added:

- procedural safeguards relating to expulsion of aliens[303];
- right to appeal in criminal matters[304];
- compensation for wrongful conviction[305];
- right not to be tried or punished twice[306];
- equality of spouses[307].

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[295] Art. 1, *Protocol 1 to the European Convention on Human Rights*, *supra* note 278. See also Hauer v. Land Rheinland-Pfalz [1979] ECR 3729; Ferriera Valsabbia SpA and Others v. Commission (Concrete Reinforcement Bars) [1980] ECR 907; Schrader HS Kraftfutter GmbH and Co KG v. Hauptzollamt Gronau [1989] ECR 2237; Wachauf v. The State (Bundesamt fur Ernahrung und Forstwirtschaft) [1989] ECR 2609; R v. Commissioners of Customs and Excise, ex parte Faroe Seafood Co Limited and Others; Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications, Ireland [1996] ECR I-3953.

[296] Art. 2, *Protocol 1 to the European Convention on Human Rights*, *supra* note 278.

[297] Art. 3, *Ibid.*

[298] Art. 1, *Protocol 4 to the European Convention on Human Rights*, *supra* note 278.

[299] Art. 2, *Ibid.* See also Rutili v. Minister of Interior [1975] ECR 1219; Sevince v. Staats-Secretaris van Justitie [1990] ECR I-3461.

[300] Art. 3, *Protocol 4 to the European Convention on Human Rights*, *supra* note 278. See also R. v. IAT & Surinder Singh, ex parte Home Secretary [1992] ECR I-4265.

[301] Art. 4, *Protocol 4 to the European Convention on Human Rights*, *supra* note 278.

[302] Art. 1, *Protocol 6 to the European Convention on Human Rights*, http://en.wikipedia.org/wiki/European_Convention_on_Human_Rights.

[303] Art. 1, *Protocol 7 to the European Convention on Human Rights*, http://en.wikipedia.org/wiki/European_Convention_on_Human_Rights.

[304] Art. 2, *Ibid.*

[305] Art. 3, *Ibid.*

[306] Art. 4, *Ibid.*

[307] Art. 5, *Ibid.*

Section II of *the Convention* includes provisions laying down the composition, powers and procedure of the Court (Articles 19-51).

Section III consists of supplementary and procedural provisions, dealing with, *inter alia*, the application *of the Convention* to colonies and the making of reservations (Articles 52-59)[308].

According to general international law, *the Convention* is applicable to the whole territory of a contracting State, including those territories for whose international relations the State in question is responsible[309].

C. The European Convention and the Russian Federation.

Russia ratified *the European Convention on Human Rights* in May 1998. Hence, Russia undertook to secure for everyone within its jurisdiction the rights and freedoms entrenched in *the Convention*. Ratification of *the Convention* allows Russian citizens to apply to the European Court if they think that their rights have been violated. This is reassured by article 46 (3) of *the Constitution of the Russian Federation*, which says: "everybody has the right according to international treaties to apply to interstate organs on Human Rights protection, if domestic legal forms of protection were exhausted". Ratification of *the Convention* also requires that the activity of all branches of government of the Russian Federation does not violate the provisions of *the Convention.* There is no obligation to incorporate *the Convention* into the domestic law of Russia. *The Convention* is intended to be supplementary to the national systems of protection of Human Rights rather than a replacement of them. Moreover, some aspects of the international procedure for Human Rights protection can be impracticable[310]. Regardless, the Russian Federation incorporated *the Convention* into the domestic legal system, according to article 15 (4) of *the Constitution of the Russian Federation. The European Convention on Human Rights* operates as final level of control, in order to guarantee that the Russian authorities have not weighed the balance between the interests of the state

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[308] See Cameron, *supra* note 279.

[309] See art. 29 of *the Vienna Convention on the Law of Treaties of 1969*, I.L.M. 8 (1969), at 679.

[310] See Cameron, *supra* note 279.

and individual rights too heavily in favour of the former[311]. The ratification of *the Convention* also means that if Russian domestic laws do not give effective recognition to the rights entrenched in *the Convention*, then the Russian Legislature must change the laws in order to ensure that they do.

As a key element of the Human Rights protection mechanism, article 6(1) of *the European Convention on Human Rights* requires that independent and impartial tribunals be established by law to determine people's civil rights and obligations, and to determine criminal charges. These tribunals must be both independent and impartial, if *the Convention* is to be obeyed. The courts must therefore be genuinely independent of the executive and the legislature. The courts must also not be subject to any form of outside pressure, and the judges must not be corrupt[312]. This implies that despite the fact that *the European Convention on Human Rights* operates at the final level of control, it cannot and will not replace the domestic mechanisms for Human Rights protection.

The implementation of *the Convention* is subject to strict rules, narrowing substantively the range of all possible applications and constitutes the final and exceptional case for ensuring that Human Rights are protected[313]. Therefore, the best way of ensuring that a country complies with *the Convention* is creation of conditions for working domestic mechanism of Human Rights protection.

As was already mentioned, the cornerstone of the mechanism of Human Rights protection is the judicial system. Article 6 of *the Convention* sets out the minimum requirements that a country's judicial system must satisfy: Its tribunals must be independent and impartial; able to provide a hearing, for both civil and criminal trials, within a reasonable time; conduct their business in public (unless one of a small number of exceptions apply); and a criminal court must apply the rule that everyone is presumed innocent until found guilty according to law[314].

The current situation in Russian state, as set forth in first chapter of the thesis, constitutes the deviation from the above stated principles and represents diversion from

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[311] *Ibid.*

[312] An address by Lord Justice Brooke on the Implications of the European Convention on Human Rights Moscow, 12 November 1999.

[313] The procedure of the enforcement of *the European Convention on Human Rights* will be discussed in the next paragraph.

[314] An address by Lord Justice Brooke, *supra* note 311.

the Convention. In the case of Russia, the judicial branch is not very strong, the judges are poorly paid, received their education under the communist regime and do not completely acknowledge how the principles of *the Convention* work. The enforcement of *the Convention* at domestic level therefore might not be effective[315].

Russia has said its people are entitled to the rights, entrenched in *the Convention*, but has not publicized them properly, and people's rights are sometimes ignored in court because the judges are not aware of them, either. Russia does not provide the systems of criminal legal aid promised in *the Convention*. If defence attorneys are assigned by the state, they are often very poorly paid and of very low quality. Hearings are delayed because the courts cannot cope with the pressures of business. They are then rushed, for the same reason. Much needs to be done in Russia to enable the courts to operate in compliance with *the Convention*[316].

There is a demand to ensure that everyone who is concerned with applying these laws and procedural rules, police and procurators and judges alike, can easily understand what is required of them, and thus apply them accordingly. This is a call for the introduction of clear, just laws and clear, effective procedures, and the provision of the essential resources for education and training[317].

Russia should build a tradition of having independent and impartial judges. Consequently, the lessons learned from an examination of the Canadian Judicial system are of great importance. The more issues relating to judges' salaries and conditions of service can be taken out of politics, and resolved at a safe distance from any place where judges' judgements may be upsetting to local officials and influential local people, the stronger the prospects are for the rule of law[318].

Along with building a tradition of having an independent judicial system, Russia should take very seriously the need to improve the pay, the working conditions and the

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[315] However Russia made some steps in right direction: The enactment of the Federal Constitutional Act on the Judicial System of the Russian Federation; the creation of the new Constitutional Courts in the centre and in the regions; the enactment of the Federal Law on Justices of the Peace; the enactment of the federal law on Court Bailiffs; the newly created budgetary independence of the Supreme Court; the formation of the new Judicial Academy for the training of judges, quite separate from the Ministry of Justice; the transfer of the responsibility for the enforcement of judgments to the Supreme Court and the transfer of the penitentiary system to the Ministry of Justice; the enactment of the new Criminal-Procedure Code.

[316] An address by Lord Justice Brooke, *supra* note 311.

[317] *Ibid.*

social status of judges. Judges should also be given an up-to-date education that would allow them to understand the principles set out in the in *the European Convention on Human Rights* and other international treaties.

Judges in country like Russia need all the help and support that society can give them in order to build the aforementioned tradition. This also requires from the part of society a broad understanding of the reasons why the rule of law and an independent judiciary are so important.

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[318] *Ibid.*

3.2. The European Court on Human Rights

A. Legal Basis for the European Court on Human Rights

The European Convention on Human Rights not only declared a list of basic Human Rights but also introduced a mechanism for their enforcement. Initially the enforcement mechanism included three organs: The European Commission on Human Rights, the European Court on Human Rights and the Committee of Ministers. In November 1998, however, by virtue of *Protocol #11,* the Commission and the Court were merged into one entity – the European Court on Human Rights. The Court became an effective instrument for the enforcement *of the European Convention on Human Rights.*

B. The Structure of the Court

The European Court consists of a number of members, corresponding to the number of contracting states that signed *the European Convention on Human Rights*[319]. The requirements for appointment are competitive. Judges must be of "high moral character" and must be either qualified for appointment to the higher courts in their national legal systems or be recognized academic lawyers[320]. Judges are usually elected for a term of six years and may be reelected. The age of retirement is 70 years. The independent nature of their activities is ensured by the provision that they do not sit as representatives of their states. Moreover, a judge may not engage in any activity that is incompatible with his or her office. A judge may be dismissed from his office if the other judges decide by a majority of two-thirds that he has ceased to fulfil the required conditions[321]. The Court sits in committees of three judges and chambers of seven judges. The Grand Chamber consists of seventeen judges.

The ratification *of the European Convention on Human Rights* by the Russian Federation opened the door to Russian citizens, whose rights have been violated, to apply

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[319] Art. 20 of *the European Convention on Human Rights, supra* note 278.
[320] Art. 21 *Ibid.*
[321] Art. 24 *Ibid.*

to the European Court on Human Rights for the protection of their rights and remedy. However, application is subject to certain restrictions:

1. The subject of the complaint can only be rights that are entrenched in *the Convention* and/or *Protocols*, which Russia has signed.
2. The complaint must be from the person, whose rights have been violated.
3. The complaint must be submitted to the European Court no later than six months after the rendering of a final decision by the competent state organ.
4. The complaint can only include Human Rights violations that occurred after the Convention was ratified by the Russian Federation.
5. The complainant must first exhaust all available domestic sources for Human Rights protection.

Moreover, the European Court on Human Rights does not and should not function as a final court of appeal to the domestic courts, as a form of the European Constitutional Court. It does not overrule domestic courts' judgements and does not review national laws as such[322]. Rather, the Court generally examines the compatibility of national laws and practice against the standards set forth in *the Convention*. The Courts policy is to respect the national sovereignty of the contracting states and their right to conduct their own national policies. The Court normally takes care not to infringe upon states' freedom of action by spelling out the exact implications of a judgement for domestic law. The Court simply establishes that a violation of *the Convention* has occurred, and leaves it up to the state itself to decide what changes in domestic law and practice are necessary to bring these back into line with its obligations under *the Convention*[323]. The fact that the European Court is designed as an international institution, serving the needs of more than 40 contracting states, makes it technically impossible to review and fix all possible complaints.

This leaves large loopholes in *the Convention's* implementation, where Russia often changes the "letter of the law" and not "the spirit of the law" in order to reconcile domestic law with *the Convention*.

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[322] However, there are some exceptions to this rule, i.e. Art.5 and the like that require to make independent reviews of national laws.

[323] Cameron, *supra* note 279.

Despite the fact that the European Court of Human Rights constitutes an important element of the mechanism for Human Rights protection and gives Russian citizens the opportunity to protect their rights at the international level, the Court nevertheless does not replace the need for the construction of an effective and real working system of Human Rights protection at the domestic level.

C. Court Mechanism

The structure of the Court is designed in such a way that received complaints are segregated and transferred to the court organs according to the level of their complexity. Straightforward complaints are dealt with by the committees, ordinary cases are transferred to the chambers, and very important cases are reviewed by the Grand Chamber.

At the initial stage, the received complaint is reviewed by the Registry, which consists of 70 legal officers, as well as secretarial and administrative staff from various member states[324]. After the review, the Registry will inform the complainant of the prospects of his complaint. When the complaint has no prospect of success, the Registry tries to deal with it directly without applying to the Court. The Registry will then try to persuade the complainant not to insist on the registration of the complaint. If, nevertheless, the complainant takes a firm stand on the case being registered, the Court registry will assign it to a Chamber, the President of which will appoint a judge *rapporteur* (referent) to the case. The rapporteur will then be assigned by one or more members of the Court's Registry. If the case turns out to be neither uncomplicated nor inadmissible, the rapporteur will refer the case to a Committee including the rapporteur and two other judges. By a unanimous vote, the Committee can declare the application inadmissible. In the instance where unanimity is not obtained, the Committee will refer the case to the Chamber that will decide by majority whether or not the case is inadmissible. The admissibility and judgement stage are kept separate in order to

[324] This number of officers is the result of the merger of the Commission and the old Court. Committee of Ministers Resolution 98(3).

encourage the procedure of friendly settlements[325]. When a friendly settlement cannot be arranged, the Chamber will continue to investigate the case further, requesting additional information and, if necessary, holding more hearings. At the final stage, the Chamber delivers a judgement by simple majority where the president has a casting vote. The judgement of the Chamber becomes final after a period of three months in the absence of an appeal. However, if an appeal is made, a panel of five judges determines whether the case raises a "serious question, affecting the interpretation or application of *the Convention* and so should be referred to a Grand Chamber[326], which consists of the "national" judge or a national *ad hoc* judge, the President and Vice-Presidents of the Court and the Presidents of the Chambers. The judgement of the Grand Chamber is final[327]. The final judgement of the Court is then transmitted to the Committee of Ministers, which supervises its execution[328].

The judgement of the Court is binding on the respondent state. If, for example, the Court finds that the domestic law of the state violates *the Convention*, the state then has an obligation according to international law to amend the law. The Court itself has neither the authority to alter the state's internal law, nor the authority to instruct the state in which way it should amend the law. However, according to article 50, the Court may award "just satisfaction" to the claimant if it finds that his / her rights, entrenched in *the Convention* have been violated. The Court can award monetary compensation that may include legal costs, but moral damages are usually rejected. The Court has some incidental powers. Among other aspects, its competence extends to all questions of *the Convention's* interpretation, including the question of its own competence.

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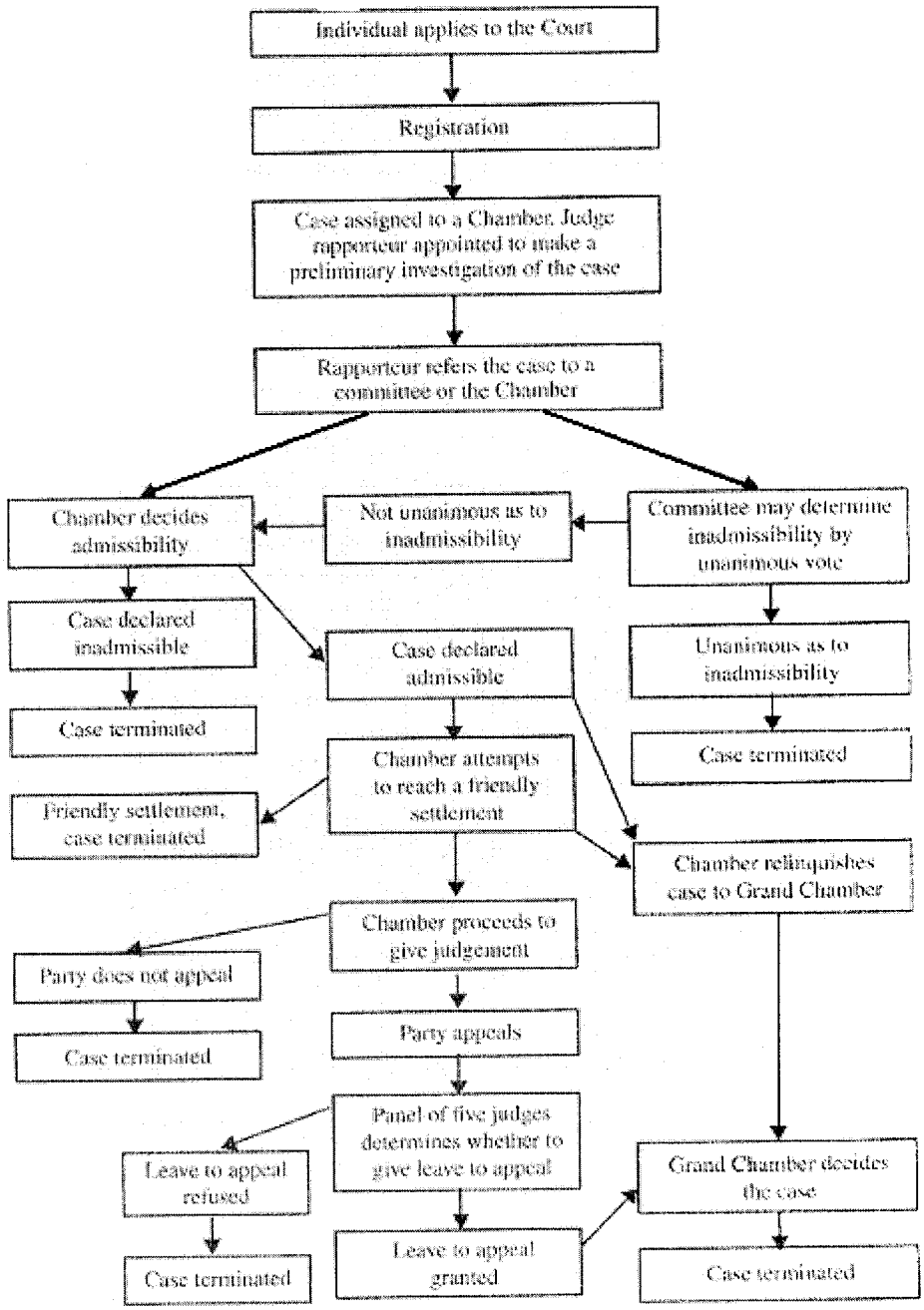
[325] The settlement must be "on the basis of respect for the human rights in the Convention" so the Court in principle can refuse its consent to a friendly settlement agreed by the parties. The friendly settlement procedure is kept confidential, although a brief note of the terms of the settlement is published later. Friendly settlements are often criticized because instead of amending the laws or practice, leading to Human Rights violations, the state deals with the individual who had the courage, time and resources to pass through the "entire legal pyramid" without dealing with the other vulnerable people who did not have such an opportunity. See Cameron, *supra* note 279.

[326] Art. 43 of *the European Convention on Human Rights*, *supra* note 278.

[327] Cameron, *supra* note 279.

[328] Art. 46 (2) of *the European Convention on Human Rights, supra* note 278.

The chart below provides a schematic overview of an individual application to the European Court on Human Rights.



329

It should be mentioned that the contracting states almost always respect the Court's decisions. This is predetermined by the provision that they can be easily expelled from the Council of Europe in the case of non-compliance.

D. Russia and the future of the European System on Human Rights protection

The entrance of Russia into the Council of Europe on February 28, 1996, raised active and vivid debates within the legal and international community on the future of the European Union and its judicial institutions, especially the European Court on Human Rights. Some scholars welcomed Russia into the new international institution, and mentioned that ratification by the Russian Federation of *the European Convention on Human Rights* would create an incentive towards the effectiveness of the mechanism for Human Rights protection in Russia. Some researchers noted that the inclusion of the Russian Federation in the Council of Europe was merely a political action rather than a legally based decision. They appealed to the provision that the Summit would welcome new members from "the democracies of Europe freed from communist oppression", so as long as an applicant had "brought its institutions and legal system into the lien with the basic principles of democracy, the rule of law and respect for human rights"[330]. They argued that Russia's legal system failed to conform to the basic principles of democracy, the rule of law and respect for human rights required of applicant states[331]. The opposition claimed that as a consequence of Russia's participation, there would be the increased possibility that European human rights law and respect for Human Rights will be both destroyed and seen to be flouted. This doubt has been expressed with respect to actual efficacy of the system, even regarding the traditional liberal democracies. This was supported by the argument that, firstly, Russia falls short of the usual European standard of the rule of law and the protection of Human Rights. Secondly, because of Russia's lack of experience in protecting Human Rights at the level of municipal law, it is likely that a

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[329] Source: Cameron, *supra* note 279.

[330] Council of Europe, *Vienna Declaration* of 8/9 Oct. 1993, Human Rights Law Journal 373 (1993).

[331] Council of Europe, Parliamentary Assembly, Bureau of the Assembly, Report on the Conformity of the Legal Order of the Russian Federation with Council of Europe Standards

great many violations of the European Human Rights law may be committed there, and that they will not be remedied at the local level. Third, the political importance of Russia that prompted the Council to accept its admittance would make it especially difficult for Europe to force the Russian government to comply with adverse findings. Thus, there will be a strong temptation for the European institutions to fashion a two-tiered legal order that would allow lower than normal expectations for Russia[332].

In order to give a well-founded answer to the above stated critique, it is necessary to evaluate how influential the European Court has been in pushing Russia to protect Human Rights. During the five years of practice of *the European Convention* in the territory of the Russian Federation, more than 12,000 Russian citizens submitted complaints to the European Court. Of these complaints only 125 were admitted for further proceedings and only 12 were found to have a sufficient basis for rectification. At present, only five decisions have been rendered against Russia for violations of the European Convention on Human Rights. These decisions were made in the following cases: *Smirnova v. Russia [2003], Ryabykh v. Russia [2003], Posokhov v. Russia [2003], Burdov v. Russia [2002], Kalashnikov v. Russia [2002]*[333].

In *Kalashnikov,* the Court held that there had been a violation of Article 3 (freedom from torture and inhuman or degrading treatment), Article 5 § 3 (right to appear promptly before the judge in case of detention) and Article 6 (right to a fair trial within a reasonable time) of *the Convention.* As a result, the Court decided: (a) that Russia pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of *the Convention*, the following amounts, to be converted into Russian roubles at the rate applicable at the date of settlement:

(i) 5,000 EUR (five thousand euros) in respect of non-pecuniary damage;

(ii) 3,000 EUR (three thousand euros) in respect of costs and expenses;

(iii) any tax that may be chargeable on the above amounts;

Prepared by Rudolf Bernhardt , Stefan Trechsel, Albert Weitzel, and Felix Ermacora, 7 Oct. 1994, AS/Bur/Russia (1994) 7.

[332] Janis, M "Russia and the "legality" of Strasbourg law", 8 European Journal of International Law 93 (1997).

[333] See http://www.echr.coe.int/Eng/Judgments.htm

(b) simple interest at an annual rate equal to the marginal lending rate of the European Central Bank plus three percentage points shall be payable from the expiry of the above-mentioned three months until settlement.

In *Burdov* the Court held that the applicant may claim to be a "victim" for the purposes of Article 34 of *the Convention*. In addition, the Court decided that Article 6 § 1 (right to a fair trial within a reasonable time) of *the Convention* and Article 1 (protection of property) of *the Protocol # 1* to *the Convention* had been violated. As a result, the decision was as follows: (a) the respondent State (Russia) is to pay the applicant, within three months from the date on which the judgment becomes final, according to Article 44 § 2 of *the Convention*, EUR 3,000 (three thousand euros) in respect of non-pecuniary damage, to be converted into the national currency of the respondent State, at the rate applicable at the date of settlement, plus any tax that may be chargeable; (b) simple interest at an annual rate of 23% shall be payable from the expiry of the above-mentioned three months until settlement.

In *Smirnova* the Court found Russia in violation of Article 6 § 1 (right to a fair trial within a reasonable time), Article 5 §§ 1 (right to liberty and security of person) and 3 (right to appear promptly before the judge in case of detention) of *the Convention* with respect to both applicants, and in violation of Article 8 (right to respect for private and family life, home and correspondence) of *the Convention* with respect to the first applicant. Finally, the Court determined that: (a) the respondent State (Russia) pay, within three months from the date on which the judgment becomes final according to Article 44 § 2 of *the Convention*, the following amounts:

(i) to the first applicant EUR 3,500 (three thousand five hundred euros) in respect of non-pecuniary damage;

(ii) to the second applicant EUR 2,000 (two thousand euros) in respect of non-pecuniary damage;

(ii) to the applicants jointly EUR 1,000 (one thousand euros) in respect of costs and expenses;

(b) from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

In *Ryabykh* the Court found that there had been a violation of the applicant's right to a fair trial and the right to a court as guaranteed by Article 6 § 1 (right to a fair trial within a reasonable time) of *the Convention,* in that the final judgment was quashed on supervisory review. The court also held that there had been no violation of Article 1 (protection of property) of *the Protocol No. 1* and that it was not necessary to consider the allegation of procedural unfairness of the supervisory-review proceedings.

With respect to *Posokhov* case, the Court also held that the applicant may claim to be a "victim" for the purposes of Article 34 of *the Convention,* and that Russia violated Article 6 § 1 (right to a fair trial within a reasonable time) of *the Convention*. The Court awarded non-pecuniary damages in the amount of 500 EUR.

The preceeding analysis of the court decisions involving Russia shows that ultimately, only 0.05% of the total complaints were upheld by the European Court. However, at the present, it is too early to make any definite conclusions regarding the effect of *the European Convention* on Russian practice with respect to Human Rights protection. A detailed analysis of the rejected complaints reveals that a major part were rejected simply for technical reasons (e.g. the complaint was based on alleged violations not entrenched in *the Convention*; the complaint was based on violations that occurred before Russia actually ratified *the Convention*; the time frames were not maintained, etc.). This is partly a result of the fact that Russian society does not have the culture and experience in appealing to international organisations for Human Rights protection, since such a procedure was prohibited by the Soviet regime.

Further investigation of the resolved claims with respect to the received remedies shows that in none of the cases pecuniary damages were awarded, and the amounts awarded for the non-pecuniary damages and legal costs were very small.

More importantly, the Court, when writing the judgements for these cases, discussed Human Rights violations in Russia with implications for a necessity to change the practices, which led to the aforementioned offences. For example, in *Burdov* case, the Court directly addresses the weaknesses of the judicial system in Russia: "By failing to comply with the judgements of the Shakhty City Court, the national authorities prevented the applicant from receiving the money he could reasonably have expected to receive" and thus, violated the provisions of the Convention.

In *Smirnova* the Court examined the Russian *Criminal Procedure Code* and subsequent practice. In the plaintiff's claim of unreasonably long detention, the Court reviewed *the Convention* case law, which has four basic acceptable reasons for refusing bail. The risk that the accused would fail to appear for trial[334]; the risk that the accused would take action to prejudice the administration of justice[335], if released; would commit further offences[336] ; or would cause public disorder[337]. Finding that the plaintiff's detention was based primarily on the severity of the possible sentence, the Court stated that "the danger of absconding cannot be gauged solely on the basis of the severity of the possible sentence; it must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify pre-trial detention. In this context regard must be had in particular to the character of the person involved, his morals, his assets, his links with the State in which he is being prosecuted and his international contacts[338]".

In *Ryabykh*, the Court examined *the Code of Civil Procedure of 1964* and its provisions applicable to the supervisory-review procedure of the Russian courts. In discussing the latter procedure, the European Court stated that it should be based on the rule of law. More specifically, the Court mentioned the need for the application of the principle of legal certainty in Russian judicial proceedings, which requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question[339] .

"Legal certainty presupposes respect of the principle of *res judicata*[340], that is the principle of finality of judgments. This principle insists that no party is entitled to seek a review of a final and binding judgment merely for the purpose of a rehearing and a fresh decision of the case. Higher courts' power of review should be exercised for correction of judicial mistakes, miscarriages of justice, and not to substitute a review. The review cannot be treated as an appeal in disguise, and the mere possibility of two views on the

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[334] See Stögmüller v. Austria, judgment of 10 November 1969, Series A no. 9, § 15
[335] See Wemhoff v. Germany, judgment of 27 June 1968, Series A no. 7, pp. 24-25, § 12
[336] See Matznetter v. Austria, judgment of 10 November 1969, Series A no. 10, § 9
[337] See Letellier v. France, judgment of 26 June 1991, Series A no. 207, § 51
[338] See W. v. Switzerland, judgment of 26 January 1993, Series A no. 254-A, § 33 with further references
[339] See Brumarescu v. Romania, judgment of 28 October 1999, *Reports* 1999-VII, § 50
[340] *Ibid.*

subject is not a ground for re-examination. Departures from that principle are justified only when made necessary by circumstances of a substantial and compelling character."

The European Court considers that the right of a litigant to a court would be equally illusory if a Contracting State's legal system allowed a judicial decision which had become final and binding to be quashed by a higher court on an application made by a State official[341].

In the *Posokhov* case the Court reviewed whether the plaintiff's "right to a fair ... hearing by ... an independent and impartial tribunal established by law[342]" was violated. The Court examined *the Federal Law on the Lay Judges of the Federal Courts of General Jurisdiction (the Lay Judges Act), the Code of Criminal Procedure* and the actual practice of the Lay Judges appointment. As a result, the Court reiterated that the phrase "established by law" covers not only the legal basis for the very existence of a "tribunal" but also the composition of the bench in each case[343].

The complaint concerning the conditions of detention, stated in *Kalashnikov* case, the Court found the applicant's conditions of detention, in particular the severely overcrowded and unsanitary environment and its detrimental effect on the applicant's health and well-being, combined with the length of the period during which the applicant was detained in such conditions, amounted to degrading treatment. With respect to the length of detention and the length of criminal proceedings, the Court evaluated the reasonableness of the detention and proceedings. It was mentioned that whether it is reasonable for an accused to remain in detention must be examined in each case according to its special features. Continued detention can be justified in a given case only if there are particular indications of genuine public interest being served which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention[344].

It is the responsibility in the first place, of the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a

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[341] See Ryabykh, *supra* note 332.
[342] See art. 6 § 1 of *the Convention*, *supra* note 278.
[343] See Buscarini v. San Marino (dec.), no. 31657/96, 4 May 2000, unreported.
[344] See, among other authorities, Kudla v. Poland [GC], no. 30210/96, § 110, ECHR 2000-XI

reasonable time. To this end they must, paying due regard to the principle of the presumption of innocence, examine all the evidence arguing for or against the existence of the aforementioned requirement of public interest justifying a departure from the rule in Article 5, and must set them out in their decisions concerning the applications for release. It is upon the basis of the reasons given in these decisions, and any well-documented facts stated by the applicant in his appeals, that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3[345].

The persistence of reasonable suspicion that an individual arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time, this argument no longer suffices. The Court should then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds are "relevant" and "sufficient", the Court must also be satisfied that the national authorities displayed "special diligence" in the conduct of the proceedings. The complexity and special characteristics of the investigation are factors to be considered in this respect[346].

In light of the aforementioned judgements, it can be concluded that if Russia takes them seriously and reviews its practice, then it will definitely help in the creation of a Constitutional law mechanism for Human Rights protection and may start a dialogue between the European Court and the Russian Federation. Only one year has passed since the first judgement and less than one month since the last judgement. Thus, it is too early to evaluate the degree of Russia's compliance with the judgements. We can assume, however, that the Russian government will try to re-examine its practice.

Finally, the detailed evaluation of the complaints and court decisions allows us to suppose with a great deal of certainty that the lion's share of the former criticisms regarding Russia's ratification of *the European Convention* on Human Rights will prove to be baseless. The European Court on Human Rights is able to extend its jurisdiction to Russia. Moreover, despite the relatively small amount of judgements against Russia, court decisions showed to the Russian population that Human Rights violations could be

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[345] See, for example, Labita v. Italy [GC], no 26772/95, § 152, ECHR 2000-IV.

[346] See, for example, the Scott v. Spain judgment of 18 December 1996, *Reports* 1996-VI, pp. 2399-2400, § 74, and I.A. v. France judgment of 23 September 1998, *Reports* 1998-VII, p. 2978, § 102

remedied by an impartial tribunal – i.e., the European Court on Human Rights. This tendency is very important for a culture of trust regarding the judicial institutions in Russia.

Russia ratified *the Convention*, and is therefore trying to work as a civilized partner in the modern European environment and trying to fulfil its international obligations. The ratification of *the Convention* served as an important step towards the formation of Human Rights culture in Russia. *The Convention* and the Court have sufficient power and, more importantly, a great potential for influencing future Human Rights issues. This can be proved by the fact that twenty years ago, nobody would have imagined the United Kingdom of Great Britain, a country with a long democratic history, complying with a "supranational bill of rights". Nowadays, however, the compliance of the UK with *the European Convention* speaks for the power of this document. If *the Convention* influenced a very conservative English society in such a way, it will most probably have a positive effect on the Russian Federation as well. In addition, *the Convention* in general, and the European Court decisions in particular, will serve as an external way of stopping the tendency of Human Rights abuse by government officials in Russia, thus helping to create a Human Rights culture.

Along with the question of formation of a Human Rights culture, the issue arises of whether a Human Rights culture requires some form of transitional justice[347], where public officials will be held accountable for their past Human Rights violations?[348]. Can we allow the victims of Human Rights abuses to pass without compensation? Should we punish public officials involved in Human Rights violations? If so, then how and to what degree? In that respect, the European experience will be helpful, in particular the implications of the transitional justice in the Czech and Slovak republics. Another question is how a Human Rights culture can deal with the phenomenon of corruption? And how deep is that phenomenon in Russian society? Is it curable?

The answers to these questions require additional research and exploration and can be emphasised in further doctoral dissertation.

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[347] i.e. lustration

[348] See discussion at p. 27-30

Conclusion

The problem of human rights protection is one of the greatest concerns of today's international society. The problem is even more actual for the Russian Federation because it is in the process of the transition from communist styled government to democracy and civil society.

Russia is a civilization with more than one thousand years of history. It has a unique culture as well as ancient customs and traditions. Throughout the centuries Russia has been recognized as being one of the world's most powerful states, due in large part to its immense territory and its extensive natural and human resources. Russian history has always developed distinctly from those of Eastern and Western civilizations. This independent development became a disadvantage to the Russian judiciary system in that certain legal concepts that are considered to be prerequisites for a successful, civilized society and were often disregarded by Russian lawmakers. The main concept of the aforementioned disregarded concepts is that of the Constitutional Law mechanism for human rights protection. Until recently, Russian culture had only a vague idea about human rights and it did not fully enjoy the notions of freedom and protected liberties associated with Western governments. The pre-revolutionary "Russian philosophy of law"[349] that began to elaborate on the concepts of human rights and of the individual's place within the Russian monarchy was erased by the Bolshevik revolution of 1917. A further seventy years of soviet dominance created a precedent of permissiveness on the part of the Russian government. It was only after the dissolution of the Soviet Union, that Russia experienced a re-emergence of the pre-Revolutionary "Russian philosophy of law" and a rise of human rights concepts.

The first significant step in that direction was Russia's adoption of *the Declaration of Rights and Freedoms of the Individual and Citizen of 1991.* The concepts described in the *Declaration* reject many dimensions of the Soviet notion of individual rights and embrace internationally recognized human rights standards. As a normative document, the *Declaration of Rights and Freedoms of the Individual and Citizen of 1991*

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[349] See the works of Dostoevskii F.M., Novgorodzev P.I., Soloviev V.S. This problem can be elaborated in further Doctoral dissertation.

was a progressive and innovative step towards democracy and civil society. However, the rights and freedoms entrenched in *the Declaration* were not legally enforceable.

In order to give the above stated rights real meaning, the Russian Federation took a second major step towards democracy when it adopted t*he Constitution of the Russian Federation, 1993*. This document replaced a former document that was based on communist ideology.

The adoption of these two major legal documents constituted the "declaratory revolution on human rights in Russia". As legal documents, these pieces of legislature constitute a major progression towards democracy in comparison with the ignorance of human rights concepts found under the soviet doctrine. However, the existent constitutional law mechanism for human rights protection in Russia is infirm and underdeveloped due to its novelty.

In comparison with Russia, it is interesting to explore the legal traditions of Canada, the country that is famous for its long and continuous history of effective human rights maintenance. Through the analysis and comparison of normative documents, judicial precedents, public opinion, legal history and cultural differences between the two countries, much advice and lessons can be gained by the Russia to secure the successful building of a constitutional mechanism for human rights protection. First, the Constitutional law mechanism for human rights protection should be based on the idea of the rule of law-the idea that the government and the people should be equally bound by law while the government should always obey the law. Second, the mechanism for human rights protection should be supported by the human rights culture; it should be an inherent part of Russian society and should be coupled with the people's trust in judicial institutions. Russian society should play a significant role in pushing governmental institutions towards the enforcement of rights. Third, the judges should receive legal training that is in accordance with democratic standards and the most current methods of training. This will allow them to understand the notion of the "rule of law" and to subsequently use it to protect human rights. Russian judges should begin the precedents of proving the invalidity of unjust legislation invalid and force the executive branch of society to obey the law. Accordingly, the judicial system should be independent from the executive and legislative branches of government. Fourth, the Constitution of the Russian

Federation should become the supreme law *de facto*. The Canadian experience is of great value to Russia because it has a long democratic history and it does not have in its Constitution a clause that protects socio-economic rights that undermine the enforcement of basic civil and political rights. One section of *the Charter* that could use broader Human Rights guarantees is s. 15. This task proves to be extremely difficult. While section 15 is being worked on, Canadian courts are very cautious in interpreting and applying the law. In contrast, Russia has group of unenforceable rights, entrenched in *the Constitution* that undermines the value of this document. Finally, Russian courts should be more flexible in granting remedies and learn lessons from the variety of remedies and the history of their granting by Canadian courts.

The analysis and implications for building a constitutional law mechanism for human rights protection in Russia would be incomplete without elaborating and exploring a certain segment of European practice.

The third major step towards democracy, made by Russia, constituted the ratification of *the European Convention on Human Rights* in 1998. This signified that Russia undertook to secure that everyone within its jurisdiction would enjoy the rights and freedoms entrenched in *the Convention*. Ratification of *the Convention* made it possible for Russian citizens to apply to the European Court if they believe that their rights have been violated. The analysis of the court decisions regarding Russia brought up the conclusion that the Court is becoming an external element of the Constitutional law mechanism for human rights protection. If Russia takes these decisions seriously and reviews its practice, this element will help in the creation of the internal elements of the Constitutional law mechanism for human rights protection and a dialogue between the European Court and the Russian Federation will ensue. Although *the Convention* does not replace the interior mechanism for human rights protection it gives Russian citizens another opportunity to protect their rights if all domestic methods of human rights protection fail. The ratification of *the Convention* is a right step towards building a human rights culture that will hopefully one day play one of the important roles in the Russian mechanism for human rights protection.

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