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Certain Challenges for Property Rights in Russia

I. Introduction

The fall of the Soviet Empire and the beginning of a market economy in the former Soviet Union territory are some of the biggest changes that took place globally in the 20th century. Now, more than 25 years after the fall of the Soviet Union, it is interesting to look at the end of communism and the following reforms aimed at a transition to a market economy in the countries.

Russia became a member of the Council of Europe (CoE) in 1996. This meant new engagement and enforcement of human rights in the Russian legislation. With this engagement towards human rights and international standards, we can see how the European Convention on Human Rights (ECHR) has been implemented in Russian national law. However, not only is the formal legislative implementation important, but the putting into practice has been important as well since this has been a flaw in the Russian legal system for quite some time.[1] One of the current interesting legal challenges is the protection of property rights in Russia, especially because the notion of property protection developed during the transition process in the '90s, and has now been manifested in the 1993 Russian Constitution and in Article 1 Protocol 1 ECHR. All of this should guarantee a universal protection of property in Russia. However, recent developments show a different tendency. After the transfer of property and the privatizations in the '90s, the Russian government began questioning the legality of the privatizations and tried to undo some of them. What does this say about property protection in Russia? Is it possible to transplant the CoE concept of "property protection" into Russian law?

Thus, while examining the current challenges for the protection of property in Russia, it is interesting to determine the importance and effectiveness of Article 1 P-1 ECHR in this regard.

In the first part of the article, the current challenges will be examined in a case study. This leads to the question regarding the conduct and problems of the privatization process in the '90s in Russia since the functioning of markets require such rights. In the last part, it will be examined how the protection of property in Russia is in line with the international standards as agreed upon the in ECHR.

II. On the current property law in Russia – the "kiosk case"

When looking at the property rights protection in Russia, it becomes visible that there are a lot of problems in the safeguarding of this human right. To illustrate this, I will closely examine the so-called "kiosk-case", in which the protection of property is not guaranteed, especially under the violation of the law.

The night of the destruction of kiosks in Moscow signifies a cut in the protection of property under the Russian law. The government of the city of Moscow decided based on Article 222 of the Russian Civil Code (hereinafter referred to as RCC)[2] to destroy all

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[1] *M. Mommsen/A. Nussberger*, Das System Putin: gelenkte Demokratie und politische Justiz in Russland, 2007.

[2] Article 222 of the Russian Civil Code (RCC) states: Unauthorized Structure (самовольная постройка): **1.** A dwelling house, other building, structure, or other immovable property created on a land plot not allotted for these purposes according to the procedure established by a law or other legal acts, or created without obtaining the necessary permissions for this, or with a substantial violation of

"самовольная постройка" (unauthorized structures), in this case all kiosks[3]. The first "wave of destructions" took place in February 2016, and from then on continued in several other waves of demolition. This targeted those that were built without all the legal and necessary documents, property rights and/or permits. It should be taken into account that those kiosks, selling almost everything from flowers to food, had been constructed during the '90s, in which time it was almost impossible to obtain all of the necessary permission[4] since most small businesses operated in the so called "shadow economy".[5] This meant difficult complicated business relations with the State with a mutual distrust. The small businesses felt a lack of interest of the government in their existence and the State on the other side perceived the small businesses as playing by their own set of rules.[6] Thus, problematic in this regard is first of all the sudden "need" to destroy the kiosks, although it had not been a problem for over 25 years. This is a clear cut in the legal certainty.

Considering that the "night of the long shovels" took place without presenting a court order to the tenants of the kiosks/small constructions it is necessary to take a close look at the Russian law to obtain a better understanding of these circumstances.

Firstly, it is necessary to examine article 222 RCC, which allows the removal of property that had been created on a land plot, which had not originally been allocated for those purposes, without all the necessary documents, and/or if the construction violates city planning norms and rules.[7]

In 2001 the Russian Constitutional Court ruled in a series of decision that no property taking, including fines, is allowed without a court decision.[8]. In 2004 however, the Russian Constitutional Court decided in its decision of 24.2.2004 that a judicial control can

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town-planning and construction norms and rules, shall be an unauthorized structure. **2.** A person who has erected an unauthorized structure shall not acquire the right of ownership in it. He shall not have the right to dispose of the structure, i. e. to sell, give as a present, lease out, or effectuate other transactions. An unauthorized structure shall be subject to demolition by the person who erected it or at his expense, except for the instances provided for by point 3 of this Article. **3.** The right of ownership to an unauthorized structure may be deemed by a court to belong to the person who erected the structure on a land plot not belonging to him on condition that the plot in question will be granted to this person for the erected structure according to the established procedure. The right of ownership in an unauthorized structure may be deemed by a court to belong to the person in whose ownership, inheritable possession for life, or permanent (perpetual) use the land plot is where the structure was erected. In this event the person whose right of ownership to the structure has been recognized shall compensate the person who erected it for the expenses for the structure in the amount determined by the court. The right of ownership in the unauthorized structure cannot be recognized for the said persons if retention of the structure violates the rights and law-protected interests of other persons or creates a threat to the life and health of citizens.

3 The Guardian, They tore it all down: How Moscow destroyed my business over night, 16.2.2016, https://www.theguardian.com/world/2016/feb/16/they-tore-it-all-down-moscow-demolition-kiosks.

4 *С. Волкова*/*С. Викторова*, Киоски из 90-х начали сносить в Москве, а продолжат по всей стране (*Volkova*/*Viktorova*, Kiosks from the 90s began to demolish in Moscow, and continue throughout the country), Комсомольская Правда (Komsomolskaya Pravda) 21.2.2016, http://www.kompravda.eu/daily/26492/3361317/; *И. Ремесло*, Нужно ли сносить московский самострой (*Remeslo*, Do we need to demolish the Moscow "constructions"), РИА Новости (Ria Novosti) 10.2.2016, https://ria.ru/analytics/20160210/1372414125.html.

5 *M. Hanna*, The Evolution of Small Business Reform in Russia (2009), Electronic Theses and Dissertations. Paper 265, p. 12ff.

6 Ibid.

7 Cf. Article 222 RCC.

8 Russian Constitutional Court decisions of 17.12.1996, N. 20, VKS RD, no. 5 (1996), p. 22–29, 5.7.2001, O-130.

be issued as well post factum. This gives already a huge margin of appreciation to the authorities.

In 2010 in the Joint Resolution of the Plenum if the Supreme Court of the Russian Federation and the Plenum of the Supreme Commercial Court of the Russian Federation[9] it had been stated in point no. 23 that in the case of an "illegal construction" a court order is not required. This had been confirmed in the Information letter of the Presidium of the Supreme Commercial Court of the RF[10] regarding court practice on matters concerning the application or article 222 RCC of the RF by commercial courts.

In 2014 the Russian Supreme Court[11] in the bulletin no. 6 stated that constructions without proper permits and in violation of town-planning regulations pose a threat to life and health. Nevertheless, there is a possibility of claim for ownership. In 2015 the Federal Law[12] regarding the interpretation of article 222 RCC, determined that it is in the discretion of the local authority to demolish the unauthorized constructions. In 2016 the Russian Constitutional Court decided[13] that "unauthorized structures" can be demolished if close to monument, official building, etc.

Nevertheless, there exists a procedure[14] for which only the land-owner can apply in order to legitimize the "unauthorized construction". The procedure is quite clear but still very complex and time-consuming, especially in terms of receiving the necessary approvals regarding the various permits (health, fire, etc.).

With regard to the short or even non-existent notification before the destruction of the kiosks, it would have been very difficult to go through this whole procedure of legalizing the unauthorized construction before its destruction by the authorities. Taking into account the long time that the kiosks could operate without any constraints, the sudden application of article 222 RCC was unpredictable. This is contrary to the legal certainty. Additionally, the destruction does not seem proportionate given the fact that there was no notification in order to have enough time to legalize the unauthorized structure. Thus, it constitutes an excessive burden on the other party.

This case can be examined under the protection of the ECHR since Russia is a member of the CoE. Therefore, Article 1 Protocol 1 ECHR[15] is highly relevant here. The ECHR formulates a general rule in the first phrase of the first paragraph: the principle of respect of the property. This was shown for the first time in the judgment *Sporrong and*

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9 Joint Resolution of the Plenum if the Supreme Court of the Russian Federation and the Plenum of the Supreme Commercial Court of the Russian Federation[9], dated 29 April 2010 No. 10/22 "On certain matters arising in court practice concerning the disputes on property rights and other proprietary rights defense".

10 Information letter of the Presidium of the Supreme Commercial Court of the RF[10,] dated 9.12.2010 No. 143

11 Russian Supreme Court, Обзор судебной практики по делам, связанным с самовольным строительством, Бюллетень № 6 2014.

12 Federal Law, 01.09.2015, N 258-f3.

13 Russian Constitutional Court, 27.9.2016, N. 1748-O, http://doc.ksrf.ru/decision/KSRFDecision 246691.pdf.

14 Электронный журнал азбука права (Azbuka Prava, How to legalize unauthorized buildings?), 14.12.2016.

15 Protocol 1 Article 1 ECHR states: Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Lönnroth v. Sweden.[16] This is one of the most important judgments of the ECtHR regarding the protection of property and structured the reasoning regarding property related issues for years to follow. In this case, the applicants alleged that an expropriation permit and a prohibition of construction impacted the peaceful enjoyment and free disposition of their property. They did not dispute the legality of the acts taken by the city of Stockholm; however, the applicants complained about the long duration of the time given to the city before continuing the court proceedings regarding compensation for the act of expropriation. They did not receive any compensation for the period of uncertainty concerning the fate of their property.

Consequently, the applicants opposed an unlawful assault on their right of property, which P1-1 guarantees. The Court then noted that the property rights of the applicants had become precarious because of the expropriation permits. The ECtHR decided that there had been an interference with the property rights of the applicants, consequently creating jurisprudence that covers problems regarding property law. *Sporrong and Lönnroth* became a landmark case, especially because the ECtHR elaborated three rules coming from P1-1 regarding the protection of property:

> […] That Article (P1-1) comprises three distinct rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognizes that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph. The Court must determine, before considering whether the first rule was complied with, whether the last two are applicable. […].[17]

Subsequently, the ECtHR was asked about the applicability of the second rule of P1-1. Since the applicants kept the possibility to use, sell, issue, or dispose of their property, it was not a matter of expropriation or deprivation, and consequently, the second rule was not applicable. Looking at the third rule in the second subparagraph of P1-1, the ECtHR decided that it was applicable to the ban of construction and that meant, consequently, a regulation of property rights.

Thus, the ECtHR defined three rules protecting property rights: the principle of respect of property, the possibility of deprivation of property under specific conditions, and the recognition of the State's rights to regulate the use of property. These three rules, which have been structured for years, show the reasoning behind how the ECtHR deals with property rights. Nevertheless, P1-1 does not contain an explicit definition of the term "property" itself and the Court does not say to a member state what should be done since this depends on the legislator.

However, does Article 1 P-1 concern the "kiosk case"? The ECtHR has developed a six-step procedure to determine whether there is a breach of Article 1 P-1.[18]

In a first step, the ECtHR examines if there is a property right in dispute. This means that the claim needs to constitute a "possession" covered by Article 1 P-1.

The concept of "possessions" has an autonomous signification in the ECHR, which means that it is not necessary for national legislation to recognize economic interest as a property right. The term "possessions" includes rights in rem, both movable and immovable property as well as rights in personam, which can arise either between two private

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[16] ECtHR, *Sporrong and Lönnroth v. Sweden*, 23 September 1982.

[17] Ibid.

[18] CoE, Human Rights Education for Legal Professions, http://help.ppa.coe.int/login/index.php.

individuals or as a public law relationship.[19] Thus, in this case, a "kiosk" constitutes a possession.

In a second step, it should be determined if the state has interfered with the possession. An interference must, first of all, be provided for in the law. In addition, the law must be clear, applied with consistency, issued from a fair and transparent procedure, and individuals must be able to invoke it in fair proceedings. In the case *Hentrich v. France*,[20] the Court underlined the importance of foreseeability within the concept of law in the meaning of the ECHR. Given the facts of the overnight destruction of the kiosks and then the missing court order as required by law, this shows that the law has not been consistently and transparently applied. In addition, the government initiated the destruction of the "kiosks." Consequently, a state interference with the possession exists.

Thirdly, it is necessary to determine which of the three rules of Article 1 P-1 is applicable. Here, the third rule regarding the control of use of property would be applicable since it concerns the regulation of constructions.

This interference must be lawful, pursue public or general interest, be proportionate to the aim, and should not interfere with the measure against the standard of legal certainty. Thus, it should be foreseeable, accessible and non-retroactive. In the "kiosk" case, this point is crucial. Even though the "kiosks" had been qualified as "unauthorized structures" (самовольная постройка), they had been operating in Moscow around the metro stations for over 25 years. Since there had not been any notifications or interventions from the side of the government regarding the legal status of the "kiosks", it could have been assumed that their status was not against the law. Therefore, the actions taken by the government were not foreseeable and thus did not conform to the principle of legal certainty.

In a fifth point, it should be examined whether or not the interference premised on the pursuit of a legitimate or public interest. This point is quite open for discussion. It could be argued, on the one hand, that the removal of the "kiosks" happened in the public interest since it would guarantee a safer and cleaner city.[21] On the other hand, the principle of proportionality should be kept.

This principle is checked in the last point. The interference is proportional if there is no excessive individual burden on the other party. Considering that the removal of the "kiosk" constitutes the basis of income for the owners of such "unauthorized structures" (самовольная постройка), and that they did not receive any kind of compensation, it is rather apparent that the proportionality of these actions has not been kept.

Taking into account that all six of these steps regarding the determination of whether there is a breach of Article 1 P-1 show that the actions taken by the government were not in compliance with Article 1 P-1.

A parallel can be drawn between the "kiosk case" and the decision *Oneryildiz v. Turkey*.[22] In this case, the applicant had constructed a house in a slum area of Istanbul. The claimant had not obtained any permission for the construction of the house. In this area, an explosion of methane gas occurred, which destroyed the building and killed several people. The plaintiff complained under Article 1 P-1 ECHR since the authorities did not take any preventive measures in preventing this explosion that destroyed his house and movable property. The ECtHR qualified the house, which had been built by the applicant

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[19] Council of Europe, The European Convention on Human Rights and property rights, Human Rights files, No 11 rev., Strasbourg 1999.

[20] ECtHR, *Hentrich v. France*, 22. 9.1994, Application n° 13616/88.

[21] Various opinions from blogs, for example: http://vz.ru/opinions/2016/2/10/793479.html, https://snob.ru/selected/entry/104423.

[22] ECtHR, *Oneryildiz v. Turkey*, 30.11.2004, Application n° 48939/9.

as a possession in the sense of Article 1 P-1 since it had been his actual residence and also represented a substantial economic interest. Furthermore, the Turkish authorities had let the claimant live in this construction over a long period of time with knowing the facts. Accordingly, the ECtHR decided that there was a violation of Article 1 P-1.[23]

In this case, the ECtHR had qualified the house of the claimant as property under Article 1 P-1. Moreover, the Turkish government knew about the illegal construction for several years and did not do anything about it. Consequently, this case can be considered an example under the scope of Article 1 P-1, and so the "kiosks," even if considered to be "unauthorized structures" by the Russian government, would be protected under the ECHR. Therefore, by analogy the destruction of the kiosks constitutes a violation of Article 1 P-1 ECHR, and it is likely that – should the case reach the ECtHR – it would be qualified as such.

III. Transition Towards Property Rights

Taking the current situation into account, in which privatizations that had been done during the '90s are being put into question now regarding their legality or validity, it is important to have a look at the actual transition and privatization process and what went supposedly wrong with this in Russia.

The transition in the '90s was a rough process that was marked by "Shock Therapy", radical privatizations and some unexpected outcomes. Nonetheless, the transition did not just mean a transition towards a market economy but a transition towards a new set of laws. Most important had been the concept of "private property". At the moment of the transition, there was no legislation in place protecting the private property. It was not even clear what the notion of "private property" meant and what the consequences would be. Consequently, it is vital to identify why the protection of property had been so difficult. It needs to be taken into account that the classical notion of "private property" had never existed before in the Russian law and that it had yet to be defined.[24]

Currently, we can find the protection of property in the Russian Constitution (Article 8) and in the Russian Civil Code as well (Article 212). With Russia's membership in the CoE, it had also accepted the European Convention on Human Rights (ECHR), which protects property in its Protocol I Article 1. Although the Russian Constitutional Court has claimed in its judgment of 17 July 2015 its supremacy over the ECHR[25], it is interesting to see if the Russian legislation meets the standards set by ECHR regarding the protection of property. To understand if the transition has been successful and has led to a good protection of property rights or not, it is important to look first of all at the transition process itself in the '90s and the conditions under which the privatizations had taken place. Secondly, an analysis of the jurisprudence of the Russian Constitutional Court regarding the protection of property will extend the understanding of the protection of property in Russia nowadays, after the transition process.

The privatization process led to important changes in the Russian legislation. Particularly, because the notion of property protection developed during the transition process in the '90s, and has now been manifested in the 1993 Russian Constitution and in Article 1

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[23] ECtHR, *Oneryildiz v. Turkey*, 30.11.2004, Application n° 48939/9.

[24] *M. Winkler*, Eigentum! Heiliges Recht! Seele der Gesellschaft: Adel, Eigentum und Autokratie in Russland im 18. und frühen 19. Jahrhundert, in: Jenseits der Zarenmacht. Dimension des Politischen im Russischen Reich 1800–1917, Frankfurt/Main 2008; *R. Pipes*, Russia under the Old regime, New York, 1974.

[25] Russian Constitutional Court, 19. 4.2016, http://doc.ksrf.ru/decision/KSRFDecision230222.pdf.

Protocol 1 ECHR. Thus, the sudden need for property regulations appeared, and the Law of 31 October 1990 came into force. This law was "On safeguarding the economic foundation of the sovereignty of the RSFSR". It pertained to all USSR property located in the Russian territory, including land, waters, forests, minerals, and the state enterprises and institutions. This law provided a framework in which some property was at the disposal of the USSR to allow it to exercise certain functions to which the RSFSR had voluntarily delegated it. Furthermore, the Law on Ownership of 24 December 1990 had been adopted to replace the USSR Law on Ownership.[26]

The legislative basis for transforming the state ownership of property already existed owing to the Russian Supreme Soviet's passage of the law on the Privatization of State and Municipal Enterprises in the Russian Federation in July 1991.

1. Transition towards a market economy

"Shock therapy" was used in order to facilitate transition towards a market economy. It consisted of a sudden release of price and currency controls, withdrawal of state subsidies, and immediate trade liberalization. Shock therapy refers to policies that reduce inflation quickly, reduce budget deficits, restore competitiveness, and reduce current account deficits. It involves price liberalizations, an end to government subsidies, and, last but not least, privatizations. However, shock therapy can lead to a significant increase in inequality because those on low incomes may not be able to afford the new prices and may lose their jobs since it causes a rapid increase in unemployment.

In Russia, the privatization program led to a situation in which a few oligarchs owned the wealth of the country and the distribution of property lead to political power.[27] The economy lacked sufficient infrastructure and a legal system for a free market economy.

To end the inefficiency of state-owned enterprises that employed too many people and produced goods that consumers did not need, it was necessary to start the process of privatization. During the privatizations, the goal was to sell the assets of the Russian government to the Russian public. The privatizations were organized by the State Committee for State Property Management of the Russian Federation under *Anatoly Chubais* (*Анатолий Чубайс*).[28] The aim was to transform the formerly state-owned enterprises into profit-seeking businesses that would not depend on government subsidies. To distribute property as quickly as possible, the Committee decided on two forms of privatization: voucher privatizations and loans-for-shares.

The vouchers, each containing a share, were distributed equally among the population. They could then be exchanged in the enterprises to be privatized. Most people were not well informed of the nature of the privatization program and, therefore, quickly sold their vouchers below their actual value.[29]

Because *Chubais* needed to gain support among the directors of the state enterprises, he made a deal with the directors that up to 51 percent of privatized enterprise shares would go to the management and workers of the enterprise at an artificially low price.

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[26] *F. J. M. Feldbrugge*, Russian Law: The End of the Soviet System and the Role of Law, Dordrecht 1993.

[27] *Hanna*, fn. 5, p. 12 ff.

[28] *M. Boycko*/*A. Shleifer*/*R. Vishny*, Privatizing Russia, Cambridge MA 1997.

[29] *B. Black*/*R. Kraakman*/*A. Tarassova*, Russian privatization and corporate governance: what went wrong?, Stanford Law Review 2000, p.1731–1808.

Clearly, the problem that most Russians faced was that they were not able to buy shares from their savings.[30]

While facing financial difficulties in 1995, the Russian government adopted a loans-for-share scheme proposed by *Vladimir Potanin* (*Владимир Потанин*).[31] The program was then endorsed by *Chubais*. The loan-for-share scheme was quite simple. The government gave shares in 12 large state-owned enterprises to certain businessmen who owned a bank in trust. In return, the Russian government received loans totaling about $ 800 million. The companies in question included *Surgutneftegaz*; the oil corporations *LUKoil*, *Yukos*, *Sidanko*, and *Sibneft*; the nickel producer *Norilsk Nickel*, and the *Mechel and Novolipetsk Steel Works*. If the government did not repay the loans by September 1996, the creditors were then allowed to auction off the tranches and keep 30 percent of any profit. During this time, the government did not repay the loans, and the creditors sold the stakes, usually to themselves.[32] This practice went against the general idea of property rights and lead towards a mix-up of politics and property.

Competition was kept to a minimum through careful rigging of the auctions.

2. The protection of property of private persons in the CRF

The law of 23 December 1992 No. 4196-1 of 1992 "On the right of Russian nationals to transfer into private property and for sale of the plots of land for subsidiary smallholding, truck farming, gardening and personal housing" regulates the transfer of ownership of smallholding, truck farming, gardening and personal housing in towns, settlements and rural areas. This law interprets the privatization law on Housing Funds in the way that houses can be sold not only by the local Soviets of people's deputies, but by all owners of residential space, their authorized organs and the enterprises and institutions that have these dwellings in full economic jurisdiction or in operative management. Article 9 CRF also states that land and natural resources may be in the ownership of a private person. This is taken up in Article 36 CRF:

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

In 1993, the Russian Constitutional Court recognized in a series of decisions the property rights of private corporations, state-owned enterprises, regions, and municipalities. Consequently, the state had to ensure equal treatment of both public and private property and could discriminate against private property holders in taking title, in bankruptcy proceedings, in imposing punishment for property crimes, and so on.[33] In this context, two decisions regarding the law on bankruptcy show the Russian Constitutional Court's application of the concept of proportionality in finding a balance between governmental interests and property rights. "In the first, the Court found that a provision permitting the transfer of property from a bankrupt estate to a municipality represented a

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[30] *M. McFaul*, State power, institutional change, and the politics of privatization in Russia. World Politics, 47(02)|1995.

[31] *S. Guriev*/*A. Rachinsky*, The role of oligarchs in Russian capitalism. The Journal of Economic Perspectives, 19(1)|2005, p. 131–150.

[32] *B. Black*/*R. Kraakman*/*A. Tarassova*, Russian Privatization and Corporate Governance: What went wrong?, William Davidson Institute at the University of Michigan Business School, September 1999.

[33] *A. Trochev*, Judging Russia. Constitutional Court in Russian Politics. 1990–2006, Cambridge 2008.

disproportionate interference with the property rights of the debtor because it failed to provide compensation.[34] In the second, the Russian Constitutional Court examined a legislative grant of power to a bankrupt trustee to cancel a long-term contract with the creditor.[35] The Court ruled that this constituted interference with freedom of contract grounded in arbitrary criteria that were not "necessary" to meet the legitimate goal of protecting the rights of others. In both cases, the Court emphasized that the proportionality test requires that legislation strike a fair balance between the values of the legitimate interest and the implicated constitutional right."[36] The question of proportionality usually plays an important role in tax-related matters. This matter is of great importance since the privatizations and tax reforms.

IV. Russia towards international standards – Russia and the CoE

The privatizations and new reforms led to the need for major changes in the Russian legislation, especially concerning property regulations. Thus, new laws regulating property and ownership matters came into force.[37]

The legislative basis for transforming the state ownership of property already existed owing to the Russian Supreme Soviet's passage of the law on the Privatization of State and Municipal Enterprises in the Russian Federation in July 1991.

One of the current problems is that the privatizations are put into question. During the chaotic years in the '90s, some people profited from the situation and the just developing property rights to find "loopholes" in order to obtain shares and companies for a very low price. Furthermore, a lot of small enterprises emerged and operated for a long time, more than 25 years, in the so called "grey zone". These actions are now being questioned by the government.

With the end of the Cold War, the CoE changed its traditional focus of developing continent-wide agreements to standardize its member states' legal basis for the further promotion and assistance in implementing human rights, the rule of law and democracy.[38] Russia's agreement with the CoE in 1996 was an important step towards a closer dialogue.[39] Judge *V. Zorkin* (*В. Зорькин*) stressed the importance of the CoE-Russia relationship:

> It is important to keep in mind that the interaction between the RCC and the ECHR is a two-way road. The RCC pays particular attention to the ECHR's judgments. This is mainly due to the fact that, having ratified the Convention, Russia undertook an obligation to bring its national legislation and law enforcement practices in line with the provisions of the Convention.

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[34] Russian Constitutional Court decision 8-P, 16 May 2000, VKS, RF, no.4 (2000), p. 38–45.

[35] Russian Constitutional Court decision 9-P, 6 June 2000, VKS RF, no. 4 (2000), p. 46–53.

[36] *Trochev*, fn. 33.

[37] *Feldbrugge*, fn. 26.

[38] *S. Saari*, Promoting Democracy and Human Rights in Russia, BASEES/Routledge Series on Russian and East European Studies, New York 2010.

[39] *L. Mälksoo*, Russian Approaches to International Law, OUP Oxford 2015.

> Relying on the ECHR judgments in the constitutional proceeding is also aimed at fulfilling these international obligations.[40]

Still, in 1996, Russia did not meet all of the formal requirements for membership in the CoE; however, Russia's decision to join was made in the hope of encouraging the Russian government to carry out needed reforms in the legislation and especially in the hope of enhancing the implementation of the human-rights commitments. Although Russia had signed several human-rights treaties under the CoE, there were still problems and violations which led to Russia protesting against a monitoring of its commitments stemming from its being treated like the other member states.[41] Even the suspension of Russia's voting rights during the Ukraine crisis did not lead to changes in Russian politics, and, as *Aleksei Pushkov* (*Алексей Пушков*), Chairman of the Foreign Affairs Committee in the State Duma, announced, this conflict would not lead to a resignation from the CoE.[42]

Even in 2017, Russia has not fulfilled all of the accession criteria from 1996. Also, despite twenty years of CoE membership, Russia still has not reached the same level of human rights protection as the founding member states have, a situation that results from not implementing the ECtHR decisions in the national legal system. Russian judges still need to apply more ECtHR case law, and it needs to justify its claims and legal practices using the international legal framework.

As stated in 2012, the CoE and ECHR are important for Russia as the Chairman of the Russian Constitutional Court *Valery Zorkin* (*Валерий Зорькин*) stated:

> […] the participation of Russia in the Convention, the observance of which is ensured by the ECHR has been and continues to be conditional on the task of the due implementation of the constitutional provisions. Accordingly, harmonization between national law and practice and the provisions of the Convention, including its interpretation through the judgments of the ECHR is allowed insofar as it does not contradict the Constitution of the Russian Federation, including rulings by the Constitutional Court on the constitutionality of certain statutory provisions. I would like to say that in most cases there are no such conflicts.[43]

Nevertheless, the tendency shows that Russia wants more independence regarding the implementation of the ECHR. In 2015 at the international conference on "Enhancing National Mechanisms for Effective Implementation of the European Convention of Human Rights" in Saint Petersburg, *Valery Zorkin* (*Валерий Зорькин*) then said in the context regarding the implementation of the ECHR that factors like socio-cultural diversity and special historic features should be considered. Furthermore, he pointed out that the Russian Constitution represents the highest authority in the Russian legal system and thus

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[40] *V. Zorkin*, in: Russia and the European Court on Human Rights: A decade of change. Essays in honor of Anatoly Kovler Judge of the European Court of Human Rights in 1990–2012, Interaction between national and supranational justice in modern times: new prospects; see also *B. Старженецкий*, in: Russian Yearbook of the European Convention on Human Rights 1|2015, Отсутствие единообразия судебной практики – нарушение прав человека? (*Starzhenetskiy*, Lack of unanimity in jurisdiction – a violation of human rights?).

[41] *S. Stewart*, Russland und der Europarat, SWP-Studie, Berlin 2013; see also European Commission, Press release regarding the funding of the monitoring of the Russian elections, http://europa.eu/rapid/press-release_IP-93-1061_en.htm.

[42] Пушков: Вероятность выхода России из Совета Европы (Pushkov: Likelihood of Russia exiting the Council of Europe), Накануне (Nakanune) 26.6.2014, http://www.nakanune.ru/news/2014/6/26/22358299.

[43] *Zorkin*, fn. 40.

> the Constitutional Court holds the position that in case the Russian Constitution as interpreted by the Constitutional Court afford greater protection for human and civil rights and freedoms in the Russian Federation as opposed to the Convention as interpreted by the European Court, the Constitution Court's interpretation takes precedence in the given case.[44]

Consequently, the implementation of the decisions of the ECtHR, the situation has become more complex. The Russian Constitutional Court issued its first decision[45] regarding the applicability of the ECtHR decision *Anchugov and Gladkov v. Russia*,[46] whereas it says if they are unconstitutional, in the Courts own opinion, they will not be implemented. This now leaves the recognition of a decision of the ECtHR up to the Russian Constitutional Court. This shows the tendency towards a more autonomous jurisprudence than initially required by the ECHR.

V. Conclusions

When looking at the protection of property in Russia, the privatization process in the '90s plays a big role. The destruction of the "kiosks", the invalidation of the privatizations and the critical approach towards the CoE show that the protection of property in Russia is a current topic and there are more cases to be argued in the area of property rights[47] – before the ECtHR and the Russian Constitutional Court.

Looking at how the privatization process went, it is not surprising that those actions are being put into question. The history shows that the fast privatizations without a previous legislation made an adequate protection of property rights basically impossible. Nevertheless, re-doing of privatizations does not fully conform to the principle of legal certainty. This is not only important for citizens, but foreign investors and especially in the sphere of property questions this can lead to difficulties. It brings up as well the question on how many more cases there will be. Will every privatization done in the '90s be redone? Although the Russian legislation is rather clear in this regard, it could be argued that there would have been alternatives regarding the destruction of the kiosks. The government could have bought them off the owners and then destroyed them, especially with a longer notification period. This surely would have guaranteed more legal certainty. Additionally, the current solution seems disproportionate to the burden of the private parties.

Looking generally at the implementation of decisions of the ECHR, studies have shown that usually the well-performing countries have similar characteristics. They share a strong protection of rights by the national courts and also put a big effort into the diffusion and mainstreaming of the general human rights awareness of the society.[48] Considering Russia's recent decision just to recognize decisions of the ECtHR that are not considered contrary to its Constitution, it shows the importance of the ECHR for Russia. So, what does this say about the effectiveness of Article 1 P-1 in Russia?

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[44] *V. Zorkin*, Concluding address, International Conference on Enhancing National Mechanisms for Effective Implementation of the European Convention of Human Rights, Saint Petersburg, 22–23.1.2015, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806fe1a5.

[45] Russian Constitutional Court, 19.4.2016, http://doc.ksrf.ru/decision/KSRFDecision230222.pdf.

[46] ECtHR, *Anchugov and Gladkov v. Russia*, 4 July, 2003, Applications nos.11157/04 and 15162/05.

[47] ECtHR, *Volchkova and Mironov v. Russia*, 28 March 2017, Application nos. 45668/05 and 2292/06.

[48] *D. Anahnostu*/*A. Mungiu-Pippidi*, Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter, The European journal of International Law Vol. 25(1), Oxford 2014.

Nevertheless, Russia is still a member and thus respects the ECHR to which it had agreed upon when becoming a member of the CoE. However, the whole process of transformation towards a market economy and the privatization process in general are special cases, which not all of the member states had to go through; this constitutes a different initial situation. This, of course, does not justify the non-respect of the ECHR but explains the difficulties in compliance with these international standards in the area of property rights.

Thus, regarding the protection of property there is still much work to be done in Russia.[49]

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