



**STATUS AND IMPLEMENTATION OF THE  
EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC  
LAW: AZERBAIJAN AND RUSSIA**

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## **EXECUTIVE SUMMARY**

The thesis sets out to find out the problems of the poor implementation of the ECHR in Azerbaijan and Russia. It argues that the reason of the poor implementation is mostly in the bad application of good formal rules and because the domestic legal environments have not been yet adapted to the European standards in these countries. Shortfalls in law-enforcement practice and the lack of a mechanism of national legal enlightenment, directed at familiarizing the authorities and citizens with the ECHR standards hinder the process of fully successful implementation. The legislative, administrative and judicial practices of the two states are studied applying the comparative method and case-study.

## INTRODUCTION

The aim of this paper is to evaluate the effectiveness of the implementation of the European Convention on Human Rights (hereinafter: the ECHR or Convention) in the Republic of Azerbaijan (hereinafter Azerbaijan or AR) and will focus specifically on the different domestic measures taken at the legislative, administrative and judicial levels. This paper will show that the still remaining Soviet-type legal thinking and culture renders all the reforms of legislation, administrative practice and judiciary, ineffective.

This research is the first work, as such, which evaluates the current situation (five years after the ratification) with the ECHR implementation in Azerbaijan. Previous few papers in the national literature were mainly written during the first years after the ratification<sup>1</sup> and thus not mainly contained much information on implementation. This paper serves to be a contribution to the field of study on the adaptation by Azerbaijan as an example of former Soviet countries to the ECHR standards and also can be referred to, for possible evaluation of the development level of implementation in the country at later stages.

Among major problems I would mention particularly the still existing incompliance with the Convention of the national legislation and administrative practice, as well as the lack of judicial practice in the ECHR's direct application. Although the Convention is considered a constituent part of the national legislative system according to the Constitution, still domestic courts and other law enforcers do not apply to the ECHR provisions in their activities. Throughout the paper I will seek the answer to the issue: which one of the experienced problems most unfavorably affects the successful implementation: whether the source of problems is the incompliant legislation and whether new set of rules should be

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<sup>1</sup> For instance: ATAKHAN ABILOV, AVROPA INSAN HUQUQLARY MEHKEMESI VE AZERBAIJAN [ECTHR AND AZERBAIJAN], *Jemiyet ve Huquq* (2002); Charles Martin, *Comparative human rights jurisprudence in Azerbaijan: theory, practice and prospects*, vol. 14, No.2 Florida State University Journal of Transnational Law & Policy, 216 (Spring 2005), <[http://www.law.fsu.edu/journals/transnational/vol14\\_2/martin.pdf](http://www.law.fsu.edu/journals/transnational/vol14_2/martin.pdf)>

established in order to solve the matter once and for all, or whether it is the issue of bad application of existing good formal rules.

In order our assessments of the implementation efforts done by Azerbaijan authorities to be adequate, I deemed appropriate to develop my research in comparison with another country of a similar social-political, ideological background – the Russian Federation (hereinafter Russia or RF). The reforms made in judicial and legal systems, beginning from Constitutional provisions to ordinary legislation, dealing with human rights, as well as, the application practice of the Convention by national courts in these two countries will be compared throughout the thesis.

Approach to the issue from a comparative law perspective is necessitated with the need for finding out possible improvements of the level of the Convention's implementation in domestic law. Only in that way can we find possible ways for solving the problems within a particular system, and find out whether successful methods and practices can be taken as a model from other member states' experience and applied in another bearing in mind national peculiarities. The need for the comparative method in legal research also comes from the increasing level of interdependence between states and also the need of national courts to make their judgments more authoritative by means of referring to the outstanding precedents of international and regional tribunals. From this perspective, to study and keep path with internationally approved standards and at the same time to get informed on another state's practices criticized by international human rights instances, is crucial for the national courts of each state to eliminate similar negative practices in its own system.

The reason that I chose Russia for comparison is that, in the first place, these countries were both under the former Soviet regime and therefore have many common features in both their political past and legal systems. The judicial-legal system of Azerbaijan

was built on the basis of the model of the Russian civil system.<sup>2</sup> Moreover, Russia also is having problems with the ECHR implementation. Russia, however, has accrued respectively more experience in the implementation of the Convention due to its earlier membership than Azerbaijan<sup>3</sup>. For these reasons, I consider that Russia's legislative and practical experience in the implementation of the Convention would be an appropriate comparator with Azerbaijan. My purpose in comparing with Russia is to find out whether the difficulties experienced with the successful implementation is due to some specificities of Azerbaijan's legal system or it is common for the countries with Soviet legacy. In such a way it would be easier to come up with solutions already proved effective in the other country.

It is also of a great interest for me to detect whether the experienced problems are because of the first years of adaptation to the European standards and will fade away as the time goes by and relevant experience is accrued, or there is a risk of living with such a situation even longer. Thus Russia is again a good counterpart to get some idea and possible predictions for perspectives of the ECHR implementation in Azerbaijan. In case there are issues in Azerbaijan that are taking likely to the same situation with Russia and which should be concerned about, then it is the right time "to beat the drums" now and thinking about possible ways of their prevention.

To fulfill these objectives I will build my research on the following methodology: the analysis of the relevant national legislative acts, established administrative practice, country reports, case-law of both national courts of different instance and as well as the ECtHR judgments. Besides, comparative method will be used throughout the paper to compare all the relevant materials on the two countries. I will describe the current situation,

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<sup>2</sup> Charles Martin, *Comparative human rights jurisprudence in Azerbaijan: theory, practice and prospects*, vol. 14, No.2 Florida State University Journal of Transnational Law & Policy, 216 (Spring 2005), <[http://www.law.fsu.edu/journals/transnational/vol14\\_2/martin.pdf](http://www.law.fsu.edu/journals/transnational/vol14_2/martin.pdf)> (citing: FAKHRI AKPEROV GUDRAT, A guide to the Republic of Azerbaijan law research, at <http://www.llrx.com> (January 15, 2002) and Peter b.Maggs, The Civil Codes of Central Eurasia – A comparison (2003), at <http://home.law.uiuc.edu>).



then identify the problematic factors in successful implementation, discuss relevant suggestions concerning the ways how these problems might be resolved and in conclusion, evaluate whether the proposed solution is efficient.

The thesis will consist of five chapters. In the first chapter of the thesis I will analyze the legal status of the Convention as an international agreement in the hierarchy system of normative acts, as provided by the Constitution of the Republic of Azerbaijan and Russian Federation. The first chapter will be, to some extent, of an introductory character and will serve for setting out background information about both countries, so that readers can better understand the problems with the implementation.

Having examined the background on the situation, in the subsequent four chapters I will speak about the particular problems. In the second chapter I will review the issue on the importance of the education and awareness-raising campaigns on the ECHR as a background to other problems with its implementation. The chapter will examine the real work done with the purpose of raising the level of knowledge on the ECHR in the two countries. The third chapter deals with the harmonization of the domestic legislation in line with the ECHR law. The chapter will address the legislative incompliance, efforts taken to bring the national laws in line with the ECHR's principles. The fourth chapter will deal with the work done on the administrative level, namely reforms made in the police, prosecution, media regulation, in implementation of the Convention. The last - fifth chapter is on the judicial implementation of the ECHR; in this chapter I will look at the situation with the direct application of the ECHR and its precedents by the national courts. Conclusion will summarize all the issues dealt with in previous chapters, present the principle finding and suggest possible solutions for overcoming the problems identified.

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<sup>3</sup> Ibid. 224 (citing: Khanlar Hajiyeu, The interpretation of the provisions of Constitution and law by Constitutional Courts 73 (Rauf Guliyev ed., 2002).).

# CHAPTER 1 – STATUS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN AZERBAIJAN AND RUSSIA

Notwithstanding that they contain highest values and principles, universally recognized principles and international documents can only be effective if they are duly implemented and directly enforced on the domestic level. For these purposes they need to be incorporated into domestic law. In legal theory there are two conceptions on the incorporation of international documents into national legal system: monism and dualism. According to monist theory, national and international law are considered separate parts of a single system of rules. International provisions can be directly applied in domestic law since the time they are ratified by the state. There is no need for specific acts transforming them into national law. According to dualist theory, however, provisions of international documents can only be applied through ratification act or other kinds of acts enabling them to work within national law.<sup>4</sup>

The Convention itself does not explicitly determine the way of its incorporation. Therefore, this issue has been a topic of lengthy debates among legal scholars. Monism was supported by H. Kelsen, often called the method of incorporation and is applied in the Netherlands and France. Whereas dualism was supported by D. Anzilotti and C.H. Triepel, in other way called transformation and is implemented in Sweden, Norway and the UK<sup>5</sup>. It should be noted at the outset that, the approach taken by both Russia and Azerbaijan can be characterized as monist<sup>6</sup>.

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<sup>4</sup> PIETER VAN DIJK, GODEFRIDUS J.H. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS*, Kluwer Law International, 16-18 (1998).

<sup>5</sup> REIN MULLERSON, *ORDERING ANARCHY. INTERNATIONAL LAW IN INTERNATIONAL SOCIETY*. Martinus Nijhoff publishers. 182 (2000). Mullerson himself compares the difference between monism and dualism with a car's speedometer, telling that when a state takes dualist approach, its openness to the international law is in the zero, it is in reverse direction when a state adheres to the monist approach, "a state that is well integrated into the community of nations ...does not consider it necessary to transfer them one by one into domestic law and is ready to admit the primacy of international treaties over domestic acts".

<sup>6</sup> R.F. CONST. article 15 clause 4; AZE. CONST. art. 148. See also: Peter F. Krug, *Internalizing European Court of Human Rights Interpretations: Russia's Courts of General Jurisdiction and New Directions in Civil*

There is much discourse in the legal literature concerning the effectiveness of either approach in the implementation of international treaties. I will neither question the approach chosen by the two countries that my research is about, nor argue that the other approach if taken would have been more effective<sup>7</sup>. I would however agree with those authors' (among them E. Denza) opinion that taking a monist or dualist approach by a state regarding the incorporation of international documents doesn't itself say anything about the level of the implementation in those countries. The most important thing is the attitude of governments, legislative bodies and courts in fulfilling the obligations coming from the international law<sup>8</sup>. Social, political and legal internalization should be conducted in the domestic domain for the implementation of international human rights norms<sup>9</sup>. National factors, such as the "existence of national legal cultures favorable to international law and to human rights argumentations", as well as "the mobilizations of knowledgeable sub-national actors need be taken into account for successful incorporation of international jurisprudence' into national legal system<sup>10</sup>.

After transformation of international norms into the national law, there emerges the issue on the status of international documents in respect of the national law. The status given to international agreements in domestic legal systems predetermines the further extent of the former's impact upon the latter. The Convention neither determines the status to be given to it

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*Defamation Law* <<http://law.bepress.com/expresso/eps/1175>> (citing: M. Danilenko, *Implementation of International Law in CIS States: Theory and Practice*, 10 *European Journal of International Law* 51, 58 (1999), available at <http://www.ejil.org/journal/Vol10/No1/ab3.html>, at 52) and Charles Martin, *Comparative human rights jurisprudence in Azerbaijan: theory, practice and prospects*, vol. 14, No.2 *Florida State University Journal of Transnational Law & Policy*, 227 (Spring 2005), [http://www.law.fsu.edu/journals/transnational/vol14\\_2/martin.pdf](http://www.law.fsu.edu/journals/transnational/vol14_2/martin.pdf).

<sup>7</sup> REIN MULLERSON, CONSTITUTIONAL REFORM AND INTERNATIONAL LAW IN CENTRAL AND EASTERN EUROPE 6-7 (Rein Mullerson et al. eds.) (1998). R.Mullerson calls the monist and dualist theories to be "endless and sterile doctrinal debate" and state that legislators should rather national interests in conformity with the international ones, rather than spend their time on this debate.

<sup>8</sup>Eileen Denza, *The relationship between international law and national law*, in *INTERNATIONAL LAW* 423-51 (MALCOLM D. EVANS ed. 2006).

<sup>9</sup> REIN MULLESON, ORDERING ANARCHY. *INTERNATIONAL LAW IN INTERNATIONAL SOCIETY* 186.(2000).

<sup>10</sup> VIRGINIE GUIRAUDON, *INTERNATIONAL HUMAN RIGHTS NORMS AND THEIR INCORPORATION: THE PROTECTION OF ALIENS IN EUROPE* (European University Institute. EUI working papers EUF No. 98/4, 1998).

in the party-states. This issue is directly regulated by Articles 148(2); 151 of the Constitution of Azerbaijan and Article 15(4) of the Constitution of RF.

In this chapter I am going to address the status given to and the approach taken in case of conflict between the ECHR and national legislation of these two states. I will also deal with background historical, socio-political situation at the time of the ratification of the document and refer to some information from the CoE country reports and recommendations, ratification processes, reservations to the Convention by these states, etc. This will be conducted for the purpose of comparison with and getting better insight on the current situation with the ECHR's implementation in these countries, which will be looked in more detail in the following chapters.

### **1.1 Azerbaijan**

Azerbaijan ratified the ECHR on 15 April 2002. However, I must note that some attempts for bringing the national legislation in line with the Convention had begun before that time. It would be interesting to note that moratorium on the execution of death penalty was declared as early as 1993 in Azerbaijan. In 1998 the Milli Mejlis (the Parliament) of the Republic of Azerbaijan adopted a resolution on the abolishment of death penalty on the basis of the legislative initiative of the President. Later in 1998 the censorship on media was abolished (though formally) in Azerbaijan, which also can be characterized as a step towards coming closer to European standards. Now I will describe in a chronological order a brief history of events leading Azerbaijan to the ratification of the Convention.

On 13 July 1996 the Azerbaijani President addressed a letter to the Secretary General of the CoE, expressing Azerbaijan's intention to become a member of the organization and at the same time its readiness to sign and ratify the Convention. Before becoming a full member of the CoE, Azerbaijan's parliament delegation was first granted

Special Guest Status within the PACE on 28 June 1996.<sup>11</sup> The aim of the established Special Guest Status was to build closer relationships between parliaments of Central and Eastern European countries<sup>12</sup>. During this period of inter-parliamentary cooperation a number of Azerbaijani draft legislative acts on various human rights issues were sent to be examined by legal experts of the CoE. This cooperation accelerated the adaptation process of Azerbaijani legislature to European standards.<sup>13</sup>

The PACE nominated two eminent lawyers in 1996 and two reporters in 1998, from among the members of Political Affairs Committee and the Committee on Legal Affairs and Human Rights, to examine the conformity with the Convention's requirements of Azerbaijan's legal system<sup>14</sup>. As a result of their examination of Azerbaijani legislative system experts of the PACE expressed their concerns about serious shortfalls with the CoE standards. From the report on Azerbaijan's accession to membership, prepared by the Political Committee Reporter, we can see the situation with human rights at the time of the ratification. The principal problems were particularly with the judicial system, institute of Public Prosecutor and legal profession. Moreover, overall socio-political situation in Azerbaijan experienced a number of problems - Nagorno Karabakh conflict and institutions rooted in Soviet heritage.

In 2000, the PACE issued its Opinion (222) on Azerbaijan's application for the CoE membership. In Paragraph 14 of this document, there were listed commitments required to be fulfilled by Azerbaijan as a condition to the membership. The list of the CoE Conventions to which Azerbaijan was to join in a short period comprised a separate group of obligations. The

<sup>11</sup> PACE OPINION. NO. 222, (2000) <<http://assembly.coe.int>>.

<sup>12</sup> Andrew Drzemczewski, *The European Human Rights Convention: a new Court of Human Rights in Strasbourg as of November 1, 1998*, WASHINGTON AND LEE L. REV. (1998).

<sup>13</sup> ATAKHAN ABILOV, AVROPA INSAN HUQUQLARY MEHKEMESI VE AZERBAIJAN [ECTHR AND AZERBAIJAN] (2002).

<sup>14</sup> PACE REP. OF POL. AFF-S COM-TEE, , DOC. NO. 8748 (2000). <<http://assembly.coe.int>>.

European Convention on Human Rights and its 1, 4, 6 and 7<sup>th</sup> Protocols were to be signed at the time of accession and ratified within a year.<sup>15</sup>

The Convention was signed by the President of the Republic of Azerbaijan at the time of Azerbaijan's accession to the membership of the CoE - on 25 January 2001<sup>16</sup> in Strasbourg and was ratified by the Milli Mejlis of the Republic of Azerbaijan on 25 December 2001. The law on Ratification was published in the official body of Milli Mejlis, "Azerbaijan" newspaper on 10 March 2002, after having been signed by the head of the state. The document on the ratification of the Convention by the Republic of Azerbaijan was submitted to the General Secretary of the CoE on 15 April 2002. Since that date citizens of the Republic of Azerbaijan obtained the right to appeal directly to the ECtHR from the acts of state authorities violating their Convention rights.

Three reservations, on articles 5, 6 and 10.1, and a declaration, stating Azerbaijan's inability to apply the Convention in its territories occupied by the Republic of Armenia until they are set free, were made. Azerbaijani government informed that the requirements of Article 5 and 6 of the Convention would not affect the provisions of the national law on "Disciplinary Regulations of Armed Forces", which gives authority to high officials of Armed Forces to issue extrajudicial disciplinary penalties involving the deprivation of liberty. The reservation regarding Article 10.1 was that "the establishment of mass media by foreign legal entities and citizens in the territory of the Republic of Azerbaijan shall be regulated by interstate treaties concluded by the Republic of Azerbaijan".

"Reservation means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it

<sup>15</sup> PACE OPINION. NO. 222, (2000) <<http://assembly.coe.int>>.

<sup>16</sup> Charles Martin, *Comparative human rights jurisprudence in Azerbaijan: theory, practice and prospects*, vol. 14, No.2 Florida State University Journal of Transnational Law & Policy, 227 (Spring 2005), <[http://www.law.fsu.edu/journals/transnational/vol14\\_2/martin.pdf](http://www.law.fsu.edu/journals/transnational/vol14_2/martin.pdf)> (citing: Resolution 1305 (2002): Honoring of Obligations and Commitments by Azerbaijan, Eur.Parl.Ass.Deb.31st Sitting (Sept.26, 2002), available at <http://assembly.coe.int> ).

purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”<sup>17</sup>. Reservations are made at the time of the ratification when a state believes that it will not be able to comply with certain requirements of the treaty. Reservations are made to international human rights treaties more often than to other international treaties<sup>18</sup>.

When Azerbaijan ratified the ECHR, it made reservations regarding only three abovementioned articles of the document, while its domestic situation showed incompliance with more ECHR articles. Unfortunately, the discussions, taken part at the Milli Mejlis session, on the ratification of the ECHR were not made open for general public; therefore I cannot provide here the exact reasons behind the reservations made by Azerbaijani government<sup>19</sup>. One of them - one made to Article 5 is the most common for the other states similar reservations as well, which concerns the application of extrajudicial sanctions in the military.

To a natural question that may arise why Azerbaijan did not make more reservations, I would answer that, first of all, making more reservations to the ECHR would have rendered Azerbaijan’s ratification meaningless. Ratification of the Convention means that notwithstanding all the inadequacies at the domestic level, the government commits to put all

<sup>17</sup> Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Treaty Series, Vol. No. 1155, 331.

<sup>18</sup> Eric Neumayer, *Qualified ratification: Explaining reservations to international human rights treaties*, (July, 2006)

<<http://www.lse.ac.uk/collections/geographyAndEnvironment/whosWho/profiles/neumayer/pdf/Humanrightsreservationsarticle.pdf>>..

<sup>19</sup> There are 2 points of view in the literature regarding the reservations’ legitimacy. According to first, liberal countries make more reservations because they are taking the human rights more seriously. This approach comes from the perspective, according to which, respect to human rights by a state is not the result of an international human rights treaty, but rather self-interest of that particular state. According to this perspective, liberal democracies make more reservations, because they don’t want their sovereignty to be intruded. Second approach states that reservations are danger to the whole protection of human rights and their application must be avoided. According to this second perspective, respect to human rights by a state is the result of the pressure by other states. So, therefore reservations are very dangerous for the respect to human rights. The reasoning of this group of lawyers is that, human rights are universal and reservations can devalue them letting states avoid any obligations on respecting human rights. So, for this group of lawyers, liberal democracies make fewer reservations than other states.

possible efforts to provide protection of all rights contained therein and be let in to the CoE membership.

I will now address the ECHR's status in the domestic legislation as it is determined by the Constitution. I deem necessary to address this issue, because it has a practical value besides the theoretical. Improper understanding by the national legal professionals of the ECHR's status is one of the reasons of its misapplication or absence of the application at all. The status of international treaties in the hierarchy of national acts is given in separate norms of the separate sections of the national Constitution dated 1995. Respective constitutional provisions are sometimes misinterpreted, which further results in their improper applications.

Currently, law enforcers prefer referring to national statutes than the ECHR. Therefore, a well understanding by legal professionals that the Convention stands above the national ordinary statutes would facilitate the document's application at the domestic level. A well-established practice of the ECHR's direct application by national courts would facilitate the adaptation process to the ECHR standards, which would happen faster than both parliamentary amendments and even rulings of the Constitutional Court<sup>20</sup> in case of any discrepancies between two legal system. Thus by relying on the ECHR, the ordinary courts can set aside and do not apply national conflicting provisions, although they cannot abolish them.

International norms on human rights, thus also the ECHR, are given the highest status in the hierarchy of normative acts of Azerbaijan, it is also called a quasi-constitutional status<sup>21</sup>. Four articles (12, 71(3), 148(2) and 151) of Azerbaijani Constitution deal with the status of the Convention. Article 148.2 declares that international agreements concluded for

<sup>20</sup>By saying the process of adaptation would be much faster if ordinary courts assist, I mean that people use the Constitutional Court as the last instance, after having exhausted all the national instances.

<sup>21</sup> Charles Martin, *Comparative human rights jurisprudence in Azerbaijan: theory, practice and prospects*, vol. 14, No.2 Florida State University Journal of Transnational Law & Policy, 222 (Spring 2005), <[http://www.law.fsu.edu/journals/transnational/vol14\\_2/martin.pdf](http://www.law.fsu.edu/journals/transnational/vol14_2/martin.pdf)>, (citing: Holly Dawn Jarmul, Effects of Decisions of regional human rights tribunals on national courts, in international law decisions in national courts



and on behalf of the Republic of Azerbaijan comprise integral part of the domestic legislative system. Article 151 provides a concrete solution in case of a conflict between provisions of domestic and international legislation. It establishes that provisions of international character have a higher legal authority over the domestic law, but they do not prevail over the Constitution and acts adopted by referendum.

Thus the ECHR stands higher than the ordinary statutes and by-laws, but below referendum acts and the Constitution. Some opinions in the legal literature consider such a status (when the ECHR is below the national constitution) to be catastrophic for international treaty, because its provisions can become void by any conflicting constitutional norm. In other words, it conflicts with the principle of *pacta sunt servanda*, and contradicts with Article 27 of the Vienna Convention 1969, according to which states are not allowed to rely on the provisions of their national legislation as an excuse from their international obligations.<sup>22</sup>

In the Opinion on Azerbaijan's Constitution's conformity, the Venice Commission<sup>23</sup> Reporters (the CoE European Commission for Democracy through Law), however, stated that there would not be such a problem with the Convention's status in Azerbaijan. According to them, even if the Constitution of the country does not explicitly provide direct effect to the Convention, but still the status of the Convention granted under the Constitution makes the document directly effective and equal to the state Constitution. It is because, Article 12 can be interpreted in such a way that international agreements on human rights are even on a higher level than the Constitution of Azerbaijan, because

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247 (Thomas M. Franck & Gregory H. Fox eds., 1996). at 263-81, Thomas Buergenthal Modern Constitutions and Human Rights treaties, 36 Colum. J. Transnat'l L. 211, 214 (1997) at 217 )

<sup>22</sup> Ibid, 221, (citing: Hugh Poulton, Article 19: Global Campaign for Free Expression, Azerbaijan: Press Freedom or Personal Fiefdom? Para. 4.1 (Jan.2001), at <http://www.article19.org> (citing Vienna Convention on the Law of Treaties, Article 26, 1969).).

<sup>23</sup> Eur. Comm'n for Democracy through Law, was established in 1990 within the frame of the CoE, advisory body on constitutional matters, comprised of experts from member states, main areas are: constitutional assistance, elections and referendums, co-operation with constitutional courts and transnational studies, reports and seminars, <<http://www.venice.coe.int>>

according to this article, in case of discrepancy between two types of documents, norms of the Constitution should be interpreted in the light of respective international agreements.<sup>24</sup> Therefore, as a court having a power for interpreting the Constitution, the Constitutional Court can play an important role in the ECHR's implementation. Its rulings are binding for all authorities of the AR<sup>25</sup> and absolute and cannot be repealed, amended or otherwise interpreted by anybody or person<sup>26</sup>. They must be executed without any condition and state officials not executing them shall be brought liable according to law. National court decisions, declared incompatible with the Constitution and laws, by the CC, shall not be executed and be sent back for reconsideration<sup>27</sup>.

This argument can be further strengthened by referring to the first paragraph of Article 12 which declares that the protection of human rights and freedoms is the highest objective of the state. In 2001 the Venice Commission also assured that the Convention's provisions would have direct effect before national authorities upon their ratification by Azerbaijani government<sup>28</sup>.

<sup>24</sup> Charles Martin, *Comparative human rights jurisprudence in Azerbaijan: theory, practice and prospects*, vol. 14, No.2 Florida State University Journal of Transnational Law & Policy, 222 (Spring 2005), <[http://www.law.fsu.edu/journals/transnational/vol14\\_2/martin.pdf](http://www.law.fsu.edu/journals/transnational/vol14_2/martin.pdf)>, (citing: Opinion on the Draft Constitutional Law of the Implementation of Human Rights and Freedoms of Azerbaijan. Euro. Comm'n for Democracy through Law (Venice Comm'n), CDL-INF (2001) 27, Para. 14 [hereinafter Opinion on the Draft Constitution], at <http://venice.coe.int> (Dec.21, 2001). (citing: Law on the Constitutional Court of Azerbaijan, Eur.Comm'n for Democracy through Law (Venice Comm'n), CDL (2004) 005, available at <http://venice.coe.int> (Feb. 9, 2004).). (citing: Constitution of the Republic of Azerbaijan with modifications, Eur.Comm'n for Democracy through Law (Venice Comm'n), CDL (2003) 48, available at <http://venice.coe.int> (July 10, 2003).).

<sup>25</sup> AR CONST. art. 130, § 9.

<sup>26</sup> Law on the Constitutional Court, art.63.4 (2003).

<sup>27</sup> Law on the Constitutional Court, art.66 (2003).

<sup>28</sup> Besides analysis and comments on compatibility of national legislation with the Convention, Venice Commission also proposed Azerbaijani parliament to adopt a number of new laws and to amend the existing legislation, in order to accommodate shortfalls with the European requirements. Particularly it was proposed to adopt laws on the Constitutional Court, Ombudsman, laws on elections and the implementation of the Convention. The major amendments which were proposed to be made to the Constitution were on making individual application to the Constitutional Court possible. Besides the individual application, referral by ordinary courts and Ombudsman to the Constitutional Court were also required to be included into the new legislation and respective amendments to the state Constitution were approved by means of referendum on August 24, 2002.

## 1.2 Russia

Like it was in Azerbaijan, the socio-political situation in Russia just before the ratification of the Convention was also problematic. They were more or less the same problems that were in place in Azerbaijan. More concretely, after the fall of the former Soviet Union, there was an increased level of criminality in the society<sup>29</sup>.

Other problems in Russia at that time were the war waged in Chechnya<sup>30</sup>, which was observed with a great number of human rights' violations, executions, the commitment on which abolition has not been fulfilled yet differently from Azerbaijan and Prosecutor's Office, which had more power than defense and the court.<sup>31</sup> Non-compliance with the Convention of the national legislation, Prosecutor's vast authorities in sanctioning pre-trial detentions, residence permit system remained most problematic areas even after the ratification. Prosecutor's Office, especially concerned the CoE, because this body has authority both for the protection of state interests and at the same time the rights of defendants during investigation, two powers vesting both of which in the same body is incompatible under the Convention<sup>32</sup>. These shortcomings were for several times criticized in the CoE Reports on Russia and the Russian authorities were urged to address those issues under the Convention's principles<sup>33</sup>.

<sup>29</sup> PACE REP. OF THE POL. AFF. COM.-TEE, , DOC.No. 7443 (1996) VOL. NO. 17, NO.3-6, HRLJ, 190. Just in order to describe the human rights situation in the country, I think it is sufficient to mention the decree of the Russian President, which was given with the purpose of combating this criminal trend. This decree made detention of suspected persons for a term of 30 days possible without requirement to bring them before the court. This was contrary to the Constitution of the Russian Federation and the Criminal Procedural Code, but nevertheless was in force.

<sup>30</sup> Ibid. 188

<sup>31</sup> ROBERT BLACKBURN & DR JORG POLAKIEWICZ EDS., FUNDAMENTAL RIGHTS IN EUROPE. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES, 1950-2000, Oxford University Press 731-735 (2001); see also: Bill Bowring, *Russia's accession to the Council of Europe and human rights: four years on*, 4, E.H.R.L.R., 362-67, (2000).

<sup>32</sup> I.Petrukhin, *Federalniy zakon o ratifikachii Konvenchii o Zashite Prav Cheloveka i Osnovnikh Svobod i Protocolov k ney* [Federal Law on Ratification of the ECHR and its Protocols], cmt. 7, Rossiyskaya Yustichiya, 1998, 2-4 (1998).

<sup>33</sup> Mark Janis, *Russia and the 'Legality' of Strasbourg Law*, 8, No.1 European Journal of International Law, 93-100, (1997). < <http://www.ejil.org/journal/Vol8/No1/> >. See also: PACE REP. OF THE POL. AFF. COM.-TEE, , DOC.No. 7443 (1996) VOL. NO. 17, NO.3-6, HRLJ, 190. There were remarkable objections to the Russia's accession to the ECHR by the other Member States, because Russia was a descendant of the former Soviet

As a pre-condition of a continuous membership to the CoE, a number of strict requirements were imposed on Russia. They were 25 and were listed in the CoE Resolution as of 25 January 1996 concerning the application of the Russian Federation for membership<sup>34</sup>. Among them: to ratify the Convention and its Protocols within a year, to recognize the right of individual application and compulsory jurisdiction of the ECtHR, to declare a moratorium in the execution of capital punishment, to sign within a year Protocol 6 on the abolition of death penalty and to ratify it within three years<sup>35</sup>.

The European Convention was ratified on 20 February 1998 by the Duma (I Chamber of Russian parliament) and on 13 March 1998 by the Federation Council (II Chamber). After that, the President signed the agreement and thus the Convention entered into force within the country. On international level, it entered into force when the instrument of ratification was deposited at the CoE General Secretary on 5 May 1998, four years earlier than Azerbaijan. By the ratification of the Convention, Russia recognized the compulsory jurisdiction of the Commission and the ECtHR and a right of individual petition. It was decided that only violations which would take place after the ratification of the Convention by the state could be complained to the ECtHR, the main reason of which was to avoid the

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Union, which played a leading role in communist ideology. It was argued that membership of Russia, a country with poor records of human rights, would create a threat to the Convention's standards, because it would disregard and not comply with the obligations therein.

<sup>34</sup> I. Petrukhin, *Federalnyi zakon o ratifikatsii Konvencii o Zashite Prav Cheloveka i Osnovnikh Svobod i Protokolov k ney* [Federal Law on Ratification of the ECHR and its Protocols], cmt. 7, Rossiyskaya Yustitsiya, 1998, 2-4 (1998).

<sup>35</sup> Bill Bowring, *Russia's accession to the Council of Europe and human rights: four years on*, 4, E.H.R.L.R., 362-67, (2000). In legal literature there are opinions stating that these requirements to be fulfilled by Russia, within such a short period as one year, were very strict and unfair of the CoE, if to take into account Russian communist ideological legacy, the country's size and number of its population. Besides that, state authorities and judges had to familiarize themselves with the Convention and its implementation mechanisms before taking fully enforcement obligation. As it was stated in the Opinion on Russia prepared by the CoE committees and also from the discussions held at parliament sessions on the ratification of the Convention, it can be noticed that indeed there was not enough information about the Convention's substance and purposes among Russian parliamentarians at that time. See also: THE EXECUTION OF STRASBOURG AND GENEVA HUMAN RIGHTS DECISIONS IN THE NATIONAL LEGAL ORDER (Tom Barkhuysen et al. eds. 1999), Kluwer Law International, 123-135. According to another group of opinion, these requirements cannot be taken as the CoE's inferior attitude towards Russia. Rather, it must be explained in such a way that the CoE was already aware of most common problems in the sphere of implementation in other member states and had become more experienced by that time, therefore found it necessary to put stricter requirements on Russia.

huge load of complaints that might be brought to the ECtHR on human rights violations committed during repressions.<sup>36</sup>

Upon ratification of the Convention and its Protocols, however, Russia did not ratify Protocol 6 on abolition of capital punishment.<sup>37</sup> The obligation about its ratification within three years was also not fulfilled. The draft law on abolition of the death penalty, submitted to the Duma by the President, was rejected each time in 1997, 1998 and 1999 respectively. As a response, the President declared an unofficial moratorium on August 2, 1996. Additionally, the President's Commission on Clemency was established, where death sentences might be substituted with a life imprisonment.

Russia made two reservations on the Convention; both of them were about its inability at that moment to adapt its legislation to the requirements of the Convention. The reservations were particularly on Articles 5(3) and 5(4)<sup>38</sup>. The principal incompatibilities of the domestic legislation with the Convention, which can be classified into two groups, were the following: the first group dealt with the provisions of the Criminal Procedural Code: the institute of Prosecutor, its power to sanction arrests, broader list of legal grounds for sanctioning arrest than the one given in the Convention, such as possibility to arrest a suspected person with a ground that, if released, he/she can "obstruct criminal establishment of a crime" by eliminating evidence, etc., poor conditions in detention places, length of pre-trial detentions and lack of the practice to bring arrested persons immediately before the court; and the second group, which was about the law on the status of military servants: possibility of disciplinary arrest of military servants, which could not be appealed to the court<sup>39</sup>.

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<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> I.Petrukhin, *Federalniy zakon o ratifikachii Konvenchii o Zashite Prav Cheloveka i Osnovnikh Svobod i Protokolov k ney* [Federal Law on Ratification of the ECHR and its Protocols], cmt. 7, Rossiyskaya Yustichiya, 1998, 2-4 (1998). See also: PACE REP. OF THE POL. AFF. COM.-TEE, , DOC.No. 7443 (1996) VOL. No. 17, No.3-6, HRLJ, 190.

<sup>39</sup> Whereas the Convention recognizes only two grounds for the arrest and detention of a person: the necessity of prevention of crimes or preventing the suspected person to flee after having committed the crime. See: I.Petrukhin, *Federalniy zakon o ratifikachii Konvenchii o Zashite Prav Cheloveka i Osnovnikh Svobod i*

The status of the Convention in Russia's legal system is the same as it is in Azerbaijan. Relationships between domestic and international norms are determined by the 1993 Constitution and the Federal law "On the international treaties of the Russian Federation" as of July 15, 1995<sup>40</sup>. Article 15.4 of the Russian Constitution declares the international agreements, to which the state is a party, a part of the national legal system<sup>41</sup>. The second part of Article 15.4 of the Constitution of the Russian Federation, speaks about the priority of international agreements over national legislation, as it is done in Article 151 of Azerbaijani Constitution<sup>42</sup>.

Article 17 of the Russian Constitution provides that human rights and freedoms are fully recognized and protected by the Russian Federation in accordance with the *universally recognized international norms and principles*. From here it can be deduced that the Convention have a status equal to the state Constitution, as the human rights provisions of the latter shall be interpreted on the basis of the Convention directly invoked by individuals before domestic courts.<sup>43</sup> Article 22 of the Federal Law "On the international treaties of the Russian Federation" provides that if provisions of international agreements require an

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*Protokolov k ney [Federal Law on Ratification of the ECHR and its Protocols]*, cmt. 7, Rossiyskaya Yustichiya, 1998, 2-4 (1998). See also: PACE REP. OF THE POL. AFF. COM.-TEE, , DOC.No. 7443 (1996) VOL. NO. 17, No.3-6, HRLJ, 188-190.

40 Federal Law On the International Treaties (1995) <<http://www.garant.ru>>.

41 LIDIYA B. ALEXEIEVA, ET AL., MEJDUNARODNIE NORMI O PRAVAKH CHELOVEKA I PRIMENENIE IKH SUDAMI ROSSIYSKOI FEDERATSII [INTERNATIONAL NORMS ON HUMAN RIGHTS AND THEIR IMPLEMENTATION BY THE COURTS OF RUSSIAN FEDERATION], 8-9 (1996). According to the interpretation of this provision given in the book by Alexeieva and et al., not all norms of international treaties can be considered to be universally recognized, notwithstanding the number of the member states which are the party to these treaties. As an example, the International Covenant on Economic, Social and Cultural rights is referred. The authors argue that notwithstanding most of the states had ratified this international document, but still there are many states which declared their inability to give full effect to the Covenant in their countries. Therefore, the authors interpret the provision: "universally recognized principles" in Article 15: as obligatory norms of public international law that must be obeyed by every state. The Constitution of the Republic of Azerbaijan does not explicitly refer to this kind of universally recognized norms and principles and only speaks about the status of international agreements to which Azerbaijan is a party.

42 PACE REP. OF THE POL. AFF. COM.-TEE, , DOC.No. 7443 (1996) VOL. NO. 17, No.3-6, HRLJ, 189.

43 THE EXECUTION OF STRASBOURG AND GENEVA HUMAN RIGHTS DECISIONS IN THE NATIONAL LEGAL ORDER (Tom Barkhuysen et al. eds. 1999), Kluwer Law International, 123-135.

amendment to the Constitution, these agreements can only be signed after such an amendment has been made.<sup>44</sup>

Here I think it is also interesting to mention the issue, raised by Alexeieva and et al., according to which, Article 15 of the Constitution does not include the direct requirement that laws of the Russian Federation must not contradict international agreements, whereas there is such a requirement about federal laws' compatibility with the Constitution (Article 15.1). From here they come to the conclusion that the issue of conflict between international and national law must be solved by ordinary courts themselves based on Article 15.4. In case of a collision between international agreements and federal laws, ordinary courts in Russia can simply refuse to apply domestic laws in favor of the former, without referring the issue to the Constitutional Court.<sup>45</sup>

Finally, I would like to mention Article 46.3 of Russian Constitution which contains a provision which grants individuals a right to appeal to international tribunals from decisions of national institutions (Article 46.3). According to the interpretation given to this provision by the Russian Constitutional Court, decisions of international tribunals over national courts' judgments must be considered as newly opened circumstances and serve as a ground for re-opening cases before the national courts<sup>46</sup>. This article and its interpretation are very important for the execution of the ECtHR decisions in the country. The Azerbaijani Constitution does not contain such a provision.

<sup>44</sup> Federal Law on the International Treaties art. 22 (1995) <<http://www.garant.ru>>.

<sup>45</sup> LIDIYA B. ALEXEIEVA, ET AL., MEJDUNARODNIE NORMI O PRAVAKH CHELOVEKA I PRIMENENIE IKH SUDAMI ROSSIYSKOI FEDERATSII [INTERNATIONAL NORMS ON HUMAN RIGHTS AND THEIR IMPLEMENTATION BY THE COURTS OF RUSSIAN FEDERATION], 59 (1996).

<sup>46</sup> R.F. CONST. art. 46, § 1.3. (cmt.V.D.Karpovich) <[http://constitution.garant.ru/DOC\\_10003000\\_sub\\_para\\_N\\_2000.htm](http://constitution.garant.ru/DOC_10003000_sub_para_N_2000.htm)>, see also: COM. OF EXPERTS FOR THE IMPROV.-T OF PROCED.-ES FOR THE PROT.-ON OF HR DRAFT SURVEY, CoE, DH-PR (1998)001, (1998), <[http://www.coe.int/t/e/human\\_rights/cddh/3.\\_committees/](http://www.coe.int/t/e/human_rights/cddh/3._committees/)> citing: *Kulnev et al.*

### ***1.3 Conclusion to the Chapter***

In this Chapter we have looked at the formal status of the Convention under both Azerbaijani and Russian law. We saw that in both countries the Convention's status is higher than the domestic ordinary statutes and in case of a conflict between the two; the former is always given higher priority. During their application, the constitutional provisions on human rights and freedoms should be interpreted on the basis of the ECHR.

I have also given some background information which allows us to have an idea about the human rights legislation and practice, which was, to some extent, similar in the two countries, at the time of the ECHR's ratification. This information given in the chapter will further assist us in the next chapters in conducting our comparative analysis and evaluation of the situation in the Convention's implementation, methods chosen to overcome the problems and the achieved level in both countries five years after the ratification.



## **CHAPTER 2 - AWARENESS AND EDUCATION ON THE CONVENTION AS A BACKGROUND TO OTHER PROBLEMS WITH THE IMPLEMENTATION**

International treaties to which a country joins should be made publicly available so that citizens can get acquainted with its principles<sup>47</sup>. The availability of an international treaty includes its existence in the national or most spoken languages of the country, publication in sufficient number and proportional and successful dissemination both among general population and national authorities, particularly the courts, police authorities, prison administrations or social authorities, non-state entities such as bar associations, professional associations, security forces, personnel of hospitals and immigration services etc.<sup>48</sup>.

This chapter will deal with the importance of the awareness and education programs in effective implementation of the Convention at the domestic level. I will look at the practical measures taken in the sphere of raising the level of awareness and education on the ECHR, in Azerbaijan and Russia. As 5 years has passed since Azerbaijan ratified the Convention, for the proportionality of my comparison, I will take the indicators of the first five years after the ratification by Russia (1998-2003) as well.

### **2.1 Azerbaijan**

#### **2.1.1 Translation, publication and dissemination of the ECHR text and its case-law**

I would split my analysis on the work done in this sphere in Azerbaijan into two places: first, the legal-normative basis established for such activities in the country and, the second, the real implementation of these legal commitments and their effectiveness. It is for

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<sup>47</sup> CHRISTIAN TOMUSCHAT, HUMAN RIGHTS. BETWEEN IDEALISM AND REALISM..(2003).

the reason that, as we will see in the following pages, there is a big gap between the adoption of various measures and their effective realization.

First of all, the Basic Law of the country, the Constitution provides for everyone's right to access to information, including legal information<sup>49</sup>. Article 25 of the Law "On signing, execution and termination of international treaties of AR" dated 13 June 1995 contains a direct provision on official publication of the international treaties, to which Azerbaijan becomes a party, upon the presentation of the Ministry of Foreign Affairs. The second part of the Article states that: "if the authenticated copies of such international treaty are only in foreign languages, then the publication of the original text should be accompanied by its translation into Azerbaijani." The Presidential Order "On the approval of the National Action Plan about the protection of human rights in the AR" dated 28 December 2006 (hereinafter National Action Plan), however, assigned this one of the most necessary and practical tasks – systematic translation of the ECtHR's precedent law into Azerbaijani - to a particular body, the Government Agent<sup>50</sup>.

It is regretted to note that, although the Governmental Agent was charged with the task of translation of precedents, its activity is not visible in practice, i.e. there have not been any publications by the office of the Government Agent. During my meetings with the representatives of practicing legal professionals in the country, they did refer to neither any translations nor publications done by the office of the Governmental Agent. The most widely

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<sup>48</sup> *Recommendation of the Comm. of Ministers*, Ministers' Deputies 822nd meeting, Rec(2002)13 (2002) On the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights

<sup>49</sup> Konstitusiyaya art. 50 (AR).

<sup>50</sup> NATIONAL ACTION PLAN art. 43 (Az.). Governmental Agent represents the state party before the ECtHR, observes and facilitates where possible the execution of judgments in the country and identifies the issues of legislative compatibility with the ECHR.

used materials in the national language are the following: 1. two compilations, of the ECtHR judgments published by the CoE Information Center in 2004<sup>51</sup>;

2. Translated excerpts of some ECtHR judgments on freedom of association can also be found in the book Establishment of civil society: practical aspects of the freedom of association: source book, which was translated into Azerbaijani by the Legal Education Society (LES), national legal NGO and with the assistance of PILI and OSI-AF in 2004<sup>52</sup>;

3. A number of compilations of the selected ECtHR judgments concerning different articles published by LES in 2005;

4. Currently, ABA CEELI Legal Advocacy Center (LAC) translates the ECtHR judgments issued against Azerbaijan;

5. Besides the ECtHR judgments, there are also the following electronically available materials in Azerbaijani: Convention and Protocols No. 1, 4, 6 and 7, ECHR Glossary for legal professionals, and a handbook on “The right to a fair trial”<sup>53</sup>.

As to other measures for the public enlightenment on the ECHR, I would like to mention, the Order of the President of AR “On approval of the State Program on the protection of human rights”, which was issued before the ratification of the ECHR by Azerbaijan. In this order, the President charged the Presidential Administration, the Ministry of Media and Information and the State Company for Tele-Radio Broadcasting with the obligation to disseminate the ECHR provisions among the population via mass media<sup>54</sup>. Furthermore, the Order of the President of the AR “On dissemination of information about the CoE and relationship between AR and the CoE” dated 18 March 2000, created a

<sup>51</sup> First of them contains 15 selected judgments concerning Articles 2, 3, 5 and 6, the second compilation is comprised of 13 judgments on Articles 8, 9, 10, 11, 50 and Article 1 of Protocol 1 (however, the quality of translation is assessed as inappropriate by the national legal professionals<sup>51</sup>)

<sup>52</sup> In the book one can find translations of excerpts from 17 cases concerning Articles 10 and 11, which are not contained in the abovementioned compilations published by the CoE Information Center.

<sup>53</sup> *Materials for use in human rights awareness and training activities*, <<http://www.humanrights.coe.int/aware/GB/publi/publiresla.asp?F=1>>

<sup>54</sup> Presidential Order “On approval of the State Program on the protection of human rights” art. 36 (1998), (Azerbaijan).

normative basis for the establishment of the CoE Information Center. Such measures adopted by the head of the state should be considered as a strong political will in raising the awareness level of the population.

### **2.1.2 Legal education**

The legal education in the country, in general, still maintains the style and methodology used in the Soviet period<sup>55</sup>. Legal education in the country is mostly theoretical, the only opportunity to get into some practical work, is legal clinics. The latter also lack due effectiveness, because of the few number of cases submitted to them. Therefore legal education should be made more practice oriented, in order to develop law-students' critical reasoning skills and ability to work with case-law.

As to the subjects on the ECHR, there are no specialized courses dealing with the Convention and its case-law in the curriculum of the legal departments of the national universities. In the best case, two hours of an 18-hour general Human Rights course is allocated to the ECHR<sup>56</sup>. Neither is there any master program on the specialization of human rights in the national universities, according to the list approved by the Government<sup>57</sup>. Another problem is that there is almost no sufficient respective literature on the ECHR law in the national language.

Some positive steps have already been made at the normative level. The National Action Plan for Human Rights emphasizes the importance of the human rights education at secondary and high schools and charges the Cabinet of Ministers and the Ministry of Education to improve educational programs for these purposes during 2007-2008<sup>58</sup>. The

<sup>55</sup> ABA CEELI, INDEX OF THE LEGAL PROFESSION REFORM IN AZERBAIJAN 19 (2005).

<sup>56</sup> As an alumna of the Law department of Baku State University (considered to be the best in the country for the level of education), I can say that during 4 year-study (1999-2003) towards bachelor degree, we did not have any single subject on human rights, not speaking about ECHR law. There was only one general Human Rights course (18- hour course) within the Master of Law program (2003-2005), 2 hours of which was dedicated to the ECHR.

<sup>57</sup> The Cabinet of Ministers Resolution "On the list of Master programs" (1997) (Aze).

<sup>58</sup> The Presidential Order "On the approval of the National Action Plan about the protection of human rights in the AR" art. 33 (2006) (Aze).

Cabinet of Ministers of AR issued a Resolution “On approval of the Conception and Strategy of the consecutive pedagogical education and training of trainers in the AR” on June 25, 2007. It is regretted to note, however, that neither respective provisions of the National Action Plan, nor the act of the Cabinet of Ministers have any real effect in practice. The only considerable step in implementation of the National Action Plan so far is that, the Ombudsman’s Office has already begun coordinating the activity of six legal clinics functioning within the national universities.

More substantive work has been done within the project on legal education reform and training of trainers by Interights and ABA CEELI.

### **2.1.3 The ECHR in professional training**

Currently, the Ministry of Justice conducts training courses for national judges, except judges of the Supreme Court, Nakhchivan Autonomous Republic (NAR) Supreme Court and courts of appeal<sup>59</sup>. Excluding the training of the judges of the higher instances – SC and Appeal court judges from the centralized training program should not be considered efficient in practice, though. To the contrary, reforms should begin from the higher instance, because they review the lower courts’ decisions at later stages.

The judges of the Supreme Court independently organize the studying of the ECtHR precedents. According to the information given by the President of the Supreme Court, similar methodic assistance was rendered to the Supreme Court of the NAR and a number of seminars were conducted for the judges of regional courts with the purpose of facilitation of the studying the ECtHR principles. 55 candidates to the judiciary positions were sent to different training courses abroad, organized by the experts of the CoE, for raising their qualifications and knowledge.

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<sup>59</sup> Law on Courts and Judges art. 86 (1997) (Aze). The inclusion of the judges of the Courts of Appeal is also planned in the near future.

Furthermore, it is planned to establish Academy of Justice within the Ministry of Justice. The PACE, has however expressed its concern that the Academy should be placed under the Judicial Legal Council in order to guarantee the independence of this body from the executive<sup>60</sup>. However, I think that placing the Academy under the Judicial Legal Council still will not address those concerns. Notwithstanding that according to the law, the Judicial Legal Council is a self-regulatory body of the national judiciary and in spite of recommendations given by the Venetian Committee, the Judicial-Legal Council was established and operates within the Ministry of Justice; 8 out of 15 members are appointed by the executive; the Minister of Justice at the same time is the president of the Judicial Legal Council. Thus I think that the placement of the Academy of Justice not under the Ministry of Justice, but under Judicial-Legal Council will not make much difference from independence perspective.

At the same time, the Judicial-Legal Council also organizes examinations to vacant judiciary positions and training courses for the candidates who successfully have passed the exams.

As to the training of prosecutors, the CoE and European Commission's "South Caucasus" Joint Program has conducted seminars on the ECHR for Azerbaijani prosecutors and a number of prosecutors have participated in several training courses organized by the CoE or ECtHR in Strasbourg. ABA CEELI also organizes trainings for prosecutors in Azerbaijan.

The education of police and prison personnel of the country in the ECHR standards is in the center of attention of the CoE institutions since *Mammadov (Jalaloglu) v. Azerbaijan*<sup>61</sup>. The applicant was the Secretary General of the Democratic Party of Azerbaijan, one of the opposition parties that considered the presidential elections of 15

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<sup>60</sup> EUR. PARL. ASS. DOC. 11226, (March 30, 2007) Honouring of obligations and commitments by Azerbaijan. *Report of the Comm. on the Honouring of Obligations and Commitments by Member States of the CoE (Monitoring Committee)*.

<sup>61</sup> *Mammadov (Jalaloglu) v. Azerbaijan*, Eur. Ct. H.R.(2007)

October 2003 to be illegitimate. Several masked police officers, armed with machine guns, forced their way into the applicant's home, arrested him and took him into custody in order to interrogate him in connection with a demonstration. The applicant was charged with "organizing public disorder" and "use of violence against state officials". The applicant alleged that he had been ill-treated during his arrest, while being transported to the detention centre and during police custody; he claimed to have been beaten on the soles of his feet (*falaka*) by two masked policemen with truncheons, tortured and threatened with rape. The investigation authorities found that the medical report did not establish conclusively that the applicant's injuries had been inflicted while in police custody and, having questioned four police officers who denied all the allegations of ill-treatment, refused to institute criminal proceedings. The ECtHR considered that the applicant could not have sustained injuries during the demonstration in Azadliq Square because he had not been present. The Court considered that the violence inflicted on the applicant, administered with the aim of extracting information, was of such a serious and cruel nature that it could be characterized as torture. The Court considered that the authorities failed to gather forensic evidence in a timely manner. Furthermore, the authorities limited their investigation to studying the medical report and questioning four police officers. Having regard to those flaws and omissions, the Court therefore held that there had been a violation of Article 3<sup>62</sup>.

It would be very effective for prevention of similar violations in the future, if this judgment is translated and sent to the respective police and prison authorities for wider dissemination to the lower structures. The ECHR and its case-law should be integrated into the course of Human Rights course taught at the Police Academy.

A program of prison reform is carried out by the Ministry of Justice of AR with the CoE and European Commission's assistance. An Action Plan for 2006-2007, as a part of a

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<sup>62</sup> Mammadov (Jalaloglu) v. Azerbaijan, Eur. Ct. H.R.(2007).

Joint CoE/EC Programme, provides for a number of activities aiming at, among others, the establishing of the Prison Training centre in order to improve the professional skills of prison staff and the protection of human rights. The PACE Monitoring Committee on the Honouring of Obligations and Commitments by Member States of the CoE has expressed its satisfaction with the implementation of the Action Plan<sup>63</sup>.

### **2.1.4 Training of the members of the Collegium of Advocates**

The Order of the President of the AR dated 11 March 2005 included a number of recommendations to the Collegium of Advocates to organize appropriate training courses and take other appropriate measures with the purpose of raising the professionalism and the quality of the legal assistance rendered by the members of the Collegium. However, it is regretted to note that at the present there is no centralized re-training system of the Bar members on the convention and its case-law. The PACE has also expressed its concern on the importance of measures on raising the quality of Azerbaijani lawyers and has several times offered its assistance in this regard<sup>64</sup>. Unfortunately, none of these suggestions were admitted by the Collegium of Advocates. In order to stimulate the process of learning of the Convention and its case-law, the Presidium of the Bar should include a set of questions on the ECHR law as a part of the Bar examination as it is done in Russian practice<sup>65</sup> and organize intensive training courses on the ECHR law for the Collegium members. In this respect the Collegium should closely cooperate with the CoE and other international NGOs specialized in training of lawyers.

<sup>63</sup> EUR. PARL. ASS. DOC. 11226, (March 30, 2007) Honouring of obligations and commitments by Azerbaijan. *Report of the Comm. on the Honouring of Obligations and Commitments by Member States of the CoE (Monitoring Committee)*.

<sup>64</sup> EUR. PARL. ASS. DOC. 11226, (March 30, 2007) Honouring of obligations and commitments by Azerbaijan. *Report of the Comm. on the Honouring of Obligations and Commitments by Member States of the CoE (Monitoring Committee)*.

<sup>65</sup> The Presidium of the Bar is the body establishing rules for qualification examinations to the Bar. Law “On advocates and advocate activities” art. 11.3 (1999) (Aze.).



Notwithstanding the inactivity of the Collegium, different international and national NGOs have done considerable work in the field of education and training of lawyers in the country. Among them I would like especially to note the activity of Interights and ABA CEELI in the direction of raising professionalism of Azerbaijani lawyers.

## **2.2 Russia**

### **2.2.1 Translation, publication and dissemination of the ECHR text and its case-law**

According to the information given on the site of the CoE, the following materials for human rights awareness and training activities are translated into Russian and are available in electronic format: the ECHR Glossary for legal professionals, a handbook on “Freedom of expression”, a brochure on “Historical background, organisation and procedure of the Court: Information document issued by the Registrar of the ECtHR”, a brief leaflet on “Lodging an application with the ECtHR” for legal professionals, a book named “Short guide to the ECHR” for legal professionals and handbooks on “The prohibition of torture”, “The right to a fair trial”, “The right to liberty and security of the person”, “The right to property”, “The right to respect for private and family life” for general public<sup>66</sup>. 225 cases have been translated into Russian and are available in electronic format on the CoE’s website<sup>67</sup>. 91 out of 225 cases were made available with the kind assistance of Interights, Constitutional and Legislative Policy Institute (COLPI). Remaining part was translated by the Volga Information and Documentation Center on the CoE, Media Law and Policy Institute (Moscow) and the Open Society Foundation (London).

Differently from Azerbaijan Supreme Court, its Russian counterpart plays a significant role in the dissemination of translated ECtHR judgments to the lower courts. In

<sup>66</sup> *Materials for use in human rights awareness and training activities*  
<<http://www.humanrights.coe.int/aware/GB/publi/publiresla.asp?F=1>>

the Resolution dated 10 October 2003 “On application of the universally recognized principles and norms of international law and international treaties of the RF by the courts of general jurisdiction”, the Supreme Court recommended to its Judicial department to provide the lower courts with the authentic texts of ECtHR judgments concerning the RF and their Russian translations. The Supreme Court publishes translations of the ECtHR judgments on cases against the RF in its Bulletins and sends them to lower courts<sup>68</sup>. Russian SC’s practice in dissemination of the ECHR would be worth to be applied by Azerbaijani SC as well.

The translation and publication of the ECtHR judgments issued against Russia is still problematic. Some earlier ECtHR judgments against Russia, translated by the office of the RF Governmental Agent at the ECtHR were published in “Russian gazette”<sup>69</sup>. From more than 100 judgments issued against Russia only 5-6 have been published so far<sup>70</sup>. Several legal and human rights associations also independently translate and publish judgments on Russia<sup>71</sup>. Some judgments are published in the journal of “Russian law”, upon the own initiative of the journal<sup>72</sup>.

## 2.2.2 Legal education

Differently from the universities in Azerbaijan, the law of the ECHR and the precedent-law of the ECtHR are already included into the curriculum of the law departments of some RF universities. The ECHR standards and its case-law are taught both as

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<sup>67</sup> *Case law on the ECHR available in Central and Eastern European languages* <<http://www.humanrights.coe.int/aware/GB/publi/caselangres.asp?F=1>>

<sup>68</sup> Olqa Shepeleva, *Praktika rossiyskikh sudov: faktori, vliyayushie na primeneniye norm Evropeyskoy konvencii prav cheloveka I osnovnikh svobod I resheniy Evropeyskoqo Suda po pravam cheloveka rossiyskimi sudami* (*Practice of Russian courts: factors having effect on the implementation of the ECHR norms and ECtHR judgments by Russian courts*) <<http://www.demos-center.ru/projects/6B3771E/70688C12/1167153457>>

<sup>69</sup> *Primeneniye Evropeyskoy konvencii o zashite prav cheloveka v sudakh Rossii* [Implementation of the ECHR in Russian courts], (A.L.Burkov ed.), 2006, at 88. See also: *Steering Comm. for HR, CDDH*, (2006)008, Add. No. II, Tables on the implementation of the 5 recommendations (2006)

<sup>70</sup> *Primeneniye Evropeyskoy konvencii o zashite prav cheloveka v sudakh Rossii* [Implementation of the ECHR in Russian courts], (A.L.Burkov ed.), 2006, at 89.

<sup>71</sup> *Ispolneniye resheniy Evropeyskoqo Suda po pravam cheloveka* (*The execution of the ECtHR judgments*) <<http://www.demos-center.ru/projects/6B3771E/6B377BD/9C8ED85/1178546655>>

<sup>72</sup> Pavel.A.Laptev, *Yevropeyskie standarti zashiti prav cheloveka. Obespecheniye dostupa v Rossiyskoy Federachii* [European standards of human rights protection. Provision of access in RF] Address before the

independent subjects - European protection of human rights, Practice and procedure of the ECtHR - and also within the frame of other law disciplines, such as International Criminal Law<sup>73</sup>.

Furthermore, the Institute of the European law (IEL) has been established in the RF. It is an educational institute preparing highly-qualified lawyers specialized in the sphere of European law. IEL is established on the basis of the decree of the President of the RF "On the measures of guaranteeing the participation of the RF in the CoE" dated 13 April 1996 as a major educational and scientific center on training and raising the qualification of specialists with respective profile. It functions as a structure of the Moscow state institute of international relations to the MFA of the RF. Scientific-technical and financial assistance in establishment of the IEL has been rendered by the CoE within TACIS program<sup>74</sup>.

### 2.2.3 The ECHR in professional training

The Russian Academy of Justice is charged with the responsibility to raise the qualification of judges and personnel of judiciary apparatus, as well as to give proper attention to studying of universally recognized principles and norms of international law and international treaties of the RF during their training, retraining, to regularly analyze the international and European legal resources, publish necessary practical manuals, commentaries, monographs and other educational, methodical and scientific literature<sup>75</sup>. The Academy closely cooperates with the TACIS program in organization of training programs

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Internet-conference of the CoE and the ECtHR (Feb. 12, 2002), in <http://www.garweb.ru/conf/coe/20020212/index-06.htm>

<sup>73</sup> Nijegorod state university named after N.I.Lobachevskiy, Law Department <http://www.unn.ru/rus/fl1/evrop.htm>

<sup>74</sup> Moscow state institute of international relations (University) MFA of RF, Institute of European Law [http://eclaw.ru/index.php?option=com\\_content&task=view&id=12&Itemid=200](http://eclaw.ru/index.php?option=com_content&task=view&id=12&Itemid=200)

<sup>75</sup> Postanovlenie, O primenении sudami obshey yurisdiktsii obshepriznannikh principov i norm mejdunarodnoqo prava i mejdunarodnikh dogovorov Rossiyskoy Federachii [Resolution On application of the universally recognized principles and norms of international law and international treaties of the RF by the courts of general jurisdiction], Plenum Verkhovnoqo suda RF (Plenum of the RF Supreme Court), No. 5, (10 Oct. 2003), Biull. Verkh. Suda RF, 2003, No. 12

for judges<sup>76</sup>. The number of professional staff trained at the RAJ reached up to 9000 in 2005. The fact that the Academy from time to time conducts research among judges for the purposes of the improvement of training process, should be seen as a good effort to achieve better results<sup>77</sup>.

## 2.2.4 Training of the members of the Collegium of Advocates

The decision on awarding the advocate status is taken by the qualification commission to the Chamber of advocates of the subject of the RF (qualification commission), after the person claiming to the status of an advocate has passed a qualification examination<sup>78</sup>. Provisions on the rules of taking qualification exams and evaluation of the candidates' knowledge, the list of questions asked from candidates are prepared and approved by the Council of the Federal chamber of advocates<sup>79</sup>. Comparing to the exams for the membership to the Collegium of Advocates of the AR, a set of questions on the ECtHR procedure are included into the list of questions for qualification exams and approved by the Council of the Federal Chamber of Advocates on 6 April 2005<sup>80</sup>.

For a general picture of the current level of awareness on the ECHR in the countries, let's look at the number of applications against Russia as compared with Azerbaijan. For the comparison I will again take the statistics of the first and four years after the ratification by the two countries. During analysis of these indicators, we should also bear in mind the difference between the numbers of population of the two countries. In 1999, the year after the

<sup>76</sup>EC, EuropeAid, Eastern Europe and Central Asia Programme, *Reform of the Justice System: a priority area for the Russian Government* (last updated Jun, 10, 2006) <[http://ec.europa.eu/europeaid/projects/tacis/case\\_russia\\_justice\\_en.htm](http://ec.europa.eu/europeaid/projects/tacis/case_russia_justice_en.htm)>.

<sup>77</sup>Vladimir Peysikov, *The institutional training of judges in Russia* <http://www.ebrd.com/pubs/legal/lit071k.pdf>.

<sup>78</sup>Zakon ob advokatskoy deyatel'nosyi I advokature v RF [Law On the advocate activity and advocacy in the RF] art. 9 (2002), Vedomosti Fed. Sobr. RF.

<sup>79</sup>Zakon ob advokatskoy deyatel'nosyi I advokature v RF [Law On the advocate activity and advocacy in the RF] art. 11 (2002), Vedomosti Fed. Sobr. RF.

<sup>80</sup>Perechen voprosov dlya vklyucheniya v ekzamenachionnye bileti pri prieme kvalifikachionnoqo ekzamina ot lich, pretenduyushikh na priobretenie statusa advokata [The list of exam questions for obtaining the status of advocate], Zakon ob advokatskoy deyatel'nosyi I advokature v RF [Law On the advocate activity and advocacy in the RF] art. 9 (2002), Vedomosti Fed. Sobr. RF, Council of Federal Chamber of Advocates, Protocol No. 11 (2005) <<http://www.paso.ru/people/perechen5/>>.

ratification, 972 applications (or 1 application from 148,000 individuals<sup>81</sup>) were lodged against Russia, 348 out of them (or 35%) were declared inadmissible or struck off<sup>82</sup>. In 2003, the year after the ratification 265 applications (or 1 application/30,000 individuals<sup>83</sup>) against Azerbaijan were lodged, 45 of them (16%) were declared inadmissible or struck off the list<sup>84</sup>. In 2002, the number of applications against Russia was 4006 (1 application/35946 people), 2223 (55%) of the latter was declared inadmissible or struck off<sup>85</sup>. In 2006, of its 4<sup>th</sup> year after the ratification, 443 applications (1 application/18,000 applications) were lodged against Azerbaijan, 57 (12%) were declared inadmissible or struck off<sup>86</sup>. As we see, the number of applications lodged against Russia has increased during these four years, the same trend has been observed with Azerbaijan. The increase in the number of applications on the one hand indicates the increase in the level of information and awareness on the ECtHR system, but on the other hand, it is because of the systematic failures<sup>87</sup>. The most sad side of the story is that, as we see from the figures, the proportion of inadmissible applications within the overall number of lodged applications has grew from 35 to 55%, which shows the need for further educational programs. The situation in this sphere is better in Azerbaijan: the number of inadmissible cases has come down to 12 from 16% within the four year time frame.

## ***2.3 Conclusion to the Chapter***

This chapter was to argue that the raising the level of awareness and knowledge on the ECHR both among the general public and the law-enforcement officials of member states

<sup>81</sup> Russia has 144, 168, 000 population. Statistics 2004, 1323996 Eur.Ct.H.R., (2005) <[http://legalguide.am/doc/materials\\_on\\_website/materials\\_english/statistic/ctats\\_2004.pdf](http://legalguide.am/doc/materials_on_website/materials_english/statistic/ctats_2004.pdf)>.

<sup>82</sup> Survey of activities, Registrar of the Eur.Ct.H.R. (1999) <<http://www.echr.coe.int/NR/ronlyres/BA4CD581-4E3E-4324-83A6-1A753F92C1DE/0/SurveyofActivities1999.pdf>>.

<sup>83</sup> Azerbaijan has 8,266 000, population. Statistics 2004, 1323996 Eur.Ct.H.R., (2005) <[http://legalguide.am/doc/materials\\_on\\_website/materials\\_english/statistic/ctats\\_2004.pdf](http://legalguide.am/doc/materials_on_website/materials_english/statistic/ctats_2004.pdf)>.

<sup>84</sup> Registrar of the Eur.Ct.H.R. (2003) <<http://www.echr.coe.int/NR/ronlyres/4FB9067E-9EAE-4573-B756-56D836DEF3E3/0/SurveyofActivities2003.pdf>>.

<sup>85</sup> Registrar of the Eur.Ct.H.R. (2002) <<http://www.echr.coe.int/NR/ronlyres/ADA993B5-8591-42BA-80F5-CD26A6E598B8/0/SurveyofActivities2002.pdf>>.

<sup>86</sup> Registrar of the Eur.Ct.H.R. (2006) <[http://www.echr.coe.int/NR/ronlyres/69564084-9825-430B-9150-A9137DD22737/0/Survey\\_2006.pdf](http://www.echr.coe.int/NR/ronlyres/69564084-9825-430B-9150-A9137DD22737/0/Survey_2006.pdf)>.

is one of the most important “rings” in the “chain” of the domestic measures to be taken for the implementation of the Convention.

I have conducted research on the measures taken for the ECHR and its case law’s translation, publication and dissemination, its education at universities and practical trainings for judges, lawyers, police and prison authorities and other law-enforcement officials.

In Azerbaijan there is a big gap between the adoption of various measures and their effective realization. Although there is a very good normative-legal basis for improvement of the current situation, these norms lack their effective implementation.

As to problems with Russia, notwithstanding that there have been made some positive developments as inclusion of a special ECHR law course into the curriculum of law departments, establishment of the Institute European Law and Russian Academy of Justice for training legal professionals, the annual number of applications declared inadmissible by the ECtHR make us come to the conclusion that the effectiveness of these measures is not very good.

In both states some positive achievements have been made so far, but much yet to be done. The awareness-raising efforts on the ECHR made at the NGO level in the two countries are more than welcome. However, I think that the most important thing that governments should engage in is to launch the ECHR courses or successfully integrate ECHR subjects into other legal courses at law departments and teacher training<sup>87</sup>. If we want to prepare lawyers and other law-enforcement officials respecting ECHR principles, then we should assure that these norms are properly understood by lawyers through their professional education<sup>89</sup>. In parallel with the reform in university curriculums, states should integrate the

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<sup>87</sup> Interview by Pravda with Luzius Wildhaber, the chairman of the Eur. Ct. H. R., PRAVDA.Ru <<http://english.pravda.ru/>> (Nov. 5, 2005).

<sup>88</sup> *Recommendation of the Comm. Of Ministers* Rec (2004)4 On the ECHR in university education and professional training.

<sup>89</sup> *Resolution of the Comm. Of Ministers*, 294<sup>th</sup> meeting of the Ministers’ Deputies, (78)41 (1978) On the teaching of human rights

ECHR principles into the training of practicing lawyers. I believe that through national commitments on both these “fronts” substantive achievements can be achieved in the sphere of education on the Convention.

## CHAPTER 3- HARMONIZATION OF THE NATIONAL LEGISLATION IN COMPLIANCE WITH THE CONVENTION

Harmonization of national legislation with the ECHR includes both making necessary changes and amendments to the existing legislation and at the same time to give proper attention to the preparation of new draft laws in compliance with the provisions of the international treaties. For draft laws' compatibility with the ECHR, member states should keep in place a systematic verification mechanism, whereas, the existing laws' compatibility can be questioned either in case its compatibility was not checked before its adoption or in case it was initially compatible<sup>90</sup> and such a necessity emerged in the course of the ECtHR's evolving case-law<sup>91</sup>.

It is true that both Azerbaijan and Russia adhere to the supremacy of the ECHR over national laws. However, it would be inadequate to rely only on the ECHR's primary status for its successful implementation and not bring the national laws in conformity with it. It is first of all, crucial for the consistency of national legislation, which the ECHR is also a part of. If not, the national legislative system will become a chaos of conflicting provisions. Secondly, apart from its advantage for systematic legislation, the harmonization of their internal norms system with the CoE standards is the obligation which the states take upon themselves when they join the organization<sup>92</sup>. Failing to do it would mean the breach of obligations before the organization. Thirdly, bringing national legislation in line with the ECHR and its case law would help the ECtHR with the problem of excessive case-load, thus

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<sup>90</sup> *Recommendation of the Comm. Of Ministeres*, 114th Sess., Rec(2004)5 (2004) On the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights.

<sup>91</sup> "Judgments in fact serve not only to decide those cases brought before the Court but more generally, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the states of the engagements undertaken by them as contracting states". *Ireland v. UK*, Eur. Ct. H.R. (1978).

<sup>92</sup> *Cooperation and human rights awareness*, H. R. Info. Bull. ISSN 1608-9618 H/Inf (2003) 8, No.59 at 52; See also: Yuval Shany, *How supreme is the supreme law of the land? Comparative analysis of the influence of international human rights treaties upon the interpretation of constitutional texts by domestic courts*. 31 BKNJIL 341 (2006).



eliminating one of the sources of this problem<sup>93</sup>. National legislation not conflicting with the Convention and fully compatible with it, is one of the important guarantees for stopping further human rights violations and one of the ways to decrease the number of applications lodged with the ECtHR. We should, however, bear in mind that, mere establishment of good formal rules cannot be deemed sufficient for the successful implementation; the success can be destroyed with their bad application in practice. Nevertheless, by building its national legislature on the basis of the ECHR standards, the member state eliminates one of the potential reasons of the violations of the Convention in its territory. Finally, reliance only upon the domestic status of the ECHR would not be effective, especially, in case of Azerbaijani and Russian courts with a long Soviet legacy, which are reluctant to admit the direct applicability of international treaties.

In this Chapter I will deal with the legislative measures taken by Azerbaijan and Russia to the furtherance of the ECHR standards in their territory. The relevant sections on each state will be discussed under the following subheadings: the scale of the problem of non-compliance of the national legislation with the ECHR; the extent of a process to deal with it; and the measures actually taken. I will build my analysis on the examples of both good and bad practices concerning the conformity of the national legislations of these countries, although the problems cited here are not exclusive, but rather selective.

### **3.1 Azerbaijan**

#### **3.1.1 The scale of the problem of non-compliance**

Also I would group the in-compliance problems into three groups: first, the overall lack of the legislative act concerning the protection of some rights, second, existence of norms directly conflicting with the ECHR standards and third, provisions of a declaratory

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<sup>93</sup> President of the Eur.Ct.H.R. Luzius Wildhaber, Speech at the *Eur.Ct.H.R* solemn hearing on the occasion of the opening of the judicial year (Jan. 21, 2005).. See also: *Applying and supervising the ECHR. Reform of the European human rights system*, Proceedings of the high level seminar (2004).

nature without a clear-cut mechanism of their application, which create problems with their subsequent implementation.

As an example to the first group, I would bring the following: notwithstanding that Article 76 of the Constitution provides for the possibility of the substitution of military service of conscientious objectors with an alternative service (protected under Article 9 of the ECHR), *in cases determined by law*, such a law on alternative civil service has not yet been adopted, which could regulate the relations in this sphere in more detail. Azerbaijan authorities had promised to adopt one by January 2004, though. National authorities explain the delay of the adoption of the law with the Nagorno Karabakh conflict<sup>94</sup>.

As to an example for a conflicting provision: the recent amendment made to the Civil Procedural Code restricts access to court for indigent people protected by Article 6 of the ECHR. After the respective amendment, Article 67 of the Civil Procedure Code reads as the following: “Courts can take cassation, additional cassation appeals and applications for the reopening of a case, for consideration only in the case they are prepared by an advocate (a member of the Collegium) and court hearings on such applications are possible only with the participation of an advocate.” Thus, cassation, additional cassation appeals and applications for the reopening of a case must be accompanied with the nomination of an advocate for that appropriate case and the cost of the Consultant Office’s order for the nomination of an advocate starts from 200 Azeri Manat (approx. US\$ 250). It conflicts with the right of access to court provided by Article 6 ECHR, taking into account that there is no legal aid scheme for civil cases in Azerbaijan.

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<sup>94</sup> Interview by Day.az with S.Seyidov, the Head of the Azerbaijani delegation to the PACE, (Jun. 22, 2007) <<http://www.day.az/news/politics/83751.html>>. The draft law was sent to the CoE experts for their opinion. Furthermore, The PACE Monitoring Group has stated the necessity of making further amendments to the Criminal Code of AR, particularly concerning the decriminalization of defamation. Azerbaijan's first draft law on defamation has already been prepared and submitted to the respective commission of the national parliament in 2006, but has not yet been adopted by the parliament. The key novelties of the draft law are: it identifies defamation as a tort and set limits for the compensation, which should be proportional to the offence and the financial situations of the individual or the media outlet. It would be, however, more reasonable to set down non-pecuniary forms of redress for defamation rather than pecuniary ones.

The legislator should make possible for individuals to have a lawyer on his/her choice either from the members or non-members of Collegium, via concluding a contract on representation. If the legislator limits individuals to choose their representatives only from among the members of the Collegium, then the legislator must also provide an opportunity for free legal assistance to such applicants before the court. In *Airey v. Ireland* the ECtHR held that: “Article 6(1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case”<sup>95</sup>. In *Aerts v. Belgium* the ECtHR found a violation where legal aid in proceedings for compensation for unlawful detention was not available but legal representation was obligatory for proceedings in the Court of Cassation<sup>96</sup>.

As regards the third group of incompliance: Article 20 of the Law “On advocates and the advocate activities” provides for a legal assistance during administrative and criminal proceedings in courts, to defendants, suspected or accused persons with low income, at the expense of the state. However, in practice the quality of this assistance is very low, because the advocates so nominated by the presidium of the Collegium, are not remunerated for their work on such cases. Thus, the right to a free legal assistance provided by the national legislation is not effectively realized in practice. Advocates, representing the accused persons on appointment but practically not getting remuneration for this, most of the time only formally participate in the process and do not render a real legal assistance to the people whom they represent. In this regard, the ECtHR has established its position: “where an accused person has the right to a free legal assistance, he/she is entitled to a legal assistance which is practical and effective and not merely theoretical and illusory”. In *Czekalla v.*

<sup>95</sup> *Airey v. Ireland*, Eur. Ct. H.R. at 26 (1979).

<sup>96</sup> *Aerts v. Belgium*, Eur. Ct. H.R (1998).

*Portugal*, the ECtHR held that the failure of a legal aid lawyer to complete the grounds of appeal with the necessary formal conclusions, which led to the rejection of the appeal, deprived the applicant of a practical and effective defense<sup>97</sup>. Thus taking into account such a situation in national practice and considering that the ECtHR has already addressed this issue in its precedents, the national legislator should make appropriate amendments to the legislation to put an end to such incompliance. The Court stated in the case of *Kamasinski v. Austria* that "... the competent national authorities are required under Article 6(3) c to intervene ... if a failure by a legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention ..."<sup>98</sup>

In this respect, the ECtHR precedents give good ideas on possible amendments to the national legislation. Where the judge determines that the lawyer representing the accused before the domestic court has not had the time and opportunity to get ready for the case appropriately, the judge should be obliged to take measures of a positive nature to assure that the advocate's obligations to the defendant are properly performed. In such case the judge should be given additional authority to adjourn the proceeding<sup>99</sup>.

### **3.1.2 The extent of a process to deal with the non-compliance**

As to the measures taken by the legislative body, there is almost no proper internal mechanism within the Milli Mejlis commissions for verification with the ECHR requirements at the time of the preparation of draft laws. According to the information given by a member of the commission of the Milli Mejlis one of the problems with the national legislative process is that, national authorities, who have power of a legislative initiative, do not submit any explanatory reports for draft laws that they submit to the parliament. Parliamentary

<sup>97</sup> Czekalla v. Portugal, Eur. Ct. H.R (2002).

<sup>98</sup> Kamasinski v. Austria, Eur. Ct. H.R at 65 (1989).

<sup>99</sup> Goddi v. Italy, Eur. Ct. H.R at 31 (1984).

commissions then have to develop the submitted draft into law, sometimes not knowing the rationale behind its provisions<sup>100</sup>.

With the reference to harmonization measures taken by the executive, the following presidential acts should be noted, although their real effect is not seen in practice:

1. The Presidential Order “On the measures in the sphere of regulation of AR’s membership to international treaties”, dated 16 August 1994, states that if it becomes necessary to amend Azerbaijani legislation due to the ratification of an international treaty, the list of legislative acts, to be amended, should be agreed by respective state bodies and be reported to the AR President at the time of the submission of international treaties for his consideration. In practice, this means that in such cases the president shall either apply to the CC with the request on the verification of their compatibility or under his power of legislative initiative apply to the parliament with the proposal of amending current legislation.

2. The Presidential Order “On the measures for the implementation of the cooperation program between the CoE and AR” dated 8 July 1996 is another act adopted before the ratification of the ECHR, with the purpose of bringing the national legislation in line with the ECHR. The Order charged the Legal Reform Commission of the President Administration to examine the compliance the 3<sup>rd</sup> Chapter (Fundamental Rights and Freedoms) of the Constitution and ordinary national human rights legislation with the ECHR through the assistance of the CoE experts during 2-month’s period. The group of independent national experts started an examination; unfortunately, the work of the group was not completed due to reasons unknown to us<sup>101</sup>. Unfortunately, neither the activity, nor the report, if any, prepared in the result of such legislative examination were open for the public.

3. The Presidential Decree “On the measures of human rights protection” dated 22 February 1998, the Order “On the approval of the State Program on the protection of human

<sup>100</sup> Interview with a member of the AR parliamentary commission, Mr. H.

<sup>101</sup> Interview with a member of the AR parliamentary commission Mr. H.

rights” dated 18 June 1998 and the Order “On the approval of the National Action Plan on the protection of human rights in AR” dated 28 December 2006 contain recommendations addressed to the Milli Mejlis and to ministries to examine national laws’ conformity with the international, as well as the ECHR standards.

4. The Legislation department within the Ministry of Justice was charged, to improve the expertise of normative-legal acts and the preparation of draft laws, by the Presidential Decree “On the development of justice institutions”<sup>102</sup>.

5. Governmental Agent has an authority to identify the compatibility of the national legislation with the ECHR<sup>103</sup>.

As for the measures taken by the judiciary, Constitutional Court has great potential to reveal incompliance with the ECHR of the existing national legislation. It is another way of harmonization of national laws with international treaties. First of all, interstate agreements of AR, which have not yet come into force, are subject to conformity verification with the Constitution through the Constitutional Court’s preliminary control<sup>104</sup>. Furthermore, during the consideration of cases, the Constitutional Court can either hold unconstitutional an incompliant provision and stop its application or apply to the legislative body with the recommendation of filling gaps or making amendments to law. By doing so, the Constitutional Court can interpret the Constitution based on the ECHR principles to bring

<sup>102</sup> Edliyye orqanlarinin inkishafi haqqinda Prezident Fermani [Presidential Decree On the development of justice institutions] (2006) (Aze.).

<sup>103</sup> Prezident Fermani ile tesdiq edilmish Azərbaycan Respublikasının Avropa Mehkemesi yanında Numayendesi barede Muddealar [Provisions on the Representative (Governmental Agent) of the AR before the ECtHR approved by the Presidential Decree], (2003).

<sup>104</sup> As to the process of achieving conformity between national laws and the Constitution, through abstract control reflected in Article 130 of the Constitution, Azerbaijani Constitutional Court on the basis of a petition lodged by the President, Milli Majlis, Cabinet of Ministers, Supreme Court, Procurator’s Office, Ali Majlis of Nakhichevan Autonomous Republic decides on the conformity with the Constitution of laws, presidential decrees and orders, decrees of Milli Majlis, decrees and orders of Cabinet of Ministers and other normative-legal acts of the executive. Concrete normative control is carried out upon the request of general courts, via consideration of constitutionality of the norm, which has been applied or is a subject to application in concrete case, commenced by the complaint regarding infringement of the constitutional rights and freedoms of the citizens. Since the 2002 referendum, individuals and ombudsman can directly complain to the CC from acts of legislative, executive, judiciary bodies and municipalities, allegedly violating human rights.

them closer to the ECHR. The activity of the CC would be a very good supplement to the parliament's activity on harmonization. CC can interpret laws under the principle: "legislators had not intended to compromise their state's international obligations via internal legislation". Furthermore, comparing to the parliamentary commissions, the CC will fulfil this task more speedily and in a more operative way.

Recently the CC was the author of very progressive decisions, upholding the ECHR principles, which solved the problems experienced for a long time in the national legal sphere. Notwithstanding the potential it has, the number of cases considered by the CC is very low, for instance, only 11 decisions were issued by the CC in 2006.

To speak about international cooperation on matters of harmonization, I would like to note that, the national parliament has a number of times applied for the CoE experts' assistance in the preparation of draft laws, for instance: the Election Code, dated 27 May 2003 and the law on Radio and Television Broadcasting, dated 25 June 2002, etc. Currently, Azerbaijani government co-operates with the Venice Commission on the amendments to the Law on Freedom of Assembly dated 1998.

It must be noted that not in all cases the recommendations of the CoE experts were taken into account by the national authorities. For instance, Election Code was not amended in line with the recommendations that had been given by the Venice Commission for the May 2006 re-run elections<sup>105</sup>. The PACE has once again urged Azerbaijani authorities to amend the Election Code on the basis of its recommendations, as they remain topical because of the coming 2008 presidential elections<sup>106</sup>.

<sup>105</sup> PACE DOC. REP. BY THE COMM. ON THE HONOURING OF OBLIGATIONS AND COMMITMENTS BY MEMBER STATES OF THE CoE (MONITORING COMM.).11226, (March 30, 2007).

<sup>106</sup> PACE DOC. REP. BY THE COMM. ON THE HONOURING OF OBLIGATIONS AND COMMITMENTS BY MEMBER STATES OF THE CoE (MONITORING COMM.).11226, (March 30, 2007). The amendments concern the composition of electoral commissions and development of the procedure for handling complaints.

### 3.1.3 The measures actually taken

At the time of the accession to the membership of the CoE, the legislation of Azerbaijan still contained norms of past Soviet legal order, as well as elements of other foreign legal cultures, very often brought hastily and without any critical evaluation of possible consequences of such “implantation” for existing legal order. With the beginning of the process of Azerbaijan’s accession to the CoE, legislative activity was notably activated, which fundamentally changed the legal order in Azerbaijan.

A number of amendments were made to the Constitution, by the 24 August 2002 referendum, with the purpose of bringing it in line with the ECHR and other obligations taken by Azerbaijan upon accession to the CoE. The amendments were the following: the order of the commandeering staff during states of emergency or military actions was excluded from the grounds listed in Article 27.4, allowing limitations to the right to life. Article 155 was amended to imply that the provisions of the Constitution dealing with the fundamental human rights and freedoms cannot be limited more than it is allowed by the international treaties to which Azerbaijan is a party. Another amendment concerned the application of alternative civil service in Azerbaijan.

The Constitutional Law “On the regulation of implementation of human rights and freedoms in AR” adopted on 24 December 2002, should especially be noted as an effective step in harmonization<sup>107</sup>. This act, for the first time, introduced *habeas corpus* rights into the national legislation. Until then neither the Constitution of AR, nor the ordinary legislation had provided for *habeas corpus* - one of the fundamental human rights.

Articles 431-1 of the Civil Procedural Code and Articles 455-460 of the Criminal Procedural Code were amended on 11 July 2004, to include a new provision on the

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<sup>107</sup>Konstitutsiya, art. 92, Constitutional Laws are adopted by the Milli Mejlis with the quorum of 95. After the adoption, they have to be approved by the President; otherwise they cannot enter into force (art. 110.2). Constitutional laws amend the Constitution. Constitutional Courts are indispensable part of the Constitution and should not contradict with it.



reconsideration of cases, if the ECtHR finds a violation of the Convention in Azerbaijani courts' decisions. According to the amendments made to Articles 431-3 of the Civil Procedural Code and Article 456 of the Criminal Procedural Code, judgments of the ECtHR should be reviewed during 3 months after their submission to the Plenary Assembly of the Supreme Court<sup>108</sup>.

According to the former Criminal Procedural Code, an individual could be arrested or detained on the basis of a sanction of prosecutor during preliminary investigation. Moreover, the law excluded the possibility of complaining to court from such a decision of the prosecutor. Complaints based directly on the constitutional guarantees of judiciary protection of human rights were dismissed by national courts on the ground that the laws did not grant them such authority to question prosecutor's acts. Thus, the prosecutor was the only authority sanctioning preliminary detentions and arrests and there was no judiciary control over the application of this power. This situation continued until the new Criminal Procedure Code was adopted in September 2001. According to Article 14.2 of the new CPC, pre-trial detention and arrests can only be sanctioned by the decision of the court.

### **3.1.4 Overall assessment of success**

As we see from the examples given, membership to the ECHR brought Azerbaijani legislation closer to the ECHR standards. Some human rights provisions guaranteed by the ECHR were for the first time introduced into the national legislation: such as abolition of the capital punishment, boundaries of human rights limitations, *habeas corpus* rights, etc. A number of new laws regulating the realization of human rights were prepared, adopted and yet to be adopted upon the pressure and recommendations of the CoE. However, I regret to note that recently made amendments to the Civil and Criminal Procedural Codes conflict with the ECHR standards. It is a really dangerous trend for the harmonization process overall,

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<sup>108</sup> The Supreme Court has reconsidered *Mammadov v. Azerbaijan* (Eur.Ct.H.R., 2007) and sent the case back to

because as a result even the laws prepared and supported by European experts can later become in conflict with the Convention. Therefore, establishment and keeping in place an effective verification mechanism within the parliament commissions is very crucial in Azerbaijan.

## **3.2 Russia**

### **3.2.1 The scale of the problem of non-compliance**

Concerning Russia's commitments before the CoE to bring its national legislation into compliance with the ECHR, I would like to note that together with considerable achievements, we can still observe much incompliance. For instance, notwithstanding the commitment to ratify the Protocol 6 to the ECHR by 1999, it is the only member-state that has not ratified the Protocol *de jure*<sup>109</sup>. Although there was established a moratorium by the president since 1996, then by the Constitutional Court and is not carried out, death penalty has not been abolished by law<sup>110</sup>. Furthermore, Protocols 12, 13 and 14 to the ECHR have neither been ratified by the RF yet.

As it is in the criminal legislation of AR, the Criminal Code of the RF also considers defamation as a crime. This seems contradictory to Article 10 of the ECHR and respective ECtHR practice. The PACE, therefore, has called the RF to decriminalise defamation. Contrary to the principle set by the ECtHR principles, the Criminal Code provides stricter penalties for the defamation of public officials. The Civil Code of RF provides sufficient protection for defamation and renders the sanctions, such as prison sentences, arrest, the suspension of rights and mandatory labour, contained in the Criminal Code, excessive. The Civil Code also has problems with giving priority to pecuniary compensation over non-pecuniary forms of redress for defamation and also with the

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the Court of Appeal.

<sup>109</sup> Azerbaijan has abolished the death penalty in 1998, before the membership to the CoE.

disproportional sizes of fines. Necessary amendments should be made to the Civil Code to make clear that public officials should expect more criticism. Possibility of suing on behalf of a deceased person should be repealed. For the purposes of defamation, clear differentiation of “opinion” and “facts” is needed to be added to the code<sup>111</sup>.

As regards to civil procedure, in *Ryabykh v. Russia* the ECtHR ruled that the possibility of quashing of the higher court decisions upon the application of state officials, as it is provided by the legislation, conflicts with the principle of legal certainty. Differently from Russia there is no supervisory review in Azerbaijan. According to Article 233 of the Civil Procedural Code of AR: “If no appeal has been lodged from them, court judgments shall become legally binding on the expiration of 1 month. If the judgment is not quashed following an appeal, it shall become legally binding when the higher court delivers its decision. ...”. Decisions and rulings of Azerbaijani courts cannot be amenable on an application of state officials. There is no further means of recourse to enable courts to reopen final judgments in Azerbaijan, except proceedings on new conditions concerning the violation of human rights and freedoms. The grounds for such reopening are the following:

1. The CC ruling on unconstitutionality of the decisions issued by the SC or other national courts and
2. The ECtHR judgment, finding a violation of the ECHR, in the decisions of Azerbaijani courts.

### **3.2.2 The extent of a process to deal with the non-compliance**

By the request of the CoE, a survey on “The ECHR and the legislature and administrative practice of RF” was prepared by a group of Russian lawyers in 1997. The group of experts gave 40 recommendations, concerning the realization of human rights,

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<sup>110</sup> PACE DOC. REP. COMM. ON THE HONOURING OF OBLIGATIONS AND COMMITMENTS BY MEMBER STATES OF THE COUNCIL OF EUROPE (MONITORING COMMITTEE), 10568, (Jun, 3, 2005), Honouring of Obligations and Commitments by the RF.

established in the constitution and statutes<sup>112</sup>. On the basis of these recommendations, seven federal draft laws were prepared by respective federal executive bodies and with the participation of the Supreme Court and the General Prosecutor<sup>113</sup>. Subsequently, they were included into a federal draft law “On amendments and changes to several legislative acts of RF”, which contains amendments to the Criminal Code, Criminal-procedural Code, Code on Administrative infringements and etc<sup>114</sup>. In March 2000, the draft was submitted to the State Duma by the president and was adopted at the first reading in September<sup>115</sup>.

What is considerable about the Russian practice is that within the Russian parliament there is a proper internal mechanism of the verification of the compliance of the national legislation with the international commitments of the state. The legal department of the State Duma Apparatus is directly engaged in issues related to the legal expertise of draft laws, including draft laws on the ratification of international treaties. The practice shows that any draft law has to pass through legal expertise on the compliance with the CoE standards. The expertise is more effective when it is carried out during the first reading. Here the conformity of draft laws with the ECHR and Constitution is evaluated.

As to the efforts of the executive in contribution to the harmonization process, the president issued the “Plan of preparation of draft laws for bringing the legislation of the RF into conformity with the ECHR” in 1998<sup>116</sup>. The plan defined primary and most important directions of the reform of the RF legislation on the CoE requirements. During its preparation,

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<sup>111</sup> ARTICLE 19 AND BLACK SOIL REGIONAL MASS MEDIA DEFENCE CENTER, A GUIDE TO DEFAMATION LAW AND PRACTICE IN RUSSIA, THE PRICE OF HONOUR: A GUIDE TO DEFAMATION LAW AND PRACTICE IN RUSSIA 2003.

<sup>112</sup> A.Kovler, *Evropeyskoe pravo prav cheloveka I konstituciya Rossii [European human rights law and RF Constitution]* < <http://www.demos-center.ru/projects/6B3771E/71A1FC6/71A2046/1144250133>>.

<sup>113</sup> FUNDAMENTAL RIGHTS IN EUROPE. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES, 1950 – 2000 740 (R. Blackburn & J. Polakiewicz ed.), (2001). See also: William D. Jackson, *Russia and the CoE. The perils of premature admission*, vol. 51, no. 5, Problems of Post-Communism (2004) 23-33. See also: B.Bowring, *Russia's accession to the CoE and human rights – four years on*, 4, EHRLR (2000), 362-379.

<sup>114</sup> Bill Bowring, *Russia's accession to the CoE and human rights: compliance or cross-purposes*, 6, EHRLR (1997), 628-643...

<sup>115</sup> Y. Berestnev, *Rossiyskaya pravovaya sistema I evropeyskie standarti (Russian legal system and European standards)*, 1, Rossiyskaya yustichiya, (2001), 14-15..

<sup>116</sup> Eugenia Zusman, *Evropeyskiy sud i nasha deystvitelnost [The ECHR and our reality]* <<http://www.hro.org/court/2007/06/08-4.php>>.

the research made by 1997 expert group was taken into account. Furthermore, the President of the RF (if the expertise was conducted on his request – and it is the case in most of the cases) sends to the State Duma his proposals on possible amendments concerning the conclusions of expertise. These proposals and amendments should also take into consideration the CoE experts' opinions as much as possible<sup>117</sup>.

The ECtHR principles are observed even in the ratification of subsequent interstate treaties. For instance, a Treaty on legal assistance and juridical relations on civil and criminal cases between the RF and Mongolia was recalled by the President, notwithstanding that it was submitted to the ratification of the State Duma. The reason was that the Treaty had not determined the possibility of the application of the death penalty in a requesting state as a ground for the refusal in extradition. The death penalty was applied for some crimes in Mongolia. As the RF had signed the Protocol 6 to the ECHR (notwithstanding that it has not been ratified so far), the violation of this commitment even in respect to the citizens of the state which is not a member of the CoE, is inadmissible.

### 3.2.3 The measures actually taken

Russia adopted a new Criminal Procedure Code in order to bring the criminal prosecution into compliance with the ECHR standards. The terms of criminal proceedings were brought down to reasonable limits according to the ECHR. According to the previous legislation, an individual could be detained up to 3 years awaiting his/her trial. New Criminal Procedure Code limited this period up to 6 months.

However, the practice on criminal proceedings is still far from these ECHR standards. It is sufficient to read the ECtHR rulings on violation of Article 5 by Russian authorities to have some insight on the real situation with detention on remand in Russia. In *Lebedev v. Russia*, the applicant was a senior manager of Yukos. He was arrested as a suspect

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<sup>117</sup> Y. Berestnev, *Rossiyskaya pravovaya sistema I evropeyskie standarty* [Russian legal system and European

and taken to a pre-trial detention centre on 2 July 2003. Then he was charged with fraud committed in the course of the privatization of Yukos in 1994. The applicant's detention was prolonged for several times and, on 16 May 2005 he was convicted and sentenced to nine years' imprisonment. Thus he kept in custody for almost 2 years waiting his trial. Furthermore, the procedure with the prolongation of the detention term was observed with serious legal violations: either his lawyers had not been duly informed about the time and place of hearings on detention or the decisions were taken in private, or the applicant was kept in detention for days without a proper extension by a court decision. The ECtHR found violation of Article 5§1(c), §3 and §4<sup>118</sup>.

In *Khudoyorov v. Russia*, the applicant was a national of Tajikistan. He was detained on remand on 22 January 1999 and charged with the unlawful purchase and possession of hashish. His detention was subsequently extended, on the ground of further investigation, for 5 years, 4 months and 6 days, until 28 May 2004 when he was released. Such terms were held to be in conflict with the requirements of Article 5.1 of the Convention. The ECtHR held that keeping defendants in detention, after the detention period, authorised during the investigation had expired, is a practice which was incompatible with the Convention. There was a violation of the length of proceedings on the applicant's appeal against the decisions on extension. The ECtHR found a violation of Article 5 §1 (concerning the period of the detention on remand), §3 and §4 (as regards the length of proceedings and failure to examine the merits of appeals)<sup>119</sup>.

According to the last report of the CoE Monitoring Committee on the honouring of obligations and commitments by the RF, the Federal Law on Psychiatric Treatment and Associated Civil Rights Guarantees contains some provisions contradicting with Article 5 of

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*standards*], 1, Rossiyskaya yustichiya, (2001), 14-15.

<sup>118</sup> Lebedev v. Russia, Eur.Ct. H.R., (2007).

<sup>119</sup> Khudoyorov v. Russia, Eur.Ct. H.R., (2005).

the ECHR. In this respect the RF authorities has been recommended to reform the current legislation taking into consideration the ruling of the ECtHR in *Rakevich v. Russia*.

The Criminal Procedural Code was amended to make possible the reopening of criminal cases after the ECtHR judgment finding a violation. It is a progressive step made at the legislative level, in the direction of the execution of the ECtHR judgments in the country. In Azerbaijan the same ground for the reopening of a final judgment was added both to Civil and Criminal Procedural Codes on 11 June 2004. In Russia there is not such a possibility for reopening the civil cases.

### **3.2.4 Overall assessment of success**

Russia has still considerable problems in the compliance with the ECHR requirements. *De jure* abolition of death penalty, ratification of a number of ECHR protocols, decriminalization of defamation, abolishment of supervisory review, etc. are still pending their settlement. It is true that Russian government displayed a good deal of diligence for analyzing its national legal system with the ECHR at the time of ratification. Differently from Azerbaijan, the work of the group of national experts proved to be really effective in terms of taking them into account for amending national legislation. Keeping in place of a verification mechanism within the parliament is also a progressive step. However, as it is a case with the detention on remand, the problem with the ECHR's successful implementation in Russia is most likely because of the bad application of good formal laws, rather than bad laws.

### **3.3 Conclusion to the Chapter**

This chapter addressed the issue of the harmonization of the national legislation in compliance with the Convention in Azerbaijan and Russia. Each of the two sections on the respective countries covers the issues: the scale of the problem of non-compliance, the extent of the processes to deal with the non-compliance and the measures actually taken. Because of

the limitations with the space, the examples brought from the legislation of both countries were not exclusive, but only illustrative.

It may be concluded that whereas the harmonization of the national legislation with the ECtHR standards can be achieved, the implementation of these standards is not an easy job in practice. This is the issue of compliance of the ECHR's standards with the national reality. Analysis of the complaints submitted to the ECtHR from Azerbaijan and Russia shows that notwithstanding to many changes made to the domestic legislation, which particularly reformed civil and criminal procedures, implementation of these newly adopted laws still carries on them the mark of the past Soviet period, conflicting with the ECtHR jurisprudence. For instance, to the detriment of the guarantees contained in the national constitution and laws, still there is a practice of keeping individuals under detention, without informing on the reasons of their arrest<sup>120</sup>.

Notwithstanding the implementation of certain obligations by Azerbaijan and Russia concerning the harmonization of national legislation with the ECHR, it is still early to speak about the effective adaptation of the domestic legal environments to the European standards in these countries. The yearly increase of the number of applications to the ECtHR from these countries exposes the reality: the legislative harmony is not sufficient. "Even the best law is only as good as the way it is applied". Shortfalls in law-enforcement practice and the lack of a mechanism of national legal enlightenment, directed at familiarizing the authorities and citizens with the ECHR standards hinder the process of fully successful implementation. Even if the governments have established all the necessary legislative grounds for successful implementation its international obligations, the state's law enforcement officers can feel reluctant in the application of legislation. The reason for that are: either long-established perceptions, according to which governmental interests, rather

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<sup>120</sup> Interview with Fuad Agayev, lawyer practicing in Baku, representative of the applicant in *Mammadov (Jalaloglu) v. Azerbaijan*.



than human rights, were in the centre of all activities in the Soviet Period<sup>121</sup>, or insufficient level of knowledge of state authorities on the nature of the ECHR law<sup>122</sup>. The same can be said about the population's knowledge about the ECHR and trust in the legal-judicial system in general, their sensitivity to violation of their rights and willingness to stand up for them. For instance, population of these countries still prefers prosecutor over courts to complain from the acts violating of their rights. It is also the issue of long-established perceptions of a Soviet period<sup>123</sup>. Therefore, efforts taken at the domestic level should, first of all, be directed to achieve "reform in minds" and change the way the law enforcers of the state think, reason and adjudicate and the latter can only be achieved through consecutive education and professional training for law-enforcers and effective awareness-raising campaign for general public.

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<sup>121</sup> It is obvious from *Ryabykh v. Russia* (Eur.Ct.H.R., 2003), where the higher court 5 times repealed the first instance court's decision which ruled for return of the applicants' savings by the national bank.

<sup>122</sup> A.Kovler, *Evropeyskoe pravo prav cheloveka I konstituchiya Rossii* [European human rights law and RF Constitution], < <http://www.demos-center.ru/projects/6B3771E/71A1FC6/71A2046/1144250133>>.

<sup>123</sup> A.Kovler, *Evropeyskoe pravo prav cheloveka I konstituchiya Rossii* [European human rights law and RF Constitution], < <http://www.demos-center.ru/projects/6B3771E/71A1FC6/71A2046/1144250133>>.

## **CHAPTER 4 - IMPLEMENTATION OF THE ECHR AT ADMINISTRATIVE LEVEL**

In this chapter I will review the measures taken at administrative level for the implementation of the ECHR in Azerbaijan and Russia. With this purpose, the situation in national police, prosecution, penitentiary institutions and the media regulation bodies will be analyzed in the two countries. I will refer both to good and bad practices; both reforms done by the government and the programs carried out by the initiative of international organizations involved in human rights protection.

### ***4.1 Azerbaijan***

#### **4.1.1 Police**

Azerbaijani police have been for many times alleged in mass human rights violations in the reports of international human rights organizations, such as Human Rights Watch (HRW) and etc. Criticism by the international community was especially sharp and telling, for the gross violations of freedom of assembly and brutality, committed by the police forces during opposition rallies taken place after the October 2003 presidential elections.

These human rights violations occurred at the background of Azerbaijani government's commitments, to guarantee due respect to human rights and freedoms, taken with the ratification of the ECHR, a new legislative basis, regulating the activity of the police institutions, has been formed. After the ratification of the Convention, necessary changes were made in the normative-legislative basis of the police activity, in order to bring it in compliance with the ECHR requirements. New draft laws "On police", "On operational-investigation measures" and "On police service" received high opinion of the CoE experts. The President issued the Decree "On the approval of the State Program on the improvement

of the activity of the police institutions in the AR (2004-2008 years)”<sup>124</sup>. As one of the measures taken to the implementation of this decree, in June 2007 a hotline (102) was established. The hotline is considered for calling and reporting the violations of human rights to the police. However, the fact that the hotline works on a chargeable basis, significantly decrease its effectiveness.

Concerning the efforts made on the ministerial level in the direction of bringing the police institution closer to the European standards, the Minister of Internal Affairs have a number of times stated in his interviews that the protection of human rights is given a special attention in the activity of the internal affairs organs. According to the Minister, for this purpose, training courses on the relevant topics are organized for the police personnel and experienced specialists are invited from European countries to teach in these courses. A similar special course on human rights is taught at the Police Academy, as well.

According to the information given from the Ministry, these systematic educational measures are conducted in parallel with the involvement to the liability of individual police officers committing human rights violations. In 2001-2003 204 police officers were penalized for legal violations, 6 of them were involved to the criminal liability, 30 were dismissed from the police system and about the remaining different disciplinary measures were taken. From 2004 to the second half of 2006, 383 police officers were involved to liability, 27 were involved to criminal liability, 64 of them were discharged from the service at the institutes of internal affairs and 29 were dismissed from the position held. These decisions are disseminated among the police personnel, for the purposes of the prevention of similar unlawful acts in the future<sup>125</sup>.

<sup>124</sup>Interview by Biziasr.media-az with Mr. Ramil Usubov, Minister of Internal Affairs of Azerbaijan, (2004) <[http://biziasr.media-az.com/arxiv\\_2004/32/ic.html](http://biziasr.media-az.com/arxiv_2004/32/ic.html)>

<sup>125</sup> Interview by Ikhtiyar Huseynli with the Minister of Internal Affairs of Azerbaijan, (Nov, 27, 2007), <<http://azerbaijan.news.az/index.php?Lng=aze&Pid=5674&lng=aze&pid=9598>>

Furthermore, Open Society Institute Assistance Foundation (OSI-AF) assisted in police reform of Azerbaijan within the frame of the Criminal Justice Program in 2000-2002. The OSI Constitutional and Legal Policy Institute (COLPI), with the cooperation of the CoE “Police and Human Rights” project, assisted in the reorganization of the police academy’s curriculum and, as a consequence, a number of new teaching methodologies were introduced in the academy.

#### **4.1.2 Prosecutor’s Office**

Before the reforms conducted in the country, Prosecutor’s Office had been a body with an authority of general supervision over the courts, the application of the law in places of detention and etc. Wiretaps and mail interceptions could be sanctioned solely on the prosecutor’s decision<sup>126</sup>.

The jurisdiction of the Prosecutor's Office in Azerbaijan was fundamentally changed as the result of the reforms that were launched not long before the ratification of the ECHR. The over controlling function of the Prosecution was abolished in 1999. Since then this state body does not exercise control over the execution of laws by companies and bodies, also on their official authorities. In May, 1999 the Constitutional Court (CC) considered the issue of immediately bringing of a detained person before a court, in order to examine the lawfulness of this detention. In its resolution the CC acknowledged the necessity of guaranteeing this right and by the law “On Prosecutor’s Office” adopted in 1999, the power of sanctioning arrests was taken from the prosecutor’s jurisdiction and given to courts<sup>127</sup>. Accordingly, the national practices in this sphere were brought in line with the one of the most significant requirements of the ECHR’s Article 5.

As the result of the further reforms in the country, the Prosecutor’s Office retained only the role of an independent organ supervising over criminal investigations, observance of

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<sup>126</sup> UN CAT, 401<sup>st</sup> mtg. at 14, CAT/C/SR.401, (1999).

laws during such investigations, pursuing public interests in both criminal and civil cases and examining citizens' complaints and depositions.

What is considerable about the efforts on the implementation of the ECHR, the Order of the General Prosecutor “On taking into consideration of the provisions of the ECHR and the precedent law of the ECtHR at prosecution bodies during criminal prosecution” issued on 1 December 2006 should be noted as a positive step made in this sphere. The Order was issued on the basis of the recommendations to study the precedent law of the ECtHR and take them into consideration in the judicial practice contained in the Presidential Decree “On modernization of the judicial system in the AR and the execution of the Law “On amendments to a number of legislative acts””.

Furthermore, in the course of the on-going reforms, a training center of the General Prosecutor’s Office was established<sup>128</sup>. According to the information given from the General Prosecutor’s Office, on “Training days” held at the General Prosecutor’s Office with the purpose of increasing theoretical and practical skills of the prosecutor’s office personnel, the importance of the studying of the requirements of international human rights conventions, the substance of human rights, their interpretation and the application of international practice are explained<sup>129</sup>.

#### 4.1.3 Prisons

Protection of physical and psychological integrity, freedom from torture and other degrading and inhuman treatment, of a person sentenced to imprisonment, is comparatively

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<sup>127</sup> UN CAT, 401<sup>st</sup> mtg. at 13, CAT/C/SR.401, (1999).

<sup>128</sup> Khalq qazeti <<http://www.xalqqazeti.com/index.php?lngs=aze&cats=6&ids=13304>>

<sup>129</sup> Vamiq Asadov, *Insan huquq ve azadliqlarinin mudafiesi prokurorlugun esas vezifesidir [The protection of human rights and freedoms is the main duty of procurators' office]* <<http://www.xalqqazeti.com/public/print.php?lngs=aze&ids=13826>>

difficult to be fully guaranteed, because the inmates are isolated from the outside world and the flow of information is limited<sup>130</sup>.

Before the ratification of the ECHR, improvement of conditions in detention places in Azerbaijan mainly occurred under control and public pressure of national and international NGOs<sup>131</sup>.

The reform of Azerbaijani penitentiary system on European standards began soon after the country's application for the membership to the CoE in 1996. Since 1998 the CoE began to assist in the reform of the prison system in the country. In the 2003 Summary Report of the Steering Group it was noted that by the time of the preparation of that report the governmental authorities had fully implemented the 1998 recommendations of the Group<sup>132</sup>. Good progress made with regard to health facilities, establishment of new settlements, of a Staff Training Center, reduction of prison population and amnesties were highly appreciated by the CoE experts. Furthermore, it was noted that the relationships with the society and the level of education of juvenile prisoners have been improved since 1998. Within the action plan of this assistance program, study visits to Poland and Austria were organized for Azerbaijani prison authorities and they were provided with different training packages.

<sup>130</sup>In *Jalaloglu (Mammadov) v Azerbaijan* (Eur. Ct.H.R., 2007) the ECtHR found the violation of Article 3 (torture) in the acts of police authorities inflicted against the applicant during his detention. The judgment also refers to the CPT reports on Azerbaijan. The first of three reports was very critic on detention conditions in the country, the 2 remaining reports were not published due to the lack of governmental permission.

<sup>131</sup>Most active national NGO monitoring prisons was Human Rights Center of Azerbaijan, which prepared its reports as a conclusion of such monitoring and put efforts for humanization of penitentiary system of the country. During their visits to prisons, the NGO representatives gave to prison libraries tens of books on democracy and human rights in different languages and sent a letter, to Azerbaijani President, addressing human rights aspects of life imprisonment and severe conditions of detention of persons confined to life imprisonment. Furthermore, the NGO called the President to submit necessary legislative suggestions on further humanization of life imprisonment and directly applied to the Parliament with the legislative suggestion to define torture as a crime to be punished and not to be pardoned.  
<<http://www.pressclubs.org/pages/russian/newsletter/news/11.02.2000.html>>.

<sup>132</sup>*Summary Report of the Dir.General I – Legal Affairs. Action plan on the reform of the prison system in Azerbaijan*, Steering Group, 3<sup>rd</sup> mtg., SG (Azerb) 2003(1), (2003).  
<[http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/prisons\\_and\\_alternatives/technical\\_co-operation/azerbaijan/AzerbRep\(2003\).pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/prisons_and_alternatives/technical_co-operation/azerbaijan/AzerbRep(2003).pdf)>. The Ministry of Justice was involved into the project. Please see: <[www.justice.gov.az](http://www.justice.gov.az)>.

However, the Steering Committee emphasized in its report that organization of health care seminars for prison staff needs to be continued<sup>133</sup>.

Notwithstanding the abovementioned reforms conducted in the sphere of criminal-execution policy and the humanization of the penitentiary process, in 1997-2003 there was a tendency of the application of severe disciplinary measures about the inmates<sup>134</sup>. 208 persons died during the execution of their punishments in institutions of confinement under the auspices of the Ministry of Justice of the AR in 2003. At that time 632 TB and 89 HIV infection facts among inmates were recorded<sup>135</sup>. According to the Azerbaijan Committee Against Torture (ACAT), 7 people died of tortures inflicted in detention facilities in 2004. Human Rights Watch and other national and international human rights organizations urged Azerbaijani government to conduct impartial and thorough investigations into the death facts of prisoners<sup>136</sup>. Apart from the death facts, overcrowding and poor medical care have been among the serious problems in Azerbaijani prisons and for a number of times were the reason of riots and hunger strikes by prisoners<sup>137</sup>.

The CoE Directorate General on Legal Affairs and the European Commission conducted Joint Programme on Penitentiary Reform in Azerbaijan from 2005 to 2006<sup>138</sup>. Members of national human rights NGOs specializing in the monitoring of the prisons, however, criticize the reforms conducted in Azerbaijani penitentiary system, alleging that

<sup>133</sup> Apart from the CoE, the reforms in the penitentiary system of the country were assisted by the OCSE within the program on the improvement of the detention conditions via trainings of prison personnel. Olkemizin penitensiar sisteminde islahatlar ATET-in diqqet merkezindedir [Reforms in the penitentiary system of the country is in the OSCE's focus of attention] <[http://bizimasr.media-az.com/arxiv\\_2003/avgust/173/olke.html](http://bizimasr.media-az.com/arxiv_2003/avgust/173/olke.html)>

<sup>134</sup> Donetsk Memorial, *Observance of penitentiary systems of 7 CIS members*, (2004) <<http://prison.memo.ru/prints.htm>>.

<sup>135</sup> Donetsk Memorial, *Provedenie monitoringa soblyudeniya prav cheloveka v penitensiarikh sistemakh stran SNQ [Observance of penitentiary systems of 7 CIS members]* (2004) <<http://prison.memo.ru/prints.htm>>.

<sup>136</sup> Human Rights Watch (HRW), *Azerbaijan: Investigate death in custody* <<http://hrw.org/english/docs/2005/02/18/azerba10195.htm>>. See also: Shahla Ismayilova, *Azerbaijan: Prison conditions life threatening* <<http://www.humanrightshouse.org/dllvis5.asp?id=2967>>.

<sup>137</sup> International Federation for Human Rights (FIDH) & Human Rights Center of Azerbaijan (HRCa), *The hunger strike in Azerbaijani prison* (visited Jun, 28, 2007) <<http://www.fidh.org/spip.php?article4443>>.

<sup>138</sup> CoE & EC (European Commission), *Joint Programmes – Logframes and Activities* <<http://www.jp.coe.int/CEAD/JP/Default.asp?SA=1&SpecificObjectiveID=506>> also, <<http://www.jp.coe.int/CEAD/JP/Default.asp?SA=1&ProgrammeID=89>>.

they resulted only in “larger cells, with a carpet on their floor”, which are inaccessible in reality<sup>139</sup>, whereas this process should have been developed in the direction of the humanization of inmate treatment. The penitentiary system not any more does require the painting of walls or adding to ration, but requires the changing of the attitude of the government (and community in general) towards prisons and persons behind bars. The most important is the change in the mentality of the law enforcement officials that the human rights must be respected; assurance of this is as important as the financial provision of such facilities<sup>140</sup>.

Widely publication and dissemination by the Ministry of Internal Affairs and/or the Ministry of Justice, to the police and prison facilities, of the ECtHR judgment on *Jalaloglu (Mammadov) v Azerbaijan*, and further use of it in the training of respective law-enforcement officials in the country would be a very effective administrative measure<sup>141</sup>. The effectiveness of these methods is proved by the CM practice on the execution of the ECtHR judgments. For instance the same methods were chosen for the execution of *Ribitsch v. Austria*. Furthermore, HR groups should be supported to monitor prisons and other detention places.

#### 4.1.4 Media

For 70 years Azerbaijan was within the former Soviet Union, where government was not accountable in front of its citizens and much information was kept in a secret from them. Notwithstanding Azerbaijan gained its independence in 1991, changing people's perceptions that have been formed during the Soviet period cannot be achieved overnight.

<sup>139</sup> Eldar Zeynalov, *Yevrostandart: penitentsiarnaya sistema Azerbaydjana [Euro standard: penitentiary system of Azerbaijan]* <<http://www.regioncenter.org/ru/st-ezeynalov.html>>.

<sup>140</sup> Gerald Staberock, *Quo vadis Caucasus? The rule of law or rule of power?*, 4, . HUMANITARES VOLKERRECHT – INFORMATIONSSCHRIFTEN, SPECIAL: DER KAVKASUS 262-271(2004).

<sup>141</sup> The execution of *Yagiz v. Turkey* (Eur. Ct.H.R., 1996), *General measures adopted to prevent new violations of the ECHR. Stock-taking of measures reported to the Committee of Ministers in its control of execution of the judgments and decisions under the Convention (Application of former Articles 32 and 54 and of Article 46)* H/Exec (2006)1, (2006).



The Azerbaijani government abolished censorship on publication in 1998, but has imposed considerable informal restrictions on the media. Notwithstanding the obligations taken by Azerbaijani government before the CoE, to guarantee the freedom of media and the independence of media in its territory, Azerbaijani media has always experienced problems with the independence and alleged in being deeply politicized. This is explained with the national media outlets' poor financial-economic status<sup>142</sup>. Due to media's power to influence public opinion and the course of events, government always tried to keep it under control. Such control especially aggravated in 2002 and during the 2003 presidential elections as reported by national and international reporters. According to the reports prepared at the time of 2003 presidential elections, 4 commercial and one state TV channels did not provide equal timeframe for opposition candidates during pre-election campaign and 80% time was allocated to the candidates from the ruling party<sup>143</sup>.

One of the reforms made after the ratification of the ECHR in the national media is the establishment of the Press Council in 2003. It is a self-regulatory body of the national print media. However, since its establishment, the Council has not demonstrated any substantive progress in the sphere of the media independence. The Press Council should assure to be more powerful institution in guaranteeing the implementation of media legislation and monitoring the compliance of the government with its commitments on the freedom of media<sup>144</sup>. With this purpose, the best practices of foreign countries should be studied.

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<sup>142</sup>Dr. Gela Kvashilava, *Towards the Network Society: IT, Mass media and democratization of the South Caucasus* < <http://www.isn.ru/public/Kv.doc> >, also: OSI-AF, *Media Program Strategy for 2004* < <http://www.osi-az.org/mediatr4.shtml> >.

<sup>143</sup> OSI-AF, *Media Program Strategy for 2004* <<http://www.osi-az.org/mediatr4.shtml>>

<sup>144</sup> OSI-AF, *Media Program Strategy for 2004* <<http://www.osi-az.org/mediatr4.shtml>>.

The independence of public broadcaster (ITV) established under the pressure of the CoE is also questioned by national and international organizations. The reason of criticism is that the broadcaster is financed from the state budget <sup>145</sup>.

Notwithstanding that still some laws, for instance the law on defamation is needed, the reforms conducted in the country revealed that the problems experienced by the national media were because of the improper implementation of existing regulations, rather than their improvement.

Taking into account concerns with the independence of media, the following areas should be kept in the focus of reforms: professional and legal education and legal assistance to journalists, elimination all the existing obstacles in the advertisement market, encouragement of the media outlets' solidarity operating in the country and development of media in the regions <sup>146</sup>. In order to raise the independence of Azerbaijani **media**:

- A parliamentary commission, which is responsible for the investigation of informal censorship, should be established;
- The Press Council should more closely cooperate with the CoE experts on freedom of information and media <sup>147</sup>.

## **4.2 Russia**

### **4.2.1 Police**

Russian militia is also, like its Azerbaijani counterpart, allegedly criticized in practices of torture and ill-treatment against individuals. The Minister of Interior of the RF also confirmed the use of blackmailing methods by some police officers in the investigation of crimes. National human rights organizations explain such violations committed by national

<sup>145</sup> Dr. Gela Kvashilava, *Towards the Network Society: IT, Mass media and democratization of the South Caucasus* < <http://www.isn.ru/public/Kv.doc> > (citing: Comment: Rhetoric and Reality in Azerbaijan , By Whit Mason with Rashid Hajili in Baku (CRS No. 220, 26-Feb-04, iwpr.net)).

<sup>146</sup> Internews, US Embassy, USAID, OSI-AF assisted with the development of media in the provinces. OSI-AF, *Media Program Strategy for 2004* <<http://www.osi-az.org/mediastr4.shtml>>.

<sup>147</sup> HRW < [http://hrw.org/backgrounder/eca/azerbaijan1105/2.htm#\\_Toc120082505](http://hrw.org/backgrounder/eca/azerbaijan1105/2.htm#_Toc120082505)>.

police officers, with the existing informal system of criminal investigation, where quantitative indicators of “opening” crimes are more important than the quality of investigations. Therefore the police extensively use ill-treatments for extorting confessions from the suspected<sup>148</sup>. Apart from this reason, the CoE report states that such police violations exist also because of the low legal culture and education of police officers.

For elimination of such practices, disciplinary measures have been taken about police officers found guilty in unlawful activities: 21,000 officers were censured and 17,000 were fired by the preparation of 2005 CM Report<sup>149</sup>. The more considerable measure, however, is that, 560 police officers trained on the ECHR after ratification of the Convention<sup>150</sup>.

#### 4.2.2 Prosecutor’s office

When Russia was accepted to the membership of the CoE, it took commitment to reform the *prokuratura* institution according to the European standards<sup>151</sup>. Notwithstanding some efforts have been made, the CoE is still concerned about the current situation with prosecution in the country.

The reason of the CoE’s anxiety about the *prokuratura* was its subjection to the executive branch of the government, as its main mission was the protection of state interests

<sup>148</sup> *Ministers’ Deputies Information Documents, Progress Review Report*, Dir. of Strategic Planning (DSP), Program of activities 2004, CM/Inf (2005)12 (public) (2005) <<https://wcd.coe.int/ViewDoc.jsp?id=830519&BackColorInternet=9999CC&BackColorIntranet=&BackColorLogged=FDC864>>..See also: US DEP. OF STATE, BUREAU OF DEMOCRACY, H.R. AND LABOR, Russia, Country reports on human rights practices-2003 (2004) <<http://www.state.gov/g/drl/rls/hrrpt/2003/27861.htm>>; See also: Amnesty International, *Russian Federation, Denial of Justice* <http://web.amnesty.org/library/Index/ENGEUR460272002>; See further: Bill Bowring, *Russia’s accession to the Council of Europe and human rights: four years on*, 4, E.H.R.L.R., 362-67, (2000).

<sup>149</sup> *Ministers’ Deputies Information Documents, Progress Review Report*, Dir. of Strategic Planning (DSP), Program of activities 2004, CM/Inf (2005)12 (public) (2005) <<https://wcd.coe.int/ViewDoc.jsp?id=830519&BackColorInternet=9999CC&BackColorIntranet=&BackColorLogged=FDC864>>; See also: [www.transparency.org](http://www.transparency.org).

<sup>150</sup> *Ministers’ Deputies Information Documents, Progress Review Report*, Dir. of Strategic Planning (DSP), Program of activities 2004, CM/Inf (2005)12 (public) (2005) <<https://wcd.coe.int/ViewDoc.jsp?id=830519&BackColorInternet=9999CC&BackColorIntranet=&BackColorLogged=FDC864>>.

in criminal cases<sup>152</sup>. Initially excessive power of the prosecution comparing to the defense, seriously damaged the equality of arms and adversarial order of court proceedings. Prosecutor had very broad jurisdiction in supervising the legality of all administrative decisions, any decisions concerning the protection of human rights and liberties, places of detention and sanctioning of arrest and detention. Prosecutor had a power to challenge a sentence already passed.

Notwithstanding that in the course of reforms a significant part of procurator's powers have been complied with the requirements of Article 5 and 6 of the ECHR, the institution retained a number of key areas under its control, such as elections, local government, environment, consumer and labor rights<sup>153</sup>. Further reform of the prosecutor institution still remains topical and international community called for Russian authorities to reconsider its authorities once again at the time of the Russian chairmanship of the CoE Committee of Ministers in 2006.

#### 4.2.3 Prisons

Bringing the conditions in the places of pre-trial detention in line with the Articles 3 and 4 and Recommendation R (87)3 on European prison rules was also one of the commitments taken at the time of the Russia's accession to the CoE<sup>154</sup>. At that time, Russian prisons were excessively overcrowded and sanitary situation was deteriorating. Only one out of 13 CPT reports on Russian prison conditions has been published so far. The CoE

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<sup>151</sup> The commitments were conditions for the CoE membership. PACE OPINION 193(96) (Jan. 25, 1996). See also: THE EXECUTION OF STRASBOURG AND GENEVA HUMAN RIGHTS DECISIONS IN THE NATIONAL LEGAL ORDER. INTERNATIONAL STUDIES IN HUMAN RIGHTS, 123-137 (T.Barkhuysen et al. eds., 1999).

<sup>152</sup> Jean Pierre Massias, *Russia and the CoE: 10 years wasted?*, 15 RUSSIA. NEI. VISIONS (2007); See also: Amnesty International, Public statement, Joint call by Amnesty International, Center "Demos", Center for the Development of Democracy and Human Rights, Civic Assistance Committee, Human Rights Watch, International Helsinki Federation for Human Rights, Human Rights Center Memorial, Moscow Helsinki Group, Union of Committees of Soldiers' Mothers of Russia, *As Russia Takes Over the Chair of the Council of Europe It Must Show Respect for Human Rights*; See also: B. Bowring, *Inquiry into global security. Russia*, House of Commons, Foreign Affairs Committee <<http://www.parliament.the-stationery-office.co.uk/pa/cm200607/cmselect/cmaff/memo/495/ucm302.htm>>. (2007).

<sup>153</sup> Bill Bowring, *Russia's accession to the Council of Europe and human rights: four years on*, 4, E.H.R.L.R., 362-67, (2000).

authorities have for several times called the Russian government to publish all CPT reports, because their publication is considered to be an effective method in prevention the similar cases from happening in the future.

Some efforts have been made by the Russian government in reformation of prisons after the ratification of the ECHR. Among such measures the following should be noted: in order to struggle with the overcrowded condition, the number of inmates was reduced through issuing a number of amnesties and sentences related with incarceration were substituted with the ones which are not related with the imprisonment. The PACE especially welcomed the establishment of new facilities in Moscow and the regions with the purpose to reform the Ministry of Justice's penitentiary system in 2001-2006 within the Federal Programme. This progress was appreciated in 2005 PACE's report on Russia<sup>155</sup>. Moreover, raising the transparency in places of detention in Russia should be considered as a good practice. According to the Law "On public control over respect of human rights in places of detention and public associations' assistance to their activity", NGO Councils were set up with the authority to visit detention places<sup>156</sup>.

In spite of the abovementioned positive steps made, the situation in Russian SIZOs, regional penitentiary facilities and "filtration camps" in Chechnya still need further improvement<sup>157</sup>. The death facts in prisons make a thorough investigation on each such case inevitable. Furthermore, the CoE report recommended to keep the conduction of medical care

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<sup>154</sup> PACE, Addendum III to the Report, 7473 (Jan. 2, 1996) Russia's request for the membership of the CoE, Overview of relations between the CoE and the RF.

<sup>155</sup> PACE, REP. COMM. ON THE HONORING OF OBLIGATIONS AND COMMITMENTS BY MEMBER STATES OF THE CoE (MONITORING COMM.).10568 (Jun. 3, 2005) Honoring of obligations and commitments by the Russian Federation.

<sup>156</sup> PACE, REP. COMM. ON THE HONORING OF OBLIGATIONS AND COMMITMENTS BY MEMBER STATES OF THE CoE (MONITORING COMM.).10568 (Jun. 3, 2005) Honoring of obligations and commitments by the Russian Federation. See also: Amnesty International, *RF: Memorandum to Russian Government* <<http://web.amnesty.org/library/index/engeur460231998>>.

<sup>157</sup> Noëlle Quenivet, *The rule of law in the RF. Case study: filtration camps in Chechnya* <<http://www.ca-c.org/dataeng/quenivet.shtm>>.

programs in prisons, as the number of persons infected with TB and HIV in prisons is higher than among the general population.

#### 4.2.4 Media

Experts of different international organizations have for several times stated that there is a real threat for freedom of press in Russia<sup>158</sup>. National journalists have complained about constant persecutions by the state authorities and a wide scope of the notion of state secret. For these features, the situation in the sphere of mass media resembles its Azerbaijani counterpart and these problems can again be explained with the perceptions about media established at the time of Soviet Union.

Another problem is again the financial dependence of media and press outlets from either government or big commercial companies, close to governmental authorities<sup>159</sup>. As a consequence of such economical dependence, mass media representatives fall under control of such subjects, who dictate the kind of information disseminated via these media outlets<sup>160</sup>. The existence of such negative influence of the government was confirmed in the report of the Federal agency for press and mass media (Rospechat)<sup>161</sup>.

#### 4.3 Conclusion to the Chapter

On the basis of the above mentioned, I came to the conclusion that, none of the two countries can be considered having a good implementation practice of the Convention. Both of them experience problems in one or more areas, notwithstanding that some positive efforts

<sup>158</sup> Katerina Gordeeva, *SMI v Rossii: ekstrem ili chenzura? (Mass media in Russia: extreme or censure?)*, BBC, Feb. 12, 2002 <[http://news.bbc.co.uk/1/hi/russian/news/newsid\\_1816000/1816931.stm](http://news.bbc.co.uk/1/hi/russian/news/newsid_1816000/1816931.stm)>.

<sup>159</sup> European Audiovisual Observatory & Moscow Media Law and Policy Center, *Co-/Self-regulation bodies in the mass media. Report on the workshop jointly organized by the Moscow Media Law and Policy Centre and the European Audiovisual Observatory with the Grand Jury of the Russian Union of Journalists* (2005) <<http://www.obs.coe.int>>.

<sup>160</sup> GIPP (Gildiya Izdateley Periodicheskoy Pechati), *Rospechat ochenila rinok pechatnikh SMI v Rossii [Rospechat assessed the situation of Mass Media in Russia]* <<http://www.gipp.ru/opennews.php?id=12836&type=0>>.

<sup>161</sup> GIPP, *Rospechat ochenila rinok pechatnikh SMI v Rossii [Rospechat assessed the situation of Mass Media in Russia]* <<http://www.gipp.ru/opennews.php?id=12836&type=0>>. See also: Sabine Ripperger, *Svoboda SMI v Rossii stanovitsya vse bole prizrachnoy [Freedom of media in Russia becomes more and more illusive]* <<http://www.dw-world.de/dw/article/0,2144,1870882,00.html>>.

and steps have been also made. After the research done on the measures taken in two countries, to bring the practices of the law-enforcement agencies in line with the European standards, I came to the conclusion that the reason of the problems with the proper execution of the obligations on the Convention, is not the law, but rather the will and understanding, by the officials of governmental bodies, how to apply them in their practice. For this reason, organization of training courses and awareness programs for such state officials is very crucial for achieving good implementation of the ECHR on administrative level.

Reconsideration of state budgetary allocations for the activity of law enforcement bodies would especially be recommendable to Azerbaijan. For instance, after increasing the state budgetary allocations for prisons in Russia, some considerable progress were made, particularly new detention facilities were established, which to some extent solved the problem with overcrowded detention facilities, which is common for Russia. According to the CEPEJ report, the ration of financial means, allocated for the activity of law-enforcement bodies in the annual state budget, is substantively low in Azerbaijan compared to Russia<sup>162</sup>. For instance, this table indicates the allocations to the prosecution system in 2004 state budget:

Countries	Annual public budget spent on the prosecution system	Annual public budget spent on the prosecution system per inhabitant	Annual public budget spent on the prosecution system per inhabitant as percentage of per capita GDP	Annual public budget spent on the prosecution system per inhabitant as percentage of annual gross average salary
Azerbaijan	10 916 740 €	1,3 €	0,15%	0,13%

<sup>162</sup> *Eur. Commiss. for the Efficiency of Justice (CEPEJ)*, *Eur. Jud.-al. Sys.-s*, Edition 2006 (2004 data) (2006).

Russia	926 827	6,5 €	0,19%	0,27%
	355 €			

It is not to say that increase in the financial allocations will improve the situation immediately. I see the measure as one of the possible effective ways that somehow can contribute to encourage reforms and achieve better implementation results. For instance, the allocated budgets could be increased with the instruction to direct them to the improvement and increase the number of appropriate professional trainings.



## CHAPTER 5 - THE IMPLEMENTATION OF THE ECHR BY NATIONAL COURTS

### 5.1 Azerbaijan

#### 5.1.1 Mechanism of the ECHR's implementation by Azerbaijani courts

AR can be considered to be a country with a monist legal system, where an international treaty becomes a part of the legal system from the moment of its ratification. The Constitution of AR provides that the Convention is a part of the national legal system<sup>163</sup>. Azerbaijani courts have to equally apply the Convention as they apply any other national law. Not necessarily have the norms of international treaties to be transformed into the domestic legal system (by issuing a special law which interprets the norms of international treaty) in order the Azerbaijani judge to apply the provisions of international law<sup>164</sup>. Theoretically, there is no difference between the legal effects of the Convention and for example, Civil Procedural Code of AR for their application by the courts of AR. Both laws should be applied directly during the consideration of cases by the national courts. In this chapter I will address the issue of whether the Convention is implemented in practice by the courts as frequently as the Constitution and national legislative acts are.

In the Resolution of the Plenary Board of the AR SC “On the judicial activity in the sphere of the protection of human rights and freedoms during administration of justice” dated 10 March 2000 it is stated that until the national legislation has been complied with the international treaties, courts (judges) should refer directly to the international treaties to which the state is a party.

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<sup>163</sup> KONSTITUSIYA art. 148.2 (AR).

<sup>164</sup> FLORENCE BENOIT-ROHMER & HEINRICH KLEBES, CoE LAW. TOWARDS A PAN-EUROPEAN LEGAL AREA (2005).

The first Resolution of the Plenary Board of the Supreme Court of the AR, wholly dedicated to the implementation of the ECHR - “On implementation of the provisions of the ECHR and the precedents of the ECtHR during administration of justice” - was issued on 30 March 2006. The SC emphasized the acknowledgement by all state authorities of the ECtHR precedents on the interpretation and implementation of the ECHR and its Protocols<sup>165</sup>. The Supreme Court stated that: “During interpretation of the norms of international treaties, as well as the ECHR, along with its context, the subsequent implementation practice of the treaty should be referred to”<sup>166</sup>. This provision is the reiteration of the Article 31.3.b of the Vienna Convention on the law of international treaties<sup>167</sup>.

The Resolution of the Plenary Board also contains brief survey of the ECHR’s judicial practice on the Articles 5, 6, 8 of the ECHR and the Article 1 of the Protocol No. 1. However, there are no references to the respective ECtHR precedent law in the document. There is no doubt that the Resolution of the SC is a positive development, however the SC could have referred to the respective precedents on those articles so that the lower courts could take them into consideration in similar cases before them. The practice shows that courts are much keener to refer to the ECHR norms and the ECtHR precedents when these references are “indirectly” used, in other words, the representative of the parties achieve more success in application of ECHR law by the national courts, when they refer to the ECHR

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<sup>165</sup> Edalet muhakimesinin heyata kechirilmesi zamani “Insan huquq ve esas azadliqlarinin mudafiesi haqqinda” Avropa Konvensiyasi muddealarinin ve Insan Huquqlari uzra Avropa Mehkemesinin presedentlerinin tetbiqi haqqinda [On the implementation of the provisions of the ECHR and the precedents of the ECtHR during administration of justice] Ali Mehkemenin Plenumu [Plenary Board of the Supreme Court] 2 (AR).

<sup>166</sup> Edalet muhakimesinin heyata kechirilmesi zamani “Insan huquq ve esas azadliqlarinin mudafiesi haqqinda” Avropa Konvensiyasi muddealarinin ve Insan Huquqlari uzra Avropa Mehkemesinin presedentlerinin tetbiqi haqqinda [On the implementation of the provisions of the ECHR and the precedents of the ECtHR during administration of justice] Ali Mehkemenin Plenumu [Plenary Board of the Supreme Court] 3 (AR).

<sup>167</sup> Dinah Shelton, *The boundaries of human rights jurisdiction in Europe*, 13 Duke J. Comp. & Int'l L, 95, (2003). Also, in *Golder v. UK* the ECtHR, established that the terms of the Vienna Convention concerning interpretation are applicable to the ECHR because they proclaim "generally accepted principles of international law".

norms through citing appropriate decisions of the CC or the SC which contain the same references to the ECHR<sup>168</sup>.

Implementation by the national courts of the recommendations contained in the Decree of the AR President, dated 19 January 2006, to study and apply the ECtHR precedents can also significantly facilitate the process of implementation of the ECHR. The 6<sup>th</sup> paragraph of this Decree recommends to the SC, Appellate Courts of the AR and the SC of the Nakhchivan Autonomous Republic to study the ECtHR precedent law and take them into consideration in the judicial practice.

### **5.1.2 Analysis of the ECHR's implementation by Azerbaijani courts of different jurisdictions**

The real legal effect of an international treaty is determined not only by particular constitutional or other legislative provisions, but also with the will of the national judges to apply these international provisions. In this chapter I will address the issue, whether the national courts apply the ECHR and if yes, then to what extent. I will analyze the experience of the CC, SC and district courts.

#### **5.1.2.1 Constitutional Court of the AR**

Until August 2007, the ECHR is referred to in 46 judgments out of 109 judgments of the CC of the AR since the entry into force of the ECHR in the AR on 15 April 2002. I would especially like to note that the first reference to the ECHR was made by the CC in the decision on the compliance of some provisions of the Housing Code with the AR Constitution. The decision was issued on 14 April 2000, i.e. before the ratification of the ECHR by Azerbaijan<sup>169</sup>. Furthermore, only 3 judgments out of 14 decisions issued by the CC in 2006 mention concrete paragraphs of the ECtHR judgments so referred<sup>170</sup>. It creates

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<sup>168</sup> INTERNATIONAL HUMAN RIGHTS MECHANISMS 561-585 (G.Alfredsson et al. eds. 2001).

<sup>169</sup> Institut prava I publichnoy politiki <[http://www.ilpp.ru/content/files/forum8\\_reports\\_rus.pdf](http://www.ilpp.ru/content/files/forum8_reports_rus.pdf)>

<sup>170</sup> Available in: < <http://www.constcourt.gov.az/index.php?j=5>>

difficulties for lawyers and the judges of lower courts to study more deeply the provisions of the ECtHR precedent law applied by the Constitutional Court.

The first judgment that the Plenary Board of the CC AR cited the ECtHR precedent was issued on 11 May 2004. It was the judgment upon the complaint of *E. Alizadeh and others* on the verification of judiciary acts with the Constitution and laws of AR. The CC pointed out that the refusal in the registration of the public association without any lawful grounds can result in the violation of freedom of association, also right to the establishment and joining trade unions. Referring to *Sidoropulos and others v. Greece*, the CC noted that possibility of establishment by individuals of juridical entities is a very important aspect of the freedom of association<sup>171</sup>.

In the Decision “On Article 440.4 of the Civil Code and Article 74.2 of the Law “On the execution of court decisions”” (2002) the Constitutional Court of the AR referred to Article 6 ECHR and to the respective ECtHR practice and stated that “the execution of court judgments is a dispensable part of “judicial proceedings” provided in this article”.

Notwithstanding that the CC makes references to the ECHR provisions from time to time, citations of the ECtHR precedents are in a very few number of CC judgments. However, it is already proved in the practice that the provisions of the ECHR can rightly be implemented only taking into account the meaning that the ECtHR gave them in its judgments. The national courts should follow the method used by the ECtHR in the interpretation and the implementation of the ECHR.

#### **5.1.2.2 Supreme Court of the AR**

The practice of the AR SC demonstrates that the situation with implementation of the ECHR is still not good after 5 years of the ratification of the Convention. Only do the judgments issued under the presidency of Mr. V. Ibayev, the judge of the Judicial Collegium

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<sup>171</sup> Decision on the complaint of E.Alizadeh and others (Konstitusiya Mehkemesi [Constitutional Court] 2004) (Aze.).

on civil cases of the AR SC, contain references to the provisions and the case-law of the ECHR<sup>172</sup>. The application of the ECHR by the AR SC itself does not comply with the requirements of the Resolution of its Plenary Board “On the implementation of the provisions of the ECHR and the precedents of the ECtHR during administration of justice”, which we mentioned above, i.e. the SC itself does not apply the ECHR and its case law during consideration of cases.

### 5.1.2.3 Courts of Appeal

The same situation can be observed in the Court of Appeals: judges ignore the ECtHR precedents. On 11 July 2007, the Court of Appeal dismissed the complaint given from the judgment of the Yasamal district court, dated 19.03.2007. The appeal was filed by the founders of “Public Interest Citizen Initiative” Public Association against the Ministry of Justice of the AR<sup>173</sup>.

The board of judges taking as a ground that the association has already been registered, partly revoked the decision of Yasamal district court, but did not even consider the claim requesting the approval of the association’s charter by the Ministry of Justice. To explain in terms of the ECtHR, the reasoning of the court was that, the association had already lost its “victim” status. Thus the Court of Appeal neither secured the compensation of the caused damage, nor did sanction the violation of Article 11 of the ECHR. It should also be noted that although the association was registered by the Ministry of Justice, the latter made arbitrary amendments and changes to the charter.

In this case, the Court of Appeal should have given a due respect to the ECtHR judgment on *Ramazanova and others v. Azerbaijan*. In the judgment ECtHR stated that the decision or other measures taken in favor of the applicant can be deemed sufficient for the

<sup>172</sup> Interview with Judge V.Ibayev and practicing lawyers: Mr. Fuad Agayev and Mr. Intigam Aliyev.

<sup>173</sup> Ictimai Maraqlar Namine Vetendash Teshebbusu Ictimai Birliyi [Public Interest Citizen Initiative Public Association], *Azerbaijan mehkemeleri novbeti defe Avropa Mehkemesinin presedentlerine mehel qoymadi*

termination of his “victim” status only if the national authorities openly admit the violation of the ECHR’s appropriate provisions in substance and fully compensate the damage caused by the violation<sup>174</sup>. The ECtHR have established that the state registration of the association after very long delays cannot automatically be the reason of termination of the applicant’s “victim” status, which was true about the mentioned case before national courts.

#### 5.1.2.4 District courts

The judicial practice of district courts is difficult to access; practically it is not published in any official sources. Therefore in this subsection the practice of local NGOs - Legal Enlightenment Society and Media Institute will be referred to. Generally the application of the ECHR by the first instance courts is still far from the desired level. However, some progressive steps have been made by separate judges.

For instance, Yasamal district court, for the first time, applied the arguments on freedom of expression used in the precedents of the ECtHR in the case upon the complaint of F. Khankishiyev, the head of the Imishli district Railway Administration Office against Q. Zahid, chief editor of “Azadliq” newspaper<sup>175</sup>.

Khankishiyev was dissatisfied with the article published in “Azadliq” newspaper. The article contained information that Khankishiyev possessed cattle and kept them in new cargo wagons belonging to the Railway Administration Office. The head of administration argued that this information humiliated his honor, dignity and business reputation. The Prosecutor requested from Yasamal district court to rule for payment of compensation in the amount of 20,000 AZN and involve Q. Zahid, the chief editor, to a criminal liability under Article 147.2 (libel) of the Criminal Code of AR.

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[*Azerbaijani courts disregarded the ECtHR precedents*]  
<http://www.monitoring.az/index.php?lngs=aze&cats=1&ids=198>

<sup>174</sup> Ramazanova v. Azerbaijan, Eur. Ct. H.R. (2007).

<sup>175</sup> Monitoring.az, *Yasamal mehkemesinden mutereqqi qerar [Progressive decision by Yasamal district court]* <<http://www.monitoring.az/index.php?lngs=aze&cats=1&ids=205>>.

In his petition, dated 16 June 2007 the respondent brought his counter arguments alleging that the objective and subjective elements of libel or humiliation did not exist in the article that dissatisfied the applicant; the prosecutor also did not explain the reason why it had considered the expressions contained in the article to be libel and insult. Furthermore, the complainant also had not brought any arguments proving the falsehood of those expressions which he argued to be libel. The defense requested to reject the complaint and to close the proceedings on the case.

In its decision the court stated that, the AR is a member to the ECHR; it recognizes the obligatory character of the ECtHR jurisdiction and Azerbaijani courts should refer to the ECtHR practice along with the national legislation. The court referred to *Torgerson v. Ireland* dated 25 June 1992 and stated that the freedom of expression is one of the foundations of the democratic society. It includes not only information and thoughts which is neutral, harmless or benevolent, but also which is insulting, shocking or raising anxiety.

The court based its arguments on Article 302 of the Criminal Procedural Code and refused to admit the complaint into consideration and to open legal proceedings on the complaint of F. Khankishiyev requiring the involvement of Q. Zahid, the editor-in-chief of “Azadlig” newspaper, to the criminal responsibility under Article 147.2 of the Criminal Code. The decision can be considered as a progressive step made by the national court<sup>176</sup>.

I would like to conclude that although some separate progressive steps are made by some district, the Supreme and the Constitutional Court judges, the general level of the implementation of the ECtHR case law by the national courts can be evaluated as poor. The national courts either do not apply the ECHR at all, or they apply the ECHR law only as a subsidiary instrument, in order to add more weight to their arguments based on the national

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<sup>176</sup> Monitoring.az, *Yasamal mehkemesinden mutereqqi qerar [Progressive decision by Yasamal district court]* < <http://www.monitoring.az/index.php?lngs=aze&cats=1&ids=205>>.

legislation. The norms of the ECHR have never been taken by the national courts as the only ground for substantiation of the reasoning of the judgments.

National courts can apply international law either as an independent or an additional legal argument. Although there is not a strict classification in theory, in practice 3 forms of application of international law by the national courts can be differentiated<sup>177</sup>: 1) *contra legem* (contrary to the national law); 2) *praeter legem* (besides the national law); and 3) *secundum legem* (in addition to the national law). In *contra legem* application the court applies the international treaty instead of the “conflicting” norm of the national law. According to Huseynov, *contra legem* application of international law can be done, on the basis of the Article 151 of the Constitution, which states that “if there is a conflict between the normative legal acts of the AR legislative system (except the AR Constitution and the acts adopted by the referendum) and the treaties to which AR is a party, these international treaties shall be applied”.

In *praeter legem* application, a reference to international law is made with the purposes of filling gaps or unclear formulations in the national legislation. In *secundum legem* application of an international treaty, the latter is used as an additional legal argument or subsidiary means for interpretation of national legal provisions. In this case the court “strengthens” its argumentation with internationally recognized standards. Such “strengthening”, however, does not have a decisive role in solving the case which is under consideration.

Huseynov argues that there has not been yet any decision issued by the national courts where international law is applied in the order of *contra legem* or *praeter legem*. The application of international law by Azerbaijani judges is still at a primitive level; i.e. courts

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<sup>177</sup> INTERNATIONAL HUMAN RIGHTS MECHANISMS (G.Alfredsson et al. eds.), 561-585 (2001); See also: Letif Huseynov, *Konstituchiya Azerbaydjanskoy Respubliki, prava cheloveka i mejdunarodnoe pravo [Constitution of the AR, human rights and international law]*, I Jurnal Mejdunarodnoqo Prava [INTERNATIONAL LAW JOURNAL] 16-46 (1998).



refer to international law only as a subsidiary means of substantiating their arguments. It is because of the following reasons: 1) judges are educated in soviet positivism; 2) are not competent in the application of international law; 3) tend to strictly follow the law; 4) do not have practice of direct implementation of constitutional norms. Therefore, in order to avoid difficulties, Azerbaijani judge: 1) is keen to ignore international treaty; 2) ignore the self-executing character of an international treaty; 3) interpret international treaty and national law in such a way as if there is no collision between them.

### 5.1.3 The problems with the application

Judges refuse to apply precedents, arguing that Azerbaijan does not use a precedent system. However, we can bring counter arguments in response that, precedents are not alien to Azerbaijani judicial system at all. For example, the meaning of the Constitutional norms cannot be completely understood without referring to the decisions of the CC.

National judges should be explained that the mere application of the ECHR is not sufficient. In other words, it cannot be applied in a way as it is understood by the national judges, but in a way as it is interpreted by the ECtHR. The ECtHR has established in *Cossey v. UK* that to follow precedents is “in the interests of legal certainty and the orderly development of the Convention’s case-law”<sup>178</sup>. In *Ireland v. UK* the ECtHR has indicated that “the Court’s judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (Article 19)”<sup>179</sup>.

Other arguments that national judges usually bring for the non-application of the ECHR precedents are that:

<sup>178</sup> *Cossey v. UK*, Eur.Ct.H.R. (1990)

<sup>179</sup> *Ireland v. UK*, Eur.Ct.H.R. at 154 (1978).

1) National legislation contains sufficient guarantees for the protection of human rights; the application of the ECHR is excessive; 2) they do not speak English or French and the ECtHR judgments are not translated into the national language. They refuse to admit the unofficial translations of these judgments submitted by the parties to the case<sup>180</sup>.

#### **5.1.4 The measures taken at the national level to improve the situation with the judicial implementation of the ECHR**

By the Law “On making changes and amendments to some legislative acts of the AR” dated 11 June 2004, particular amendments concerning the reopening of cases were made to the Civil-procedural and Criminal-procedural Codes of the AR. According to these amendments, a judgment of the ECtHR, which found a violation of the ECHR, is a ground for re-opening of cases. In this case the Plenary Board of the AR SC has an authority to reconsider the cases on the grounds of human rights violations omitted during previous proceedings. Having reconsidered the case, the Plenary Board of the SC has a power wholly or partially to abolish the decisions of the first, appellate, cassation and additional cassation instances and to send the case back to the respective first or appellate instance.

Recent amendments made to the national legislation set up a new order, according to which, judges violating the ECHR principles in their judgments may be involved to disciplinary liability by the Judiciary-legal Council<sup>181</sup>. Thus, since 2005, 77 disciplinary proceedings were launched about the judges of different instances by the Judiciary-legal Council, 58 of them have been already completed, different disciplinary measures have been taken on them, as well as 2 judges have been dismissed from their office before termination of their duties<sup>182</sup>.

<sup>180</sup> Monitoring.az, *Yasamal rauon mehkemesi GHT-nin qeydiyyatından qanunsuz imtina ile bağlı novbeti shikayeti de redd etdi* [Yasamal district court dismissed the second complaint from the unlawful rejection to the local NGO in registration] <<http://www.monitoring.az/index.php?lngs=aze&cats=1&ids=137>>.

<sup>181</sup> Law On judges and courts (1997, 111), (AR).

<sup>182</sup> The reason for involvement to the disciplinary liability was not only the violation of the ECHR provisions by the national judges, among other reasons were the facts of corruption and etc.

This measure, however, should not be considered as an effective measure, as no improvement has been observed since the introduction of such a disciplinary liability in Azerbaijan. Besides the doubts on its effectiveness, this measure is also questionable concerning its conformity with the principle of judicial independence. The measures should be proportional to the problems and needs of the national judiciary. The problem in this case is the absence of sufficient knowledge and skills of domestic courts' judges in application of the ECHR and the ECtHR precedents. Thus the measures also should be directed to the advancement of the level of their knowledge and skills in this sphere<sup>183</sup>.

A good knowledge on the ECHR law should be one of the requirements for the admission to the position of a judge in domestic courts. Although a set of questions have been already included into the list of examination questions for the selection of judges in Azerbaijan, they are mainly of a technical character, rather than on substantive ECHR principles. For instance, the questions are about the list of rights provided by the ECHR, the order of the appointment of the ECtHR judges or reservations made by the AR government at the time of the ratification of the ECHR”<sup>184</sup>.

The most effective way of improvement of the current situation with the implementation can be organization of systematic educational and training programs for judges dealing with the ECHR. Judges should understand negative consequences, arising from the non-application of the ECHR norms, for the image of the country. At the time of ratification of the Convention, Azerbaijan has taken an obligation to provide everybody residing under its jurisdiction with the rights and freedoms defined in the Section 1 of the ECHR (Article 1 of the ECHR)<sup>185</sup>. Moreover, if national courts apply the ECtHR principles, it can prevent the potential case from appearing before the ECtHR in the future.

<sup>183</sup> INTERNATIONAL HUMAN RIGHTS MECHANISMS (G.Alfredsson et al. eds.) 561-585 (2001).

<sup>184</sup> Rules on the election of non-judge candidates to the vacant judge positions, the Resolution of the Judiciary-Legal Council (2005).

<sup>185</sup> MARK JANIS, ET AL, EUROPEAN HUMAN RIGHTS LAW. TEXT AND MATERIALS. 430-444 (1995).

In the legal literature there are some other suggestions for the facilitation of the ECHR implementation at the domestic level, such as: the court decisions issued without references to the ECtHR precedents should be complained to the higher court<sup>186</sup>. In *Hiro Balani v. Spain*, the ECtHR established that the refusal of the higher court to consider in its judgment the grounds of the appeal was a violation of the applicant's right to a fair trial according to Article 6<sup>187</sup>.

## 5.2 Russia

### 5.2.1 Mechanism of the ECHR's implementation by Russian courts

According to the last paragraph of the Article 1 of the Federal law “On ratification of the Convention”: “The RF acknowledges the jurisdiction of the ECtHR on issues of interpretation and implementation of the Convention and its Protocols”<sup>188</sup>. The Law of AR “On the ratification of the ECHR and Protocols 1, 4, 6 and 7”, however, directly acknowledges only the effect of the ECHR, but not the ECtHR case-law. Notwithstanding the absence of a direct statement on the acceptance of the jurisdiction of the Court, the law cannot be interpreted in a way that it does not consider the application of the ECHR precedents by the national courts, unnecessary. In application of the ECtHR case-law, Azerbaijani courts can rely on Article 31.3.b of the Vienna convention on law of international treaties, which states that “along with the context of the treaty, its subsequent implementation

<sup>186</sup> A.V.Demeneva & L.M.Churkina, *Primenenie Konvencii yuristami Uralskoqo chentra konstitutsionnoy mejdunarodnoy zashiti prav cheloveka [Implementation of the Convention by the lawyers of the Ural center on constitutional international human rights protection]* in PRIMENENIE EVROPEYSKOY KONVENCHII O ZASHITE PRAV CHELOVEKA V SUDAX ROSSII (APPLICATION OF THE ECHR IN THE COURTS OF RUSSIA) 95-97 (A. L. Burkov ed. 2006).

<sup>187</sup> OBRASHENIE V EVROPEYSKIY SUD PO PRAVAM CHELOVEKA [TAKING A CASE TO THE ECtHR], (Philip Leach ed.) 55 (2006).

<sup>188</sup> A.L.Burkov, *Mekhanizm primeneniya Konvencii v Rossiyskikh sudakh [Mechanism of the implementation of the Convention in Russian courts]* in PRIMENENIE EVROPEYSKOY KONVENCHII O ZASHITE PRAV CHELOVEKA V SUDAX ROSSII [IMPLEMENTATION OF THE ECHR IN THE COURTS OF RUSSIA] 17 (A.Burkov ed. 2006).

practice also should be taken into account during the interpretation of that international treaty”<sup>189</sup>.

According to the Article 3 of the Federal constitutional law “On the judicial system of the RF”, all Russian courts must apply universally recognized principles and norms of international law and international treaties of the RF<sup>190</sup>. The Law “On courts and judges” of the AR does not contain such a provision. Thus differently from Russia, in Azerbaijan the instructions, addressed to the national judges on the application of the ECHR and its case-law, are given either in the presidential decree, which are only of a recommendatory character for judiciary, or in the Resolutions of the Supreme Court. It might be considered as one of the reasons of the reluctance in the application of the ECHR precedents by judges who were educated in soviet positivism and tend to strictly follow the “letter” of the law<sup>191</sup>. Therefore, the reiteration of respective obligation in the law might change the attitude of Azerbaijani judges.

## **5.2.2 Analysis of the ECHR’s implementation by Russian courts of different jurisdictions**

### **5.2.2.1 RF Constitutional Court**

Differently from its Azerbaijani counterpart, Russian CC has already established a legal position on the implementation of the ECHR. In the case on the verification of the constitutionality of the Articles 371, 374 and 384 of the Criminal-procedural Code of the RSFSR, the Constitutional Court of the RF set up an obligation for all courts of the country

<sup>189</sup> V. Ibayev, *Azerbaijan Respublikasi Prezidentinin Fermani edalet muhakimesinin Avropa huquq mekanina chikhtmasini teblig edir [The Decree of the President of AR requires the justice “to go out” to the European legal space]* <<http://www.judicialcouncil.gov.az/3017.htm>>.

<sup>190</sup> A.L.Burkov, *Mekhanizm primeneniya Konvencii v Rossiyskikh sudakh [Mechanism of the implementation of the Convention in Russian courts]* in PRIMENENIE EVROPEYSKOY KONVENCHII O ZASHITE PRAV CHELOVEKA V SUDAKH ROSSII [IMPLEMENTATION OF THE ECHR IN THE COURTS OF RUSSIA] 24 (A.Burkov ed. 2006).

<sup>191</sup> L.B.ALEKSEEVA ET AL. MEJDUNARODNIE NORMI O PRAVAKH CHELOVEKA I PRIMENENIE IKH SUDAMI ROSSIYSKOY FEDERACHII [INTERNATIONAL HUMAN RIGHTS NORMS AND THEIR APPLICATION BY THE COURTS OF THE RF] (1996).

“to give a direct effect to the decisions of international bodies, including the ECtHR”<sup>192</sup>. However, Azerbaijan CC did not take the similar course. In the case on the verification with the AR Constitution of the lower court’s decision on *E. Alizadeh and others*, the Plenary Board of the CC of AR noted that “taking into account the provisions of the ECHR during consideration of cases can give positive results”<sup>193</sup>. As it is seen, the language of the judgment does not set up a firm legal position which can impact on the practice of the implementation of the ECtHR case law by lower courts.

### 5.2.2.2 RF Supreme Court

Russian SC has a number of times misapplied the ECHR. In the judgment of the RF SC, dated 16 November 2000, on the case upon the complaint of a trade union, representing personnel of the Moscow police station, from the “Instructions on the implementation of the Regulation of the service at the internal affairs organs of the RF” dated 14 October 1999, the SC stated that “the transfer of the internal affairs organs’ personnel to another permanent workplace without their consent falls under the definition of forced labor, as it is stated in the paragraph 2 of the Article 4 of the ECHR”. However, it is enough only to refer to the text of the ECHR, to find out that it does not contain any definition of forced labor.

Furthermore, the ECtHR established something contrary in one of its judgments: “Neither does the Article 4 define what is understood under the words of “forced labor”, nor in the other CoE documents on the preparation of the ECHR’s text, there is any explanation of it”. The ECtHR uses the definition of forced labor, given by the ILO, in the interpretation of the Article 4. Moreover, if looked in the light of the qualifications given to the “forced labor” in *Iversen v. Norway*, the transfer of the police personnel to another workplace should not have been deemed a violation of the paragraph 2 of the Article 4 ECHR by the RF SC. So

<sup>192</sup> A.L.Burkov, *Analiz primeneniya Konvenchii v Rossiyskikh sudakh [Analysis of the implementation of the Convention in Russian courts]* in PRIMENENIE EVROPEYSKOY KONVENCHII O ZASHITE PRAV CHELOVEKA V SUDAKH ROSSII [IMPLEMENTATION OF THE ECHR IN THE COURTS OF RUSSIA] 32 (A.Burkov ed. 2006).

not only does the RF SC rarely apply the ECHR, but also applies it either when its application is impossible or refuses from its application when it is inevitable<sup>194</sup>.

### **5.2.2.3 District courts**

Unlike the SC, Russian courts of low instance refer to the provisions of the ECtHR precedent law more often. However, according to the lawyers practicing in Russia, the situation with the implementation of the ECHR, especially the ECtHR precedent law by Russian courts, still can be qualified as poor.

## **5.2.3 The measures taken at the national level to improve the situation with the judicial implementation of the ECHR**

In order to find a way how to improve the situation with the implementation of the ECHR, national legal NGOs have carried out a number of campaigns in Russia. The campaign, organized by lawyers, on the strategic representation of cases in Russia, came to the conclusion that in the judicial procedures, where arguments of the parties were based only on the ECHR, without references to the ECtHR's precedent law, the court did not apply the fundamental international law principles on human rights protection.

Then the lawyers changed the method, submitting to the court their arguments on the significance of the direct implementation of the ECHR and as the result district courts began to apply the ECtHR precedents. Thus the judicial practice of Russian district courts allows drawing a conclusion that the regular referrals to the precedents of the ECtHR by the parties of the case, during substantiating their positions, can turn the situation in the sphere of the implementation of the ECHR into better<sup>195</sup>.

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<sup>193</sup> Decision on the complaint of E.Alizadeh and others (Konstitutsiya Mehkemesi [Constitutional Court] 2004) (Aze.).

<sup>194</sup> A.L.Burkov, *Analiz primeneniya Konvenchii v Rossiyskikh sudakh* [Analysis of the implementation of the Convention in Russian courts] in PRIMENENIE EVROPEYSKOY KONVENCHII O ZASHITE PRAV CHELOVEKA V SUDAKH ROSSII [IMPLEMENTATION OF THE ECHR IN THE COURTS OF RUSSIA] 44-52 (A.Burkov ed. 2006).

<sup>195</sup> A.L.Burkov, *Analiz primeneniya Konvenchii v Rossiyskikh sudakh* [Analysis of the implementation of the Convention in Russian courts] in PRIMENENIE EVROPEYSKOY KONVENCHII O ZASHITE PRAV CHELOVEKA V SUDAKH ROSSII [IMPLEMENTATION OF THE ECHR IN THE COURTS OF RUSSIA] 52-72 (A.Burkov ed. 2006).

### 5.3 Conclusion to the Chapter

To arrive at a conclusion, it is crucial for a lawyer, representing interests of individuals in the courts, to know the ECHR law well and to have strong skills on their application and interpretation<sup>196</sup>. The following question is the one most often asked by some Azerbaijani lawyers: “Why apply the ECHR norms at all at the domestic level? We can refer to them during preparation the application to the ECtHR.” The answer is: first of all, the application of the ECHR norms and the ECtHR precedents in a domestic case will guarantee the fulfillment by the potential applicant, of one of the requirements for filing applications, in case the case reaches the ECtHR<sup>197</sup>. The absence of the indication of the violation of a particular ECHR right can result with the non-admissibility decision. Furthermore, it would be more efficient for an applicant to get the protection of his/her ECHR rights by the domestic courts, rather than applying to the ECtHR. It is because in the latter case, it will take respectively a longer time to remedy the violated rights. The length of the ECtHR proceedings, difficulty in fulfillment of its admissibility criteria, foreign language of the judicial procedure and usually small amount of compensations in case of a violation is found, are factors indicating the significance of the use of the ECHR precedents by lawyers from the very earlier stages of proceedings before the domestic courts. The lawyer should refer both to the Convention and its precedent law, as well as remind their direct applicability to national courts<sup>198</sup>. Attachment of the translations of the ECtHR judgments, referred in the application, to other case materials, would also be necessary<sup>199</sup>.

<sup>196</sup> OBRASHENIE V EVROPEYSKIY SUD PO PRAVAM CHELOVEKA [TAKING A CASE TO THE ECtHR], (Philip Leach ed.) 57 (2006).

<sup>197</sup> A.V.Demeneva & L.M.Churkina, *Primenenie Konvencii yuristami Uralskoqo chentra konstitutsionnoy mejdunarodnoy zashiti prav cheloveka [Implementation of the Convention by the lawyers of the Ural center on constitutional international human rights protection]* in PRIMENENIE EVROPEYSKOY KONVENCHII O ZASHITE PRAV CHELOVEKA V SUDAX ROSSII (APPLICATION OF THE ECHR IN THE COURTS OF RUSSIA) 81 (A. L. Burkov ed. 2006).

<sup>198</sup> OBRASHENIE V EVROPEYSKIY SUD PO PRAVAM CHELOVEKA [TAKING A CASE TO THE ECtHR], (Philip Leach ed.) 51 (2006).

<sup>199</sup> OBRASHENIE V EVROPEYSKIY SUD PO PRAVAM CHELOVEKA [TAKING A CASE TO THE ECtHR], (Philip Leach ed.) 57 (2006).



As a conclusion to the abovementioned, one can note that both the AR and RF courts experience difficulties in the application of the ECHR law in national courts. In order to improve the situation, judiciary bodies should closely cooperate with the CoE institutions and experts and implement the respective CM Recommendations. Paragraph 8 of the Appendix to the Rec(2004)6 states that “The improvement of domestic remedies also requires that additional action be taken, so that, when applying national law, national authorities may take into account the requirements of the Convention and particularly those resulting from judgments of the Court concerning their state. This notably means improving the publication and dissemination of the Court's case-law (where necessary by translating it into the national language(s) of the state concerned) and the training, with regard to these requirements, of judges and other state officials”<sup>200</sup>.

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<sup>200</sup> *Recommendation of the Comm. Of Ministers, On the improvement of domestic remedies adopted by the Committee of Ministers 114th Sess., Rec(2004)6 (2004); See also: INTERNATIONAL HUMAN RIGHTS*

## CONCLUSION

The paper is to argue that the raising the level of awareness and knowledge on the ECHR both among the general public and the law-enforcement officials of member states is one of the most important “rings” in the “chain” of the domestic measures to be taken for the implementation of the Convention. The ECHR and its case law should be translated, publicized and disseminated, taught at universities and used for practical trainings of judges, lawyers, police and prison authorities and other law-enforcement officials<sup>201</sup>.

Azerbaijan and Russia both were within the Soviet Union for 70 years. This time period had a very strong impact upon the countries’ policy and ideology about human rights and the role of international law and tribunals. We saw that even so many years after the joining to the CoE and the ratification of the Convention, those old perceptions hinder the process of the European human rights standards’ successful implementation.

The problem of poor implementation in these two countries is not an absence of good formal rules, but rather, is their bad implementation. “Even the best law is only as good as the way it is applied”. There is a big gap between the adoption of various measures and their effective realization. Adopted implementation measures remain on the paper and serve to show the international community that the government has made all the necessary steps. Analysis of the complaints submitted to the ECtHR from Azerbaijan and Russia shows that notwithstanding many changes made to the domestic legislation, which particularly reformed civil and criminal procedures, implementation of these newly adopted laws still carries on them the mark of the past Soviet period, conflicting with the ECtHR jurisprudence. For instance, to the detriment of the guarantees contained in the national constitution and laws,

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MECHANISMS (G.Alfredsson et al. eds.), 561-585 (2001).

<sup>201</sup> Dinah Shelton, *The boundaries of human rights jurisdiction in Europe* 13 Duke J. Comp. & Int'l L. 95 (2003).

still there is a practice of keeping individuals under detention, without informing them about the grounds of the arrest<sup>202</sup>.

In sum, it is still early to speak about the effective adaptation of the domestic legal environments to the European standards in these countries. Shortfalls in law-enforcement practice and the lack of a mechanism of national legal enlightenment, directed at familiarizing the authorities and citizens with the ECHR standards hinder the process of fully successful implementation. Even if the governments have established all the necessary legislative grounds for successful implementation its international obligations, the state's law enforcement officers can feel reluctant in their application. The reason for that are: either long-established perceptions, according to which governmental interests, rather than human rights, were in the centre of all state activities in the Soviet Period<sup>203</sup>, or insufficient level of knowledge of state authorities on the nature of the ECHR law<sup>204</sup>. The same can be said about the population's knowledge about the ECHR and trust in the legal-judicial system in general, their sensitivity to violation of their rights and willingness to stand up for them.

Besides this, I would also explain the reason of the poor implementation, with the absence of a sufficient strong political will of the governments in guaranteeing the ECHR standards in their territories. I mean the motives of these countries to join the CoE and ratify the ECHR, were different from those of Northern and Western European states, the first members of the organization. Differently from the latter, the aims of Azerbaijani and Russian governments were most likely to "jump on the bandwagon"<sup>205</sup>, rather than to establish a human rights protection mechanism based on European standards in their territories. The ratification of the ECHR was not because of the experienced domestic need for protection of

<sup>202</sup> Interview with Mr. Fuad Agayev, lawyer practicing in Baku.

<sup>203</sup> It is obvious from *Ryabykh v. Russia* (Eur. Ct. H.R., 2003), where the higher court 5 times repealed the first instance court's decision which ruled for return of the applicants' savings by the national bank.

<sup>204</sup> A.Kovler, *Evropeyskoe pravo prav cheloveka I konstituchiya Rossii [European human rights law and RF Constitution]* < <http://www.demos-center.ru/projects/6B3771E/71A1FC6/71A2046/1144250133>>.

human rights, but was the want not to fall short from the “trend” of becoming a member of the CoE. Thus further respect and level of implementation by the government depend on its motivation for joining the international treaty. Human rights still remain peripheral to the other political interests in these countries. The evidences for this are: not yet ratification of a number of ECHR Protocols by RF and introduction of new, incompliant with the ECHR standards, provisions to the national legislation in Azerbaijan, etc.

On the one hand the shortfalls in the implementation of the ECHR in Azerbaijan can be explained with the relatively short period after the ratification and can be hoped that these problems will fade away by the time. On the other hand however, the situation with the implementation in Russia in its 10 years of ratification, make us think before making our deductions. Therefore, efforts taken at the domestic level should, first of all, be directed to achieve “reform in minds” and change, first of all, the way the law enforcers of the state think, reason and adjudicate and the latter can only be achieved through consecutive education and professional training for law-enforcers. This would also guarantee the establishment of effective domestic remedies within the countries and strengthen national courts.

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<sup>205</sup> Heyns, Christof H. & Viljoen Frans *The impact of the UN Treaties on the domestic level Vol.23, No.3 Human Rights Quarterly* 483-535 (2001).

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