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RUSSIAN LAW JOURNAL (RLJ)

An independent, professional peer-reviewed academic legal journal.

Aims and Scope

The *Russian Law Journal* is designed to encourage research especially in Russian law and legal systems of Eurasia countries. It covers recent legal developments not only of this region, but also on an international and comparative level.

The RLJ is not sponsored or affiliated with any university, it is an independent All-Russian interuniversity platform, initiated privately without any support from the government authorities.

It is published in English and appears four times per year. All articles are subject to professional editing by native English speaking legal scholars. RLJ is indexed by Scopus and ESCI Web of Science.

Notes for Contributors

The RLJ encourages comparative research by those who are interested in Russian law, but also seeks to encourage interest in all matters relating to international public and private law, civil and criminal law, constitutional law, civil rights, the theory and history of law, and the relationships between law and culture and other disciplines. A special emphasis is placed on interdisciplinary legal research.

Manuscripts must be the result of original research, not published elsewhere. Articles should be prepared and submitted in English. RLJ doesn't accept translations of original articles prepared not in English. The RLJ welcomes qualified scholars, but also accepts serious works of Ph.D. students and practicing lawyers.

Manuscripts should be submitted electronically via the website *www.russianlawjournal.org*. Articles will be subjected to a process of peer review. Contributors will be notified of the results of the initial review process within a period of two months.

Citations must conform to the *Bluebook: A Uniform System of Citation*.

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CHIEF EDITOR'S NOTE ON THE ENFORCEMENT PROCEEDINGS IN RUSSIA

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Recommended citation: Dmitry Maleshin, *Chief Editor's Note on the Enforcement Proceedings in Russia*, 5(1) Russian Law Journal 4–5 (2017).

In Russia, the big reform of enforcement proceedings was initiated in 1997 when the Federal Bailiff Service was established. It became a part of the system of agencies of the Ministry of Justice. The execution is regulated not only by the procedural codes, but also by special laws "On Execution" (1997) and "On Bailiffs" (1997). The Director of the Federal Bailiff Service is appointed by the President of the Russian Federation. The Federal Bailiff Service has been a member of the International Union of Judicial Officers since 2015. In order to become a bailiff a person must be a citizen of Russia and be at least twenty-one years old. There are no requirements concerning a university degree in law. Before presenting an applicant for the bailiff's position, there is a preliminary coordination of the candidacy with a medical commission.

There are four stages of the execution of the judgment: initiation of the execution, preparation for the implementation of measures of compulsory execution, implementation of measures of compulsory execution, and termination. The law provides for a general two-month deadline for the entire enforcement procedure. However, there are no sanctions for violation of this deadline, thus enforcement, in practice, could last much longer.

There are a number of particular measures in Russian enforcement procedure. First, one of the most popular indirect enforcement measures of recent times is the prohibition to leave the country. This measure has been effective since 2007. The bailiff can prohibit the debtor from traveling abroad if the debt is more than 10,000 RUR.

This measure was performed in relation to 2 million debtors in 2016, 50 percent of them were claims regarding alimony.

It is necessary to note that unlike many countries criminal arrest of debtors in relation to civil cases is not used in Russia. This appeared in Russian case law in 2013.

A special enforcement procedure is established in relation to official state authorities if they act as debtors. This concerns the government, ministries, official agencies, etc. The general rules are excluded in this case, and special legal regulation has been established. The Budget Code (1998) provides the rules concerning the enforcement of such judgments. The Federal Bailiff Service does not have authority to enforce them. A writ of execution should be delivered to the Treasury Department, which acts as the enforcement organ.

Finally, some statistics (2015). There are 25,000 bailiffs in Russia. On average, about 2,200 cases are pending with each bailiff every year. Thirty million cases are initiated every year by the bailiffs. There were around 324,000 garnishments (seizures) of property performed by the bailiffs.

ARTICLES

U.S.-RUSSIA-EAST ASIA COMPARISONS OF DISPATCH (TEMPORARY) WORKER REGULATIONS

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Russia had few temporary workers in the 1990s, but after the fall of the Soviet Union and the entrance of foreign MNCs, the percent of workers on temporary contracts grew in 2014. In 2016, a new law was implemented that bans hiring temporary workers except through government-accredited agencies, but only for the purpose of substituting for employees who are temporarily absent from the workplace; to assist in the temporary expansion of production or services (for up to a maximum of nine months); and to provide temporary employment to certain approved categories of workers (i.e., full-time students, single parents, parents of multiple children, and former convicts).

This paper will compare and contrast the current labor protections of temporary dispatch workers in the U.S. and Russia, with consideration also of the recent legislative labor protections provided in the East Asian countries of China, South Korea, and Japan. Following the Introduction, the paper, in Part I discusses the phenomena of "fissurization," in employment relations and its resulting legal implications for the regulation of "dispatch (agency)" workers in the above countries. Part II compares and contrasts the regulatory approaches of the U.S. with Russia and the East Asian countries of China, Japan, and South Korea; and the Conclusion follows. Perhaps the menu of regulatory legislation provided in this paper will be useful for those looking for the tools to construct dispatch regulation in the U.S.

Keywords: labor and employment laws; dispatch workers; international and comparative laws; human resource management.

Recommended citation: Ronald Brown & Olga Rymkevich, *U.S.-Russia-East Asia Comparisons of Dispatch (Temporary) Worker Regulations*, 5(1) Russian Law Journal 6–32 (2017).

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Introduction

Russia had few temporary workers in the 1990s, but after the fall of the Soviet Union and the entrance of foreign MNCs, the percent of workers on temporary contracts grew in 2014.[1] In 2016, a new law was implemented that bans hiring

[1] According to the estimations of the Russian Ministry of Health, in the Russian Federation there are between 100.000–130.000 people working as temporary employees in the legal labor market in Russia (Feb. 20, 2017), available at http://www.audit-it.ru/articles/personnel/a110/323705.html. However statistical data in Russia are not precise especially regarding this category of workers whose legal status before the adoption of the law was not defined and even after remains vague. *See also*

temporary workers except through government-accredited agencies,[2] but only for the purpose of substituting for employees who are temporarily absent from the workplace; to assist in the temporary expansion of production or services (for up to a maximum of nine months); and to provide temporary employment to certain approved categories of workers (i.e., full-time students, single parents, parents of multiple children, and former convicts).[3]

China, Japan, and South Korea have also recently passed legislation that deal with the issues raised by the use of dispatch workers.

The legal issues become tangled when balancing legitimate needs of employers to use temporary replacements to fill unexpected temporary vacancies or during peak business periods. However, when employers hire temporary workers on a continuing or permanent basis (*permatemps*) and at cheaper wages or for hazardous work, and for core jobs within the company, a different set of issues arises, also affecting the job security of permanent regular employees. This is further entangled when there is the use of "independent contractors" and outsourcing or *insourcing* with "subcontractors,"[4] further raising the issues of who is an "employee" and who is an "employer" or a "joint employer," that is "jointly liable?"

In the U.S., permanent, full-time workers can perform the same duties side by side with a temporary employee who receives lower wages and fewer benefits and who can stay at that "temporary" job for an unlimited time. The European Union (EU) in 2008, to thwart the use of temporaries to reduce costs, mandated that temporary workers receive equal pay and working conditions as provided to permanent employees.[5] More than half of the developed countries have addressed the issue with legislation to better protect temporary and permanent workers, including South

Delphine d'Amora, *New Law Curtails Widespread Temp Staffing*, The Moscow Times, May 6, 2014 (Feb. 20, 2017), available at https://themoscowtimes.com/articles/new-law-curtails-widespread-temp-staffing-35152.

[2] Федеральный закон от 5 мая 2014 г. № 116-ФЗ «О внесении изменений в отдельные законодательные акты Российской Федерации», Собрание законодательства РФ, 2014, № 19, ст. 2321 [Federal law No. 116-FZ of May 5, 2014. On Amendments to Certain Legislative Acts of the Russian Federation, Legislation Bulletin of the Russian Federation, 2014, No. 19, Art. 2321].

[3] *Id.* It also bans hiring workers to replace employees on strike or refused to work due to a violation of their labor rights, or sending them to work on hazardous facilities or in dangerous conditions; and they must be paid equally with permanent workers. Трудовой кодекс Российской Федерации от 30 декабря 2001 г. № 197-ФЗ, Собрание законодательства РФ, 2002, № 1 (ч. 1), ст. 3 [Federal law No. 197-FZ of December 30, 2001. Labor Code of the Russian Federation, Legislation Bulletin of the Russian Federation, 2002, No. 1 (Part 1), Art. 3] (with the Amendments), Art. 341.1, English version is available at https://www.wto.org/english/thewto_e/acc_e/rus_e/WTACCRUS58_LEG_363.pdf.

[4] *See* discussion in Ronald C. Brown, *Korea-U.S. Labor Law Developments: Any Lessons?*, KLP Working Paper Series (Korea Legislation Research Institute, 2014), at 161–164.

[5] Directive 2008/104/EC of the European Parliament and of the Council of November 19, 2008 on Temporary Agency Work, O.J. L 327, December 5, 2008, p. 9–14 (Feb. 20, 2017), available at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008L0104.

Korea, Japan, China, and Russia (effective 2016).[6] Regulations vary from a Russian general ban on the use of temporary workers ("outstaffing") to a South Korean law that converts workers to permanent status after a certain period of time in the temporary position.[7]

This paper will compare and contrast the current labor protections of temporary dispatch workers in the U.S. and Russia, with consideration also of the recent legislative labor protections provided in the East Asian countries of China, South Korea, and Japan. Following the Introduction, the paper, in Part I discusses the phenomena of "fissurization,"[8] in employment relations and its resulting legal implications for the regulation of "dispatch (agency)" workers in the above countries. Part II compares and contrasts the regulatory approaches of the U.S. with Russia and the East Asian countries of China, Japan, and South Korea; and the Conclusion follows. Perhaps the menu of regulatory legislation provided in this paper will be useful for those looking for the tools to construct dispatch regulation in the U.S.

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[6] **South Korea:** Labor Standards Act (Act No. 5309 of March 13, 1997), amended by Act. No. 11270 of February 1, 2012, Art. 44-2 (Feb. 20, 2017), available at http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/46401/74081/F437818795/KOR46401%20Eng2014.pdf.

Japan: On September 11, 2015, the "Act to Partially Amend the Act for Securing the Proper Operation of Worker Dispatching Undertakings and Protection of Dispatched Workers" was concluded. 2015 Amendments to the Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers No. 88 of 1985 (Feb. 20, 2017), available at law.e-gov.go.jp/htmldata/S60/S60HO088.html (English translation available on website).

China: Labor Contract Law of the People's Republic of China (Order of the President of the People's Republic of China No. 65), Arts. 57–67 (Feb. 20, 2017), available at http://www.lawinfochina.com/display.aspx?id=6133&lib=law; Decision of the Standing Committee of the National People's Congress on Amending the Employment Contract Law of the People's Republic of China (Order of the President of the People's Republic of China No. 73) (2012) (Feb. 20, 2017), available at http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=92672; China Interim Provisions on Labor Dispatch (2014) (Feb. 20, 2017), available at http://www.hrone.com/article/-China-Interim-Provisions-on-Labor-Dispatch (hereafter called Interim Provisions).

Russia: Labor Code of the Russian Federation, *supra* note 3. For a succinct summary, *see Russia: Significant Labor Law Changes for 2016 Will Alter Temporary Employee Market*, Willis Towers Watson, June 25, 2014 (Feb. 20, 2017), available at https://www.towerswatson.com/en/Insights/Newsletters/Global/global-news-briefs/2014/06/russia-2016-labor-law-changes-will-affect-temporary-workers.

[7] *See* discussion in Brown 2014, 159, at 161–164. For a broader overview of East Asian laws *see* Fang L. Cooke & Ronald Brown, *The Regulation of Non-Standard Forms of Employment in China, Japan and the Republic of Korea*, Conditions of Work and Employment Series No. 64 (Geneva: ILO, 2015), available at http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_414584.pdf.

[8] This describes the phenomena of fragmented workplaces where employers use subcontracting, outsourcing, franchising, and independent contractors for formerly core operations. *See* David Weil, *Enforcing Labor Standards in Fissured Workplaces – the U.S. Experience*, 22(2) Economic and Labour Relations Review 33 (2011); David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can be Done to Improve It?* (Cambridge, MA: Harvard University Press, 2014).

1. Regulating Dispatch Workers in U.S., Russia, and East Asia

1.1. Changing Landscape of Employment Relationships

1.1.1. Fissurization

"The employment relationship in a growing number of industries with large concentrations of low wage workers has become 'fissured,' where the lead firms that collectively determine the product market conditions in which wages and conditions are set have become separated from the actual employment of the workers who provide goods or services. Instead, the direct employers of low wage workers operate in far more competitive markets that create conditions for non-compliance."[9]

While fissurization may occur *horizontally* through employer links with franchises, contracted subcontractors with labor chains, etc., it also occurs *vertically* as when one employer uses temporary workers from another employer, e.g., a staffing agency who is the technical employer.[10]

1.1.2. Dispatch/Agency Workers as Employees

Dispatch workers are hired by an independent *sender-company* and temporarily contracted out to a *user-employer* who may use that worker for an unlimited time and have them perform functions the same as other permanent user-employer workers. As the number of temporary workers rose around the globe,[11] including dispatch workers, regulations appeared in many countries to protect the rights of regular employees whose jobs were being displaced by the hiring of an increasing number of "temporary or leased" employees (*permatemps*).[12] Legislation varies and addresses a number of issues: goal to protect regular employees vs. temporary employees; regulation of the sending companies (temp agencies); the scope of the limitations on the type of jobs; the duration of the temporary status; the obligations of requiring comparative wages and benefits between temporary and regular employees; and the penalties for violations.

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[9] Weil 2011, at 33.

[10] *Id*.

[11] Jessica R. Nicholson, *Temporary Help Workers in the U.S. Labor Market*, U.S. Department of Commerce, Economics and Statistics Administration, Issue Brief #03-15 (July 1, 2015) (Feb. 20, 2017), available at http://www.esa.doc.gov/sites/default/files/temporary-help-workers-in-the-us-labor-market.pdf. *Contingent Workers*: *Incomes and Benefits Lag Behind Those of Rest of Workforce*, GAO/HEHS-00-76, General Accounting Office (June, 2000) (Feb. 20, 2017), available at http://www.gao.gov/assets/240/230443.pdf. It is reported that "from 1982 to 1998, the 'temporary help supply industry' grew by 577 percent, compared with 41 percent growth in total employment." Jeff Vockrodt, *Realizing the Need for and Logic of an Equal Pay Act for Temporary Workers*, 26 Berkeley J. Emp. & Lab. L. 583–584 (2005) (Feb. 20, 2017), also available at: http://scholarship.law.berkeley.edu/bjell/vol26/iss2/14.

[12] *Permatemps*, Center for a Changing Workforce (Feb. 20, 2017), available at http://www.cfcw.org/permatemps.html.

The nature of the employment relationship often needs to be identified and sometimes distinguished from "dispatch" workers. Are independent contractors and outsourced or insourced contractors or *gig* workers included under the dispatch legislation, particularly if under the law the sender and user employers are "joint" employers of the same employee?[13]

Mistakes in classifying workers as "employees" can be costly to the offending employer.[14]

1.2. Special Legislation: Temporary/Dispatch/Outstaffing? U.S., Russia, China, Japan, South Korea

1.2.1. U.S.

In the U.S., there is no specific national regulation for temporary, dispatched, or leased employees, though their number is significant.[15] In the U.S., it is reported that "from 1982 to 1998, the 'temporary help supply industry' grew by 577 percent, compared with 41 percent growth in total employment."[16] And the growth continues; according to the American Staffing website,

> more than three million temporary and contract employees work for America's staffing companies during an average week. During the course of a year, America's staffing companies hire nearly 16 million temporary and contract employees. Most (76%) work full time, comparable to the overall workforce (82%). One-third (35%) were offered a permanent job by a client where they worked on an assignment… Individual assignments range from a few hours to several years; overall employment tenure averages just over three months.

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13 *See* Ronald C. Brown, *An Employee By Any Other Name?* in *Attività transnazionali: sapere giuridico e scienza della traduzione* 107–122 (P. Sandulli, M. Faioli, eds., Roma: Nuova Cultura, 2011). *Also see* discussion on U.S. developments on joint liability under new case law. Scott Prange, *Managing the Workforce in the Gig Economy*, 20(6) Hawaii Bar Journal 4 (2016).

14 Vizcaino v. Microsoft Corporation, 120 F.3d. 1006 (9th Cir. 1998), *cert. denied*, 522 U.S. 1098 (1998). Microsoft reached a $96.9 million settlement with a group of freelance workers who worked for Microsoft after the 9th Circuit found that the workers were in fact common law employees and not independent contractors and were entitled to participate in Microsoft's various pension and welfare plans. And *see* Robert J. Bohner Jr. et al., *Beware the Legal Risks of Hiring Temps*, Workforce, October 17, 2002 (Feb. 20, 2017), available at http://www.workforce.com/articles/beware-the-legal-risks-of-hiring-temps.

15 *See* Rebecca Smith & Claire McKenna, *Temped Out: How the Domestic Outsourcing of Blue-Collar Jobs Harms America's Workers* (National Employment Law Project 2014) (Feb. 20, 2017), available at http://www.nelp.org/publication/temped-out-how-domestic-outsourcing-of-blue-collar-jobs-harms-americas-workers/.

16 *See* M. B. Sturgis, Inc., 331 N.L.R.B. 1298 (2000) and *Contingent Workers*: *Incomes and Benefits Lag Behind Those of Rest of Workforce*, *supra* note 11 (Feb. 20, 2017), available at http://www.gao.gov/assets/670/669899.pdf, and http://www.gao.gov/products/HEHS-00-76.

> Staffing employees work in virtually all occupations in all sectors: 37% Industrial; 28% Office–Clerical and Administrative; 13% Professional–Managerial; 13% Engineering, Information Technology, and Scientific; 9% Health Care.[17]

With vertical fissurization, employers increasingly contract labor from another employer that supplies the labor. Under the current trend of law where workers are economically dependent on both employers or controlled by the user employer, joint employer liability is likely. These temporary employers are regularly paid lower wages and have lower or fewer benefits than the permanent employees of the user employer with whom they are working. Labor laws apply to most workers, depending on compliance with statutory definitions of "employee" and "employer." Therefore, *minimum* labor standards and conditions must be met for covered employees though that is not to say temporary, subcontracted, or dispatched employees must receive the same wage and benefit package paid to the regular employee working beside them. The Equal Pay Act, protecting against gender discrimination, does not necessarily provide protection for dispatched temporary workers so as to provide equal pay between temporary and permanent employees.[18] Corporations in the business of supplying temporary labor are regulated by individual state laws as are other businesses. The numbers of temporary and dispatched workers in the U.S. continues to climb.[19]

1.2.2. Russia

In Russia the fissurization of the labor market took place after the collapse of the Soviet Union (USSR). The Soviet period had been characterized by full employment on open ended contracts and the Labor Code (2001) recognized only few atypical

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[17] *Staffing Industry Statistics*, American Staffing Association (Feb. 20, 2017), available at https://americanstaffing.net/staffing-research-data/fact-sheets-analysis-staffing-industry-trends/staffing-industry-statistics/.

[18] The EEOC that enforces the Equal Pay Act has stated that "temporary workers often do not receive compensation on par with their permanent counterparts. The Commission does not consider this practice discrimination *per se.* But it does recognize the potential for this practice to be discriminatory in application, particularly in light of data showing that women are more likely than men to work as temporary employees. Thus, the Commission's compliance manual states that in determining whether employees' status as temporary vs. permanent is nondiscriminatory, the following issues should be considered: 1) whether the wage differential is applied uniformly regardless of employees' protected status (e.g., race, sex, etc.); 2) whether the differential conforms to the nature and duration of the job; and 3) whether the differential conforms with a nondiscriminatory customary practice within the industry and establishment. *See* EEOC Compliance Manual Section 708.5(3) (BNA) 708:0023." *Equal Employment Opportunity*, U.S. Equal Employment Opportunity Commission (August 2000) (Feb. 20, 2017), available at https://www.eeoc.gov/eeoc/foia/letters/2000/titlevii_epa_wage.html. *See also* Vockrodt 2005, at 583.

[19] Nicholson 2015, *supra* note 11. In the EU, since 2008 there has been a Directive that applies to the working conditions of temporary employees and entitles the temporary employees to equal treatment including: access to amenities and collective services, wages, and other protections and rights. It further recognizes temporary-work agencies as employers. Directive 2008/104/EC of the European Parliament and of the Council of November 19, 2008 on Temporary Agency Work, *supra* note 5.

forms of work, such as fixed term, part-time and apprenticeship contract.[20] In Russia temporary work agencies (TWA) appeared in the 1990s mainly due to the entrance of foreign MNCs into the Russian labor market. Although proposals to regulate temporary agency work were put forward earlier, it was regulated in 2014, by a law that was not effective until January, 2016.[21] The delay in adoption of this law and its implementation is explained by the fact that the main shareholders (the trade union, State and employers associations) were still negotiating a mutually acceptable compromise. The trade union labeled TWA as an absolute evil and a worst form of worker exploitation and demanded its total ban; whereas employers and agencies actively lobbied in its favor. As a consequence, the new law represents a sort of a paradoxical compromise; on one hand the law bans most temporary workers, but on the other hand it allows accredited temporary work agencies in some cases to temporarily send workers to the third party host companies. So the same law both prohibits and allows the use of temporary workers dispatched from a TWA.

Under the law, temporary agency work is put under strict control and accredited private employment agencies (PEAs) must satisfy special accreditation requisites.[22] PEAs must supervise the actual use of posted employees' labor by the receiving party with regard to their employment function, as well as monitoring the receiving party's compliance with labor laws. In addition, joint responsibility (subsidiary responsibility) is assigned in relation to the employment contracts with workers under the staff secondment agreement (payment of wages, annual leave and so on).[23] As of January 1, 2016 the law also contemplates the possibility of workers dispatch by other legal entities (including foreign ones with their affiliates) that comply with the requirements prescribed by law (the presence of an affiliation or a shareholder agreement with a legal entity receiving posted staff).[24]

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20 Labor Code of the Russian Federation, *supra* note 3.

21 *Id.*

22 These include: minimum capital of at least one million rubles; lack of indebtedness to the Russian budget. The forms of such reports are regulated by the Order of the Ministry of Labor and Social Protection of the Russian Federation No. 265n from May 30, 2016 [Приказ Министерства труда и социальной защиты РФ от 30 мая 2016 г. № 265н] (Feb. 20, 2017), available at http://www.rostrud.ru/rostrud/deyatelnost/?CAT_ID=6261. Labor Code of the Russian Federation, *supra* note 3. The accreditation rules are established in the Order of the Government of the Russian Federation No. 1165 from October 29, 2015, Legislation Bulletin of the Russian Federation, 2015, No. 45, Art. 6255 [Постановление Правительства РФ от 29 октября 2015 г. № 1165 «Об утверждении Правил аккредитации частных агентств занятости на право осуществления деятельности по предоставлению труда работников (персонала)», Собрание законодательства РФ, 2015, № 45, ст. 6255], according to which PEA must send annual reports to the special accreditation bodies.

23 Labor Code of the Russian Federation, Art. 341.1(5), *supra* note 3. *See also* Jon Hellevig et al., *Awara Russian Labor Law Guide 2014*, Awara Group (2014), at 27 (Feb. 20, 2017), available at www.awaragroup.com/wp-content/uploads/2015/05/awara-labor-law-guide.pdf.

24 Art 18.1(2) of the Federal law No. 36-FZ from April 20, 1996 on the employment in the Russian Federation, Legislation Bulletin of the Russian Federation, 1996, No. 17, Art. 1915 [Федеральный

Temporary agency work is defined as work performed by an employee at the request of the employer in the interest and under the control and supervision of a natural person or legal person that is not the employee's actual employer.[25] Under the law, temporary agency work is put under strict control and employees dispatch is allowed for the purpose of substituting for employees who are temporarily absent from the workplace; to assist in the temporary expansion of production or services (for up to a maximum of nine months); and the law exempts certain categories of workers (i.e., full-time students, single parents, parents of multiple children, and former convicts).[26]

Other restrictions on the dispatch workers are similar to those generally adopted in other countries and include the prohibition of replacement of employees engaged in industrial action; performance of work during idle time or during a bankruptcy procedure or with the purpose of avoiding collective redundancies or replacement of employees who refuse to perform work in cases established by labor law (for instance, in cases in which workers temporarily suspend work because of a delay in the payment of wages exceeding 15 days) and fines may be imposed for violations of the Dispatch Law.[27] It also banned hiring workers to replace employees who refused to work due to a violation of their labor rights, or sending them to work on hazardous facilities or in dangerous conditions.[28] So the same law both prohibits and allows some use of temporary workers dispatched from a TWA.

The law permits staff posting by PEAs to certain activities such as providing housekeeping support for an individual who is not a self-employed entrepreneur; temporary performance of duties of an absent employee with a right to return to the job; cases when it is possible under the law to conclude fixed-term contract, cases of performance of work related to a temporary (up to nine months) expansion of

закон от 20 апреля 1996 г. № 36-ФЗ «О внесении изменений и дополнений в Закон Российской Федерации «О занятости населения в Российской Федерации»», Собрание законодательства РФ, 1996, № 17, ст. 1915], as amended by the Federal law No. 116-FZ of May 5, 2014; *see also Agency Labour Law: Legal Regulation of Staff Secondment in Russia*, Flash Report: Russia Issue No. 21(92), May 2014 (Feb. 20, 2017), available at https://www.pwc.ru/en/legal-services/news/assets/agency_labour.pdf. Labor Code of the Russian Federation (with the Amendments), *supra* note 3.

25 Law of the Russian Federation No. 1032-I from April 19, 1991 on employment of population in the Russian Federation (as amended on March 9, 2016), Gazette of the Congress of People's Deputies of the Russian Federation and the Supreme Soviet of the Russian Federation, 1991, No. 18, Art. 566 [Закон РФ от 19 апреля 1991 г. № 1032-I «О занятости населения в Российской Федерации», Ведомости Съезда народных депутатов Российской Федерации и Верховного Совета Российской Федерации, 1991, № 18, ст. 566], Art. 18.1 (Feb. 20, 2017), available at http://base.garant.ru/10164333/.

26 Labor Code of the Russian Federation, Art. 341.2, *supra* note 3.

27 Labor Code of the Russian Federation, Art. 142, *supra* note 3. For penalties, *see* the full text of the Code of Administrative Offences of the Russian Federation No. 195-FZ from December 30, 2001 as amended October 3, 2016 [Кодекс Российской Федерации об административных правонарушениях от 30 декабря 2001 г. № 195-ФЗ], Arts. 5.27 and 5.27.1 (Feb. 20, 2017), available only in Russian at http://www.consultant.ru/document/cons_doc_LAW_34661/.

28 d'Amora 2014, *supra* note 1.

manufacturing capacity or scope of services provided. In this later case if the quota of temporary workers exceeds 10 percent of the number of workers of the receiving party, the opinion of the primary trade union should be taken into account.[29]

As for the employment conditions and the anti-discrimination principle, the law establishes it only to remuneration by stating that the wages of the dispatch employees should not be worse if compared to those of employees of the user-enterprise with the same qualifications and performing the same functions.[30] Insurance contributions for the posted employees must be paid on the basis of an insurance tariff determined in accordance with the type of business operations performed by the user enterprise which is obliged to provide the agency with all the necessary information in this regard.[31]

1.2.3. East Asia: China, Japan, South Korea

1.2.3.1. China

In *China*, there is recent legislation[32] regulating the use of dispatch workers. As of 2014, dispatched workers can be used only in temporary positions (defined as 6 months or less), auxiliary positions, or in substitute positions,[33] and provided workers must not comprise more than 10 percent of a company's total workforce.[34]

In 2008, after the Labor Contract Law (LCL) and the Labour Disputes Mediation and Arbitration Law (LDMAL) took effect, the number of mediations and arbitrations rose dramatically, spurring greater enforcement and award of remedies.[35] Therefore, using irregular employees left employers with some flexibility; and while *probationary* and *part-time* workers gave employers some measure of discretion, it was the *dispatch* workers that provided the most. Dispatch workers were largely excluded from the

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29 Art. 18.1(2) of the Federal law No. 36-FZ from April 20, 1996 as amended by the Federal law No. 116-FZ of May 5, 2014, *supra* note 24.

30 Labor Code of the Russian Federation, Art. 341.1, *supra* note 3. *See also* d'Amora 2014, *supra* note 1.

31 Art. 22 of the Federal law No. 125-FZ from July 24, 1998 on the compulsory social insurance from accidents at work and professional diseases, Legislation Bulletin of the Russian Federation, 1998, No. 31, Art. 3803 [Федеральный закон от 24 июля 1998 г. № 125-ФЗ «Об обязательном социальном страховании от несчастных случаев на производстве и профессиональных заболеваний», Собрание законодательства РФ, 1998, № 31, ст. 3803], as amended by the Federal law No. 116-FZ of May 5, 2014.

32 Labor Contract Law, Arts. 57–67, *supra* note 6; Decision of the Standing Committee of the National People's Congress, *supra* note 6; Interim Provisions, *supra* note 6.

33 Interim Provisions, *supra* note 6. Portions first presented in Cooke & Brown 2015, *supra* note 7.

34 Interim Provisions, Arts. 4 & 28, *supra* note 6. *See also China: Strict Limits and Cap on Labour Dispatch Arrangements*, Linklaters (February 2014) (Feb. 20, 2017), available at www.linklaters.com/pdfs/mkt/shanghai/A17733169.pdf.

35 *See* Ronald C. Brown, *Defusion of Labor Disputes in China: Collective Negotiations, Mediation, Arbitration, and the Courts*, 3 China-EU Law J. 117 (2014).

protections of the LCL. Inadvertently, the LCL provided employers with an incentive to replace full-time workers with dispatch workers in order to avoid the heightened restrictions of the LCL.[36] In 2010, the ACFTU estimated there were 60 million dispatch workers in China[37] and it was reported there were 26,000 labor dispatch companies.[38] These agency workers were often reported to be making lower wages and receiving much less social security protection than employees of the user firms.[39]

In response to this incentive misalignment, in 2012 the Standing Committee of the National People's Congress made revisions that addressed the issue.[40] The Chinese government tightened and clarified the regulation of agency employment and the agency industry and in 2014 the Ministry of Human Resources and Social Security (MOHRSS) issued the Interim Provisions on Labor Dispatch.[41] Effective in March 2014, dispatched workers must not comprise more than 10 percent of a company's total workforce.[42] Dispatched workers can be used only in temporary positions (defined as 6 months or less), auxiliary positions and substitute positions (e.g. to cover maternity leave, long-term sick leave, and study leave).[43] The Interim Provisions detail obligations for both the employer and labor dispatch agency on the signing and termination of labor contracts,[44] social insurance contributions,[45] and work-related injuries, and pre-service training and safety education,[46] among other items. A tougher penalty is prescribed for violations, with a fine between 5,000 yuan and 10,000 yuan per employee.[47]

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36 Virginia H. Ho & Huang Qiaoyan, *The Recursivity of Reform: China's Amended Labor Contract Law*, 37 Fordham International Law Journal 973, 982–983 (2014).

37 Genghua Liu, *Private Employment Agencies and Labour Dispatch in China*, SECTOR Working Paper No. 293 (Geneva: ILO, 2014) (Feb. 20, 2017), available at http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_246921.pdf.

38 *China Labor Dispatch Industry Indepth Research and Investment Strategy Report, 2013–2017*, QianZhan (Feb. 20, 2017), available at http://en.qianzhan.com/report/detail/6cdf8ac1017640a3.html), *cited in* Daniel S.S. Cairns, *New Formalities for Casual Labor: Addressing Unintended Consequences of China's Labor Contract Law*, 24(1) Washington International Law Journal 238 (2015).

39 *China Amends Labor Contract Law to Eliminate Labor Dispatch Abuse*, Bryan Cave, April 18, 2013 (Feb. 20, 2017), available at https://www.bryancave.com/images/content/1/9/v2/1949/LaborAlert4-18-13.pdf.

40 Decision of the Standing Committee of the National People's Congress, *supra* note 6.

41 Interim Provisions, *supra* note 6.

42 Interim Provisions, *supra* note 6. *See also* China: Strict Limits and Cap on Labour Dispatch Arrangement, *supra* note 34.

43 Interim Provisions, Art. 3, *supra* note 6.

44 *Id.* Art. 8.

45 *Id.* Art. 8(4). The dispatch agreements shall stipulate the positions to which the workers are dispatched, the number of persons to be dispatched, the term of dispatch, the amounts and terms of payments of remunerations and social security premiums, and the liability for breach of agreement.

46 *Id.* Art. 8.

47 Labor Contract Law, Art. 92, per Art. 20, *supra* note 6. Interim Provisions, *id*.

Art. 66 of the LCL defines the scope of lawful labor dispatch workers to include temporary, auxiliary, and substitute positions; the amended Art. 66 also mandates that dispatch work can "only" be these three types of workers.[48] The Interim Provisions further define these terms as follows.[49] *Temporary* is now defined as work that does not exceed six months duration. *Auxiliary* is defined as a non-primary business position that supports the receiving employer's core business. *Substitute positions*, also translated as "back-up jobs," are defined as positions that provide temporary coverage for full-time employees that are on leave.[50] The Interim Provisions further define and regulate labor dispatch agencies[51] and penalties are provided for violations.[52]

With the enactment of the dispatch laws, the employers' labor strategies have turned to changing non-standard positions into permanent positions, using outsourcing, part-time work, intern placement, and volunteer work. In particular, business outsourcing has been a popular strategy for large SOEs and foreign firms to cope with the new labor regulations.[53]

But reforms may be difficult. Even since the passage of the dispatch laws, it is reported some companies continue to violate the regulatory obligations, employing dispatch workers outside the three permissible categories in core jobs, exceeding the 10 percent limit, requiring workers to pay recruitment fees, and not fully paying social security obligations.[54]

1.2.3.2. Japan[55]

In 2015, the Japanese Diet approved an amendment to its Worker Dispatch Law and amid some controversy removed most limitations to employ dispatch workers, though with a three year limit on their use.[56] The Dispatch Law is said to have "the aim of gaining greater employment stability and protection for dispatched workers,

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48 Labor dispatch workers are to be temporary, auxiliary or substitutive positions. Labor Contract Law, Art. 66, *supra* note 6.

49 Interim Provisions, Art. 3, *supra* note 6.

50 *See* discussion in *China Amends Labor Contract Law to Eliminate Labor Dispatch Abuse*, *supra* note 39.

51 Interim Provisions, Art. 7, *supra* note 6. Labor Contract Law, Art. 57, Amended, *id*.

52 Interim Regulations, Arts. 20–24, *supra* note 6, referencing Arts. 92, 48, 87, and 83 in the Labor Contract Law, *id*.

53 Qiao Jian, *2014: China Labour Relations in the Economic Structure Adjustment* in *2015 Blue Book of China's Society: Society of China Analysis and Forecast* 252–271 (P.L. Li, G.J. Chen & Y. Zhang, eds., Beijing: Social Science Academy Press, 2014). As a result, from 2011 to the end of 2013, the total number of dispatched workers in the four big banks in China had reduced from 172,900 to 142,600 workers. *Id.*

54 *Labor Dispatch Workers in China*, Fair Labor Association (March 2016) (Feb. 20, 2017), available at http://www.fairlabor.org/sites/default/files/documents/reports/march-2016-dispatch-labor-in-china.pdf.

55 *See* Cooke & Brown 2015, *supra* note 7, at 22–24 and 40–48.

56 2015 Amendments to the Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers, *supra* note 6.

among other benefits. This would be done by setting new time limits under the rationale of making it a rule that dispatch work should be temporary and provisional in nature, and by creating schemes for improving the quality of worker dispatching undertakings, giving support for career formation including the conversion of dispatched workers to regular employees, and so on."[57]

In 2014, dispatch workers were reported to constitute about 11.9 million, about 6.1 percent of all employees in Japan; and nearly 11 percent of Japanese employers retained dispatch workers.[58] Not surprisingly, the larger employers in Japan tend to have more dispatch workers than smaller employers as reflected by the fact that 80.5 percent of employers with at least 1,000 employees use dispatch workers.[59]

Japan has had a Worker Dispatch law since 1985 reportedly not aimed at protecting the dispatch worker, but rather for the purpose of preventing substitution for regular employment.[60] In 2012, the law had "26 business areas" that placed no restrictions on the use and duration of employment of dispatch workers, whereas for ordinary work outside those categories there was a three year term limit. Thereafter, under the law, if the worker outside the 26 business areas was retained, he or she would have a required regular employment relationship. These 26 categories were regarded as "specialized" or as involving specific skills or knowledge–suggesting that the use of dispatched workers for these job categories did not involve substitution for regular employment.

The 2015 amended Revision eliminated the 26 business categories for dispatch workers and removed restrictions on any job category, though there is a three-year limit on the use of *specific* dispatch workers in a specific position, after which the dispatch agency must send a new worker, though the displaced worker may be employed in a different department of the employer or given permanent status. There also is a three year limitation on dispatch workers being sent to the open position of the employer, unless the union or representative of a majority of employees is "asked for its opinion" (no consent required) for a decision to "roll over" the three year limit.[61]

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[57] Sugeno Kazuo, *Labor Situation in Japan and Its Analysis: General Overview 2015/2016*, The Japan Institute for Labour Policy and Training, at 180 (Feb. 20, 2017), available at http://www.jil.go.jp/english/lsj/general/2015-2016/2015-2016.pdf.

[58] Michihiro Mori, *Recent Amendments to Employment Laws in Japan*, 28th Annual LAWASIA Conference 2015, at 4 (Feb. 20, 2017), available at www.lawasia.asn.au/MORI.pdf?blobheadername1=Content... MORI.pdf.

[59] *Id.*

[60] Before 1985 the use of dispatch workers was prohibited under Art. 6 of the Labor Standards Act ("no person shall obtain profit by intervening, as a business, in the employment of others"), until the 1985 Dispatch Worker Act made an exception, beginning the path toward de-regulation. Employment Security Act (Act No. 141 of November 30, 1947, as amended) (Japan) (Feb. 20, 2017), available at http://www.japaneselawtranslation.go.jp/law/detail/?id=10&vm=04&re=01.

[61] Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers (Act No. 88 of 1985), Art. 40-5 (Japan) (Feb. 20, 2017), available at http://www.cas.go.jp/jp/seisaku/hourei/data/aspo.pdf. The bill to amend the Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers (the "Worker Dispatching Act") was enacted on September 11, 2015, and came into force on September 30, 2015.

Many observers conclude, therefore, that there is no longer any meaningful three year limit and "the new legal framework will trap workers into a dispatch relationship for their entire working lives (known as *shōgai haken* – meaning "lifelong dispatch").[62] An earlier provision of the proposed law that provided that an employment relationship may be deemed to exist directly between the dispatch worker and the user company after three years was removed by the Diet.[63]

All dispatching agencies are now required to obtain licenses and to take measures to secure employment opportunities for dispatch workers who finish their terms. User employers are to provide any necessary training of the new dispatch workers and user employers must "provide them with the same level of access to welfare facilities (*fukurikōsei shisetsu* – meaning dorms, cafeterias, and recreational facilities used by employees, etc.) that company employees enjoy."[64] "With the revision of the Worker Dispatch Act in 2012, a direct employment offer shall be considered to be provided by the Client Company to the dispatch workers when there are illegal items in the worker dispatch arrangement, including breach of the term limit, which has taken effect in October 2015 (Article 40-6 of the Workers Dispatching Act)."[65]

The 2015 law provides an "exemption," to the worker dispatch period regulations in that it shall not be applicable to the following cases: "(i) the dispatched worker enters into an employment agreement with the worker dispatch business operator without a definite period: …under the new law, depending upon the worker dispatch period, the dispatch company is obligated to provide indefinite term contracts to their employees (i.e., the dispatched workers) and if the dispatch company complies with this obligation… an exemption will apply and thus, the new law will not apply to limit the period of dispatch to 3 years. (ii) the dispatched worker is sixty (60) years of age or older; (iii) the dispatched worker engages in project of which termination date is clear; (iv) the dispatched worker works for ten (10) days per month or half of the working days for other general workers; and (v) the dispatched worker is dispatched by reason of maternity leave, family-care leave, etc."[66]

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62 Hifumi Okunuki, *Legal Change Will Make Temp Purgatory Permanent for Many Japanese Workers*, Zenkoku Ippan Tokyo General Union, September 29, 2015 (Feb. 20, 2017), available at http://tokyogeneralunion.org/legal-change-will-make-temp-purgatory-permanent-for-many-japanese-workers/.

63 Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers, Art. 49, para. 1, Arts. 58–61, *supra* note 61.

64 *See* Florence Cheung, *Changing Times: New Rules for Dispatch Workers in Japan*, Lexology, April 7, 2014 (Feb. 20, 2017), available at http://www.lexology.com/library/detail.aspx?g=a1f10c74-28fb-47c5-a123-3299bf387c4d.

65 Trent Sutton & Aki Tanaka, *Japan: Amendment to Worker Dispatch Act*, Littler, December 8, 2015, note 5 (Feb. 20, 2017), available at https://www.littler.com/publication-press/publication/japan-amendment-worker-dispatch-act.

66 Masanori Nakajima, *Summary of Amendments to the Worker Dispatch Law (Law No. 88 of 1985, as amended), Effective as of September 30, 2015*, Tozai Sogo Law Office (Feb. 20, 2017), available at http://www.tozai-sogo.com/news-1/iff41vsd19/Summary-of-Amendments-to-the-Worker-Dispatch-Law-Law-No-88-of-1985-as-amended-Effective-as-of-September-30-2015.

The 2015 law in order to pursue dispatched worker's employment stabilization further provides: a worker dispatch business operator is obliged to (a) request host companies to directly employ a dispatched worker following the expiration of his dispatched term; (b) provide a new host company to the dispatched worker once the dispatch period to the initial Client expires; (c) to enter into an employment agreement with the dispatched worker without a definite period; or (d) any other measures to pursue dispatched worker's employment stabilization.[67]

While equal treatment for part-time and fixed-term-contract workers is mandatory in European countries,[68] equal pay of dispatched workers and directly employed workers in Japan, under the revised law, is still just something that dispatching agencies must make "efforts" to achieve.

Thus, it seems to be a fair question, whether Japan's 2015 Worker Dispatch Law Amendment, moving away from the original purpose of the law of protecting the regular workers, moves any closer to the protection of dispatch workers as workers or just provides added discretion to the employer?

1.2.3.3. South Korea[69]

In *South Korea*, the Dispatched Workers Act[70] regulates the use of dispatch workers sent by a temporary work agency that is also regulated.[71] This law prohibits a company from "engaging dispatched workers in direct production processes and can only engage dispatched workers in 32 specified business roles."[72] Any employer who dispatches or uses a dispatched worker contrary to the Dispatched Workers Act may be subject to criminal sanctions.[73] The dispatching agency is closely regulated by the statute and must meet certain requirements.[74]

The law also mandates that if a dispatched employee has worked for the company for two years, the dispatched employee may be deemed to be a company employee. Further, the law requires the employment conditions for dispatched workers should be the same that apply to the company's regular employees in the same or similar jobs.[75]

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67 Nakajima, *supra* note 66.

68 Directive 2008/104/EC of the European Parliament and of the Council of November 19, 2008 on Temporary Agency Work, Art. 5, *supra* note 5.

69 Portions of the material first presented in Cooke & Brown 2015, *supra* note 7, at 24–28 and 49–56.

70 Act on the Protection, etc., of Dispatched Workers (Act No. 5512 of February 20, 1998), last amended Act No. 12632 (Feb. 20, 2017), available at http://elaw.klri.re.kr/eng_service/lawView.do?hseq=25605&lang=ENG.

71 *Id.* Arts. 7 to 19.

72 Jeong Han Lee & Anthony Chang, *Employment and Employee Benefits in South Korea: Overview*, Practical Law (Feb. 20, 2017), available at http://us.practicallaw.com/6-508-2342#.

73 Act on the Protection, etc., of Dispatched Workers, Arts. 42–45, *supra* note 70.

74 *Id.* Arts. 5–19.

75 Act on the Protection, etc., of Dispatched Workers, *supra* note 70.

The *Act on the Protection, etc., of Dispatched Workers*[76] prohibits discriminatory treatment of temporary agency or "dispatched workers" in wages and other working conditions, as compared to a directly employed worker "who performs the same work in the business of the using employer."[77] This law defines "dispatched worker" as a worker who maintains an employment relationship with a "sending employer," (temporary agency) and works for a "using employer" under the direction and order of the using employer and with a worker dispatch contract.[78]

The *Labor Standards Act*, which limits the term of any fixed-term labor to one year, unless the term is required for the completion of a particular project, provides a further requirement on the use of dispatch workers.[79] In order to prevent the use of continuing fixed-term contracts to employ a worker in long-term non-regular status, the *Act on the Protection, etc., of Fixed-Term and Part-Time Employees* provides an employer may hire an individual as a fixed-term employee only for a period of up to two years (unless for justifiable reasons).[80] The *Act on the Protection, etc., of Dispatched Workers* also mandates that the length of an employment period for a dispatched worker may not exceed two years (unless for justifiable reasons) or else the employer is obligated to directly employ the dispatched worker.[81]

Effective in 2012, the amended Protection of Dispatched Workers Act, requires an employer to directly employ the dispatched worker immediately even when the term of dispatch does not exceed two years if the dispatch is deemed to be illegal, as for example, where the dispatched workers are used for jobs prohibited by the law[82] or not included in the 32 statutorily-permitted categories.[83] Use of dispatched workers for "*core*" Company functions not on the Dispatch Law's list of allowed jobs is a violation, as is their use for purposes specifically disallowed, such as construction, stevedoring, hazardous jobs, etc.[84]

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[76] Parts of the following material was first published in Brown 2014, at 159, 161–164.

[77] Act on the Protection, etc., of Dispatched Workers, Art. 21, *supra* note 70.

[78] *Id.* Art. 2.

[79] Labor Standards Act, Art. 16, *supra* note 6.

[80] Act on the Protection, etc., of Fixed-Term and Part-Time Employees (Act No. 8074 of December 21, 2006), amended by Act No. 11273 of February 1, 2012, Art. 4 (Feb. 20, 2017), available at http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/79807/85982/F-2091075080/KOR79807%20Eng%202012.pdf.

[81] Act on the Protection, etc., of Dispatched Workers, Arts. 5(2) and 6, *supra* note 70.

[82] *Id.* Art. 6, *supra* note 70.

[83] Act on the Protection, etc., of Dispatched Workers, Addenda <Presidential Decree No. 22799 of March 30, 2011 (effective July 1, 2011)> (jobs permitted for worker dispatch).

[84] *Dispatched Workers Used in Ways Contrary to Statutory Limitations Should Be Immediately Employed by Service Recipient Company Under Amended Statute*, American Bar Association Section of Labor and Employment Law (Feb. 20, 2017), available at http://www.americanbar.org/content/newsletter/groups/labor_law/int_newsletter/ilel_news20121/april2012/1204_aball_int_skorea.html. *See also* Global Legal Insights (Feb. 20, 2017), available at http://www.globallegalinsights.com/practice-areas/employment/global-legal-insights---employment-and-labour-law-4th-ed./korea.

1.3. Related Issues

In addition to regulations placing limitations on the use of dispatch workers and sometimes on wage parity, other labor issues may arise. Are workers considered independent contractors or employees under various protective labor statutes, such as health and safety laws? If the latter, are they "employees" of which employer or both? Usually the obligations are on the "employer," whether it is the sending or host employer or as joint employers.[85] Questions may still arise in a number of related areas. Do temporary/dispatch workers have the right to join a union[86] and if they have a union, must it be separate from the employer's regular employees?[87] Who is the employer and does the law allow for "joint employers" for this and other labor rights?[88] These issues are left for future research projects. The dispatch laws may explicitly protect ILO standards, discussed below, or these rights may be found in general labor laws outside the dispatch law.

1.4. ILO Guidance?

The ILO provides some guidance on the global labor standards relating to dispatch workers.[89] The ILO has a convention dealing with labor dispatch agencies, Private Employment Agencies Convention, 1997 (No. 181).[90] It sets forth the framework for

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85 E.g., in the U.S. *see* OSHA: Protecting Temporary Employees (DOL) (July 24, 2013), available at https://www.osha.gov/temp_workers/.

86 In the U.S., temporary employees may join a union. A question has been, which union, that of sender or user? The latest position is for them to join same union in the same bargaining unit as their co-worker permanent employees of the user employer who is a *joint employer* with the sender employer. Miller & Anderson, Inc. and Tradesmen International and Sheet Metal Workers International Association, Local Union No. 19, AFL–CIO, Case 05-RC-079249, July 11, 2016 (Feb. 20, 2017), available at https://www.nlrb.gov/case/05-RC-079249.

87 In China, dispatch workers may join the union of either the sending or using employer. Interim Provisions; Labor Contract Law, *supra* note 6.

Article 64. Dispatched workers have the right to join the labor union of the worker dispatch service provider or of the accepting entity or to organize such unions, so as to protect their own lawful rights and interests. *Id.*

88 In Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery, 362 NLRB No. 186 (2015) (Browning-Ferris), the Board majority substantially expanded the circumstances when multiple entities would be deemed a joint employer of particular employees.

89 There are a number of ILO conventions (C) and recommendations (R) that relate to the employment relationship and can relate to temporary workers, including dispatch workers. C158 – Termination of Employment Convention, 1982 (No. 158); R166 – Termination of Employment Recommendation, 1982 (No. 166); C181 – Private Employment Agencies Convention, 1997 (No. 181); R188 – Private Employment Agencies Recommendation, 1997 (No. 188); R198 – Employment Relationship Recommendation, 2006 (No. 196); C175 – Part-Time Work Convention, 1994 (No. 175); R182 – Part-Time Work Recommendation, 1994 (No. 182).

90 C181 – Private Employment Agencies Convention, 1997 (No. 181), International Labour Organization (Feb. 20, 2017), available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C181. *See also* the accompanying R188 – Private Employment Agencies Recommendation, 1997 (No. 188), Part II, International Labour Organization (Feb. 20, 2017), available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:SUP,en,R188,/Document.

operation of private employment agencies; employment conditions; and treatment as regards such issues as pay, social protection, leave and pensions.[91] Of the countries discussed in this paper, only Japan has ratified Convention 181.

The Convention on private employment agencies provides that the agencies should protect the workers core labor rights and keep them free from discrimination; the Convention provides that a Member state should regulate the agencies and provide that the necessary measures to ensure adequate protection for the workers employed by private employment agencies in the following areas: "(a) freedom of association; (b) collective bargaining; (c) minimum wages; (d) working time and other working conditions; (e) statutory social security benefits; (f) access to training; (g) occupational safety and health; (h) compensation in case of occupational accidents or diseases; (i) compensation in case of insolvency and protection of workers claims; (j) maternity protection and benefits, and parental protection and benefits."[92]

Additionally, the Convention provides that a Member state shall determine and allocate, in accordance with national law and practice, the respective responsibilities of private employment agencies providing the above services and the user enterprises regarding a list of labor rights issues.[93] The Recommendation states that there should be cooperation between the public employment services and the private employment agencies.[94] It also recommends providing laws for penalties, written contracts for the workers specifying terms and conditions, prohibiting their use to replace strikers, placing them into jobs of unacceptable risk, abuse, or discrimination, and a list of other worker-protective measures.[95]

2. Regulatory Approaches Compared

2.1. Comparisons

In evaluating the various dispatch laws, there are numbers of factors that could be compared. For example, a. Was the aim of the law to "protect" regular employees or dispatch employees? b. Does the law regulate the temporary agency itself?

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[91] *Temporary Agency Work*, International Labour Organization (Feb. 20, 2017), available at http://ilo.org/sector/activities/topics/temporary-agency-work/lang--en/index.htm. *See also Guide to Private Employment Agencies – Regulation, Monitoring and Enforcement* (Geneva: ILO, 2007) (Feb. 20, 2017), available at http://www.globalmigrationgroup.org/sites/default/files/uploads/UNCT_Corner/theme2/labor-migration/guide_to_private_employment_agencies_wcms_118153.pdf.

[92] C181 – Private Employment Agencies Convention, Arts. 3, 4, 5, and 11, *supra* note 90.

[93] *Id.* Art. 2: "(a) collective bargaining; (b) minimum wages; (c) working time and other working conditions; (d) statutory social security benefits; (e) access to training; (f) protection in the field of occupational safety and health; (g) compensation in case of occupational accidents or diseases; (h) compensation in case of insolvency and protection of workers claims; (i) maternity protection and benefits, and parental protection and benefits."

[94] R188 – Private Employment Agencies Recommendation, Part II, *supra* note 90.

[95] *Id.*

c. Does the law itself protect ILO labor rights? d. What is the scope? e. Does it limit jobs and/or duration? f. Are wages and conditions non-discriminatory compared with permanent workers? g. Are there penalties for violations?

2.1.1. U.S.

Though the U.S. has no national dispatch law, it does have dispatched workers sent to user companies by staffing companies, with all "employees" generally subject to state and federal protective labor laws. So there is no legislative goal to distinguish these workers from others. Usually staffing agencies are only regulated by state laws as corporations, the same as other companies. In the U.S., by either federal or state law most "employees," including these dispatched workers, are protected by labor laws that uphold many of the ILO core labor rights, with questions sometimes arising, who is the employer – the sender, the user, or both jointly? Wages are not circumscribed by specific laws other than the labor law standards, such as minimum wages; so there can be higher pay for regular workers. Therefore, under current law in the U.S. there can be a dispatch worker and a permanent worker performing the same work for disparate pay for unlimited duration with no limitations on the types of jobs performed, including those that are core jobs or hazardous.

2.1.2. Russia

Notwithstanding its wide use for many years, temporary agency work has been regulated only recently. For a long time this market operated without much notice, so the aim of the new law was to address the abuses that took place. On the one hand it aims to put the temporary worker agencies under control and closer scrutiny in order to diminish the number of dishonest temporary staffing agencies. It also aimed to protect temporary workers by ensuring them equal treatment from the point of view of remuneration.[96]

With regard to the legislative provision that allows employers to hire temporary workers to expand their company, but limits temporary workers to 10 percent of the employer's workforce, a shortcoming of this limit is it must be taken to the trade union for its opinion. This seems difficult in practice as the trade union is often absent from many workplaces,[97] thus leaving the employer with much discretion on the number of dispatch workers it uses. Also the choice of the legislation to exempt from the limitations such categories as full-time students, single parents, parents with a large number of children, and former convicts is a somewhat unique feature and might be questionable.

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[96] It is also aimed to ensure major revenues to the Fund of social insurance. Аутсорсинг персонала: запрет или легализация? [*Outsourcing of Personnel: Ban or Legalization?*], Tax Coach (Feb. 20, 2017), available at http://www.taxcoach.ru/about/news/Autsorsing_personala-_zapret_ili_legalizatsiya-/.

[97] There are only about 45 percent of workers organized in trade unions. Irina Kozina, *The Post-Soviet Unions*, 37(4) Notes of the Fatherland 94–98 (2007).

The law does not itself specify explicit sanctions for violations of the provisions, but does reference them to penalties outside the dispatch law; however, it does provide for *joint liability* and the user-company will be recognized as the subsidiary employer under the provisions of Art. 67(1) of the Labor Code stating that a person is considered to be employed by the employer by virtue of the fact that he/she started working with the awareness and consent of the latter.

Presumably these workers should not be subject to discrimination compared with their permanent employee counterparts and should be covered under the same labor law as the other workers but in light of the relatively weak enforcement of anti-discrimination laws, the practical implementation of the principle of the equal treatment of these workers also seems to be problematic.[98] Even if they are entitled to the wages not lower than the workers of the receiving company, in practice it is likely there will be some difficulty in achieving the same economic treatment. In Russia minimum wage is regulated by law and is periodically adjusted.[99] As it may happen in practice, a part of the salary is given as bonuses or informally so in case of claims TWA workers may be entitled only to the conventional quite low minimum. No specific rules are foreseen in case of dismissal so they are expected to be covered by general labor law provisions in this regard.

The practical outcome of this law is of course unclear. It may be expected that many unaccredited private agencies will disappear from the market. Moreover if the cost of TWA will be too high, employers may use alternative forms such as outsourcing, fixed-term contracts, part-time, dual job holding unpaid holidays and other ways in order reduce expenses.[100] Also the courts are traditionally oriented to the bilateral labor relationship and the claims and interpretation of new trilateral norms may present new challenges.

2.1.3. China, Japan, South Korea

2.1.3.1. China

China's growth in the use of dispatch workers, especially after the promulgation of the 2008 Labor Contract Law making it more difficult to easily terminate employees, was recognized as a problem and a few years later a new Labor Dispatch Worker Law was issued. One purpose or result of the law is to protect the jobs of regular

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98 Elena Sychenko, *Contradictions in the Anti-Discrimination Protection of Employees in Russia and the Influence of the European Court of Human Rights in Labour Law in Russia* in *Labour Law in Russia: Recent Developments and New Challenges* 289 (V. Lebedev & E. Radevich, eds., Newcastle upon Tyne, UK: Cambridge Scholars Publishing, 2014); Nikita Lyutov, *The Compliance of Russian Labour Law with International Labour Standards*, *id.* at 71.

99 The minimum wage is periodically adjusted and from January 1, 2016 it is 6.204.00 rubles (roughly 88 euros). *Id.*

100 Labor Code of the Russia Federation, Arts. 60.1 & 282–288, *supra* note 3.

employees from being replaced by dispatch workers. This is accomplished by placing a cap of 10 percent of the user employer's workforce being dispatch workers[101] which at the same time limits an "end-run" around the law by the hiring of "insourced" independent contractors to the jobs of the regular workforce as they may be deemed dispatch workers. The law provides dispatch workers the right to unionize[102] and the same wages and benefits, and coverage of work-related injuries,[103] as the permanent employees;[104] otherwise these workers have the same labor law protections as other employees, such as termination of dispatch is made the same as for permanent workers under this law.[105] There is a 6 month limit on the temporary dispatched job, with some deviation possible around the so-called "auxiliary" jobs. Commentators have expressed concerns on how the auxiliary category will be used in practice. The penalty for violations is a fine between 5,000 and 10,000 yuan per employee.[106]

Compensation and termination provisions align incentives to discourage the long-term use of dispatch workers. The LCL clearly outlines that compensation is not limited just to salary or hourly wages, but includes all employment bonuses and benefits.[107] Treating a return of a dispatch worker to the sending agency as the equivalent of termination of a full-time employee further de-incentivizes the use of dispatch workers.[108] Traditionally dispatch workers were desirable because dispatch workers were paid less than full-time employees and they were easier to terminate; but as dispatch workers are now entitled to equal pay and can only be dismissed under a standard approaching for cause, then the user employer might be better served just hiring a full-time employee.[109]

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101 Interim Provisions, Art. 4, *supra* note 6.

102 Labor Contract Law, Art. 64, *supra* note 6.

103 Interim Provisions, Art. 10, *supra* note 6.

104 *Id*. Art. 9.

105 Ministry of Human Resources and Social Security, Interim Provisions on Labor Dispatch [Laowu Paiqian Zanxing Guiding], issued January 26, 2014, effective March 1, 2014, Arts. 5–7, 12–17 (Feb. 20, 2017), available at http://www.mohrss.gov.cn.

106 Labor Contract Law, Art. 92, *supra* note 6.

107 Labor Contract Law, Art. 62, *supra* note 6. *China Amends Labor Contract Law to Eliminate Labor Dispatch Abuse*, *supra* note 39. *Amendments to China Labor Contract Law Will Force Employers to Re-Evaluate Their Use of Labor Outsourcing*, Benesch Attorneys at Law (February 2013) (Feb. 20, 2017), available at http://www.beneschlaw.com/files/Publication/821a47aa-285c-4461-a9b3-6da96a2586c8/Presentation/PublicationAttachment/619ad948-9bc3-45f0-b955-798891499ae5/China_Amendments%20to%20China%20Labor%20Contract%20Law.pdf.

108 *China Issues Interim Provisions on Labour Dispatch*, Mayer Brown, February 11, 2014 (Feb. 20, 2017), available at https://www.mayerbrown.com/files/Publication/129f94f0-0dbb-415a-9640-489f1150f35a/Presentation/PublicationAttachment/559cc298-f044-4ba5-a571-4b0851c6b380/140211-PRC-Employment.pdf.

109 Of course part of the calculation whether to attain the 10 percent dispatch workforce can include the cost advantages of cost-shifting of non-compensatory labor law benefits to the dispatching agency as the employer.

2.1.3.2. Japan

Japanese legislation moved from a ban on dispatch labor in 1985 through a series of amendments to a very permissive use of these workers in 2015. The purpose of the evolving law arguably went from protecting regular workers to that of authorizing open-ended use of dispatch workers for any jobs, ostensibly benefitting employers and not the regular employees. The Workers Dispatch Law regulates the Dispatching Agency and requires it to be licensed by the government to issue dispatch contracts. The law itself does not contain labor protections, which are generally available to all employees through other labor standards legislation. However, the right to pay equal to that of fulltime employees is not required at this time; rather the employer is only to use "efforts" to achieve that. The dispatcher worker is limited in the current job position to three years, but may be retained as a dispatch worker thereafter in a different department. A dispatch worker can be provided permanent status upon violations of the law.

2.1.3.3. South Korea

The original aim of the Dispatched Workers Act and its related laws to protect the regular workers in the core production jobs in the manufacturing industry in which dispatch workers cannot be employed has eroded to some extent as dispatch workers gain more protections. At the same time there is a durational limit of two years for which dispatch workers can be employed, after which if they are retained, they must be permanently hired. Of course they can be dismissed and/or replaced by other dispatch workers, creating a wheel of job insecurity. Dispatch workers must be provided equality of wages with regular employee counterparts and are accorded the same labor protections as regular employees under labor standards legislation. Penalties are enforced against violators of the law and employers that use dispatch workers for positions that are not permitted to be held by dispatched workers, or those employers that receive services from a manpower agency not duly licensed to engage in the business of dispatching workers, and in such cases must hire these dispatched workers as their regular employees regardless of the duration of the engagement of the dispatched workers.

Table 1: Country Comparisons of Dispatch Laws

	Aim of law to "protect" regular worker (RW), dispatch worker (DW), or employer (E)?	Dispatch Agency regulated?	Dispatch law protect ILO core labor rights?	Scope of coverage?	Jobs or duration limited?	Regulate wages and anti-discrimination?	Penalties for violation?
U.S.	No law	No law	General labor laws	No law	No law	General labor laws	General labor laws

Russia	DW/RW	Yes	Some	General ban with limited exceptions	Ban on dispatch workers, except temporary, expansion (9 months and 10%, limit) and special exemptions for students, et al. Some jobs banned including for work dispute replacements and hazardous conditions	Must be same as regular workers	Fines, but not specified; general labor laws applicable Joint liability
China	RW	Yes	Some; right to join the Union	General ban; only temporary (6 mo. or less), auxiliary, and substitute positions	6 month duration for temporary workers 10% of company's total workforce	Equal pay for equal work; and discrimination prohibited	Fines Joint liability
Japan	E/DW?	Yes	No	No limit	3 year duration at same job only with several exemptions	Duty to make "efforts for equal treatment"	Fines; and instatement to permanent job for violations
South Korea	RW/DW	Yes	No	Ban on direct production process and limit 32 categories	2 years; some exclusions; automatic permanent job if retained over 2 years	No discrimination in wages or conditions	Criminal penalties; instatement permanent job

2.2. Has a Model Emerged?

Whether the above dispatch laws comply with ILO standards is discussed below, noting that only Japan has ratified ILO Convention 181. Initially, it is noted that the ILO rights and labor protections may be found outside the labor dispatch laws, for example in the general labor codes. The ILO focus is on protection of the dispatch workers, not whether they are banned or permitted to work, a matter left to national legislation. It is noteworthy that China explicitly authorizes dispatch workers to unionize, as does

the U.S. under its general labor legislation. Whether or not each country has ratified pertinent ILO Conventions, each does provide general labor law protections to some degree for many if not most of Convention 181's requirements.

The ILO Recommendation 188 states that there should be laws for penalties, written contracts for the workers specifying terms and conditions, prohibiting their use to replace strikers, placing them into jobs of unacceptable risk, abuse, or discrimination, and a list of other worker-protective measures.[110] Illustrative provisions could provide a mosaic of a possible model law. In Japan, user employers are to provide any necessary training of the new dispatch workers and user employers must "provide them with the same level of access to welfare facilities (*fukurikōsei shisetsu* – meaning dorms, cafeterias, and recreational facilities used by employees, etc.) that company employees enjoy."[111] In South Korea, dispatch workers cannot be placed in hazardous work.[112] Russia, also bans hiring workers to replace employees who refused to work due to a violation of their labor rights, or sending them to work on hazardous facilities or in dangerous conditions.[113]

Whether or not a model has emerged, more importantly, choices are apparent for national governments on how they might regulate dispatch workers and the dispatching agencies in their jurisdiction. They range from no specific laws such as in the U.S. to a dispatch law that generally bans their use, such as in Russia which protects against abuse of dispatch workers while also preserving jobs for regular employees.

The steps toward determining appropriate regulation may begin with a national assessment of how wide-spread the use of dispatch workers is and what are the workplace rights, working conditions, and labor law protections of these workers. That is, what is the availability and level of enforcement of general labor law protections based on their employment status of either being an employee, independent contractor, short-term contract worker, casual employee, or some other temporary worker category? An interesting question is whether eliminating the use of dispatch workers better protects these workers, as opposed to allowing them, but with regulatory protections?

Dispatch legislation analyzed above begins with a legislative purpose: is the law to protect permanent employees from being replaced by cheaper temporary employees, like the goals in South Korea and China, and Japan's early dispatch law.

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110 R188 – Private Employment Agencies Recommendation, Part II, *supra* note 90.

111 *See* Cheung 2014, *supra* note 64.

112 K.Y. Kim & Kim & Chang, *Dispatched Workers Used in Ways Contrary to Statutory Limitations Should Be Immediately Employed by Service Recipient Company Under Amended Statute*, American Bar Association Section of Labor and Employment Law (April 2012) (Feb. 20, 2017), available at http://www.americanbar.org/content/newsletter/groups/labor_law/int_newsletter/ilel_news20121/april2012/1204_aball_int_skorea.html.

113 d'Amora 2014, *supra* note 1. *See also Russia: Significant Labor Law Changes for 2016 Will Alter Temporary Employee Market*, *supra* note 6.

If so, then the Russian general ban may be preferable. Or is it better to allow some use by employers, protect regular employees, but also provide labor protections for dispatch workers who otherwise can be taken advantage of? However, there may be a conundrum that a law to prevent substitution of permanent employment may not be consistent with protection of dispatch workers.

The easiest target to regulate is the dispatching agency itself, as directed by ILO standards. The primary reason for regulating them, as was done in Russia, is to control possible abuses by unregulated agencies. The laws may impose capital requirements as well as responsibilities for the welfare of dispatch workers at the user's place of business for the job in question, such as having employment contracts, briefings on the user's working conditions and pay issues, and including social security payments, etc.

Regulating dispatch workers can provide them specific labor rights not necessarily available under the general labor laws. If ILO guidance is followed, dispatch workers may receive benefits, such as the right to unionize (China) or the prohibition on being assigned to replace workers out on a labor dispute (Russia); or these rights may exist outside the dispatch regulation in the general labor laws. Dispatch regulations can also be used to require job training, such as in Japan, or mandate joint liability between the sender and user, such as in Russia and China.

Regulations typically limit the acceptable scope of dispatch work by providing the types of acceptable jobs and the duration in that job. For example, in Russia there is a general ban except for several areas such as temporary expansion of the business, but that is limited to 10 percent of the employer workforce. In South Korea, there is a ban on 32 job categories and for dispatch workers outside those jobs their duration is limited to two years. In Japan, there is no limit on the types of jobs, but there is a two year durational limit in that particular job. In China jobs are limited to the types of jobs and have a six month durational limit and 10 percent workforce limitation.

The dispatch regulation may explicitly require equal and/or non-discriminatory pay for dispatch workers compared with permanent employee counterparts, but sometimes those obligations may be found outside the dispatch regulations in the general labor codes. Japan, since the 2015 dispatch law, is reportedly still working to add a provision for equality. Some dispatch regulations limit discriminatory assignment to hazardous work.

Penalties for violations of dispatch laws vary from explicit Korean criminal penalties in the regulations themselves, to fines in Russia which are placed outside the dispatch law. Japan and Korea also require as penalties for violation of the dispatch law the conversion of dispatch workers to a permanent employee status.

Has a model emerged? Not likely, as the legislative goals and societal values vary among countries. Yet, workers' interests (temporary and permanent) balanced with – and not against – the needs of employers for temporary flexibility, suggest several of the above laws or parts of them, could provide a balanced approach. A general ban with limited exceptions (Russia, China, Korea) protect the jobs of regular permanent

workers, limits the exposure of dispatch workers with fewer of them, and with durational and percentage of workforce limits again balancing the interests. Those dispatch workers allowed to work can have their exposure diminished by regulation of the dispatching agencies.

Stabilizing the agencies and placing responsibilities on them for some rights of dispatch workers in the end seems to harmonize the interests of employers, workers (permanent and temporary), and responsible dispatch agencies. It is true that the needs of and for dispatched workers continue in the U.S. and other countries. Therefore, the lessons and diversity of approaches of Russia, China, Japan and South Korea may be instructive for governments searching for legislative solutions. In following the guidance of pertinent ILO Conventions and Recommendations and providing a regulated dispatch agency and certain mandatory labor rights of fairness and equality to dispatched workers, it would follow that more workplaces would provide a "decent workplace" for more workers.

Conclusion

While the U.S. has not yet directly embraced the regulation of dispatch workers on a national scale, certain labor rights are accorded to temporary employees under general labor legislation. These include many of the ILO core labor rights, minimum wages and labor standards, and penalties. However, the use of these workers, their job security, and those of the replaced permanent employees are largely at the employers' discretion and there are reports of abuses. And moreover, as stated earlier, the U.S. lags far behind other industrialized countries in specific labor protections for temporary workers. Of 43 "developed and emerging economies" tracked by the OECD, the U.S. ranks near the bottom, at 41st, for temporary worker protections.[114] Other nations, including Russia, China, Japan, and South Korea have provided models to consider that fit their economic and industrial relations needs.

Whether permitted or limited, the needs of dispatched temporary workers as well as those of permanent regular workers should be addressed. Taking the evaluative variables discussed above,[115] one could fashion an appropriate response to the needs of the workers and employers.

This paper provides a menu of national legislative experiences and a "tool bag" of legal approaches and raises the question, why isn't there legislation in America

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[114] Charlie Fanning, *The Shameful U.S. Record on Temporary Worker Protections*, AFL-CIO, February 26, 2014 (Feb. 20, 2017), available at http://www.aflcio.org/Blog/Political-Action-Legislation/The-Shameful-U.S.-Record-on-Temporary-Worker-Protections.

[115] The variables discussed are: who does the law propose to benefit; are dispatch agencies regulated; does it protect labor standards set forth by the ILO; what is the scope of the law, from ban to open to ban with limits and exceptions; should it ban only certain jobs and/or place durational limits on the jobs; does it provide for equality in wages and conditions; and what are the penalties for violation?

regulating dispatch workers? There is a wealth of legislative models and experience from which to choose, some from the most unlikely sources.

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THE CONCEPT OF LEGAL COERCION AND POWER-CONFERRING LEGAL REGIMES

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The basic question of the paper: are power-conferring legal rules coercive and in what sense can we say that power-conferring legal rules coerce? In his recent book, Frederick Schauer answers the first question in the affirmative and proposes an interesting account of how it works. I believe that this claim is unsustainable due to the inconsistencies in the psychological account of coercion applied by Schauer, and his theory's unrestricted reliance on counterfactuals. In what follows, I try to reconstruct the thesis on the coerciveness of the power-conferring legal rules. The basic insight is that the power-conferring legal rules coerciveness claim is inextricably connected to the unmoralized account of coercion, as any moralized theory shifts the problem from coercion to the issue of distributive justice. However, the unmoralized concept of coercion can hardly be coherent in law because it makes coercion a matter of context, dependent on the willpower of each individual, which threatens to eliminate the force of law as such. Even applied on its own terms, the unmoralized concept of coercion is unworkable within the context of power-conferring through law because power-conferring legal regimes do not eliminate non-legal alternatives, making it dependent on the will of the legal subjects themselves. Schauer's everlasting contribution lies in his ingenious attempt to substantiate the coercion (of power-conferring rules) claim relying on counterfactuals. A (coerced) choice has been limited relative to some situation which never occurred but would or should have occurred. In order to limit a set of counterfactuals, making them realistic (preferences and needs are limited only by imagination), one should impose severe limits on them, which makes it impossible to characterize the particular situations described by Schauer as coercive in that sense.

Keywords: coercion; power-conferring legal rules; baseline.

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Table of Contents

Introduction

"Rules conferring private powers must, if they are to be understood, be looked at from the point of view of those who exercise them. They appear then as an additional element introduced by the law into social life over and above that of social control… The reduction of rules conferring and defining legislative and judicial powers to statements of the conditions under which duties arise has, in the public sphere, a similar obscuring vice. Those who exercise these powers to make authoritative enactments and orders use these rules in a form of purposive activity utterly different from performance of duty or submission to coercive control."[1] This groundbreaking passage from Herbert L.A. Hart's masterpiece "The Concept of Law" was one of the major arguments against early legal positivist conceptions of law such as "coercive orders." Hart has shifted the focus from coercion to the normativity of law. Nevertheless, the role of coercion within the Hartian theory of law remains highly disputed, even among the adherents of the Hartian legal positivism. On several occasions, Hart himself stressed the importance of coercion without specifying its status.[2]

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[1] Herbert L.A. Hart, *The Concept of Law* 40 (3rd ed., Oxford: Oxford University Press, 2012).

[2] *See, for example*, *id.* at 37.

Therefore, there is a certain tension between two clusters of issues, which can be defined as "power-conferring legal rules" and "legal coercion." In what follows, I want to reflect on some aspects and mutual interactions of these two issues.

1. The Problem

In what sense can power-conferring legal rules can be coercive? There are, at least two possible ways to assert the coerciveness of legal powers.

Firstly, legal powers as *powers* are capable of affecting others' sets of options by limiting them. If one interprets coercion as a limitation of one's range of possible choices, the "coercion talk" in the context of legal powers seems, at least, not to be self-contradictory. More than that, the law very often imposes some formal requirements on the exercise of legal powers. To create a will, one should make it in some (written) form. Again, by the application of a definite interpretation of coercion, one can find some limitations of choice even here. These problems will be the major focus of this paper.

Secondly, formal analysis of the concept of legal power can raise the question of coercion. Traditionally, legal duties are conceived as a paradigm of cases of legal coercion. This seems quite natural because duties are intrinsically limiting, setting constrains on the range of the possible choices. Can legal powers also impose limits, *conceptually*, as a matter of purely logical analysis? Some legal scholars believe so. We postpone our reflection on this matter for future.

2. Schauer's View on the Coerciveness of Power-Conferring Rules

Frederick Schauer, in his marvelous book "The Force of Law," put forward the first point. Schauer stresses that the importance of the Hartian discussion of power-conferring rules is not limited simply by the asserted existence of "non-duties" within the law. The most important innovation of "The Concept of Law" is much more profound: "Hart took these criticisms further. He not only reemphasized that coercion seems not to explain the legal status of contracts, wills, trusts, and other optional features of law, but he also explored a topic noted only briefly by Pound and Allen: the role of law in constituting such arrangements in the first place."[3]

In fact, Hart supposes that law creates the very possibility of these non-optional phenomena. Law creates this possibility *ex nihilo*. To elucidate the point, Schauer masterfully applies to this context the dichotomy between constitutive rules and regulative rules put forward by philosopher John R. Searle.[4] "Regulative rules, the

[3] Frederick Schauer, *The Force of Law* 27 (Oxford: Oxford University Press, 2015).

[4] John R. Searle, *Speech Acts: An Essay in the Philosophy of Language* 33–42 (Cambridge, UK: Cambridge University Press, 1969).

most familiar sort of rule, govern conduct whose conceptual existence is logically prior to the rules. My ability to drive a car at 90 miles per hour may be a function of the car, the road, and my preferences, but it does not depend on the law."[5] Constitutive rules differ radically from the previous type of rule in that they create and define the very possibility of the relevant type of conduct. They are wholly dependent on the rules and cannot exist without the rules. Neither existed prior to the enactment of the constitutive rules. "A group of people can run a business together without the law, but they can only create a corporation by virtue of legal rules that establish the very idea of a corporation. And the same is true of trusts, wills, pleadings, and countless other law-constituted and thus law-dependent institutions and practices."[6]

An extremely important thing about constitutive rules is that they create possibilities, multiply options, but in no way limit the choices of the legal subjects. That is what distinguishes them from the regulatory rules which govern the social practices that existed before the rules. Constitutive rules do not govern relevant social practices; they define them.

Hence, significant divergences between the legal technicalities exist. When you have to deal with a more or less firmly established social practice and you what to legalize it somehow via regulation, you inevitably transform it. This means, among other things, that you limit somebody's range of choices within the practice with the same inevitability because regulation of something which existed before the regulation means interference and change. For some, this is for the better, for others, the worse. Typically, regulation promotes the imposition of legal duties as the basic technique for governance. When you have to deal with established activities, you can only change them by suppressing the undesirable types of such activities. These undesirable types of activities are practiced, so you cannot simply declare them legally non-existent. In fact, you can do that, but that alone will not work. The problem is that you are trying to eradicate a non-legal, and, in some way, "factual" phenomenon. It existed before the law, can exist without it and it "does not care" about the law. When your strategy was neutrality, you could ignore it and not try to eradicate it. Some law professors call this "legal irrelevance," i.e., the law does not recognize the thing as relevant from the legal point of view. Still, it can exist as a matter of fact.

However, in our case the law is trying to suppress a type of conduct which cannot simply be treated as legally nonexistent, precisely because it exists as a matter of fact. The only possible way to suppress it is to impose a duty on the relevant group with sanctions for non-compliance. In so doing, the law discourages the legal subjects from the prohibited activity by raising its cost for would be violators.

Within the realm of constitutive rules, the legal landscape differs tremendously. Constitutive rules create social practices and determine the conditions of their validity.

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[5] Schauer 2015, at 27.

[6] *Id.* at 27.

As I have already stated, law defines the relevant practice. The basic formula is: "A counts as X." Law creates some new artificial phenomenon. Its mode of existence is validity.

This is a purely legal phenomenon, it never existed before the rule and could not exist independently of it in a "parallel reality." It lacks factual independence. It means that regulative rules do not suppress or try to eradicate some factual practices. They themselves are created in a "parallel reality" of law. And it can peacefully coexist with competitive "factual" social practices in "mutual disinterest." Here the law solves another type of problem. It needs not to suppress, but to supplant the "factual" competitor. Take the example, which Schauer applies, of contract and promise. Contract is a purely legal creature. Before the contract was introduced into law, nothing of *that* kind existed. Promise, a "factual" equivalent of a contract, cannot provide a level of reliability in any significant way comparable to the "service" of a legally defined and administered contract.

In that sense, law creates new possibilities and does not suppress the previously existing ones. Not only does law have no "need" to suppress anything coercively because it can obtain the same result through competition. More importantly, within the power-conferring legal regimes, law simply lacks the devices of discouragement of the undesirable behavior. All that it can do is define the conditions of validity and establish the rules of the practice. Everything that cannot fulfill these conditions would be simply irrelevant to the practice. But it can exist as a pure matter of fact or as an element of a different practice. So, you need not impose a duty, you only have to determine the conditions of validity.

Accordingly, the legal technique is distinctive. One need not use the legal duties, resorting predominately to legal powers, liberties and inabilities. The fact is that power-conferring legal regimes do not only create entirely new possibilities for their legal subjects. They create totally legal, in a sense, "virtual," regimes. This sort of artificial reality can only be created through the constitution of different legal capacities and assignment of legal statuses. The relevant legal techniques here are legal powers, legal liberties and legal immunities.

All the abovementioned contributes to an understanding of the problem; if the law is coercive, if the duty-imposing rules are coercive, both of which sound not entirely wrong, in what sense (if any) could power-conferring rules be coercive?

3. The Ambiguities of the Hartian Account and Schauer's Interpretation

Hart himself was not entirely clear on the matter. In analyzing power-conferring rules, he states: "Such laws do not impose duties or obligations. Instead, they provide individuals with facilities for realizing their wishes, by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law."[7]

[7] Hart 2012, at 27.

What does this "within the coercive framework of the law" mean exactly? Can we say that legal coerciveness is due to duties and sanctions? Or should we agree that powers and liberties are also coercive in some way?

In fact, Hart himself has contributed greatly to the shift in the research focus from coercive to normative and institutional aspects of law. At some stage of development, it was inevitable that some influential group of Hartian legal positivists would finally reject the essential character of coercion in law. Whereas the other (no less influential group) of the Hartians prefers to defend the importance of coercion for law. But the debate centered substantially on duties and rarely involved power-conferring rules. With the notable exception of Frederick Schauer. Ironically, he seems to demonstrate the same sort of deliberate refusal to answer in a straightforward "yes or no" manner.

One the one hand, Schauer agrees: "The law is hardly coercing anything or anyone, at least in the sense of requiring people to engage or not to engage in any of these law-constituted activities. Law constitutes corporations, but it does not mandate that anyone create one."[8] On the other hand, the author continues, "If the point is to show the importance of law even when it is not being coercive by backing its prescriptions with sanctions, then we should consider the possibility that law, even in its constitutive mode, may be more coercive than is often appreciated. Sometimes, to be sure, coercion consists simply of telling people what to do, but sometime coercion exists when it tells people that what they want to do must be done in one way and not another. When law creates the very possibility of engaging in an activity, it often supplants a similar and law-independent one. And if the law-independent activity is part of people's normal behavior and background expectations, eliminating this possibility and compelling people to use law's alternative operates as a form of coercion."[9]

Why and how thoroughly do the constitutive rules eliminate "similar and law-independent activities"? When law creates a contract, its non-legal equivalent, the promise, "has been pushed to the side psychologically."[10] Schauer elucidates this point: "I can promise to sell you my house for a certain amount, but in a world with contracts, a background understanding emerges such that a contract to sell a house is the only way to promise to sell a house. To repeat, this is a psychological and not a logical claim, but that makes it no less sound. By moving into some domain of behavior, law often occupies the field, crowding out preexisting non-legal alternatives."[11]

But how does this "crowding out" actually take place? As we have seen, definitely not through the imposition of duties and sanctions. Otherwise, it is not power-

8 Schauer 2015, at 28.

9 *Id.*

10 *Id.*

11 *Id.*

conferring rules that coerce, but the duty-imposing. As I understand it, Schauer thinks that the comparative inefficiency of the non-legal alternative in relation to its legal counterpart, is the crux of the matter. Take wills, for instance. "Telling someone that he will get all my money when I die, and doing that outside of established legal processes, is less effective in a world that uses wills than in a world that does not."[12]

In other words, legal regimes are comparable with "similar" non-legal regimes, but in an elaborately specific manner. We should not compare all the advantages and disadvantages of the two. Rather, we should determine whether a legal regime is stricter anywhere and anyhow in comparison with its non-legal alternative. Taking into account the power-conferring character of the legal regime under discussion, the only point where limits and restrictions can be identified is conditions of validity or invalidity: "When legally constituted forms of conduct supplant similar law-independent forms of conduct, therefore, or when law regulates optional but law-independent conduct, the sanction of nullity becomes a real sanction. If I want to make a contract but do not do so in accordance with the forms prescribed by law, the contract is no contract at all. My expectations and desires will have been frustrated, and my disappointment will be palpable. If I wish to avoid that disappointment and achieve a particular goal by entering into a contract, the law's ability to frustrate these desires gives it a power of coercion not dissimilar to more direct coercion."[13] In the final analysis, a power-conferring legal regime coerces because it makes alternative non-legal regimes inefficient by providing more predictability, certainty (which outperforms the non-legal competitors), and creates "access conditions" through (in)validity rules (which are often stricter than in non-legal regimes). In this way, the power-conferring law "crowds out" its non-legal alternatives.

Finally, Schauer states that, even within the legal regime itself, rules of (in)validity can be experienced by the participants as coercive, because nullity can "frustrate parties expectations": "To be sure, the invalidity of a contract is sometimes not experienced as unpleasant, but for most people making most contracts most of the time, the law's ability to say that it must be done in a particular way on pain of non-enforcement will be experienced as coercive."[14] In other words, if people successfully use the power-conferring regime most of the time and are accustomed to the fact that they are successfully contracting all the time but suddenly experience the application of the nullity rule in the case of their contract, they feel disappointed and frustrated, which reveals the coerciveness of contract law in that one cannot treat as a contract whatever he considers reasonable.

Schauer finds the ultimate justification of this last thesis in the transformation of constitutive rules into regulative for those who are a part of the practice: "It is true that

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[12] Schauer 2015, at 28.

[13] *Id.* at 29.

[14] *Id.*

nullity is in some sense an essential component of any constitutive rule and thus that 'if failure to get the ball between the posts did not mean the 'nullity' of not scoring, the scoring rules could not be said to exist.' And so nullity may best be understood as part of a constitutive rule rather than a conceptually distinct enforcement of an independent requirement. But, once one is inside the game, whether that game be judging or contracts or football, the rules lose some of their constitutive power and appear regulative and coercive."[15] This is an extremely interesting point and which I shall return to in some detail later on.

Still, the final verdict is rather nuanced: "We must concede that law's ability to create the power to make wills and trusts and contracts, just like its ability to create the power to enact legislation and issue judicial decrees, is not completely captured by a coercion-based account of law. But even with this concession, we can also recognize that attempting to explain the operation of constitutive rules without recognizing the coercive dimensions of nullity is incomplete as well. Still, it seems an error to understand all legal rules as coercive."[16]

4. Analysis of Schauer's Theory. Preliminary Remarks

Schauer definitely views power-conferring legal rules as at least potentially coercive even if he flatly refuses to deduce far-reaching conclusions from this: "What to make of the widespread but nonessential presence of coercion-based reactions to law even in its constitutive mode remains a difficult question..."[17] This ambivalence can probably be explained by the very logic of the Hartian positivist debate on the role of coercion in law. Those who felt skeptical of the overuse of the concept of legal normativity and practical reason-based explanations of legal practices because of its inherently Dworkinian import preferred to stay on the stable ground of "facts," reversed, to a certain extent, the significance of coercion in law within the post-Hartian philosophy of law.

The second point is that there has always been a certain ambiguity about the place of coercion in Hartian theory. As I have already mentioned, Hart has radically and extremely convincingly shifted the focus of legal positivism from coercion to legal normativity, the internal point of view concept, the secondarity concept, and the like, but he never said that coercion does not matter. As the radical innovator, he left plenty of undecided issues to his followers.

Pre-analytically, we feel that coercion matters in a significant way. At the same time, we feel that the key concepts of the Hartian synthesis (the secondarity concept and the internal point of view) are devoid of the coercion concept.

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[15] Schauer 2015, at 30.

[16] *Id.*

[17] *Id.*

Schauer has made an ingenious attempt to retain both the crucial importance and the (conceptually) non-essential character of coercion in law. From that vantage point, one should interpret his deliberations on the coerciveness of constitutive power-conferring rules in law.

Probably, the most important thing to know is what concept of coercion Schauer applies. He uses the term in the widest sense: "...law is coercive to the extent that its sanctions provide motivations for people, because of the law, to do something other than what they would have done absent the law."[18] The fact is that Schauer explicitly refuses to comment on the concept of coercion in general. He considers it to be unnecessary for the purposes of his research: "Accordingly, the running claim in this book that coercion has jurisprudentially underappreciated the importance in understanding and explaining the phenomenon of law does not require that we have a definition of coercion that will distinguish instances of coercion from those of voluntariness. We need only keep in mind the basic idea that law, and not just this law or that law, generally makes us do things that we do not want to do or not do things that we do want to do. How and why law does this is assuredly of great importance, but identifying the coercive dimension of each individual law is equally assuredly not."[19]

Nevertheless, it seems as if Schauer was somewhat closer to the unmoralized versions of the coercion concept than to the moralized theories of coercion. More than once, Schauer stresses that legal regimes limit the range of people's reasonable choices by imposing costs on their choices which are undesirable from the legal point of view. Exactly that idea, as we have seen, justifies the asserted coerciveness of the "sanction of nullity."

The first problem here is the problem of the baseline, according to which one should identify the limitation of reasonable choices. As we have already mentioned, regulative rules are a more likely candidate for being coercive because they govern the pre-existent social practice, which can hypothetically be a baseline. In that case, when the law imposes a duty to abstain from some sort of behavior previously regarded as normal by the community and sets up a sanction for violations, it can be regarded as a limitation on the reasonable range of choices.

The real problem is with the constitutive rules, which create previously non-existent types of behavior. As we have seen, Schauer thinks that, notwithstanding the fact that constitutive rules create practices *ex novo*, sometimes the non-legal twins of such practices are supposed to exist. And, if he is right, we have the baseline from which we are able to assess the impact of a new legal regime on the range of options of the relevant group and communities and the reasonableness of alternatives. A power-conferring legal regime can be coercive if it limits the range of choices (by making

[18] Schauer 2015, at 129.

[19] *Id.* at 128.

some previously existing options reasonably ineligible in comparison to the more efficient legal regime, but also more demanding one, from the point of view of formal conditions of validity) relative to the pre-existing non-legal alternative. Paradoxically enough, a legal regime, which undoubtedly creates more opportunities and options, can, at the same time, limit them. A contract, as an utterly legal creature, generates new opportunities that are inaccessible in the non-legal regime of the "promise." One can now rely on the complex legal infrastructure in order to assure the attainment one's goals. But, at the same time, a contract is coercive in that it is more restrictive on the conditions of the formal validity of legal acts than promise used to be.

The first point is how accurate and transparent this search for some "alternative non-legal regime" should be. For some legal institutions and regimes, especially those that are highly complex, there is no obvious non-legal equivalent. What about, say, promissory notes, derivatives or the German Abstraktes Verfügungsgeschäft? Law creates innovative regimes which are purely legal. But I think this is not the problem for Schauer as he carefully states that constitutive rules are not necessary coercive. They can be.

But in that case we should clearly understand what we are comparing to what. I have already remarked earlier that Schauer proposes an extremely unusual method of comparison. One should compare the costs and the benefits of the power-conferring regime with the costs and the benefits of some strange hypothetical hybrid, combining the benefits of the legal regime (more pre-visibility, legal institutions, etc.) with the benefits of the "similar" non-legal regime (relaxed formal requirements). But how legitimate is this type of methodology? A set of choices like this is nonexistent. One can only choose between existing alternatives in our case.

I could agree that, in our case, we can only refer to hypotheticals if the law makes the legal regime non-optional at the expense of legally suppressing its non-legal counterpart. In that case, the range of choices has been deliberately limited and, theoretically, one can use hypotheticals in order to fix the order of things which would normally take place were coercive legal intervention not undertaken. But this case is unproblematically coercive from the vantage point of the unmoralized accounts of coercion because a legal duty is imposed in order to suppress the non-legal alternative.

What makes us use this hypothetical when, in a real life situation, choices exist between two actually existing regimes?

I will try to reconstruct the hypothetical response of Schauer. When we treat as coercive in principle each and every limit of a set of possible reasonable choices deliberately imposed by another person, any limit of the relevant kind counts as a limit. Immortalized theories of coercion treat coercion as a matter of fact, or a more or less factual phenomenon. That is why what really matters is deliberate imposition of limits and the psychological sense of loss. Both conditions are, strictly speaking, fulfilled in our case. New restrictive form requirements are deliberately imposed as an

entrance condition and the participants may feel frustrated because of the imposed impossibility of combining the privileges of the new legal regime with the relaxed form of the requirements of the older non-legal regime.

At a deeper level, the problem is with the widest understanding of coercion in the sense of the unmoralized theory, which Schauer uses. This factual or "psychological" concept of coercion enables treatment of virtually everything as coercive because, psychologically, each pressure or desire can frustrate, i.e., "pressure" or "overwhelm the will." And a wide-range of social phenomena from previous choices made by some others and competitive activities in the market economy are coercive in the literal sense of the unmoralized theory. Being aware of these difficulties, Schauer declines to comment on his theory of coercion. Instead, he applies the unmoralized account of coercion in its most unqualified and immodest form.

Let us explore this theme and ask whether our case is genuinely coercive from the vantage point of the unmoralized theory. You have a choice between the two regimes, each has its costs and benefits, is it coercive that you cannot combine the benefits of both regimes and decline both costs? One can be wholly aware of the fact that such a "nirvana regime" is non-existent. Obviously enough, the more restrictive form requirements of the legal regime (costs) are a direct consequence of the institutional structure of law responsible for the benefits of the legal regime. They cannot be simply "picked out" of the legal regime. The same type of "optimal equilibrium" is characteristic of the non-legal regime, only the point of optimality is different.

Under these circumstances, can we conclude that someone deliberately limits the range of choices? Both of the regimes are optimal. The more restricted "entrance conditions" of the legal regime are motivated entirely by the internal considerations of more efficient administration of the legal regime and not because of a deliberate attempt to limit someone's set of choices. Within the non-legal alternative you have same sort of trade-off, i.e., more accessibility with less predictability and efficiency. I hope I have shown clearly that the unqualified and implicit use of the unmoralized theory of coercion has an internal tendency to widen its scope of application.

This very important aspect of the problem raised by Prof. Leslie Green in his extremely thoughtful review of Frederich Schauer's book: "The theoretical point is that although the ordinary semantic range of 'coercion' is broad enough to cover all sorts of things, including social embarrassment, brick walls, and tempting offers, its use in jurisprudence is shaped by two considerations. First, it is a feature of the normative character of law: law is a guide to action, and those who defend the coercion thesis take the view that law guides by coercive proposals, normally by threats. Second, coercion is marked by the intention to direct someone's will in a particular way, by a proposal they would not normally welcome, and which will make them significantly worse off if they do not behave that way. We say figuratively that coercion leaves people with 'no choice' or, less figuratively, with 'no reasonable

choice', but to comply. ...It is only by washing out such distinctions that Schauer can treat so many cases of law-provided incentives as forms of coercion."[20]

5. The Concept of Coercion. Problems and Ambiguities of the "Pressure Theory" of Coercion

My basic insight is that the principal source of all these ambiguities and incoherences may be explained by a more rigorous analysis of the concept of coercion, which Fredrick Schauer seems to apply. There are two main types of coercion concept. The first *moralized* theory denies a purely psychological nature of coercion. Various "pressures," imposed on the will are a relatively common phenomenon. So the real question is what sort of pressures are coercive? To answer that question one needs a normative (moral) theory within the framework of which one can discriminate between coercive and non-coercive phenomena. In some sense, the whole "coercion issue" vanishes completely from this vantage point. As Jeffrie G. Murphy notes, "in most cases properly called duress or coercion, however, what we are characterizing is really something quite different – something mainly moral rather than mainly psychological – namely that an individual has been unfairly placed in the situation where his only choice is to make a morally unacceptable sacrifice in order to avoid what is being demanded..."[21] In other words, the whole problem has been reconfigured and transferred into the reality of the theory of distributive justice, i.e., the basic issue here is not whether the will or set of options were restricted, but rather whether this is fair. That particular point makes moralized theories of coercion an unlikely candidate to serve as an impediment to the claim that power-conferring laws can be coercive. Any moralized account of coercion enables one to discriminate between cases where a restriction on options is considered unfair (coercive in the sense of the moralized account) and cases where restrictions on options are not considered unfair. In other words, not each and every restriction on options or pressure is coercive. But the basic premise of the coerciveness of power-conferring rules, as we have seen, is that each restriction is coercive *ipso facto*.

The second theory is the so-called *unmoralized* theory which treats coercion as a purely factual phenomenon: "The traditional theory views coercion as an overcoming of the will of the victim such that the resulting action is viewed as unfree, involuntary, or against one's will."[22] The very fact that the will was, in some way, unfree, obviating from what would be considered normal behavior in the standard case, makes the coercion claim reasonable. As John L. Hill formulates it, "the use of

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[20] Leslie Green, *The Forces of Law: Duty, Coercion, and Power*, University of Oxford Legal Research Series, Paper No. 12/2015, at 19–20 (Feb. 20, 2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2588588##.

[21] Jeffrie G. Murphy, *Consent, Coercion, and Hard Choices*, 67(1) Virginia Law Review 86 (1981).

[22] John L. Hill, *Moralized Theories of Coercion: Critical Analysis*, 74(4) Denver University Law Review 907–908 (1997).

the term 'coercion' to represent cases of physical compulsion and instances of duress reflects the prevailing view that duress is an excuse which exculpates because the actor's will is 'overborne' or because, most generally, the act was unfree insofar as the actor was forced to act against her will."[23]

In that sense, the difference between pure compulsion, where "free will" is totally absent, and coercion, where the will is somewhat "distorted," is not categorical, but a matter of degree.[24] In both cases[25], an actor prefers to act "otherwise" if she acted "voluntarily." The mere difference between compulsion and coercion resides in the absence of the very act (as a criminal law scholar would say, *actus reus*) in the first instance. In the case of coercion, the will is present, but distorted in the sense that an actor would not prefer to act in the same way when she acted voluntary, i.e., when the process of decision-making was totally free.

All this explains two critically important traits of coercion phenomenon as interpreted by "unmoralized" accounts. Firstly, the mere fact of coercion distorts a voluntary act, making it involuntary to some extent at least. Secondly, it is implied that one can more or less easily identify the instances of coercion relying on its empirical characteristics.

6. Difficulties with the Concept of Voluntary Action

The main problem with the "unmoralized" theory of coercion resides in the concept of voluntary action it implies. At the outset, there seems to be an ambiguity of a sort. On the one hand, to be coerced one needs to act free in the sense that his will is distorted, but not totally absent. In other words, using the language of criminal law, we need an *actus reus*. On the other hand, however, the coerced act needs to be "involuntary," at least in *a sense*. The will of an actor is distorted and overwhelmed by the fact of coercion. This means that, if not coerced, an actor would act otherwise. Hill distinguishes between volitional and voluntary acts: "There is, however, a second sense of the term 'voluntary' which must be discussed. The term is sometimes used with a subjunctive connotation to mean that a person could have acted in an alternative manner had she so chosen. In this sense, to say that an act is voluntary is to say more than that the act was volitional, as in the first sense. It is to say that, with other reasonable choices open to the actor, she nevertheless chose the course of action to which she ultimately committed herself. It is in this sense that an act is involuntary when it is 'against one's will,' and thus is deemed a coerced act thought to be involuntary."[26]

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[23] John L. Hill, *A Utilitarian Theory of Duress*, 84 Iowa Law Review 275–286 (1998–1999).

[24] Michael D. Bayles, *A Concept of Coercion* in *Nomos XIV: Coercion* 17 (J.R. Pennock & J.W. Chapman, eds., Chicago: Aldine-Atherton, 1972).

[25] Michael Bayles calls the two forms "occurrent" and "dispositional" coercion, respectively.

[26] Hill 1998–1999, at 287.

7. A Purely Psychological Account of Coercion and Authority of Law

Another important problem faced by the proponents of the unmoralized theories of coercion, is that a purely psychological account makes the coercion phenomenon rather illusive. Generally, each person has her own "degree of resistance" against any external pressures. More than that, some intentional external pressures with the goal of changing somebody's course of action may not be coercive as a sort of psychological pressure when the "coerced" is directed to behave in the same way for independent (for instance, moral) reasons.

This creates a problem for the law. Should we agree in this case that law is not coercive for those who act in accordance with it for independent non-legal reasons and that only those who act according to law motivated solely by law[27] are technically coerced by the law in the sense of the pressure theory? Also, psychologically conceived coercion has an individualizing effect. In the legal context, this means that one never knows for sure whether any given law coerces or not. Everything depends on contexts and individual cases.[28]

This corresponds barely to the conventional wisdom about the authority of law. We cannot simply say that law is sometimes coercive and sometimes not, and we know not exactly when and where. If one ascribes some sort of essentiality to the coerciveness of law,[29] coercion cannot be dissolved in the numerous empirical contexts of the application of law. In some sense, it should be omnipresent.

In his excellent piece on legal coercion, Ekow N. Yankah questions the alleged inconsistency here: "That one may act for independent reasons does not undermine the coerciveness of pressure if one would have no choice in acting if those independent reasons failed. If a prisoner, during a blizzard, does not wish to try his luck in the forest surrounding the prison, do his independent reasons for not leaving suddenly render the fact that he is prohibited in any case from leaving the prison non-coercive? Dormant coercive force remains coercive force."[30]

The problem is that if one is to assess the relevance as well as the impact of the pressure from the psychological point of view, there is no room for the "dormant coercive force." Empirically, coercion is always actual pressure and only actual pressure

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[27] In those cases, legal subjects can act because of a fear of sanctions (a "bad man" in the sense of Hart's "The Concept of Law") or because they are disposed to act according to law just because it is law (the famous Hartian "puzzled man"). *See* Hart 2012, at 39.

[28] William A. Edmundson, *Is Law Coercive?*, 1(1) Legal Theory 94 (1995).

[29] One need not immediately think that law is necessary coercive. It suffices to treat coercion as empirically important (important in most cases), as Frederick Schauer, in fact, does. *See* Schauer 2015, at 4–7.

[30] Ekow N. Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, 42(5) University of Richmond Law Review 1995–1222 (2007–2008).

makes you do what you otherwise would not have done. So the dilemma remains. Either one has to reject the coerciveness of law thesis or one should sacrifice the pressure theory of coercion. In the latter case, one should *add* something normative to the pressure theory. In other words, if law coerces through psychological pressure to avoid the individualizing effect there should be some "pressure threshold," which is inherent to law, no matter how legal prescriptions actually affect individual incentives to obey. But this is impossible precisely because a level of psychological pressure cannot be universal, i.e., common to all human beings. So if one sets a baseline it will be a *normative baseline molded by a certain moral theory of coercion.* We simply presuppose that some type of pressure, or a certain intensity of pressure, etc., deserves to be labeled as coercive. Therefore, the psychological theory of coercion either collapses into a myriad of highly contextualized instances or seems to be completely dissolved into some normative (moralized) theory.

8. Indeterminacy of the Psychological Account of Coercion

Under the pressure theory, any incitement, i.e., any attempt to induce a person to do what she otherwise would not have done, would be enough to qualify the relevant behavior as coerced. In fact, as we have already seen, Schauer works with this very wide concept of coercion. And here lies the crux of the problem. Such a wide concept of coercion is an unworkable concept. It is not only unable to discriminate between coercion and incitement in any meaningful fashion. More than that, it leaves unexplained its basic premise, i.e., the distinction between volitional and voluntary acts. What remains unclear is how to define the potential range of choices, limited by the act of coercion. Intuitively, it seems that only externally "imposed choices" can be meaningfully labeled as coercion. Choices, even "hard choices," are entirely "internally" generated, i.e., generated by the balance of internal motivation without any sort of external interference.[31] Furthermore, to make the concept of coercion more operative, one needs to add one more component, "an interpersonal relation involving a complex intention on the part of a coerced."[32] This helps to exclude those situations in which the will was "overwhelmed" by natural or unintentional "forces" and which nobody treats as instances of coercion. As Jeffrie G. Murphy put it: "True duress, to put it crudely, requires not merely an unhappy choice but a *villain* who is responsible for creating the necessity of making such choice."[33]

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[31] Strictly speaking, this is an arguable twist from the standpoint of assimilation of compulsion and coercion, because compulsion can also have internal sources. But this is the only reasonable way to "save" the volitional nature of coercion.

[32] Bayles 1972, at 17.

[33] Murphy 1981, at 87.

But, even fashioned like that, the concept seems to be too broad and ambiguous. Hill notes, "As such, the will of the coerced actor is viewed to be a passive mediating structure through which the will of the coercer is transmitted. ...Where coerced acts are characterized as those in which the will of the coerced actor is rendered passive, it becomes difficult to distinguish cases in which a person acts because of threat of harm from those where she acts because of compelling desire. Moreover, cases in which acts are motivated by compelling desire may be difficult to distinguish. And how are we to distinguish coerced acts from those that result from external conditions that serve to shape the will of the actor, such as those embodied in the process of socialization?"[34] If so, the entire internal/external dichotomy seems to be of a questionable value as regards rendering the (unmoralized) coercion concept more intelligible: "To the extent that a person adopts and 'internalizes' various desires, motives, values, and beliefs in response to her perception of the available range of alternatives, her internalized preferences and values may be as much a function of external options as is the desire to avoid the coercive stimulus on the part of the victim of duress."[35]

9. The Threat/Offer Dichotomy as a Way to Solve the Problem

Another way to characterize the coercion phenomenon is an offer/threat distinction. "Threats may be viewed to be freedom-limiting in one of two ways: by their effect on the will of the actor, or by their impact on the range of external contingencies or choice options open to the actor. One version of the theory holds that offers and threats are distinguished in that threats appeal to sources of motivation over which the agent has less control, e.g., fear, self-preservation, while offers evoke only desires. In other words, threats undermine the voluntariness of the act in a way that an offer never could because threats cannot be refused in the way that offers can."[36]

Still, even this much more satisfactory account is not entirely satisfactory. Psychologically, there is no way to distinguish between, say, a seductive offer, an extremely profitable offer and a threat. Even more, sometimes from the purely empirical psychological point of view, the former can induce far more effectively than the latter.

Here the whole problem is vividly demonstrated. If coercion is to be unpacked as an instance of inducement, you cannot discriminate between inducement through a threat of evil and inducement through an offer of good on purely factual psychological grounds. Psychologically, there is the same "distortion" of will.

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[34] Hill 1998–1999, at 289–290.

[35] *Id.* at 292.

[36] *Id.* at 293.

What remains is to state that offers cannot coerce, whereas threats can. The underlying idea may be that offers create new options whereas threats limit them relative to some previously existing baseline. But such a theory cannot be purely factual or empirical. First of all, the supposition that offers cannot coerce cannot be justified on purely empirical psychological grounds. Secondly, and this is even more important, the baseline which distinguishes a pre-offer situation from a post-offer situation of an offeree is also normative. And, finally, it is hard to see why a limit on the range of choices imposed by a threat should *eo ipso* have a coercive impact on the will. "Having fewer options from which to choose – even where the range of options is radically reduced – does not render the choice itself involuntary, even if it might otherwise be unfair to punish the actor for the choice."[37] At minimum, one should make explicit the relevant connection between the range of choices, on the one hand, and the coercion, on the other.

It seems to me that the major problem here is the same. There is a certain incoherence between two basic insights of the unmoralized account of coercion. On the one hand, one should regard coercion as a purely empirical psychological phenomenon. In the final analysis, to call something coercive means to find some constraints imposed on the free will of an actor. But, so defined, the phenomenon becomes omnipresent; it is much harder to find the pure voluntary (totally unrestrained, whatever this happens to mean) act. That is why one should make some qualifications in order to make the definition workable. Hence two dichotomies (external/internal and threat/offer) occurred. The problems is, however, that these qualifications are external and therefore not explained solely by psychology of will. In other words, psychologically, all restraints on the will are on an equal footing, no matter whether they are external or internal, or whether the will is being "overwhelmed" by the threat of imposing evil, or by the offer of the good. Therefore, one cannot apply the pure empirical or psychological concept of coercion in any meaningful way because the distinction between voluntary and involuntary actions collapses totally.

Quite unsurprisingly, even within the circle of the proponents of the unmoralized account of coercion, the value of the threat/offer dichotomy is questioned. Ekow N. Yankah writes: "But it is not obvious why coercion should be limited to threats to deprive another as opposed to offers that cannot be reasonably declined. Indeed, accepting this depends on accepting that it is coercion only when one reduces another's opportunities as opposed to the possibility of coercion where one severely restricts another's opportunity sets. After all, if one's opportunity sets are restricted by certain offers in ways that one could not reasonably choose to act otherwise, it seems one's will is equally overcome."[38] And Yankah is absolutely correct if one applies

[37] Hill 1998–1999, at 295.

[38] Yankah 2007–2008, at 1228.

the empirical (or psychological) test in a more or less rigorous fashion in order to identify the "rationally irresistible pressure," which blocks the free will. From a purely empirical standpoint, the peculiar way it blocks the will (external or internal, threat or offer, or whatever it may also be) is conspicuously irrelevant.

What remains, is only one of the two: either next to everything would be "voluntary." Or, *vice versa*, there are no voluntary acts at all, and we live in a world of mutual coercion. One can state some threshold conditions of the voluntariness: "there must be both a mental state approximating some conscious intention or desire to bring about the act, and a corresponding bodily movement by which this mental state is manifested."[39] This definition can discriminate between voluntary and involuntary on purely factual grounds. The problem is that, defined as it is, it happens to be quite unhelpful as a practical guide. By widening the concept of voluntary acts, it equates coercion to compulsion. As a matter of a fact, the will can be wrongfully "distorted" only where there is no will at all. It contradicts our basic intuitions and human practices, which more or less clearly distinguish between coercion and compulsion. More importantly, legal systems sometimes qualify acts which were "volitional" in the sense of "bodily movement plus corresponding mental state," as involuntary.

This is the second alternative. One can treat voluntariness in the sense of capacity to "choose the alternative."[40] In this sense, to say that an act is voluntary is to say more than that the act was volitional, as in the first sense. That is to say that, with other reasonable choices open to the actor, she nevertheless chose the course of action to which she ultimately committed herself. It is in this sense that an act is involuntary when it is "against one's will," and thus is deemed a coerced act thought to be involuntary. But this sense of the term is too strong. Not each and every "restricted" or "imposed" option is conventionally considered coercion. Sometimes imposed choices are qualified by legal systems as coerced and sometimes they are not. This means that the criteria applied to discriminate between coerced and non-coerced choices is utterly normative.

Summing up for the coercion theories. Neither of the two interpretations of the empirical or psychological concepts of voluntariness can explain the coercion phenomenon adequately. "If the defender of the traditional theory argues that coerced acts are involuntary and uses the first (volitional) sense of the term, the argument is simply false. Coerced acts are, perhaps by definition, acts characterized by volitional responses to impossible choices. On the other hand, if 'voluntary' is used in the second sense to require the existence of reasonable external alternative courses of action, there are other difficulties. Not only does this second sense of the word depart from the conventional legal sense in which the term is used in other

[39] Hill 1998–1999, at 286.

[40] *Id.* at 287.

contexts, but it requires highly nuanced normative judgments regarding the range of options open to an actor."[41]

I hope that this long journey to coercion theory will help us to understand some crucial points. First and foremost, all intuitive appeal and simplicity apart, unmoralized accounts of coercion are incoherent and require some normative impediment. Secondly, there is an inherent tendency to overstate or to understate the role of coercion in social practices from the standpoint of the unmoralized account of coercion. Thirdly, some more should be said about the particularities of the application of the unmoralized account of coercion to power-conferring legal regimes. I suppose that even being applied to them *on its own terms*, it is unable to generate a genuinely coercive legal regime. Let us see why.

10. Unmoralized Theory of Coercion and Power-Conferring Legal Rules

Now we are able to apply the unmoralized theory of coercion, with all its implications, to the power-conferring legal regimes, whose asserted coerciveness is our major focus of analysis. As we have seen above, the key role belongs to two dichotomies (external/internal and threat/offer) which help to identify coercion instances.

We can agree that power-conferring legal rules, like any other tokens of legal rules, are externally imposed. In and of itself, this does not make power-conferring rules coercive. One also needs "an interpersonal relationship involving a complex intention on the part of a coercer."[42] This would probably mean some sort of intention to induce a coercee to act in a certain way. I cannot help finding this type of intention in our case. One cannot deduce the relevant intention altogether. As we have seen, the only "possibly" coercive instance of the power-conferring legal regimes is form requirement. Can we seriously state that the only intention of the legal system here is to induce the legal subjects to fulfill the relevant form requirements? If this is true, there is a far more efficient way to achieve this objective – to impose a duty or to prohibit the alternative (non-legal) ways of achieving a similar result.

The offer/threat dichotomy even confirms the alleged non-coerciveness of the power-conferring regimes. In fact, this is a classical case of offers which improve the offeree pre-proposal situation in contrast to the threats which make the offeree worse off compared to her pre-proposal situation. I do not think we can seriously qualify power-conferring legal rules as threats in the strict sense, as a statement or intention to inflict pain, evil, etc., if something is done or not done by the threatened person. Again, two important characteristics of the threat in its classical form seem to be absent.

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41 Hill 1998–1999, at 287.

42 Bayles 1972, at 17.

Primarily, there is no intention to induce somebody to do or not to do something. Power-conferring rules are facilitative, they are offered as devices for the legal subjects to achieve their goals and objectives. There is no particular inducement intention on the part of the legal system, apart from the very general desire to facilitate markets. To induce means in some way to block the alternatives, which is totally absent in the concept of power-conferring.

Secondly, there is no evil or pain threatened. The power-conferring legal regimes are conceptually facilitative, i.e., enabling.

These two traits together make power-conferring legal regimes more similar to offers than to threats. So we should qualify power-conferring legal rules as non-coercive if we agree that offers are non-coercive.

However, as we have already seen, not every proponent of the unmoralized accounts of coercion is ready to acknowledge the non-coerciveness of offers. Yankah, for instance, states that "While it may be uncomfortable to describe a job offer to the starving man as coercive, it is natural to imagine the man saying he had no choice but to take the job (though, depending on other factors, this may also be a justified coercive offer). Further, if one imagines an economic system in which the only jobs available were grueling, physically destructive jobs at subsistence wages but people were perfectly free to turn them down and starve to death, literally an offer one cannot refuse, the idea that these 'offers' would be coercive is not at all implausible, but rather natural. Similarly, if the legal benefits in a society were such that with marriage, one secured a job, a home and a large dowry assuring one lifelong comfort and without marriage one faced a lifetime of uncertainty and near poverty, it would seem that the legal system would be coercing citizens to marry."[43]

Again, the author seems to be reluctant to state explicitly and unconditionally that each and every offer which cannot be "reasonably" (whatever that is supposed to mean) avoided or refuted, is coercive. And it seems quite plausible. In fact, Yankah himself explains this twist in the next passage: "Again, it is possible that these circumstances would be created without the intent of any will to restrict others to a course of action, i.e., people could simply be forced by circumstances or unfree to act in their desired ways. We need not take the position that any unfree or non-voluntary choices that a person may face is appropriately labelled coercive. But where the circumstances of the offers were created with the intent to restrict available courses of action it seems we have a coercive offer."[44]

In other words, we have come full circle. In any case, one needs to somehow limit the range of coercive offers. Otherwise, every offer would be coercive because each offer presupposes some existing structures for the distribution of wealth in a given society, the existence of which can hardly be attributed to any particular person.

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[43] Yankah 2007–2008, at 1229.

[44] *Id.*

But, in that case, the coercive/voluntary dichotomy collapses. That is why some qualifications are required.

The key qualification was masterfully introduced by David Zimmerman. The central focus of Zimmerman's analysis is the capitalist wage system and in what sense it can be coercive. Zimmermann suggests two additional criteria of a coercive offer: feasibility and prevention conditions. In this sense a coercive offer would only be one which was purposefully created in order to prevent the alternative choice (with which an offeree would feel more comfortable), when such an alternative choice was real, if not prevented.

For the feasibility condition: "We can account for its being a coercive offer by bringing into the picture an alternative pre-proposal situation which the slave strongly prefers to the actual one. This suggests a hypothesis: an offer is coercive only if Q would prefer to move from the normally expected pre-proposal situation to the proposal situation, but he would strongly prefer even more to move from the actual pre-proposal situation to some alternative pre-proposal situation... in assessing the coerciveness of offers, we do not need to take into account alternative pre-proposal situations which are not possible, historically, economically, technologically, or the like, however much Q prefers them to the actual pre-proposal situation."[45]

For the prevention condition: "(I)n any event, for a coercive offer is not merely an extremely unattractive offer which Q cannot afford to refuse: it is all-important how Q came to be in such a vulnerable position. I would claim that for P's offer to be genuinely coercive it must be the case that he actively prevents Q from being in the alternative preproposal situation Q strongly prefers."[46]

This theory is undoubtedly far more coherent. Particularly interesting is an ingenious attempt to reformulate the baseline problem. The distinction between offers and threats presupposes a certain baseline. An offer is each proposal which enlarges the scope of eligible options. Consequently, a threat diminishes that scope. As Robert Nozick put it in his highly influential text on coercion: "if C makes the consequences of Q's action worse than they would have been in the normal and expected course of events, then P's proposal is a threat; if C makes the consequences better, the proposal is an offer... the term 'expected' is meant to shift or straddle predicted and morally required."[47]

So the scope of eligible options before Zimmermann was basically interpreted either statistically: only really existing options in the pre-proposal situation matter, or morally: violations of pre-existing moral rights are also included. Zimmermann wants to enlarge a set of options; not only options existing in the pre-proposal

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[45] David Zimmerman, *Coercive Wage Offers*, 10 Philosophy and Public Affairs 132 (1981).

[46] *Id.* at 133.

[47] Robert Nozick, *Coercion* in *Philosophy, Science, and Method. Essays in Honor of Ernest Nagel* 447 (S. Morgenbesser et al., eds., New York: St. Martin's Press, 1969).

situation are included, but also those both historically and technologically possible which are prevented by the intentional effort of the offer.

In other words, we compare a post-proposal situation with some hypothetical pre-proposal situation of the offeree which never existed but could have existed if not prevented by the offeror. This is rather an ingenious attempt to solve the problem of how to limit the range of contrafactual alternatives which could have been real if not for the routines of the existing institutional structure. As Seth F. Kreimer remarked: "This is the shortcoming of the existential counterfactual as a baseline; in our World, the government does exist, and we lack the theoretical or investigative apparatus to determine what the world would look like in its absence."[48] In an epistemological situation like that, the only plausible way to "save" counterfactuals is to control their proliferation with some kind of intentionality condition. Only those counterfactuals which were actively prevented by the intentional efforts are relevant.[49]

This line of thought can shed some light on the similar methodology applied by Frederick Schauer, when he compares the costs and benefits of the power-conferring legal rules with cost and benefits of the artificially construed hypothetical non-legal alternative, which combines only the benefits of the legal regime and the its pre-legal alternative.

As a matter of fact, Schauer's interpretation of the baseline will not satisfy the requirements put forward by Zimmermann. Counterfactuals, proposed by Zimmermann, are carefully delineated in order to make them feasible, thinkable or possible in a real world. A more or less strict delineation is crucially important, otherwise the whole project fails because the only limit on possible (contrafactual) alternatives is one's own imagination. It is quite clear that, via creation of power-conferring legal rules, a legal system could prevent legal actors from using non-legal alternatives only by imposing a legal prohibition on them, which is not the case. It is also evident that the hypothetical alternative normative regime constructed by Schauer, combining the beneficial sides of both the factually existing normative regimes and none of the costs thereof, is highly unlikely to survive the feasibility condition.

To sum up the whole story of the unmoralized account of coercion, it seems that, in its purest form, as a "pressure theory," it is unworkable because it is too wide and indeterminate with a considerable risk either to make everything or nothing at all coercive. More satisfactory and functional restrictive accounts are literally inapplicable, at least on their own terms, to the context of power-conferring regal regimes.

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[48] Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 University of Pennsylvania Law School 1293–1352 (1984).

[49] Even this is not beyond doubt. *See, for instance*, Lawrence A. Alexander, *Zimmermann on Coercive Wages,* 12(2) Philosophy & Public Affairs 160–164 (1983).

Conclusion

1. The power-conferring legal rules coerciveness claim is inextricably connected to the unmoralized account of coercion, as any moralized theory shifts the problem from coercion to the issue of distributive justice.

2. The unmoralized and extremely wide concept of coercion can hardly be coherent in law because it makes coercion a matter of context, dependent on the willpower of each individual, which threatens to eliminate the force of law as such.

3. Even applied on its own terms, the unmoralized concept of coercion is unworkable within the context of power-conferring through law because power-conferring legal regimes do not eliminate non-legal alternatives, making it dependent on the will of the legal subjects themselves.

4. The most interesting thing about Schauer's theory lies in his ingenious attempt to substantiate the coercion (of power-conferring rules) claim relying on counterfactuals. A choice has been limited relative to some situation which never occurred but would or should have occurred. But that does not work either. In order to limit a set of counterfactuals, making them realistic (preferences and needs are limited only by imagination), one should impose severe limits on them, which makes it impossible to characterize the particular situations described by Schauer as coercive in that sense.

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THE RE-BIRTH OF SOVIET CRIMINAL LAW IN POST-SOVIET RUSSIA

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Unlike some other Soviet Codes, first acts of the Bolshevist Criminal law were not modeled after the pre-revolutionary imperial codes. In the early Soviet criminal legislation, key juridical categories were replaced by sociological categories. The Marxist-Leninist principle of supremacy of interests of the state over the interests of an individual was envisaged on the legislative level and became a fundamental principle of the Soviet criminal law: crimes against the state were made the gravest ones, and the punishment for these crimes was much heavier than for all other crimes. The principle of analogy allowed criminal prosecution even in the cases, where the offence was not stipulated in the Criminal Code. In 1930s, the trend towards criminal repression intensified. Big changes, including the restoration of the traditional vocabulary of criminal law, the limitation of the doctrine of analogy, the careful analysis of crime in terms of subject and object, took place in the Soviet criminal legislation in 1960, when the new Criminal Code of the RSFSR was adopted. 1990s saw the long-awaited humanization and modernization of Russian criminal law, but situation started to change after the turn of the millennium. Certain cases as well as recently passed pieces of the Russian legislation show the sings of old Soviet attitudes in contemporary Russian criminal law and law enforcement.

Keywords: Soviet criminal law; social danger; measures of social defense; principle of analogy; Bolshevist law; judicial mentality; courts; law-enforcement.

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1. "Measures of Social Defense": Soviet Theories of Criminal Law

When Bolsheviks came to power in 1917, one of their main goals was to repeal the legislation of the Russian Empire and to replace it with new Soviet legislation. At the same time, they understood that it was impossible to create a new legal system from scratch. One of the first acts of the Bolsheviks authorized courts to use "the laws of the overthrown governments" (that is, pieces of the pre-revolutionary legislation) that "were not repealed by the Revolution and did not contradict the revolutionary conscience and the revolutionary legal consciousness."[1]

Marxist-Leninist doctrine viewed law as a tool intended to maintain the domination of the working classes over the non-working classes. According to Marx and Lenin, law was essential for a bourgeois society, where it was a tool of capitalist domination and a reflection of the bourgeois values. In a classless communist society law would not be needed and would inevitably wither away together with state, family and other "anachronisms of bourgeois society." However, at the time of transition from dictatorship of proletariat to socialism and then to communism, law was certainly needed as a temporary phenomenon. Thus, despite a temporary acceptance of law as a tool of the revolution, it is not surprising that this Marxist attitude towards law later on translated into disrespect for law and legal nihilism.

When the new Soviet Codes were developed during the early 1920s, in most cases the drafters drew on the imperial codes. Criminal law was an exception. In the early Soviet criminal legislation the juridical categories of *crime, punishment*, and *guilt* were replaced by sociological categories. The phrases "socially dangerous act" and "measure of social defense" were substituted for the words "crime" and "punishment": "the criminal legislation of the RSFSR has as its aim the protection of the Socialist State of Workers and Peasants, and the legal order established therein, from socially dangerous acts (crimes) by means of application to persons who committed them of the measures of social defense indicated in the present Code."[2] Fault was declared to

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[1] Декрет о суде № 1 от 22 ноября (5 декабря) 1917 г. [Decree on Courts No. 1 of November 22, 1917] (Feb. 20, 2017), available at http://www.hist.msu.ru/ER/Etext/DEKRET/o_sude1.htm.

[2] Уголовный кодекс РСФСР 1926 г. [Criminal Code of the RSFSR of 1926], Art. 1 (Feb. 20, 2017), available at http://www.consultant.ru/cons/cgi/online.cgi?req=doc;base=ESU;n=3274#0.

be a bourgeois criterion: "measures of social defense" should be applied in accordance with the best interests of the "Workers'-and-Peasants' State," as determined by the "revolutionary legal consciousness" of the judges.[3] Art. 23 of the 1922 Criminal Code of the RSFSR introduced the principle of retroactivity of the Soviet criminal law. The same principle was envisaged in Art. 6 of the 1929 Decree of the Presidium of the USSR Central Executive Committee of November 21, 1929, "On Criminalization of Soviet Officials Who Joined the Enemies of the Working Class and the Peasantry Abroad and Refused to Return to the USSR." Such refusal of a Soviet official to return to the Soviet Union was qualified as high treason and was punishable by confiscation of all the offender's property and execution by shooting within 24 hours from the moment of establishment of identity. By virtue of the aforementioned Art. 6, provisions of this Decree applied also to those Soviet officials who refused to return to the USSR before the day of enactment of the Decree. The doctrine of *nullum crimen, nulla poena sine lege* (which now is stipulated at the international level in Art. 7 of the European Convention for Human Rights) became the object of sharp criticism, and instead the *principle of analogy* was introduced: if an *act or omission* was considered socially dangerous – even though no specific statute prohibited it – the judge could apply a statute prohibiting an analogous act or omission.[4] That is how the supremacy of law was replaced by "revolutionary legal conscience."

The 1922 Criminal Code envisaged two main types of crimes: "Crimes directed against the fundamentals of the new legal order established by the power of workers and peasants or recognized as the most dangerous by the Soviet regime" and "all other crimes."[5] Through this conceptual division of criminality, the key Marxist-Leninist principle of supremacy of interests of the state over the interests of an individual was envisaged on the legislative level and became a fundamental principle of the Soviet criminal law. Traditionally, various crimes are specified in the Special part of a Criminal Code according to the degree of social danger: the gravest crimes always go first. In the 1922 Criminal Code, crimes against life, freedom and dignity of individuals were put into Chapter V – after the crimes against the state, official malfeasance, breach of rules of separation of church from the state and economic crimes. The legislative intent was to show that crimes against individuals were less dangerous that the other four types of wrongdoings above. From the viewpoint of the Soviet lawmakers, murder and rape were less dangerous than wasteful usage of labor force provided in the form of exercise of compulsory labor duty (Art. 127) or moonlighting (Art. 140). It is also remarkable that libel and criminal insult were criminalized as early as in 1922.

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[3] Harold J. Berman, *Principles of Soviet Criminal Law*, 56 Yale Law Journal 803 (1947).

[4] Уголовный кодекс РСФСР 1922 г. [Criminal Code of the RSFSR of 1922], Art. 10 (Feb. 20, 2017), available at http://www.consultant.ru/cons/cgi/online.cgi?req=doc;base=ESU;n=3006;frame=83#0.

[5] *Id.* Art. 27.

The 1926 Criminal Code of the RSFSR made social danger itself, and not violation of a specific provision of the Special part of the Code, the key to judicial sanctioning.[6] The new Code incorporated the basic provisions of the 1922 Criminal Code and brought them to a more advanced level. Under the 1922 Code, a person could be recognized as socially dangerous (1) as a result of his/her criminal activity, "due to systematic abuses in his/her professional activity," or due to his/her connections with the criminal environment.[7] The 1926 Code added one more ground – previous activities of the person in question.[8] In some cases, punishment was based on the perceived social danger of the person rather than on the act that this person committed. Art. 7 of the 1926 Code stated: "With regard to persons who have committed socially dangerous acts or who represent a danger because of their connection with a criminal environment or because of their past activity, measures of social defense of a judicial-correctional, medical or medico-educational character shall be applied." Thus a person who committed no act whatsoever but merely had a "connection with criminal environment," or who had engaged in "past activity which caused him to pose a danger," could be sentenced by a court.[9] The term "punishment" that was used together with the term "measures of social defense" in the 1922 Code was not included in the 1926 Code: "Measures of social defense of a judicial-correctional nature" was the new Code's euphemism for criminal sanctions imposed by a court.[10] The new Code held that the principle of analogy remained one of the key principles of the Soviet criminal law: "If any socially dangerous act is not directly provided by the present Code, the basis and limits of responsibility for it shall be determined by application of those articles of the Code which provide for crimes most similar to it in nature."[11] Consequently, any person could be determined socially dangerous for practically any reason. This created a convenient design for a totalitarian state: at any time, any person could be imprisoned or shot, in full accordance with the law.

The priority to protect the new regime was made even more clear in comparison to the previous Code. "Any act or omission directed against the Soviet system or that violates the legal order established by the worker-peasant power during the period of transition to the communist system" constituted a socially dangerous act (Art. 6). The gravest crimes were those directed against the Socialist State. This led to a very

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6 Harold J. Berman, *Soviet Criminal Law and Procedure: The RSFSR Codes* 21 (Cambridge, Mass.: Harvard University Press, 1972).

7 Criminal Code of the RSFSR of 1922, *supra* note 4, Arts. 48, 49.

8 Criminal Code of the RSFSR of 1926, *supra* note 2, Art. 7.

9 Berman 1972, at 21.

10 *Id.*

11 Criminal Code of the RSFSR of 1926, *supra* note 2, Art. 16.

sharp division between political and non-political crimes. Art. 46 of the 1926 Code provided that crimes contained in this Code are classified as follows:

- Those directed against the foundations of the Soviet system established in the USSR by the power of workers and peasants, and therefore considered to be the most dangerous;
- All other crimes.[12]

Punishments for crimes directed against the foundations of the Soviet system were much heavier than punishments for other crimes. The death penalty was applicable only to crimes against the state.[13]

In an insightful commentary on these issues, Professor Harold J. Berman wrote that some of the philosophy of the early Soviet criminal law "seems to have stemmed from the sociological school of jurisprudence of the 19th and early 20th century", and that "Soviet jurists were greatly influenced by Enrico Ferri, the leader of the sociological school"[14]. Soviet legal scholars,[15] however, angrily rejected the assumption that Enrico Ferri's theories had a significant impact on the formation of early Soviet criminal law. They considered it shameful to acknowledge that the conceptual and categorical apparatus of Soviet criminal law was formed under a pronounced influence of an odious bourgeois scholar and a Mussolini apologist who actively collaborated with the Nazi regime. Nevertheless, the resemblance was too close to go unnoticed. It is telling that Ferri's *Criminal Sociology* was not reprinted in Russia for nearly a hundred years.

According to Ferri's concept of social protection, the function of justice is to protect society from socially dangerous elements. Ferri denied such basic elements of criminal law as crime, punishment, guilt, responsibility, and the objective examination of a crime, and he strongly advocated for the personification of punishment, or the determination of punishment based on the personality of the offender, not on the offense. A key role in determining punishment was played by the judges. "Since punishments, instead of being the simple panacea of crime which popular opinion, encouraged by the opinions of classical writers on crime and of legislators, imagine them, are very limited in their deterrent influence, it is natural that the criminal sociologist should look for other means of social defense in the actual study of crimes

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12 Berman 1972, at 22.

13 *Id.*

14 Berman 1947, at 804.

15 *See* Пионтковский А. Марксизм и уголовное право. О некоторых спорных вопросах теории уголовного права [Andrey Piontkovsky, *Marxism and the Criminal Law. On Certain Disputable Issues of Criminal Law Theory*] (Moscow: Juridical Publishing House of the People's Commissariat of Justice of the USSR, 1927).

and of their natural origin. We are taught by the everyday experience of the family, the school, associations of men and women, and the history of social life, that in order to lessen the danger of outbreaks of passion it is more useful to take them in their origin, and in flank, than to meet them when they have gathered force… If the counteraction of punishment must inevitably be opposed to criminal activity, still it is more conducive to social order to prevent or diminish this activity by means of an indirect and more effective force."[16] Ferri's theory contributed greatly to shaping the defensive nature of the Soviet criminal law.

The first Soviet Criminal codes (1922 and 1926) influenced the initial competence and specific mentality of the Soviet judges. Certain explicit instructions on the mode of judicial behavior also came from the part of the head of the Bolshevik state: "the courts should not do away with terror – to promise that would be to deceive ourselves and others – but should give it foundation and legality, clearly, honestly, without embellishments."[17] Specific features of the early Soviet criminal law provided unlimited possibilities for judicial discretion, arbitrary interpretation and selective application of law as follows:

- Ambiguity of norms describing grave crimes (counterrevolutionary crimes and crimes directed against the foundations of the Soviet state) and the presence of the principle of analogy allowed discretion to qualify most of acts as socially dangerous ones;
- The provision that a socially dangerous person includes not only a person who committed a socially dangerous act, but also those who allowed systematic abuses in the course of fulfilling their professional duties, as well as those who had connections with the criminal environment (Arts. 48, 49 of the 1922 Criminal Code). The new Criminal Code of 1926 added one more qualifying characteristic: a person with a suspicious or otherwise problematic past was also considered socially dangerous (Art. 7).
- According to the requirements of the early Soviet legislation, judges had to handle cases in accordance with the available legislation and revolutionary legal consciousness.
- It was up to a judge to decide which type of punishment (measure of social defense) should be applied in a particular case and how severe such punishment should be.
- The most severe types of punishment (including the death penalty) were envisaged for counter-revolutionary crimes (Art. 58) and other crimes directed

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[16] Ферри Э. Уголовная социология [Enrico Ferri, *Criminal Sociology*], 100–111 (Moscow: Infra-M, 2009).

[17] Ленин В.И. Дополнения к проекту вводного закона к Уголовному кодексу РСФСР и письмо Д.И. Курскому 17 мая 1922 года [Vladimir I. Lenin, *Additions to the Draft Introductory Act to the Criminal Code of the RSFSR and Letter to D.I. Kursky of May 17, 1922*] 296 (Moscow: Collected works, vol. 27, 1932).

against the foundations of the Soviet state. According to the provisions of the 1926 Criminal Code, such crimes did not have to necessarily involve criminal intent.

By the 1930s, it became clear that early revolutionary ideas about the inevitable demise of law, state, family and other basic were unrealistic. The Soviet criminal law, however, proved to be a surprisingly useful tool: the state appreciated it, began to enjoy it, and ultimately decided not to reject it any more. The trend towards criminal repression intensified with as Stalin's personal grip on power strengthened.[18] One of the immediate results was the passing of three notorious acts. The Joint Decree of the USSR Central Executive Committee and Sovnarkom of August 7, 1932 "On Protection of Property of State-Run Enterprises, Collective Farms and Cooperatives, and Strengthening of Public Socialist Property," or "the Law of Three Spikelets," explicitly emphasized the persistent defensive nature of the Soviet criminal law. The preamble of the act stated that the Decree was the state's response to the repeated complaints of workers and peasants regarding theft of cargos, kolkhoz and cooperative property committed by "antisocial elements." All types of public property (state, kolkhoz and cooperative property) were declared as fundamental to the socialist public order. Persons attempting theft of public property were labeled "enemies of the people," and the fight against "enemies of the people" was proclaimed the top priority of the Soviet state. The Law of Three Spikelets envisaged execution by shooting and confiscation of property as a measure of punishment for (1) a theft of kolkhoz or cooperative property and (2) pilferage committed on a railway or water transport. If there were mitigating circumstances, the capital punishment could be replaced by 10 years' imprisonment with confiscation of property. Persons sentenced under this law were not subject to amnesty.

The Joint Decree of the USSR Central Executive Committee and Sovnarkom of August 22, 1932 "On Fighting Blackmarketeering" served as a logical continuation of the Law of Three Spikelets. This act envisaged disproportionally severe punishments for activities that could be qualified as black marketeering (given that the principle of analogy was still in force): a person could be sentenced to 10 years of imprisonment for selling cookies on the black market, for example. This Decree provided additional legal grounds for the battle of the Soviet state against its own people as they were sliding into poverty. Early 1930s saw horrific consequences of collectivization, which caused mass starvation and poverty. Another hidden goal of this Decree was to eliminate memories about the New Economic Policy, which was discontinued in 1927. By proclaiming the NEP in March 1921, the Soviet government formally recognized for the first time that its previous economic policies had failed. This same proclamation showed – also for the first time – how pliable the communist

[18] Мишина Е. Длинные тени советского прошлого [Ekaterina Mishina, *Long Shadows of the Soviet Past*] 37 (Moscow: "Liberalnaya Missiya," 2014).

ideology could be: in the face of impending economic disaster, the "die-hard" fighters against "capitalist exploiters" and private property decided to turn back to certain elements of in order to prevent the country from plunging into economic chaos. In a short time, the NEP saved the economy and started to appear politically dangerous. The early 1930s marked a new phase in the life of the Soviet Union, with no place for the NEP. This new phase brought a new concept of responsibility for the activities in breach of the Soviet legislation in force – a collective responsibility. An offender's family members also had to be convicted and made liable for the offender's wrongdoings.

The Resolution of the USSR Central Executive Committee of June 8, 1934 "On Amending of Provisions on Crimes against the State (Counterrevolutionary Crimes and Crimes against Administrative Order) with Articles on Betrayal of the Motherland" introduced a particularly broad definition of "betrayal of the Motherland." Persons convicted under this Resolution were punished by execution and confiscation of property; if there were mitigating circumstances, the punishment was 10 years of imprisonment with confiscation of property. Betrayal of the Motherland committed by a military serviceman was punishable with death penalty and confiscation of property. If a military serviceman knew that a betrayal of Motherland was committed or imminent and failed to report it, he was subject to 10 years of imprisonment. If family members of a military serviceman who undertook an unauthorized travel outside of the Soviet Union contributed to the act of betrayal of the Motherland or knew about it and did not notify the authorities, they were subject to 5–10 years of imprisonment with confiscation of property. The Law "On Family Members of Traitors of Motherland" followed in March of 1935. In the same year, the age of criminal responsibility was reduced from 14 to 12 years old. The Decree of the USSR Central Executive Committee of October 2, 1937, extended the maximum term of imprisonment for the most dangerous crimes (sabotage, espionage, etc.) from 10 to 25 years.

The assassination of Sergey Kirov on December 1, 1934, became a trigger for the escalation of political repression. Another Decree of the USSR Central Executive Committee followed on the very same day. This act introduced amendments to the criminal procedural legislation envisaging a special order of adjudication for the cases of terrorist organizations and terrorist acts that targeted Soviet officials.[19] Investigation of such cases were required to be conducted within 10 days. Criminal defendants had to be served with indictments one day before the trial (and in most cases, they were not served at all). Hearings were conducted in absentia, and

[19] Постановление ЦИК СССР от 1 декабря 1934 г. «О внесении изменений в действующие уголовно-процессуальные кодексы союзных республик» [Decree of the USSR Central Executive Committee of December 1, 1934. On Amending Codes of Criminal Procedure of the Union Republics] (Feb. 20, 2017), available at http://www.alppp.ru/law/ugolovnoe-pravo--ispolnenie-nakazanij/16/postanovlenie-cik-sssr-ot-01-12-1934.html.

convictions were not subject to appeal. Guilty verdicts resulting in a death penalty were enforced immediately.[20]

The special NKVD Order of July 30, 1937 No. 00447 "On Repression of Former Kulaks, Criminals and Other Anti-Soviet Elements" illustrates how the Soviet criminal justice worked in the late 1930s. This startling document was designed specifically for the purposes of the Great Purge and envisaged "Contingents (Quotas) Subject to Repression" according to the following categories:

1. Former kulaks, returning after serving out their punishment and continuing to conduct active anti-Soviet subversive activity.

2. Former kulaks escaping from camps or labor colonies carrying out anti-Soviet activity.

3. Former kulaks and socially dangerous elements, belonging to rebellious, fascist, terrorist, and bandit formations, serving out their terms, hiding from repression or escaping from places of confinement and resuming their anti-Soviet criminal activity.

4. Members of anti-Soviet parties (listed), former Whites, gendarmes, officials, members of punitive organizations, bandits, and gang members, accomplices, those assisting escapes, re-emigrants, those hiding from repression, fleeing from places of confinement and continuing to conduct anti-Soviet activity.

5. Those exposed as a result of investigations as the most hostile and active participants in currently-being-liquidated Cossack-White Guard insurgent organizations, fascist, terrorist, espionage-diversionist counter-revolutionary formations.

6. The most active anti-Soviet elements among former kulaks, members of punitive bodies, bandits, sectarian activists, church officials and others currently being held in prisons, camps, work colonies and continuing to carry out active anti-Soviet insurgency work. Criminals (bandits, thieves, recidivist thieves, professional contrabandists, swindler-recidivists, livestock thieves) carrying out criminal activity and circulating in criminal milieu.

7. Criminal elements located in camps and work colonies and conducting criminal activity.

8. All the above elements currently located in villages – in collective farms, state farms, agricultural enterprises and in cities – in industrial and trade enterprises, transport, in Soviet institutions and in construction are subject to repression.[21]

The Decree stipulated the following measures of punishment: "The most dangerous individuals shall be immediately arrested. After adjudication of their cases by special troikas, such individuals are subject to a death penalty. Less dangerous individuals shall be arrested and sent to labor camps for 8–10 years. The most socially dangerous individuals shall be imprisoned for the same period."[22]

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[20] Decree of the USSR Central Executive Committee of December 1, 1934, *supra* note 19.

[21] Paul R. Gregory, *Lenin's Brain and Other Tales from the Secret Soviet Archives* 50 (Stanford, CA: Hoover Institution Press Publication, 2007).

[22] *Id.*

Between August of 1937 and October of 1938 *767,397* people were convicted under the special NKVD Order of July 30, 1937 No. 00447. Of those, *386,798* people were executed; others were imprisoned or sent to Siberian labor camps.

Beyond violating bedrock principles of criminal responsibility under the law, these standards became a terrible weapon and a basis of a catastrophe waiting to happen. The elasticity and vagueness of early Soviet criminal law provided a pseudo-legalization for the massacre of hundreds of thousands of innocent people.

The implications of the early Soviet approach to criminal law remain relevant and dangerous to this day. The early Soviet criminal law, including the Criminal Codes of 1922 and 1926, formed the basis for a legal tradition of arbitrary interpretation and selective application of the law. These acts contributed significantly to the formation of a specific mentality of Soviet judges and transformed judicial discretion into judicial arbitrariness. And here, too, Ferri's theories played a sinister role in establishing that the main function of justice is to protect society from socially dangerous elements. In the Soviet version of this concept, the basic function of justice has transformed into the prioritization of defense of the state over defense of its citizens. This approach became customary in the Soviet Union.

Big changes took place in the Soviet criminal legislation in 1960, when the new Criminal Code of the RSFSR was adopted. As Professor Harold J. Berman puts it, "the restoration of the traditional vocabulary of criminal law, the limitation of the doctrine of analogy, the careful analysis of crime in terms of subject and object, and the emphasis throughout on strict legality all bear witness to what may be called a Struggle for Law."[23] Donald D. Barry, George Ginsburgs and Peter B. Maggs state that many of the most important developments in Soviet law that took place in the 1960s and 1970s "could be classified under the heading of legal reform, and this would apply in particular to the impressive codification activity that has taken place in many branches of law."[24] However, that legal reform retained its Soviet underpinnings. Similar to the 1926 Criminal Code, the interests of the Soviet state were the top priority: crimes against the state (treason, espionage, sabotage, wrecking, anti-Soviet agitation and propaganda, etc.) were still considered the most dangerous crimes. The 1960 Criminal Code envisaged a number of wrongdoings typical of the Soviet regime: violation of rules for currency transactions, failure to report crime against the state, theft of state or social property, pederasty, defamation, insult, private entrepreneurial activity and activity as commercial middleman, profiteering, etc. Even vagrancy was criminalized in May of 1961 by the Decree of the Presidium of the USSR Supreme Soviet "On Tightening of Control over Individuals Avoiding Socially Useful Labor and Engaging in Antisocial Parasitic Lifestyle."

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[23] Berman 1947, at 836.

[24] *See Soviet Law after Stalin* (D.D. Barry et al., eds., The Netherlands: Sijthoff and Noordhoff Publishers, 1978).

Along with other major political changes, the 1990s saw a long-awaited humanization and modernization of Russian criminal law. The 1996 Russian Criminal Code brought a fundamental change of the top priorities of Russian criminal law, which emphasized on the protection of the individual. Legality, equality before the law, liability solely based on guilt, justice and humanism became the basic underlying principles of the new Code.[25] The fact that these principles are stated signals an intent to depart from the principles and practices of the old Soviet Code, which emphasized "protection of the social structure of the USSR, its political and economic system… and socialist law and order."[26]

2. Incomplete Reforms: Business, Criminal Law and "Artificial Criminalization"

Significant achievements were made in modernization and humanization of the Russian penal law in 1990s in a clear attempt to break with the Soviet past; even so, the initial version of the Criminal Code of the Russian Federation outlined economic crimes in a way that continued to reflect socialist attitudes. As a result, entrepreneurs and their property were inadequately protected under Russian law. Because of the government's weak commitment to protecting private property, doing business in Russia continued to involve unnecessarily large risks even after the change to a market economic system. Unfortunately, the situation has only deteriorated since the 1990s. The principles of justice and individual equality under the law no longer apply in Russia today. In addition to abnormal economic conditions in the marketplace, businesspeople in Russia face additional risks stemming from abuses of power by law enforcement agencies and the impossibility of compliance with legislation currently in force. As a result, Russian businesspeople are not protected by the law and do not feel safe. As a result, more and more Russian businesspeople are opting for relocation to countries where they may benefit from legal systems that provide real protections to law-abiding entrepreneurs in the form of dependable individual and property rights.

The situation in Russia today may be described as an almost total lack of property protections that should be guaranteed in criminal law and constant wrangling between entrepreneurs and government officials. This model is based on the old-fashioned idea that it is possible to make economic decisions at the state level, using the law as a tool to benefit both the legal and the non-legal interests of government officials. The authors of the Conceptual Framework for the Modernization of the

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[25] Уголовный кодекс Российской Федерации 1996 г. [Criminal Code of the Russian Federation of 1996], Arts. 3–7 (Feb. 20, 2017), available at http://www.consultant.ru/document/cons_doc_LAW_10699/.

[26] Peter B. Maggs et al., *Law and Legal System of the Russian Federation* 765 (6th ed., Huntington, New York: Juris Publishing Inc., 2015).

Criminal Code of the Russian Federation in the Economic Sphere[27] treat this model as a modified socialist idea using a body of criminal law as a tool of economic management. The concept emphasizes that having the ability to affect the economy is predicated on administrative discretion. This perspective, in turn, evokes the phenomenon of a "mixed nature" of business. Under this construct, a business can be characterized as having some legal aspects and some non-legal aspects at the same time. In other words, a business can be considered legal from the standpoint of non-criminal law, but illegal from the standpoint of criminal law. Accordingly, artificial criminalization of business activity may be secured either through the adoption of repressive, Soviet-like criminal legislation, or by means of undue, arbitrary legal interpretations that disfigure the nature of the legal norms in question.

As a result of non-legal interpretation, a legal norm can be replaced by a quasi-norm that qualifies, or reclassifies, as illegal all business activities that are considered to be completely legal in other areas of law. Where the concept of artificial criminalization has the potential to be invoked, any legal contract or transaction falls under a real threat that it might be qualified as illegal. An illustrative example may be found in the text of the Resolution of the Supreme Court of the Russian Federation of December 27, 2007. The act states that a transaction, a contract, or an otherwise legitimate activity can be proclaimed criminal if a court finds a motivation for committing a crime. Such an approach inevitably results in an escalating cascade of criminal repressions that target entrepreneurial activities.

When the new Criminal Code of 1996 was drafted and adopted, humanization of legal norms was declared to be one of the main goals. Indeed, the revised Code eliminated certain notorious articles dating back to the Soviet Criminal Code that stipulated criminal penalties for homosexuality, vagrancy, currency-exchange operations, and so on. At the same time, the humanizing trend of 1990s had almost no effect on those provisions of the Code that pertain to economic crimes. Moreover, it turned out to be impossible to extract the bad heredity of the Soviet Criminal Code of 1960. That Criminal Code was infamous for the severity of the sanctions that it imposed on people who were convicted of economic crimes. The repressive nature of the Soviet Criminal Code is still present in a number of provisions of the Criminal Code of 1996, especially those related to punishments and law-enforcement procedures in the sphere of business. When an excessively repressive criminal legislation is combined with a broad interpretation of what is permissible when it comes to the targeting of business activities, the end result is the establishment of penalties against businesspeople that may be more severe than the penalties established for convicted felons. Furthermore, the escalating severity of punishments for economic crimes – a salient feature of Russian criminal policy both in Soviet times and in the period of

[27] *See* Концепция модернизации уголовного законодательства в экономической сфере [*Concept of Modernization of Criminal Legislation in the Economic Domain*] (Moscow: "Liberalnaya Missiya," 2010).

transition to the market economy – brings serious social and economic damage. This is despite the fact that world history shows that increasing the severity of criminal penalties has never stabilized or reduced the level of crime, and never will.

The reality is that Russian legislative norms regulating the issues of property rights and economic activity provide scant protections for individuals or their property. What is more, such norms constitute a serious threat to individual rights and freedoms: their formulations are ambiguous and uncertain, and there is a serious risk of "ditto-ology" and arbitrary interpretation. In its present form, Russian criminal legislation is not only an impediment against, but quite obviously a threat to, Russia's further social and economic development. Originally instituted values, such as protection of property rights and fair competition (in the initial sense of these definitions) are at the point of disappearing. Moreover, the possibility that criminal punitive measures can be applied under ambiguous legislative acts sets the stage for abuses of power by law-enforcement agencies. In the criminal procedure area as well, Russian law-enforcement agencies practice arbitrary interpretations of the norms of the Russian Code of Criminal Procedure – especially norms relating to economic crime. This environment of arbitrary interpretation contributes to the repressive nature of criminal procedure in Russia. It also blocks the application of legal norms regulating special procedures for persons charged with economic crimes. A very recent example of dangerously vague interpretation of the rules of criminal procedure can be seen in the application of one of the new norms of the Russian Code of Criminal Procedure: Provision 1.1 of Art. 108 of the Code establishes that detention shall not be applied to those charged with the types of crimes indicated in this provision if such a crime was committed in the context of entrepreneurial activity.

The main sources of existing problems are arbitrary interpretation of the norms of the Russian Criminal Code and the Russian Code of Criminal Procedure, improper law enforcement and deformation of the legal consciousness of the Russian people. This phenomenon has been captured in numerous sociological surveys. Most respondents think that Russians are not protected while doing business, and that their property is not protected either. In order to do business in Russia, one must obtain numerous official permissions, known colloquially as "no-objections." Even while purporting to conduct legitimate economic activity, a law-abiding Russian entrepreneur must solicit these permissions from numerous governmental agencies to avoid arbitrary enforcement of vague statutes.

3. The Continuing Influence of the "Best Traditions" of Soviet Criminal Law – Contemporary Case Studies

Certain cases as well as recently passed pieces of the Russian legislation show the sings of old Soviet attitudes in contemporary Russian criminal law and law enforcement.

The Pussy Riot Case. For organizing a so-called "punk prayer" in Moscow's Christ the Savior Cathedral in February 2012, Pussy Riot members were arrested and later sentenced to two years in prison. Their case reveals a number of disturbingly familiar features in Russia's public and legal environment. Most people might dislike the idea of holding a punk prayer in a place where believers come to worship. However, despite individual tastes and attitudes toward the band's performance, under the law, Pussy Riot members should not have been subjected to such harsh legal penalties or such heavy-handed treatment by law enforcement. The applicable Russian legislation in effect at the time of the violation established the sanction of a fine in the amount of 1,000 rubles in the a case of presenting "offense to the religious feelings of believers and/or desecration of items, signs and emblems of religious reverence" (Part 2 of Art. 5.26 of the Russian Code of Administrative Offenses). This exactly fits the violation committed by Pussy Riot in Moscow's Christ the Savior Cathedral, and it has little overlap with "hooliganism," the violation for which the participants were sentenced. In other words, the "punk prayer" was an administrative offense, that is, an unlawful, guilty act that is characterized by a considerably lower degree of public danger than a crime. If their actions had been assessed objectively rather than according to the "best traditions" of the Soviet law, Pussy Riot members would have been fined and that would have been the end of the case.

In this particular case, nevertheless, *who* did it and *how* it was done was more important than *what* was done, and the Russian judicial machine reacted in strict accordance to Art. 24 of the infamous 1922 Soviet Criminal Code, which stipulates that "when determining the punitive measure, the degree and the character of the threat the offender poses as well as the degree and the danger of the crime he committed are examined. In pursuing these aims the circumstances of the crime are examined, the identity of the criminal is established because it manifested itself in the crime the offender committed and in his motives, and because it can be established based on his way of living and his past. Also, the extent to which the crime itself violates the principles of public safety at a given time and under the given circumstances is determined." This accurately describes the illegal, one-sided and biased approach to evidence by Judge Marina Syrova, who stated that the behavior of the accused in the courtroom should be considered as yet another proof of their guilt – an interpretation that ensured the required result: the members of Pussy Riot were not found guilty of what they actually did, but, according to the best traditions of early Soviet criminal justice, were sentenced on the basis of their categorization as socially dangerous individuals. It is notable that acts insulting religious feelings were criminalized in June of 2013.[28]

The "Rubber Homes" Legislation. December of 2013 saw changes to Russia's law "On the Rights of Citizens of the Russian Federation to Freedom of Movement,

[28] Criminal Code of the Russian Federation of 1996, *supra* note 25, Art. 148.

Choice of Place of Sojourn and Residence within the Russian Federation." At the same time, the Criminal Code introduced criminal liability for fictitious registration of Russian and foreign citizens or stateless people (Art. 322-2), as well as for fictitious registration of foreign citizens or stateless people at a location in the Russian Federation (Art. 322-3). The legislative intent for this law was stated with appealing frankness in the explanatory note to the bill: "Hundreds of thousands of people register each year in thousands of so-called 'rubber homes' in Russia with no intention of living at the locations. At the same time, their real place of residence is not known. In 2011 alone, nearly 300,000 people were registered at only 6,400 addresses. By exercising their right to choose the place of residence, many citizens are shirking their *constitutional duties to other citizens, the state and society*." The note adds: "this situation became possible due to massive abuse by homeowners of their property rights, often for material motives."

This law is dangerous not only on its own terms but because it is aimed at abolishing the supremacy of a person's rights and freedoms – and accentuating his or her responsibilities. Here, the bill's authors trample the Constitution, in particular, its Art. 2, which states that: "The person, his rights and freedoms shall be the supreme value. The recognition, observance and protection of human and civil rights and freedoms shall be an obligation of the State." In part, the Constitution focuses on a person's rights and freedoms, and not his duties, because rights and freedoms must be considered foremost in a properly functioning legal system, both based on legal history and due to the significance of rights and freedoms in society. Constitutional obligations for individuals are younger than constitutional rights by almost two centuries, and only began acquiring a legal expression after the Second World War. The textbook list of traditional obligations implicitly or openly placed by the state on its citizens usually consists of *compliance with laws and other statutory acts, the obligation to pay taxes and the duty to serve in the military*. In modern constitutions, one can see not only the term "citizens' obligations" itself, but even whole chapters and sections dedicated to this subject (for example, Part I of the Italian Constitution on "Rights and Duties of Citizens;" Title III of the Venezuelan Constitution on "Duties, Human Rights and Guarantees;" Title III of the Constitution of Panama on "Individual and Social Rights and Duties;" Part I, Chapter 2, Division 2 of the Spanish Constitution on "Rights and Duties of Citizens."). The Russian Constitution, by contrast, contains no such developed theory of duties, which means the reference to any such principles in justifying legislation is deeply disconcerting.

Second Citizenship Legislation. In June of 2014, changes to the Russian legislation introduced the obligation of Russian citizens who have a second nationality or a residence permit in a different country to notify in writing the federal Migration Service. These changes included amendments to Russia's law on Citizenship, the Criminal Procedure Code and the Criminal Code, which was amended with Art. 330.2: "Failure to Comply with the Obligation to Notify of the Citizenship (Nationality) of

a Foreign State or a Residence Permit or Other Document Confirming the Right to Live Permanently in a Foreign State." Such a violation was made punishable by a fine of up to 200,000 rubles or up to an amount equal to the offender's annual income, or by compulsory labor for a term of up to 400 hours. Apparently, the drafters of these amendments neglected to acquaint themselves with the criminal law. If they had, they would have known that the criminalization of acts is based on a number of qualifying characteristics, such as *culpability, punishability*, and *public danger* (Art. 14 of the Criminal Code). Part 2 of this Article expressively provides that "an action [inaction] is not considered a crime, although it can formally contain any characteristics of an offense under this Code, but because [such an action] does not represent any public danger due to its insignificance." Public danger is one criterion used in defining a crime that constitutes a socially dangerous act that harms or threatens to harm the individual, society, or the state. The social danger that results from a Russian citizen's failure to inform the relevant authorities about his or her possession of another state's citizenship or residence permit was never made clear in the legislation or otherwise.

The problem of dual citizenship and the desire to criminalize it has preoccupied domestic legislators for some time. Back in 2000, Alexei Mitrofanov, a member of the Parliament of the Russian Federation, prepared and submitted draft law to the State Duma, in which he proposed criminalizing the acquisition of another state's citizenship by a Russian Federation citizen. Shortly thereafter, he proposed adding the following language to Art. 136 of the Criminal Code: "Acquisition by a person of the nationality of another state while temporarily staying or residing outside the Russian Federation, while retaining the citizenship of the Russian Federation, shall be illegal." Upon closer examination, this language is not much different from some of the provisions of the notorious Art. 64 of the 1960 Criminal Code of the Russian Soviet Federative Socialist Republic (upheld by the Constitutional Court of the Russian Federation on December 20, 1995), which labeled the refusal to return from abroad or the act of fleeing abroad as treason. It is noteworthy that the Third State Duma considered this bill in the first reading in October of 2002 and responded sensibly. The Law Committee said that the bill contradicted the provisions of Art. 6 of the Constitution, noting that it is difficult to define the acquisition of another country's citizenship as a socially dangerous act. The Legal Department of the State Duma decided that "the proposed project establishing criminal liability for actions aimed at a Russian citizen's acquisition of the citizenship of another state raises serious objections" and was unacceptable.

Currently para. 3.1 of Art. 4 of the Federal law "On Basic Guarantees of Electoral Rights and the Russian Federation Citizens' Right to Participate in Referenda" (No. 67-FZ of June 12, 2002) reads: "Citizens of the Russian Federation with foreign nationality or a residence permit or other document confirming the right of residence of a citizen of the Russian Federation on the territory of a foreign state do not have the

right to be elected. These citizens have the right to be elected into local government, if it is stipulated by an international treaty of the Russian Federation." This Article's provision, which denies individuals holding another country's passport one of the most important political rights held by Russian citizens, is not in accord with Parts 2 and 3 of Art. 55 of the Russian Constitution, which reads:

> • Laws that abrogate or derogate the rights and freedoms of men and citizens shall not be passed in the Russian Federation.
>
> • The rights and freedoms of persons and citizens may be limited by federal law only to the extent that it is necessary for the protection of the constitutional order, morality, health, and the rights and lawful interests of other persons, national defense, and state security.

Provisions of the aforementioned law also disagree with Part 4 of Art. 15 of the Constitution of the Russian Federation, which states that the "generally recognized principles and norms of international law and international treaties of the Russian Federation form a constitutive part of its legal system. If an international treaty of the Russian Federation stipulates other rules than those provided by law, the rules of the international treaty are to be applied." In addition, these provisions contradict Art. 3 of Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Art. 4 of the Convention itself.

The Case of Svetlana Davydova. In November 2012, substantial amendments were made to Art. 275 of the Criminal Code relating to espionage and state secrets. In order to understand the significance of this disastrous change, it is sufficient to compare the text of the previous version of this article with its current version. Legal sanctions for the crime have remained unchanged, but the scope of the Article has changed dramatically. Prior to November 2012, Art. 275 defined high treason as "*espionage, transfer of a state secret or any provision of assistance to a foreign government, foreign organization or their representatives in their conduct of hostile actions to the detriment of the external security of the Russian Federation, committed by a citizen of the Russian Federation*." As amended, however, Art. 275 defines high treason as an act "*that is committed by a citizen of the Russian Federation, acts of espionage, disclosure to a foreign state, an international or foreign organization, or their representatives of information constituting a state secret that has been entrusted or has become known to that person through service, work, study or in other cases determined by the legislation of the Russian Federation, or any financial, material and technical, consultative or other assistance to a foreign state, an international or foreign organization, or their representatives in activities against the security of the Russian Federation*."

The following are the most dangerous pitfalls of the new provision:

1. The phrase "hostile actions to the detriment of the external security of the Russian Federation" is replaced by the ambiguous phrase "activities against the

security of the Russian Federation." The omission of the word "hostile" makes this concept indecipherably ambiguous.

2. The new definition covers not only external but also internal security. A clear and detailed definition of either concept is absent from the Criminal Code.

3. The ambiguity of the wording "financial, material and technical, consultative or other assistance to a foreign state, an international or foreign organization, or their representatives in activities against the security of the Russian Federation" makes the article applicable to virtually any activity.

4. International organizations are identified as potential recipients of information constituting state secrets, as well as of the abovementioned types of assistance. Any list of such recipients must necessarily be open-ended and can include any international organization by default.

5. The vagueness of this statutory provision makes it impossible for citizens to properly abide by it, a violation of one of the fundamental conditions of the rule of law.

6. The provision's extensive ambiguity creates unlimited possibilities for arbitrary interpretation and selective application. Pursuant to the provisions of Art. 275, a criminal case for high treason can be initiated against any citizen of the Russian Federation who provides someone almost any information or commits almost any action.

In January 2015, Svetlana Davydova encountered these pitfalls personally. She was subjected to the most radical measure prescribed by the law: being remanded in custody. According to Art. 108 of the Code of Criminal Procedure, a person is taken into custody "when it is impossible to apply a different, less stringent preventive measure. When a person is remanded in custody, a judge's ruling must detail the specific factual circumstances based on which the judge made such a decision." What were the factual circumstances based on which the judge decided that the use of less stringent preventive measures against the mother of seven children was not possible? According to the text of the ruling of February 3, 2015, the decision by Investigator Mikhail Svinolup to take Davydova into custody was based on Art. 110 of the Code of Criminal Procedure. According to this Article, "a preventive measure is changed to a less stringent one once the basis for imposing such a measure has changed."

It is abundantly clear that what really changed was not the basis for the preventive measure, but the team of lawyers: on February 2, 2015, Davydova dismissed her attorney, Andrei Stebenev, and since that day she has been represented by attorneys Sergei Badamshin and Igor Pavlov. The results of this shift became evident the day after the dismissal, when, at the request of Badamshin and Pavlov, Davydova was released from custody on bail. The Moscow Bar Association thereafter initiated disciplinary proceedings for inadequate provision of legal assistance against Stebenev, who was eventually disbarred.

Davydova's case confirms that the defensive nature of the Soviet criminal law, enshrined in the very first Soviet Criminal Codes of 1922 and 1926, has returned. Under this Code, the state actively defends itself against its citizens and sometimes exceeds the limits of self-defense to commit acts of oppression against them.

The Case of Ildar Dadin. Further proof to that Russian criminal law is on a dangerous track of restoration of certain attitudes of Bolshevist law can be found in the case of Ildar Dadin, an opposition and civic activist. In the summer of 2014, a new article, Art. 212.1 on "Repeated Violations of the Established Rules of Organizing or Holding Public Gatherings, Meetings, Rallies, Marches, and Pickets," was added to the Russian Criminal Code. In December 2015, Ildar Dadin became the first person prosecuted and convicted under this Article, which has been strongly criticized both by members of the Russian Presidential Human Rights Council and by most prominent Russian lawyers as contradictory to the country's fundamental law and the European Convention on Human Rights. Noted Russian lawyer Henri Reznik has pointed out the anti-constitutional nature of this Article and emphasized that *multiple and repetitive administrative offenses do not constitute a crime*, as criminal acts are associated with a higher level of danger to the public.[29] Reznik also noted another blatant violation: when a criminal case against Ildar Danin was initiated, some court decisions on Dadin's administrative offenses had not yet come into legal force and therefore charges under Art. 212.1 of the Russian Criminal Code were filed against him illegally.

There are several shocking features in Ildar Dadin's case.

First, Art. 212.1 itself and Dadin's criminal case initiated under this article will eventually become textbook examples of the restoration of Bolshevik-style criminal law in post-Soviet Russia. Those who suggested introducing criminal liability for repeated violations of the rules of organizing and holding meetings, rallies, and other forms of public gatherings cannot draw justification from the danger such assemblies pose to the public, because there is simply no such danger. Once again following the "best traditions" of Art. 5 of the 1922 Criminal Code of the RSFSR, the authors of this legislative innovation nonetheless found that such gatherings posed a threat to the current political system. Art. 212.1 stipulates a maximum penalty of five years, which qualifies such offenses as medium-gravity crimes.[30] For comparison, the same maximum penalty is provided for the murder of two or more people committed under the influence of extreme emotional disturbance (Part 2 of Art. 107 of the Criminal Code) and for incitement to suicide (Art. 110 of the Criminal Code). For further comparison, Part 1 of Art. 117 stipulates a maximum penalty of three years for torture without aggravation, thus making it a minor crime. In other words,

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[29] Букварева А. Генри Резник – о приговоре Ильдару Дадину: "Это оскорбление права," Новая газета, 1 апреля 2016 г. [Aleksandra Bukvareva, *Henri Reznik on Ildar Dadin's Conviction: It's an Insult of Law*, Novaya gazeta, April 1, 2016) (Feb. 20, 2017), available at https://www.novayagazeta.ru/articles/2016/04/01/68036-genri-reznik-8212-o-prigovore-ildaru-dadinu-171-eto-oskorblenie-prava-187.

[30] Criminal Code of the Russian Federation of 1996, *supra* note 25, Art. 15.

from the point of view of 21st-century Russian legislators, torture is less dangerous for society than repeated violations of the rules of holding meetings, marches, and rallies, including individual pickets. This represents yet another similarity between this article and early statutes of Soviet criminal legislation, according to which crimes against the state – which, in this case, has been equated with the current political order – posed a bigger public threat than crimes against persons.

Second, as in the Pussy Riot case, law-enforcement bodies were more interested in Ildar Dadin himself as a "socially dangerous element" than they were in his actions. The situation evolved along the lines of the first Soviet Criminal Code, which instructed judges, when deciding on a sentence, to take into account the level and nature of the threat posed by both the criminal and his act and to "establish the personality of the criminal, since it revealed itself in the crime he committed as well as in his motives, and since it can be established based on his way of life and past."[31] Judicial authorities determined the punishment according to their "socialist legal conscience": although the prosecutor was asking for only two years of imprisonment, the judge decided such a punishment would be insufficient. As a result, Dadin was sentenced to three years in a penal colony.

Third, although Art. 51 of the Russian Constitution guarantees the right not to give incriminating evidence against one's relatives, Ildar Dadin's father testified against his own son. Even Art. 205.6, which joined the Russian Criminal Code in July of 2015, contains an annotation stipulating that a person cannot be held criminally liable for failure to report a crime prepared or committed by his or her spouse or close relative, and in 2015 this Article did not even exist. It seems that some sort of social genetic memory dating back to Stalin's 1930s, when legislative innovations encouraged whistleblowing and denunciations, must have kicked in.

Fourth, the punishment stipulated by Art. 212.1 openly violates the principle of proportionality, which is one of the fundamental principles of criminal law. According to Art. 43, punishment is used to restore social justice as well as to correct convicted criminals and to prevent crimes in the future. Actions criminalized by Art. 212.1 of the Criminal Code do not infringe upon social justice. From the point of view of criminal law, being an accumulation of administrative offenses, such actions do not represent any social danger, and thus, they do not entail the task of correcting the convicted individual. The introduction of this Article to the Criminal Code was motivated solely by political expediency and the urge to fight dissent. As for punishment, just like in feudal times, it serves as intimidation to teach others not to dissent.

On February 10, 2017, the Constitutional Court of the Russian Federation delivered its decision on constitutionality of Art. 212.1. The Court ruled that the Article was constitutional in the interpretation given by the Constitutional Court. By the virtue of the 2016 amendments to the 1994 Federal Constitutional law "On the

[31] Criminal Code of the RSFSR of 1922, *supra* note 4, Art. 24.

Constitutional Court of the Russian Federation,""The constitutional legal meaning of provisions of Article 212.1 of the Criminal Code of the Russian Federation discovered in this Decision shall be binding for all representative, executive and judicial bodies of state power, bodies of local self-government, enterprises, institutions, organizations, officials, citizens and their associations."[32] The Court ruled that the federal legislature is eligible (but not obliged) to change Art. 212.1 "following the requirements of the Constitution of the Russian Federation and in accordance with the legal stances of the Constitutional Court outlined in this Decision."[33] On February 22, 2017, the Presidium of the Supreme Court of the Russian Federation repealed the Dadin's conviction on narrow grounds, and on February 26, Dadin was released from the penal colony. While Dadin's release is a certainly a very good development, Art. 212.1 remains in the Criminal Code of the Russian Federation and will be further applied by law-enforcers.

As with Art. 275 on espionage, the ambiguity of Art. 212.1 makes vitally important the issue of who will apply the law. The mentalities of judges, prosecutors, investigators and other actors in the process play critical roles in the real-world context of the courtrooms where life intersects with the law on a daily basis. Today, Russian legal system is operated by conventional law-enforcement bureaucrats whose minds bear the deformities of Soviet-style legal consciousness.

Beyond immediate questions of justice and constitutionality, these laws raise an even more worrisome question: why is the assumption of the infallibility of the state, most recently evident during Soviet times, so firmly entrenched in the minds of Russian legislators and government officials? The Soviet instincts of these individuals are still sharp, but their historical memory is short. It seems clear that they either do not remember or do not want to remember what an authoritarian regime often does to its most loyal vassals. Here is just one of the glorious pages of Russian history which might provide an appropriately bracing warning. In June 1937, a special military judicial panel of the USSR Supreme Court returned a guilty verdict in a case of an "anti-Soviet Trotskyite military organization" and sentenced to death several elite commanders of the Soviet Army, including Mikhail Tukhachevsky, Ieronim Uborevich, and Iona Yakir. The special military judicial panel consisted of nine members, of whom four were subsequently executed in 1938, one was tortured to death, and another one, according to some reports, shot himself in anticipation of his arrest. Solely on the basis of individual survival, these statistics should be harrowing for government officials: a criminal justice system unaware of its because history tends to repeat itself.

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[32] Постановление Конституционного Суда РФ от 10 февраля 2017 г. № 2-П [Decision of the Constitutional Court of the Russian Federation No. 2-P of February 10, 2017] (Feb. 20, 2017), available at https://rg.ru/2017/02/28/sud-dok.html.

[33] *Id.*

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COMMENTS

THE MILITARY USE OF CHILDREN BY THE SYRIAN-IRAQI SALAFI-JIHADIST GROUP

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Non-state armed groups are the main threats to states' national security in the 21st century, to defend against which, states require useful methods. Recently, use of children by these groups, especially in the Middle East, has turned into one of the most important discussable issues that need to be evaluated in the context of the law of armed conflict. This study aims to discuss legal regime of the military use of children in armed conflict. The main purpose of the study is to analyze the use of child soldiers by the Syrian-Iraqi Salafi-Jihadist Group in its combat operations. In this respect, initially, the legal definition of child soldiers and the role of them in armed conflicts will be discussed. Based on this, different forms of the child soldiers' involvement in armed conflicts and the international criminal responsibility for their war crimes will be examined as an applicable law in the context of international criminal law.

Keywords: non-state armed groups; the law of armed conflict; child soldiers; military use of children; war crimes.

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Introduction

The recruitment of children into armed groups or forces is an indication of negative developments of armed conflicts in different species across the world. As well as African countries where armed some conflicts have ended and a few are continuing, recruitment of children into armed groups is now escalating in other regions of the world, particularly in the Middle East. The "ethnic" or "ideological" factors are the main reasons of the emergence of many of these armed conflicts in the Middle East. As Edwards and Hinchcliffe argue, "conflicting ideologies, ethnic and religious differences, superpower rivalry and the development of state nationalism are all factors that have been cited to one degree or another in explanation of conflict in the region."[1] One of the most important examples of Ethnicity-based conflicts is the conflict between Kurdistan Workers' Party (PKK) and Turkish Armed Forces. In the late 1990s, the PKK recruited children from schools in Sweden to serve in PKK forces in southeast Turkey.[2] In other terms, these conflicts revolve around the ethnic Kurd minority in Turkey which sought independence from Turkey.

Furthermore, many of the newly emerged armed groups in the Middle East are fighting for the sake of their ideologies.The most important instance for ideological conflicts which have recently been triggered in the Middle East is the growing armed activities of the Syrian-Iraqi Salafi-Jihadist Group (hereafter Jihadist Group). The social and political conditions in the region have led to the emergence of the most extremist non-state armed group known as the Jihadist Group inside the borders of Iraq and Syria.[3] The group is an obvious example of extremist groups and one of the most powerful jihadist movements whose main objective is establishing an "Islamic caliphate". Studies and reports clearly show that the abductions and forced recruitments have been conducted by the Jihadist Group throughout Iraq ansd Syria. In line with their extremist ideologies and advancing movement, military leaders of the Jihadist Group are recruiting child soldiers and transforming them into militants. Actually, unproportional threats of the Jihadist Group are the main important consequences of the use of child soldiers in its combat operations. The issues of the prohibition of recruitment of children into armed groups and international criminal

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1 *Conflicts in the Middle East Since 1945* 5 (B. Milton-Edwards & P. Hinchcliffe, eds., London and New York: Routledge, 2008).

2 Tom Malinowski, *In Support of the "The Child Soldiers Accountability Act of 2007"; Hearing in the US House Judiciary Subcommittee*, Human Rights Watch (2008) (Feb. 20, 2017), available at https://www.hrw.org/news/2008/04/07/support-child-soldiers-accountability-act-2007-hearing-us-house-judiciary.

3 Vincent Durac, *The Role of Non-State Actors in Arab Countries after the Arab Uprisings*, IEMed Mediterranean Yearbook (2015), at 37–38 (Feb. 20, 2017), available at http://www.iemed.org/observatori/arees-danalisi/arxius-adjunts/anuari/med.2015/IEMed%20Yearbook%202015_NonStateActorsArabUprisings_VincentDurac.pdf.

responsibility for violations of the law of armed conflict by child soldiers are still among the highly argued subjects of international law.

Non-state armed groups threaten international peace and security partly because the use of force by these groups takes many different forms, including warlords, drug traffickers, youth gangs, terrorists, militias, insurgents and transnational terrorist organizations. Recruitment and use of children as soldiers is one of the most effective used tactics by these groups in order to achieve their objectives.[4] Around 70 percent of child soldiers worldwide are estimated to be found in the ranks of non-state armed groups.[5] In legal studies, several categories of child soldiers recruited by the Jihadist Group – such as abandoned children, children forced to enroll, and voluntary recruits – have frequently been discussed. However, in this study, we will evaluate the forced recruited children by the group.

The main idea of this study is to show that the non-state armed groups which force children to commit war crimes should be kept criminally responsible. Executing prisoners, beheading or setting them on fire, compilations of roadside bombs by a large number of child soldiers recruited by the Jihadist Group as a result of incitements or threats by the Jihadist Group's military leaders are serious violations of the law of armed conflict – which is mainly regulated by the Geneva Conventions of August 12, 1949. However, assigning criminal responsibility to those child soldiers of the Jihadist Group that were forcibly recruited and forced to commit such crimes is consistently violating the law of armed conflict. The protection of the rights of children affected by armed conflicts is one of the law of armed conflict's customary rules. As stated by Rule 135 of Customary International Humanitarian Law Study, "Children affected by armed conflict are entitled to special respect and protection."[6] As well, "State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts."[7]

Actually, the quest for a respond to the question whether the child soldiers committing war crimes as members of a murderous armed group of the Jihadist Group victims or perpetrator requires a legal assessment of the issue under the law of armed conflict. In this regard, first legal definition of child soldiers and their relations with armed groups or forces, and then the role of child soldiers in armed conflicts should be examined.

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4 Durac, *supra* note 3, at 38–39.

5 *See* Philippe Gazagne, *Engaging Armed Non-State Actors on the Issue of Child Recruitment and Use* in *Seen, but not Heard: Placing Children and Youth on the Security Governance Agenda* 248 (D. Nosworthy, ed., Zürich: LIT Publishing, 2009).

6 Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law. Vol. I: Rules* 479 (Cambridge: Cambridge University Press, 2005).

7 *Id.*

1. Armed Conflicts and Child Soldiers

1.1. The Legal Definition of Child Soldiers and Children's Role in Armed Conflicts

Generally, the term "child soldiers" is used in order to refer to any of boys and girls conscripted by armed groups or forces. They are commonly used in different positions such as cooks, porters, messengers, spies and also to do any orders of their commanders. Actually, the term "child soldiers" has been defined in many different ways. The most important of these definitions is noted by the Cape Town Principles that the UNICEF is using from 1997. According to the Cape Town Principles,"[A] 'Child soldier' in this document is any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members."[8]

However, as an internationally agreed legal definition of the child soldiers it can be referred to *the Principles and Guidelines on Children Associated with Armed Forces or Armed Groups* (Paris Principles), which has defined it as follows:

> A child associated with an armed force or armed group refers to any person below eighteen years of age who is, or who has been, recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, spies or for sexual purposes.[9]

In any case, using a child for military aims is a serious violation of human rights. Therefore, it is not important what the reasons for taking part of the children in training and combat operations of the armed groups are or how they are recruited by the armed groups. The important issue is that all of the child soldiers are generally victims because many of them are subject to inhuman treatments of military leaders of the armed groups. Most of them are forced to perpetrate serious violations of the law of armed conflict, who in the result of these actions suffer serious long-term and grave psychological impacts. The reintegration of these children into civilian life is a complex process. Therefore, evolving comprehensive and helpful policies on recovery and reintegration of child soldiers used by armed groups in their operations will be the most beneficial step in this process.

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[8] UNICEF, Cape Town Principles and Best Practices, Cape Town, South Africa, April 27–30, 1997 (Feb. 20, 2017), available at https://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf.

U.S. Department of State, The Child Soldiers Prevention Act of 2008, December 23, 2008 (Feb. 20, 2017), available at http://www.state.gov/j/tip/rls/tiprpt/2015/245236.htm?goMobile=0.

[9] The Paris Principles. Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (February 2007), at 7, para 2(1) (Feb. 20, 2017), available at http://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf.

As mentioned before, child soldiers play many different roles in armed conflicts. Generally, they participate in conflicts as spies, bomb carriers, sentries, and human shields. They "are also often used to lay and clear landmines. As they grow older and stronger, children who were recruited into armed groups may be 'promoted' from lower servant roles to active combat roles."[10] In fact, children are recruited into armed groups as small adults capable of performing very strict duties. Children's role in armed conflicts "was generally supportive to the war effort; for example, children assumed roles as charioteers, armor bearers for adult soldiers, buglers, aides or squires, and porters, drummers, cooks,"[11] sent to clear minefields, serve as cleaners or simply servants that have multiple tasks.[12] However, the roles of children recruited by non-state armed groups in armed conflict are very critical. A large number of legal scholars and human rights practitioners have commonly accepted that "children are 'recruited' by a non-state armed group committing mass atrocities and/or genocide largely because of the role they are expected to play in perpetrating atrocity".[13] Generally they "are subjected to extreme brutality, they are beaten, starved, drugged and in some cases as initiation they are forced to kill their relatives as a way of parting with their 'previous lives.'"[14] It should be noted that "small arms"[15] are the most important prerequisites of the child soldiers' serious and critical roles in armed conflicts. In other terms, there is a crucial link between small arms and use of child soldiers in armed conflicts. Actually, as children can be easily trained to handle these arms, states have generally preferred to use children as their combatants in wars. They are firstly used in simpler positions such as cooks or wood gatherers. After a while "these children [were] given guns to fight. Children are trained to use small arms properly in order to become effective combatants.

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[10] Mark Lorey, *Child Soldiers: Care & Protection of Children in Emergencies: A Field Guide* 3 (London: Save the Children Federation, 2001).

[11] Roméo Dallaire, *They Fight Like Soldiers, They Die Like Children* 105 (Toronto: Random House Publishing, 2010). *See also* Ilene Cohn and Guy S. Goodwin-Gill, *Child Soldiers: The Role of Children in Armed Conflict* 30–53 (Oxford: Oxford University Press, 1994).

[12] Darija Marković, *Child Soldiers: Victims or War Criminals?: Criminal Responsibility and Prosecution of Child Soldiers under International Criminal Law*, Regional Academy on the United Nations (2015), at 4 (Feb. 20, 2017), available at http://www.ra-un.org/uploads/4/7/5/4/47544571/child_soldiers_-_victims_or_war_criminals.pdf.

[13] Sonja C. Grover, *Child Soldier Victims of Genocidal Forcible Transfer: Exonerating Child Soldiers Charged with Grave Conflict-Related International Crimes* 50 (Berlin: Springer, 2012).

[14] Marković, *supra* note 12.

[15] According to definition of the Small Arms Working Group (SAWG), "Small arms are weapons that can be carried and used by one or two people, including handguns, assault rifles, machine guns, grenade launchers, anti-tank or anti-aircraft guns and light mortars. Light weapons, ammunition, grenades, landmines, and explosives are also part of this category." *See* Small Arms Working Group, Small Arms and Children (2003) (Feb. 20, 2017), available at http://fas.org/asmp/campaigns/smallarms/sawg/2003factsheets/small_arms_and_children.pdf.

Without small arms, children are generally less useful to armed groups".[16] However, regardless of children's age, gender, and their role differences in armed conflicts in which they have participated (either directly or indirectly), they are under threat in any case. Notwithstanding they are committing many different types of violations, they are the main victims of armed conflicts; this aspect needs to be speculated more in the next section.

1.2. Prohibition of the Use of Children in Armed Conflicts under the Law of Armed Conflict

According to Rule 136 of Customary International Humanitarian Law Study, "children must not be recruited into armed forces or armed groups."[17] Practically, this principle is applicable in both international and non-international armed conflicts. Likewise, the recruitment of children as soldiers has repeatedly been condemned by the United Nations Security Council.[18] In accordance with resolutions adopted by the 26th International Conferences of the Red Cross Red Crescent[19] in 1995, recruitment of children has been prohibited. The Conference also adopted the Declaration and Plan of Action for the years 2000–2003 in its 27th meeting, which requires all parties to an armed conflict to ensure that all measures, including penal measures, be taken to stop the recruitment of children into armed forces or armed groups.[20]

Besides all these prohibitions, recruitment of children as soldiers raises many other questions. The criminal responsibility of child soldiers for their war crimes as a result of a violation of the law of armed conflict is the most important of these questions, which needs to be evaluated.

Art. 1 of the United Nations Convention on the Rights of the Child[21] defines a child as follow:

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16 Rachel Stohl, *Targeting Children: Small Arms and Children in Conflict*, 9(1) Brown Journal of World Affairs 281, 287 (2002).

17 *See* Henckaerts & Doswald-Beck 2005, at 482.

18 *See* U.N. Security Council, Resolution 1314, U.N. Doc. S/RES/1314, August 11, 2000; U.N. Security Council, Resolution 1261, U.N. Doc. S/RES/1261, August 25, 1999; U.N. Security Council, Resolution 1296, U.N. Doc. S/RES/1296, April 19, 2000; U.N. Security Council, Resolution 1306, U.N. Doc. S/RES/1306, July 5, 2000 (Feb. 20, 2017), available at http://www.un.org/en/sc/documents/resolutions/.

19 26th International Conference of the International Red Cross and Red Crescent Movement, Resolution II (Geneva, December 3–7, 1995) (Feb. 20, 2017), available at https://www.icrc.org/eng/resources/documents/resolution/26-international-conference-resolution-2-1995.htm.

20 27th International Conference of the International Red Cross and Red Crescent Movement, Resolution I (Geneva, October 31 – November 6, 1999) (Feb. 20, 2017), available at https://www.icrc.org/eng/resources/documents/resolution/27-international-conference-resolution-1-1999.htm.

21 Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the General Assembly of the United Nations Resolution 44/25 of November 20, 1989, entry into force September 2, 1990, New York, 1577 UNTS 3, Art 2, at 3 (Feb. 20, 2017), available at https://treaties.un.org/doc/Publication/UNTS/Volume%201577/v1577.pdf.

> For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Accordingly, a child participant in combat operations of armed groups refers to any person below eighteen years of old who is recruited or used as a fighter, cook, porter or spy or for sexual purposes. In practice, other than the governments' armed forces, children are recruited largely by non-state armed groups such as rebel forces, guerrillas, revolutionaries, insurgents, terrorist groups, paramilitaries, global terrorist networks and ethnic or religious militants. As a non-state armed group, the Jihadist Group currently uses children as soldiers, executioners, suicide bombers, human shields, spies, messengers, and guards, with the increasing use of small arms facilitating their active participation in its combat operations. Regardless of their young age, the international criminal responsibility of these children is a significant issue worth more discussion.

Firstly, it should be noted that, regardless of what is the main reason of participation of children in training and combat operations of the armed groups, they are constant victims of armed conflicts because of being subject to their commanders' inhumane treatment. In other terms, "child soldiers as a part of armed groups which committing systematic atrocities and genocide are situated as victims of genocidal forcible transfer to such armed groups by committing these international crimes."[22] Undoubtedly, forcing the child soldiers, as the next generation of jihadists, to execute and behead prisoners by the Jihadist Group is a war crime.[23] In other words, all of the child soldiers of the Jihadist Group carry out war crimes by committing these acts of violence. Nonetheless, there is no international consensus on the minimum age of criminal responsibility between the states and it has not been addressed in international criminal law. Even, the statutes of the ad hoc tribunals do not include any provisions related to the minimum age of criminal responsibility. Although the Rome Statute of the International Criminal Court (ICC) reads in Art. 26 that "The court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of the offense", it is a jurisdictional provision and practically defers the issue to national law.[24]

Even, the law of armed conflict has not provided a minimum age of criminal responsibility for international crimes of child soldiers. Insofar as this fact, Protocol

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22 Grover 2012, at viii.

23 *See* Human Rights Council, *Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic*, Thirty-First Session, A/HRC/31/CRP.1, February 3, 2016, para. 103 (Feb. 20, 2017), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-31-CRP1_en.pdf.

24 Penal Reform International, *The Minimum Age of Criminal Responsibility*, 4 Justice for Children Briefing (2013), at 2 (Feb. 20, 2017), available at https://www.penalreform.org/wp-content/uploads/2013/05/justice-for-children-briefing-4-v6-web_0.pdf.

Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)[25] in its Art. 77 reads:

> 1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.
>
> 2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavor to give priority to those who are oldest.

From this point of view, it can be concluded that if it is accepted that children under fifteen are too young to fight, it should also be accepted that these children must also be considered too young to be held criminally responsible for their wrongful acts and serious violations of the law of armed conflict while participating in armed operations of the Jihadist Group. That is to say, if it is accepted that the age of criminal responsibility is fifteen, the armed groups will be more inclined to use children under fifteen in armed conflicts. Accordingly, in this situation, discussing the criminal responsibility of children as young as fifteen as fighters and kids as young as fourteen in support roles, targeted aggressively by the Jihadist Group recruitment and use in its operations, including suicide bombing missions, will be unfeasible. Actually, judicial norms and standards have been established in order to protect child soldiers as victims of armed conflicts and limit their participation in combat operations of armed groups such as the Jihadist Group.

Generally, it is accepted that prosecution of any person who committed war crimes, as long as any trial takes place with all the appropriate fair trial standards in place, is possible.[26] From this point of view, at first sight, it could be said that holding child soldiers – especially children under eighteen – responsible for their war crimes and prosecuting them is possible in the context of appropriate fair trial standards, but it should be noted that determining criminal responsibility of child soldiers is not a solution. On the other hand, investing more efforts by the governments and international organizations such as the United Nations on the extermination of

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[25] International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 UNTS 3 (Feb. 20, 2017), available at http://www.refworld.org/docid/3ae6b36b4.html.

[26] *Id.* at 209–210.

the "child soldiers" phenomenon could be the primary and most important step in this process. In other terms, the most significant issue is that governments have a responsibility to protect the lives and liberties of their citizens, especially their youth. Therefore, it is the governments' commitment to prevent joining of their youths to armed groups and to detain the participation of children in training and combat operations of these groups. In this regard, governments' authorities can initiate appropriate legal actions against their citizens who have joined to armed groups or have considered doing it.

According to Principle II of *the Principles of the Nuremberg Tribunal*, "The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law."[27] It could adventurously be said that the provision provided by this principle also includes child soldiers. However, the case of the Jihadist Group has very different features. There are robust evidence that a large number of child soldiers in the Jihadist Group were forcibly recruited and forced to commit war crimes such executing and beheading prisoners. Many of them are children of orphanages controlled by the Jihadist Group children abducted by the group. Generally, they are forced to commit war crimes under threat of death. In order to survive, parents of child soldiers recruited by the Jihadist Group allows access of the Jihadist Group militants to their children; also, because they have no other choice. Therefore, it cannot be said that these families support violations of this extremist group.

As Robert Young, ICRC's legal adviser, said: "coercion and duress may provide exceptions… and one can quickly imagine how this principle might mitigate the responsibility of a child soldier who was forcibly recruited and forced, under threat of harm, to commit war crimes."[28] In this context, there are many international conventions which have prohibited any forced recruitment of children under eighteen into the armed groups. For instance, according to Art. 2 of the Optional Protocol to the Convention on the Rights of the Child[29], "States Parties shall ensure that persons who have not attained the age of eighteen years are not compulsorily recruited into their armed forces." Alongside of the mentioned Protocol, the African Charter on the

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[27] International Committee of the Red Cross, Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal, 1950 (Feb. 20, 2017), available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/52d68d14de6160e0c12563da005fdb1b/3a0ef64882993569c125641e004ab014?OpenDocument.

[28] *See Should Child Soldiers be Prosecuted for Their Crimes?*, The Inside Story on Emergencies (2011) (Feb. 20, 2017), available at http://www.irinnews.org/analysis/2011/10/06/should-child-soldiers-be-prosecuted-their-crimes.

[29] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, UN Doc. A/RES/54/263 (Feb. 20, 2017), available at http://www.ohchr.org/Documents/ProfessionalInterest/crc-conflict.pdf.

Rights and Welfare of the Child[30] in its Art. 22(2) reads: "State Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child." Therefore, debate on the criminal responsibility of such soldiers is not sensible; however, according to the legal doctrine of "command responsibility," the commanders who controlled the child soldiers which have committed war crimes should be responsible for their violations and "children who were threatened would be able to argue that they acted under duress, either as a defense or in mitigation of punishment."[31]

According to the Rome Statute, "Conscripting or enlisting children under the age of fifteen years into armed forces or using them to participate actively in hostilities"[32] – both international and non-international armed conflicts – is a war crime. Criminalizing recruiting children under fifteen (whether this is forced or voluntary) into armed groups means that the prohibition applies both to governments' armed forces and non-state armed groups' or oppositions'. In accordance with this doctrine, commanders are criminally responsible for the actions of their subordinates, where they gave a command to commit violations of the law of armed conflict.[33] Therefore, in cases where "the commander was aware that their subordinates were committing war crimes or crimes against humanity (or were about to commit them) but failed to take reasonable and necessary action to stop them or to have them prosecuted, such a commander will also be responsible to be prosecuted for the action of the subordinates."[34] From this point of view, military commanders of the Jihadist Group must be held responsible for the serious violations of the law of armed conflict and cruelties committed by their subordinates, especially the child soldiers under their control.[35]

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30 The African Charter on the Rights and Welfare of the Child, adopted by the Twenty-Sixth Ordinary Session of the Assembly of Heads of State and Government of the OAU, Addis Ababa, July 1990 (Feb. 20, 2017), available at http://www.acerwc.org/download/african-charter-on-the-rights-and-welfare-of-the-child/?wpdmdl=9406.

31 *Child Soldiers: Criminals or Victims?*, Amnesty International (December 2002), at 2 (Feb. 20, 2017), available at https://www.amnesty.org/download/Documents/140000/ior500022000en.pdf.

32 Rome Statute of the International Criminal Court, Rome, July 17, 1998, U.N. Doc. A/CONF.183/9, 2187 UNTS I-38544, Art. 8(2)(b)(xxvi), at 90 (Feb. 20, 2017), available at https://treaties.un.org/doc/Publication/UNTS/Volume%202187/v2187.pdf.

33 Amnesty International, *supra* note 31, at 6.

34 *Id.*

35 For more details on the criminal responsibility of commanders and other superiors for war crimes committed by their subordinates, *see* Jamie A. Williamson, *Some Considerations on Command Responsibility and Criminal Liability*, 90(870) International Review of the Red Cross 303–317 (2008). *See also* Henckaerts & Doswald-Beck 2005, at 558.

2. The Legal Framework of the Use of Children in Combat Operations of the Syrian-Iraqi Salafi-Jihadist Group

2.1. The Status of the Syrian-Iraqi Salafi-Jihadist Group

The Jihadist Group's leaders call their extremist group a "state," however, it should be examined whether the conditions required for the formation of a sovereign state as the most important group in international law exist for this group.

There are some different views about the characteristics of the creation of a state. However, there is no certain definition of "state" in international law. Nonetheless, the essential requirements of statehood under international law, which has been commonly accepted by the international community, are provided by *Montevideo Convention on the Rights and Duties of States* (1933).[36] As stated by Art. 1 of the Convention, the state as a person of international law should possess "a permanent population"; "a defined territory"; "government"; and "capacity to enter into relations with other states." Alongside the conditions mentioned by the Montevideo Convention, there is also another view raised customarily by the international community, particularly by some legal scholars, is that the "independence" and "legitimacy" are also required conditions for the creation of a state. In this view, only states can have sovereignty over territory and become members of the United Nations and other international organizations.[37]

At first sight, it could probably be claimed that the Jihadist Group has a permanent population, because many of the Sunni tribes pledged allegiance with Abu Bakr al-Baghdadi, the leader of the Jihadist Group in western Iraq, Syria, Libya and Afghanistan, at the beginning of their movement. The group entered the armed conflicts in neighboring Syria under the leadership of Abu-Bakr al-Baghdadi. It became the Jihadist Group in Iraq and Syria in April of 2013. After having extended its control over a substantial area straddling Syria and Iraq, the Jihadist Group declared a global Islamic caliphate and renamed itself [the Syrian-Iraqi Salafi-Jihadist Group].[38] Conversely, the Jihadist Group does not have a defined territory. In other terms, although the Jihadist Group has controlled certain parts of the territory of Syria and Iraq, its control over these regions is not legal or legitimate, because its control over these regions has been achieved through the use of force and occupation. Additionally, it should be noted that the territory makes no sense for the Jihadist Group because its goal is to reign over the entire Muslim world. On the other side,

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[36] Convention on Rights and Duties of States, December 26, 1933, CLXV LNTS 3801-3824, at 19 (Feb. 20, 2017), available at https://treaties.un.org/doc/Publication/UNTS/LON/Volume%20165/v165.pdf.

[37] Robert Beckman & Dagmar Butte, *Introduction to International Law*, International Law Students Association (Feb. 20, 2017), available at https://www.ilsa.org/jessup/intlawintro.pdf. For more details *see*, James R. Crawford, *The Creation of States in International Law* 37–96 (Oxford: Oxford University Press, 2006).

[38] Durac, *supra* note 3, at 39.

although the Jihadist Group has a government, it is not an effective government because an effective government should adhere to its international obligations in order to enter into the international community. In the Jihadist Group case, it can definitely be said that it does not fulfill any international obligations.

As stated in the United Nations Security Council's resolutions 2161,[39] 2170,[40] 2178,[41] and 2199[42] concerning "Threats to International Peace and Security Caused by Terrorist Acts," occupation of territory in parts of Iraq and Syria by the Jihadist Group, and committing grave violations of the law of armed conflicts and human rights law, particularly fomenting sectarian tensions in the region have led to the displacement of millions of people.[43] The Council once again has reaffirmed independence, sovereignty, unity and territorial integrity of the Republic of Iraq and the Syrian Arab Republic, by emphasizing the purposes and principles of the Charter of the United Nations.[44] Additionally, Security Council's emphasis on sovereignty, unity and territorial integrity of the Republic of Iraq and the Syrian Arab Republic in the preamble of its resolution 2199 confirms the lack of an independent legal existence of the Jihadist Group.[45]

As a result, an extremist group such as the Jihadist Group, that does not have any effective government, will practically incapable of having relations with other states. Considering the existing situation of the Jihadist Group and its serious violations of the law of armed conflicts, it could be definitely said that the caliphate established by the Jihadist Group does not include the conditions required for the creation of a sovereign state. Actually, after committing the grave violations of human rights and the law of armed conflict, debate on the legitimacy of the Jihadist Group is beyond possible. In this situation, recognition of this group as an entity of international law by the international community will not happen under any circumstances.

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39 U.N. Security Council, Resolution 1261, adopted by the Security Council at ıts 4037th meeting, on August 25, 1999, U.N. Doc. S/RES/1261 (Feb. 20, 2017), available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CAC%20SRES%201261.pdf.

40 U.N. Security Council, Resolution 2170, adopted by the Security Council at its 7242nd meeting, on August 15, 2014, U.N. Doc. S/RES/2170 (Feb. 20, 2017), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2170(2014).

41 U.N. Security Council, Resolution 2178, adopted by the Security Council at its 7272nd meeting, on September 24, 2014, U.N. Doc. S/RES/2178 (Feb. 20, 2017), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2178%20(2014).

42 U.N. Security Council, Resolution 2199, adopted by the Security Council at its 7379th meeting, on February 12, 2015, U.N. Doc. S/RES/2199 (Feb. 20, 2017), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2199%20(2015).

43 U.N. Security Council, *supra* note 40, Preamble.

44 *Id.*

45 For more information *see* Christian Chinkin, *The Security Council and Statehood* in *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* 155–172 (C. Chinkin & F. Baetens, eds., Cambridge: Cambridge University Press, 2015).

Furthermore, it could not be claimed that the Jihadist Group is a terrorist group. In other terms, any of terrorist organizations have dozens or hundreds of members, attack civilians, do not hold territory, and cannot confront armed forces.[46] Conversely, as mentioned above, the Jihadist Group has territory and some 30,000 fighters and holds territory in Iraq and Syria. At this stage, it can be said that the Jihadist Group is only a non-state armed group that is involved in armed conflicts in order to achieve its political and ideological objectives, thereby lacking legal capacity to become a party to relevant international treaties. However, terrorist actions may be committed by the non-state armed groups and which it does not change these groups' status according to the law of armed conflict. In this respect, it should be noted that although the non-state armed groups are not signatories to the Geneva Conventions and their Additional Protocols which form the core of the law of armed conflict, the majority view among the legal scholars is that, "national jurisdiction is paramount and that [non-state armed groups] are bound by the rules of the states on whose territories they operate. To the extent that these states are High Contracting Parties to the Geneva Conventions and Additional Protocols, the activities of [non-state armed groups] operating within these sovereign territories are similarly regulated by the laws of war."[47] In this case, military actions of the Jihadist Group are taking place inside borders of Iraq and Syria, which are contracting parties to the Geneva Conventions. Therefore, the commitment of the states of Iraq and Syria to the law of armed conflict binds the Jihadist Group too.

Actually, the Jihadist Group is a group that presents a unique model that combines conquering territory and attempting to establish a state; and managing a civil government in the Middle East.[48] However, the Jihadist Group conducts the above-mentioned acts by committing terrorist actions, thereof violating international law and the law of armed conflict. However, some of the key international treaties such as Rome Statute impose obligations upon armed groups, requiring that they forgo the recruitment and use of child soldiers. Accordingly, these armed groups are bound by the law of armed conflict as embodied by the Statute. In short, "the international community imposes obligations upon armed groups without offering such groups any recognized rights or even token of legitimacy. At the same time, it is difficult to enforce international law against armed groups already regarded as illegitimate and criminal."[49]

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[46] Audrey K. Cronin, *ISIS is Not a Terrorist Group*, Foreign Affairs (March/April 2015) (Feb. 20, 2017), available at https://www.foreignaffairs.com/articles/middle-east/isis-not-terrorist-group.

[47] *Empowered Groups, Tested Laws, and Policy Options: The Challenges of Transnational and Non-State Armed Groups*, Program on Humanitarian Policy and Conflict Research Harvard University (Geneva: Graduate Institute of International Studies, 2007), at 32 (Feb. 20, 2017), available at http://www.hpcrresearch.org/sites/default/files/publications/Report_Empowered_Groups_Nov2007.pdf.

[48] Carmit Valensi, *Non-State Actors: A Theoretical Limitation in a Changing Middle East*, 7(1) Military and Strategic Affairs 72–73 (2015).

[49] David M. Rosen, *Child Soldiers in the Western Imagination: From Patriots to Victims* 139 (New Jersey: Rutgers University Press, 2015).

In accordance with Art. 8(2)(f) of the Rome Statute which has defined war crimes, "Paragraph 2(e) … applies to armed conflicts that take place in the territory of a state when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups." As stated in Art. 8(2)(e) of the Statute, all of the "intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; pillaging a town or place, even when taken by assault; committing rape, sexual slavery, enforced prostitution, forced pregnancy; and especially conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities"[50] are war crimes that the Jihadist Group is committing in many different regions of the Middle East such as Iraq, Syria, and Libya.

From this point of view, it can be said that the Jihadist Group by committing many different types of war crimes provided in Art. 8(2)(e) of the Rome Statute during its continuing conflicts is included within the scope of this Article as a non-state armed group.

2.2. Using Children in Combat Operations by the Syrian-Iraqi Salafi-Jihadist Group: A New Phase of Child Soldiers?

The child soldier is not a new phenomenon. However, by recruiting different age groups of children and training them in order to be used in combat operations, the Jihadist Group has created a new and different type of child soldiers' phenomenon. Actually, the extremist Jihadist Group aims to train a new generation of jihadists by recruiting children and using them for grave violence based on their ideological beliefs.

The Jihadist Group enlists children inside borders of Iraq and Syria in order to use them as child soldiers in its different combat operations. Actually, the group uses child soldiers for various purposes as follows: using children directly in combats operations; in combats operations as porters, spies, messengers, lookouts, suicide

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[50] The International Criminal Court has issued enlisting and conscripting child soldiers under the age of fifteen years and using them to participate actively in hostilities as war crimes, against members of armed groups in the Democratic Republic of the Congo (DRC) and Uganda. *See* The International Criminal Court, *Investigation in the Democratic Republic of the Congo or the Situation in the Democratic Republic of the Congo* (June 2004) (Feb. 20, 2017), available at https://www.icc-cpi.int/drc; The International Criminal Court, *Investigation in Uganda or the Situation in Uganda* (July 2004) (Feb. 20, 2017), available at https://www.icc-cpi.int/uganda.

bombers; and in combats operations as human shields and propaganda.[51] "In Iraq and Syria, the advances by [the Jihadist Group] and the proliferation of armed groups have made children even more vulnerable to recruitment. Children as young as twelve are undergoing military training and have been used as informants, to patrol, to man checkpoints and to guard strategic locations. In some cases, they have been used as suicide bombers and to carry out executions."[52]

According to the reports of the United Nations Human Rights Council (UNHRC), the Jihadist Group has established many types of training camps to recruit children into armed roles under the guise of education. The group recruited children from the age of fourteen or fifteen to undergo the same training as adults, offering them financial rewards. The child soldiers recruited by the Jihadist Group received weapons training and religious education. They also were deployed in active combat during military operations, including suicide-bombing missions. For instance, in Al-Raqqah, children are recruited and trained at the Jihadist Group's camps from the age of ten. Actually, by recruiting and using children younger than eighteen, the Jihadist Group has violated the law of armed conflict and human rights law. On the other side, by using children below the age of fifteen, it is committing a war crime.[53]

Currently "over five million children have been impacted by the Syrian conflict, finding themselves extremely vulnerable and susceptible to exploitation by all parties in Syria's conflict. They have been used as soldiers, human shields, messengers, spies, and guards, with the increasing use of 'small arms' facilitating their active participation in the war effort."[54]

The terrible violations committed by the Jihadist Group against abducted children and those recruited by force, including their injuring, killing, their use in combat operations, rape, and other forms of sexual violence, may be accepted as war crimes and crimes against humanity under the law of armed conflict and customary international law.

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51 *See* for more details, U.N. Security Council, Report of the Secretary-General on Children and Armed Conflict in the Syrian Arab Republic, January 27, 2014, S/2014/31 (Feb. 20, 2017), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2014/31.

52 UNICEF, *More Brutal and Intense Conflicts Leave Children Increasingly at Risk of Recruitment*, February 12, 2015 (Feb. 20, 2017), available at http://www.unicef.org/media/media_79775.html.

53 *See* U.N. General Assembly, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, August 13, 2014, U.N. Doc. A/HRC/27/60, para. 95 (Feb. 20, 2017), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A.HRC.27.60_Eng.pdf.

54 Katarina Montgomery, *ISIS Sets a "New Paradigm" for Child Soldiers: Ideology, Combat and Forced Marriage*, Syria Deeply (2014) (Feb. 20, 2017), available at https://www.newsdeeply.com/syria/articles/2014/11/27/isis-sets-a-new-paradigm-for-child-soldiers-ideology-combat-and-forced-marriage.

Conclusion

In the recent years, with the increasing number of non-state armed groups in the Middle East, armed conflicts have also augmented in the region. Recruitment of children as child soldiers by these groups, training and using them in armed conflicts, and forcing them into grave violations of the law of armed conflict and human rights law has upset the international community. Actually, the growing number of child soldiers in the region in last decade has been one of the critical issues that have led to many different controversies between legal scholars. The Jihadist Group, having conquered territory in Iraq, Syria, and Libya, can be considered a significant example of these groups. The main objective of the group, which has drawn the attention of the international community in the last years, is establishing the caliphate and political and theological Sovereignty over the world's Muslims. In this respect, the easiest and most effective methods to achieve its objective are the recruitment of children into the armed group, training them as a new generation of jihadists and more lethal fighters in a variety of roles than themselves. In addition, converting children to radical ideologies and indoctrinating them into extreme values is the most effective method that the Jihadist Group is carrying out as an ideal way to use them in their combats. All these acts are the most avowed forms of child abuse. The children (generally under the age of fifteen)who have been recruited and used in armed conflicts by the Jihadist Group are not capable of comprehending their actions – including serious violations of the law of armed conflict and any form of war crimes – during armed conflicts.

In any circumstances, children have been protected under the law of armed conflict. Insomuch that the use of children as soldiers in armed conflicts by states or non-state armed groups has commonly been condemned as an unacceptable act. There are different ranges of international provisions to protect children, especially from being recruited into and used in armed conflicts. For instance, the Geneva Conventions 1949 and their Additional Protocols 1977, which form the core of international law of armed conflict, regulates the conduct of armed conflict and seeks to limit its effects. According to these provisions, children who take a direct part in hostilities do not lose that special protection; while being aware that the children used in armed conflicts may commit very grave violations such as war crimes during the conflicts. On the other hand, criminal responsibility of children is also one of the most controversial issues in international criminal law, because there is no minimum age limit for criminal responsibility of child soldiers. However, the international community's focus with regard to child soldiers has tended to be on children forcibly recruited into armed groups. In the case of the Jihadist Group, abducted children or those coerced into armed conflicts commit many violations such as executing prisoners, beheading or setting them on fire, and compilations of roadside bombs. In other terms, the children recruited by the Jihadist Group are the first victims of this war. Therefore, debate on their criminal responsibility is almost

unreasonable. Additionally, international law protects children from individual criminal responsibility. As stated in Art. 26 of the Rome Statute, "The Court shall have no jurisdiction over any person who was under the age of eighteen at the time of the alleged commission of a crime." From this point of view, the forced recruited children of the Jihadist Group can not be tried; hence no criminal responsibility can be related to them. In addition, according to Rome Statute "a person shall not be criminally responsible if, at the time of that person's conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person."[55]

In the light of the points made above, it can be stated that a large number of the child soldiers of the Jihadist Group – generally under fifteen – commit the serious violations of the law of armed conflict and fundamental principles of human rights law under force and without consent.

As evaluated above, child soldiers are victims of their commanders' inhumane treatment. Therefore, attributing criminal responsibility to such soldiers is not sensible; and the commanders who controlled the children and have committed serious graves and violations should be responsible for their acts because a large number of these violations have been committed under threats and duress of commanders.[56] In other terms, the various violations of the law of armed conflict and human rights law by the child soldiers are the atrocious consequences of child recruitment and use of them in armed conflicts by armed groups. Actually, recruitment and use of children by these groups in armed conflicts are the grave violations against children during armed conflict.[57] Undoubtedly, all of the committed violations and any strong negative psychological impacts of these acts on children lead to individual criminal responsibility. However, it is important to note that the recruitment of children is already a crime that has been accepted by the Rome Statute in 1998. Accordingly, children forcibly recruited into and used in armed conflicts should be considered primarily as victims, not as criminals.

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[55] Rome Statute, *supra* note 32, Art. 31(d).

[56] This responsibility of non-state armed groups follows from the requirement in Art. 2 of the United Nations Convention on the Rights of the Child to "ensure" the relevant rights – so called positive obligations. According to para. 2 of Art. 2: "States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members." *See* Magne Frostad, *Child Soldiers: Recruitment, Use and Punishment*, 1.1 International Family Law, Policy and Practice 71–72 (2013).

[57] The other violations that have been considered as "grave violations against children during armed conflict," are "killing or maiming of children, sexual violence against children, attacks against schools or hospitals, abduction of children, and denial of humanitarian access." *See* Jonathan Kolieb, *The Six Grave Violations against Children during Armed Conflict: The Legal Foundation* 9 (New York: Office of the Special Representative of the Secretary-General for Children and Armed Conflict, 2013).

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THE REPUBLIC OF ABKHAZIA AS AN UNRECOGNIZED STATE

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The international legal right of peoples to self-determination is an integral part of the basis for the formation of an independent state. The most acute problems are with those regions that seceded from the Soviet Union in political and military conflicts and now seek recognition of sovereign status. Until the middle of XX century, such recognition was achieved following global military conflict, and then following the struggle against colonialism. In the past three decades, it has been associated mostly with the destruction of totalitarian regimes. This study is analysis the formation of the unrecognized state and historical, political and legal processes in a changing world political environment, and the implementation of the right of peoples to self-determination. The modern search for optimal forms of self-determination subject to the ideas of external and internal forms predetermines the scientific analysis of the historical political and legal formation of statehood in the territories for which the implementation of the right of peoples to self-determination is problematic. Here we examine the example of the Republic of Abkhazia. The methodological basis of research is the systemic approach that allows a holistic view of political and legal processes in the state. We also use comparative, structural-functional and historical approaches. The current status of the Republic of Abkhazia at its present stage of development is "denied," which affects its political and legal system, characterized by a mixture of traditional and modern state and legal institutions. The state and the law in Abkhazia largely depend on the geopolitical situation in the region and the world, as well as the political systems of its neighbors and strategic allies. Quite a large role in the formation of Abkhazian statehood and its legal system is played by the Russian Federation, which has influenced power structures of the Republic of Abkhazia so as to integrate them into a single economic, political and legal space. Conclusions: The state and the legal system of the Republic of Abkhazia are in a state of transition and

undergoing synchronization with the state and legal system of the Russian Federation in in order to establish a sovereign state. The status of an unrecognized state makes it impossible for the Republic of Abkhazia to fully participate in international processes and slows down the possible impact of international legal institutions on its state legal system.

Keywords: sovereignty; international institutions; the right of peoples to self-determination; historical, political and legal processes.

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Introduction

The problem of the legal status of a country in a state of military, national or religious conflict is now first and foremost a matter of international relations. Unrecognized states appeal to international organizations such as the UN to protect their interests in the international community and to defend their right to self-determination in accordance with international law (the UN Charter, the 1970 Declaration on Principles of International Law, General Assembly Resolution 2625 of the UN, the Helsinki Final Act of 1975, etc.) on sovereignty.

The change in the geopolitical map of the world following the velvet revolutions of 1989–1991 in Europe and the collapse of the USSR, along with its ideal of building communism, led to the development of political processes in the framework of formation of new subjects of international politics and law. This phenomenon entered in modern history as a parade of sovereignties in the former Soviet republics, which occurred without regard to the territorial and status implications of autonomous republics.[1] National and regional tensions, which had been building up for years within the structure of Soviet political and state system, gave rise to sectarian and ethnic conflicts (Nagorno-Karabakh, South Ossetia, Transnistria, and Abkhazia) in the post-Soviet space.

On the northern coast of the Black Sea such tensions resulted in the Georgian-Abkhazian war of 1992–1993, which ended in territorial loss for Georgia and the proclamation of independence of the Republic of Abkhazia, which was reflected in its Constitution on November 26, 1994, with the consolidation of a sovereign democratic and legal status of Abkhazian statehood.

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[1] *See* Larry J. Diamond, *Thinking about Hybrid Regimes*, 13(2) Journal of Democracy 21–35 (2002).

1. The Historical and Geopolitical Dimensions

1.1. The Historical Dimension

The question of the formation of Abkhazian statehood is a discourse for political and historical-legal research that is reflected in the monographic and dissertation works of many authors. The authors have formulated a vision of the development of the statehood of Abkhazia in the next chronological Abkhazian ethno-genesis covered from the ancient era to its becoming a part of the Russian empire in the XIX century; the revolutionary events of 1917 and the ensuing civil war of 1917–1922 allowed the Abkhaz people to announce the creation of its statehood outside the framework of other states; in 1921–1931 Abkhazia was developing in the status of a Soviet Socialist Republic within the Transcaucasian Socialist Federative Soviet Republic (TSFSR) and in 1922 in the framework of statehood of the USSR; in 1931 the Republic was included as an autonomous region within the Georgian SSR. In August 1991, the Georgian Republic declared its sovereignty and secession from the USSR, which was confirmed on December 21, 1991 in the Declaration on the dissolution of the union state. Consequently, during the XX century the Abkhaz people, in the framework of the Soviet state, both lost and gained independence to varying degrees. The ensuing ethnic and military conflicts of 1992–1993 between Georgia and Abkhazia after the collapse of the Soviet Union led to the announcement by the latter of its independence that became the basis for the international community to consider the Republic of Abkhazia as an unrecognized state.[2]

The August war of 2008 that ended with Russia's recognition of Abkhazia's statehood, and later in the recognition by other states (Nicaragua – September 5, 2008, Venezuela – September 10, 2009, Nauru – December 15, 2009, Vanuatu – May 23, 2011 (withdrawn on May 20, 2013), Tuvalu – September 18, 2011 (revoked on March 31, 2014)) of the independence of Abkhazia led to a radical change in the situation in the South Caucasus. The negative reaction from Western powers was immediate. The leaders of most countries, including Italy, France, Germany, Canada, Japan, USA and others made statements about violations by Russia of international law, the inadmissibility of the decision and appeals to the Russian Federation for its immediate opinion. Such a reaction is understandable as few competent experts doubted that the decision on the beginning of the war was made in Washington. Direct confirmation of this is given in the words of the former Ambassador of Georgia to Russia, E. Kitsmarishvili, who claimed that "President Bush personally gave the nod to the Georgian leadership to conduct military operations in Abkhazia and South

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[2] *See* Камкия Ф.Г. К вопросу об особенностях правовой системы Абхазии, 2 Вестник Российского университета дружбы народов. Серия: Юридические науки 197–205 (2014) [Fatima G. Kamkiya, *On the Question of the Characteristics of the Legal System of Abkhazia*, 2 Bulletin of Russian Peoples' Friendship University, Series of Legal Sciences 197–205 (2014)].

Ossetia."[3] In Georgia, there was growing discontent with President Saakashvili and many of his former supporters had moved to the political opposition. However, the firm position of Russia was a vivid demonstration of its ability to withstand the geo-strategic calculations of the United States regarding the use of mechanisms to weaken the influence of Russia in the Black Sea region. According to the American academic, D. Friedman, "the United States has not noticed how Russia has changed in recent years and made the mistake of continuing to look at it through the prism of the experience of the 1990s."[4]

In the end, when it became clear that the return of, through military force, territories Georgia had lost was impossible, the US and the EU had to adjust their policy towards the former Soviet autonomous regions. They began establishing new approaches to the settlement of the situation in the region. Taking into account the new realities after the events of August 2008, the Georgian government and undertook a strategy approved by its Western partners of "engagement without recognition." This strategy was based on the principles of establishing contacts with the peoples of the breakaway regions, providing the people of partially recognized republics with various kinds of humanitarian programs aimed at strengthening confidence-building measures between the parties and promoting the involvement. These include, for example, enabling medical services to be provided to the citizens of Abkhazia in Georgia. At the same time came the development of a mechanism of registration under a simplified scheme of neutral identity cards and travel documents to ensure receipt of a permit to travel to Western countries (the EU and the United States do not issue visas to residents of Abkhazia with Abkhaz Russian passports), as well as the use of existing Georgian social benefits for business and education. In the opinion of Georgian politicians, the initiative is aimed at implementing the mechanism, tested in international practice, for making isolated unrecognized republics independent. The US Secretary of State, Hillary Clinton, expressed the readiness of the US to accept these documents during her visit to Tbilisi in 2012. According to her statement, "the United States will contribute to the resolution of conflicts on the territory of our partner." This statement was met with great enthusiasm by the Georgian administration. Saakashvili called it "unimaginable diplomatic support."[5] However,

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[3] *See* Соловьев В., Двали Г. Посол ва-банк. Бывший глава посольства Грузии в РФ объявил войну Михаилу Саакашвили, Коммерсантъ, 27 ноября 2008 г. [Vladimir Solovyev & Georgy Dvali, *The Ambassador Broke. The Former Head of the Georgian Embassy in Russia has Declared War on Saakashvili*, Kommersant daily, November 27, 2008] (Oct. 9, 2016), available at http://www.kommersant.ru/doc/1081548.

[4] *See* Грушко А. О России, ЕС и НАТО, 7 Международная жизнь (2014) [Alexander Grushko, *On Russia, the EU, and NATO*, 7 International Life (2014)].

[5] *See* Грузинская «грин-кард»: США соблазняют нейтральными паспортами абхазов и осетин, Московские новости, 7 июня 2012 г. [*Georgian "Green Card": U.S. Tempts Abkhazians and Ossetians with Neutral Passports*, Moscow News, June 7, 2012] (Oct. 9, 2016), available at http://www.mn.ru/world ussr/20120607/319976783.html.

the Abkhazian public approached these initiatives with great skepticism, assuming the true purpose of such ideas to be to undermine their sovereignty and stability in the region.[6] There is no doubt that Georgia and the West, tried to remove pro-Russian Abkhazia from Russia's sphere of influence and also tried to find instruments with which to achieve a peaceful return of Abkhazia to Georgia. EU representative Peter Semneby, who oversaw the situation in the South Caucasus, indirectly confirmed this conclusion. Semneby noted that "only by engaging... may the EU provide an alternative perspective for Abkhazia and South Ossetia."[7]

These steps were dictated by the need for progress in Georgia's plan to join the North Atlantic Treaty Organization. This is due to the fact that, according to some political analysts, its defeat in August 2008 reduced the likelihood of Georgia's accession to NATO. Some analysts believe that, at present, there is no agreement among NATO members on the membership of Georgia, as the main condition for joining the alliance was solving the internal problems in the country. The separation of the two autonomous regions apparently resulted in a skeptical assessment of the possibilities of Tbilisi ever meeting the membership criteria or making a contribution to NATO activities. At the same time, it is very likely that Western countries gained an understanding of the consequences of Georgia's membership of the alliance in view of the possible consequences, namely, the possibility of Georgia drawing the alliance into a direct war with Russia. While the West is has not explicitly made clear that Georgia has no chance of joining the alliance, its real prospects are still very vague. Georgia still has not received the promised action plan for membership expected after the expanded NATO summit in Newport (Wales) in 2014. Moreover, according to NATO representatives, Georgia is preparing for membership of the organization but it is not known how or when this will happen.[8]

This analysis allows us to summarize the following. The conceptual framework, which determines the strategy of the U.S. and Western Europe, assumed the achievement of objectives of a different nature. The priorities were set as follows. The EU was to ensure stable energy supplies in view of the unfolding economic crisis. An important role was to be played by the creation of transport corridors which would bypass Russia in order to undermine the oil sector of the Russian economy. The main aim of the U.S., which declared the southern Caucasus an area of vital U.S. interests, was to withdraw Georgia from the Russian sphere of influence and thus provide America with almost absolute supremacy in the Black Sea area of the Caucasus.

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6 *See Testimony by the European Union Special Representative for the South Caucasus, Peter Semneby*, U.S. Helsinki Commission Hearing on "Mitigating Inter-Ethnic Conflicts in the OSCE Region," Washington, D.C., May 4, 2010.

7 *See id*.

8 *See* Уэльский саммит НАТО: все, что нам нужно знать [*The Wales NATO Summit: Everything That We Need to Know*], Sputnikipogrom – Information and News Resource (Oct. 9, 2016), available at https://sputnikipogrom.com/politics/21071/nato-summit/#.WLSBjO1SDDc.

It is obvious that the state structure of Abkhazia, as a former autonomous region of Georgia, and its territory, located in close proximity to the state border of the Russian Federation, could be profitably used in order to meet the ambitions of the US to expand NATO in the East. Dominance over the territory of the South Caucasus has allowed the West and the United States to take full advantage of geostrategic and resource potential not only for this region. Georgia was supposed to be used for the construction of transit pipelines for Caspian oil, the volume of which, according to some estimates, would only be slightly inferior to that of the world's largest exporter, Saudi Arabia. By recognizing Abkhazia and South Ossetia as independent states, and, hence, their *de jure* separation from Georgia, Russia not only greatly influenced the course of historical events on an international level (experts included the move among the top ten most important geopolitical realities of the first decade of the XXI century) but has also thrown a serious challenge to the West and the U.S. However, according to some Russian politicians, it was a necessary response to the "political speculators" convinced of Russia's intentions to annex Abkhazia with the aim of expanding its territory. The decision of the Russian leadership fully demonstrated the readiness of the Russian Federation to defend its interests and, of course, greatly increased its diplomatic and political weight in world politics.

1.2. The Geopolitical Dimension

It is important to understand the geopolitical positions of the various actors involved in this extremely complex and controversial area, i.e., in the Greater Caucasus. According to V. Tsymbursky, the Caucasus are a "Great Limitrophe" formed by the peripheries of all civilizations of the Old World. The multilevel system of the Caucasus macro-region literally mixed all the peoples living here with their religions and cultures. Therefore, in order to understand the dynamics of the relationship of the geopolitical actors in the macro-region it is important to look holistically at administrative-territorial, ethno-cultural, religious, legal, resource and other aspects. It is important to remember that the geo-ethno-political culture of the Greater Caucasus relatively homogenous. At the present stage of its geopolitical development, the Greater Caucasus consists of three clusters which are unequal but close to one another: first, the North Caucasus, which comprises the North Caucasus Federal District and part of the Southern Federal District of the Russian Federation; second, the states of the Caucasus, which gained independence after the collapse of the USSR – Azerbaijan, Armenia and Georgia; third, the newly formed states – Abkhazia, South Ossetia and Nagorno-Karabakh. R. Metreveli believes that the Caucasus does not exist, and that there is a Central Caucasus, which is adjacent to the real Southern Caucasus, uniting the Caucasian foothills of Iran and Turkey. However, in the post-Soviet space we are going to talk about the South Caucasus, referring to Georgia, Azerbaijan, Armenia, as well as a number of unrecognized states.

At the present time, two republics within the Caucasus present time are homogeneous (Armenia and Azerbaijan), while the others remain heterogeneous (Georgia

and most of the republics of the North Caucasus). Recent conflicts in the area have been between Armenians and Azeris (Nagorno-Karabakh), the Ossetians and the Ingush (Ingush-Ossetian conflict), Ossetians and Georgians (South Ossetia war), and Abkhazians and Georgians (Abkhaz conflict). The ethno-political balance in Dagestan, where Avars, Dargins, Kumyks, Lezgins, Nogais and other peoples reside, is supported on the basis of the fading traditions of the Soviet quota for the preservation of ethnic balance. Finally, it is important to emphasize that the Caucasus is home to a Russian (Christian) population, which is perceived in the region in highly contradictory ways.

Of particular importance is the fact that that the Muslims of the North Caucasus come from many titular ethnic groups. The integration of Muslim ethnic groups on religious grounds is difficult because of the theological differences between Sunnism and Shi'ism and because of the wide distribution of schools of Sufi tarikats and vindov fraternities that do not recognize Islamic universalism. The desire of radicals to exploit Islam for political purposes, of course leads to very negative consequences. The debate in the press on the subject suggests that this political stance may be, under certain conditions, demanded by conservative political circles and supported by the nationalist electorate.

Despite the multi-ethnicity of the Caucasus region, however, it is accepted to speak about its cultural identity and the existence of a special "Caucasian mentality" in the "Greater Caucasus." This statement is a matter for some geopolitical ambivalence. The concept of a United Caucasus legitimizes the strengthening of Russia's strategic interests on its southern borders, the preservation of the integrity of the territories of Russia, the security of the region, forging partnerships with all Caucasian actors, wide cooperation with them in combating terrorism and illegal migration, joint development of mineral resources, and control over transportation of the extracted natural resources. During the implementation of this concept, a deeper integration of the Caucasus in the framework of supranational bodies of the CIS, EurAsEC, and CSTO. In this form, the concept refers to the paradigm of post-modern Eurasia, reflects the continental mentality and offers a "modernization without Westernization." The foundations of this philosophical approach are presented in the works of New Eurasia theorist, A.G. Dugin. The Russian leadership sees the future of this region in a geopolitical structure that embraces the Eurasian "great space" as opposed to unipolar globalization. It was with this in mind that Russian President, Vladimir Putin, established the Eurasian Economic Union. However, Russia's significant competitors would see a United Caucasus as an opportunity for the region to build a military, political and economic presence and to continue its geopolitical expansion. R. Metreveli sees such a holistic Caucasus being opposed to Russia and, as a civilization and a political region, oriented to the West. In his opinion, this means first and foremost strengthening the position of NATO in Azerbaijan and Georgia, and Armenia.

The nature of the various geopolitical positions of all the subjects of the Greater Caucasus. This occurred first in connection with the unbundling of the subjects of the

political process and secondly in connection with enlargement, as expressed in the creation of unions, alliances and blocs. Adjusted geopolitical relations are manifested on four levels: international, macro-regional, state (national) and micro-regional. The study of this factor allows us to solve the problem of the essence and implementation of mechanisms in this region of geopolitical interests of all global players. Vladimir Putin identified the recognition of the semi-recognized and unrecognized states in the CIS area as an important Russian foreign policy objective.

The essence of the value of the political process in the geopolitical context is the deterministic way human action affects the political sphere in strictly defined natural geographical, socio-political and cultural-religious terms. Types and forms of political behavior in the macro-regions represent the concretization of civilizational determination, in certain circumstances, of appropriate values, behavior and mentality. The role of the civilization factor is specified in the geopolitical determinants of political behavior of ethnic and social communities in Russia. The transformation of the models of political behavior in any society is due to its civilizational specificity, and relative independence developed on the basis of national interests. Under the influence of immanent factors specific to each civilization, each ethnic group has formed a unique mentality, national character and political culture.

The geopolitical processes in Armenia, Georgia and Azerbaijan in the post-Soviet period had the traits of immanence: a permanent rise in conflicts; the gradual involvement in cross-border international relationships; and institutionalizations of the participation of foreign actors. In the 1990s, ethno-nationalism as the main principle of the nation-state gave rise to a number of problems that threaten the security of the states. Ethnic conflicts and separatist movements, ending in most cases by the formation of new states, have restricted the development of the statehood of Georgia and Azerbaijan. The territorial problems of these countries are compounded by political conflicts. Since independence, the countries of the South Caucasus have constantly striven to bridge the gap between modernism and traditionalism in the political field, and to resolve the inconsistency arising from the presence of formal democratic procedures and informal authoritarian practices. Due to the peripheral policy, the interest of the countries of the center in the orientation of political processes in the South Caucasus results in a greater level of adaptability in their political systems. Political decisions are usually made by a narrow circle of political leaders. In the regions of the Caucasus, geopolitical views of the government and opposition have certain but not fundamental differences, and they, to a certain extent, affect not only foreign policy but also the domestic political process.

Geopolitical factors are ongoing because of the current of period of geo-ethno-political of identification which seriously affect all political processes. In the conditions of systemic crisis after the collapse of the Soviet Union the impact of geopolitical factors increased dramatically from both outside and inside the country. The geopolitical disintegration of the USSR was the catalyst for the struggle

for geopolitical programs of the national authorities who had spoken earlier in opposition towards the federal center. Inside the breakaway republics there was a new schism in connection with the changed geopolitical orientation. In the former Soviet republics of the Caucasus, after the withdrawal from the USSR and formation of independent states there was a relative unity of government and opposition on the main areas of geo-strategy, while differences were maintained on tactical issues. In Azerbaijan, the authoritarian regime and the weak political opposition are in favor of the return of Nagorno-Karabakh, union with Turkey and a limited partnership with Russia. In Armenia, the democratic regime is based on a geopolitical unity of the government and opposition on maintaining the status quo of the Nagorno-Karabakh confrontation with Azerbaijan and a strong alliance with Russia. Georgia achieved geopolitical unity against Russia for the purposes of reviving its former Soviet borders under "power-opposition" conditions.[9]

In the newly formed small states of the Caucasus, the implementation of the right of nations to secession and the formation of an independent state have not been the subject of political controversy between the government and the opposition. The oppositions within these states began to take shape, in general, as stable allies of the regimes in the process of implementation of the overall geopolitical strategy. In Abkhazia, almost all political actors are for cooperation with Russia while maintaining independence and opposition to the aggression of Georgia. In South Ossetia, all political actors oppose returning to Georgia and want to join the Russian Federation and participate in the political struggle for power in general.

When it comes to its geo-ethno-political plan, the Caucasian macro-region is divided not only into North and South Caucasus but also contains the Christian Eurasian segment (Krasnodar and the Stavropol Region, North and South Ossetia, Georgia and Armenia) and the Islamic East (the North Caucasus republics and Azerbaijan). The government and the opposition Islamic republics of the North Caucasus direct their mainly geo-ethno-political potential in support of Putin's political regime. The Greater South-Caucasian regions of Georgia, Armenia and Azerbaijan have formed the different approaches to the problem of geopolitical orientation and definitions of political tactics in the breakaway autonomous regions – the newly formed states of Abkhazia, South Ossetia and Nagorno-Karabakh. The geopolitical split of Georgia and geo-Americanism of its government and the opposition led it outside the Russian Eurasian civilization. During the 2008 war, the Georgian opposition expressed its willingness to refrain from criticizing Saakashvili in order not to weaken or further to exacerbate the condition of Georgia, but a few months after the war, the opposition blamed the president for making arbitrary decisions about war and peace.

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[9] *See* Thomas de Waal, *Georgia's Choices: Charting a Future in Uncertain Times*, Carnegie Endowment for International Peace (2011) (Oct. 9, 2016), available at http://carnegieendowment.org/files/georgias_choices.pdf.

The new elites of the South Caucasus states have almost unanimously agreed on the geopolitical self-determination and the choice of Russia as a strategic ally for the long period of development. In Abkhazia and South Ossetia, there is a relative unity of government and opposition on the question of the need to preserve their sovereignty and independence and to oppose Georgia, which is calling for the return of those states to its jurisdiction. Confrontations between the ruling and opposition structures are about the redistribution of power through democratic development of the country. The only difference in positions is that the Abkhaz opposition would like to maintain a distance from Russia in culture, language, etc., and the South Ossetian opposition would prefer stronger ties with Russia under certain conditions. The type of political process in Abkhazia and South Ossetia corresponds to the political relations of constituent entities of the North Caucasus, especially in North Ossetia. This situation is determined by the total geo-ethno-political culture of these peoples.

The resolution of ethno-political Karabakh, Abkhazian and South Ossetian conflicts in the Caucasus depends on the outcome of the geopolitical confrontation between the strategic partners, Russia and the U.S., as well as on tactical decisions: to establish cooperation between the warring parties before or after the decision on a conflict. The leadership of Azerbaijan and Georgia rejects any cooperation with political adversaries to resolve conflicts. The opposition in Georgia and Azerbaijan did not reject cooperation, adopting more moderate positions. For Azerbaijan, the solution to the Karabakh problem is based on the restoration of the prewar status quo in accordance with the Azerbaijani model, the essence of which is the establishment of Azerbaijan's jurisdiction over Karabakh. Armenia's ruling regime is proposing innovative approaches and creative solutions and to pave new paths, which will contribute to the solution of the Nagorno-Karabakh conflict, while maintaining the postwar status quo. The democratic opposition in Armenia suggests developing economic cooperation between the parties involved in the conflict to change the situation and create more favorable conditions for its future resolution, but the on the basis of recognition of Azerbaijan's territorial integrity.[10]

Political processes in the Caucasus society are directly linked to its objective geopolitical position and the aims of geopolitical development on the part of the leaders of the major ethnic groups in the region. Geopolitical ethno-politics occurs not only in the Caucasus but in the entire post-Soviet space. A vivid example, which is not considered in this article is the geo-ethno-political situation in Ukraine.

A geopolitical understanding of the processes is required to ensure the security of the region, the establishment of the equal partnership of all Caucasian subjects, a wide cooperation in the fight against terrorism and illegal migration, joint development of mineral resources, and control over transportation of extracted natural resources. During the implementation of this concept, it is possible a deeper integration of the

[10] *See* Jozef Batora et al., *Newly Generated Small States:* Taking Stock, European Forum Alpbach (Oct. 9, 2016), available at https://www.alpbach.org/de/session/newly-generated-small-states-taking-a-stock/.

Caucasus will take place in the framework of supranational bodies of the CIS, EurAsEC, CSTO. In this form, the concept refers to the paradigm of post-modern Eurasia, reflects the continental mentality and offers "modernization without Westernization."

Developed after "the five-day war" of August 2008, the new situation in the South Caucasus has created new potential opportunities and prospects, but also produced new threats and challenges to regional security. It may be noted that, in the medium-term geopolitical perspective, Russia has greatly strengthened its position and presence in the South Caucasus, justified by the results of the confrontation with Georgia and recognition of Abkhazia and South Ossetia and the deployment of Russian military bases in the former Georgian autonomous regions. But, in the long term, this has led to the deterioration of relations with the West, to the development of the sanctions regime and new, serious problems in the implementation of Russian policy in the South Caucasus.[11]

The EU's position appeared consistent during the August crisis and today Europe is trying to find its niche in regional politics and is looking for new ways of institutionalizing its presence in the South Caucasus. Placing European observers in the buffer zones around the borders of South Ossetia and Abkhazia has been the first serious independent initiative of the European Union by projecting its political potential in peacekeeping operations outside its borders and without the direct support of the NATO structures or the U.S. Moreover, a number of key members of Western European NATO are strongly opposed to Georgia's accelerated membership in this organization.

The U.S. has traditionally adhered to the doctrine of "limited understanding of the recognition of new states" ("the Tobar doctrine of international recognition"). The Tobar doctrine as international custom is widely used in the international practice of states' recognition of states and governments. It establishes that a state may be recognized as a subject of international law if it recognizes another subject of international law. Its counterweight in international law is the Mexican "Pop Doctrine," which states that if a new government comes to power "through unconstitutional means" but is recognized by the people, it needs no special act of recognition by foreign states. That doctrine was directed against U.S. interference in the internal affairs of other states struggling for independence and was supported widely by Soviet foreign policy.[12]

Currently, in international law there are several theories of recognition, the most popular of which is constitutive and declarative, reflecting the two forms of conduct

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[11] *See* Коппитерс Б. Оттенки серого. Намерения, мотивы и моральная ответственность в грузино-абхазском конфликте [Bruno Coppieters, *The Shades of Gray. Intentions, Motives and Moral Responsibility in the Georgian-Abkhaz Conflict*] (Oct. 9, 2016), available at http://poli.vub.ac.be/publi/Georgians/russian/pdf/08_Coppieters.pdf.

[12] *See Statehood and Security: Georgia after the "Rose Revolution"* (B. Coppieters & R. Legvold, eds., London: MIT Press, 2005).

of states in the international arena regarding recognition of international actors. According to supporters of the constitutive theory, recognition of law-making has value when it creates new subjects of international law. Without recognition by the group of leading states, a new state cannot be considered a subject of international law. From the point of view of the representatives of the declarative theory, the recognition only confirms the legitimacy of any particular international legal actions and events, i.e., recognition is declaratory in nature and aims to establish stable international relations. The main problem is that the institution of recognition is not codified in international law, creating precedents of paradoxical transformations. On the one hand, large areas with millions of indigenous people claiming their sovereign rights are seen as separatists and, on the other, Western countries easily recognize a small compact area that is not actually state as a subject of international law (e.g., Kosovo).

Western theories often are declarative and one-sided, being based on the "benefit" of nations fighting for sovereignty.

2. The Statehood of the Republic of Abkhazia: Problems of Formation

After the events of "five-day war" in 2008 and the activation of the foreign policy of the Russian Federation, the problem of independence of the Republic of Abkhazia requires a new approach to address the problem of unrecognized states.[13] The Republic of Abkhazia had considered the support of the political leadership of the Russian Federation, as a position of non-interference in the affairs of sovereign states and the influence of Russia on its political reforms was reflected in the Constitution of Abkhazia of 1994.[14]

2.1. Russia's Influence on Attempts to Register Abkhazian Statehood

When, on August 26, 2008, President Medvedev signed a decree on recognition of the independence of South Ossetia and Abkhazia, it seemed that this was an exception – a response to the West's recognition of Kosovo's independence without the consent of Russia.[15] The last two years have shown that Moscow is ready to continue

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[13] *See* Mikhail Barabanov, *The August War between Russia and Georgia*, 3(13) Moscow Defense Brief (2008). *See also* Richard Giragosian, *Georgia Planning Flaws Led to Campaign Failure*, Jane's Defense Weekly, August 15, 2008 (Oct. 9, 2016), available at http://www.armenian.ch/fileadmin/user_upload/saa/Docs/2008/20080815-JDW-Georgie-Ossetie.pdf.

[14] *See* Peter Semneby, *The EU, Russia and the South Caucasus – Building Confidence*, 1 Russia in Global Affairs (2012) (Dec. 13, 2016), available at http://eng.globalaffairs.ru/number/The-EU-Russia-and-the-South-Caucasus--Building-Confidence-15507.

[15] *See* Jan Cienski, *Tbilisi Admits Misjudging Russia*, Financial Times, August 21, 2008 (Oct. 9, 2016), available at https://www.ft.com.

to use the theme of self-determination: the annexation of Crimea, support for the self-proclaimed Lugansk and Donetsk national republics, and the intensification of formal contacts with Transnistria and Georgia. Recent activity has concerned states outside the former Soviet Union. On September 20, 2016, Moscow hosted the international conference "Dialogue of Nations. The Right of Peoples to Self-Determination and Building a Multipolar World," which was attended by representatives of separatist movements from the countries of Western Europe and America.

Moscow is trying to demonstrate that it can be the alternative to the West as a center of gravity, offering fighters for self-determination what is necessary – political, financial or military support, and promoting their interests in the regions. However, the experience of the first two, South Ossetia and Abkhazia, indicates that a long-term partnership to build will turn bad.

Russia initially provided the two republics with what they needed: security, financial and political support, taking advantage of the opportunity to establish its military presence in the region in response to the strengthening of NATO's cooperation with Georgia. Today, while remaining grateful to Russia, the residents of the two republics are increasingly critical of Moscow's policy, which relies on the loyalty of the elites and often ignores the needs of the population.[16]

In Sukhumi on October 21, 2016, the block of opposition forces of Abkhazia gathered several thousand people and called on President Raul Khajimba to resign, accusing him of increasing dependence on Russia, "the Republic of Abkhazia is losing its sovereignty."

Abkhazia and South Ossetia fully supported the policy of Russia at the moment of recognition. In their view, the West had taken Georgia, and Russia was the only one which could protect and guarantee socio-economic stability. Russia then really took over the functions of political representation, safety (by locating military bases and border guards in the republics) and financing (the level of budgetary support for the republics is higher than for the neighboring North Caucasus regions: more than 90% for South Ossetia and 70% for Abkhazia). The conduct of foreign policy and their own power structures is fundamentally different from the republics of the Russian regions. However, many officials in Moscow have begun to perceive them as additional regions of the Russian Federation.

2.2. The Intention to Achieve the Status of a Sovereign State

In August of 2008, when Russia recognized the independence of two breakaway republics, their leaders were people whose relations with Moscow had not been easy. Politicians Eduard Kokoity and Sergey Bagapsh could not be called anti-Russian

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[16] *See* Коппитерс Б. Этнофедерализм и политика в области строительства гражданского государства. Идея общего государства в грузино-абхазском конфликте [Bruno Coppieters, *Ethno-Federalism and Policy of Building a Civil State. The Idea of a Common State in the Georgian-Abkhaz Conflict*] (Dec. 13, 2016), available at http://poli.vub.ac.be/publi/orderbooks/federal_r/14coppieters.pdf.pdf.

politicians – good relations with Russia were the guarantee of the survival of the republics in conflict with Georgia. But Kokoity's statements and actions often irritated Moscow, and Bagapsh was elected in 2004 against the will of Russia, which then supported the candidacy of the current President Raul Khajimba. The situation did not become easier with the coming to power of Alexander Ankvab, who again came to power in spite of the support of the Kremlin. Ankvab reportedly refused to sign a new cooperation agreement with Russia in 2014 which would have qualitatively strengthened the dependence of the republic on Russia.

The current presidents of South Ossetia and Abkhazia came to power with the support of Moscow. Now you can talk about an elite not just loyal to the Kremlin, but largely integrated into the Russian power vertical, serving Moscow more than their own people. Although in Abkhazia and South Ossetia the degree of such dependence varies greatly, the formula of "loyalty in exchange for funding" works everywhere.

Moscow's approach to the disputed territories in these two republics resulted in the mass protests that preceded the election of the present leaders. Moscow's chief aim, apparently, was not determining the policy of the street, but the absolute loyalty to the Kremlin.

During the political crisis of May – June of 2014 in Abkhazia, the Moscow high-ranking representatives Vladislav Surkov and Rashid Nurgaliyev did not prevent the opposition protests or the ousting of president Ankvab, since candidates for the office of president had agreed to sign a new treaty with Russia which "would allow Moscow to consolidate its allies and to strengthen its position and influence in the new geopolitical situation after the annexation of Crimea." However, last autumn the text of the agreement on cooperation and strategic partnership caused outrage in Abkhazia and was perceived as a threat to its sovereignty, primarily due to it significantly increasing Russian control of local power structures, and aiming to harmonize external policies. The treaty implied that socio-economic support would be provided to the republic, and the final version took into account many comments from the Abkhaz side, but its implementation was no less problematic. The conclusion of interdepartmental agreements between the law enforcement agencies of Russia and Abkhazia stalled: the parliamentary opposition was against agreements that had restricted sovereignty in that area. The money promised by Moscow for socio-economic development was not received. Furthermore, the authorities consistently fail to pay salaries. The republic had gained the support of Russia but had now become hostage to the policy of Moscow. Responding to criticism of the opposition, Khajimba said, "In Russia and around it today is a complicated situation because of the known circumstances. And it can't affect our position."

An agreement between Russia and Abkhazia about a united group of troops was signed on November 21, 2015 in Moscow. As noted in the explanatory note to the document, the grouping was intended to respond to an armed attack and other threats to military security in respect of any of the parties.

The composition of the group included a joint Russian military base stationed on the territory of Abkhazia, two mechanized battalions, artillery and aviation groups and a special forces detachment. In the event of a threat of aggression in wartime, the group is subordinate to the commander of the Ministry of Defense of Russia. The decision to deploy the troops was adopted by the military departments of the two countries.

In January 2015, the State Duma ratified the agreement between Russia and Abkhazia on alliance and strategic partnership. The document provides for joint actions for the protection of the Georgian-Abkhaz border and maritime areas subject to the sovereignty of the Republic of Abkhazia.

U.S. Department of State spokesperson John Kirby stated that, "The United States strongly opposed Russia's ratification of the agreement with the *de facto* leaders of the breakaway Georgian region of Abkhazia on the joint group of troops. We do not recognize the legitimacy of this so-called treaty, which does not constitute a contractually binding international agreement."

According to him, "the U.S. position on Abkhazia and South Ossetia remains clear: these regions are integral parts of Georgia and the United States continues to support Georgia's independence, sovereignty and territorial integrity... Russia should fulfill all its obligations under the agreement on a cease-fire of 2008." He urged Moscow to return its troops to the positions they had occupied before the conflict, "to reverse its recognition of the Georgian regions of South Ossetia and Abkhazia as independent states," and to ensure that residents in these regions have access to humanitarian assistance.

On November 16, 2016, at a plenary meeting, the Federation Council ratified the agreement on a unified group of troops of Russia and Abkhazia. A document defining the purpose, formation, deployment and use of the joint group of forces of the Armed Forces (AF) of Russia and Abkhazia was signed in Moscow on November 21, 2015. The Russian part of the group is made up of the Russian military base stationed in Abkhazia, and the Abkhaz part of the group is made up of two separate motorized rifle battalions, one artillery and aviation group, as well as a separate special forces detachment.

The group is designed to "adequately respond to an armed attack (aggression), as well as other threats to the military security in respect of any of the parties," read the accompanying documents. It is assumed that the organization and conduct of joint activities will be carried out on the basis of the joint directive of the headquarters of the armed forces of both countries. Interaction between the military units in peacetime involves members of the joint group meeting in an operational group consisting of representatives of the parties. The chair of this group should be the commander of the Russian military base.

The agreement was concluded until November 24, 2024 for the period of validity of the agreement between the Russian Federation and the Republic of Abkhazia

on alliance and strategic partnership, with the possibility of automatic renewal. The agreement is explicitly not directed against third countries. On November 22, 2016, the law on ratification of the agreement was signed by the President of the Russian Federation.

Thus, that the political factor is the dominant factor in the development of the legal system of the country is most clearly evident in constitutional reform. This trend is generally characteristic of states in the process of formation of national political and legal institutions.

3. The Legal System of the Republic of Abkhazia and Its Features

The Constitution of the Republic of Abkhazia of 1994 established a democratic model of organization of state relations based on the principle of separation of powers in the classical sense. Many academics have noted[17] that proclaiming the achievement of key political and legal purposes in the process of building a democratic state where the rights and freedoms of man and their guarantees determine the activity of the state, and the existence of a constitutional and legal ideology. The social development of Abkhazia is traditionally prone to conflict because of, as has been noted earlier, the specific aspects of its political and ethnic development. Therefore, academic and political circles of Abkhazia increasingly address the issue of the need to strengthen the political capacity of the parliament, the independence of the judiciary, the municipal authorities, to improve the power vertical and to strengthen civil society institutions.

The Republic of Abkhazia, while it has the status of an "unrecognized state" and constantly correlates its activities with the political, economic and media influence, and is forced to maneuver between different political forces wishing to establish geopolitical dominance in the region. The only appropriate way to resist these processes is the formation of the ideology of constitutional patriotism, which involves the creation of models of law in its most perfect form, able to withstand the presence of destructive tendencies. Thus, you need to understand that the greater the threat to the stability in the Republic of Abkhazia, the greater should be the motivation to confront threats and challenges to security and stability through developed constitutional and legal norms and institutions, dating back to the recognized international standards.

3.1. The "Constitutional Patriotism" Model

In the development of statehood of peoples with a complex historical past forced to respond to the challenges and threats of the world, the status of sovereignty

[17] *See* Барциц И.Н. Государственное (конституционное) право Республики Абхазия [Igor N. Bartsits, *State (Constitutional) Law of the Republic of Abkhazia*] (Moscow: RACS, 2009).

becomes a fundamental idea that includes traditional and contemporary ideas about national and state rights.

The Republic of Abkhazia is going down the path of integration of people into a single state (it has done this *de facto* and aims at international recognition in order for the same to become *de jure*). The constitutionalism of the Abkhazian state is an expression of patriotism when the constitution is interpreted as the guarantor of peace, prosperity and justice through protection of the values of democracy and civil rights. "Constitutional patriotism" gives meaning to the rule of law, but often each nation-state tries to find its own approaches to social and political life. However, the Abkhazian state has some serious problems in developing as a result of the opposition of traditional and innovative variants of development of a society that has used a variety of political forces and selfish means to legitimize their presence in power.

The lack of significant progress in public life and in the lives of most ordinary citizens in the Republic of Abkhazia is often due not only to the political and economic situation in the country and the state of its natural resources, but also to gaps and imperfections in certain provisions of the Constitution of Abkhazia. The main problem is not that constitutional mechanism is imperfect, but the fact that the political elite of the "new states" of the post-Soviet world use their constitutions not in the literal interpretation of their individual provisions but apply them in their own interests according to the principle of political expediency.

Even before 2008, there were ideas in the Republic of Abkhazia on the need for amendments to the Basic Law, especially the constitutional court. In 2005 the Commission on Constitutional Reform established a republican constitutional court. In particular, there were marked individual professional requirements for candidates for positions of judges and their competence. Among the majority of the citizens of the republic and in the environment of professional lawyers, the dominant idea was that the establishment of a constitutional court would radically change the situation since it would be easier to monitor the implementation of constitutional norms (if the constitution fails, it is an imperfect constitution and should therefore be changed).

The Constitution of Abkhazia is a modern legal instrument that provides opportunities for progressive development in the process of formation of democratic rights and freedoms, and their substantial protection. For example, Art. 11 of the Constitution (on the recognition and guaranteeing of the rights and freedoms of the person) implies openness to modern standards in the field of human rights.

It seems increasingly likely that improvement in the social, political and economic system of the state is possible without major constitutional reform, limited only by the adoption of laws and regulations aimed at the implementation of the constitution. These measures can lead to a positive impact on governance and the perception of the legal system in society.

Naturally, the main problem of the legal system of the Republic of Abkhazia, as in the whole post-Soviet space, is to ensure the effectiveness of the Basic Law. When it comes

to current democratic states, there is a clear system of measures that does not allow the change of the constitution in favor of political interests (state-controlled society, the separation of powers with a clear mechanism of checks and balances, independent courts, etc.). In order to avoid enshrining partisan interests in law, many scholars and lawyers have proposed that constitutional changes should enter into force at least five years after their adoption. This provision may limit non-legal factors of influence on the constitutional process and the adoption of amendments without reference to current political conditions. Thus, the modification will only become possible if the amendments to the constitution are indeed socially significant in character.

At the present stage of its development, the Republic of Abkhazia is faced with many challenges that hinder full implementation of the constitution such as corruption, a low level of legal awareness among citizens, lagging economic indicators, and the low status and professionalism of law enforcement officers and court employees. Without stabilization of this situation there is a risk that all the reforms will remain on paper.

Constitutional reform according to this principle should not be to amend the constitution and the constitutional modernization of the state mechanism.

As a result of this, constitutional reform has occurred not only in the amendment of the constitution but in the adoption of the constitutional law of the Republic of Abkhazia on judicial power, which will come into force on January 1, 2017. Discussion of amendments occurred from 2010 to 2014, recent amendments were made to the constitution in 2016.

The legal system of the Republic of Abkhazia consists of the Basic Law, which establishes a presidential-parliamentary republican form of government under the declaration of a democratic regime. The constitutional order is also regulated in the laws "On Elections of the President of the Republic of Abkhazia," "On Citizenship of the Republic of Abkhazia" and "On the Cabinet of Ministers." The legal system consists of industry codes: criminal, civil, family, criminal procedure, civil procedure, etc.

Consequently, on the one, the legal system of the Republic of Abkhazia hand historically cooperates with the Russian legal system, and, on the other, is developing in the framework of continental law system, but with influences of customary law and non-institutional forms of political life characteristic of the traditional political system (citizens' assemblies). In these conditions, a peculiar paradigm can be observed according to which tradition and morality is the dominant source of law in law enforcement practice.

In its development, the legal system of the Republic of Abkhazia actively unified with the Russian legal system and the legal systems of the country-participants of EurAsEC, therefore, challenges in the political, economic and social natures create very difficult conditions for its progress. Sometimes, this can be the basis for social conflicts and disagreements. Currently, the state and political systems in the Republic of Abkhazia, as in many other post-Soviet States, prevail over the legal system and this occasionally leads to outbursts of public indignation, as mentioned

earlier. For the Abkhazian government, the most important task is the elimination of the misalignment of the foundations of national law with the predominance of customary law and modern standards of law and democracy. Whether the modern law model fits into Abkhazian society, its culture and history is a question that has not lost its relevance.

Around the Republic of Abkhazia and today there are difficult geopolitical processes and the situation is affected by two major circumstances: on the one hand, the historical gravitation towards Russia and its legal system, and, on the other, the training of a large number of lawyers on the basis of Russian law schools which focus on an appropriate model law. It has been noted that, in the formative years of the statehood of Abkhazia, it adopted a number of serious regulations, a brief analysis of which suggests that, to a large extent, they are the result of harmonization with the legislation of the Russian Federation.

3.2. The Role of Customary Law in the Legal System

However, simultaneously with these processes there is still a place for the development of customary law, which still has a significant influence on legal consciousness and legal behavior.

This is most clearly seen during periods of acute security threats and intensified social and political conflicts. So, during the fighting of 1991–1993 a custom entered into force, according to which one son was allowed not to go to the front in order to save the future generations of the nation. The leader and ideologist of the struggle for independence, V.G. Ardzinba, has always appealed on behalf of the people and often asked for blessings the elders to fight. It is important to note the development in Abkhazia of the institution known as the Council of Elders, which has its own structure and includes a wide variety of local coalitions – tribal, rural, regional and national. This institution has strict rules for the election of its members based on prescribed imperatives. The decisions of the Council of Elders are regulated by the customary rules of structure. There is usually an introductory, a descriptive, and a motivational part and a resolution. They are rather difficult to identify with modern regulations and are complicated by the specific language of the court of appeals to eternal values and traditions, which are evident in the argumentation of the decisions of the Council of Elders.

In our time, legal pluralism in the interpretation of the law and its application may also be found. We are talking about the interpretation of the law from the standpoint of spiritual ideals: respect for elders, sanctity of the memory of ancestors, honor and dignity, the priority of the interests of the Abkhazian ethnos, etc. For example, legislators are not yet willing to liberalize land legislation, not allowing the sale of land to those who are not citizens of the Republic of Abkhazia.

Thus, we can say that the legal system of the Republic of Abkhazia today remains in a fairly unstable state. In these conditions, the state faces a clear alternative, either

the prevalence of a unique value, invested in state-legal form, expressed in the existence of a private law traditions and the creation of a separate legal system, or legal development in the Russian system of law with the emergence of more and more standardized features.

Conclusion

The study of the legal and political status of the Republic of Abkhazia as an unrecognized state in the contemporary international system can come to the following conclusions:

1. The leading factor in the recognition of the statehood of Abkhazia is the Russian Federation, whose aim is to defend its geopolitical interests in the region by supporting with the republic with humanitarian, socio-economic, cultural and of course political connections.

2. The duration of the conflict and the change of its political component suggest the possibility of a final recognition of the Republic of Abkhazia in conditions of international conjecture, even taking into consideration the negative attitude of NATO to this process.

3. The Republic of Abkhazia, as its domestic and foreign policy sustainable development is ready to prove in the framework of international integration, is focused on the right of the Abkhazian people to self-determination.

4. The current situation in the Republic of Abkhazia is characterized by selective application of the constitution and the absence of absolute rule of law in different spheres of society. As a consequence, there are constant attempts to reform the constitution and the obvious lack of a clearly defined national legal ideology.

5. The Republic of Abkhazia began the process of forming its own legal system at the end of XX century. This process has not been completed, therefore, the legal system of the Republic of Abkhazia is characterized by fragmentation and instability.

6. The current legal system of the Republic of Abkhazia can be described as a transitional one which is in the process of synchronization with the law of the Russian Federation which will bring it closer to the Roman-Germanic legal family within the framework of its aspirations to build a sovereign state with its subsequent recognition by the international community.

7. Its unrecognized status prevents Abkhazia from becoming a full participant in the international political system and slows down the process of the impact of international law on the legal system of the Republic of Abkhazia. Only in case of strengthening of the international legal status of the Republic of Abkhazia and its subsequent recognition will there a possibility of changes in legislation and their implementation in practical enforcement activities.

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RECENT CASES

RATIO DECIDENDI OF SELECT DECISIONS OF RUSSIAN HIGHEST COURTS

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Ruling of the Supreme Court Judicial Division for Economic Disputes of January 17, 2017 No. 309-KG16-13100

Legal issue: Whether the transfer of property under accord and satisfaction agreement terminating the contract of loan would be subject to VAT taxation?

Ratio decidendi: Lower courts were wrong in deciding that such transfer of property would be exempt from VAT similarly to the repayment of money under loan. Transfer of property by virtue of accord and satisfaction agreement for the purpose of cancelling obligations under loan contract is in legal terms the sale of a property, in which case the transferring party must pay output VAT from such sale, whereas the receiving one may offset input VAT.

Judgment of the Constitutional Court of the Russian Federation regarding the constitutionality of execution of the European Court of Human Rights judgment of July 31, 2014 in the case "OAO Neftyanaya kompaniya 'YUKOS' vs Russia" (January 19, 2017 No. 1-P)

Legal issue: The constitutional feasibility of execution of the European Court of Human Rights judgment – to the extent it puts Russia under obligation to pay €1.87

billion to former shareholders of "Yukos" by way of compensation for unlawfully levying tax penalties for the years 2000 and 2001 and execution fees.

Ratio decidendi: The Constitutional Court has deemed the execution of the ECHR decision to be impossible. In the opinion of the Court, the interaction between the Convention legal order and the Russian Constitution may not take place in the form of subordination, since only a dialogue between two different legal systems may serve as a ground for proper balance between them, and the efficiency of the Convention's rules within the Russian constitutional order depends, to a great extent, on the respect shown by the European Court of Human Rights to the national constitutional identity. While acknowledging the fundamental significance of the European system of the protection of human rights and freedoms, of which the judgments of the ECHR make a part, the Constitutional Court of Russia is ready to search for a lawful compromise for the sake of supporting this system; but the Court reserves the right to decide, to what degree it is ready to accept such compromise, because in this particular question the limits of such compromise are determined by the Constitution of the Russian Federation. As an international treaty signed by the Russian Federation, the Convention enjoys greater legal force in law-application procedures than any federal law, but not equal to or greater than that of the Constitution of the Russian Federation. In the situation when the very substance of a decision of an international body for the protection of human rights and freedoms impinges unlawfully upon the basic principles and rules of the Constitution of the Russian Federation, Russia may deviate, by way of exception, from performing the obligations placed upon it by such decision, provided that this deviation is the only possible way to avoid the violation of the national Constitution.

The European Court of Human Rights by its judgment from July 31, 2014 found Russia in violation of the property rights of the company "Yukos," which caused material damage to the applicant company. However, the fact of principal importance is that the material losses were the consequence of illegal activities of the company itself, whereas the State had to apply the measures of responsibility, including the administrative one, in order to compensate for the property damage borne by the State. The company "Yukos," as is clear from the court decisions against it, showed itself to be a persistent tax defaulter and ceased to exist, leaving unpaid outstanding tax obligations. The activities of the company had a law-destroying effect, undermining the stability of constitutional legal regime and public policy.

Furthermore, the Court found that the payment under ECHR decision to former shareholders of the company who engaged in illegal scheming to avoid taxation, as well as to their heirs and legal successors, of such significant sum of monetary compensation from public funds which were systematically deprived by the company of due amounts of tax payments necessary for meeting public obligations to all the

citizens and overcoming the financial and economic crisis, contradicts the principles of equality and justness in tax relations.

As for the interpretation of Art. 113 of the Tax Code given by the Constitutional Court in its judgment of July 14, 2005 (implying the right of a court to extend statute of limitations if it expired due to a taxpayer's obstruction of tax control measures), the such interpretation is the only reasonable one and corresponds to the authentic intent of the federal legislator. Accordingly, the application of this rule to tax disputes of "Yukos" relating to years 2000 and 2001 is not a retroactive one and does not constitute an act of arbitrary and unforeseeable law-application.

All the same, the Constitutional Court does not exclude the possibility of Russia's showing good will with regard to setting the limits of such compromise and means of its achievement as long as it concerns "Yukos" shareholders who suffered losses because of illegal actions of the company and its managers. Therefore, the Government of the Russian Federation is empowered to consider paying out respective amounts in the procedure provided for by Russian and foreign legislation for distribution of newly-found property of a liquidated legal entity; but it may only be implemented only upon finalizing the settlements with creditors and eliciting other property (for instance, the one hidden in offshore accounts). However, such payments may not, in accordance with this judgment, affect receipts and expenditures of public budgets, as well as the property of the Russian Federation.

There are two individual opinions of members of the Court.

Judge Vladimir Yaroslavtsev, dissenting, believes that the request of the Ministry of Justice of the Russian Federation is not admissible and proceedings in the case should be ceased. In case of disagreement with the ECHR decision, Russian authorities ought to appeal against it to the Grand Chamber within 3 month term, as provided for by Art. 43 of the Convention. However, they failed to exercise their right to appeal and thus they acknowledged, formally speaking, the legality and validity of the violations of the Convention that have been found by the ECHR. This inconsistent and quite contradictory position of Russian authorities has effectively led into a "legal dead end" the solution of the question at hand. Hence the Ministry of Justice found a "simplified solution" by filing the case at the Constitutional Court stating the impossibility to execute the ECHR judgment. But such application may not be admitted by virtue of the principle *nemo judex in propria causa* (no one can be a judge in his own case), because the conclusion of the ECHR regarding the violation of the Convention was in a considerable degree based on the finding that the Russian Constitutional Court had violated the principle of legality in its judgment of July 14, 2005.

In the opinion of Judge Yaroslavtsev, only legislator may establish and change the statute of limitations with regard to a criminal liability. The statute imposes a 3 year term, which is barring and preclusive; that is why its expiration constitutes a mandatory and unconditional ground for discharging a person from such liability.

The provisions of Art. 113 of the Tax Code of the Russian Federation in the new version could be applied only from January 1, 2007 onwards, i.e. from the time when this article was amended by the legislator who provided for the possibility to interrupt the statute of limitations with regard to tax violations.

The Ministry of Justice of the Russian Federation should not seek easy ways of resolving the problem by means of applying to the Constitutional Court; instead, it was necessary to continue dialogue with the Committee of Ministers of the Council of Europe.

Judge Konstantin Aranovsky, concurring, also believes that the request of the Ministry of Justice is not admissible, because the case was resolved by the ECHR without the procedural opponent. ECHR decision affects the rights of third persons who did not participate in the case, and it requires of the violator himself to determine the victims in its case and assign compensation amounts to them. Strictly speaking, it does not allow considering the decision as a judicial act and considering Russia as obligated to pay compensation judicially, even if it does pay something out of respect to the ECHR decision. The Convention law requires to list by name the persons awarded payments by the Court, which makes it impossible to award payments to nameless groups. This affects the rights of Russia itself, because even if it makes certain payments to "Yukos" shareholders, it will not oblige the "victims" to regards the compensation received as just and equitable one, because the Court failed to consider the case with their participation, even *in absentia*.

Ruling of the Supreme Court Judicial Division for Economic Disputes of January 19, 2017 No. 305-ES15-15704

Legal issue: What is the relation between paras. 1 and 2 of Art. 1107 of Civil Code, that is, between the requirement to compensate all profits received as a result of unjust enrichment, and the requirement to pay interest under Art. 395, Civil Code for the use of monies belonging to another person?

Ratio decidendi: Inferior courts made a mistake, believing that in case of unjust enrichment both profits derived and interest incurred should be paid. The interest indicated in para. 2 must be set off against profits indicated in para. 1. Para. 2 established a simplified procedure for proving the minimal amount of income in case of pecuniary enrichment, but at the same time it does not preclude the recovery of profits in a greater amount in accordance with rules of para. 1, provided that the existence of such excessive profits has been proved. The opposite interpretation, which limits the amount of recoverable income solely by para. 2, that is, by an interest alone, would make it profitable to use property belonging to others and would create an incentive for the defendant to continue intentionally using it and returning it to the owner as late as possible.

Besides, profit consists of net revenue, that is, gross revenue minus expenses. Therefore, in case the bank is a defendant in a case, it would be wrong to determine its income as corresponding to a credit interest rate: it is also necessary to take into account the expenses of the bank relative to issuing credits.

Ruling of the Supreme Court Judicial Division for Economic Disputes of January 24, 2017 No. 305-KG16-10570

Legal issue: Whether the owner of all apartments in a residential house must register his right of ownership to it as a single object of real estate, if he wants to demolish the house and register his right of ownership to the land under it?

Ratio decidendi: Contrary to the opinion of lower courts, there is no need to do so. From the moment of registration of his right of ownership to this apartment the buyer of an apartment also acquires by virtue of the law the right to a share in common property to the land plot under the house.

When a single person owns all the apartments in a residential house, he by virtue of the law becomes the owner of all shares in the land plot and from the moment of registration of his ownership to the last apartment in the residential house becomes an owner of the entire land plot thereunder. Since that moment onwards the existence of the right of common shared ownership is no longer possible, and it turns into the right of individual ownership in real estate. As for a demolition of a residential house situated on a land plot, it may not serve as legal grounds for terminating a right of ownership to this land plot.

Ruling of the Supreme Court Judicial Division for Economic Disputes of January 24, 2017 No. 310-ES16-14179

Legal issue: Whether good-faith mortgage lender may demand that the mortgaged property (a flat) be foreclosed – in the context of legal relations arising before July 1, 2014?

Ratio decidendi: Good-faith mortgage lender may demand foreclosure. Although the rule of Art. 335, Civil Code, in which the notion of good-faith mortgage lender is found, came into force on July 1, 2014, whereas the relations between parties precede it, this notion had already existed in the decisions of the Supreme Arbitrazh (Commercial) Court. Therefore, the legislation in force before 2014 already implied that the rights of mortgage lender could survive in case of invalidity of the transaction by which the owner (mortgagor) had acquired the property in question (i.e. the collateral), provided that the mortgage lender was unable, acting reasonably and with proper prudence, to discover the flaws of such transaction.

Ruling of the Constitutional Court on the denial to accept for consideration the petition of the All-Russian Social Organisation of Disabled Persons – Russian Association of Blind Students and Professionals against the violation of constitutional rights and freedoms by parts 6 and 11 of Art. 45 and part 17 of Art. 48 of the Federal law "On the Election of the Deputies of the State Duma of the Federal Assembly of the Russian Federation" (January 26, 2017 No. 203-O)

Legal issue: Whether the Association may challenge in the Constitutional Court the decision of the Central Electoral Commission prohibiting the signing of subscription lists by means of digital signature or facsimile.

Ratio decidendi: The Constitutional Court held that the case was inadmissible because the organisation was challenging the constitutionality of the federal law without quoting any facts of violation of its members' rights, which would have been examined and legally assessed by courts, i.e. it is requesting an abstract judicial review of constitutionality of the federal law. However, by virtue of Art. 125 of the Constitution and Art. 3 of the Law on the Constitutional Court the petitioner is not listed among the entities entitled to apply to the Constitutional Court in such fashion.

The ruling is accompanied by two individual opinions of the members of the Court.

Judge Nickolai Bondar, dissenting, believes that the Court ought to admit the petition for consideration. The subsidiary character of the constitutional justice does not imply restrictive interpretation of its competence; in view of the exhaustion of the ordinary judicial remedies its competence ought to be interpreted in the manner ensuring the most efficient restoration of violated rights and freedoms of the applicant. Not only the courts of general jurisdiction and commercial courts, but particularly the Constitutional Court itself should minimize strict formalism, so that the constitutional rights might enjoy real and efficient protection.

The failure of the federal legislator, in spite of the position expressed earlier by the Constitutional Court, within many years to regulate properly the issue of participation in electoral procedures by disabled persons incapable of signing subscription lists with their own hand testifies to the fact that the gap in legal regulation which was indicated earlier by the Constitutional Court has become persistent. This may lead to a massive violation of electoral rights of persons belonging to the respective socially vulnerable class of the population. This circumstance constitutes an additional argument for admitting the petition and its consideration on merits.

Judge Alexander Kokotov, dissenting, also disagreed with the refusal to admit the case for consideration. He points out that the decision of the Supreme Court to return the application (an administrative suit) to Association was based on the fact that once before the Supreme Court has already considered and resolved an analogous application by a political party. Consequently, the substantive answer given by the

Supreme Court to that party was in fact its answer to the Association as well. Therefore, one may argue that the Association, when filing petition with the Constitutional Court, might base its right to apply to it on the decision of the Supreme Court with regard to another applicant (the political party). It is exactly what the Association has done.

Besides, it would be good if the federal legislator, without waiting the Constitutional Court's resolution of the question posed by the applicant, would have provided in the election laws the means enabling blind voters and other incapable persons to have a full-fledged participation in the nomination of candidates.

Ruling of the Supreme Court Judicial Division for Economic Disputes of January 30, 2017 No. 305-ES16-14210

Legal issue: Whether supplier may demand that the customer performs the contractual obligation to provide bank guarantee from a bank?

Ratio decidendi: The supplier may demand this. Lower courts were wrong in regarding this obligation (to provide a bank guarantee) as being impossible to perform, solely on the ground that the customer is unable to force the bank to issue such guarantee. However, the impossibility to perform an obligation occurs only if the action which constitutes the substance of the obligation may not be carried out by whatever person or entity. Yet, the issuance of bank guarantees is a standard and regular bank service rendered by credit organisations with the purpose to derive profits.

Ruling of the Supreme Court Judicial Division for Economic Disputes of February 9, 2017 No. 305-KG16-15387

Legal issue: Whether a company may be allowed to take part in a government tender (in the form of request for quotation), if it offers zero price (0.00 RUR)?

Ratio decidendi: Courts wrongly proceeded from the idea that zero price characterizes the contract as gratuitous and that it is contrary to the purposes of state procurement solely because such offer is not commensurate to the minimal expenses borne by the winner. However, when determining the winner, it does not matter whether the proposed contract is feasible for him; the only thing which matters is price. Besides, the procurement legislation does not prohibit statements in the offer that goods or services are procured without consideration, and the lack of consideration does not constitute a ground for declining such offer. This conclusion accords to the principles of procurement system aiming at the efficiency of buying goods or services for governmental or municipal needs. Such offer does not restrict competition, because it does not prevent other bidders to offer the same terms of contract. This distinguishes the request for quotation from an electronic contract where offering zero price of a contract is not admissible.

Judgment of the Constitutional Court on the constitutionality of provisions of Art. 212.1 of the Criminal Code of the Russian Federation in connection with the petition of the citizen I.I. Dadin (February 10, 2017 No. 2-P)

Legal issue: The constitutionality of the criminal prosecution for a violation of the procedure for conducting meetings, assemblies, manifestations and picketing, given that the accused has already been repeatedly (more than twice within 180 days) brought to administrative responsibility.

Ratio decidendi: The Court found the provisions in question not to be contrary to the Constitution, but gave them a narrow interpretation. It pointed out, *inter alia*, that:

– crime has to be characterized by a particular social danger; otherwise even an action which might appear to be formally criminal should not be regarded as such;

– federal legislator, when deciding which actions that are dangerous for persons, State and society should be considered as crimes must avoid an excessive use of criminal repression;

– federal legislator may use criminal liability in the interest of proper protection of constitutionally significant values even when the illicit action is being committed by a person who has already been administratively punished for analogous actions, that is, may use so-called "administrative res judicata";

– all the same, if such violation was merely formal and did not in reality entail negative consequences or a danger thereof, it may not be considered as having a criminal social danger, and therefore making the accused responsible on the sole basis of repeated perpetration of such offence would be outside the realm of constitutionally admissible restriction of citizen rights by criminal legislation;

– punishment in the form of deprivation of freedom is possible only in the absence of other means to ensure achievement of the purposes of criminal liability;

– court decisions on bringing a person to administrative liability, although being prejudicial in nature, may not be regarded as incontestable; this requires the verification by a court of all the circumstances of previous violations on the basis of equality of parties and in an adversarial procedure.

Review of court practice of the Supreme Court of the Russian Federation No. 1 for the year 2017 (affirmed by the Presidium of the Supreme Court on February 16, 2017)

In the first review of the Supreme Court practice in 2017 the following decisions deserve particular attention:

– if a debt in nominated in a foreign currency, the interest on it under Art. 395 of the Civil Code shall be calculated in accordance with Central Bank average interest rate for short-term credits; if this rate is not published yet, then the average rate for

short-term currency credits shall apply, and it must be confirmed by the statement of a leading bank at the place of creditor's sojourn (this issue remained unresolved for a long time both in law and judicial practice);

– the risks of fluctuations in the exchange rate of foreign currency lie with the borrower under a credit contract: the repayment of the amount of loan should be made in the very currency which is indicated in the contract; the fact that the borrower is mother of a large family and unemployed may not be regarded as a material change of circumstances, because it does not prove that the plaintiff is deprived of what she might have expected when signing the contract;

– consumer protection laws shall not apply to disputes between banks and depositors, as long as their relations are regulated by the Civil Code and bank account contracts;

– if the person who seeks in court to reverse a judicial decision on the ground of a ECHR judgment failed to enclose with his application the text of judgment's unofficial Russian translation, the court must nonetheless proceed with such application. At the same time, the judge should, upon a motion of a party or at his own accord, apply to the representative of Russia at the ECHR, asking him to provide a translation of the respective judgment;

– if jurors found the accused to be guilty, but deserving lenience, the court, when delivering its sentence, should not take aggravating circumstances into account.

Review of practice of consideration by courts of cases involving the application of certain provisions of Sec. V.1 and Art. 269 of the Tax Code of the Russian Federation (affirmed by the Presidium of the Supreme Court on February 16, 2017)

The Review relates to transactions between interdependent entities and cases of thin capitalization. Among the most interesting interpretations are the following:

– repeated deviation of price from the market level may be just one of the signs indicating that there is an unjustified tax benefit in place; in order to prove that the company evaded paying taxes, one should determine other circumstances discrediting a business cause of the transaction – for example, interdependence between parties to the transaction, formation of the organisation in question immediately before the disputed transaction, the use of special forms of settlements and terms for payment, and so on;

– the Review explains what is the correct way the Federal Tax Service should determine the amount of certain taxes which are calculated on the basis of market prices (for example, VAT and profit tax). The Tax Code does not contain special methods of calculating such taxes, but it does not mean that the Tax Service may arbitrarily assess tax liability. It should be guided by the rules of Sec. 5.1 of the Tax Code. The Supreme Court believes that the rules contained therein are of supplementary nature and do not necessarily apply to transactions of interdependent persons only. Therefore, they are applicable to determining market prices in the context of above-mentioned taxes in the course of both field and internal tax audits;

– controlled debts may occur not only between parent and daughter companies, but also between sister companies. In the latter case the dependence of a Russian taxpayer from a foreign organisation may be indirect – when both firms are controlled by the same parent company;

– if taxpayer failed to defend his position and the interest paid under his loans was requalified as latent dividends, he may nonetheless apply to them a reduced tax rate provided for in a relevant international treaty on the avoidance of double taxation (this is a solution of a long-felt problem, because in thin capitalization disputes tax authorities failed to fully take into account the real relations of parties and in case of success and judicial requalification of loans as dividends were reluctant to apply the reduced rate for dividends in question);

– the presumption that prices in transactions between interdependent entities are market ones (arm's length transactions) may be refuted only by the Federal Tax Service and not by inferior tax authorities;

– the right of the court, as provided by Sec. V.1 of the Tax Code, to take into account any circumstances relevant for determining whether the transaction is arm's length one or not, should not serve as a ground for ignoring the rules, established by a law for the purpose of calculating the amount of taxes in controlled transactions (this point purports to curb the practice of courts to determine the market price without due regard to calculation methods provided for by Art. 40 of the Tax Code).

Ruling of the Supreme Court Judicial Division for Economic Disputes of February 20, 2017 No. 306-ES16-16518

Legal issue: Whether the procurator (public prosecutor), when applying to a court in the interest of an uncertain class of persons, should use the mandatory extrajudicial dispute settlement procedure before?

Ratio decidendi: Extrajudicial dispute settlement procedure promotes quick and mutually beneficial resolution of conflicts; however, the procurator should take measures for preliminary extrajudicial settlement only when the Procuracy appears in court as a party to a substantive legal dispute. In other cases (for instance, when he enters the proceedings for the sake of ensuring legality) he is not under obligation to do so. Therefore, lower courts erred when demanded from the procurator to use such extrajudicial procedure.

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CONFERENCE REVIEW NOTES

ADMINISTRATIVE JUSTICE: INTERNATIONAL, FOREIGN AND RUSSIAN DIMENSIONS

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With the adoption of the Code of Administrative Proceedings of the Russian Federation[1] (hereinafter CAP), the discussion concerning the need to consider administrative justice as an independent branch of judicial authority has livened up in both doctrine and practice. On the one hand, the adoption of such an important normative legal act is positive. The implementation of public power received a procedural regulation and an effective protection of rights and interests of citizens and legal entities becomes possible. On the other hand, there are concerns about the efficiency of this Code, not only in doctrine but also in practice. Nonetheless, it is partly wrong to reduce an assessment of the law only to its efficiency. Therefore, a discussion of the issues, questions, and challenges facing administrative justice is important and necessary.

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[1] Кодекс административного судопроизводства Российской Федерации от 8 марта 2015 г. № 21-ФЗ, Собрание законодательства РФ, 2015, № 10, Ст. 1391 [Code of Administrative Proceedings of the Russian Federation No. 21-FZ of March 8, 2015, Legislation Bulletin of the Russian Federation, 2015, No. 10, Art. 1391].

On September 29–30, 2016, Tyumen State University (Russia) hosted the international conference titled "Administrative Justice: Comparative and Russian Contexts" within the II Siberian Legal Forum – a forum devoted to the development of administrative legal proceedings. The conference continued the topic of the I Siberian Legal Forum "Specialization of Courts and Judges: World Practice and the Russian Experience" (held from October 16–17, 2014).[2] Its mission is to create a platform for debating a wide range of modern issues and trends within the legal sphere, exchanging experiences, and establishing multidimensional communication for researchers and practitioners of Siberia, Russia as a whole, and foreign states.

Many leading institutions in higher legal education within the Russian Federation presented at the II Siberian Legal Forum, among which included Lomonosov Moscow State University, Kutafin Moscow State Law University, St. Petersburg State University, Ural State Law University, and Voronezh State University. Likewise, representatives from a number of foreign countries presented as well – including France, Brazil, Argentina, Italy, Poland, Spain, and Serbia – countries whose administrative jurisdictions developed rather long ago. The issue in question concerned not only doctrine, but also business structures. Likewise, the conference discussed the idea of judicial authority, like the Constitutional Court of the Russian Federation, the Supreme Court of the Russian Federation, the Arbitrazh Court of the West-Siberian Circuit, the Tyumen Regional Court, and a number of the regional *arbitrazh* courts within the West-Siberian Circuit. Representatives of the judicial authority moderated two sessions – the chairman of the Arbitrazh Court of the West-Siberian Circuit Vladislav Ivanov and the vice-chairman of the Tyumen Regional Court Vyacheslav Antropov. In particular, the reports of some judges concerned the settlement of disputes between businesses and authorities. Of note is the fact that the number of such disputes has increased, demonstrating stronger businesses and its aims to assert its rights.

Allocation in an independent branch of legislation and codification of administrative legal proceedings received assessment from different aspects. According to Professor Mikhail Kleandrov despite the imperfections of the CAP, there was a clear necessity to adopt it. Only practice can illuminate the shortcomings of the CAP; theory is therefore powerless here. On his assumption, in the following ten years, changes in separate sections and in the concept of the CAP will be made, especially if the judicial system changes (if, for example, special administrative courts are established). Only time will show how such a system will function once different options are possible. Regarding administrative cases, chapters 24 and 25 of the Civil Procedure Code the Russian Federation (hereinafter CPC) have played an important role, but civil proceedings are intended for permission of private legal disputes.

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[2] *See* Sergei Marochkin & Anton Permyakov, *The Russian Constitution and the Specialization of Judges and Courts: The Current Reforms of the Judiciary in Russia. The Celebration of the Russian Judicial Reforms of 1864*, 39 Review of Central and East European Law 369–381 (2014); Yury Kondrashov, Dmitry Maleshin, Nadezhda Sukhova, Stefaan Voet,Valery Falkov, *The First Siberian Legal Forum "Specialization of Courts and Judges*," 3(2) Russian Law Journal 142–148 (2015).

Professor Yury Starilov noted with satisfaction that the acceptance of the CAP is a considerable and important event in the development of the judicial system of the country. It also represents an improvement of the Russian legal system as a whole, an extension of legal statehood, the building of a judicial structure in appropriate order conforming the standards of ensuring the rights, as well as a step forward for the freedoms and interests of natural and legal persons.

According to the remarks of Svetlana Savchenko, a wealth of experience went into the CAP's creation, especially that relating to the legal proceedings of administrative cases at the *arbitrazh* courts. As such, certain gaps connected with the jurisdiction of this type of disputes are considered and eliminated; the conceptual framework of the administrative legal proceedings was fixed to distinguish the specifics elements of this legislation.

The existence of positive responses in the doctrinal environment is certainly a positive signal in the assessment of the legal decision concerning the availability of justice and the protection of citizens' rights when intersecting with public entities. Such a two-uniform approach to the settlement of disputes with a procedural difference in protecting private and public interests also finds support in the legal systems of other states, despite various forms of the judiciary, specialization of courts and judges.

Comparative aspects of administrative proceedings in some countries were also examined at the session moderated by Dmitry Maleshin. The specific feature of Argentina's justice administration system, which consists of at least 25 different procedural subsystems, each of which have a different approach. Even though there are special Courts to deal with administrative cases in Argentina, there are no general special proceedings enacted to attend the specificities and complexities of cases directly involving the Federal State or other situations. Several legislative initiatives were introduced in the Senate and the Chamber of Deputies in order to establish such proceedings on the federal arena.

Unlike Argentina, administrative justice in Italy is dispensed by a set of courts separate from the ordinary courts that decide civil and criminal cases. In a way, one can say that administrative courts are special courts, since their jurisdiction is conceived as an exception to the general jurisdiction of ordinary courts. The same situation occurs in France, where the administrative courts, which are the ordinary administrative courts, were created in 1953 (except the court at Strasbourg which was founded in 1903). The Administrative Courts of Appeal were added to the judicial hierarchy in 1987 for the purpose of unclogging a Conseil d'Etat, overloaded with litigation. The last two levels of jurisdiction operate on a collegial basis, even if the latter, like the judicial judge, tends to be undermined by the development of the single judge, created to accelerate the processing of cases and according to a managerial logic. In this case, a single judge makes most of the decisions.

The supreme supervision over the administrative activity of the administrative courts in Poland is exercised by the President of the Supreme Administrative Court.

Jaroslaw Turlukowski, Assistant Professor of commercial law at the Institute of Civil Law at Warsaw University, noted that such supervision is of great importance because the administrative court cannot be dependent on the government administration. Additionally, the administrative courts are not supervised by the Supreme Court. On the other hand, the courts of general jurisdiction in the field of administration (not as to adjudication) are supervised by the Ministry of Justice.

The judicial system of some Latin American countries is undergoing an interesting period. In particular, Brazil, like Russia, is carrying out reforms of its administrative justice system. However, in Russia, this reform is instead connected with the adoption of the CAP and the recent merging (in 2014) of the Russian Supreme Commercial (Arbitrazh) Court and the Supreme Court. It shows that there are two very different approaches to judicial organizations that have been taken to create a specialization in administrative adjudication.

As Ricardo Perlingeiro, Federal Judge of Rio de Janeiro, Executive Secretary of the Drafting group on the Model Code of Administrative Procedure for the countries of Latin America, Fluminense Federal University (Brazil) states, there are generally no specialized administrative courts in countries of common law (especially in the USA, UK and Australia). Instead, there are rather highly specialized quasi-judicial bodies within the administrative agencies themselves. By contrast, in most Continental European legal systems with civil law origins, the courts have a special division for cases, which tend to have broad powers to review the factual grounds for administrative decisions (an open judicial review). Such broad powers of review work to counterbalance the traditional absence of internal dispute-resolution mechanisms within the administrative authorities themselves. Thus, regardless of the organizational system, administrative justice is always placed in hands of specialized adjudicators. The difference is that within the "Continental European" approach, specialized judges within the Judiciary itself resolve administrative disputes, whereas in the USA quasi-judicial bodies within the administrative agency play a decisive role, although they remain subject to relatively deferential closed review by the Judiciary. This dichotomy has given rise to serious problems in Latin American systems of administrative justice.

As former Iberian colonies, the countries of Latin America inherited the Continental European legal culture, with its civil law tradition. Since the early 19th Century, however, US Constitutional law has exercised a strong influence on Latin-American countries. As a result, most of them have adopted a judicial system with "general jurisdiction," meaning that the same courts handle both ordinary and administrative disputes. Since those countries have not managed to cut all their ties with European legal culture, their adoption of the US model of general jurisdiction has not been entirely successful. Countries that have organized their judiciary with general jurisdiction are now suffering from the weaknesses of both predecessor systems: the lack of specialized administrative courts in the U.S. model, combined

with the absence of quasi-judicial bodies within the administrative authorities themselves, which is typical of the Continental European model.

As the reporter says, the future of Latin American administrative justice depends on compensating for the lack of specialized administrative courts by endowing administrative agencies with guarantees of procedural due process, as established by the 5th and 14th Amendments to the U.S. Constitution and adopted by most Latin American national constitutions.

The main problems of administrative justice in Russia are connected with the establishment of boundaries and competences of different elements of the judicial system, the correct interpretation and use of procedural rules, and ensuring uniform approaches to court hearings and litigation in public disputes. They are caused by the fact that currently, in Russia, courts of both general jurisdiction and the specific *arbitrazh* courts consider these kinds of disputes within their competence by the rules of three codes – the CAP, the Commercial (Arbitrazh) Procedural Code (hereinafter APC) and the Code of the Russian Federation on Administrative Offenses. At the same time, as a judge at the Arbitrazh Court of the West-Siberian Circuit Olga Chernousova notes, the illegibility of formulations of particular provisions of the legislation concerning participants of the court proceedings is a matter of a dispute. Likewise, the complexity of these categories have resulted in uncertainty of their perception, in both interpretation and application. However, the issues brought to life by the existence of several procedural codes have a widespread (world) character.

In particular, according to Francisco Verbic, adjunct Professor of Procedural Law II and Academic Secretary of the LL.M. in Procedural Law at the National University of La Plata School of Law and Social Sciences (Argentina), administrative conflicts are still widely discussed today. However, numerous procedural rules have been enacted to deal with private conflicts, particularly those in the National Civil and Commercial Procedural Code. Another problem is the impossibility to find, within Argentina, a systematic and comprehensive procedural mechanism to deal with considerable administrative conflicts. The lack of adequate procedural devices at the federal level is particularly problematic because, since the 1994 reform to Argentina's Federal Constitution, standing to sue in order to enforce collective rights has acquired a constitutional pedigree, while some collective substantive rights are considered "collective incidence rights."

The Italian legal system distinguishes two different forms of entitlement that every individual can claim against a public entity, namely, "subjective rights" and "legitimate interests." This distinction is at the basis of the institutional arrangement of jurisdiction: in the system of dual jurisdiction, at least in principle, subjective rights can be enforced by ordinary courts while legitimate interests must be claimed before administrative courts. Elisabetta Silvestri, professor in the Department of Law at the University of Pavia (Italy) outlines one way to make the dual system of jurisdiction (the jurisdiction of ordinary courts and the jurisdiction of administrative courts) more

understandable, thereby circumventing the complex distinction between "subjective rights" and "legitimate interests." She argues that institutions should emphasize that when a public entity or administration is a party to a case, it does not mean that the court holding jurisdiction over the case itself is always an administrative court, since the plaintiff determines jurisdiction. As the Italian Constitutional Court has clarified in several judgments, the mere fact that the public administration is involved in a judicial proceeding is not sufficient cause to establish the jurisdiction of administrative courts. By the same token, a generic element of public interest in a case does not imply necessarily that the case at stake would fall within the jurisdiction of the administrative courts.

According to doctor of jurisprudence, professor, and judge at the Tyumen Regional Court Maxim Mateykovich, in raising the question of protecting a person's rights and freedoms, we must consider that at the same time, courts have to protect public interest. Moreover, the right of the individual sometimes conflicts with public need. Public interest is of great importance for administrative justice, and in this framework, the cases following from administrative and other public relations are considered. A court faces, in this regard, a complex challenge: how not to break balance between subjective, private interest and public ones. Moreover, there is a problem of interpretation of public interest, which is expressed, as a rule, by bodies of the public power. A real danger exists that the selfish personal claims of some public officials can be made in the name of public interest.

It is also impossible to forget that private and public interests are in indissoluble communication. Therefore, according to the author, it is necessary to recognize that administrative justice, as a less formalized and respectively operational instrument for the protection of the rights and freedoms, is not a certain ideal or panacea for resolving conflicts in the public sphere. It should therefore not expand its jurisdiction nor involve itself in new types of disputes. He insists that it is necessary not to allow the washing out of the civil regulative procedure, and to exclude a possible solution for any material claims by means of other judicial processes. This is preferable to a full-fledged research and assessment of the evidence by the court in a competitive format for traditional claim proceeding.

From this point of view, Hugo Flavier, Associate Professor of Public and European Law at Montesquieu University – Bordeaux IV, Centre de Recherche et Documentation Européen et International (CRDEI) (France), notes that the adage that "jurisdiction follows the substance" presupposes knowledge of the applicable law (civil or administrative) to determine the competent court (either civil or administrative). There used to be two criteria for such a determination – an organic criterion and a material one. The organic criterion concerns the public or private nature of the person involved in the dispute. The material criterion concerns either the nature of the activity (is it a public service or not), or the nature of the act adopted (does this involve the exercise of public powers or not).

The criterion for determining the correct definition of a type of legal proceedings (civil or administrative) is the nature of legal relationship. This is predetermined not only by the body of the authority's participation, but also by the fact that participants of such a legal relationship have no equality, and one of them is given authority in relation to another. It was a leitmotiv of the session moderated by Associate-professor Sergei Belov (St. Petersburg State University). As judge at the Tyumen Regional Court, the chairman of the judicial body for administrative cases Svetlana Koloskova noted that such an approach does not fully provide an effective realization of the right of citizens to judicial protection. Though they can independently choose a way for protecting their violated rights while appealing to court with different requirements, this could be mistaken in a type of legal proceedings (administrative or civil) which must actively consider the legal requirements.

The Constitutional Court of the Russian Federation repeatedly specified that the inalienable right to judicial protection of one's rights and freedoms – as it is formulated in Art. 46 of the Constitution – does not strictly follow the possibility that a citizen can choose their own procedure of judicial protection. These are instead defined by the federal law according to the Constitution.[3]

For this reason, with the entering into force of the CAP, an incorrect definition by the applicant of a type of legal proceedings as well as an inclusion of the requirements for public and private legal relations into one application leads to the refusal to adopt such applications completely or partly. According to point 1 Part 1 Art. 128 of the CAP, the judge must refuse to accept an administrative claim if it is not subject to consideration in administrative proceedings and it is instead to be considered in a court of general jurisdiction by civil or criminal proceedings, or even in an *arbitrazh* court in line of the *arbitrazh* procedure legislation.

If one considers the close interaction and an the interconnectedness of questions concerning private and public law as noted above, then the adoption of the CAP may further complicate the protection of rights and interests. This is because the interpenetration of private and public law can lead to some difficulties in determining the proceedings (civil or administrative) which are more suitable for the consideration of a claim.

At the same time, the CAP is not the original law containing special rules as it only retells the provisions of the CPC and the APC. According to Dmitry Tumanov, Candidate of Juridical Sciences and associate professor at chair of civil and administrative

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[3] Определение Конституционного Суда РФ от 24 ноября 2005 г. № 508-О [Determination of the Constitutional Court of the Russian Federation No. 508-O of November 24, 2005] (Feb. 20, 2017), available at http://doc.ksrf.ru/decision/KSRFDecision31176.pdf; Определение Конституционного Суда РФ от 19 июня 2007 г. № 389-О-О [Determination of the Constitutional Court of the Russian Federation No. 389-O-O of June 19, 2007] (Feb. 20, 2017), available at http://doc.ksrf.ru/decision/KSRFDecision16458.pdf; Определение Конституционного Суда РФ от 15 апреля 2008 г. № 314-О-О [Determination of the Constitutional Court of the Russian Federation No. 314-O-O of April 15, 2008] (Feb. 20, 2017), available at http://doc.ksrf.ru/decision/KSRFDecision17349.pdf.

legal proceedings of Kutafin Moscow State Law University, this issue is indirectly confirmed by the fact that the approaches and terms revealed in the CAP are actually characteristics of private legal disputes, but not public ones. As Natalia Bocharova, Candidate of Juridical Sciences, associate professor law at Lomonosov Moscow State University also notes, the legal terms related to action-based proceedings can be found now in the APC, but this results in some confusion, particularly when analyzing the autonomy of parties in administrative proceedings. This itself demonstrates that there is actually no need for the existence of some special (different from the existing in the CPC) regulation of judicial review of public (administrative) affairs.

Some other particular provisions of CAP also raise such questions. In particular, granting a court of discretion power to invite a person as a secondary administrative defendant in case the administrative plaintiff expresses accurate and unambiguous disagreement on the replacement of the primary administrative defendant with another person. Dmitry Abushenko, doctor of jurisprudence and professor at the chair of civil processes at the Ural State Law University, notes that such court power leads to a categorical conclusion that the rule of point 1 Art. 43 of the CAP, which gives a court the authority to initiate replacement of the inadequate administrative defendant, presents a contradiction with the adversary trial. Such a perversity of an appeal to the administrative plaintiff with a claim to a certain person goes beyond such an adversary trial. There are no reasonable foundations as to why the court should have the right to anticipate the final judicial act, directly indicating on the incorrect administrative defendant. The author asserts that in such a case, there cannot be a discussion of competitiveness because the court has already taken a certain position and decided for itself that it would refuse satisfaction of the administrative claim to this defendant.

All this, with some other controversial innovations, leads some authors to an idea that the adoption of the CAP does not ensure the realization of the right for judicial protection and formation of effective administrative justice. Currently, the CAP is imperfect, but throughout the world, the legal practice of adopting separate acts that regulate a procedure for resolution of public disputes between individuals and public entities is not widespread. At the same time, the importance of a differentiation between private and public questions in the procedural sphere indicate the need of adoption of such a statutory act. Therefore, the CAP is an important step in ensuring the effectiveness of judicial legal protections of the rights and the interests of citizens concerning the interaction with public entities. Withal, the doctrine and practice unconditionally help the legislator improve upon its activities. Only through a practical analysis of this procedure can one accurately see the merits and demerits of the adopted acts.

Issues linked with administrative justice are generally similar in all states, especially when separate regulation is required. They are connected not only by the existence or absence of administrative courts, but by the creation of administrative

legal proceedings and its differentiation from civil legal proceedings. Finding such points lead to the positive effect of ensuring the right of judicial protection in the conditions of globalization and rapprochement of legal systems.

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