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POWER CONFERRING LEGAL RULES AS COERCIVE OFFERS?

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This paper deals with the question of if and to what extent power-conferring legal rules can be treated as coercive and whether the concept of coercive offers can help to substantiate the coerciveness of power-conferring in law. In his recent book, "The Force of Law," Frederick Schauer claims that power-conferring legal rules are coercive.[1] *There are several ways to interpret this claim. In this piece I would like to explore one route of interpretation of this interesting and controversial claim, i.e., whether one can use a highly controversial concept of "coercive offers" to substantiate this claim. First, the very concept of coercive offers requires clarification. In fact, there are several distinct ways to interpret it and I explore them below. The second point is whether the coercive offers concept is applicable in the context of the power-conferring legal rules. Two influential theoretical models of coercive offers are analyzed and critically evaluated and their ramifications for the coerciveness of the power-conferring legal rules are demonstrated. In my view, the only possible route to substantiate the coerciveness claim from the vantage point of coercive offers concept is through the distributive non-neutrality of law narrative.*

Keywords: coercive offers; threats; proposals; exploitativeness; pre-proposal situation.

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

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Introduction: Coercive Offers Debate

Let us first explore the "coercive offers" debate in detail. The basic question was whether an offer can be coercive. The initial examination of this question was made in Robert Nozick's seminal paper on coercion[2] in which he denies the fact that offers can coerce. Nozick claims that coercing somebody means diminishing his range of actions. At the same time, to offer something normally means to increase somebody's options for actions because, prior to the offer, the offeree's options did not include the offered option. In other words, starting from the baseline of a pre-existing set of options, an offer is definitely an improvement.

Still, the concept of the baseline is far more problematic than it seems at the first sight. In fact, Nozick himself proposes two different baseline concepts. Imagine that a drug dealer who usually supplies a drug for $20 suddenly says that this time he will only supply the drug if an addict not only pays $20 but also beats someone up. Judging from the baseline of the pre-existing course of action, this is a threat, not an offer, because, from the standpoint of an addict, his normal pre-existing range of options is diminished.

This solution may make one uneasy. The line of reasoning is a slippery slope: a sadist can tell you that his morbid fantasy is an integral part of his normal baseline. That is the basic reason for the second moral concept of the baseline. Imagine that the drug dealer from the previous case has been arrested and so the situation of an addict has changed drastically: now he cannot "normally" expect that the drugs "are there" for $20 on an on demand basis. A new dealer offers the drugs in exchange for the addict beating someone up. From the non-moral baseline test this is an offer pure and simple. It is definitely an "improvement" in an addict's situation, he would not expect such an improvement, etc. Still, it is immoral.

In order to fully explain the point, here is a final case. A slave owner who regularly beats his slave proposes that he will stop beating him if the slave does something

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[2] Robert Nozick, *Coercion* in *Philosophy, Science, and Method. Essays in Honor of Ernest Nagel* 440 (S. Morgenbesser et al. (eds.), New York: St. Martin's Press, 1969).

which is not particularly burdensome. Again, from a non-moral "statistical" or "empirical" baseline concept, this is undoubtedly an offer. And still here we feel the same moral confusion. If one is to reject slavery outright, one cannot acknowledge any baseline which includes slavery. In other words, a moral baseline presupposes the inviolability of the moral rights.

Here is the crux of the matter. There can be different descriptions of situations, each implying different concepts of a baseline judging from which the situation has been framed as coercive or voluntary. Nozick shifts frameworks: in one case the normal course of action takes precedence over the moralized account and vice-versa in another:

> Sometimes the first takes precedence in determining the status of a proposal, as in the slave-owner case, but this will not always be so. In another case Nozick considers, a drug supplier proposes that he will give an addict the dose he usually sells him for $20 only if the addict will, in addition, perform some disagreeable task. In the normally expected course of events, this supplier sells the addict the dose for $20; in the morally required course of events (we shall suppose), he supplies no drug. Nozick suggests that the proposal is a threat. This time, the baseline established by the normally expected, and not the morally required, course of events takes precedence. Why? Nozick suggests that this is determined by Q's preferences. In general, a proposal is an offer only if Q prefers moving from the "pre-proposal situation" to the "proposal situation"; it is a threat if Q strongly prefers not making this move. And, where the morally required and normally expected baselines diverge, the relevant pre-proposal situation is also picked out by Q's preferences. The slave prefers the morally required course of events (he is not beaten at all) to the normally expected course of events (he is beaten); whereas the addict (we may suppose) prefers the normally expected course of events (he gets his dose for $20) to the morally required course of events (he is not an addict). In each instance, it is the victim's preference which determines which pre-proposal situation determines the status of the proposal itself, and it is the frustration of this preference which makes acquiescence to the proposal a case of unfreedom.[3]

Another thing is that the concept of "the normally expected range of actions" or options seems to be rather vague. The problem is that the mere fact that a butcher raises the price of meat falls neatly within this description. Should we acknowledge that each and every rise in price is coercive?[4] In order to overcome this difficulty,

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[3] David Zimmerman, *Coercive Wage Offers*, 10(2) Philosophy & Public Affairs 121, 128–129 (1981).

[4] Harry G. Frankfurt, *The Importance of What We Care About* 30 (Cambridge: Cambridge University Press, 1988).

Harry G. Frankfurt proposes imposing restrictive conditions. An offeree should be dependent on the offeror due to the absence of any rational possibility to get the required good elsewhere, he should be in need of the good and the offeror should exploit his need and dependency.[5] The basic problem here is whether we are ready to equate coercion and exploration *tout court*. One can exploit the hard choice, which another has to make, but which he has not created. More than that, such a choice can be created by chance, for which nobody is to blame. Under such circumstances, it is at least inaccurate to state that each case of exploitation is a case of coercion. Coercion normally implies some intentional stance of the coercer in that he creates the situation that coerces. What is more important from our perspective is the shift in focus from the normally expected range of actions and options to counterfactuals. This shift is even more dramatically manifested in Daniel Lyons' and David Zimmerman's papers on coercive offers.

Daniel Lyons created his own methodology, which boils down to the following:

> P's offer counts as coercive if 1) P knows that Q is rationally reluctant to give y to P for x; and 2) Either Q knows that he has a right to x from P on easier terms, or Q knows that P would have given x to Q, on easier terms, if the chance had not arisen to trade x for y.[6]

Lyons interprets Nozick as follows:

> Nozick said that whenever a seeming offer really involves a threat, it is because the package offered falls short of what might be expected (either morally or customarily).[7]

Lyons clarifies that "what might be expected" is a "minimum transfer price." If the price is sufficiently higher than the "economically rational" minimum transfer price, it is likely to be coercive because the offeror is trying to exploit an existing vulnerability of the offeree and to acquire a surplus to which he is not entitled under normal circumstances.

Grossly oversimplified, Lyons' basic insight follows the lines of Harry G. Frankfurt. He treats each exploitative offer as a coercive one, basically because it is the fact of the offeree's vulnerability to the otherwise (normally) inaccessible offer that makes him accept it. What seems to be the genuine contribution of Lyons himself is a more precise and more technical definition of this "otherwise (normally) unacceptable offer." In contrast to Frankfurt, who applied a relatively vague criterion of "need," Lyons

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5 Frankfurt 1988.

6 Daniel Lyons, *Welcome Threats and Coercive Offers*, 50(194) Philosophy 425, 436 (1975).

7 *Id.* at 426.

claims that "non-normalcy" means significantly higher than the minimum transfer prices or violation of the previously existing moral right of the offeree (Nozick's example of the slave owner's offer fits well here).

1. David Zimmerman on Coercive Offers

David Zimmerman has provided the most sophisticated and thought-provoking analysis of the coercive offers problem. Zimmerman rejects the exploitation and coercion equation, as well as the two-baseline demarcation of coercive and voluntary, but retains, develops and extensively relies on counterfactuals in his analysis of the problem.

> In 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 pre-proposal situation Q strongly prefers.[8]

The most important thing to understand about Zimmerman's concept of coercive offers is that this "pre-proposal situation," which the offeree strongly prefers, has nothing to do with the actual pre-proposal situation. It is a pure contrafactual. An alternative situation would have taken place, if offeror had not actively prevented it.

In order to elucidate the point, let us take the much-discussed example of the slave owner promising to stop to beating his slave (which he does on a regular basis) in exchange for the slave's promise to do something which is not particularly burdensome. In this case, the slave does not want to retain the pre-proposal situation. The post-proposal situation is altogether coercive because, from each moral baseline, slavery is wrong from the beginning.

> It is somewhat misleading, therefore, to analyze coercion solely in terms of whether or not the move from pre-proposal to proposal situation makes Q considerably worse off, because this does not bring out explicitly the connection between the structure of coercion and unfreedom. The more important (as well as more basic) feature is that Q strongly desires not making the move. Nozick himself implies as much when he talks about situations in which the morally required and normally expected baselines diverge.[9]

Furthermore, Zimmerman claims that the moral baseline is incoherent in itself:

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[8] Zimmerman 1981, at 133.

[9] *Id.* at 128.

> On Nozick's account, the slave-owner's proposal counts as coercive in part because he has a prior obligation to refrain, without conditions, from beating the slave. This invites an explanation of the wrongness of his proposal directly in terms of the violation of this prior obligation: what he should give unconditionally he gives only conditionally. But this explanation makes no explicit reference to the non-moral features which figure in the utilitarian and Kantian accounts of the prima facie wrongness of the coercion itself. To be sure, utilitarian and Kantian reasons can be given for why the slave-owner ought to refrain unconditionally from beating the slave, but it is one thing to say his proposal is coercive because he *violates a prior obligation*, which is itself grounded in either utilitarian or Kantian reasons, and quite another to say that his act of coercing the slave is wrong because it has *those non-moral features* which figure in the utilitarian and Kantian principles. Only the second explanation makes explicit reference to the relevant non-moral features, therefore only the second tells us what it is about coercion that makes it prima facie wrong.[10]

So, the task is to construe an unmoralized one-baseline account of coercion, which should not include cases of exploitation pure and simple. The solution is quite remarkable: counterfactuals. The essence is as follows:

> My suggestion is that we retain the normally expected course of events as the relevant pre-proposal situation in *all* cases, and then broaden the framework as follows to account for the coerciveness of certain offers. The slave does in fact prefer to move from the pre- proposal situation in which he is beaten every day to, the proposal situation in which he is spared the customary beating for performing the disagreeable task, so let us concede, for the sake of theoretical uniformity, that the slave owner is making a genuine offer. 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*. The slave, for example, would strongly prefer not being a slave to having a choice between being beaten and being spared a beating for performing a disagreeable task.[11]

To make this alternative pre-proposal situation more precise, Zimmerman formulates two conditions.

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[10] Zimmerman 1981, at 130–131.

[11] *Id.* at 132.

> First, there has to be some kind of a feasibility condition: 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.[12]

The second is the prevention condition:

> …the 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 pre-proposal situation Q strongly prefers.[13]

Now, we have finally solved two problems in one go. First, we have got the one-baseline unmoralized framework of coercive offers. Because, even in the most difficult cases, such as that of the slave owner's offer, we can get rid of "violation of the pre-existing moral right (of the slave)" criteria and compare the factual post-proposal situation with the alternative *counterfactual* situation. In order to make sure that this contrafactual is a *real alternative* and not just some fantasy or desire that has no chance of being realized in the real world, relatively strict conditions are imposed on it. What makes the whole scheme even more plausible is that it separates the cases of coercion and exploitation.

2. Applicability to Power-Conferring Legal Regimes. Critical Remarks

These reflections help us to understand why Schauer chose such a strange baseline to assess the coerciveness of a power-conferring legal regime.[14] If the application of a contrafactual, at least under some restrictive conditions, is valid, then why not hypothesize something like a power-conferring regime without restrictions on the form of legal acts? In that case, a power-conferring legal regime with form restrictions would be made up of coercive offers.

In my view, the problem is that a hypothetical situation like that does not fit any of the descriptions of coercive offers which we have analyzed. In "offering" power-conferring legal rules, legal orders do not normally exploit weaknesses or vulnerabilities of the legal subjects to get something from them that they should

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[12] Zimmerman 1981, at 131.

[13] *Id.* at 133.

[14] Schauer 2015, at 28–29.

not or would not have got if not for the said weaknesses and vulnerabilities. The form requirement has an entirely different objective in the standard case: to soften the proof in the court and to assure the seriousness of the intention of the parties involved in the transaction.

That is why one cannot conclude that legal orders intentionally and actively remove some feasible alternative in order to coerce one to "choose" power-conferring rules with form restrictions. The goal of the law is entirely different. There is considerable doubt as to whether most power-conferring legal regimes could have existed without form requirements. In other words, neither the non-prevention, nor the feasibility condition are present.

Still, there exists a possibility to conceptually assert the coerciveness of the power-conferring legal rules from the standpoint of Zimmerman's theory. One should bear in mind the initial motive of Zimmerman: to clarify the extent to which the capitalist labor market is coercive. This is an old and quite traditional element of Marxist sociology. Interpreted in this context, Zimmerman's model of coercive offers can be applied to power-conferring legal regimes.

In order to fully understand the theory, let us examine the "non-prevention condition" more closely. Zimmerman assumes that the coerciveness of an offer in the relevant cases means two things. First, the fact that the proposal of the coercer is very inappropriate, presenting a "hard choice" from the standpoint of the coercee. And, secondly, that the whole situation involving this hard choice was totally created by the coercer himself. In other words, it was not bad luck that put the offeree in the hard choice situation but the actions of the offeror himself. Zimmerman illustrates the whole thing using the following case.

> Consider the difference between these two cases. A kidnaps Q, brings him to the island where A's factory is located and abandons him on the beach. All the jobs in A's factory are considerably worse than those available to Q on the mainland. The next day A approaches Q with the proposal "Take one of the jobs in my factory and I won't let you starve." Coercive or uncoercive? B also owns a factory (the only other one) on the island, in which the jobs are just as bad. Seeing Q's plight, he beats A to the scene and makes the same kind of proposal. Coercive or uncoercive? Let us concede that both A and B make genuine offers, for in each case Q would presumably prefer to go from the actual pre-proposal situation in which he starves on the beach to the proposal situation in which he has a choice between working at a terrible job or starving. Let us also concede that both A and B exploit Q's misfortune by offering such bad terms. (Whether their terms are unfair we can leave to the theory of justice.) The question is whether they both coerce Q.[15]

[15] Zimmerman 1981, at 133.

The difference between the two cases marks the difference between the exploitative offer pure and simple, on the one hand, and the coercive offer, on the other:

> The intuitive idea underlying coercion is that the person who does the coercing undermines, or limits the freedom of the person who is coerced, so coercing goes beyond exploiting, however morally objectionable the latter may be. If the island wage-level is unfairly low, then B wrongs the dependent Q in only one way: he offers him an exploitive wage. But A wrongs him in two ways: first, he places Q in a dependent position where he is vulnerable to exploitation, and then he offers him an exploitive wage.[16]

In other words, in the case of coercive offers, coerciveness stems from the fact that the offeror has placed an offeree in the situation of a hard choice. When this is not the case, and an offeror simply exploits the preexistent vulnerability of an offeree, there is no coercion. It seems reasonable, because "trade threats" is a model case of coercive proposals.[17] Threats are some evils, e.g., inflicting pain, which are intentionally created by the coercer in order to obtain what he wants from the victim. Offers are proposals of something good and valuable to the offeree in order to obtain what the offeror needs. Coercive offers are a hybrid in the sense that the coercer offered something valuable to the offeree, but it becomes valuable only because the offeree has been placed in a deplorable situation by the offeror himself in order to obtain his consent.

The most interesting thing in the whole story is how Zimmerman applies it to the assessment of the coerciveness of the capitalist labor market:

> Whether capitalist wage offers are coercive or not depends on whether an alternative pre-proposal situation is feasible *which is sufficiently better* than the terms of the actual wage offer *and* which capitalists prevent workers from having.[18]

A possible description of the feasibility condition is as follows:

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[16] Zimmerman 1981, at 134.

[17] By this I mean that threats are biconditional statements, as Joel Feinberg has convincingly demonstrated. Proposals are asserted in the form: "1. If you do Y, then I will do X, and 2. If you do not do Y, then I will not do X," where the threat is something "bad," which would be intentionally inflicted on the victim in the case he rejects the proposal (the first prong of the biconditional). *See more* in Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Self* 217 (New York: Oxford University Press, 1986).

[18] Zimmerman 1981, at 140.

> The main alternative pre-proposal situations *outside* the capitalist framework are various kinds of cooperative and communal enterprises.[19]

The word "outside" (italicized by Zimmerman) is key to comprehending the idea. This is not about higher or lower salary proposals within an existing system of a capitalist labor market. Within *that system*, an employee always (or nearly always) has a choice. It is about some other possible alternative system with far better labor conditions, which is economically and technologically possible but non-existent because it is prevented by the capitalists.

Zimmerman is rather cautious about the non-preventing condition in that case:

> Various actions and policies within the capitalist framework would count as preventing, and it is clear that most of the important ones involve collective activity, coordinated in one degree or another. (Just how much coordination is required for the satisfaction of the prevention condition is not clear.) For example, capitalists might attempt to depress wage levels by union-busting, or by actively lobbying for "right to work" legislation, or, more subtly, by threatening to move their plants to neighboring regions, or even overseas, where unions are already weak or non-existent. They might oppose an improvement of working conditions by resisting anti-pollution or safety-device regulations. More radically, they might resist attempts to create alternative enterprises outside the capitalist framework.[20]

This is a rather curious list. The basic problem with it is that it is not entirely clear whether a specific intention, a kind of *animus doli*, on the part of "the capitalists" is required. After all, they could simply strive for better and more competitive business conditions. And the deterioration (or, more accurately, distribution of the surplus between employers and employees which is worse for the employees compared to a possible more equal distribution) for the employees is a side effect of the employers' activities at best.

Zimmerman is quite aware of this and added:

> It might be claimed that this is less a matter of preventing the emergence of a non-capitalist alternative than simply one of not providing the necessary resources, less a matter of capitalist interests harming their non-capitalist competitors than simply of not helping them. This raises difficult issues which I will not try to tackle here. Again, I will rest satisfied with a conditional claim: if this kind of discretionary control of capital resources counts as preventing

[19] Zimmerman 1981, at 140.

[20] *Id.* at 143.

> the emergence of an alternative non-capitalist pre-proposal situation, then one condition for the coerciveness of capitalist wage proposals is satisfied, but if instead it is a case of not helping a potential competitor, then these wage proposals are, at most, exploitive.[21]

It seems as if there were a certain qualitative difference between Zimmerman's "kidnapping case" and his own assessment of the coerciveness of the capitalist labor market. In the "kidnapping case," the coercive intention to place the victim in a situation of a forced difficult choice between hard labor or starving is evident enough: the very situation of the hard choice was artificially created by the "employer" with the intention of getting what he wants anyway. The second situation with the capitalist labor market as a whole is not all the same. Here, any given capitalist is not responsible for the existence of the "hard choice" of any given employee, i.e., for the existence of the capitalist labor market. In a sense, any capitalist is "coerced" to the same extent to which any laborer is.[22] Anyway, in most cases a special intention to coerce (what continental private law scholars used to call *animus doli*[23]) is absent from the labor market.

This means that, in the case of the capitalist labor market, coerciveness can be conceived far more broadly so as to include some market activities which are typically considered "business as usual." Take the "discretionary control of capital resources." Capitalists generally control the capital resources, which is a kind of conceptual necessity. If the capital market is closed to "various kinds of cooperative and communal enterprises" precisely because the capitalists want to suppress the alternative and not solely on efficiency grounds, then the situation is similar to the "kidnapping case."

However, the fact is that the capital market is subjected to the same kind of "coerciveness" of efficiency considerations: if something generates value it will be financed anyway. One can hardly "close the capital market" to profitable initiatives, whatever they may be. Efficiency considerations work against biases.

We still need to try and make sense of the analogy between the asserted coerciveness of the labor market, on the one hand, and power-conferring legal regimes, on the other. Power-conferring legal rules are offers in the sense that they

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21 Zimmerman 1981, at 144.

22 The point was masterfully demonstrated by Lawrence A. Alexander in *Zimmermann on Coercive Wages*, 12(2) Philosophy & Public Affairs 160, 162–164 (1983).

23 A brief and useful presentation of the history of the *actio doli* within the continental legal dogma is one by Hans-Peter Haferkamp in *Historisch-kritischer Kommentar zum BGB. Bd. I: Allgemeiner Teil, §§ 1–240* 1035–1058 (M. Schmoeckel et al. (eds.), Tübingen: Mohr Siebeck, 2003). Prof. Haferkamp is the author of another marvelous piece on the latter development (probably a mutation) of doctrine in the context of German legal doctrine of the 20th century: Hans-Peter Haferkamp, *Die heutige Rechtsmissbrauchslehre – Ergebnis nationalsozialistischen Rechtsdenkens?* (Berlin: Berliner Wissenschafts-Verlag, 1995).

promise benefits, not costs. But while conferring benefits, they define the conditions of their own application restrictively. One cannot simply "come and take" the benefits; one should comply with some formal requirements. These formal requirements are often freedom-limiting.

It would not be completely unreasonable to hypothesize some alternative proposal situation, where the benefits of power-conferring is combined with the absence of formal restrictive "entry conditions." In other words, it is possible to attempt to apply Zimmerman's theory of coercive offers to power-conferring legal rules with some formal requirements. In this case everything depends on whether or not it is possibly to satisfy feasibility and non-prevention conditions. Only if both conditions are satisfied can one conclude that this alternative arrangement can serve a baseline from which we can say whether the power-conferring rules are benefits or costs.

Feasibility conditions cause many problems. It is really hard to imagine the existence of power-conferring regimes without some legal requirement in the form of legal acts. The form of legal acts requirement is normally indispensable with regard to the values of predictability, legal certainty and the efficiency of administration of justice. This alone makes the feasibility conditions problematic in our context. Still, I think there are at least two important considerations that speak for the plausibility of further research with regard to feasibility conditions.

The first thing one should bear in mind is the widespread doubt about the distributive neutrality of power-conferring legal regimes. Simply put, the problem is as follows: power-conferring presupposes some sort of a distributional scheme that determines who can own what and to what extent goods can be legally owned and by whom. The extent of legal rights is not a matter of natural necessity, nor can it be defined on purely conceptual considerations. If this is correct, one can define the boundaries of legal entitlements in a variety of ways, each of which will be genuinely distinct in its possible impact on the distribution of wealth between different classes of legal subject (owners, creditors, debtors, third parties, etc.). Some legal entitlement schemes will be more beneficial for some classes of persons and more detrimental to others. This is, in brief, the theory of distributional non-neutrality of private law.[24]

What is even more important from our perspective is that the level of the formality in private law has been considered distributively loaded.[25] The more formal the law of the capitalist society, the more it reflects the values of individualism and self-reliance

[24] There is an immense body of literature on that subject. The distributive non-neutrality of private law is a key thesis of the Critical Legal Studies Movement. *See, for example*, Duncan Kennedy, *The Rise and Fall of the Classical Legal Thought* (Washington: Beards Book, 1975); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41(4) Maryland Law Review 563 (1982). For a more mainstream perspective *see* Anthony T. Kronman, *Contract Law and Distributive Justice*, 89(1) Yale Law Journal 472 (1979–1980).

[25] Kennedy 1975.

at the expense of a more communitarian version of social relationships. The logic is simple: economic calculability requires the maximum previsibility of each economic agent vis-à-vis the others with regard to his legal duties and rights. This can be best achieved by way of making the boundaries between the legal spheres of different subjects clear cut. This means, first and foremost, that legal acts through which the boundaries being established should be formal, as the artifice of the form makes the boundaries easily recognizable and guarantees the seriousness of the intentions of the subjects of legal acts.

Alternatively, laxity towards form requirements is typical of more communitarian societies where values of mutual help are widespread. Here, implicit duties, duties arising from reliance, etc., are far more present. Under such circumstances, strict form requirements lose their importance because rights and duties are considered the products of the contexts of the mutual relationship of the parties; the boundaries exist but they are not so clear cut.

Even the proponents of the CLS Movement continue to dispute the plausibility of the picture drawn here.[26] But let us take the thesis for granted as a hypothesis. In that case, the form requirements of legal acts are not distributively neutral. This means that alternative arrangements with different form requirements can be beneficial to some social groups and detrimental to others. For example, those social groups controlling the legal system can manipulate the form requirements of legal powers to extract rents. This makes the whole picture entirely different. There can be alternative legal arrangements with stricter and stricter form requirements, which really are feasible.

The second point about the feasibility condition is about its relationship to the non-prevention condition. The initial problem with the feasibility condition as Zimmerman models it lies in its partial indeterminacy. Feasible means economically and technologically possible. Such level of abstraction is acceptable for macro-sociological or philosophical research. But it is not particularly convenient in order to determine the baseline for assessment of the coerciveness of the proposal in a concrete case. In a sense, the non-prevention condition helps to bridge this gap. If it is possible to establish that the offeror actively prevented the emergence of an alternative social arrangement (pre-proposal situation in Zimmerman's theory), it is at least quite plausible to suppose that this alternative has been feasible. In other words, the non-prevention condition makes the feasibility condition more determinate and practically operative.

Applied to our case of power-conferring legal regimes, one can state the following: if it is possible to claim that some alternative power-conferring legal regime was actively prevented by those controlling the legal system, then, *ipso facto*, the feasibility condition is established.

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[26] *See, for instance*, Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge: Harvard University Press, 1990), Chs. 2, 3.

Taken together, these two points make the analogy between Zimmerman's concept of coercive offers and power-conferring legal regimes. The distributional non-neutrality thesis demonstrates the possibility of alternative legal arrangements with differential distributional consequences vis-à-vis different social groups. The non-prevention condition helps us pick the relevant (really feasible) alternative from a set of possible socio-legal arrangements.

The key question is in what sense the non-prevention condition is to be interpreted. As we have already seen, Zimmerman is pretty ambiguous on this point. In some cases, "actively prevent" means to act intentionally, perhaps even to commit a crime. This was crystal clear in the "kidnapping case." In other cases, the expression "actively prevent" is anything but an intentional crime.

This ambiguity has been critically reflected by Lawrence A. Alexander in his thoughtful and invigorating analysis of Zimmerman's model of coercive offers.[27] Alexander sees three possible interpretations of the non-prevention condition. The first interpretation lies in the distinction between acts and omissions. The very distinction is extremely difficult to sustain. Besides, as Alexander remarks,

> …Zimmerman wants to say that B, the non-kidnapping factory owner, does not coerce Q, the kidnap victim, even though B acts to prevent Q from helping himself to the content of B's safe and omits providing Q with money and/or transportation back to the mainland.[28]

This is particularly true of those cases in which the allegedly "coercive effect" is not attributable to any individual intentionality but is the result of the function of a complex social system. Labor markets, as well as power-conferring (private) legal arrangements are precisely such cases. Let us return to Robert Nozick's slave owner. Here, the mere fact that the slave owner is reluctant to free the slave is a relatively robust example of how mere non-action can be an instance of "active prevention." Is it possible to compare a capitalist in the labor market acting out of self-interest and not supporting "alternative arrangements" for his employees to the slave owner failing to consider freeing his slave? Generally speaking, to what extent is a given capitalist responsible for the freedom-limiting effects of the workings of anonymous and impersonal market structures?

One can probably apply some moral standard of mutual responsibility and care to others, which dominates in a given society. But, as Alexander rightly states, this is not an option for Zimmerman taking into account his firm intention to preserve an uncompromisingly unmoralized model of coercion.

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[27] Alexander 1983.

[28] *Id.* at 162–163.

> The only remaining way of drawing the distinction is to say that X prevents Y from obtaining a given preproposal situation if Y would have obtained that situation in a world without X, whereas X merely does not produce Y's preferred preproposal situation if Y could not obtain it in the absence of X. Libertarian liberals such as Nozick are primarily distinguishable from welfare-state liberals such as Rawls because the former do not allow any nonconsensual appropriation of X's body, talents, or labor-assets that would not exist to be appropriated by Y if X did not exist. If, in Zimmerman's island hypothetical, Q's strongly preferred pre-proposal situation would require that B give Q assets that would not have existed had B not existed, then B's refusal to put Q in such a preproposal situation is a case of not producing the situation rather than one of actively preventing it, and B's wage proposal to Q is noncoercive. If Q has an alternative, strongly preferred preproposal situation in which he possesses resources now possessed by B, but resources that are not human products – for example, land, air, and scenic views that could have been possessed by Q had B not existed – then B's refusal to put Q in such a situation is coercive. Of course, the implications of this are uncertain. For instance, if the natural resources are given to Q rather than B, and now B must work at a distasteful job for Q or starve, Q's wage proposal to B will also be coercive. If the resources are split evenly, both B's and Q's wage proposals to the other will be coercive if each strongly prefers the preproposal situation in which he could have possessed all the resources.[29]

In other words, when it comes to monopolies, the difference between coercion and exploitation, i.e., the cornerstone of Zimmerman's coercive whole offers narrative, fades away completely.

Applied to the power-conferring legal regimes, all this means that they can have a coercive effect in the case of their dominance as a mode of governance within a given society. In other words, when (state law) power-conferring legal regimes outperform and crowd out the previously existing alternative scheme of governance (more beneficial for some social groups at some points), such power-conferring legal rules should be treated as coercive offers.

Interestingly enough, in view of Alexander's extremely smart *reductio ad absurdum* criticism, Zimmerman has made some qualifying remarks precisely on this point:

> …note that where P has a monopoly over some scarce resource, whether natural or humanly produced, the only way *at time t* for him to prevent Q from having it, and thus from having Q's strongly preferred preproposal situation, is for him either to refrain at t from giving it to Q or to prevent Q at t from taking

[29] Alexander 1983, at 163.

> it. But this means that under conditions of monopoly the distinction I have been so eager to build into my analysis collapses. Is there any way to save it and with it the distinction between coercive and exploitive monopolies? One which comes to mind is to place constraints on *how P came to be a monopolist before t*, so that P prevents Q from obtaining some scarce resource on his own only *if P acted before t* to acquire all of the resource. If, on the other hand, P enjoys a natural monopoly (suppose that all but P's holdings in the resource were destroyed before t), then P merely refrains from giving or merely prevents Q from taking, and is thus merely an exploiter. Note that this way of handling monopolies entails that P's offer is also merely exploitive if he has become a monopolist by being *given* all of the resource.[30]

But how should one treat the dominance of the power-conferring legal regimes from this angle? One should bear in mind that power-conferring legal rules do not make alternative schemes of governance illegal, or legally impossible by prohibiting them or imposing duties to use only state law because, conceptually, they do not impose duties at all. As I have already mentioned above, power-conferring legal regimes can dominate by outperforming their competitors. Now, does that mean that a monopoly is coercive or purely exploitative? Again, it is not clear. On the one hand, the establishment of the monopoly in question has never been the result of pure chance but implies intentional efforts and reflects cost/efficiency considerations. On the other hand, this competitive result as a whole is not attributable to any individual intent. In other words, everybody uses power-conferring legal regimes primarily because of their competitive advantages, but this widespread utilization of them by most of the population most of the time makes them predominant and supplants their competitors.

All this means that only two possibilities remain. One can agree that the distinction between active prevention and mere omission to support collapses in the context of complex social arrangements, in the case of which power-conferring legal regimes could be interpreted as coercive. But the price seems to be prohibitive for the whole Zimmerman model as the non-prevention condition becomes redundant.

The other possibility is to try to reinterpret the non-prevention condition in a more "classical" intentionalist fashion. In that case, only those social outcomes that have been generated by the purposeful activity of the coercer are to be considered as coercive. However, this is not the case when those outcomes are the effects of the workings of the anonymous dominant social structures. This interpretation seems to be even more problematic for Zimmerman. Not only are the power-conferring legal regimes as well as competitive labor markets non-coercive according to it; that

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[30] David Zimmerman, *More on Coercive Wage Offers: A Reply to Alexander*, 12(2) Philosophy & Public Affairs 165, 168–169 (1983).

the narrative is utterly libertarian. Ironically enough, the non-prevention condition seems to be redundant either. In this case as well because it has been reinterpreted into *animus doli*.

In other words, Zimmerman's model of coercive offers, ingenious as it may be, is incoherent on its own terms. Consequently, we should state that it cannot be applied to justify the coerciveness of the power-conferring legal rules thesis.

3. Joel Feinberg's Equation of Coercion and Exploitation

Still, the list of possible justifications is not exhausted. The fact is that the fundamental source of the incoherence of Zimmerman's model of coercive orders lies in its basic insight: to discriminate between purely exploitative and non-coercive offers, coercive exploitative offers and coercive threats. Traditionally, there existed only a dichotomy, not a trichotomy. The sole question has been whether one should treat each and every offer as voluntary and each and every threat as coercive. Or whether one should acknowledge the parallel co-existence of the two pairs, i.e., threats/offers and coercive/voluntary. In that latter case, offers could be coercive not only in the paradigm case of a threat, but also in some other cases, for instance, in the case of exploitation of some vulnerabilities of the coercee.

The uniqueness of Zimmerman's theory of coercive offers lies in the fact that Zimmerman models his coercive offers according to the "threat pattern." Namely, pure exploitative behavior is not sufficient to make an offer coercive. One needs much more to "move" an offeree somehow to face rather a hard choice. This is basically the point of Zimmerman's non-prevention condition. As we have seen, its crucial function is twofold. First, it serves as a proxy for the feasibility of the offeree's pre-proposal situation. Second, it makes the difference between coercive and purely exploitative offers clearer. In both cases an offeree is faced with a proposal which enhances his freedom in the sense that he now has more options to reflect upon than before the offer was been made. And in this respect offers, both standard, exploitative and coercive, differ from threats which are freedom-limiting and diminish the range of the possible options of an offeree. What distinguishes coercive from exploitative offers is that, in the first case, an offeror has artificially created a hard choice for an offeree by "actively preventing" him from moving to a less dramatic pre-proposal situation. As Alexander has demonstrated, this distinction between active prevention and mere exploitation collapses precisely in the context of the workings of complex social systems. Under circumstances like this, the most plausible alternative would be to treat only (freedom-diminishing) threats as coercive and each and every (freedom-enhancing) offer as voluntary. In this case, the mere fact of the exploitativeness of an offer is not considered as coercive and it goes without saying that, in that case, all power-conferring legal regimes are treated as non-coercive.

But there is another possibility: to treat all exploitative offers as coercive. This seems to be the viewpoint of Joel Feinberg. Feinberg thinks that only "uncritical acceptance of the dogma that coercion *must* have an immediate effect on restricting freedom on balance"[31] make us suppose otherwise.

> Suppose opportunistic A holds out to unfortunate B the prospect of rescue or cure – but for a price. B is in an otherwise hopeless condition from which A can rescue her if she gives him what he wants. He will pay for the expensive surgery that alone can save her child's life provided that she becomes for a period his mistress. A thus uses his superior advantages to manipulate B's options so that she has no more choice than she would have if a gunman pointed his pistol at her healthy child's head, and threatened to shoot unless she agreed to become his mistress. The difference between the two cases, of course, is that the lecherous millionaire makes no unlawful *threat*.[32]

Still, such proposals are coercive offers:

> They appear to be coercive in that they rearrange a person's options in such a way that he "has no choice" but to comply or else suffer an unacceptable consequence. They are offers because the proposer does not threaten any harm beyond what would happen anyway without his gratuitous intervention.[33]

The most interesting point in Feinberg's analysis is that he thinks coercion can be freedom-enhancing:

> A's purpose is to force B to do what A wants, so when thought of as an instrument for achieving A's goals, his offer is an exercise of coercion. From B's standpoint… her only choice is a coerced one – sleep with me or your child dies – so there is a real point in characterizing A's offer as coercive. She must now do as he wishes. Yet there is also a point in B's welcoming an option she did not have before. Hence from B's standpoint, the description "freedom-enhancing coercive offer" is entirely felicitous in having this double point…[34]

Feinberg acknowledges several problems with this description. First of all, as he claims himself, there exists a difference between the model "gunman case"

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31 Feinberg 1986, at 233.

32 *Id.* at 229–230.

33 *Id.* at 230.

34 *Id.* at 233.

of coercion[35] and the cases of purely exploitative "coercive offers." He lists three conditions of coerciveness: the coercive effect on B's choice, coercive intent and the coercive mechanism employed to achieve the intended effect. The first two conditions are present in the cases of purely exploitative coercive offers:

> In the lecherous millionaire example there is surely coercive intent, since A's purpose in making his proposal is to force B to do his bidding. Equally surely there is coercive effect, since B is left with a forced choice between evils, one of which is extreme and intolerable to her, and therefore "ineligible," while the other, that favored by A, is highly repugnant but the lesser of the evils has to choose between.[36]

The basic problem lies in the lack of the third condition:

> What is not as clear is whether the mechanism used by A to achieve his intended effect on B is of the proper sort to be called "coercive." In the paradigm cases, the coercive method involves active manipulation by A to limit B's options, thus creating the very circumstances that A intends to exploit in order to make his subsequent offer effectively coercive. In the borderline cases we can also ascribe some "manipulation" to A, but no active intervention in B's affairs to limit B's options and thus create the exploitable circumstances. In these cases, A is an opportunist, not an arranger, so very likely his manipulations are not active enough to satisfy the initial defining conditions of the "coercive mechanism."[37]

Simply put, Feinberg's solution is to ignore the difference. He thinks that the problem cannot be resolved "on purely conceptual grounds." But why so? The second idea is that coerciveness does not necessarily invalidates the consent of an offeree. An offer can be coercive but not necessitate involuntary acceptance due to coercion:

> Active coercion which both creates and exploits a situation of vulnerability always reduces voluntariness, typically to the point where consent is invalid, whereas offers that exploit a condition already made also reduce voluntariness, but usually not to the point where consent is invalid.[38]

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35 A gunman with a gun says: "Money or life."

36 Feinberg 1986, at 247.

37 *Id.*

38 *Id.* at 248.

But what function will such a coercion concept serve? It has long been asserted that coercion contexts vary.[39] One can probably claim that there is one set of conditions for the coercion concept to fulfill its function in the context of the invalidation of the coerced choices and quite another set of conditions in the context of the justification of coercion by the state through legal institutions. But the peculiarity of power-conferring legal regimes is precisely that they lie at the intersection of the both sets of conditions, and this is the most interesting thing about the power-conferring legal rules.

On the one hand, power-conferring law is law. And, as (state) law, it is in need of justification, as it imposes itself and is mandatory and coercive in one sense or other. On the other hand, power-conferring is optional conceptually. In that sense they resemble offers, not threats. So one cannot simply discriminate between two contexts of application of the coercion concept with different conditions of assertability for each. Ironically, precisely this problem was raised by Feinberg and Zimmerman from with regard to the coerciveness of the capitalist labor market. Here we too have anonymous social structures that determine the sets of options and the extent of voluntariness with which the market actors are faced. This conditioning cannot be attributable to somebody's malice or even individual intent. The "leftist" general premise to question the voluntariness of labor market outcomes in purely exploitative contexts explains why the term "coercive" was retained by both Feinberg and Zimmerman with all its connotations, whether pejorative or not, and still raises legitimacy issues.

4. Applicability of Feinberg's Concept to Power-Conferring Legal Regimes

Let us test the level of coherence of this unitary concept of coercive offers. First of all, it eliminates the non-prevention condition of Zimmerman's model and makes every exploitative offer coercive. But at a price. From a vantage point like that one simply cannot equate coercion to limiting freedom as offers do not limit freedom. This "quantum" of coercion has been preserved even in Zimmerman's model, not to mention the traditional that only threats are coercive because they limit freedoms. Now, what is the coercion "quantum" if not a limitation on freedoms according to Feinberg? Feinberg writes that the basic problem with coercive offers is that an offeree is faced with a forced choice between undesired or even unbearable alternatives. But most people have to make hard choices between undesirable alternatives. What makes a hard choice coerced? If one is threatened, i.e., intentionally placed in a situation involving a hard choice between evils, or even evil and good, where the whole situation of the choice is artificiality created, the case is relatively simple.

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[39] Grant Lamond, *The Coerciveness of Law*, 20(1) Oxford Journal of Legal Studies 39, 47–51 (2000); Mitchel N. Berman, *The Normative Functions of Coercion Claims*, 8(1) Legal Theory 45, 46–50 (2002).

But, in our case, the coerciveness steams from the fact that an offeree is placed under a choice between a totally unacceptable and unbearable result and a less undesirable alternative, created by an offeror. The difference is that, in the first case, a coercee would not have to make a hard choice at all and, the second case is very different in that the least desirable alternative offered is the only way to escape the totally unacceptable result for which nobody is to blame. What both cases have in common is not that the coercee is placed in a position that necessitates the making of a difficult choice. The real common denominator is that both coercees experience considerable psychological pressure.

Purely psychological accounts of coercion are not particularly good for several reasons. First of all,

> there does not appear to be a psychological distinction, from the standpoint of voluntariness, between fear, desire and other motivating conditions. Even behavior motivated by fear is typically characterized as free, as when the agent escapes some dangerous condition. Thus, being motivated by fear or the instinct for self-preservation is not sufficient for a claim of involuntariness. Indeed, it is not clear how behavior motivated by desire, fear or any other conscious motivation could ever be involuntary in the sense that it is not volitional.[40]

Secondly, purely psychological theory of coercion is unable discriminate a purely coercive context (whether coercive threats or coercive offers) from cases of simple offers. In the last case, an offeree is faced by an extremely profitable and irresistibly attractive offer. In such a case the psychological pressure can sometimes be even more intense than in cases of a choice between two "evils." In that sense, purely psychologically, it is also the case of a "hard choice." Feinberg rejects this intuitively implausible implication of the pressure theory. The problem is that he makes this rejection a pure stipulation: offers which are coercive by definition are only those offers which place an offeree in a situation in which he must choose between two "evils" (which, nevertheless, increases his freedom), not "goods."

Returning to the lecherous millionaire case, Feinberg claims the following:

> it suffices now to remind the reader of the manner in which the lecherous millionaire did intervene. He did not himself produce the child's possibly fatal ailment, nor did he cause the price of the remedial surgery to be so high. But he did alter B's options in a sufficiently manipulative way to warrant our use of the metaphor of new track construction. His role was not entirely passive. It cannot be far off the mark then to call his proposal both an offer and coercive.[41]

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[40] John L. Hill, *A Utilitarian Theory of Duress*, 84 Iowa Law Review 275, 293 (1998–1999).

[41] Feinberg 1986, at 232–233.

Here, a second criterion for the coerciveness of an offer is added: its exploitativeness. So, an equivalent of Zimmerman's non-prevention condition, i.e., a second party's intentional influence on an offeree's set of choices, is added to make coerciveness more precise. The problem is that second party influence results not in limiting, but in enlargement of an offeree's set of choices. Precisely what makes such offers coercive? One can speculate that the terms of this new proposal could be less exploitative, and that is the main problem. But in that case the real source of the coerciveness concept is a moral theory (perhaps, a more communitarian and a less individualistic moral theory). This is a result which Feinberg would like to avoid, so there is considerable doubt on whether the theory is coherent enough.

But how can all this be translated into the coerciveness of the power-conferring legal regimes which is my main concern? The alleged distributional non-neutrality of power-conferring legal regimes can be seen as an equivalent of an "altering of options in a sufficiently manipulative way." In that case, a distributionally non-neutral power-conferring legal regime can be considered as coercive offers in Feinberg's sense. At the same time, if the choice has not been manipulated, as in the case of form requirements for legal acts, i.e., Schauer's case there is no coercive offer even according to Feinberg's relatively wide coerciveness concept. In other words, *if* one ignores the inconsistencies existing within Feinberg's theory *and* treats distributionally non-neutral power-conferring as a kind of exploitation, one can conclude that some egalitarian power-conferring regimes are coercive.

The problem, however, has been transferred into the realm of the theory of distributive justice, i.e., into the *normative realm*. In other words, one changes the whole focus: instead of asking whether an act is coerced, one asks whether it is *fair* to treat an act as voluntary.

Conclusion

The major difficulty with the applicability of the coercive offers concept to power-conferring through law is that the very concept is a highly contested and partially indeterminate one. The two most impressive and sophisticated versions of the concept are David Zimmerman's and Joel Feinberg's. Both of these can be utilized to defend the claim of the coerciveness of power-conferring legal regimes. However, neither can escape the considerable normative load reproach. In my view, the only possible route to substantiate the coerciveness claim from the vantage point of coercive offers concept is through the distributive non-neutrality of law narrative. This is also a highly disputable frame of reference. Determining to what extent it can be successfully applied requires further research.

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LEGAL PROTECTION OF SEXUAL MINORITIES IN INTERNATIONAL CRIMINAL LAW

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For a long time, the issues of sexual orientation and gender identity have been restrained from entering the legal arena as being regarded as too radical. In today's society, these issues warrant consideration in the context of international criminal law. Critically reflecting on the way of placing these grounds within the international criminal law framework, this paper tries to unpack the sheer possibility of addressing them within the core international crimes. Correctly defining terms such as "sexual orientation" and "gender" is not only germane, but also necessary for international criminal law to tackle them accordingly. By doing so, the power of legal argumentation in international criminal law for protecting sexual minorities is strengthened, but its boundaries and vulnerabilities are also exposed. This paper proposes that the described massive violation of the most fundamental human rights should be legally qualified as persecution. For protecting sexual minorities on an international criminal law scale, it is argued that we are not really "there" yet, but we might just be on the right track.

Keywords: sexual orientation; LGBT; gender; international criminal law; Rome Statute; human rights; crimes against humanity.

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Introduction: How Did We Get Here?

International criminal law aims to protect "peace, security and the well-being of the world"[1] and is foremost an instrument to protect fundamental human rights.[2] The highest point of the crystallization of international criminal law so far is the Rome Statute of the International Criminal Court (hereinafter Statute, ICC Statute), which established the permanent International Criminal Court (hereinafter ICC).[3] One of

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[1] Rome Statute of the International Criminal Court, opened for signature 17 July 1998 and entered into force on 1 July 2002, 2187 U.N.T.S. 3, Preamble (3).

[2] Gerhard Werle, *Principles of International Criminal Law* 45 (2nd ed., The Hague: T.M.C. Asser Press, 2009).

[3] *Id*. at 3.

the main reasons for creating the ICC was the fact that different groups of people suffered from atrocities and that the most vulnerable groups warranted international protection.[4]

One of the many atrocities, which went unacknowledged,[5] was the extermination of homosexuals by the Nazi regime during World War II.[6] The targeting of homosexuals by the Nazis was however neither a historical anomaly nor a sparse or sporadic practice in the world,[7] since people have historically been persecuted on the basis of their sexual orientation or gender identity.

The stellar rise of today's international human rights framework for the protection of homosexuals is certainly laudable, but it is far from reaching a point in which lesbians, gays, bisexuals and transgender (hereinafter LGBT)[8] people are legally protected throughout the world.[9] Today, 72 countries still criminalize private, consensual same-sex relationships and in at least 5 countries, prescribe the death

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4 ICC Statute, Preamble (2).

5 It was not until 2002 that the German authorities apologized to the homosexual community and in 2006 the European Parliament acknowledged the atrocities committed towards the homosexual community during the Nazi regime in its Resolution against homophobia. *See* European Parliament Resolution on Homophobia in Europe, adopted on 18 January 2006, para. 14 (Jan. 15, 2018), available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0018+0+DOC+XML+V0//EN.

6 Valerie Oosterveld, *The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 Harvard Human Rights Journal 55, 77 (nt. 135) (2005). Between 1933 and 1945, an estimated 100,000 men were arrested for violating Nazi Germany's law against homosexuality, and of these, approximately 50,000 were sentenced to prison and the rest were sent to concentration camps, where an unknown number of them perished. Second Reich Penal Code, para. 175 read: "An unnatural sex act committed between persons of male sex or by humans with animals is punishable by imprisonment; the loss of civil rights might also be imposed." Persecution of Homosexuals in the Third Reich, Holocaust Encyclopedia – United States Holocaust Memorial Museum (Jan. 15, 2018), available at https://www.ushmm.org/wlc/en/article.php?ModuleId=10005261.

7 E.g., Fidel Castro's persecution of homosexuals after the Cuban Revolution of 1959. ISIS persecution of homosexuals & Ancient Rome, *see Codex Theodosianus* 9.8.3: "When a man marries and is about to offer himself to men in womanly fashion (quum vir nubit in feminam viris porrecturam), what does he wish, when sex has lost all its significance; when the crime is one which it is not profitable to know; when Venus is changed to another form; when love is sought and not found? We order the statutes to arise, the laws to be armed with an avenging sword, that those infamous persons who are now, or who hereafter may be, guilty may be subjected to exquisite punishment."

8 The acronym stands for lesbian, gay, bisexual and transgender people. Nowadays, some use the acronym LGBTQI+. However, for the purpose of this work, the acronym LGBT is sufficient and will be used. For the purpose of clarity, the term LGBT and sexual minorities will be used interchangeably in this paper.

9 General Assembly Resolution 66/290, Follow-Up to Paragraph 143 on Human Security of the 2005 World Summit Outcome, A/RES/66/290, 10 September 2012, para. 3(a): "The right of people to live in freedom and dignity, free from poverty and despair. All individuals, in particular vulnerable people, are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential."

penalty.[10] In 2011, the United Nations (hereinafter UN) released the first-ever report on human rights of LGBT people around the world, which details and serves as proof to the often grim and on-going realities of violence and discrimination they face in their own countries.[11] Under international law, states are obligated to protect individuals under their jurisdiction from violence and ensure their right to equality under law.[12] In the event of failure, international criminal law would need to provide an answer to the failure of traditional mechanisms for protecting human rights.[13] Yet, there remain many serious and widespread human rights violations perpetrated, too often with impunity, against individuals based on their sexual orientation and gender identity.[14] On an international scale, it is definitely plausible to consider a situation where scattered incidents of homophobia[15] and/or transphobia[16] reach to such a high level that in the end lead to widespread or systematic attacks worthy of the legal qualification as crimes against humanity.

Essentially, what seems distinct about this particular time in our history is the lack of legal consensus regarding the recognition of LGBT rights as international human rights. Thus, international law should provide an "engine for justice" for those previously victimized, with each successive case reaching farther than its predecessors to protect more persons and more groups from international mass atrocity crimes.[17]

And despite the excessive length of the crimes against humanity, the list of prohibited discriminatory grounds for persecution is incomplete; among others

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10 Fact Sheet – Criminalization, Free & Equal, United Nations (Jan. 15, 2018), available at https://www.unfe.org/system/unfe-43-UN_Fact_Sheets_-_FINAL_-_Criminalization_(1).pdf (source taken from Aengus Carroll, *State-Sponsored Homophobia: A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition* (11th ed., Geneva: ILGA, 2016) (Jan. 15, 2018), also available at http://ilga.org/downloads/02_ILGA_State_Sponsored_Homophobia_2016_ENG_WEB_150516.pdf).

11 Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity, Report of the United Nations High Commissioner for Human Rights, U.N. Doc. A/HRC/19/41, 17 November 2011.

12 General Assembly Resolution 60/1, 2005 World Summit Outcome, A/RES/60/1, 16 September 2005, paras. 138, 139.

13 Werle 2009.

14 Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity, Report of the United Nations High Commissioner for Human Rights, A/HRC/29/23, 4 May 2015, para. 5.

15 *Homophobia*, *noun*, intense and unreasoning hatred of homosexuality and homosexuals. *Penguin English Dictionary* 668 (R. Allen (ed.), 2nd ed., London: Penguin Books, 2005).

16 *Transphobia*, *noun*, irrational fear of, aversion to, or discrimination against transgender or transsexual people. Dictionary by Merriam-Webster (Jan. 15, 2018), available at https://www.merriam-webster.com/dictionary/transphobia.

17 Brian Kritz, *The Global Transgender Population and the International Criminal Court*, 17 Yale Human Rights & Development Law Journal 1, 3 (2014).

it lacks that based on sexual preference.[18] Keeping that in mind, the possible legal constraints and challenges of protecting sexual minorities on the grounds of sexual orientation and gender identity shall be examined in the context of international criminal law.[19]

1. Sexual Orientation and Gender Identity in International Criminal Law

1.1. Overview

In this narrative, before addressing the current international legal framework for sexual minorities, the terms "sex," "sexual orientation" and "gender" need to be appropriately dissected. The term "*sex*" denotes a physical attribute of humans: external genital anatomy.[20] The "common sense" of biological sex tells us that in each individual all of these components are unambiguously male or female, congruent, and aligned in a predictable and permanent relation to each other.[21] *Gender* signifies the social or cultural dimensions derived from and determined by sex, which include attire, grooming and other aspects of physical appearance as well as behavioral mannerisms.[22] While the definitions of sex and gender used on the UN level differ in focus and wording, they all tend to emphasize three similar points: *first*, gender is a socially constructed concept; *second*, the construction of gender is complex and is influenced by culture, the roles women and men are expected to play, the relationships among these roles, and the value society places on these roles; and *third*, the content of gender can vary within and among cultures, and over time.[23] Lastly, *sexual orientation* means the predisposition, inclination, or proclivity of humans towards affectional intimacy with members of one particular sex or of both sexes.[24]

The international legal framework of LGBT rights consists of different international instruments and can be traced all the way back to the UN Universal Declaration of Human

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[18] Antonio Cassese et al., *The Rome Statute of the International Criminal Court: A Commentary* 1081 (Oxford: Oxford University Press, 2002).

[19] In contracts to the human rights approach, the human security approach introduces a practical framework for identifying the specific rights that are at stake in a particular situation of insecurity and for considering the institutional and governance arrangements that are needed to exercise and sustain them.

[20] Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83(1) California Law Review 3, 6 (1995).

[21] Paisley Currah, *Compulsory Monogamy and Polyamorous Existence* in *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* 247 (M.A. Fineman et al. (eds.), Farnham and Burlington: Ashgate, 2009).

[22] Valdes 1995, at 6, nt. 20.

[23] Oosterveld 2005, at 67.

[24] Valdes 1995, at 6, nt. 20.

Rights (1948) (hereinafter UDHR), when it proclaimed that "all human beings are born free and equal in dignity and rights" (Art. 1). The International Covenant on Economic, Social and Cultural Rights (1966) (hereinafter ICESCR) as well as the International Covenant on Civil and Political Rights (1966) (hereinafter ICCPR) provide that economic, social and cultural rights, as well as civil and political rights, shall be enjoyed without any discrimination, including on the grounds of "sex… and other status."[25] On a regional level, the European Convention on Human Rights (1950) (hereinafter ECHR) sets out in Art. 8 the right to respect for private and family life as well as the fundamental prohibition of discrimination in Art. 14. Article 2 of the African Charter on Human and Peoples' Rights (1981) sets out the right to freedom from discrimination with a non-exhaustive clause as well as Art. 3, entailing the right to equality before the law and equal protection of the law. The same can be said for the newest regional acceptance of the Inter-American Convention Against All Forms of Discrimination and Intolerance (2013), where sexual orientation and gender identity are explicitly named as prohibited grounds for discrimination in obtaining fundamental human rights.

Another important step has been made with the Yogyakarta Principles of 2007, which list twenty-nine human rights standards that urge the application of international human rights law to the lives and experiences of persons of diverse sexual orientation and gender identity. Perhaps the most prominent ones for legal international protection are Principles 2 and 3. They state that every person has a right to recognition before the law regardless of sexual orientation and gender identity, is equal to enjoy all human rights and shall not be discriminated against in the enjoyment of these rights on the basis of sexual orientation and gender identity. Although these principles have not been adopted by States in a treaty and are not by themselves a legally binding part of international human rights law, the Yogyakarta Principles are intended to serve as an interpretive aid to human rights treaties. For the purpose of the ICC, it will be argued that they should be given special consideration, in line with Art. 21(3) of the Statute and ICC jurisprudence.[26]

Moreover, the UN Declaration on Sexual Orientation and Gender Identity (2008) reaffirmed the principle of non-discrimination, stipulating that human rights must apply equally to every human being regardless of sexual orientation or gender identity.[27] More recently, two landmark UN Resolutions on human rights, sexual

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[25] ICESCR, Art. 2(2); ICCPR, Art. 2(1).

[26] *See* Part I of this paper. ICC Statute, Art. 21(3): "The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status."

[27] Letter dated 18 December 2008 from the Permanent Representatives of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the United Nations addressed to the President of the General Assembly, A/63/635, 22 December 2008.

orientation and gender identity came in June of 2011 and 2016. The most important consequence of the latter one was the appointment of an Independent Expert on Sexual Orientation and Gender Identity, whose job is among others, "to assess the implementation of existing international human rights instruments."[28] Under the auspices of the UN, this move buttresses the fact that human rights legislation for the protection of LGBT community is steadily growing.

Nevertheless, the question is, whether in the context of international criminal law as an *ultima ratio* measure for the protection of gross violations of human rights, these legal instruments carry any weight. In the event of a widespread or systematic persecution of a civilian population on the grounds of sexual orientation, could international criminal law afford efficient protection based on the international legal framework as it stands today?

In the context of the ICC, the wording of the Statute is precise as Art. 21 of the Statute establishes a clear hierarchy of applicable law for the judges of the ICC when adjudicating cases.[29] None of the previous statutes of international criminal tribunals have contained a provision dealing with "applicable law," much least a hierarchical one, and therefore, Art. 21 of the Statute is an important innovation.[30] It is also clear that *stricto sensu*, the ICC is not a human rights court, although it carries great significance for the global protection of the most fundamental human rights and values. As an international treaty, the Statute needs to be interpreted in accordance with Arts. 31 and 32 of the Vienna Convention on the Law of the Treaties (1969) (hereinafter VCLT). The Elements of Crimes (hereinafter EoC) and Rules of Procedure and Evidence supplement the Statute's provisions.[31]

Article 5 of the Statute limits the Court's subject matter jurisdiction to four crimes: genocide, crimes against humanity, war crimes and the crime of aggression. Unlike other "core crimes," the crime of genocide and crimes against humanity carry the discriminatory treatment towards members of a certain group. Whereas the prohibition of genocide aims at protecting certain groups from extermination or

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[28] General Assembly Resolution 32/2, Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, A/HRC/RES/32/2, 30 June 2016.

[29] Margaret M. deGuzman, *Article 21* in *The Rome Statute of the International Criminal Court: A Commentary* 932, 933 (O. Triffterer & K. Ambos (eds.), 3rd ed., Munich: C.H. Beck; Oxford: Hart, 2016). Art. 21(1): "The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards."

[30] William A. Schabas, *Genocide in International Law: The Crime of Crimes* 381–382 (2nd ed., New York: Cambridge University Press, 2009).

[31] ICC Statute, Arts. 9(1), 54(4),(5).

attempted extermination, the concept of crimes against humanity exists to protect civilian populations from persecution,[32] as the intentional deprivation of persons' fundamental rights due to its affiliation within a group or community.

According to Art. II of the Convention on the Prevention and Punishment of the Crime of Genocide (1948), as well as Art. 6 of the ICC Statute, the prohibition of genocide aims at the protection of four groups – *national, ethnical, racial or religious groups*. The exclusivity of this exhaustive list of four groups has not gone unchallenged. Therefore, if a certain group of people is intended for destruction by any means enumerated from (a) to (e) in Art. 6 of the Statute and does not fall within any of the enumerated groups, it is not genocide, but may meet the definition of crimes against humanity.

Though it could be argued, that the definition should be developed and interpreted in a way to afford a sexual minority protection against genocide, the currents state of international law does not allow such a qualification. It does not require considerable imagination to envision that a number of the *actus rei* enumerated in Art. 6 could be committed against a sexual minority, with the intent to destroy, in whole or in part, that sexual minority, as such. However, it seems that if LGBT people are targeted to bring about their complete or partial annihilation, they are possibly left out of Art. 6 and might not even be able to pertain to Art. 7 of the Statute.[33] Only in the event of a LGBT group of people who are at the same time targeted as a racial, religious, national or ethnical group would trigger the protection of Art. 6 of the Statute.

1.2. Crimes Against Humanity

1.2.1. Persecution

The notion of crimes against humanity is part of human legacy and indisputably forms part of customary international law.[34] As the International Criminal Tribunal for the Former Yugoslavia (ICTY) explained in the *Erdemovic* case,

> it is therefore the concept of humanity as victim, which essentially characterizes crimes against humanity… because of their heinousness and magnitude they constitute an egregious attack on human dignity, on the very notion of humaneness.[35]

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[32] Agnieszka Szpak, *National, Ethnic, Racial, and Religious Groups Protected Against Genocide in the Jurisprudence of the ad hoc International Criminal Tribunals*, 23(1) The European Journal of International Law 155, 158 (2012) (Jan. 15, 2018), also available at https://academic.oup.com/ejil/article-lookup/doi/10.1093/ejil/chs002.

[33] *See* sec. 1.2.

[34] Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (Jan. 15, 2018), available at http://legal.un.org/ilc/texts/instruments/english/draft_articles/7_1_1950.pdf; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968), Art. I.

[35] *Prosecutor v. Drazen Erdemovic* (Appeal Judgment), IT-96-22-A, ICTY, 7 October 1997, para. 21.

Crimes against humanity affect not only individual victims, but also the international community as a whole.

The crime of persecution sits very much at the core of crimes against humanity,[36] since it has often been emphasized as the gravest form.[37] All the relevant international criminal law instruments have included it since Nuremberg.[38]

Persecution is an intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.[39] The specificity of persecution is that it contemplates racist or other discriminatory acts and policies of a State or an organization that may in fact be authorized by a legal regime.[40] Discrimination is therefore intrinsic to this crime. According to the ICC Statute, not every act of persecution amounts to a crime against humanity, but

> persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, *gender as defined in paragraph 3*, or *other grounds* that are universally recognized as impermissible under international law in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court,

constitutes a crime against humanity. Many definitions of crimes against humanity in national law have adopted a similar approach.[41]

1.2.2. Persecution on the Grounds of Sexual Orientation and/or Gender Identity

Like all crimes against humanity, the persecutory acts must first satisfy the *chapeau* of this crime (contextual elements), meaning they must be committed as part of *a widespread or systematic attack against a civilian population, with the intent or knowledge of the attack*. The *chapeau* requirement is of significance to omit certain single, isolated and random acts that do not rise to the ambit of crimes against humanity. The "*widespread or systematic*" requirement is especially significant in the context of discrimination based on sexual orientation and/or gender identity. The alternative

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36 Schabas 2009, at 175.

37 *Prosecutor v. Dusko Sikirica, Damir Dosen, Dragan Kolundzija* (Sentencing Judgment), IT-95-8-S, ICTY, 13 November 2001, para. 232.

38 Nuremberg Charter, Art. 6(c); Control Council Law No. 10, Art. II(1)(c); Tokyo Charter, Art. 5(c); ICTY Statute, Art. 5(h); ICTR Statute, Art. 3(h); ICC Statute, Art. 7(1)(h); SCSL Statute, Art. 2(h).

39 ICC Statute, Art. 7(2)(g).

40 Schabas 2009, nt. 40.

41 Crimes Against Humanity Statutes and Criminal Code Provisions in Selected Countries, Law Library of Congress, Multinational Report (April 2010) (Jan. 15, 2018), available at https://www.loc.gov/law/help/crimes-against-humanity/crimes-against-humanity.pdf.

approach *either-or* is supported by the case law of international tribunals.[42] This approach opens up the possibility of protection to transgender people. If it were a cumulative approach, the question whether an attack on transgender people could be considered widespread for the purpose of ICC would be uncertain.[43] The next requirement is that the acts must be committed "*in connection with*" another crime in the ICC's jurisdiction, in order to constitute persecution. This caveat was included in the Statute "to avoid sweeping interpretation criminalizing all discriminatory practices."[44] For example, discriminatory marriage laws may not, by themselves, constitute persecution.

To correctly tackle the issue of persecution of the LGBT community, the drafting history of the provision of gender in Art. 7(3) needs to be firstly addressed. From there, it will be explained how can sexual orientation or gender identity fit within the ambit of gender as proscribed in Art. 7(3) in order to prosecute persecution against such a community. The final possibility that will be addressed is the right against discrimination on the ground of sexual orientation, universally recognized as impermissible for the purpose of Art. 7(1)(h).

1.2.3. Gender in Article 7(3)

In 1998, in the ICC Statute, "*gender*" was first used in an international criminal law treaty. During the negotiations around the ICC Statute there was a fierce debate about the use and definition of the term "gender," with a sizeable number of states opposing the use of the term as a synonym for sexual orientation, which could have included lesbian, gay, bisexual and transgender persons.[45] Due to the contentious debate surrounding its definition, the definition consequently reflects the use of "*constructive ambiguity*"[46] by the negotiators as follows:

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42 *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, ICC, 15 June 2009, para. 82; *Prosecutor v. Mrksic et al.* (Trial Judgment), IT-95-13/1-T, ICTY, 27 September 2007, para. 3; Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries (1996) (Jan. 15, 2018), available at http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf.

43 Although the ICC dismisses a *stare decisis* policy (Art. 21(2) of the Statute), the Chamber held that the adjective widespread connotes the large-scale nature of the attack and the number of targeted persons. *See Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07 OA 8, ICC, 25 September 2009, para. 394. Differently, ICC PTC II stressed that the widespread element is neither to be assessed strictly quantitatively nor geographically but on the basis of the individual facts. Situation in Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, Pre-Trial Chamber II, 31 March 2010, para. 95. *See also Prosecutor v. Tihomir Blaskic* (Appeal Judgment), IT-95-14-A, ICTY, 29 July 2004, para. 202.

44 Herman von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court* in *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* 90, 101 (R.S. Lee (ed.), The Hague and Boston: Kluwer Law International, 1999).

45 Michael Bohlander, *Criminalizing LGBT Persons under National Criminal Law and Article 7(1)(h) and (3) of the ICC Statute*, 5(4) Global Policy 401 (2014).

46 Constructive ambiguity is a term used in diplomacy to refer to the use of ambiguous words that give comfort to those on different sides of a debate, thereby promoting agreement.

> For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from above.

The term gender occurs nine times in the Statute.[47] Thus, how the ICC interprets "gender" will have a direct impact on the kinds of cases of persecution that the Court may be able to prosecute, as well as on the law applied, how the Prosecutor undertakes her duties, and on the protection and participation of victims and witnesses.[48] Accordingly, it is important to mention that the ICC Statute is the first international instrument to expressly include various forms of sexual and gender-based crimes. Further work has been done on this matter, such as the Office of the Prosecutor's Draft Policy Paper on Sexual and Gender Based Crimes.[49] It commits to integrating a gender perspective and analysis in all its work, to being innovative in the investigation and prosecution of these crimes,[50] affirms that Art. 7(3) shall be interpreted in accordance with Art. 21(3) of the Statute[51] and points out the recent efforts of the UN to put an end to violence and discrimination on the basis of sexual orientation and gender identity.[52]

In light of this, legal challenges will be discussed in two parts. *First*, the protection of a civilian population from persecution on the grounds of sexual orientation under Art. 7(1)(h) in conjunction with Art. 7(3) will be analyzed as well as under Art. 7(1)(h) independently as "*other universally impermissible grounds*." *Secondly*, the persecution of a civilian population based on their gender identity will be addressed under Art. 7(1)(h) in conjunction with Arts. 7(3) and 21(3) of the Statute.

1.2.4. Sexual Orientation

1.2.4.1. Sexual Orientation Can (Not) Be Subsumed under the Term "Gender" in Article 7(3) for the Purpose of Persecution in Article 7(1)(h)

The ICC has never been faced with a case where it needed to adjudicate whether persecution on the ground of gender could include persecution on the ground of sexual orientation. On the one occasion where persecution on the grounds of

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47 ICC Statute, Arts. 7(1)(h), 7(3), 21(3), 42(9), 54(1)(b), 68(1).

48 Oosterveld 2005, at 57.

49 Draft Policy Paper on Sexual and Gender Based Crimes (June 2014), at 5 (Jan. 15, 2018), available at https://www.icc-cpi.int/iccdocs/otp/OTP-draft-policy-paper-February2014-Eng.pdf. The OTP considers "*gender based crimes*" as those committed against a person on the basis of gender, whether male or female, as a result of existing gender norms and underlying inequalities, which it proclaims to effectively put an end to impunity as crimes of concern to the international community as a whole.

50 *Id.* at 3.

51 *Id.* para. 13.

52 *Id.* para. 20, nt. 16.

gender was briefly mentioned in the context of the *Mbarushimana* case, where the Prosecutor emphasized that not only did it amount to sexual violence against the individuals, but that this also formed persecution on the basis of gender against the collective.[53] It is clear that gender discrimination under Art. 7(1)(h) could logically be extended to situations where male or female members of a group are targeted on the basis of gender roles as understood in the context of society.[54]

In UN usage, gender refers to the socially constructed roles played by women and men that are ascribed to them based on their sex.[55] The distinction could be best described as the difference between the concepts of "*male*" and "*female*" and the adjectival descriptions of "*masculine*" and "*feminine*."[56] This differentiation and understanding of terms is important because it opens the door to legally qualify persecution on the basis of sexual orientation as crimes against humanity. If members are targeted due to their ascribed gender roles in the context of society, they can just as much be targeted due to their failure to comply with such roles. The concept of gender and sexual orientation are very closely linked, particularly in the context of persecution, where homosexuals are often targeted as punishment for defying traditionally defined concepts of masculinity and femininity.[57] Precisely this prejudice that could be found in the discriminatory intent of a perpetrator and State or organizational policy might give rise to legal protection of sexual orientation under the term "*gender*." As Bedont argues:

> Contrary to the wishes of some delegations that opposed the term "gender," the term may include sexual orientation… for example, in most if not all societies, the role of women is primarily based on their ascribed functions as wives and mothers. Women that diverge from this stereotype often suffer discrimination. This would constitute persecution on the grounds of gender.[58]

In order to successfully prosecute persecution on the grounds of sexual orientation as gender persecution, Art. 22(2) of the Statute must be respected. It would thus be the task of the Prosecutor to establish reasonable grounds that sexual

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53 *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, ICC, 28 September 2010, para. 97.

54 Bohlander 2014, at 401: "Violent targeting of sexual minorities as a group or collectivity… on the basis of the victim's perceived departure from their assigned gender role, could satisfy the elements of the crime of persecution as defined in the Statute and the EoC."

55 *See* Part I. Christopher K. Hall et al., *Article 7* in *The Rome Statute of the International Criminal Court: A Commentary* 2016, at 293.

56 *Id.*

57 Oosterveld 2005, at 77–78.

58 Barbara Bedont, *Gender-Specific Provisions in the Statute of the International Criminal Court* in *Essays on the Rome Statute of the International Criminal Court. Vol. 1* 183, 187–188 (F. Lattanzi & W.A. Schabas (eds.), Sirente: Ripa Fagnano Alto, 1999).

orientation is *not analogous* to gender persecution, but rather that it is in fact in itself gender persecution, in the sense of being based on the ideas about what it means to be "male or female, within the context of society."[59] Although the essence of the crime of persecution is that it is a crime of discrimination,[60] it is hard to envisage that gender persecution could be subsumed as persecution on the grounds of sexual orientation, since the final sentence of Art. 7(3) clearly reads that "the term 'gender' does not indicate any meaning different from the above."

1.2.4.2. The Right Against Discrimination on the Grounds of Sexual Orientation Can Be Considered a Universally Recognized Impermissible Ground under International Law in Accordance with Article 21(3) of the Statute

If gender persecution did not already include persecution on the ground of sexual orientation, it can be argued that in time that has changed. Article 7(1)(h) states that persecution may also be committed against any identifiable group or collectivity on "other grounds that are universally recognized as impermissible under international law."

The ICC Statute is the first international instrument to include other discriminatory grounds, going beyond the scope of customary international law. This open clause leaves the door ajar for further development of customary international law in a direction favorable to human rights.[61] Contrary to some opinions,[62] this paper argues that sexual orientation may be regarded as "*other grounds*" for protection under Art. 7(1)(h).

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[59] "The rule of strict construction requires that the language of a particular provision shall be construed such that no cases shall be held to fall within it which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment" (*Prosecutor v. Zdravko Mucic aka "Pavo," Hazim Delic, Esad Landzo aka "Zenga," Zejnil Delalic* (Trial Judgment), IT-96-21-T, ICTY, 16 November 1998, paras. 408–413).

[60] *Prosecutor v. Kupreskic et al.* (Trial Judgment), IT-95-16-T, ICTY, 14 January 2000, para. 621; *Prosecutor v. Radislav Krstic* (Appeal Judgment), IT-98-33-A, ICTY, 19 April 2004, para 534; *Prosecutor v. Tihomir Blaskic*, *supra* note 43, para. 131.

[61] In accordance with Art. 21(3) of the ICC Statute, "the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status."

[62] *See, e.g.*, Rebekka Wiemann, *Sexuelle Orientierung im Völker- und Europarecht: Zwischen kulturellem Relativismus und Universalismus* 147 (Berlin: Berliner Wissenschafts-Verlag, 2013). *See also* Werle 2009, at 335, footnote 280. The reference is made to the Explanatory Memorandum of the (German) Code of Crimes Against International Law [Begründung zum Völkerstrafgesetzbuch (VStGB)], at 22. Das Völkerstrafgesetzbuch (VStGB) provision on crimes against humanity as persecution reads: " eine identifizierbare Gruppe oder Gemeinschaft verfolgt, indem er ihr aus politischen, rassischen, nationalen, ethnischen, kulturellen oder religiösen Gründen, aus Gründen des Geschlechts oder aus anderen nach den allgemeinen Regeln des Völkerrechts als unzulässig anerkannten Gründen grundlegende Menschenrechte entzieht oder diese wesentlich einschränkt " (§ 7(1) Verbrechen gegen die Menschlichkeit).

From this perspective, it can be argued that discrimination on the ground of sexual orientation constitutes a norm under international human rights law that reached the necessary threshold of universality in the meaning of Art. 7(1)(h). The words "*universally recognized*" should be understood as "*widely recognized*" and not within the meaning that all States have to recognize a particular ground as impermissible.[63] Although the ICC does not accept a *stare decisis* principle, it is beneficial to mention that in the *Lubanga* case, a right has been defined as universally recognized human rights if it "finds expression in international and regional treaties and conventions."[64] Hence, if sexual orientation finds expression in international and regional treaties and conventions, it can be subsumed under Art. 7(1)(h) as *other grounds*. What is necessary is some form of discrimination that is intended to be and results in an infringement of an individual's fundamental right.[65] It would not be the first time that an open clause covers sexual orientation in international and regional human rights law.

Several treaties cover discrimination on the basis of sexual orientation, such as Art. 26 of the ICCPR and Art. 2(2) of ICESCR. But more importantly, in its 1996 Draft Code,[66] the International Law Commission confirmed that the rights found in the UN Charter[67] as well as in the ICCPR[68] are rights and freedoms to which individuals are entitled without distinction. This has been confirmed by case law, with the most prominent case of *Toonen v. Australia* brought before the UN Human Rights Committee (hereinafter HRC). It held that the term "*sex*" in Arts. 2(1) and 26 of the ICCPR included sexual orientation and that the criminalization on this basis was a violation of the right to privacy under Art. 17(1) of the ICCPR[69] and of non-discrimination under Art. 2(1) of the ICCPR. The HRC supported its reasoning based on the European Court of Human Rights (hereinafter ECtHR) jurisprudence.[70] In this respect, the ICCPR and many of the rights recognized in the UDHR[71] can be considered reflective of customary international law.[72] Thus, contrary to some

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63 Hall et al. 2016, at 226.

64 *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, ICC, 14 March 2012, para. 12.

65 *Prosecutor v. Dusko Tadic aka "Dule"* (Opinion and Judgment), IT-94-1-T, ICTY, 7 May 1997, para. 697.

66 Draft Code of Crimes, *supra* note 42, Art. 18, para. 11.

67 UN Charter, Arts. 1(3), 55(c).

68 ICCPR, Arts. 2(1), 26.

69 *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), para. 8.7 (Jan. 15, 2018), also available at http://hrlibrary.umn.edu/undocs/html/vws488.htm.

70 *Dudgeon v. the United Kingdom*, No. 7525/76, 22 October 1981, Series A No. 45, paras. 64–70; *Norris v. Ireland*, No. 10581/83, 26 October 1988, Series A No. 142, paras. 39–47; *Modinos v. Cyprus*, No. 15070/89, 22 April 1993, Series A No. 259, paras. 20–25.

71 UDHR, Arts. 2, 29.

72 Hall et al. 2016, footnote 127.

author's opinions, sexual orientation can be argued as widely recognized[73] and by this, the protection of persecution on the basis of sexual orientation becomes a legal possibility under Art. 7(1)(h) of the Statute.

1.3. Gender Identity

In the context of persecution on the ground of gender identity and the protection of transgender or intersex people against crimes against humanity, the legal reasoning appears more difficult. What is clear is that the definition of gender in Art. 7(3) removes biologically intersex individuals at the outset. Even though Art. 7(3) of the Statute defines gender referring to two sexes, namely male and female only, it also *expressis verbis* specifies that the term gender should be viewed within the context of society and as argued by some, leaves room for a broader interpretation in line with internationally recognized human rights in accordance with Art. 21(3) of the Statute.[74]

It is possible to argue that gender in today's context of society cannot be viewed as only male and female due to the fact that this dichotomous view is specific to certain cultures and is not universal.[75] However, that would not extend protection to transgender people since the term "*within the context of society*" refers to only two sexes – male or female. It uses the terms male or female as a starting point for any kind of interpretation. Surely, it can be argued that transgender persons have become sufficiently mainstreamed in some parts of the world to become at least somewhat woven into the fabric of those societies, as male or female.[76] However, we really cannot claim that transgender life has become mainstreamed in all countries throughout the globe. If the notion of transgender does not fit gender notions in these individual societies, it is hard to argue that transgender life fits within our combined global societal notions of "*male and female*," thereby not fitting "*within the context of society*,"[77] as required by Art. 7(3) of the Statute.

Contrary to this reasoning, some authors argue that the phrase "within the context of society" was chosen to give the ICC judges the flexibility to determine the meaning of the phrase on a case-by-case analysis.[78] This seems highly unlikely, since it would

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[73] There are currently 195 States in the world and 76 States still criminalize same-sex conduct, which is 38% of the world.

[74] Sunčana Roksandić Vidlička, *Prosecuting Serious Economic Crimes as International Crimes: A New Mandate for the ICC?* (Berlin: Max Planck Institute for Foreign and International Criminal Law, Pravni fakultet Sveučilišta u Zagrebu, 2017); Sunčana Roksandić Vidlička, *Criminal Responsibility for Severe Economic Crimes Committed in Transitional Periods* 365 ff. (International Dual Doctorate, Zagreb, 2014).

[75] *The Difference Between Sex and Gender*, OpenStax, at 2 (Jan. 15, 2018), available at https://cnx.org/exports/8144da41-917e-41ac-9b56-117e73186d46@5.pdf/the-difference-between-sex-and-gender-5.pdf.

[76] Kritz 2014, at 36.

[77] *Id.* at 37.

[78] Cate Steains, *Gender Issues* in *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* 357, 374 (R.S. Lee (ed.), The Hague and Boston: Kluwer Law International, 1999).

defy the accepted principles of legal interpretation to suggest that the drafters would struggle over the restriction of a term relevant to the issue and then intend to leave it open to the judges to interpret the clause in a way that would countermand their compromise.[79] Even more, reference to national penal codes confirms this. For example, for persecution as a crime against humanity, the German and French Penal Codes translate "gender" as "*Gründen des Geschlechts*"[80] and "*sexiste*." The Croatian Penal Code also confirms this by translating it to "*spolna osnova*."[81] This further confirms that gender in Art. 7(3) is intended to serve as nothing more than female and male.

Even if we argue that Art. 7(3) needs to be applied and interpreted in accordance with internationally recognized human rights as required by Art. 21(3), it still however fails to provide protection to transgender people. It is not because their human rights are not internationally recognized, but rather that even if they are, the second sentence in para. 3 of Art. 7 clearly reads that "the term 'gender' does not indicate any meaning different from the above." It seems as though a transgender population who does not view themselves as male or female, would not be protected against the crime against humanity. This may represent substantial lack of protection for a group of people, who in many countries, are subject to discriminatory practices. Unlike the argument made for sexual orientation to be subsumed as "other grounds" in Art. 7(1)(h), it is uncertain if gender identity has reached the "wide recognition" threshold necessary for protection under the Statute. What can be concluded with certainty is that the criticisms of the Statute's definition of gender highlight the fact that the term "*gender*" is under-theorized in international law.[82]

1.3.1. Domestic Criminalization of Same-Sex Conduct as Crimes Against Humanity under Article 7(1)(h)

This part has so far dealt with a substantive matter in the event of an attack against a civilian population, i.e., a homosexual or transgender one, pursuant to or in furtherance of a State or organizational policy to commit such an attack. However, the EoC clarify that

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79 Bohlander 2014, at 401–414.

80 "…eine identifizierbare Gruppe oder Gemeinschaft verfolgt, indem er ihr aus politischen, rassischen, nationalen, ethnischen, kulturellen oder religiösen Gründen, aus Gründen des Geschlechts oder aus anderen nach den allgemeinen Regeln des Völkerrechts als unzulässig anerkannten Gründen grundlegende Menschenrechte entzieht oder diese wesentlich einschränkt" (§ 7(1) Verbrechen gegen die Menschlichkeit, Völkerstrafgesetzbuch (VStGB)); "La persécution de tout groupe ou de toute collectivité identifiable pour des motifs d'ordre politique, racial, national, ethnique, culturel, religieux ou sexiste ou en fonction d'autres critères universellement reconnus comme inadmissibles en droit international" (Art. 212-1, Chapitre II: Des autres crimes contre l'humanité, Code pénal) (Jan. 15, 2018), available at https://loc.gov/law/help/crimes-against-humanity/index.php#france.

81 Kazneni zakon Republike Hrvatske od 21. listopada 2011, Nar. nov. 125/11 [Penal Code of the Republic of Croatia of 21 October 2011, Official Gazette No. 125/11], Art. 90(1), para. 8.

82 Oosterveld 2005, at 82.

> such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack.[83]

In that case, if a State allows domestic criminalization of same-sex conduct and sexual minorities are being arbitrarily arrested and even sentenced to death, it can be argued that the State agents have committed a crime against humanity pursuant to Arts. 27 and 7(1)(h) of the Statute in conjunction with the aforementioned interpretation of Art. 7(3). It is important to reiterate that

> "persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.[84]

A historical parallel may be made to a non-violent attack in nature[85] on a civilian population – the system of apartheid. The crime of apartheid is uncontestably a crime against humanity,[86] which is

> committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.[87]

In this regard, there is no difference between an institutionalized regime of systematic oppression and domination in which people are deprived of their fundamental rights on the grounds of race[88] and one in which they are dominated and deprived of the same rights on the basis of sexual orientation and gender identity.

Furthermore, the right to life, as well as the right to be protected from torture, inhuman and degrading treatment and punishment, establishes a positive legal

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83 Elements of Crimes, ICC (2011), at 5 (Jan. 15, 2018), available at https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, *supra* note 43, para. 396.

84 ICC Statute, Art. 7(2)(g).

85 *Prosecutor v. Jean-Paul Akayesu* (Trial Judgment), ICTR-96-4-T, ICTR, 2 September 1998, para. 581.

86 ICC Statute, Art. 7(1)(j).

87 *Id.* Art. 7(2)(h).

88 Genetically and biologically, there is only one race and that is the human race. *See* Four Statements on the Race Question, UNESCO (1969), at 30 (Jan. 15, 2018), available at http://unesdoc.unesco.org/images/0012/001229/122962eo.pdf; Sally Haslanger, *Gender and Race: (What) Are They? (What) Do We Want Them to Be?*, 34(1) Noûs 31, 43 (2000); Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Geneva, 25 January 2005, para. 494 (Jan. 15, 2018), available at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf. However, this issue is beyond the scope of this work.

obligation on the State to take all appropriate measure to prevent violations and punish perpetrators as well as address any conditions in society which encourage or facilitate crimes based on victims' sexual orientation or gender identity from either agents of the State or third parties. This would include putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law/enforcement mechanism for the prevention, suppression and punishment of breach of such provisions.[89] This positive obligation should not be neglected as a large part of the violations of human rights in relation to sexual orientation and gender identity, which occurs not just in the action of agents of the State, but also in their *inaction* or *failure* to take positive steps to secure the aforementioned rights.

Of the total number (83) of States, which criminalize same-sex relationships, 37 are States Parties of the ICC (44.6%) and 46 are not (55.4%).[90] The concentration of countries criminalizing LGBT *per* region is the highest in Africa, with almost 47% of the entire sample and 59.5% of the States Parties.[91] The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has explicitly stated that imposition of the death sentence for a private sexual practice, such as sodomy, is a violation of international law.[92] It is argued that the sheer existence of a state sponsored law, which allows for the imprisonment of people based on their sexual orientation is a systematic attack on a civilian population on discriminatory grounds pursuant to a policy, which in turn results in one of the acts in Art. 7 – for example, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law.[93] After all, crimes against humanity need to be at least tolerated by a State or entity.[94]

However, what stands in the way of legally qualifying domestic criminalization of same-sex conduct as crimes against humanity is precisely the aforementioned interpretation of Art. 7(3) of the Statute. The weakness of the argument that the drafters of the Statute intended to "*leave the door ajar*" when interpreting Art. 7(3) is exposed. The same can also be said with regard to the term of "*other grounds as universally impermissible*" under Art. 7(1)(h). It certainly cannot have been in the interest of the opposing states to allow for such a broad interpretative legal maneuver because the consequences under the complementarity principle would have been

89 *Angelova and Iliev v. Bulgaria*, No. 55523/00, 26 July 2007, ECHR 2007-IX, para. 93; *Osman v. the United Kingdom*, No. 23452/94, 28 October 1998, [1998] ECHR 101, para. 115.

90 Human Dignity Trust (Jan. 15, 2018), available at http://www.humandignitytrust.org/.

91 The main religion in the majority of the states criminalizing LGBT persons is not Islam but Christianity, if only by a small margin. As far as the death penalty is concerned, all jurisdictions that employ it are Islamic states. *See* Bohlander 2014.

92 Civil and Political Rights, Including the Question of Disappearances and Summary Executions: Extrajudicial, Summary or Arbitrary Executions, Report of the Special Rapporteur, Mr. Philip Alston, U.N. Doc. E/CN.4/2006/53/Add.4, 7 January 2006, para. 37.

93 ICC Statute, Art. 7(1)(e).

94 *Prosecutor v. Kupreskic*, *supra* note 60, para. 552; *Prosecutor v. Tihomir Blaskic*, *supra* note 43, para. 119.

obvious.[95] If a future ICC interpretation of Art. 7(3) would invoke sexual orientation or transgender identity, the State signatories that criminalize LGBT persons would be declared *unable* to carry out the investigation or prosecution, thus satisfying one of the "*folds*" of the *conditio sine qua non* – the principle of complementarity under Art. 17 of the Statute.[96]

2. *Sexual Minorities Uganda v. Scott Lively*

Sexual Minorities Uganda (hereinafter SMUG) is an umbrella organization comprised of several organizations that advocate for lesbian, gay, bisexual, transgender and intersex rights in Uganda. In 2012, under the Alien Tort Statute (hereinafter ATS),[97] it filed a claim against Scott Lively,[98] an American citizen based in Springfield, Massachusetts, for persecution that amounts to a crime against humanity, based on a systematic and widespread campaign of persecution against LGBT people in Uganda.[99] The claim brought alleges Lively's active involvement in initiatives with legislative and executive branch officials and private parties, including holding lectures at universities and high schools, to intimidate LGBT people, undermine their rights in Uganda and deprive them of their fundamental human rights, such as the right to life, liberty and freedom of expression.[100]

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95 Bohlander 2014.

96 The principle of complementarity "still presents a great challenge for the Court, and due to sensitive political implications will most likely continue to do so in the future." Marijana Konforta & Maja Munivrana Vajda, *The Principle of Complementarity in the Jurisprudence of the ICC* (2013), at 25 (Jan. 15, 2018), available at https://hrcak.srce.hr/file/191352.

97 The Alien Tort Statute (28 U.S.C. § 1350): "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The Supreme Court of the United States has for the first time comprehensively studied and interpreted the ATS in the case of *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The ATS furnishes jurisdiction only where the international law norm is sufficiently definite and historically rooted to support the asserted cause of action, and "the Supreme Court has held that a federal court can only recognize a claim under the ATS if the claim seeks to enforce an underlying norm of international law that is as clearly defined and accepted as the international law norms familiar to Congress in 1789 when the ATS was enacted." Cited from *Sexual Minorities Uganda v. Scott Lively*, 254 F.Supp.3d 262 (D. Mass. 2017), at 18–20 (hereinafter *SMUG v. Lively, 2017*).

98 Scott Lively is an attorney, author and evangelical minister, known as the expert on what he terms the "gay movement." He believes that America has "brought down low" due to homosexuality, blames homosexuals for historical atrocities, such as the Rwandan genocide and connects pornography with homosexuality. In one of his numerous statements he makes a link with Nazism and homosexuality: "Nazism was in large part an outgrowth of the German homosexual movement." *SMUG v. Lively, 2017*, at 2.

99 *Sexual Minorities Uganda v. Scott Lively*, 960 F.Supp.2d 304, 316 (D. Mass. 2013) (hereinafter *SMUG v. Lively, 2013*).

100 According to SMUG, Scott Lively's anti-gay propaganda throughout Uganda and his help to officials, led to a proposal of the Anti-Homosexuality Bill. The bill firstly proposed the death penalty for "aggravated homosexuality" and criminalizing any advocacy for LGBTI rights.

In 2013, Lively's motion to dismiss the federal claims case was denied, but in 2015, Lively's motion for summary judgment based on jurisdiction was allowed and thus, the case ultimately dismissed. The analysis whether this order was correctly or incorrectly dismissed, goes beyond the scope of this work. However, it will be briefly addressed for future substantive reasons only. The main issue is that not only did SMUG claim that systematic persecution of individuals based on their sexual orientation and gender identity constitutes a crime against humanity that violates international norms,[101] but the US Court accepted this argument and confirmed it in its second decision in 2015.[102]

Thoroughly explained in *Sosa*, the violations of "*law of nations*" under the ATS do not have to be identical to the ones, which were recognized in 1789, but they have to be of a comparable universality and specificity to those, which were recognized in that time.[103] The "*law of nations*" is taken by American courts to mean customary international law and courts are to invigilate this process of trans-historical analysis by detecting sufficiently definite, obligatory, mutual norms of a universal character.[104]

In essence, the US Court relied on three main arguments. At the outset, it is important to stress that the court heavily relied on the ICC Statute to support its claim that persecution on the basis of sexual orientation and gender identity constitutes a crime against humanity. This is not surprising since it is claimed that the ICC Statute can be viewed as a codification of customary norms.[105] First, the US Court acknowledged that although persecution may not always rise to a crime against humanity, it did so in the present case because it was a part of a widespread or systematic attack directed against a civilian population.[106] It relied on Art. 7(1)(h) in conjunction with Art. 7(2)(g) of the ICC Statute in which persecution is defined as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity." In the second step, it confirmed that persecution, as a crime against humanity has been "repeatedly held

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101 *SMUG v. Lively, 2013*, at 3–4.

102 *SMUG v. Lively, 2017*, at 3.

103 Piracy, abduction of ambassadors and safe conduct.

104 Mark A. Drumbl, *Extracurricular International Criminal Law*, 16 International Criminal Law Review 412 (2016).

105 Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* 340 (Cambridge: Cambridge University Press, 2014).

106 It is still controversial whether there is a requirement in international customary law that a crime against humanity be committed pursuant to or in furtherance of a plan or policy (Hall et al. 2016, at 244). *See, e.g.*, M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 243 ff. (Dordrecht; Boston; London: Martinus Nijhoff, 1999). *See also Prosecutor v. Dusko Tadic aka "Dule"*, *supra* note 65, para. 644. However, in this line of reasoning, the Court views the ICC Statute as a codification of international customary law and relies on its articles. It is evident from the facts of the case that the state policy was furthered by legislation pursuant to Lively's anti-homosexual policy.

actionable under the ATS."[107] And in the final step, whilst acknowledging that many international treaties and instruments that provide jurisdiction over crimes against humanity list particular protected groups without specifying LGBTI people,[108] it states that all of these instruments provide savings clauses and even when they do not, the jurisprudence of the *ad hoc* tribunals show that the list of persecution grounds must be interpreted broadly.[109] The most interesting part of the argument is that the court has completely disregarded the most contentious argument of gender as defined in Art. 7(3) and decided for a more clear-cut option in order to grant protection – an open, savings clause of "*other grounds*" under Art. 7(1)(h).

3. Case Study: The Chechen Republic

3.1. Factual Background

Chechnya is a semi-autonomous republic within the Russian Federation. Regardless of its certain legislative autonomy, the Russian Constitution and federal legislation bind it. However, in many respects, Chechnya is still somewhat a state of exception. It is a society of high traditionalism and strict hierarchy accompanied by a heteronormative culture.[110]

According to the report of the Russian LGBT Network in cooperation with "Novaya Gazeta," there have been three waves of persecution of LGBT people since December 2016 and the third wave is still on going.[111] The report contains 33 testimonies

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[107] "…customary international law rules proscribing crimes against humanity… have been enforceable against individuals since World War II," *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); "…holding that persecution that constitutes a crime against humanity is actionable under the ATS," *Mehinovic v. Vuckovic*, 198 F.Supp.2d 1322 (ND Ga. 2002); "Crimes against humanity have been recognized as a violation of customary international law since the Nuremberg trials and therefore are actionable under the ATCA," abrogated in part *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1246-47 (11th Cir. 2005), cited from *SMUG v. Lively, 2013*.

[108] *See, e.g.*, Art. 6(c) of the Nuremberg Charter encompassing "persecutions on political, racial or religious grounds"; Art. 7(1)(h) of the ICC Statute defining an actionable crime against humanity as "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law"; updated Art. 5(h) of the ICTY Statute providing jurisdiction over "persecutions on political, racial and religious grounds"; Art. 3(h) of the ICTR Statute providing jurisdiction over "persecutions on political, racial and religious grounds."

[109] "There are no definitive grounds in customary international law on which persecution must be based and a variety of different grounds have been listed in international instruments," *Prosecutor v. Dusko Tadic aka "Dule," supra* note 65, para. 711; "It is enough that Plaintiff alleges that the denial of fundamental rights it suffered was based on an 'unjustifiable discriminatory criterion,'" *Id.* para. 697.

[110] Relating to or based on the attitude that heterosexuality is the only normal and natural expression of sexuality. Dictionary by Merriam-Webster (Jan. 15, 2018), available at https://www.merriam-webster.com/dictionary/heteronormative.

[111] They Said That I'm Not a Human, That I Am Nothing, That I Should Rather Be a Terrorist, Then a Fagot LGBT, Persecution in the North Caucasus: A Report, Prepared by the Russian LGBT Network

of victims falling under the hands of the authorities of Chechnya for their real or perceived homosexuality. The global community became aware of this situation in March 2017, when various sources, such as the Human Rights Watch reported that there have been an unknown number of men abducted, beaten, held prisoner, tortured and murdered for being homosexual or being perceived as homosexual.[112] And, although there have been similar individual cases of unlawful arrests and detentions on the grounds of sexual orientation in the 2000s, the later events in 2017 took form of state-orchestrated crime.[113]

The EU has not remained silent on this matter. During this year's May plenary session, the European Parliament voted a joint motion for a resolution[114] on the implementation of the Council's LGBTI Guidelines,[115] particularly in relation to the persecution of (perceived) homosexual men in Chechnya, Russia. In this resolution, the Parliament called the EU to offer material and advisory support to the Russian authorities in the investigation regarding the events in Chechnya.

According to the evidence, LGBT persons in Chechnya are not only being killed by the authorities, but they also fall victim to *honor killings*[116] by their own relatives for tarnishing family honor. More and more real and perceived homosexuals are being sent to clandestine camps by the authorities or simply released to their families knowing that they would be killed.

One might also wonder why there have been extensive reports of arrests and murders of homosexuals, yet somehow homosexual women remain underreported. The fact of the matter is that Chechen women are the most vulnerable part of this traditional society.[117] Despite the fact that the female survivors were not massively taken to prisons, they also suffered detention and torture mostly coming from their

in Cooperation with Elena Milashina (senior reporter, Novaya Gazeta) (St. Petersburg, 2017), at 3–4 (Jan. 15, 2018), available at https://www.ilga-europe.org/sites/default/files/chechnya_report_by_rus_lgbt_n_31_july_2017.pdf.

112 Tanya Lokshina, *Anti-LGBT Violence in Chechnya: When Filing "Official Complaints" Isn't an Option*, Human Rights Watch, 4 April 2017 (Jan. 15, 2018), available at https://www.hrw.org/news/2017/04/04/anti-lgbt-violence-chechnya.

113 They Said That I'm Not a Human, *supra* note 111, at 9.

114 Joint Motion for a Resolution, European Parliament, 15 May 2017 (Jan. 15, 2018), available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+P8-RC-2017-0349+0+DOC+PDF+V0//EN.

115 Guidelines to Promote and Protect the Enjoyment of All Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons, Council of the European Union, 24 June 2013 (Jan. 15, 2018), available at https://eeas.europa.eu/sites/eeas/files/137584.pdf.

116 Traditions in the North Caucasus suggest that the family should renounce problematic relatives or undergo a series of severe punishments and by such severe execution, the family demonstrates that it not only renounces its relative in accordance with the Chechen tradition, but also that it values these traditions higher than kinship ties.

117 They Said That I'm Not a Human, *supra* note 111, at 23.

brothers.[118] Their invisibility in the Chechen society does not and must not diminish their pain and suffering.[119]

Arguably, the described situation in Chechnya may be subsumed under various crimes under the current Russian federal legislation, i.e., the Criminal Code of the Russian Federation.

3.2. Legal Framework in the Russian Federation

In accordance with Art. 15(1) of the Federal Constitution (hereinafter Constitution), the Constitution has supreme legal force in the entire territory of Russia. The Constitution provides for direct applicability of prohibits discrimination.[120] Although homosexuality is decriminalized in Russia, a recent federal ban, the so-called "*propaganda of homosexuality*,"[121] can be seen as the effective stigmatization of same-sex relationships.[122]

It is questionable whether the most recent ECtHR judgment *Bayev and others v. Russia* will be of any help for the advancement of LGBT rights in Russia.[123] The Court highlighted the general impact of the LGBT ban[124] on the applicants' lives, as it not only prevented them from campaigning for their rights, but also required them in effect to conceal their sexual orientation whenever a minor was present.[125] This not only directly violated Art. 10 of the ECHR, but it also contravenes the contemporary

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118 They Said That I'm Not a Human, *supra* note 111, at 24.

119 "My brother entered my room, sat in front of me with a pistol, and asked me to kill myself. He said that he promised my father that he wouldn't do it, and that it would be easier to explain to others that it was an accident if I shot myself. I replied that I was not going to commit suicide, and if he was ready to kill me, it's time." *Id.*

120 Конституция Российской Федерации, принята всенародным голосованием 12 декабря 1993 г., Собрание законодательства РФ, 2014, № 31, ст. 4398 [Constitution of the Russian Federation enacted by the national referendum on December 12, 1993, Legislation Bulletin of the Russian Federation, 2014, No. 31, Art. 4398], Art. 2.

121 Федеральный закон от 29 июня 2013 г. № 135-ФЗ "О внесении изменений в статью 5 Федерального закона "О защите детей от информации, причиняющей вред их здоровью и развитию" и отдельные законодательные акты Российской Федерации в целях защиты детей от информации, пропагандирующей отрицание традиционных семейных ценностей," Собрание законодательства РФ, 2013, № 26, ст. 3208 [Federal law No. 135-FZ of 29 June 2013. For the Purpose of Protecting Children from Information Advocating for a Denial of Traditional Family Values, Legislation Bulletin of the Russian Federation, 2013, No. 26, Art. 3208].

122 Justice or Complicity? LGBT Rights and the Russian Courts, Equal Rights Trust (September 2016), at 13 (Jan. 15, 2018), available at http://www.equalrightstrust.org/ertdocumentbank/Justice%20or%20Complicity%20LGBT%20Rights%20and%20the%20Russian%20Courts_0.pdf.

123 *Bayev and others v. Russia*, No. 67667, 20 June 2017, [2017] ECHR 572.

124 The Russian Federal law "For the Purpose of Protecting Children from Information Advocating for a Denial of Traditional Family Values." It made promoting "non-traditional sexual relationships" among minors an administrative offence and categorized homosexual relationships as "second class."

125 *Bayev and others v. Russia*, *supra* note 123, para. 61.

human security approach, as the essence for future prevention of mass atrocities. The ECtHR concluded that Russian law embodied a predisposed bias on the part of the heterosexual majority against the homosexual minority since there is a clear European consensus about the recognition of individuals' right to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their own rights and freedoms.[126] The Government had not therefore provided convincing and weighty reasons to justify treating the applicants differently, in violation of Art. 14 taken in conjunction with Art. 10.[127]

Nevertheless, Russia is a State Party to many international human rights treaties: the ICCPR, the ICESCR, the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention on the Elimination of All Forms of Discriminations against Women (1979), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (hereinafter CAT), the Convention on the Rights of the Child (1989) and the Convention on the Rights of Persons with Disabilities (2006). International human rights law requires states to take legislative and other measure to protect LGBT persons from hate-motivated violence.[128] This includes prohibiting, investigating and prosecuting such violence, and also providing remedies for such violence when it occurs.[129] States must also exercise due diligence in preventing LGBT persons from facing torture and other ill-treatment, including prohibiting, investigating, prosecuting and punishing acts of torture and other ill-treatment carried out by private individuals.[130]

In fact, the Constitution provides for supremacy of international treaties over domestic law:

> If an international treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty shall apply.[131]

This Article does not provide for supremacy of commonly recognized principles of international law, but is strictly reserved for treaties. However, the first prong of the same Article should be pointed out:

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126 *Bayev and others v. Russia*, *supra* note 123, para. 66.

127 *Id.* para. 91.

128 Justice or Complicity?, *supra* note 122, at 41.

129 ICCPR, Arts. 6, 9; General Comment No. 35, Article 9 (Liberty and Security of Person), HRC, CCPR/C/GC/35, 16 December 2014, para. 9; Discrimination and Violence Against Individuals, *supra* note 14, paras. 11, 12.

130 ICCPR, Art. 7; CAT, Arts. 3, 16; Discrimination and Violence Against Individuals, *supra* note 14, paras. 13, 14.

131 Constitution of the Russian Federation, Art. 15(4).

> The commonly recognized principles and norms of international law and the international treaties of the Russian Federation shall be a component part of its legal system.

This is significant due to the fact that one might argue that the prohibition of crimes against humanity, as a peremptory norm of international law, definitely forms part of commonly recognized principles of international law. However, in the Russian context it is superfluous to argue that crimes against humanity form part of commonly recognized principles of international law since Russia does not contain a provision on the prohibition of crimes against humanity in its domestic Criminal Code. In accordance with the cardinal legal principle *nulla poena sine lege scripta*, embodied in the Arts. 1 and 3 of the Russian Criminal Code, customary law is excluded as a basis for criminal punishment despite the fact that commonly recognized principles of international law should form part of Russia's legal system.

On the other hand, Art. 17 of the Constitution states that the "rights and freedoms of man and citizen" shall be recognized in accordance with the "commonly recognized principles and norms of international law." Arguably, this may be read as requiring that customary international law in relation to human rights also takes precedence over domestic law.[132] Although this may be of help to the victims of Chechnya in a national lawsuit, it is of no assistance for qualifying and prosecuting these crimes as a crime against humanity.

For national legislation, it also important to mention that a sexual minority, i.e., the LGBT group in Russia has been confirmed as a social group by the Russian Constitutional Court in 2014 for the purposes of both the Criminal Code and the Code of Administrative Offences.[133] According to the Russian Criminal Code, discriminatory acts on the grounds of a person's affiliation to any social group may be considered a criminal offence (Art. 136). More importantly, a crime committed "by reason of hatred or enmity with respect to some social group" is an aggravating circumstance for crimes such as murder (Art. 105), torture (Art. 117) and deliberate infliction of bodily harm (Arts. 111, 112, 115). However, Russian courts persistently denied the status of LGBT as a social group.[134]

On a European level, as a signatory to the ECHR, Russia is obliged not only to follow case law of the ECtHR, but also uphold the right to freedom from torture and inhuman and degrading treatment as required by Art. 3 of the ECHR. Hand

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[132] Justice or Complicity?, *supra* note 122, at 24–25.

[133] Постановление Конституционного Суда Российской Федерации от 23 сентября 2014 г. № 24-П, Российская газета, 3 октября 2014 г., № 6498(226) [Judgment of the Constitutional Court of the Russian Federation No. 24-P of 23 September 2014, Rossiyskaya Gazeta, 3 October 2014, No. 6498(226)], para. 2.1, regarding the "propaganda of non-traditional sexual relations."

[134] *See* Justice or Complicity?, *supra* note 122; "He Wasn't Worthy of Being a Man": How Gay People are Murdered in Russia, While the Justice System Remains Silent about Homophobia, Meduza, 2 November 2017 (Jan. 15, 2018), available at https://meduza.io/en/feature/2017/11/02/he-wasn-t-worthy-of-being-a-man.

in hand goes the respect for private and family life under Art. 8 which always closely intertwines with the prohibition of non-discrimination enshrined in Art. 14. Specifically, in cases involving homophobia, the European consensus is clear:

> When investigating violent incidents, such as ill-treatment, State authorities have the duty to take all reasonable steps to unmask possible discriminatory motives… The authorities must do whatever is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of violence induced by, for instance, racial or religious intolerance, or violence motivated by gender-based discrimination.[135]

These fundamental European rights are buttressed by the aforementioned Yogyakarta Principles, specifically Principles 6 and 24 related to private and family life in which "everyone has the right to choice to disclose or not do disclose information relating to one's sexual orientation or gender identity…"

3.3. The Anti-Gay Purge as a Crime Against Humanity

The argument that the alleged Chechnya's campaign against homosexual men by murder, unlawful imprisonment, extermination, torture, enforced disappearances and other inhumane acts constitute crimes against humanity is quite straightforward. If the alleged facts turn out to be true, they would constitute the first recorded persecution aimed solely towards a sexual minority in the 21st century. It would confirm that they were not isolated or random acts, but in fact represented a systematic attack[136] against a civilian population and as such, can be qualified as crimes against humanity.[137] The direct involvement of state authorities may give rise to the legal argument of policy element presence.[138]

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135 *Identoba and others v. Georgia*, No. 73235/12, 12 May 2015, Para. 67; *M.C. and A.C. v. Romania*, No. 12060/12, 12 April 2016, Para. 113. *See also Nachova and others v. Bulgaria*, Nos. 43577/98 and 43579/98, 6 July 2005, Para. 160.

136 Widespread refers to the large-scale nature of the attack. But, the numerical threshold should be assessed on a case-by-case basis, including the social context. *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Trial Judgment), IT-96-23-T & IT-96-23/1-T, ICTY, 22 February 2001, para. 95.

137 It should be noted that "a policy element" for such an attack is not needed under customary law, but rather under the ICC Statute under Art. 7(2)(a). In Chechnya, the unlawful detentions, arbitrary searches and clandestine camps where homosexuals are tortured, constitute a part of a systematic attack. In determining whether actions are part of a systematic attack, the former President of the ICTY, Antonio Cassesse set out the following test: "One ought to look at these atrocities or acts in their context and verify whether they may be regarded as part of an overall policy or a consistent pattern of inhumanity, or whether they instead constitute isolated or sporadic acts of cruelty or wickedness" (*Doe v. Rafael Saravia*, 348 F.Supp.2d 1112 (2004), at 1156).

138 They Said That I'm Not a Human, *supra* note 111, at 9.

3.4. Solution: A Legal Catch-22

Despite the aforementioned extensive legal framework, the Russian Federation has signed, but never ratified the ICC Statute and therefore, the situation in the Republic of Chechnya is not within the purview of the ICC. Had Russia have ratified the Statute, the gross violations of human rights on the grounds of sexual orientation in Chechnya would have been one of the first opportunities for the ICC to adjudicate on as persecution on the basis of sexual orientation. The ICC could have paved the road for a more certain interpretation of Arts. 7(3) and 7(1)(h), thereby giving a more certain judicial outcome for the future protection of sexual minorities on an international criminal law scale. Unfortunately, not only did Russia not ratify the Statute, but it also announced the withdrawal of its signature last November.[139]

Nevertheless, it must be reminded that very few might argue that crimes against humanity do not constitute a *jus cogens* norm from which no derogation is allowed. Although not yet codified in a distinct convention, "a comparable international indignation at such act is not to be doubted."[140] This has been further affirmed by the International Law Commission in Art. 9 of its proposed Draft Articles on Crimes Against Humanity.[141] Accordingly, a proper recognition of these acts as crimes against humanity provides possible accountability options under universal jurisdiction in other states. Thus, qualifying sexual orientation as other universally impermissible grounds under international law as explained in the previous part of this paper is of utmost importance in the case of universal jurisdiction.

The adequate legal solution for the homosexual minority in Chechnya is denied by the circumstances of the problem and existing national legal framework. Such a "Catch 22"[142] illustrates the need for developing a clear and certain international law response to state-orchestrated discrimination and violence against LGBT minorities.

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[139] This withdrawal was done in light of the Declaration submitted by the Ukrainian government in September 2015 pursuant to Art. 12(3) of the Statute, in which it accepted the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the perpetrators and accomplices of acts committed in the territory of Ukraine since February 2014. On the basis of this Declaration, the ICC has jurisdiction to investigate and prosecute crimes set out in its Statute that have taken place on the Crimean Peninsula during the period of Russian occupation, i.e., war crimes and crimes against humanity. Report on Preliminary Examination Activities (2016) (Jan. 15, 2018), available at https://www.documentcloud.org/documents/3220719-ICC-Crimea-Nov2016.html.

[140] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, [2002] I.C.J. 1, Joint Separate Opinion of Judge Higgins, Buergenthal and Kooijmans, para. 51.

[141] Report on the work of the sixty-eighth session (2016), Art. 9, Aut dedere aut judicare: "The State in the territory under whose jurisdiction the alleged offender is present shall submit the case to its competent authorities for the purpose of prosecution, unless it extradites or surrenders the person to another State or competent international criminal tribunal. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State" (Jan. 15, 2018), available at http://legal.un.org/ilc/reports/2016/.

[142] "Catch-22" (a satirical novel by American author Joseph Heller) is "a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule."

Conclusion: Are We There Yet?

The persecution of homosexuals by the Nazis in World War II was not a historical anomaly since people have been historically persecuted on the grounds of sexual orientation and gender. Not only did most of these crimes go unacknowledged, but they have never been given a legal attribute worthy of the atrocities committed. There should be no doubt as to whether persecution on the grounds of sexual orientation constitutes "an intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."

The aim of this paper is to show that a historically vulnerable group of people can in fact be legally subsumed under the notion of crimes against humanity for the purpose of their protection in international criminal law. In a world that is changing faster than ever before, the law can be used as a tool to stand at the frontier of change in order to prevent mass atrocities, rather than confronting them *ex-post*. If these suggestions are seen as too radical, it is important to stress that the legal qualification of persecution on grounds of sexual orientation and gender would be in line with today's international framework for human rights, in which human security sits at the apex. It

> means protecting fundamental freedoms – freedoms that are the essence of life. It means protecting people from critical (severe) and pervasive (widespread) threats and situations… by creating… systems that together give people the building blocks of survival, livelihood and dignity.[143]

By correctly defining the terms of sexual orientation and gender, by recognizing the potential of open clauses under the ICC Statute, qualifying domestic criminalization of same-sex conduct as a crime against humanity and tackling legal circumvention appropriately, a human security approach[144] with regards to sexual orientation and

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[143] Human Security Now, Report of the Commission on Human Security (2003), at 4 (Jan. 15, 2018), available at http://www.un.org/humansecurity/sites/www.un.org.humansecurity/files/chs_final_report_-_english.pdf. Too often gross violations of human rights result in conflicts, displacement, and human suffering on a massive scale. In this regard, human security underscores the universality and primacy of a set of rights and freedoms that are fundamental for human life. Human security makes no distinction between different kinds of human rights – civil, political, economic, social and cultural rights thereby addressing violations and threats in a multidimensional and comprehensive way. It introduces a practical framework for identifying the specific rights that are at stake in a particular situation of insecurity and for considering the institutional and governance arrangements that are needed to exercise and sustain them.

[144] All people, including lesbian, gay, bisexual and transgender (LGBT) persons, are entitled to enjoy the protection provided for by international human rights law, including in respect of rights to life, security of person and privacy, the right to be free from torture, arbitrary arrest and detention, the right to be free from discrimination and the right to freedom of expression, association and peaceful assembly. Discriminatory Laws and Practices and Acts of Violence Against Individuals, *supra* note 11.

gender identity would be ensured in international criminal law. In that case, the international community would truly *be resolved to guarantee the lasting respect for and the enforcement of international justice*[145] for *all* people.

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PERFORMANCE OF DERIVATIVE TRANSACTIONS THROUGH THE CENTRAL COUNTERPARTY

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The article is devoted to the contractual models designed to formalize the legal relationship between the clearing participants (parties to the original derivative transaction) and the central counterparty ("CCP"). The authors deal with the legal concepts of novation, so-called "open offer" and assignment, which are commonly used in international practice. Taking into consideration some Russian legal peculiarities and comparative law experience, the authors come to the conclusion that the concept of assignment is best suited to the Russian legal framework.

Keywords: central counterparty; novation; open offer; assignment; abstract contract; clearing; OTC derivative contract; EMIR; Dodd-Frank Act.

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Introduction

One of the main problems of the legal regime governing derivative transactions is the mechanism for their performance. On the one hand, this is because Russian legislators are traditionally cautious towards acknowledging the legal effect of obligations arising out of so-called aleatory transactions, and are conscious of the high risk of non-performance of such contracts, which are not secured by a traditional set of collateral due to their economic mission.[1] Indeed, a derivative transaction usually represents a mass financial product, which leads to its standardization. The existence of additional manners of collateralization in such a transaction is closely connected to the creditworthiness of third parties (surety, independent guarantee) or the economic assessment of the entity acting as a collateral (pledge, for instance) provided by one of the parties to a transaction, but this significantly increases the so-called counterparty risk. This does not always correspond to the initial intentions of the parties – for instance, to use derivative transactions to hedge the risks of other contracts.

One of the mechanisms designed to advance the "enforceability" of derivatives is central clearing. The idea is that certain types of derivative transactions are performed with the assistance of a special financial intermediary named a "central counterparty."[2] The central counterparty's function is to release the parties to a derivative contract from risks connected with the paying capacity of the debtor, as after an obligation with a certain content becomes effective, the central counterparty "replaces" the debtor for the creditor and the creditor for the debtor respectively. Usually, such a case is described as the termination of the principal obligation under a derivative transaction and its replacement by two other creditor-debtor relationships, identical in content. In these two new relationships, the central counterparty represents a debtor (in one of the obligations) and a creditor (in the other obligation), so that on the outside it

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[1] It suffices to remember the well-known court cases from 2011–2013 concerning performance of interest rate swap contracts made between OOO Ermitazh Development and OOO Agroterminal and the defendant ZAO UniCredit Bank (*see* Определение Высшего Арбитражного Суда Российской Федерации от 23 ноября 2012 г. № ВАС-15181/12 по делу № А40-92297/11-46-801 [Order of the Supreme Arbitration Court of the Russian Federation No. VAS-15181/12 of 23 November 2012 in the case No. A40-92297/11-46-801]).

[2] Jon Gregory, *Central Counterparties: Mandatory Central Clearing and Initial Margin Requirements for OTC Derivatives* 6 (West Sussex: John Wiley & Sons, 2014); Philipp J. Gergen, *Rechtsfragen der Regulierung ausserbörslicher derivativer Finanzinstrumente: Zur neuen Marktinfrastruktur in der Europäischen Union, den Vereinigten Staaten von Amerika und Singapur* 54 (Frankfurt am Main: Peter Lang GmbH, 2015).

appears as if the debtor in the original obligation, instead of performing the obligation to the initial creditor, transfers what he owes to a third party, a special intermediary, which in turn transfers the same to the previous creditor. And it is essential that this intermediary demands performance from the original debtor as a creditor in a new separate obligation, which is identical in content to the initial obligation under the derivative transaction. Equally, the original creditor demands performance from the intermediary as if from a new debtor (on a new basis) since the first obligation disappears and is replaced by two separate ones, "mirror-like" in content.

Such a model reduces the traditional counterparty risk in contractual relationships as each party to a derivative transaction is opposed by a professional participant specializing in the fulfillment of such contracts. Needless to say, the central counterparty will only perform its role if it is a sufficiently stable trader and possesses assets which will cover the liabilities it owes to parties to these transactions. It is also essential for it to possess effective ways of enforcing its claims, or it is destined to be an "eternal debtor" in derivative obligations.[3]

This model of "transfer" of a derivative transaction to a central counterparty was officially recommended by the International Organization of Securities Commissions' (IOSCO) Committee on Payment and Settlement Systems in the so-called Recommendations for Central Counterparties (CPSS-IOSCO) in 2004.[4] The Principles for Financial Market Infrastructures, issued by the same committee 8 years later, have maintained a similar approach.[5]

The first document specifically states that central counterparties should act on the basis of a stable legal concept of transfer of a derivative transaction to clearing (*see, e.g.*, sec. 4 "Recommendations"). Two models are suggested for this purpose: novation and so-called "open offer." Under IOSCO terminology the first of these models means "a process through which the original obligation between a buyer and seller is discharged through the substitution of the central counterparty as seller to buyer and buyer to seller, creating two new contracts" (*see* Annex 3: Glossary to the aforementioned Recommendations). The so-called "open offer" in the sense of the Recommendations implies that the central counterparty makes an "open offer" to market participants to act as a counterparty in derivative transactions. As a result, it is interposed directly and immediately between participants at the time that the terms and conditions of the transaction are agreed upon. In this case, essentially no original obligation occurs between the parties. On the outside, it looks like they have initially agreed on the terms and conditions of a future derivative through an

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[3] Gregory 2014, at 28–29.

[4] Recommendations for Central Counterparties (Bank for International Settlements, November 2004) (Jan. 8, 2018), available at http://www.bis.org/cpmi/publ/d64.pdf.

[5] Principles for Financial Market Infrastructures (Bank for International Settlements, April 2012) (Jan. 8, 2018), available at http://www.bis.org/cpmi/publ/d101a.pdf.

intermediary, which has led to the formation of two "mirror-like" obligations between the latter and two market participants (*see* Annex 3: Glossary and sec. 4.1.2 of the Recommendations).

The Principles for Financial Market Infrastructures 2012 also recommend that states use the mechanisms of novation or "open offer," the descriptions of these two mechanisms being almost identical to those specified in the 2004 Recommendations.[6] In the meantime, the IOSCO's approach is more flexible in this document: in particular, it highlights that the mechanism of "transfer" of a derivative to clearing may differ from one jurisdiction to another, "analogous legally binding arrangements" and "similar legal devices" being admissible mechanisms as well.[7] The reason for such flexibility is evidently the idea that the main purpose of national legal systems is to ensure that the system of measures ensuring the performance of obligations connected with the central counterparty works smoothly (*see* sec. 3.1.9 and further). Not surprisingly, a more recent edition of the "roadmap" on the optimization of regulation in the derivative market intentionally left this issue to the national legislator's discretion. As an example, it states that legal succession may be used to transfer the contract to the central counterparty (*see* the reference to sec. 3.1.8).

The documents described above caused a well-known discordance of opinions within the professional debate concerning the most favorable legal form of structuring relations between a financial intermediary and the parties to a derivative transaction. The situation was complicated by the fact that the aforementioned documents did not provide for any information or clarification in this respect. It comes as no surprise that legal acts somehow inspired by these recommendations also avoided the issue. For instance, EU Regulation No. 648/2012 of the European Parliament and Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (better known as EMIR (European Market Infrastructure Regulation)), which contains detailed provisions on the internal structure and organization of activity of the central counterparty, only mentions cursorily that a derivative contract may be "entered into or novated."[8] The well-known Dodd-Frank Act[9] adopted on 21 October 2010 in the USA (which entered into force on 15 July 2011), in its Title VII, which is dedicated to a detailed reorganization of over-the-counter derivative market, leaves this issue to the discretion of market participants. The Act states that a derivative transaction "shall be submitted" to a central counterparty for clearing

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6 *See* secs. 1.13, 3.1.8 of the Principles for Financial Market Infrastructures, as well as Annex D.

7 *See* the same sections.

8 *See* secs. 16, 92 of the Preamble and sec. 4 of the Regulation (Jan. 8, 2018), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:201:0001:0059:EN:PDF.

9 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub.L. 111–203, H.R. 4173 (Jan. 8, 2018), also available at https://www.sec.gov/about/laws/wallstreetreform-cpa.pdf.

but nothing more.[10] European national legal systems do not specifically regulate this issue. The same can be said about Russia.

It is thus important to consider the advantages and disadvantages for Russia's legal system of transferring derivatives to central clearing.

1. Transfer of a Derivative Transaction to a Central Counterparty Through Novation

One cannot say that Russia's legislation completely avoids the problem of transferring contracts by the party to it to central clearing. According to Art. 4(12) of the Federal law of 2 February 2011 No. 7-FZ "On Clearing and Clearing Activities" (hereinafter Clearing Law), clearing rules may cover situations when an obligation (obligations) existing between the parties to the contract made without the participation of the central counterparty shall be terminated through their replacement by a new obligation (obligations) between each party of the said contract and the central counterparty. At the same time, this new obligation (obligations) must provide for the same subject-matter and the same manner of performance as the original contract made without the participation of the central counterparty.

Based on the literal meaning of the law, it seems that the replacement of the existing obligation by a new one between each party to the contract and a third party must proceed as a result of the termination of the initial relationship between the parties to a derivative contract. However, it should be noted that the mechanism of this replacement of an obligation existing between the parties to clearing by a new obligation, between each of them and a central counter party, provided by Art. 4(12) of the Clearing Law, lacks research in Russian literature.

For instance, Pavel Soloviev only notices that

> on the over-the-counter derivative market contracts are made with a central counterparty on a bilateral basis. After the terms and conditions of the contract are agreed upon, it is transferred (through novation or other mechanism depending on jurisdiction) to a central counterparty. This means that the contract initially agreed upon between two contractors is replaced by two "mirror-like" contracts – between a central counterparty and each party to the initial contract.[11]

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[10] *See* secs. 721, 723, 728 of the Act (Jan. 8, 2018), available at https://www.sec.gov/about/laws/wallstreetreform-cpa.pdf.

[11] *Соловьев П.Ю.* Регулирование и централизованный клиринг внебиржевых деривативов // Управление в кредитной организации. 2013. № 2. С. 97–112 [Pavel Yu. Soloviev, *Regulation and Central Clearing of Over-the-Counter Derivatives*, 2 Management in a Financial Organization 97 (2013)].

However there are two prevailing views within this scant literature on the nature of such a replacement: the novation model[12] and the assignment model.[13]

In order to analyze the termination of obligations out of a derivative transaction in novation terms, it is necessary to refer to current legislation.

According to Art. 414 of the Civil Code of the Russian Federation, novation is understood as a ground for termination of an obligation implying the replacement of the initial obligation existing between two parties with another obligation between the same parties. Unless otherwise agreed between the parties, novation terminates any additional obligations.

The following features of novation have been pointed out by court practice:

– it is the parties to the initial transaction who are entitled to replace the subject-matter and undertake new obligations terminating the legal effect of the initial ones[14];

– the essence of novation is the replacement of the initial obligation existing between the parties with a new obligation, accompanied by the termination of the initial obligation[15];

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[12] It should be noticed that some sources determine novation as replacement of one party to the transaction with another person with the consent of both parties. *See Лукашов А.В.* Расчетно-клиринговая система и глобальная фондовая архитектура [Andrey V. Lukashov, *Clearing and Settlement System and Global Stock Architecture*] (Jan. 8, 2018), available at http://www.gaap.ru/articles/raschetno_kliringovaya_sistema_i_globalnaya_fondovaya_arkhitektura/.

[13] *Хоменко Е.Г., Игнатьева Е.А., Подкопаева Е.Е., Слесарев С.А.* Комментарий к Федеральному закону от 7 февраля 2011 г. № 7-ФЗ "О клиринге и клиринговой деятельности" (постатейный) [Elena G. Khomenko et al., *Commentary on the Federal Law of 2 February 2011 No. 7-FZ "On Clearing and Clearing Activities" (Itemized)*] 35 (ConsultantPlus Legal Database, 2012).

[14] Определение Высшего Арбитражного Суда Российской Федерации от 16 февраля 2012 г. № ВАС-1110/12 по делу № А13-12757/2010 [Order of the Supreme Arbitration Court of the Russian Federation No. VAS-1110/12 of 16 February 2012 in the case No. A13-12757/2010]; Определение Высшего Арбитражного Суда Российской Федерации от 26 сентября 2011 г. № ВАС-12364/11 по делу № А50-25949/2010 [Order of the Supreme Arbitration Court of the Russian Federation No. VAS-12364/11 of 26 September 2011 in the case No. A50-25949/2010]; Определение Верховного Суда Российской Федерации от 25 декабря 2000 г. № 2-В00-20 [Order of the Supreme Court of the Russian Federation No. 2-V00-20 of 25 December 2000]; Постановление Тринадцатого арбитражного апелляционного суда от 19 марта 2015 г. по делу № А21-9250/2012 [Resolution of the Thirteenth Arbitration Court of Appeal of 19 March 2015 in the case No. A21-9250/2012].

[15] Информационное письмо Президиума Высшего Арбитражного Суда Российской Федерации от 21 декабря 2005 г. № 103 [Information Letter of the Presidium of the Supreme Arbitration Court of Russian Federation No. 103 of 21 December 2005], p. 2; Постановление Арбитражного суда Дальневосточного округа от 30 октября 2014 г. № Ф03-4686/2014 по делу № А51-7839/2014 [Resolution of the Arbitration Court of the Far Eastern District No. F03-4686/2014 of 30 October 2014 in the case No. A51-7839/2014]; Постановление Федерального арбитражного суда Северо-Кавказского округа от 25 января 2013 г. по делу № А32-17542/2011 [Resolution of the Federal Arbitration Court of the North Caucasian District of 25 January 2013 in the case No. A32-17542/2011]; Постановление Федерального арбитражного суда Центрального округа от 14 декабря 2012 г. по делу № А09-6721/2011 [Resolution of the Federal Arbitration Court of the Central District of 14 December 2012 in the case No. A09-6721/2011]; Постановление Девятнадцатого арбитражного апелляционного суда от 9 июня 2012 г. по делу № А64-5425/2009 [Resolution of the Nineteenth Arbitration Court of Appeal of 9 June 2012 in the case No. A64-5425/2009].

– novation implies a change in the type of obligation (replacement of a loan obligation with issuing a bill, replacement of an obligation to transport goods with a custody obligation, replacement of a bill obligation with an obligation to hand over goods and so on)[16];

– novation only terminates an obligation when the agreement to replace the initial obligation with a new one meets all legal requirements, i.e., it is made in an appropriate form, the parties have agreed all the major conditions of the obligation and the transaction is valid[17];

– the term of the novation agreement providing for the additional obligations of the pledger connected to the initial obligation to remain in force will be null and void[18].

1. It should be noted that the above features of novation do not correspond completely to those proposed by the legislator to replace a derivative obligation by two "mirror-like" obligations between the clearing participants and a central counterparty. Firstly, novation implies the replacement of the initial obligation with a new one between the same parties. On the contrary, according to Art. 4(12) of the Clearing Law the obligation(s) existing between the parties to the contract made

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[16] Постановление Федерального арбитражного суда Московского округа от 13 февраля 2001 г. № КГ-А40/365-01 [Resolution of the Federal Arbitration Court of the Moscow District No. KG-A40/365-01 of 13 February 2001]; Постановление Федерального арбитражного суда Восточно-Сибирского округа от 15 мая 2003 г. № А33-16110/02-С2-Ф02-1432/03-С2 [Resolution of the Federal Arbitration Court of the East Siberian District No. A33-16110/02-S2-F02-1432/03-S2 of 15 May 2003]; Постановление Федерального арбитражного суда Центрального округа от 14 мая 2003 г. № А36-229/6-02 [Resolution of the Federal Arbitration Court of the Central District No. A36-229/6-02 of 14 May 2003]; Постановление Федерального арбитражного суда Восточно-Сибирского округа от 17 марта 2014 г. по делу № А33-7120/2013 [Resolution of the Federal Arbitration Court of the East Siberian District of 17 March 2014 in the case No. A33-7120/2013]; Постановление Федерального арбитражного суда Восточно-Сибирского округа от 9 октября 2013 г. по делу № А10-4338/2012 [Resolution of the Federal Arbitration Court of the East Siberian District of 9 October 2013 in the case No. A10-4338/2012].

[17] Информационное письмо Президиума Высшего Арбитражного Суда Российской Федерации от 21 декабря 2005 г. № 103 [Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation No. 103 of 21 December 2005], p. 3; Определение Высшего Арбитражного Суда Российской Федерации от 15 августа 2013 г. № ВАС-10417/13 по делу № А40-130125/11-133-1115 [Order of the Supreme Arbitration Court of the Russian Federation No. VAS-10417/13 of 15 August 2013 in the case No. A40-130125/11-133-1115]; Постановление Федерального арбитражного суда Центрального округа от 1 апреля 2013 г. по делу № А48-1873/2012 [Resolution of the Federal Arbitration Court of the Central District of 1 April 2013 in the case No. A48-1873/2012].

[18] Информационное письмо Президиума Высшего Арбитражного Суда Российской Федерации от 21 декабря 2005 г. № 103 [Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation No. 103 of 21 December 2005], p. 6; Постановление Четырнадцатого арбитражного апелляционного суда от 26 июля 2011 г. по делу № А13-12758/2010 [Resolution of the Fourteenth Arbitration Court of Appeal of 26 July 2011 in the case No. A13-12758/2010]; Постановление Четырнадцатого арбитражного апелляционного суда от 22 июля 2011 г. по делу № А13-12757/2010 [Resolution of the Fourteenth Arbitration Court of Appeal of 22 July 2011 in the case No. A13-12757/2010]; Постановление Восемнадцатого арбитражного апелляционного суда от 11 февраля 2010 г. № 18АП-12239/2009 по делу № А76-11548/2009 [Resolution of the Eighteenth Arbitration Court of Appeal No. 18AP-12239/2009 of 11 February 2010 in the case No. A76-11548/2009].

without the participation of the central counterparty, is (are) terminated by their replacement with a new obligation (new obligations) between each of the parties of the said contract and the central counterparty, i.e., a third party. In other words, clearing changes the parties to the initial contractual obligation.

However, as is noticed in the literature, the essence of novation is that such an agreement is valid only for the parties involved. In particular, this logic is implied in the idea that collateral provided by a third party cannot be reserved for the purposes of a new obligation, which has arisen on the basis of the previous contract.[19] Thus, the construction provided by the Clearing Law can be treated at best as a mixed contract. This is inappropriate for legal analysis as in general, under any qualification resulting from the above replacement, no new obligation between clearing participants arises (*see* below).

2. Secondly, novation by its nature implies passage to an obligation of another type as compared with the initial one.[20] For instance, the previous version of the Civil Code of the Russian Federation specified that novation implies another subject matter or manner of performance (novation). As stated by the drafters of amendments to the Civil Code of the Russian Federation, the previous wording used to confuse the reader since the parties to the contract could change the manner of performance as well as the subject-matter within the existing obligation by changing the contract. This is why the new wording of Art. 414 of the Civil Code of the Russian Federation (which mentions replacement of one obligation with *another* one) is designed to highlight that the new legal relationship must be different to the initial one.[21]

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[19] *See, e.g.*, *Егорова М.А.* Некоторые вопросы прекращения залоговых обязательств // Законы России: опыт, анализ, практика. 2012. № 5. С. 9 [Maria A. Egorova, *Certain Issues Concerning Termination of Collateralized Obligations*, 5 Laws of Russia: Experience, Analyses, Practice 8, 9 (2012)].

[20] *Витрянский В.В.* Проектируемые общие положения об обязательствах в условиях реформирования гражданского законодательства // Кодификация российского частного права 2015 [Vasiliy V. Vitryansky, *Projected General Provisions Concerning Obligations in the Conditions of Reforming Civil Law* in *Private Law Codification 2015*] 121 (P.V. Krasheninnikov (ed.), Moscow: Statut, 2015).

[21] *Id.* Generally this idea is supported by court practice. *See* Определение Верховного Суда Российской Федерации от 19 марта 2015 г. по делу № 310-КГ14-5185, А48-3437/2013 [Order of the Supreme Court of the Russian Federation of 19 March 2015 in the case No. 310-KG14-5185, A48-3437/2013]; Постановление Арбитражного суда Волго-Вятского округа от 18 июня 2015 г. № Ф01-1915/2015 по делу № А39-366/2013 [Resolution of the Arbitration Court of the Volga-Vyatka District No. F01-1915/2015 of 18 June 2015 in the case No. A39-366/2013]; Постановление Арбитражного суда Волго-Вятского округа от 14 мая 2015 г. № Ф01-1359/2015 по делу № А43-16460/2014 [Resolution of the Arbitration Court of the Volga-Vyatka District No. F01-1359/2015 of 14 May 2015 in the case No. A43-16460/2014]; Постановление Арбитражного суда Волго-Вятского округа от 7 мая 2015 г. № Ф01-648/2015 по делу № А17-5311/2012 [Resolution of the Arbitration Court of the Volga-Vyatka District No. F01-648/2015 of 7 May 2015 in the case No. A17-5311/2012]; Постановление Арбитражного суда Дальневосточного округа от 30 июня 2015 г. № Ф03-2036/2015 по делу № А16-529/2014 [Resolution of the Arbitration Court of the Far East District No. F03-2036/2015 of 30 June 2015 in the case No. A16-529/2014]; Постановление Арбитражного суда Западно-Сибирского округа от 21 июля 2015 г. № Ф04-20552/2015 по делу № А81-1136/2014 [Resolution of the Arbitration Court of the West-Siberian District No. F04-20552/2015 of 21 July 2015 in the case

However, according to Art. 4(12) of the Clearing Law it is the replacement of one party to the contract with a central counterparty that serves as a ground for termination of the initial obligation,[22] and this does not provide for the change in the essence of the initial relationship: "the new relationship(s) must provide for the same subject matter and the same manner of performance" (Art. 4(12) of the said act). This means that in theory, the transfer of a transaction to the central counterparty should not change the essence of the obligation. Otherwise, the initial creditor will not obtain the expected consideration (in case of actual delivery) or it will hinder the multilateral clearing procedure for the central counterparty.

3. Thirdly, the legal literature notes the derivative nature of a relationship which has arisen, as a result of novation, out of the initial obligation. Should the novation agreement be rendered void, the initial relationship remains effective.[23] Obviously, the general consequences surrounding the invalidity of transactions are not intended to cover the declared specificity of clearing relationships.

As is clear from the Civil Code of the Russian Federation, the main consequence of holding a transaction invalid (unless otherwise prescribed by law) is bilateral restitution (mutual restitution) (Art. 167(2) of the Civil Code of the Russian Federation), which implies the return of the parties to their initial positions, i.e., each party is obliged to return to the other what they have received under the

No. A81-1136/2014]; Постановление Арбитражного суда Поволжского округа от 14 июля 2015 г. № Ф06-25421/2015 по делу № А55-17453/2014 [Resolution of the Arbitration Court of the Povolzhskiy District No. F06-25421/2015 of 14 July 2015 in the case No. A55-17453/2014]; Постановление Девятого арбитражного апелляционного суда от 22 июня 2015 г. № 09АП-22464/2015 по делу № А40-199003/14 [Resolution of the Ninth Arbitration Court of Appeal No. 09AP-22464/2015 of 22 June 2015 in the case No. A40-199003/14].

22 Khomenko et al. 2012, at 35.

23 Постатейный комментарий к Гражданскому кодексу Российской Федерации, части первой [*Itemized Commentary on Part One of the Civil Code of the Russian Federation*] 778 (P.V. Krasheninnikov (ed.), Moscow: Statut, 2011); Комментарий к Гражданскому кодексу Российской Федерации (часть первая) (постатейный) [*Commentary on the Civil Code of the Russian Federation (Part One) (Itemized)*] 391 (T.E. Abova & A.Yu. Kabalkin (eds.), Moscow: Yurait, 2002). This is also supported by current court practice, which considers that resurrection of the previous obligation is a special consequence of invalidity of the novation agreement. *See, e.g.*, Постановление Федерального арбитражного суда Поволжского округа от 28 августа 2013 г. по делу № А55-6219/2012 [Resolution of the Federal Arbitration Court of the Povolzhskiy District of 28 August 2013 in the case No. A55-6219/2012]; Постановление Федерального арбитражного суда Уральского округа от 15 сентября 2009 г. № Ф09-6900/09-С3 по делу № А60-39930/2008-С11 [Resolution of the Federal Arbitration Court of the Ural District No. F09-6900/09-S3 of 15 September 2009 in the case No. A60-39930/2008-S11]; Постановление Пятого арбитражного апелляционного суда от 2 сентября 2011 г. № 05АП-4810/2011 по делу № А51-20022/2010 [Resolution of the Fifth Arbitration Court of Appeal No. 05AP-4810/2011 of 2 September 2011 in the case No. A51-20022/2010]; Постановление Семнадцатого арбитражного апелляционного суда от 13 июля 2009 г. № 17АП-602/2009-ГК по делу № А60-39930/2008 [Resolution of the Seventeenth Arbitration Court of Appeal No. 17AP-602/2009-GK of 13 July 2009 in the case No. A60-39930/2008]; Постановление Семнадцатого арбитражного апелляционного суда от 17 ноября 2008 г. № 17АП-8310/2008-ГК по делу № А50-8519/2008 [Resolution of the Seventeenth Arbitration Court of Appeal No. 17AP-8310/2008-GK of 17 November 2008 in the case No. A50-8519/2008].

relevant transaction. The consequences of invalidity may also include prohibition of restitution, compensation for real damage, compensation for losses and others.[24]

However, the consequences of invalidity of a contract made with the central counterparty are defined differently by the Clearing Law, and the obligation in this situation is terminated in the above manner. In the presence of interconnected contracts and in the absence thereof the law (Art. 14 of the Clearing Law) expressly excludes the implication of restitution where the contract made with the central counterparty is invalid. The only way of protecting civil rights provided by the Law is compensation for the losses (and only if the person knew, or ought to have known, that the contract was invalid and intentionally or negligently failed to act properly in connection with this awareness of the invalidity of the contract).[25] Whether it should be considered that Art. 14 of the Clearing Law is *lex specialis* in relation to the Civil Code of the Russian Federation and that the initial relation "resurrects" is a disputable matter. There appear to be two ways of interpreting this. In particular, it may hypothetically be concluded that in the case of invalidity of the transfer of an obligation to the central counterparty, the initial obligation between clearing members does not arise again since the Clearing Law provides for special rules on this issue.

4. Besides, it should be taken into consideration that Russian doctrine and court practice negatively treat the conclusion of novation agreements before the obligation, which the parties intend to terminate in the future, has arisen. This issue will inevitably appear provided that the transfer of the initial transaction to the central counterparty is exercised on the basis of some framework agreement between the clearing members and the central counterparty.

The possibility of incorporating automatic novation of the debt, in the case of improper performance or non-performance of the obligation by the debtor, into the main contract is not obvious. There are two opposite approaches in the literature. On the one hand, scholars point out that the "advance" formation of a novation agreement is possible because:

Firstly, Art. 414 of the Civil Code of the Russian Federation does not specify whether the novation agreement may be formed before the debt arises (for instance, supply agreement) or only after it has arisen.

Secondly, one of the fundamental principles of civil law states that individuals and legal entities are free to establish their rights and obligations on the basis of

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[24] Гражданский кодекс Российской Федерации. Сделки. Решения собраний. Представительство и доверенность. Сроки. Исковая давность. Постатейный комментарий к главам 9–12 [*Civil Code of the Russian Federation. Transactions. Decisions of the Meetings. Representation and Power of Attorney. Time Limits. Statute of Limitations. Article-for-Article Commentary on Chapters 9–12*] (P.V. Krasheninnikov (ed.), Moscow: Statut, 2013).

[25] *Мухаметшин Т.Ф.* Современная инфраструктура российского рынка ценных бумаг: научно-практический комментарий законодательства [Timur F. Mukhametshin, *Current Russian Securities Market Infrastructure: Scientific-Practical Commentary on the Legislation*] (Moscow: Yustitsinform, 2014).

a contract and to determine any conditions of the contract which do not contradict the law (Art. 1(2) of the Civil Code of the Russian Federation).

Thirdly, by virtue of Art. 421(3) the main contract should be considered as a mixed contract. It comprises elements of various contracts: the main contract and the obligation, omitted in the legislation, that is connected with the automatic novation of a pecuniary obligation into the loan in the case of non-performance of the former within a certain time.

On the other hand, the protective function of novation is notable and the impossibility of incorporating this construction into the main contract before the debt has arisen is clear. Moreover, novation differs from another ground of termination of obligations – break-up fee – in that the legal effect of novation occurs right after the parties have reached an agreement but not at any other moment.[26]

As for court practice, it rather denies[27] than admits[28] the possibility of incorporating into the main contract a condition providing for automatic novation. Court practice also highlights the impossibility of incorporating a condition concerning future novation through a suspensive condition in a transaction (Art. 157(1) of the Civil Code of the Russian Federation) in respect of which it is not clear whether this condition will occur or not, since the debtor's omission, connected with its failure to pay the creditor, cannot be considered as such a condition.[29]

5. Another important aspect of the regime of novation is the future role of collateral. In replacing one obligation by another one with the central counterparty, it is not clear what should happen to collateral, which may still exist in a derivative transaction. In this case, according to Art. 141(2) of the Civil Code of the Russian Federation, novation

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[26] *Бациев В.В, Щербаков Н.Б.* Комментарий правовых позиций Высшего Арбитражного Суда РФ по вопросам, связанным с применением норм Гражданского кодекса РФ о прекращении обязательств // Вестник гражданского права. 2006. № 2. С. 95–108 [Victor V. Batsiev, Nikolay B. Shcherbakov, *Commentary on the Legal Opinion of the Supreme Arbitration Court of the Russian Federation on Issues Concerning Application of the Rules of the Civil Code of the Russian Federation on Termination of Obligations*, 2 Civil Law Review 95 (2006)].

[27] Постановление Федерального арбитражного суда Западно-Сибирского округа от 13 января 2010 г. по делу № А03-6718/2009 [Resolution of the Federal Arbitration Court of the East Siberian District of 13 January 2010 in the case No. A03-6718/2009]; Постановление Четвертого арбитражного апелляционного суда от 7 августа 2014 г. по делу № А19-5547/2014 [Resolution of the Fourth Arbitration Court of Appeal of 7 August 2014 in the case No. A19-5547/2014]; Решение Арбитражного суда Иркутской области от 20 мая 2014 г. по делу № А19-5547/2014 [Decision of the Arbitration Court of the Irkutsk Region of 20 May 2014 in the case No. A19-5547/2014].

[28] Постановление Федерального арбитражного суда Западно-Сибирского округа от 9 июня 2011 г. по делу № А03-6686/2010 [Resolution of the Federal Arbitration Court of the East Siberian District of 9 June 2011 in the case No. A03-6686/2010].

[29] Постановление Федерального арбитражного суда Московского округа от 29 октября 2008 г. № КГ-А40/9883-08 по делу № А40-64187/07-83-570 [Resolution of the Federal Arbitration Court of the Moscow District No. KG-A40/9883-08 of 29 October 2008 in the case No. A40-64187/07-83-570]; Определение Мосгорсуда от 6 июля 2010 г. по делу № 33-18394 [Order of the Moscow City Court of 6 July 2010 in the case No. 33-18394].

terminates all additional obligations unless otherwise provided for by the agreement. In addition, if collateral in a derivative transaction has been provided by a third party, then, according to p. 6 of the Informational Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation of 21 December 2005 No. 103,[30] a novation agreement condition, which may provide for additional obligations of a third party which is not a debtor, shall be considered invalid. Thus, in viewing the transfer of a derivative transaction to a centralized clearing in terms of novation, there will be no *a priori* transfer of collateral mechanisms to a new party (the central counterparty).

6. To sum up the analysis of transfers of a derivative transaction to a centralized clearing through novation, it should be noted that such a transfer leads to the creation of two obligations but not one. Court practice is silent about the possibility of concluding such agreements. This allows for the interpretation of the discussed agreement between clearing participants and the central counterparty as a mixed or non-defined contract. However, the risk exists that courts may consider such agreements from the point of view of unlawful transactions (Art. 168 of the Civil Code of the Russian Federation), since Art. 414 of the Civil Code of the Russian Federation expressly provides for the replacement of one obligation with only one other obligation.

Taking into account the above, one more important conclusion should be made. A novation agreement only binds the parties to the initial obligation, who have an exclusive power to make such an agreement. A novation agreement is by nature a manner of terminating obligations by the parties' agreement. This is why the termination of an obligation by the will of two parties and the simultaneous "accession" to this obligation by a third party (the central counterparty) is impossible due to the very construction of novation.

We may certainly try to interpret the transfer of a transaction to the central counterparty as a mixed contract construction (Art. 421(3) of the Civil Code of the Russian Federation), which includes features of several contracts of a different nature, or a non-defined contract.

But what kind of contracts will such a mixed contract display features of? The transfer of a derivative transaction to centralized clearing in this case will theoretically look like this: agreement on termination of the original derivative transaction and simultaneous agreement on the establishment of two mirror-like obligations with the same subject matter as the initial derivative transaction. Neither the former, nor the latter are directly regulated by civil law (whereas the existence of the former is assumed by the general provisions of the Civil Code of the Russian Federation,

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[30] Информационное письмо Президиума Высшего Арбитражного Суда Российской Федерации от 21 декабря 2005 г. № 103 "Обзор практики применения арбитражными судами статьи 414 Гражданского кодекса Российской Федерации" [Informational Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation No. 103 of 21 December 2005. Review of the Practical Experience of Application by Arbitration Courts of Article 414 of the Civil Code of the Russian Federation].

the latter is only mentioned in the Clearing Law without any details of the regime of such an agreement). Thus, the application of Art. 421(3) of the Civil Code of the Russian Federation as a justification of the existence of such a construction seems unacceptable. On the other hand, it seems like in this case such an agreement should be construed as non-defined.

Indeed, Art. 421(2) of the Civil Code of the Russian Federation specifies that the parties may conclude an agreement provided for by laws or other regulations as well as an agreement which is not provided for by such laws or regulations. Rules on particular types of contracts provided for by laws or other regulations shall not apply to contracts not provided for by laws or other regulations in the absence of the characteristics specified in part 3 of this Article. This, however, does not exclude the possibility of applying rules on the analogy of law (Art. 6(1)) to certain relationships between the parties to the contract. However, it follows from this rule that the risk of applying rules regulating similar relations to a non-defined transaction remains. It seems that the application by the courts of Art. 414 on novation to this relationship may be assumed, which in its turn will render this transaction invalid, since the major elements of the transfer of a derivative contract to a central counterparty contradict the very concept of novation in civil legislation, as mentioned above.

Moreover, court practice, which deals with certain aspects of freedom of contract, is quite fragmented, although based in general on approaches developed by the Supreme Arbitration Court of the Russian Federation in the Resolution of the Plenum of 14 March 2014 No. 16.[31] This Resolution espouses a substantially liberal approach, orienting courts towards the presumption of the discretionary character of civil law rules. Notably, courts are called on to allow provisions of contracts which depart from legal regulations even where the law does not directly grant the parties the right to do so (p. 2 of this Resolution). Meanwhile, the Supreme Arbitration Court of the Russian Federation noted that freedom of contract is limited by implicit boundaries, which include the substance of legal regulation (p. 3 of this Resolution). This means that the discretion of the parties in formulating the terms and conditions of their contract cannot distort the sense of legal constructions which may be deduced from the law. Thus, when determining the nature of the mechanism of transfer of a derivative transaction to centralized clearing, a risk exist that courts, taking into consideration p. 3 of the above mentioned Resolution, will interpret an agreement between the parties to clearing and the central counterparty as an invalid transaction, which distorts the legal regime of novation.

Given the above, it would be useful to compare effective Russian legislation with the fundamental argument expressed in German legal doctrine in favor of qualifying the discussed contract as an abstract novation allowed on the basis of

[31] Постановление Пленума Высшего Арбитражного Суда Российской Федерации от 14 марта 2014 г. № 16 "О свободе договора и ее пределах" [Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation No. 16 of 14 March 2014. On the Freedom of Contract and Its Extent].

the principle of freedom of contract.[32] Novation is discussed here precisely as an abstract transaction, which means that it remains in force even where the principal agreement, obligations under which are subject to novation, is rendered invalid, and the creditor in this relationship is exempted from the need to prove the grounds of its claim (the debtor is also deprived of an opportunity to make appropriate objections). This approach allows us to maintain the transfer of the debt to the central counterparty as valid, and to keep clearing performed by this intermediary safe from requalification. However, the idea of the abstract character of a transaction implying the transfer of a derivative contract to the central counterparty should be examined in detail because its admissibility directly affects the arguments concerning the non-defined character of the said agreement.

First of all, attention should be paid to the fact that it is the construction of an abstract transaction that would help to understand why two "mirror-like" obligations, which the central counterparty has entered into as a result of the "transfer" of a derivative transaction on it, are essentially not connected with any consideration: this is atypical for civil law due to the inadmissibility of unjust enrichment (Art. 1102 of the Civil Code of the Russian Federation) and inadmissibility of gifts between commercial organizations (Art. 575(1)(4) of the Civil Code of the Russian Federation).[33] Accordingly, obligational relations between the parties to clearing, providing a possibility to transfer something to the central counterparty or to demand transfer from it, could be theoretically justified as formally gratuitous only because of their abstract nature.[34]

2. Qualification of a Transaction for Transfer of Over-the-Counter Derivatives to the Central Counterparty as an Abstract Non-Defined Transaction (*Sui Generis*)

In light of the above, let us consider the question of whether the transfer of a transaction to the central counterparty can be qualified as an abstract non-defined transaction *sui generis* under Russian law.

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[32] André Alfes, *Central Counterparty – Zentraler Kontrahent – Zentrale Gegenpartei: Über den Vertragsschluss an der Frankfurter Wertpapierbörse mittels des elektronischen Handelssystems Xetra unter Einbeziehung einer Central Counterparty* 104 (Berlin: Duncker & Humblot, 2005); Stefan Jobst, *Börslicher und ausserbörslicher Derivatehandel mittels zentraler Gegenpartei*, Institute for Law and Finance, Working Paper Series No. 120 (September 2010), at 28 (Jan. 10, 2018), available at http://www.ilf-frankfurt.de/fileadmin/_migrated/content_uploads/ILF_WP_120.pdf; Gergen 2015, at 67.

[33] The latter is important since court practice, unfortunately, treats all gratuitous transactions as gift contracts by virtue of Art. 572(2) of the Civil Code of the Russian Federation.

[34] The issue is about the gratuitous nature of "mirror-like" obligations of the parties to centralized clearing since these parties certainly pay the central counterparty for its services. However it seems the ground for this payment is not the contract as it is, as a result of which the original obligations of the parties to clearing are terminated, but two "mirror-like" relations which appear.

This qualification, as mentioned above, could be based firstly on Art. 421 of the Civil Code of the Russian Federation, as well as on p. 5 and others of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation "On the Freedom of Contract and Its Extent." It should also be mentioned that the legislation does not directly regulate abstract obligations. So, we may try to qualify an agreement on the transfer of a derivative transaction to centralized clearing as an abstract obligational agreement.

Along with this, in respect of the abstract character of the above mentioned concepts the following should be noted. Legal doctrine defines abstract obligational agreements as not requiring evidence of the existence of grounds for the creditor's claim (the so-called causal moment) when enforcing them. Consequently, the invalidity of the grounds is irrelevant for the realization of an abstract right. If the debtor does not agree and challenges the existence of the obligation, it bears the burden of rebutting the creditor's powers.[35]

It should also be realized that despite all the advantages of abstract obligations, in most legal systems they are treated with caution. In legal systems where the establishment of abstract obligations is admissible, and thus isolated performance by the debtor is admissible, this is allowed provided that strict formal requirements are met (*see, e.g.*, § 780 of the German Civil Code[36] or the exceptions to the general English legal rules concerning the provision of consideration). Some legal systems admit the conclusion of abstract agreements only in cases specified by law.

Nowadays, Russian law covers these issues primarily on the doctrinal level. Court practice treats abstract obligations very cautiously, unless securities are involved.[37] For instance, a well-known case may be mentioned in which the court considered the question of the so-called "parallel" abstract obligation in a contract for syndicated lending and could not make a firm conclusion as to whether such obligations are admissible under Russian law.[38] Perhaps the reason for such cautious treatment by

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[35] *See, e.g.*, this classic research – *Кривцов А.С.* Абстрактные и материальные обязательства в римском и современном гражданском праве [Alexander S. Krivtsov, *Abstract and Material Obligations in Roman and Modern Civil Law*] 243 ff. (Moscow: Statut, 2003).

[36] In particular, in Germany conclusion of abstract transactions is subject to strict requirements as to their form and some relations can only be formed as causal transactions. *See, e.g.*, *Palandt, Bürgerliches Gesetzbuch (BGB), Kommentar* 1311–1313 (73rd ed., Munich: C.H. Beck, 2014).

[37] *See, e.g.*, Постановление Арбитражного суда Московского округа от 17 августа 2015 г. № Ф05-9451/2015 по делу № А41-62884/14 [Resolution of the Arbitration Court of the Moscow District No. F05-9451/2015 of 17 August 2015 in the case No. A41-62884/14]; Постановление Федерального арбитражного суда Московского округа от 20 апреля 2009 г. № КГ-А40/3011-09 по делу № А40-69970/08-125-422 [Resolution of the Federal Arbitration Court of the Moscow District No. KG-A40/3011-09 of 20 April 2009 in the case No. A40-69970/08-125-422].

[38] Постановление Федерального арбитражного суда Московского округа от 25 ноября 2011 г. по делу № А40-62359/10-38-293 Б [Resolution of the Federal Arbitration Court of the Moscow District of 25 November 2011 in the case No. A40-62359/10-38-293 В].

parties to civil transactions of non-defined abstract transactions (including drawing a bill or independent guarantee) is the unwillingness of the parties to take a risk in concluding non-defined abstract transactions in the absence of the law's express specification.

As a result, it should be said that there is no express prohibition in Russian law to concluding abstract transactions; however, the risks of such agreements being invalidated on the basis of Art. 168 of the Civil Code of the Russian Federation should be borne in mind. In fact, the theory that an abstract transaction not expressly specified by law (such as a bill or an independent guarantee) cannot be created by agreement between the parties on the basis of Art. 421 of the Civil Code of the Russian Federation should be recognized as reasonable. It seems that an implied prohibition is meant here, as can be deduced from Art. 1102 of the Civil Code of the Russian Federation: since the concept of an abstract transaction (the content is not important) represents an exception of sorts to the general rules concerning the invalidity of transactions and the presumption of unjust enrichment in Art. 1102, the parties to the contract cannot endow it with an abstract character by their own initiative.

Attention should be paid to the fact that the above arguments concerning abstract transactions may also address the idea of qualifying the relations between parties to clearing and the central counterparty as relations of a "special," abstract novation. It should be stressed that most Russian courts and authors consider novation as a contract with consideration, the invalidity of which leads to automatic "renovation" of the principal obligation and *vice versa* – invalidity of the principal contract inevitably leads to invalidity of the new obligation, which has arisen on the basis of the novation.

In connection with the above, it is interesting to mention that German law uses the concept of novation in this case. This is because novation as a manner of terminating obligations is not regulated by the German Civil Code and its concept derives from §§ 311–311a of the German Civil Code concerning grounds for the creation of obligations. Thus, German law does not focus on the effect of the termination of obligations, but focuses on the consequences of implementing the will of the parties. It is logical that two types of novation are pointed out: causal and abstract (reference to the latter is based on the aforementioned § 780 of the German Civil Code). The effect of causal novation directly depends on the validity of the previous (original) obligation – for instance, the debtor may declare that since it did not owe any obligation (to transfer something, for example) under the previous obligation, it does not owe anything under the new claim. In abstract novation the debtor is deprived of such objections; however, the existence of this novation cannot be assumed.[39] From the point of view of German law, the novation regime does not prohibit the parties from creating two obligations when performing one.

[39] *Palandt* 2014, at 491.

Most German researchers agree that the transfer of a derivative transaction to the centralized clearing may be described by the mechanism of an abstract novation, by virtue of features stemming from the regulation of novation and abstract transactions in Germany. However, this is not necessarily the only possible way.[40]

3. Open Offer

As mentioned above most jurisdictions, when constructing the transfer of a transaction to the central counterparty, choose between novation and open offer (*see* the Principles for Financial Market Infrastructures at the beginning of this article).

As for open offer, it is obvious that Russian legislation tries to describe it through the offer mechanism. In the case of an open offer, provided by international standards, the central counterparty automatically enters the transaction as soon as the buyer and seller agree upon its terms; if all preliminary agreements are performed, there are no contractual relations between the seller and buyer anymore. In other words, this alternative model provides that the central counterparty enters the transaction immediately.[41]

As mentioned, both novation and open offer give the parties a legal assurance that the central counterparty, in conducting payments, uses only those methods which correspond to the legal base. Let us consider this mechanism from the point of view of its compatibility with Russian legislation.

It seems that an alternative option in the form of an open offer, which is proposed by international standards, will be quite difficult to justify from the point of view of Russian legislation. This is firstly due to the fact that Russian legislation does not expressly provide for such a mechanism. The common model of concluding a contract through offer and acceptance provides that the offeror forwards an offer addressed to one or several persons, which expresses the offeror's intention to be bound if the offer is accepted.

Accordingly, in the context of the transfer of a transaction to the centralized clearing, the derivative transaction should firstly give rise to a mutual obligation, then be transferred through offer and acceptance in some way or another. "Automatic" entrance of a third party cannot be seen admissible since in this case it is not clear what the initial expression of will is designed to do – to establish an obligation

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[40] *See* Jobst, *supra* note 31; Gergen 2015, at 67–68.

[41] In particular, this concept is common for the USA along with novation. It is believed that in this case, the central counterparty may protect itself against the invalidation of the original derivative obligation and challenge the results of clearing, since it does not arise between the parties at all. Meanwhile, it is interesting that some authors tend to consider this mechanism as novation, but "immediate." *See* Byungkwon Lim & Aaron J. Levy, *Contractual Framework for Cleared Derivatives: The Master Netting Agreement Between a Clearing Customer Bank and a Central Counterparty*, 10(7) Pratt's Journal of Bankruptcy Law 509, 528 (2014).

or to terminate it through the "transfer". It seems that such an agreement will be interpreted by a court as a non-concluded contract, since the parties failed to reach agreement on all of the conditions, as is required by law (Art. 432 of Civil Code of the Russian Federation), or as a sham transaction (Art. 170 of the Civil Code of the Russian Federation), which conceals some other structure of contractual relations between the parties.

Thus, Russian legislation does not provide for a mechanism for the immediate entrance of the counterparty in a derivative transaction between the parties to clearing. However, nothing impedes the parties from formulating an offer and acceptance after the establishment of the obligation in a derivative transaction.[42] Moreover, nothing impedes them from using this offer and acceptance to transfer the transaction to the central counterparty before the occurrence of the principal obligation, since the parties to any contract are at liberty to suspend the creation of obligations under a transaction until a certain date (Art. 190 of the Civil Code of the Russian Federation) or until the fulfilment of a certain condition (Art. 157 of the Civil Code of the Russian Federation).

Since the offeror should be clearly determined, the following method of structuring the transfer of a transaction may be used.

1. Creation of a transaction for the transfer of derivatives to the central counterparty through an offer of the party to clearing.

An offer may be seen as a transfer of data about the primary derivative transaction to the central counterparty through the electronic system performing secondary functions (usually called an "acknowledged offeror" (anerkannter Anbieter)).[43]

Defining acceptance in this case presents certain difficulties. The key moment in determining acceptance is supposed to be the moment when the transaction for the transfer of a derivative to the central counterparty has legal effect, i.e., the moment when the central counterparty gives the parties access to the report on the transaction in the electronic system.[44] Accordingly, it would be logical to consider that the publication of the report is deemed as an acceptance by the central counterparty, since the acceptance has to be received by the offeror.

2. Creation of a transaction for the transfer of derivatives to the central counterparty through an offer by the central counterparty.

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[42] It should be remembered that the existence of the original obligation between the parties to clearing to some extent guarantees their interests – in case there is some defect of will in a derivative contract between them, it would be fair to let them challenge the relations between themselves first and not between them and the central counterparty.

[43] Gergen 2015, at 67–68.

[44] There are many theories in German law describing how to qualify the mechanism of acceptance of the central counterparty; in particular, one theory states that the "acknowledged offeror," i.e., the administrator of the electronic system, acts as a representative or *nunctius*. *See* Gergen 2015, at 75–79.

Supposing that an open offer may take place in this case, the situation will proceed as follows. The offer is made by the central counterparty. It should be noted that, supposing the opposite situation (i.e., that the offer is made by the parties to clearing), it is impossible to explain how two mirror-like transactions could have been concluded independently – this is because the parties to clearing, when making this offer, do not know exactly whether they will take the position of the debtor or of the creditor in the original obligation which will be transferred to the central counterparty. This means that the content of their offers addressed to the central counterparty is not clear enough. This problem is evidently eliminated if the transfer of the transaction to the centralized clearing is possible only after "actualization" of the obligation out of the derivative transaction.

Accordingly, if the offer is made by the central counterparty, this offer can be described as a public offer: it should be accepted in accordance with Art. 438 of the Civil Code of the Russian Federation.

The problem in this context is that the central counterparty technically does not possess information about all the terms and conditions of the transaction when he makes an offer (in general – these are any over-the-counter transactions of a certain type), whereas the Civil Code of the Russian Federation requires an offer to contain all conditions of the future contract (Art. 435 of the Civil Code of the Russian Federation). However, in the context of the Code, if the parties to clearing are treated as acceptors, the central counterparty as an offeror may consider various types of public offers in respect of over-the-counter transactions of various types. At any rate, this must lead to even more artificial standardization of derivatives, which does not always have a positive impact of the market.

4. Intermediate Constructions

Determination of the offeror and the acceptor in the agreement for the transfer of the transaction to the centralized clearing does not answer the question of what the nature of such a contract is. Thus, by examining the construction of an open offer it may be concluded that it does not determine the legal nature of the transfer of a transaction to the central counterparty in the context of Russian law. It only explains a "technique" for the conclusion of some kind of agreement between the parties to a derivative and a financial intermediary. Another alternative may also be possible (apart from novation, examined above, and succession of the principal obligation (*see* below)): entrance of the central counterparty into the principal transaction as a classic intermediary. This option seems to explain what the central counterparty "enters into" the original transaction for at the moment of its conclusion – in this case it will look like the parties to clearing have decided to agree upon a special procedure to perform the future obligation – through the intermediary.

Such constructions seem to include agency agreements, representation and possibly performance of an obligation by a third party as well (Art. 313 of the Civil Code of the Russian Federation).

It should be noted that this last mechanism is of little use for several reasons. Indeed, it may be supposed that the counterparty enters into the original transaction as a person who has to perform the obligation of the debtor to the creditor on the debtor's instruction. In this case, the creditor must accept the debtor's performance (Art. 313(1) of the Civil Code of the Russian Federation). In the meantime, the creditor has the right to demand performance only from the debtor, but not from the central counterparty, against whom it would obtain the right to claim by means of subrogation only after actual performance to the creditor by the debtor (Art. 313(5) of the Civil Code of the Russian Federation). This does not conform to the world standards governing the transfer of a transaction to the centralized clearing. In fact, no risks of non-performance of a derivative transaction are reduced in this case, though it would explain the aforementioned "momentary" entrance of the central counterparty into a transaction.

As to the applicability of representation, it may be noted that the idea of the counterparty acting as a representative of the parties would be unlikely to work under the concept of representation,[45] since in our case it presents all the disadvantages of the mechanism of performance by a third party, described above. Nevertheless, it may be no accident that in German literature the concept of representation is often used to explain the manner in which the counterparty enters the transaction, since it is often quite difficult to fix the moment of meeting of the minds of all three parties in respect of the transfer of the transaction to the centralized clearing, separately from the original contract. The central counterparty, which deals with a number of transactions every business day, has to work according to some standard of expression of the will of the parties. Some German authors say that this is done through a special electronic system as a representative of the parties.[46]

Putting aside the German doctrine, let us "try on" the characteristics of the representative as if he had performed a derivative transaction in the creditor's interest.

On the one hand, the idea that the central counterparty, when it enters the original derivative contract, acts in the interests of the creditor and on its instructions, if possible. This allows us to presume the existence of a relationship of representation in the meaning of the Civil Code of the Russian Federation.

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[45] Reflected, in particular, in Chapter 10 of the Civil Code of the Russian Federation, as well as noted in p. 121–132 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 23 June 2015 No. 25 "On Application by Courts of Certain Provisions of Part One of the Civil Code of the Russian Federation" [Постановление Пленума Верховного Суда Российской Федерации от 23 июня 2015 г. № 25 "О применении судами некоторых положений раздела I части первой Гражданского кодекса Российской Федерации"].

[46] *See* Gergen 2015.

In the meantime, when characterizing acts of the central counterparty, attention should be paid to the fact that the central counterparty does not express the will of any of the parties to clearing, which is essential in representation. Moreover, the inadmissibility of qualifying the central counterparty's actions as those of a representative is supported by a lack of the counterparty's freedom to choose the form and content of the principal's will. Besides, it is hard to imagine that the offeror itself becomes a party to the transaction if the central counterparty fails to express the offeror's will properly or exceeds his authority (this means that the concept referred to in Art. 183 of the Civil Code of the Russian Federation is not applicable here).

In theory it is possible to make an assumption that the parties, when they transfer the transaction to the central counterparty, act as its representatives. However, when considering this option more deeply, it becomes clear that this assumption is wrong. In fact, if the parties to clearing acted as the central counterparty's representatives, the transaction would be made by the counterparty in respect of itself and this would contradict Art. 182(3) of the Civil Code of the Russian Federation; or the transaction would be made by the party to the original contract acting as the counterparty's representative, with another party to the original contract on the transfer of a debt to a third party.[47] In this case the mechanism would look absurd, since one of the parties to clearing would act as a two-faced Janus – as an independent party to clearing and as the representative of the central counterparty. It should also be remembered that in order to apply the rules on representation, a clearly expressed transfer of authority to the central counterparty is essential and must be based on a power of attorney, the law or acts of an authorized state/local body or on the circumstances, which is impossible in this case.

As we can see, this "representation" transfer of the transaction to the central counterparty first of all entails serious risks of failure to obtain remedies from the court and, secondly, unjustifiably complicates the whole process.

Based on the above, it may be concluded that qualifying the counterparty's actions as those of a representative is impossible. This also serves as an additional argument confirming that novation may be inconvenient: as mentioned, novation requires an additional expression of will and this creates unjustifiable difficulties for the parties.

Now let us consider if it is possible to qualify the central counterparty's actions as those of an agent. On the one hand, the agency contract seems quite a convenient contract model to explain the functioning of the central counterparty. The subject-matter of the contract includes legal and actual actions of the agent for the benefit of the principal; the agent is free enough in performing its mission (*see* Art. 1005 of the Civil Code of the Russian Federation).

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[47] Such models may be possible since as a result of performance of a derivative obligation one party may become both a creditor and a debtor.

According to Art. 1005(1), under the agency contract one party (the agent) undertakes to perform, for consideration, legal and other actions on the other party's (the principal's) instructions, in its own name, but at the principal's expense, or in the principal's name and at its expense. The relevant rules relating to the engagement agreement (Chapter 49 of the Civil Code of the Russian Federation) or the commission contract (Chapter 51 of the Civil Code of the Russian Federation) apply, depending on whether the agent acts under the contract in the principal's name or in its own name, so long as these rules do not contradict the rules on agency or the essence of the agency contract (Art. 1011 of the Civil Code of the Russian Federation).

Provided that the central counterparty acts as an agent and acts in its own name, the only possible applicable construction is the agency contract, modeled as a commission contract. However, this qualification is impeded by the fact that, according to many authors and courts, provisions of the Civil Code related to commissions are designed for another type of transaction: in particular, commission cannot authorize the intermediary to perform or change another person's obligation in its own name.[48,49] Therefore, the central counterparty cannot exercise someone else's right, which would happen when the initial derivative transaction is transferred onto it.

5. Succession Construction as the Model of Transfer of an Over-the-Counter Transaction to the Central Counterparty

Thus, qualifying the termination of the obligations between the parties to clearing as a replacement of the initial obligation with an obligation where each of the parties to the contract enters into legal relations with the central counterparty, using novation, mixed not-named contracts or intermediary contracts does not have any serious grounds.

In connection with this, it may be supposed that the ground provided by Art. 4(12) of the Clearing Law more resembles a substitution of the parties to an obligation, since the very subject-matter and mode of performance of new "mirror-like" obligations remain the same when compared to the initial obligation between the parties to clearing. In particular, some German authors use similar argumentation.

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[48] Информационное письмо Президиума Высшего Арбитражного Суда Российской Федерации от 17 ноября 2004 г. № 85 "Обзор практики разрешения споров по договору комиссии" [Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation No. 85 of 17 November 2004. Review of the Dispute Settlement Practice in Connection with the Commission Contract], p. 22.

[49] *Егоров А.В.* Сделки как предмет договора комиссии // Вестник Высшего Арбитражного Суда Российской Федерации. 2001. № 10. С. 75–89 [Andrey V. Egorov, *Transactions as the Subject Matter of Commission Contract*, 10 Bulletin of the Supreme Arbitration Court of the Russian Federation 75 (2001)]; *Егоров А.В.* Предмет договора комиссии // Актуальные проблемы гражданского права: Сборник статей. Вып. 5 [Andrey V. Egorov, *Subject Matter of Commission Contract* in *Current Problems of Civil Law: Compilation of Articles. Issue 5*] 86 (V.V. Vitryansky (ed.), Moscow: Statut, 2002).

Supporters of this point of view explain this, in particular, by the fact that if the central counterparty refuses to accept the transaction for clearing or if the contract is not concluded with the central counterparty by some other reason, qualifying the relationship between the parties as assignment allows us to conclude that the initial derivative transaction between the parties remains in force ("der ursprüngliche Vertrag erneut Wirkung entfalten sole").[50] This, in its turn, allows the legal order to react to the invalidity of the principal derivative transaction.[51]

This legal construction resembles the mechanism of substitution of the parties to an obligation provided by Chapter 24 of the Civil Code of the Russian Federation. In order to analyze the institution of substitution of the parties to an obligation, as it applies to the replacement of the initial contract between the buyer and seller with two new contracts – between the central counterparty and the buyer and between the central counterparty and the seller, the following should be noted. Reform of the provisions of the Civil Code of the Russian Federation concerning substitution of persons to an obligation was designed to significantly liberalize the provisions of the Code relating to the assignment of rights and transfer of debts. As a result, these rules have become very flexible, which allows parties to transactions to use them to structure their relations with the central counterparty in accordance with the needs of each particular situation.

Firstly, according to Art. 392(3) of the Civil Code of the Russian Federation, a simultaneous transfer of rights and obligations under the contract to a third party, which becomes a new party to this contract instead of the former, is now possible. The rules on assignment and on transfer of a debt accordingly apply to the transfer transaction. Along with this, it should be noted that the new debtor, which received a new obligation as a result of this debt transfer agreement, may, by virtue of this provision, retain the security interest, which existed in the original transaction, if it is provided with the agreement of all the parties.

Secondly, the basis for the transformation of an obligation in the assignment of an enforceable right is the change of an authorized person (the creditor). As for the rest, as a general rule, the obligation remains the same (the same debtor, the same rights

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[50] Thomas Tiedemann, *Die Stellung des zentralen Kontrahenten im deutschen und englischen Effektenhandel: Untersucht am Beispiel der Eurex Clearing AG und LCH.Clearnet* 89 (Norderstedt: Books on Demand GmbH, 2011).

[51] To be fair, it should be said that the preservation of the effect of the transfer of a transaction to the central counterparty in the case of invalidity of this transaction is not provided, either by the IOSCO recommendations, the EMIR requirements or the Dodd-Frank Act. It is a different matter that the formal compensation of damages on which, as was shown above, the Russian legislator focuses, in this case may be harmonized with dogmatic considerations either through an abstract transfer, or through an argument about a special rule which has priority over general provisions on the consequences of invalidity of transactions and so on. Nevertheless, as it seems, in general this matter should be resolved by analogy with recognition of the set-off to be invalid – since there was no derivative transaction, the central counterparty did not have any claims, which were terminated with the help of the clearing mechanism.

and obligations). The law or the contract may, though, provide otherwise. The basic idea of transfer of a debt is also the preservation of the original obligation. All of this allows us to explain why the new "mirror-like" obligations of the central counterparty remain identical to those in the original derivative transaction. Indeed, according to Art. 4(12) of the Clearing Law, in cases provided by clearing rules the party to the original contract is substituted by the central counterparty. As for the rest, the previous obligation arising out of the original contract between the parties remains the same: the same subject-matter and the same mode of performance are provided.

Thirdly, Art. 338.1(1) of the Civil Code of the Russian Federation provides for the possibility of assigning a future claim, which will arise in the future, including the claim under the contract, which will also be concluded in the future. Along with this, the future claim must be defined in the assignment agreement in away which allows this claim to be identified at the moment of its occurrence, or assignment to the assignee. A quite liberal approach to this identification is admissible, as already established by the practice of the Supreme Arbitration Court of the Russian Federation.[52]

Accordingly, parties to clearing may provide, in the framework agreement or in a particular agreement with the central counterparty, for the transfer to it of their rights and debts, which will arise in the future. According to Art. 22(2) of the Clearing Law, obligations allowed for clearing are secured by individual clearing security or individual and collective clearing security. It is fair to assume that individual clearing security is designed to secure not only one obligation but several different obligations of the parties to clearing, including future obligations arising out of one or several derivative transactions, as well as out of derivatives concluded in the future.

Fourthly, according to Art. 388(3) of the Civil Code of the Russian Federation, a monetary claim may be transferred in spite of a contractual prohibition or restriction of the assignment, which makes the model of succession more attractive for central counterparties. Indeed, it is fair to assume that, in circumvention of the contractual prohibition to transfer a monetary claim or a debt, the party to a derivative transaction may assign this claim to the central counterparty. Along with this, according to Art. 388 of the Civil Code of the Russian Federation, assignment of such rights to the central counterparty cannot be challenged, either by the other party to clearing or by its creditors.

Finally, according to Art. 391(1),(2), the transfer of debt in obligations connected with the business activity of the parties is possible without the participation of the debtor: the creditor and the new debtor may conclude an agreement, as a result of

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[52] Информационное письмо Президиума Высшего Арбитражного Суда Российской Федерации от 30 октября 2007 г. № 120 "Обзор практики применения арбитражными судами положений главы 24 Гражданского кодекса Российской Федерации" [Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation No. 120 of 30 October 2007. Review of the Practice of Application by Arbitration Courts of Provisions of Chapter 24 of the Civil Code of the Russian Federation].

which the first and second debtors will bear joint and several liability, though the parties are free to provide for subsidiary liability of the first debtor or to release it from its obligation. As it seems, a modification of this construction could be used to transfer, to the central counterparty, transactions of clients/parties to clearing who entered into a derivative transaction with the party to clearing.

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TOURIST TAXES IN ITALY AND RUSSIA

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The article deals with the legal regulation of tourist taxation in Italy with a view to improving the Russian tax system. Many European countries have adopted a tax on accommodation, also known as a tourist tax or a resort fee, in order to facilitate contribution by tourists to tourist infrastructure. This approach is currently being implemented in many countries, including those countries in the European Union which welcome a large number of tourists. Italy is one of the most popular such destinations, and has considerable experience in tourist taxation and regulation of public finances, which can serve as a useful example for the improvement of the Russian tax system. The authors point out that a nation's laws should include a direct link between a tax resident and the location of a vacationer or a tourist. They also conclude that the imposition of the tax may affect the number of tourists in a particular municipality since they may prefer to stay in a place free from resort fees. The paper also examines and supports the imposition of the tax as a reasonable and civilized solution to the problem of damage caused to the environment by a large influx of tourists into particular territories, since it makes it possible to compensate for the damage caused. The research indicates that there is room for improvement with regard to certain provisions of the Law adopted in Russia and coming into force on 1 January 2018. In the authors' view, the better solution would be to transfer resort fees to the budgets of those municipalities where tourists are accommodated. This would ensure the necessary tourist involvement in the public sphere, increase their responsibility and would also provide a direct link between the payment of the tax and the development of resort infrastructure.

Keywords: tax; accommodation tax; residence tax; tourist tax; resort fee; local tax; regional tax; regional financial law.

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Introduction

Today, many European countries have imposed a "city tax on the accommodation of tourists (tourist tax or residence tax)"[1] (in Italian – "*imposta di soggiorno*") in order to involve non-resident hotel guests, who are not tax residents or subject to any other local taxes and not owners or beneficiary owners of residential premises used exclusively for tourism purposes, in the improvement of recreation areas and the elimination of negative consequences caused to utilities and the environment by a large number of visitors.[2]

Although this is a local tax and, therefore, national legislators can theoretically freely determine the criteria for its application in each individual country, there is an obligation to observe the principles enshrined in international treaties that prevent the adoption of discriminatory measures limiting the exercise of fundamental rights and freedoms of citizens of the European Union.[3]

Discrimination may arise when persons who are not subject to taxation enjoy local and regional public benefits, as well as the cultural and environmental heritage of Italy, just like resident citizens, while not participating in the public expenditure aimed at providing those benefits.

It should be noted that the application of this tax is justified if a person stays in a particular municipality solely for tourist purposes. However, an awareness of the tourist tax may lead potential taxpayers to choose other accommodation in order not to pay the tourist tax.

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[1] In Russia, this tax is called a resort fee.

[2] *See* Enrico Corali, *Cittadini, tariffe e tributi. Principi e vincoli costituzionali in materia di prestazioni patrimoniali imposte* 168 (Milano: Giuffrè Editore, 2009).

[3] *See also* Franco Picciaredda & F. Peddis, *Individuazione del presupposto del tributo di soggiorno, principi di sistema e principi fondamentali di coordinamento* in *L'autonomia tributaria delle regioni e degli enti locali tra Corte costituzionale (sentenza n. 102/2008 e ordinanza n. 103/2008) e disegno di legge delega: Un contributo giuridico al dibattito sul federalismo fiscale* 53 (V. Ficari (ed.), Milano: Giuffrè Editore, 2009).

In Italy, the accommodation tax was established in 1910 for thermal baths and bathing resorts and, in 1938, it was extended to other popular tourist destinations. In 1989 (Art. 10 of the Decree-Law of 2 March 1989 No. 66), the tax was suspended in the run-up to the FIFA World Cup in 1990 due to the likelihood of the tax reducing potential tourist numbers.[4]

The tourist accommodation tax (*imposta di soggiorno*) was later reintroduced, though only in Rome, by the Decree-Law of 31 May 2010 No. 78, which made it possible to establish a fixed tax rate. The tax was paid by those who were accommodated in living quarters in Rome, subject to certain criteria being met. A maximum tax of ten euros per night was established in order to ensure the financial and economic sustainability of the municipality.

Finally, within the framework of the implementation of municipal fiscal federalism in Italy, a regulation on the municipal tax was reintroduced by the Decree-Law of 14 March 2011 No. 23. Under the Law, regional centers, provinces, and municipalities included in the regional lists of resorts and cultural centers were authorized to impose the tourist tax upon a decision of municipal councils. This tax is paid by residents of living quarters on the territory of the municipality in proportion to the cost of living but cannot be more than five euros per night.[5]

It is worth noting that, at the regional level, the tourist tax was introduced earlier in Sardinia in accordance with a local Law introduced on 29 May 2007 (in force until 2009). The tax was collected from non-permanent residents living in the municipalities of the Sardinia Region.[6]

The Russian Federation and the former USSR also have some experience with resort fees. A resort fee was introduced as early as in 1933 by the Decree of the Presidium of the Central Executive Committee of the USSR of 17 August 1933 No. 74/1646[7] with a view to reimbursing some of the expenses for the improvement of resorts and upgrading of everyday services for tourists. Subsequently, this resort fee was replaced by a non-tax mandatory payment which was paid by self-supporting sanatoriums and health centers (excluding those for children and tuberculosis patients) to the trade unions rather than the municipal budget. The introduction of resort fees for tourists without health resort vouchers was regulated by legislative

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4 *See* Bianca Biagi et al., *La tassazione turistica: il caso della Sardegna* in *"Tourism Taxation." Sostenibilità ambientale e turismo fra fiscalità locale e competitività* 28, 34 (V. Ficari & G. Scanu (eds.), Torino: G. Giappichelli Editore, 2013).

5 The last decree, which came into force on 5 May 2009 (No. 42), was delegated by the commission on fiscal federalism (Art. 12(d)), it was precisely "the right to introduce one or more municipal taxes thanks to tax autonomy that made it possible to establish and apply them for specific purposes, such as... fees for specific events, such as tourist flows and urban mobility."

6 Such tax was abolished in 2009 (Legge Regionale 14 maggio 2009, n. 1, Art. 2).

7 *See* Постановление Президиума ЦИК СССР от 17 августа 1933 г. № 74/1646 "О курортном сборе," Собрание законодательства СССР, 1933, № 53, ст. 307 [Decree of the Presidium of the Central Executive Committee of the USSR No. 74/1646 of 17 August 1933. On the Tourist Fee, Collected Acts of the USSR, 1933, No. 53, Art. 307].

acts of the USSR republics. The amounts collected were used to improve and maintain resort zones and beaches, to build hotels and car parks, and to provide catering and consumer services for tourists.[8] In the RSFSR, such fees were established by the Resolution of the Council of Ministers of the RSFSR of 16 August 1963 "On Resort Fees Levied on Citizens Visiting Resort Areas on Non-Organized Trips."[9,10]

As for the Russian Federation, a resort fee was introduced by Law of the RSFSR of 12 December 1991 No. 2018-I "On Resort Fees for Individuals,"[11] which expired on 1 January 2004. This Law provided for a rather complicated procedure, i.e., tourists would pay the fees directly through banks; it authorized law enforcement officers to verify these payments, thereby obliging tourists to keep the receipts on their person at all times.

On 29 July 2017, the Russian Federation adopted the Federal law No. 214-FZ[12] which, from 1 May 2018, will introduce resort fees in the four constituent entities of the Russian Federation most visited by Russian and foreign tourists. According to the Law, this experimental Law is aimed at the development of resort infrastructure in order to preserve, restore and develop the resorts, to create a unified tourist area and favorable conditions for the sustainable development of the tourist industry, and also to assess the effectiveness of the enacted fees.

Italy has gained considerable experience of legal regulation, not only in tourist taxation but also in public finance. Therefore, it is very important to consider the Italian experience of regulation of tourist taxation. It is worth mentioning that Italian academics made a valuable contribution to the theory of public finance which formed the basis of modern financial law in Italy and Russia.

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[8] For more detail, *see Толкушкин А.В.* Налоги и налогообложение: Энциклопедический словарь [Alexander V. Tolkushkin, *Taxes and Taxation: Encyclopaedic Dictionary*] 148 (Moscow: Yurist, 2000).

[9] Постановление Совета Министров РСФСР от 16 августа 1963 г. № 1012 "О курортном сборе с граждан, неорганизованно приезжающих на отдых в курортные местности," СП РСФСР, 1963, № 15, ст. 104 [Resolution of the Council of Ministers of the RSFSR No. 1012 of 16 August 1963. On Resort Fees Levied on Citizens Visiting Resort Areas on Non-Organized Trips, Collected Acts of the RSFSR, 1963, No. 15, Art. 104].

[10] *See Колосов Д.И.* Курортный сбор: правовая природа и особенности введения // Налоги. 2016. № 24. С. 6–9 [D.I. Kolosov, *Resort Tax: The Legal Nature and Features of the Introduction*, 24 Taxes 6 (2016)].

[11] Закон РСФСР от 12 декабря 1991 г. № 2018-I "О курортном сборе с физических лиц," Ведомости Съезда народных депутатов Российской Федерации и Верховного Совета Российской Федерации, 1992, № 8, ст. 364 [Law of the RSFSR No. 2018-I of 12 December 1991. On Resort Fees for Individuals, Gazette of the Congress of People's Deputies of the Russian Federation and the Supreme Soviet of the Russian Federation, 1992, No. 8, Art. 364].

[12] Федеральный закон от 29 июля 2017 г. № 214-ФЗ "О проведении эксперимента по развитию курортной инфраструктуры в Республике Крым, Алтайском крае, Краснодарском крае и Ставропольском крае," Собрание законодательства РФ, 2017, № 31 (ч. I), ст. 4763 [Federal law No. 214-FZ of 29 July 2017. On the Experiment on the Development of Resort Infrastructure in the Republic of Crimea, the Altai Region, the Krasnodar Region and the Stavropol Region, Legislation Bulletin of the Russian Federation, 2017, No. 31 (Part 1), Art. 4763].

What follows is a detailed analysis of tourist taxation in Italy and, subsequently, we will compare it with the new Law adopted in the Russian Federation. Proposals will be made to improve the legislation regulating tax collection for tourist accommodation in Italy and Russia.

1. The Structural Elements of the Italian Residence Tax

It should be noted that the Italian doctrine on public finances is unanimous on the tourist tax, considering it "a new trend aimed at taxing one of richest (and often underestimated) sources of wealth in Italy, i.e., tourism."[13]

Therefore, the tourist tax on living in Italy (*imposta di soggiorno*) is a tax that is established in the capitals of the Italian provinces, in the associations of municipalities, and in the municipalities included in the regional lists of resorts and cultural centers due to the additional costs they have to bear due to large inflows of tourists.[14]

The decision to levy the tourist tax implies that tourist and hotel services in Italy are very much in demand in tourist areas or cultural centers.[15]

The assumption is that tourists enjoy visiting certain cities but may cause damage to them and that such damage must then be repaired. Therefore, it is necessary to consider how to collect the tax from regular visitors coming to the same regions and cities for just a day and not staying overnight, i.e., non-taxpayers.

Each municipality has the right to determine the amount of tax independently, as well as establish the type and level of benefits on its territory in accordance with applicable procedures in the municipality.

Despite the legislation having been adopted, many hotels do not collect the tax in proportion to the amount actually paid for the duration of a stay at a hotel but in proportion to the number of stars they have.

There are many payment methods and criteria for calculating the tax and these are very diverse: from a fixed amount of five euros[16] to payment at a variable rate based on the type and the category of a hotel, the cost of hotel services, the location or the season.[17] Moreover, there are various exemptions from taxes in different municipalities

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[13] Agostino Ennio La Scala, *La nuova autonomia tributaria dei Comuni*, 6 Innovazione e Diritto 3 (2011).

[14] For more detail, *see* Eugenio Piscino, *L'imposta di soggiorno e l'accisa sull'energia elettrica*, 3 La finanza locale 22 (2011).

[15] *See* Loris Tosi, *La fiscalità delle città d'arte* 71 (Padova: Cedam, 2009).

[16] On 1 September 2014, Rome increased the tourist tax to 7 euros as provided for in a special law (Decree-Law of 31 May 2010 No. 78). Other cities followed suit, e.g., Florence (1 July 2011), Venice (23 August 2011), Catania (1 September 2011), Pisa (1 January 2012), Siena (1 March 2012), Turin (2 April 2012), Vicenza (1 May 2012), Verona (1 August 2012) and many other municipalities.

[17] In a number of municipalities, the tax is paid on the 15th day of each month and, in others, quarterly or every three months. Some municipalities provide paper forms for completion, others use special software. In some municipalities, operators indicate the amount of the tourist tax in a separate line in the receipt (invoice) for accommodation.

depending on whether the properties are attached to a particular facility, the season, the length and the purpose of the stay, as well as the visitor's age, disability, etc.[18]

This practice was confirmed by a decision of the Administrative Court of Tuscany (TAR Toscana),[19] which held that municipalities should establish proportional payment rates to be paid by individuals. In this regard, setting the rate based on the star rating of a hotel is justified, since a classification like "stars," "keys" or "ears" indicates the level of service the client has chosen.[20]

It is important to understand that the revenues received from tourist taxes are intended to compensate for the impact of tourism activities, especially by way of restoring cultural and environmental heritage, and maintaining and developing tourist infrastructure, as well as public services that are used by tourists. This will help to eliminate the negative impact on the environment of the tourist influx.[21]

An issue currently under dispute is compliance with the tax rules and responsibility for non-payment of tourist tax by managers of accommodation facilities. A particularly controversial aspect of this dispute relates to the role of the manager of the facility to whom the tourist actually pays the tax, as well as the obligations of the manager and the tourist arising in the case of a delay in payment or failure to pay the relevant tax.

Article 4 of the Decree-Law of 14 March 2011 No. 23, which is in force, does not determine who is responsible for tax payment in lieu of a client, nor does it specify the requirements for tax collection under national legislation.

For example, a decision of the Administrative Court of Tuscany says that the act establishing the residence tax in Florence does not allow hoteliers to be qualified as additional taxpayers. This is probably because they are considered the instrument for introducing the tax, which is completely different from the tax obligation.

Courts themselves can make requests to hotel owners regarding "payable" but not "collected" taxes. Therefore, the owners are not responsible for taxpayers' failure to fulfill the obligation to pay tax.[22]

A similar approach is followed by the Administrative Court of Veneto (TAR Veneto), pursuant to which obligations of hoteliers to collect the residence tax from clients on behalf of the state should not be applied. However, in order to justify its application, some municipal legal acts contain the expression "responsible for collection" with

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[18] For more detail, *see Копина А.А., Копин Д.В.* Курортный сбор: история, зарубежный опыт и перспективы // Налоги. 2016. № 20. С. 9 [Anna A. Kopina & Dmitry V. Kopin, *Resort Tax: History, Foreign Experience and Prospects*, 20 Taxes 1, 9 (2016)].

[19] *See, e.g.*, TAR Toscana, sentenze 7 febbraio 2013, n. 200; 24 novembre 2011, n. 1808.

[20] *See* Marta Basile, *L'imposta di soggiorno quale tributo di scopo tipico del federalismo fiscale municipale* in *La fiscalità locale tra modelli gestori e nuovi strumenti di prelievo* 139, 143 (A.F. Uricchio (ed.), Santarcangelo di Romagna: Maggioli Editore, 2014).

[21] *See* Carlo Buratti, *Ragioni e limiti dell'imposizione sui "non residenti,"* 2 Federalismo fiscale 207 (2008).

[22] TAR Toscana, sent. n. 1348/2011.

a reference to the method of calculation of "tax charges" contained in Art. 64 of the Decree of the President of the Republic No. 600/1973.[23]

The Administrative Court of Lombardy (TAR Lombardia) takes a different approach, under which hoteliers and owners of premises are not responsible for tax collection, except in cases where such payments were actually made by a client.[24]

2. Specific Aspects of Taxation of Tourists in Selected Regions of Russia

As for the Russian Federation, after 14 years, resort fees will be reintroduced in several regions starting from 1 May 2018. In addition, by 1 December 2017 special laws should be adopted in each of the four regions and in the municipalities collecting resort fees, i.e., local acts.

The situation regarding Russian resort fees significantly differs from that of Italy in that the basic principle of charging, i.e., compensation to the municipality for damage caused by a large number of tourists, was not initially followed. Instead, a fiscal principle, i.e., replenishment of budgets, was applied, and no direct link was established between a tourist, the resort he visited and payment of tax. This is evidenced by Art. 8(4) of the Federal law of 29 July 2017 No. 214-FZ: "Resort fees should be transferred to the budget of the constituent entity of the Russian Federation where the experiment is conducted," which indicates that the resort fee revenues entering the general budget are spent not only on purposes connected with tourist activity. For example, in the Krasnodar Region of the Russian Federation, the only municipalities that attract a significant number of tourists are those on or close to the Black Sea coast. However, such areas are only a part of the entire region, so the tax revenues paid there will be allocated to the general budget of the region. Moreover, the Law is not clear as to which municipalities in the Krasnodar Region will collect the resort fees. It may even be the case that the resort fees will be collected throughout the region.

Generally, the procedure for resort fee collection will be similar to that in Italy with some minor differences, for example, taxpayers will be adults accommodated for more than a day, and not for a night, as in Italy. Under Art. 7 of the Law, some groups of individuals are exempted from the tax payment and the list is not exhaustive; regional authorities have discretion to release additional groups from such payment. As in Italy, operators of resort fees in Russia will be individuals and legal entities who provide tourist accommodation.

Another possibility proposed by the Russian law is that special funds for the development of resort infrastructure receive part of their revenue from resort fees. However, the Law does not make it clear why the revenues should be accumulated in these funds rather than simply being transferred to the budget of municipalities.

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[23] TAR Veneto, sentt. n. 653/2012, n. 1165/2012.

[24] TAR Lombardia, sent. n. 1824/2013.

Moreover, the amounts of assets allocated to the funds are not specified, it remains unclear how and for what purpose the money will be spent, how and who will control the assets, and, finally, how the funds will be distributed among all the municipalities and on the basis of what criteria.

Detailed analysis of the legislative initiative on the resort fee reveals the following:

Firstly, the experimental resort fee will only apply from 1 May 2018 to 31 December 2022. Depending on the results obtained, a decision will be made either to abolish the resort fee or to introduce it into other regions of the Russian Federation. It is expected that the resort fees will boost the development of the resort infrastructure in order to preserve, restore and develop the resorts, organize a unified tourist space and create favorable conditions for the sustainable development of tourism (Art. 1).

Secondly, the experiment with the resort fee concerns certain municipalities situated in the territory of the experiment. This means that the resort fee will not be applied in all the territories of the federal entities of the Russian Federation mentioned in the Law. Only specific municipalities will be involved and will benefit from financial support for the design, construction, reconstruction, maintenance, improvement and repair of resort infrastructure facilities. For example, the Administration for External Relations, Tourism and Resort Affairs of the Altai Region reported that the authorities of the Altai Region decided to conduct an internal experiment within the framework of the general experiment and introduce a resort fee only in Belokurikha, a resort city of federal significance. If the resort fee experiment proves successful and brings positive changes, the resort fee will be introduced to a number of other municipalities of the Altai Region.[25] It is unclear why the resort fee is paid to the regional budget and not to the budget of Belokurikha, the only municipal entity participating in the experiment in the Altai Region.

Thirdly, the Law prescribes that the experiment costs shall be compensated by the budgets of federal entities of the Russian Federation, rather than the budgets of municipalities where the resort fees are to be charged. Some regions have already calculated the amount of income from the resort fees. For example, if the resort fee in the Altai Region is 30 rubles per person, Belokurikha will receive about 50 million rubles. In the Stavropol Region, income from the resort fee is based on the total number of tourists staying in the resorts for an average of 14 days and a resort fee of 50 rubles per day. It is assumed that the total additional revenue for the budget of the Stavropol Region from 2018 to 2022 will exceed 2.02 billion rubles.[26]

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[25] For more detail, *see* Курортный сбор в Алтайском крае будет взиматься только в Белокурихе // Интерфакс-Туризм. 24 июля 2017 г. [Resort Fee in the Altai Region Will Be Charged Only in Belokurikha, Interfax-Tourism, 24 July 2017] (Dec. 28, 2017), available at http://tourism.interfax.ru/ru/news/articles/42470.

[26] Закон о курортном сборе принят // Официальный сайт Думы Ставропольского края. 23 июня 2017 г. [The Law on Resort Fees is Adopted, Official website of the Stavropol Region Duma, 23 July 2017] (Dec. 28, 2017), available at http://dumask.ru/info/smipublic/sobytiya/item/17930-zakon-o-kurortnom-sbore-prinyat.html.

However, experts and the official authorities of the regions where the resort fees will be introduced do not agree on future profits. The authorities' believe that only shrewd management of the resort fees will bear fruit. Moreover, in their view, it will enhance the development of domestic resorts, attracting more visitors to them, and, over time, will make it possible to compete with foreign resorts in terms of convenience and comfort.[27] The Governor of the Krasnodar Region is of the same view, believing that the introduction of the resort fee will not deter tourists from resorts. In his opinion, only poor quality service can negatively affect the influx of tourists. He also emphasizes that the Krasnodar Region spends three times more money on preparing for the vacation season than it receives from vacationers. The city of Sochi is allocated 7 billion rubles per year while all the other Black Sea resorts together receive about 6 billion rubles a year. Everybody makes a profit except those who spend money on resort infrastructure such as: facilities for medical, recreational, social, cultural, and sports purposes; parks, public gardens, city forests, boulevards, footpaths, beaches, riverbanks, pedestrian zones, and other facilities located in the territory of the experiment that can meet the spiritual and other needs of tourists, contribute to the maintenance of their livelihoods, recuperation and fitness (except for communal infrastructure facilities and highways). Furthermore, the governor pointed out that revenue from the resort fees and the assistance of the regional authorities will help to repair the municipal infrastructure of the tourist industry of the entire Krasnodar Region. He also says that it is extremely difficult for the municipal authorities to do this alone, and that the result will only be achieved after several decades.[28]

Tourism industry experts believe that the introduction of the fees may adversely affect the tourist influx to the resort areas due to the growth in the value of the tourist product. Owners of hotels agree with them. It is also important to take into account the fact that the resort fee should already be paid in 2018, whereas the development of tourist infrastructure is a matter for the future, meaning that those who come to resorts in 2018 will not see any improvement in the quality of leisure activities just after the introduction of the resort fee. Consequently, the collection of this fee will initially provoke only irritation, which will risk continuing in the future if tourists do not see improvements in service quality, meaning that these changes should be significant. The resort fees will only be considered positive if the changes made using them are significant. It is also important to understand that the refusal to visit the regions where the resort fee is imposed may not occur immediately, but gradually, for example, following an increase in the rate.[29] Another important aspect of the introduction of the

[27] For more detail, *see* The Law on Resort Fees is Adopted, *supra* note 26.

[28] For more detail, *see* Размер курортного сбора на Кубани будут устанавливать муниципалитеты // BezFormata.Ru. 23 апреля 2017 г. [The Size of the Resort Fee in the Kuban Will Be Established by Municipalities, BezFormata.Ru, 23 April 2017] (Dec. 28, 2017), available at http://krasnodar.bezformata.ru/listnews/razmer-kurortnogo-sbora-na-kubani/56762437/.

[29] The Law provides that the fee cannot be more than 50 rubles per person per night in a hotel in 2018 and 100 rubles per night in the subsequent years of the experiment. It also specifies that the resort fee

resort fee is the good faith of taxpayers. The Association of Tour Operators of Russia (ATOR) considers the introduction of the resort fee a premature measure which will adversely affect, first and foremost, honest taxpayers, because tourists will chose to stay with private individuals offering accommodation, who, as a rule, evade taxes.[30]

It should also be noted that the laws to be adopted by the federal entities of Russia no later than 1 December 2017 will define the territories of the experiment (at the time of writing, none of the regions included in the experiment had passed such a law).

The Krasnodar Region authorities opted to decentralize the resort fee. It is believed that the amount of the resort fee in Kuban will be established by the municipalities since it is municipalities who best understand what welcoming tourists involves, what investments to make in preparation for the vacation season and the return that will be made on such investment.[31] Therefore, it is at the municipal level that a direct link between the flow of tourists and the effects of their stay exists, which forms the basis of the concept of collecting the resort fee as proven by the Italian experience. Such fee should serve a compensatory function rather than provide the financial returns expected in Russia. However, not all regions of Russia participating in the resort fee experiment follow this approach.

It is important to note that, despite the existing contradictions associated with the introduction of the resort fee, only practice and its implementation in some regions of the Russian Federation will show to what extent the efforts listed above are justified and necessary.

As for the administration of the resort fee, the practice of levying other regional and local taxes shows that Russia has been facing a systemic contradiction. Namely, the Federal Tax Service, with its territorial subdivisions in the federal entities of the Russian Federation and municipalities, being the federal executive body primarily interested in filling the coffers of the federal budget, is solely responsible for administering federal, regional and even local taxes. In view of the above, it is important to understand the following. Firstly, the branches of the Federal Tax Service will not be able to ensure the proper level of control over the payment of the resort fee by all owners of accommodation facilities specified in the Law as "individual buildings or premises providing hotel services, temporary collective or individual accommodation services, as well as accommodation for temporary residence." Secondly, operators of the resort fee will be "legal entities or entrepreneurs who, according to the legislation of the Russian Federation, provide hotel services and/or temporary collective or individual accommodation services and/or provide temporary residence (including

can be differentiated depending on the season, days spent in the accommodation facility, the value of the resort according to the legislation of the Russian Federation on natural medical resources, medical rehabilitation centers and resorts, and the location of the municipalities in the experiment territory.

30 For more detail, *see* The Size of the Resort Fee, *supra* note 28.

31 *See id*.

living quarters), in residential areas as well." Taking into account all the relevant conditions, it is important to understand that, at the present time, the Russian Federal Tax Service, having no branches in many of the municipalities participating in the resort fee experiment, lacks the resources (primarily human) necessary for the proper administration of the resort fees. Local authorities performing this function can be a solution but they are not empowered with tax administration and they are not directly interested in the amount of collected funds since the revenues from the resort fees are not allocated to their budgets but to the budget of the federal entity.

As regards the mandate to carry out the experiment, the Law regulates many issues that are not directly related to the collection of resort fees (the form and deadlines for submitting reports on the experiment, the bodies responsible for the preparation of these reports, the maintenance of registries, methodological support for the experiment, and much more) and, at the same time, the Law is silent about the administration of the resort fee, which, in the authors' view, is a serious omission, since the effectiveness of implementation of the experiment directly depends on the quality of administration of the resort fee.

Another interesting fact is that the municipalities included in the experiment do not actually have any power to implement it but act only as a venue for it. Moreover, the collection of the resort fee in municipalities is effected and may be discontinued solely by a law of a federal entity of the Russian Federation following the application of a municipality participating in the experiment. A federal entity can enact a law whereby the territory of the experiment, the amount of the resort fee, the procedure and terms of its transfer to the budget of the federal entity of the Russian Federation and the procedure for monitoring compliance with the requirements of regulatory legal acts related to the experiment are established.

In order to receive feedback on the implementation of the experiment, the Law provides that information concerning reconstructed, improved and newly built facilities, and about renovated resort infrastructure in each federal entity of the Russian Federation, will be published on the internet.

The Federal law of 29 July 2017 No. 214-FZ sets out the grounds for exemption from payment of the resort fee, whereas this fee is a regional payment pertaining to a specific territory and is paid to the budget of the relevant federal entity of the Russian Federation. Moreover, federal entities of the Russian Federation have the right to define who is exempt from payment of the resort fee on the basis of proposals by municipalities. A similar practice was also employed previously. The Law of the RSFSR of 12 December 1991 No. 2018-I (abolished in 2003), established groups of people exempt from resort fees, including: children under the age of 16; persons with disabilities and persons accompanying them; persons who arrived on vouchers and treatment coupons for sanatoria, vacation centers, boarding houses, recreation centers, etc.; persons in resort areas on a business trip or for study and permanent residence; persons travelling on tourist routes planned by tour and

excursion companies and organizations, as well as those traveling on business trips; men aged 60 and over, women aged 55 and over; children visiting parents of the age specified above. Federal entities of the Russian Federation had discretion to widen concessional categories. For example, the Law of the Krasnodar Region of 3 June 1997 No. 77-KZ "On Resort Collection" (abolished in 2003) exempted children visiting their parents, i.e., men aged 60 and over and women aged 55 and over.

Concessional categories are amply represented in the new Law. Those released from payment of the resort fee are: 1) persons awarded titles of Hero of the Soviet Union, Hero of the Russian Federation, or full knights of the Order of Glory; 2) persons awarded the title of Hero of Socialist Labor or Hero of Labor of the Russian Federation or awarded the Order of Labor Glory third-class; 3) participants in the Great Patriotic War; 4) veterans of military operations; 5) persons awarded the Resident of Besieged Leningrad medal; 6) persons who, during the Great Patriotic War, worked on air defense facilities, local air defense facilities, on the construction of defensive structures, naval bases, airfields and other military facilities behind the front line, in operational zones of active fleets, in the front-line areas of rail and motor roads, as well as crew members on ships of the transport fleet interned at the beginning of the Great Patriotic War in harbors of other states; 7) disabled war veterans; 8) members of families of deceased and disabled war veterans, participants in the Great Patriotic War and combat veterans, members of the families of persons killed in the Great Patriotic War who were members of self-defense groups for the protection of air defense facilities and local emergency air defense teams, and members of families of deceased infirmary and hospital staff in the city of Leningrad; 9) persons exposed to radiation due to the Chernobyl disaster, as well as due to nuclear tests at the Semipalatinsk test site, and persons similarly affected; 10) disabled persons of groups I and II; 11) persons accompanying disabled persons of group I and children with disabilities; 12) poor families, poor single citizens and other categories of citizen with an average per capita income below the subsistence level established at their place of residence in the relevant federal entity of the Russian Federation; 13) persons who arrived on the territory of the experiment in order to obtain specialist, including high-tech, medical assistance or medical rehabilitation after the provision of specialist, including high-tech, medical assistance at sanatorium-resort organizations, as well as the person accompanying them if the patient is a child under the age of 18; 14) patients with tuberculosis; 15) persons under the age of 24 enrolled in full-time education in educational institutions located on the territory of the experiment; 16) persons permanently working on the territory of the experiment on the basis of an employment contract or service contract; 17) owners of residential property in the territory of the experiment; 18) home owners and owners of shares in them and/or of residential premises and shares in them on the territory of the experiment; 19) athletes, coaches, sports judges, as well as other sports and fitness specialists participating in official sports events on the territory of the experiment (Art. 7 of the Federal law of 29 July 2017 No. 214-FZ).

However, the impressive list of persons excluded from payment of resort fees was significantly reduced compared to the Law of the RSFSR of 12 December 1991 No. 2018-I, since the largest groups have been deprived of the benefit, i.e., old age pensioners (men aged 60 and above and women aged 55 and above), as well as children under 16 years of age and persons visiting the territory of the experiment on business trips. Regarding the latter, a question arises as to whether the person himself or the employer that sent him on the business trip will pay the resort fee. As for foreign business trips, the payment of the tourist tax is only reimbursed if the tax is directly indicated in the invoice and the check. Otherwise, the employer may refuse to pay such expenses on behalf of the traveler.

The calculation and payment procedure of the resort fee is as follows:

> the amount of the resort fee is calculated as the number of days actually spent at the accommodation facility, except for the day of arrival, multiplied by the appropriate size of the resort fee. Please note that the amount of the resort fee to be paid is not included in the cost of living.

Therefore, the traveler is to pay the above fee himself, which violates his rights as an employee. The resort fee for the same period of residence in the experimental area is collected only once. The fee should be paid upon departure from the accommodation facility; whereas hotels abroad try to receive the tax immediately at the time of arrival. There is reason to believe that Russia will adopt the same method. The Italian case-law on responsibility of hoteliers to collect the tax if the resident refuses to pay it is not yet well-established. In Russia, this issue is also not defined by law. Russian legislators and law enforcers will certainly be faced with several questions in practice:

First, how should the hotelier act if a resident refuses to pay the resort fee?

Second, can the hotelier be held liable in case of a resident's failure to pay the fee?

Third, what kind of responsibility will the resident bear for his/her refusal to pay the resort fee and who will charge him?

Fourth, if the hotel resident has paid the tax but does not require any confirming documents, how can due transfer of the received funds to the budget by the hotelier be ensured?

As we have noted above, in Italy, some courts consider that hoteliers are only responsible for the tax payment to the budget if the tax was actually paid by residents; other courts are of the opinion that a hotelier is not generally responsible for paying such a tax because he only acts as an intermediary. So, in practice, it is unclear how to proceed if there are no documents confirming the payment of the resort fee to the hotel. Previously, the Law of the RSFSR of 12 December 1991 No. 2018-I dealt with this situation by introducing a clause pursuant to which the fee was to be paid directly by vacationers at a bank and the receipt was to be presented on demand to the law enforcement officers. The correct solution would be for the resident to pay

the resort fee himself and present the receipt to the hotelier, or even that the fee would be included in the cost of living, like VAT. By virtue of Art. 10 of the Federal law of 29 July 2017 No. 214-FZ

> the operators of the resort fee, as it is prescribed by the law of the federal entity of the Russian Federation, will calculate, collect and transfer the resort fee to the budget of a federal entity of the Russian Federation; furthermore, when collecting the resort fee from the payer, the operator of the resort fee shall issue the payer of the resort fee with a document confirming the fact of payment.

Fifth, what if an individual (not a sole trader) leases housing for residence purposes (whether on a regular basis or not) for payment, and what if he offers it free of charge? In fact, residents, regardless of how and why they came, use the tourist infrastructure and cause damage to the environment and utilities of the municipality like all other holidaymakers. For example, in Italy, even if a person is on an exchange program between educational institutions and lives in a university dormitory for free, he must still pay the tourist tax for all days of residence as he will, in any case, cause some damage to the territory in which he resides.

It may be concluded that empowering owners of accommodation facilities with administrative functions in relation of the resort fee is, in fact, a free transfer of state powers to private individuals, which is common practice now. The trend is followed in the banking sector, where private banks act as state agents and control their clients' cash and other transactions, as well as performing currency exchange control on behalf of the state, and this is done absolutely free-of-charge.

Another controversial issue concerning the introduction of the resort fee in Russia is the creation of the Resort Infrastructure Development Fund (part of the budget belonging to a federal entity of the Russian Federation to be used for the development of resort infrastructure). The question is in what legal form these funds will exist: will it be off-budget funds or private legal entities, and why are they financed by compulsory payments? Moreover, it is important to understand how the assets will be spent, whether these funds fall within the scope of the Federal law of 5 April 2013 No. 44-FZ "On the Contract System,"[32] whether they will be supervised by state financial control bodies such as the chambers of control and accounts in the federal entities of the Russian Federation included in the experiment, and so on. In the authors' view, it would be better not to transfer revenues from the resort fees to a federal entity of Russia and the Resort Infrastructure Development Fund, but to allocate the revenues

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[32] Федеральный закон от 5 апреля 2013 г. № 44-ФЗ "О контрактной системе в сфере закупок товаров, работ, услуг для обеспечения государственных и муниципальных нужд," Собрание законодательства РФ, 2013, № 14, ст. 1652 [Federal law No. 44-FZ of 5 April 2013. On the System of Public Procurement Contracts for Products, Works, Services for State and Municipal Needs, Legislation Bulletin of the Russian Federation, 2013, No. 14, Art. 1652].

to budgets of the federal entity of the Russian Federation and municipalities taking part in the experiment in order to accumulate funds for major projects.

As for control, it should be established over three main areas:

1) control over implementation of the experiment;

2) control over the payment of the resort fee (revenue control);

3) control over the expenditure of funds for the purpose of preserving, restoring and developing resorts, creating unique tourist spaces, and favorable conditions for the sustainable development of tourism (expenditure control).

It should be noted that Art. 12 of the Federal law of 29 July 2017 No. 214-FZ provides for public control in the form of a public council under the competent authority of a federal entity of the Russian Federation for the purpose of public control over intended expenditure of the fund's budgetary allocations. The council will comprise resort fee operators, and public and specialist organizations operating on the territory of the experiment. It remains unclear why the public council was entrusted with control powers. How such council will exercise this control is even more obscure. The Law also does not determine the professional composition of the said council, whether it will include persons who have experience in monitoring and expert-analytical activities, whether the council will conduct on-site inspections, taking into account the fact that, in all federal entities of the Russian Federation, the comptroller-general's offices competently operate in the legislative system, and they can effectively control the funds spent in the course of the experiment.

Conclusion

In Italy, the introduction of the tourist tax was strongly criticized by associations of hoteliers and a similar criticism is being voiced in Russia. According to Russian hoteliers, the Law on the tax is very unfair because a non-resident person has no good reason to pay for unused services. Moreover, hoteliers already bear the costs of maintaining and developing tourist infrastructure in the form of other taxes.

Another view prevailing in the doctrine is that it is necessary to establish a direct link between a tax resident and the environment. It is therefore necessary to consider such tax patterns for tourist services where an individual tourist or a tour operator assumes that

> the forms of consumption and investment indirectly affect potential contribution, the potential is greater when the economic and legal relationship between a person and the environment will be closer from a qualitative and/or quantitative perspective.[33]

[33] *See more* Roberta Alfano, *Tributi ambientali. Profili interni ed europei* 276 (Torino: G. Giappichelli Editore, 2012), cited by Valerio Ficari, *Sviluppo del turismo, ambiente e tassazione locale*, 4 Rassegna tributaria 963 (2008), para. 2.1.

In summary, both approaches can be applied. It is true that the introduction of the tax can really induce tourists to choose accommodation in municipalities free from the tax. Another point is that such tax collection in some cultural centers and municipalities with a large influx of non-residents is a reasonable decision since it will allow to them increase operating and environmental costs in order to repair damage caused by a high number of tourists.

As for the Law adopted in Russia providing for the collection of resort fees in certain regions of the Russian Federation from 1 January 2018, it lacks the main principle of charging resort fees, which can also be seen in the Italian experience. The main principle is to compensate for harm caused by tourists to the tourist and communal infrastructure of resort towns. Instead, achieving financial returns takes priority, which does not ensure future expenditure specifically designated for the tourism sector. In this regard, it would be more appropriate to allocate the resort fees to the budgets of the municipal entities welcoming tourists. However, alternatively, an additional intermediary structure has been put in place, i.e., the Resort Infrastructure Development Fund, whose activities further complicate the understanding of the process of resort fee collection in Russia. Moreover, the introduction of the tax only in specific regions may contribute to a substantial outflow of tourists to other regions or even encourage them to visit other countries where such tax is not collected.

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COMMENTS

REPRESENTATIVE ACTIONS IN RUSSIA

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Class action is an important safeguard to protect the rights and legitimate interests of large groups of people and it has already proven successful in advanced foreign legal systems. One of the most popular forms of class action in countries with a continental legal system (France, Sweden, Argentina) is a representative action, which is initiated by non-profit associations, i.e., "ideological claimants" (associations, foundations, non-profit organizations) in defense of violated collective rights of a large group of people or unspecified persons in the most vulnerable areas of economic life. The institution of collective redress by representative bodies is less popular in countries with common law legal systems (the USA, Australia, Canada), which traditionally use class actions. Nevertheless, countries with common law legal systems such as the United Kingdom (England and Wales) actively use the legal tools for the social protection of the violated rights and interests of citizens. This article analyzes the legislative consolidation and application of representative actions in the Russian Federation. The absence of a mechanism (for filing a lawsuit before the decision) of judicial protection of professional representatives' collective rights and public interests according to the generally accepted international practices involving interested persons whose rights have been violated (opt-in or opt-out), creates barriers to the development of representative actions in Russia. At the same time, the scope of these claims and the judicial protection of collective rights and public interests by public associations has its own characteristics, which can be used by legislators to effectively protect human rights.

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Article 46 of the Constitution of the Russian Federation guarantees everyone judicial protection of rights and freedoms. Historically, the Russian Federation has developed several ways of protecting violated rights and interests of groups of persons, i.e., representation, required joinder and protection of rights of other persons or the general public by the prosecutor, bodies of executive power, and public organizations.

The practice of considering a multitude of separate lawsuits with similar claims against the same defendant proved the complexity and inadequacy of available legal tools to protect the interests of these plaintiffs at all stages of the case trial (from its filing with the court to enforcement of the judgment).

One of the internationally recognized forms of collective defense of the rights and interests of citizens abroad is the "class action."[1] Having originated in the UK, it thrived in the United States and was used extensively to protect the rights of the public from financial and industrial corporations and from damage caused by human actions to large groups of individuals ("group litigation").

However, due to the global trend of civil procedure development, there has been an approximation and mutual enrichment of the two main types of civil proceeding: Romano-Germanic and Anglo-Saxon.[2]

A direct manifestation of this approximation in the countries of Romano-Germanic law tradition was an attempt to integrate class actions with the current system of civil justice by lawmakers and legal scholars.

Despite the significant number of proposals to replicate the Anglo-Saxon system of private class actions, the legislators of European countries (France, Germany and Italy) did not accept the idea. A *sui generis* alternative to the Anglo-Saxon Institute became representative actions initiated by nonprofit organizations, and accredited by the state in some countries, in defense of violated collective rights of a large group of persons or the general public in the most vulnerable areas of economic life.

In the US, by contrast, some non-state associations dealing with human rights practices are prohibited from filing class actions in defense of violated rights and interests of certain social groups, giving rise to concerns among the academic community.[3]

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[1] Stephen C. Yeazell, *Collective Litigation as Collective Action*, University of Illinois Law Review 43 (1989); Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* (New Haven and London: Yale University Press, 1987); Francisco Valdes, *Procedure, Policy and Power: Class Actions and Social Justice in Historical and Comparative Perspective*, 24 Georgia State University Law Review 627 (2008); John K. Rabiej, *The Making of Class Action Rule 23 – What Were We Thinking?*, 24 Mississippi College Law Review 323 (2005); Geoffrey Hazard et al., *An Historical Analysis of the Binding Nature of Class Suits*, 146 University of Pennsylvania Law Review 1849 (1998); Robert H. Klonoff et al., *Class Actions and Other Multi-Party Litigation: Cases And Materials* 108 (St. Paul: West Group, 2000).

[2] *Малешин Д.Я.* Российская модель группового иска // Вестник Высшего Арбитражного Суда Российской Федерации. 2010. № 1. С. 70–87 [Dmitry Ya. Maleshin, *Russian Model of Class Action*, 4 Bulletin of the Supreme Arbitration Court of the Russian Federation 70 (2010)].

[3] *Вербик Ф.* Почему дорога закрыта? Необоснованное ограничение, налагаемое на корпорацию правовых услуг касательно коллективных исков // Вестник гражданского процесса. 2012. № 5. С. 177–196 [Francisco Verbic, *Why is the Road Closed? Unreasonable Restriction Imposed on the Legal Services Corporation Regarding Class Actions*, 5 Herald of Civil Procedure 177 (2012)].

The Russian civil procedural legislation was developed by introducing and improving the institution of representative actions as was the case in most continental European countries.

Despite their relevance for Russian society, public class actions suffer from a scarcity of theoretical research in the study of the mechanisms by which courts can adjudicate such claims and, as a consequence, practical application. Furthermore, foreign legislation and court practice have developed a concept and mechanisms to adjudicate representative actions initiated by qualified associations authorized to apply to a court on behalf of a group of persons or authorized to represent a group in a particular case.[4]

Class actions are categorized as opt-in or opt-out,[5] according to the rules of group members involvement in class actions. In opt-in actions, group members only acquire the right to bring a class action if it is a directly expressed will of theirs (European law model). In opt-out class actions, all potential members of the group are assumed to be within it, if they do not declare their unwillingness to be members of the group (Anglo Saxon-law model). That is, opt-out is a right that can be exercised either before or after certification of the group.[6]

According to the European Commission,[7] the opt-in procedure is extremely burdensome and costly for consumer associations that have to conduct all preliminary work on identification of group members (consumers), establishing the facts of each case, the progress of each case and the engagement of each plaintiff.

Difficulties can also occur when a group comprises a significant number of plaintiffs with insignificant losses, which means the applicants themselves have less incentive to act. However, the advantage of this procedure is that there is no risk of maintaining exorbitant and undeserved complaints.

However, the opt-out procedure was assessed by the Commission to be procedurally thrifty compared to the opt-in procedure, but it was also found to be not without disadvantages. The most significant disadvantage of the opt-out system is the risk of encouraging excessive litigation.

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4 Christopher Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe* (Oxford: Hart, 2008); Hans-Bernd Schaefer, *The Bundling of Similar Interests in Litigation. The Incentives for Class Action and Legal Actions Taken by Associations*, 9(3) European Journal of Law and Economics 183 (2000).

5 *Дэвис С.* Групповые иски: «спасательный жилет» для инвесторов и акционеров или верный путь к катастрофе для общества и «золотая жила» для юристов // Вестник Федерального арбитражного суда Уральского округа. 2010. № 1. С. 144–150 [S. Davis, *Class Actions: A "Life Jacket" for Investors and Shareholders or a Path to Catastrophe for Society and a Mother Load for Lawyers?*, 1 Bulletin of the Federal Arbitration Court of the Ural District 144 (2010)].

6 Owen M. Fiss & John Bronsteen, *The Class Action Rule*, 78(5) Notre Dame Law Review 1419, 1441 (2003).

7 Green Paper on Consumer Collective Redress – Questions and Answers, MEMO/08/741, Brussels, 27 November 2008 (Jan. 13, 2018), available at http://ec.europa.eu/consumers/redress_cons/greenpaper_en.pdf.

In the process of discussions on the reform of class actions in the Antitrust and Competition Law of the UK, it was decided to introduce a limited opt-out system only in the Antitrust law, provided that class certification is judicially controlled, so that only the actions that meet the requirements of class actions are: exclusion of any multiple damages; exclusion of any lawyer's success fee; maintenance of the "loser pays" rule; representatives of the class actions can be plaintiffs themselves, trade associations or consumer associations, but not law firms.[8]

In turn, relevant public organizations are actively used abroad to protect infringed rights and interests of citizens and the general public from the actions of financial and industrial corporations. For example, initiators of public class actions may be non-profit associations (public organizations, associations, trade unions), whose rights and legitimate interests were violated.

In case public unions start an action to protect a group (property claims) or the general public, the court of general jurisdiction shall consider persons involved in the group (no matter how many they may be) as separate material plaintiffs even provided that there are grounds for a class action in the absence of procedural rules governing the mechanism of class action.

One of the most compelling examples may be numerous court trials in Russia, when lending institutions obtained money (commission) from their clients for account maintenance, while the responsibility for opening and maintaining such accounts was entrusted to the those institutions by law. Therefore, every borrower had to prove the illegality of the commissions in court, which could have been avoided in case of appeal to the court of public associations for the protection of groups of persons who entered into a loan agreement with a certain bank during a particular period.

In another class action[9] at the level of municipalities, a concert organizer's non-compliance with terms of the contract forced the actors to cancel the performance and the organizer did not return the money to the audience. In the end, several citizens had their rights restored on application of the public association of consumers in defense of citizens according to the rules of procedural joinder. However, the audience was over 100 persons and they could have won their money back if they had agreed to join the action. These cases are interesting because, if a case is tried according to the class action procedure, all persons affected can restore their violated rights.

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[8] From the Expert report of the Department for Business, Innovation and Skills of the UK in connection with the reform of class actions in competition law (April 2012).

[9] *Крыльцова О.* Не увидев спектакль, зрители обратились в суд // Комсомольская правда. 18 мая 2011 г. [Olga Kryltsova, *Not Having Seen the Performance, the Audience Applied to the Court*, Komsomolskaya pravda, 18 May 2011] (Jan. 13, 2018), available at https://www.alt.kp.ru/daily/25687/891488/; http://www.gcourts.ru/case/5074397.

Three basic reasons[10] are put forward in favor of interest representation by "ideological plaintiffs": a representative's interests coincide with the interests of the whole group, not its individual members; individuals are protected from risks and burdens of representation; and process financing is more manageable.

In other words, currently, a class action is the only way to deal with a dispute involving many individuals whose rights have been violated.

A successful form of collective protection of financial services consumers and investors in Russia is a financial ombudsman and the Central Bank of the Russian Federation is working on the draft law "On a Financial Ombudsman for Consumers of Financial Organization's Products," to ensure the procedural status of an authorized person.

According to the report prepared by the State Council "On the National System of Protection of Consumer Rights," there is a need to introduce the institution of group actions, since the violations in e-commerce and other fields are often widespread and it would be easier and more efficient for public authorities, and public associations, to protect consumers under a single process which could be joined by affected individuals without the need for settling complex documents or incurring any costs. It will also significantly reduce the burden on the judicial system, because, for the last two years, the number of lawsuits to protect the rights of consumers has nearly reached one million.

Despite the annual increase in the number of non-profit associations in the Russian Federation,[11] whose charter purpose is, in addition to judicial protection of the rights of the consumer market, to ensure the quality of protection of collective rights and legitimate interests of citizens, such public associations still require significant development.[12]

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[10] Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Oxford: Hart, 2004); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73(4) Notre Dame Law Review 913 (1998); The Recognition of a Class Action in South African Law, South African Law Commission (Working Paper No. 57, August 1998); Vince Morabito, *Ideological Plaintiffs and Class Actions – an Australian Perspective*, 34(2) University of British Columbia Law Review 459 (2001); Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 New York University Law Review 13 (1996); Report on Class Actions, Ontario Law Reform Commission (Ministry of the Attorney General, 1982), at 128, 132; Lafond Pierre-Claude, *Consumer Class Actions in Quebec to the Year 2000: New Trends, New Incentives*, 8 Consumer Law Journal 329, 332 (2000).

[11] As at December 2016, there were 1,755 non-profit organizations dedicated to the protection of consumer rights.

[12] Доклад Государственного Совета РФ "О национальной системе защиты прав потребителей" // Международная конфедерация обществ потребителей. 21 апреля 2017 г. [Report of the State Council of the Russian Federation "On the National System of Consumer Protection," International Confederation of Consumer Societies, 21 April 2017] (Jan. 13, 2018), available at http://konfop.ru/доклад-государственного-совета-рф-о/.

1. The Scope of Representative Proceedings in Russia

Article 46 of the Civil Procedure Code of the Russian Federation (hereinafter RF CPC), is of a reference nature, since the parties' right to appeal to court in the interests of other persons shall be provided by either other rules of the RF CPC, or other federal laws.

For example, the law of Belgium, which introduced class actions in 2014 (Art. XVII.37 of the Commercial Code of Belgium), sets out a list of normative-legal acts, the potential violation of which may result in the bringing of a suit within the framework of collective redress. These rules relate to cases of consumer rights protection; misleading and unfair advertising; unfair terms of contracts and distance contracts; undisputed collection of consumer debt; environmental harm; discrimination and racism; as well as copyright.

In Germany, the class action (structurally similar to the class-action lawsuit in the United States) was introduced in order to protect the rights of investors under the Model Law of Germany. Mechanisms of collective redress in Germany are in force (and were previously introduced) in areas of consumer protection and competition protection, telecommunications regulation, etc.[13]

That is, legislators of European countries made special laws in those areas where violation of collective rights of citizens or amendments to existing legal acts are possible. However, most countries' procedural laws do not change.

It should be noted that the organizations for consumer protection are authorized to file lawsuits to protect consumers in Belgium, Luxembourg, the Netherlands, Spain and Portugal.[14]

In Russia, the scope of representative proceedings is traditionally as follows: legislation on environmental protection, consumer rights, protection of securities investors, and copyright. However, there were cases in court practice when even legal actors granted the right to protect the interests of other persons directly by the law, faced obstacles to initiating proceedings. As some Russian scholars note,[15] the courts do not take into account the fact that, in reality, the general public and

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[13] Brigitte Haar, *Investor Protection Through Model Case Procedures – Implementing Collective Goals and Individual Rights Under the 2012 Amendment of the German Capital Markets Model Case Act (KapMuG)* (CFS Working Paper Series, 2013), at 11 (Jan. 13, 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2352248; Mariusz Maciejewski, *Overview of Existing Collective Redress Schemes in EU Member States*, European Parliament' Doc IP/A/IMCO/NT/2011-16 (July 2011), at 22 (Jan. 13, 2018), available at http://www.europarl.europa.eu/document/activities/cont/201107/20110715ATT24242/20110715ATT24242EN.pdf.

[14] Christopher Hodges, *Europeanisation of Civil Justice: Trends and Issues*, 26 Civil Justice Quarterly 96, 115 (2007).

[15] *Туманов Д.А.* Проблемы защиты общественного интереса в российском гражданском процессе // Законы России: опыт, анализ, практика. 2012. № 9. С. 3–11 [Dmitry A. Tumanov, *Issues of Public Interest Protection in Russian Civil Procedure*, 9 Laws of Russia: Experience, Analysis, Practice 3 (2012)].

the public good is determined not by the literal wording of the law, but by its logic, and the nature of the legal relations.

Despite the annual increase in state control in the field of participation in shared construction, large-scale violations resulting in failure to restore shared construction participants' rights occur in every subject of the Russian Federation. One of the latest mechanisms for the protection of the rights of shared construction participants is the creation of the nonprofit organization "Fund for Protection of the Rights of Citizens Who Are Participants of Shared Construction." The main objective of the fund is to protect the rights, legitimate interests and property of participants of shared construction, whose rights were violated by developers who are subject to the procedures initiated by a commercial court applied in bankruptcy cases.

One of the most successful national examples of collective rights protection implemented by public organizations is the protection of copyright holders and other related rights. This protection is carried out by non-profit organizations (the Russian Authors Society, the Russian National Intellectual Property Organization, and the Russian Union of Right Holders), which are accredited by the state as represented by the federal executive body exercising control and supervision functions in the field of copyright and related rights. Under the provisions of Art. 1242 of the Civil Code of the Russian Federation (hereinafter RF CC), such organizations possess the right to advocate for both copyright holders and on behalf of an indefinite number of right holders in accordance with the opt-out model.

The draft law "On Amendments to Certain Procedural Acts of the Russian Federation" (hereinafter Draft Law), proposed by Ministry of Justice in 2017, would establish the procedure for a group of persons with a collective statement of claim to apply to court; representation in cases on protection of rights and legitimate interests of a group of persons; the replacement of a person who has appealed for the protection of the rights and legitimate interests of a group of persons; requirements for the application, statement of claim and administrative statement of claim filed in defense of the rights and legitimate interests of a group of persons; and the actions of a judge in preparing a case for protecting the rights and legitimate interests of a group of persons for trial.

The Draft Law provides a list of cases that can be heard under the procedure provided by Chapter 22.2 of the same. These include the following:

1) disputes regarding consumer protection;

2) other cases provided for by federal law, subject to the availability of objective conditions for the initiation of collective proceedings.

In this way, the list of cases is limited until the adoption of federal legislation.

Vladimir Yarkov criticizes the establishment of a broad category of cases that can be tried as class actions. In his opinion, the establishment of such an extensive list of disputes that can be tried as class actions immediately after the introduction

of class actions to legislation of the Russian Federation is not merited, since it may lead to an abuse of rights to judicial protection.[16]

In our view, an exhaustive list can lead to the violation of citizens' or organizations' rights to access justice through class action lawsuits, due to the evolution of financial institutions, a lack of state control and legal regulation in some areas and, as a consequence, the possibility of violations of collective rights in specific areas of society not included in the list of cases enumerated in the Draft Law.

Moreover, since 15 September 2015, the Code of Administrative Court Procedure (hereinafter RF CACP) has been in force in the Russian Federation. Article 40 of the RF CACP establishes class actions for cases arising from public legal relations, when taking legal action to protect other persons or the general public.

It should be noted that the provisions of the RF CACP and Art. 46 of the RF CPC also refer to special legislation. Examples of cases when non-profit organizations can take legal action are social control (public organizations) for law enforcement in the Russian Federation and other regulatory legal acts on the state contracts system in relation to public procurement (Art. 102); the compensation fund is entitled to represent and protect, in court, the property interests of applicants to the fund and, in enforcement proceedings, to sue for the protection of the rights and legitimate interests of investors at large, i.e., individuals (Art. 63).

In view of recent reforms and the existence, since August 2014, of a Unified Supreme Court of the Russian Federation, a course has been set to unify proceedings in civil cases in courts of general jurisdiction and commercial courts and to create a Unified Civil Procedure Code of the Russian Federation. In para. 50.10 of the Concept of the Unified Civil Procedure Code of the Russian Federation (hereinafter Concept), approved on 8 December 2014, it is proposed to enshrine an exhaustive list of categories of cases that can be considered under the procedures for the protection of the rights of groups of individuals. The possible abuse of the right to judicial protection is the reason for the introduction of such list.

Since the existing legal regulation of collective judicial protection is reflected only in sectoral legislation, it is necessary to expand the scope of class actions, by implementing the opportunity for public associations to initiate class actions for the protection of a group of persons or the general public in the relevant federal legislation. Such areas can include protection from unfair competition, cases of cultural heritage, and the rights of participants of shared construction.

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[16] *Ярков В.В., Тимофеев Ю.А., Ходыкин Р.М.* О проекте главы 38.1 ГПК "Рассмотрение дел о защите прав и законных интересов группы лиц" // Арбитражный и гражданский процесс. 2012. № 8. С. 16–20 [Vladimir V. Yarkov et al., *On the Draft of Chapter 38.1 of the Civil Procedure Code of the Russian Federation "Consideration of Cases on the Protection of the Rights and Legitimate Interests of a Group of Persons,"* 8 Arbitration and Civil Procedure 16 (2012)].

2. Representative Actions in Russia: Opt-In or Opt-Out?

The Russian procedural system provides for the participation of public associations (organizations) in the protection of violated collective rights of large groups of persons or the general public in the most vulnerable areas of economic life (Art. 46 of the RF CPC and Art. 42 of the RF CACP).

According to the definition of a subject of judicial protection set out in Art. 4(1) of the RF CPC, a class action can be formulated as a statement made to protect both the violated rights of a large group of persons and the legally protected rights of the subject applying to court in defense of this group.

A person, applying to a court of general jurisdiction becomes a key participant in the class action proceedings, acquiring procedural rights and bearing all the procedural obligations of the plaintiff in the case, compelled to conscientiously protect clients' rights and legitimate interests except for the right to conclude the settlement agreement and the obligation to pay court costs (Art. 46 of the RF CPC).

The filing of a claim by a person concerned has the goal of restoring a violated right, and the person seeking protection of the right or interest must prove that their right or interest was really violated by the defendant's unlawful conduct and that the selected remedy will lead to its recovery.

At the same time, none of the methods of collective protection available in the Russian Federation, which could be initiated by non-profit associations (organizations), is inconsistent with generally recognized international practices of class action consideration in opt-in or opt-out models.

Therefore, the provisions of Art. 42 of the RF CACP concerning administrative class actions do not specify whether public organizations can be referred to "other persons" (subjects) that may apply to court in defense of the violated rights of a group of persons.

According to Vladimir Yarkov,[17] "other persons" can implicate, for example, a prosecutor, state bodies, and public associations that are entitled to bring a class action only in cases stipulated in the federal law.

Furthermore, the provisions of Art. 40 of the RF CACP provide that, in certain cases ascertained by law, organizations can still go to court to protect the rights, freedoms and legitimate interests of others. However, according to Art. 40 of the RF CACP, the persons mentioned above and not specified in that Article, have no right to apply to court, since, if acting within the law (Art. 40(3) of the RF CACP), public associations can go to court in defense of common rights, interests and freedoms of all their members, however, they are not entitled to require the protection of public interests or the interests of the general public.

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[17] *Ярков В.В.* Групповой иск в административном судопроизводстве: краткий комментарий // Арбитражный и гражданский процесс. 2015. № 11. С. 52–58 [Vladimir V. Yarkov, *Class Action in Administrative Proceedings: A Brief Review*, 11 Arbitration and Civil Procedure 52 (2015)].

In order to eliminate obstacles to collective protection of violated rights, it is necessary to make amendments to Art. 42 of the RF CACP regarding what entities, other than citizens, can go to court with administrative claims to bring a class action. Such persons should include state agencies, local governments, and public associations. The current wording of Arts. 40 and 42 of the RF CACP (on the stipulation that "other persons" mean non-profit and public associations), *de facto* overlaps. Moreover, sectoral legislation, which Arts. 40 and 42 of the RF CACP make reference to, does not contain areas of legal relations authorizing the filing of administrative claims by non-profit associations in defense of groups of persons. Only in Art. 208(2) of the RF CACP is it stated that they can file a lawsuit challenging normative legal acts in order to protect all *their* members, which repeats the provisions of Art. 40(3) of the RF CACP and does not entitle nonprofit organizations to file a collective claim to protect non-member persons.

According to Vladimir Yarkov, a significant number of the procedural issues of Art. 42's application are unregulated (unsettled), including the issues concerning the specific nature of preparation and hearing of a case under an administrative class action, notification of potential group members, interaction between members of the group and the representative plaintiff in proxy, the order of selection and replacement or termination of the representative plaintiff's powers, the powers of the group members to personally participate in the proceedings, peculiarities of drafting of the operative part of a judgment, etc.

In other words, having proposed the opt-in model to protect collective rights in administrative proceedings, the legislator has not resolved the basic procedural mechanisms for trying such claims, which means that this institute cannot function fully at present.

As regards civil proceedings, it should be noted that the RF CPC does not contain any provisions on collective rights and interests defense according to the opt-in model, or mechanisms for the resolution of collective disputes.

The Russian equivalent of the class action opt-out model is the claim for the protection of the general public, stated in Art. 46(1) of the RF CPC, which may be initiated by a public association. For example, in the domestic procedural doctrine, protection of public interest relates to protection of the general public by public associations.

The Civil Procedure Code of the RSFSR (Art. 42(1)) stipulated that, in cases provided for by law, organizations are entitled to apply to court for protection of violated or disputed rights, freedoms and lawful interests of other persons at their request or for protection of violated or disputed rights, freedoms and lawful interests of the general public.

When adjudicating upon such claim, the court has no right to impose any pecuniary duty on the defendant to a specific plaintiff or group of plaintiffs, since this category of cases results from the need to protect certain common values and the public interest.

Under para. 20 of the Resolution of the Plenum of the Supreme Court of the Russian Federation on proceedings concerning consumer protection (31), actions to protect the rights and legitimate interests of the general public are filed by prosecutors, competent authorities, bodies of local self-government (*parens patriae* actions), public associations and unions of consumers with the status of a legal entity (representative actions) who can only initiate actions aimed at finding a defendant's actions illegal or, barring the defendant's wrongful actions without monetary claims. Therefore, the possibility to use representative actions for damages in Russia is not provided.

Moreover, in European doctrine, actions to protect the general public do not provide for possible financial compensation of losses of individual participants of the general public. The nature of the provided judicial protection in such cases is public law.

Furthermore, in accordance with Art. 31 of the French Civil Procedure Code, a trial is only possible if a plaintiff has a reason for, and an interest in, judicial recourse. However, difficulties arise when a legal person (e.g., an association) takes legal action to protect the common interests of persons of a certain category, since one of the main principles of French civil law reads: "no one needs to act for another" (*Nul ne plaide par procureur*).

Therefore, at present, personal interests may not be protected and, even if they are accumulated in a single trial, each plaintiff must articulate his own claims, which should be assessed by the court separately. As a result, class actions *per se* are unenforceable in accordance with the standards of French law. Exceptions to this rule are class actions of consumer associations, who can file collective civil actions under specific conditions, as well as of trade unions and professional associations.

Paragraph 50.3 of the Concept sets out the structure of a claim (Art. 46 of the RF CPC concerning protection of rights, freedoms and legitimate interests of the general public, which is a type of a class action (opt-out) but does not provide protection of each person).

However, the concept of "general public" contained in Art. 46 of the RF CPC is not clarified or described and the issue of defining this category is being solved by court practice. For example, it was noted in some court decisions that the term "protection of the general public" in relation to the provisions of the current legislation refers to the protection of common interests of individuals when the number of potential plaintiffs (applicants) cannot be defined either before or after trial and there is identity of subject matter and reason of action for all plaintiffs, a common method of rights protection and a common defendant, i.e., the fact of mass violation of rights of the general public is established.

Civil legislation proposes both opt-in and opt-out models in the field of collective protection of intellectual property rights. Under the provisions of Art. 1242(3) of the RF CC, public organizations have the right to advocate for both definite and indefinite copyright holders.

Note that claims of public organizations *for the protection of unspecified right holders* may only be submitted by state-authorized associations. In Russia, there are several accredited "ideological plaintiffs," i.e., the Russian Authors Society, the Russian National Intellectual Property Organization and the Russian Union of Right Holders.

The position of researchers that class actions practiced by the authorized societies managing rights on a collective basis do not just have an opt-out nature but an absurd and cruel opt-out with the state turning blind eye to it, appears to be reasonable. However, even in this case a person has the possibility to withdraw from the collective claim, at least by withdrawal of rights from collective management, but not being deprived of these rights.

In such proceedings, NGOs do not protect their personal rights and interests, but the rights and interests of right holders that are their members. Court decisions on compensation redress shall be made in respect of the rights and obligations of other persons, and are not relevant for these organizations, subsequently, amounts are withheld from these rewards to cover the necessary costs for the collection, distribution and payment of such fees.

Organizations are entitled to enter into contracts with users in the interests of the right holders that granted them powers to manage rights, which means they are able to identify all persons concerned.

Some Russian scholars believe that the terms "class action" and "representative action" can be used to signify the same legal phenomenon: in both cases there is a group of individuals and, at the time of case initiation, it is not personalized. *At the same time, according to Art. 46(1) of the RF CPC, a non-profit association has the right to file a lawsuit in defense of persons with the material demands of the group, joined by at least 20 individuals (Art. 42(2) of the RF CACP says the same) on the basis of their written request, however, such a claim cannot be heard as an opt-in model class action.* Everyone seeking protection will be treated as a separate material plaintiff and the group as a whole will be treated as a plurality of persons on the part of the plaintiff (joinder).

The procedural legislation of Denmark[18] allows opt-in and opt-out class actions to be filed depending on the prices of individual material demands, the amount of which does not exceed 2,000 kroner (about 320$), i.e., up to 2,000 kroner – opt-out, more than 2,000 kroner – opt-in only.

In accordance with the UK Consumer Rights Act 2015, consumer associations and trade associations may initiate opt-in or opt-out style class actions. Proceedings on class actions may only be initiated with the approval of the tribunal, which will consider this class action, identify a group of participants of the claim (certification), approve a class (group) representative, and choose either an opt-in or opt-out model.

Currently, national legislation provides for both models of class action: opt-in, when an association takes legal action to protect violated rights of a group consisting

[18] Paul G. Karlsgodt, *World Class Actions: A Guide to Group and Representative Actions Around the Globe* 193 (New York: Oxford University Press, 2012).

of at least 20 (or more) persons, and opt-out (the Russian equivalent being a "claim in defense of general public"), which can be initiated by non-profit organizations empowered by the relevant sectoral legislation.

Note that the characteristic features of the considered models of class actions are far-removed from their traditional forms, creating obstacles to the development of collective protection in general.

The above mentioned problems refer to a claim on protection of the general public, since, according the opt-out model, everyone who falls within the group definition is automatically included in a group and will be bound by the outcome of the case if they do not resign from the group, which can be done by filing a petition to court or a group lawyer. The right to withdraw from the group is not provided by Art. 46 of the RF CPC.

It appears that the opt-out system for Russia will experience difficulties due to the size of the country and the spread of potential offenders in all regions. For example, in the US, class actions are mostly brought at the state level.

The provisions of Art. 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms will also render a complaint to protect an unascertained community impossible. Otherwise, it would be possible for enthusiasts to complain on behalf of unidentifiable forming, for example, a municipal community, social minority or even majority of citizens, passing them off as a group.[19] This position is reflected in the practice of the European Court of Human Rights.[20]

There are disputed academic opinions implying that applicants themselves will choose the model of a class action, however, with the change in group size and ability to define all its members, the plaintiff should have the opportunity to replace opt-out with opt-in and *vice versa* and use the resulting procedural options, including the possibility of changing an action for declaration of a right.

It appears that this freedom to choose the procedural actions (discretion) may lead to applicants' abuse, trial delays, and nullification of timely judicial protection.

In turn, the Concept determining the development of the Russian court system, establishes the possibility for a person to join the group proceedings (class action) only by filing a relevant claim (petition) following the opt-in model. The proposed wording

[19] Постановление Конституционного Суда Российской Федерации от 19 января 2017 г. № 1-П "По делу о разрешении вопроса о возможности исполнения в соответствии с Конституцией Российской Федерации постановления Европейского Суда по правам человека от 31 июля 2014 года по делу "ОАО "Нефтяная компания "ЮКОС" против России" в связи с запросом Министерства юстиции Российской Федерации" [Resolution of the Constitutional Court of the Russian Federation No. 1-P of 19 January 2017. On the Case of the Resolution of the Issue Concerning the Possibility to Enforce, in Accordance with the Constitution of the Russian Federation, the Decision of the European Court of Human Rights of 31 July 2014 in the Case of *OAO Neftyanaya Kompaniya Yukos v. Russia* in Connection with the Request of the Ministry of Justice of the Russian Federation] (Jan. 13, 2018), available at http://www.consultant.ru/document/cons_doc_LAW_211287/.

[20] *Yevdokimov and others v. Russia*, No. 27236/05, 16 February 2016, [2016] ECHR 187; *Cyprus v. Turkey*, No. 25781/94, 10 May 2001, ECHR 2001-IV.

of Chapter 38.1 of the RF CPC, in particular, Art. 319.1(3) of the RF CPC, stipulates that a person can only join a class by filing the relevant application or decision, i.e., the norm is constructed on the model of "opportunity to enter" (opt-in).

Therefore, in accordance with the provisions of Chapter 50 of the Concept, the legislators noticed the necessity to introduce a single model of a class action and class proceedings, which may be equally applied by all courts, taking into account peculiarities of jurisdictions. The authors also provided a mechanism for regulation when considering class actions and certification of the group, and noted the need to consider such claims, both as actions for declaration of a right and the award of compensation. The above demonstrates the beginning of development of a collective protection institute and mechanisms for its regulation.

3. Objective Reasons for Filing a Representative Action and Class Certification

The issue of whether it is possible to consider representative actions according to procedural legislation in Russia, is debatable.

The authors of the Concept say that one of the main criteria for the consideration of a class action (certification) is the possibility for the court to establish 1) a group of persons whose shared rights and interests have been violated by one defendant, and 2) that group members should have the same legal relations with the defendant.

In civil procedure theory there is a point of view[21] that a public association is not a member of a group but only its agent or representative body due to the absence of a material interest in the class action, therefore, it has no possibility of initiating group litigation.

A similar position was set out in the Resolutions of the Constitutional Court of the Russian Federation,[22] which stated that organizations empowered to apply to court seeking to protect rights, freedoms and legitimate interests of others in accordance with Art. 46(1) of the RF CPC, are not subjects of the alleged disputed material relationship that becomes the subject of judicial activities in a case, the NGO is not subject to the legal force of a court decision, the organizations are not awarded anything, and nothing is recovered from them, including legal expenses.

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[21] *Рожкова М.А., Глазкова М.Е., Савина М.А.* Актуальные проблемы унификации гражданского процессуального и арбитражного процессуального законодательства: Монография [Marina A. Rozhkova et al., *Current Issues of Civil Procedural and Commercial Procedural Law Unification: A Monograph*] (M.A. Rozhkova (ed.), Moscow: Institute of Legislation and Comparative Law under the Government of the Russian Federation; Infra-M, 2015); *Алиева И.Д.* Защита гражданских прав прокурором и иными уполномоченными органами [Irina D. Alieva, *Protection of Civil Rights by Prosecutor and Other Competent Authorities*] (Moscow: Wolters Kluwer, 2006).

[22] Определение Конституционного Суда РФ от 29 января 2015 г. № 137-О [Resolution of the Constitutional Court of the Russian Federation No. 137-O of 29 January 2015]; Определение Конституционного Суда РФ от 25 февраля 2016 г. № 370-О [Resolution of the Constitutional Court of the Russian Federation No. 370-O of 25 February 2016] (Jan. 13, 2018), available at ConsultantPlus Legal Database.

That is, with this regulation, independent legal institutes, i.e., class actions, and representative actions, and rights and legal interests of other persons (Art. 46 of the RF CPC, Art. 53 of the Arbitration Procedure Code of the Russian Federation, and Art. 40 of the RF CACP) are mixed without justification.

However, as Victoria Kulakova[23] indicates, the interests of a public organization derive from the interests of its members and represent a generalized benefit, that consist of needs of members, and the statutory goals are the driving force that directs the organization to use the right provided for in Art. 46 of the RF CPC, in defense of public interest or the interests of its members.

For example, in the UK, Art. 716(1) of the Companies Act 1985 provides for compulsory registration as a legal body of any entity "consisting of more than 20 individuals and having the intention to carry out activities aimed at them receiving profits directly or via its members." Having introduced this requirement in 1862, the English legislator managed to solve the procedural problem of a lack, in English procedural law, of a practically efficient representative action or action that may be brought against a group of persons or to protect the interests of group of individuals. From the position the courts are maintaining, it follows that violation of the provisions of this Article leads to recognition of the association as illegal and, subsequently, it will be impossible to sue either the association itself or start an action on its behalf.[24]

It is, therefore, possible to expand the concept of a public class action on protection of rights and legal interests of a group of persons who are not members of a public association, and also other persons whose rights and legal interests were violated by the defendant in the field of public organization professional activity enshrined in an NGO's statute.

In turn, in the draft law "On Amendments to the Civil Procedure Code of the Russian Federation and Certain Legislative Acts of the Russian Federation," which, in 2012, was introduced in the State Duma of the Russian Federation (Chapter 22.2 "Cases to Protect the Rights and Legitimate Interests of a Group of Persons") and which was renewed in October 2016, it is proposed to legislate the right of public associations to go to court in defense of common rights, freedoms and legitimate interests of members and participants of a public association and establish a procedure for consideration of cases on protection of rights and legitimate interests of a group.

In addition, in Art. 244.11(1) of the RF CPC (draft version), it is stated that, in cases stipulated by federal law, agencies, organizations and citizens, can apply to court

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[23] *Кулакова В.Ю.* К вопросу о специальных основаниях обращения в суд в защиту чужих интересов государственных органов, органов местного самоуправления, граждан и организаций // Законы России: опыт, анализ, практика. 2012. № 9. С. 11–19 [Victoria Yu. Kulakova, *Revisiting the Special Grounds of Judicial Recourse in Defense of Someone Else's Interests of State Bodies, Local Authorities, Citizens and Organizations*, 9 Laws of Russia: Experience, Analysis, Practice 11 (2012)].

[24] Dan D. Prentice, *Veil Piercing and Successor Liability in the United Kingdom*, 10 Florida Journal of International Law 469 (1996).

to protect rights and legitimate interests of individuals *who are not members of the group*. Similar provisions are contained in the above mentioned draft law, which adds Chapter 38.1 "Consideration of Cases on Protection of Rights and Legitimate Interests of a Group of Persons" to the RF CPC.

That is, under the new concept of procedural legislation, a class action lawsuit may be filed by a public association both in the interests of its members and *in the interests of citizens who are not members of such an organization*.

It appears that this approach will allow representative bodies to overcome possible obstacles to the development of public class actions and will optimize the process of group certification.

It should be noted that in most foreign legal systems, the court takes the decision on the possibility of consideration of an action according to the rules of representative action proceedings and conducts certification of the group (class) and their representative at the stage of case preparation, that is, the conclusions obtained during this stage have a significant impact on the progress of the case and its result.

Russian scholars have pointed out the issue of pre-qualification of the claim at the stage of initiation of the case from the point of view of the criteria of Art. 42 of the RF CACP: who qualifies a claim as a group, being the subject of this Article, is unresolved in the RF CACP. By implication of Art. 130 of the RF CACP, a judge can only leave a claim on a class action suit without action in the absence of indicia, referred to in Art. 42 of the RF CACP.

The equivalent of the stage of case preparation for a representative action in England, where this institute originated, is the stage of case management. Case management allows the judge to manage the process more accurately, determining procedural steps that must be completed by the court and the parties for hearing on the merits.[25]

The guidance provided by the court administration may contain provisions for variation and determination of resolution of the disputed matters under a Group Litigation Order that were included in the group's demands after the statement of action was accepted by the court, on cooperation with each other during the proceedings, and on the appointment of a solicitor for one or more parties as the leading solicitor for all the plaintiffs or all the defendants. After the claim is submitted, the court must, as soon as possible, identify controversial issues of GLO, specify the date after which no claim can be included in the group register without the consent of the court, and decide the issues of disclosure of evidence and pre-trial review.

However, according to Art. 150.1 of the RF CPC (Draft Law) when preparing, the court determines the nature of legal relationship under Art. 40.1 of this Code,

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[25] *Вафин Я.* Особенности судопроизводства по групповым искам в Англии // Арбитражный и гражданский процесс. 2009. № 8. С. 25–30; № 9. С. 33–35 [Ya. Vafin, *Distinctions of Proceedings in Class Actions in England*, 8 Arbitration and Civil Procedure 25 (2009); 9 Arbitration and Civil Procedure 33 (2009)].

the compliance with the conditions and circumstances relevant to the proper consideration and resolution of the case, and the applicable laws.

Given that the legislator currently concedes to public associations the right to bring class actions in sectoral legislation, it is possible to face a situation when a mass violation may occur in a field where class actions are impossible. For example, the activities of debt collection agencies, unfair competition or false advertising, and protection of cultural heritage.

Supporting the need to protect the legitimate interests of persons by professional public associations, the author agrees with Dmitry Tumanov,[26] who believes that, if faced with a public interest violation, one can discover the absence of the necessary organization.

In those jurisdictions where it is theoretically possible to use a class action, having objective criteria for collective proceedings could not be considered as abuse on the part of the appellants and denial of the right to judicial protection.

Conclusion

Needless to say that the potential capacity of the class action in general, and public (representative) class actions in particular, as a modern procedural form of collective judicial protection is considerable. One need only look at comparative studies on this matter and successful foreign practices of application of opt-in and opt-out models of group proceedings.

In turn, the practice of the use of class actions in Russia points to the fact that this institute is understudied, inconclusively regulated by the state (the legal aspect) and that public organizations are reluctant to initiate court proceedings in defense of infringed rights (the financial aspect).

Having examined the Western experience of regulatory mechanisms for class actions, we propose a legal instrument of state accreditation of public associations to initiate and represent the interests of persons whose rights were violated in court in a particular area of legal relations (protection of rights of consumers, goods and services, environmental protection, etc.). Despite the large number of registered public associations, established to protect citizens' rights, the situation regarding protection of citizens from unfair acts of commercial organizations has not improved.

In order to maintain the independence of public associations, it is important to fund the procedure of trying of class actions with membership dues from the members of the class action that will cover the operating expenses of public association in the course of the proceedings before the court decision goes into effect. These changes will encourage participation of nonprofit organizations in the cases of massive violation of citizens' and organizations' rights due to the current inability to recover court fees for the services of representation.

[26] Tumanov 2012.

However, over the last five years, the domestic procedural system is developing a collective defense system and mechanisms for its regulation, as evidenced by the adoption of the Concept, as well as the active participation of public institutions and NGOs in the protection of civilians from mass violations of rights and legitimate interests (the invalidation of unfair contracts, a ban on the release of products, harmful to the health of consumers, the recognition of false advertising, etc.).

At the same time, concerns grow in the academic community over the extensive use of class actions in Russia, because the mechanisms for determination by the court of objective criteria for initiation of class actions, group certification, and the active role of the court in collective proceedings are still being established, which can give rise to mass violation of applicants' rights either when applying or at the stage of hearing.

Furthermore, academic literature notes[27] that the issue concerning extension of the scope of rights to persons who joined the class action later, including an independent appeal of the court act, is similarly important. While the Concept says nothing about the rights of persons who joined the claim for protection of violated rights.

The introduction of class actions in civil proceedings is also a serious challenge to the system of courts of general jurisdiction. Some scholars compared the representative actions with the insolvency (bankruptcy) cases that are heard by specialized commercial courts, whereas class actions in courts of general jurisdiction require the same level of expertise of federal judges entrusted with the right to try such cases.

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IS THE BATTLE OVER? THE NEW LITHUANIAN LAW ON ASSISTED REPRODUCTION

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The Law on Assisted Reproduction was adopted by the Parliament of Lithuania (Parliament) on 14 September 2016. This law entered into force on the 1 January 2017 and replaced the Order of the Ministry of Health of 1999 which regulated assisted reproductive technologies (ART) until then. After the adoption of the new Civil Code in 2000, Parliament recommended that the Government prepare a draft law on ART by 2002. The first "liberal" draft was presented to Parliament in 2004. Its opponents also prepared a "conservative" draft. Both drafts were rejected. Only in 2010, a new draft was prepared but the adoption of this law was delayed until 2016. This article could be one of the first to present an overview and analysis of the history of legal regulation of ART in Lithuania; it also describes the main features of the new law, reveals its shortcomings and gaps, and explains the main reasons for such a long legislative process in this area.

Keywords: anonymity of donor; assisted reproductive technologies; embryo; Lithuania.

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In Lithuania, the necessity of legal regulation of the use of assisted reproductive technologies (ART) was first raised in legal literature in 1985,[1] seven years after the

[1] Mikelėnas V. *Santuokos ir šeimos teisinis reguliavimas*, 7 Mokslas ir gyvenimas 16 (1987) [Valentinas Mikelėnas, *Legal Regulation of Marriage and Family*, 7 Science and Life 16 (1987)].

birth of the first ART baby in the United Kingdom.[2] The need for legal regulation in this area was explained not only by the developments in ART, but also by the infertility data and demographic problems in Lithuania. Around 10 to 15 percent of families in Lithuania are infertile nowadays. It is estimated that there are over 50,000 infertile couples of childbearing age in Lithuania and this number has been increasing by about 2000 each year.[3] On the other hand, the demographic situation in the country is very complicated. The population of Lithuania decreased from 3.7 million in 1991 to 2.8 million in 2016.[4] There are two main reasons for this decline. First and foremost is the high level of emigration: about 650,000 citizens of Lithuania have emigrated since 1990. This massive emigration is the main reason for the decline in the population, being responsible for about 73 percent of the loss. Second is the natural decrease which caused 27 percent of the decline. The crude rate of a natural population change (per 1,000 people) decreased from 8.8 in 1970 to 3.9 in 2013. The total fertility rate in 2013 was 1.59 (live births per 1,000 people), while the most favourable demographic situation is observed where the total rate stands at around 2.1.[5] There also exist more factors which have an impact on infertility in Lithuania, for example, postponement of marriage and childbirth. In 2013, the mean age of first marriage was 29.3 years for men and 27 years for women. Consequently, the mean age of women at childbirth was 29.2 years and the mean age of women at the birth of their first child was 26.8 years.[6] Demographic problems cause a variety of social and economic problems. Therefore, increasing fertility is a vital task for society. Due to the demographic problems in Lithuania, the attitude of the public to ART is quite positive. According to sociological research undertaken by the company *Vilmorus* in 2000, 77 percent of all respondents supported the introduction of ART, 65.3 percent of all respondents thought that ART was needed to treat infertility, 52 percent would be interested in using ART procedures if they did not have children, 61.3 percent would support ART but only if applied exclusively in the woman's body, and 38.4 percent were opposed to ART for religious or moral reasons.[7]

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2 Patrick C. Steptoe & Robert G. Edwards, *Birth after the Reimplantation of a Human Embryo*, 2 Lancet 366 (1978).

3 Dėmesys nevaisingumo problemoms, Sveikaszmogus.lt [Attention to Infertility Care, Healthyhuman.lt] (Jan. 9, 2018), available at http://www.sveikaszmogus.lt/Ginekologines_ligos-4127-Demesys_nevaisingumo_problemoms.

4 Stankūnienė V. & Baublytė M. *Lietuvos demografinė situacija: kokios galimybės demografiškai atgimti?*, Alfa.lt, 2016-12-21 [Vlada Stankūnienė & Marė Baublytė, *Lithuanian Demographics: What Are the Opportunities for Demographic Rebirth?*, Alfa.lt, 21 December 2016] (Jan. 9, 2018), available at http://www.alfa.lt/straipsnis/50119175/lietuvos-demografine-situacija-kokios-galimybes-demografiskai-atgimti.

5 *Demographic Yearbook 2013* 7 (Vilnius: Statistics Lithuania, 2014).

6 *Id.* at 39.

7 Dirbtinio apvaisinimo įstatymo projekto Nr. IXP-1966(2) aiškinamasis raštas [Draft Law No. IXP-1966(2) on Assisted Reproduction: An Explanatory Note] (Jan. 9, 2018), available at https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/TAIS.223433?jfwid=-88erf9ddb.

1. The First Legal Act on ART

The first legal act in this field was adopted on 24 May 1999 when the Minister of Health issued the Order on Artificial Insemination (No. 248).[8] In terms of global practice, this Order may be viewed as a controversial legal act which did not cover all major ART-related problems that needed to be legally regulated. In addition, it had gaps and was not up to date in terms of contemporary Lithuanian society, i.e., it did not sufficiently regulate embryo and gamete protection, donation of female oocytes and auto donation, issues relating to sperm banks, surrogacy, requirements for donors of reproductive cells, or liability for violations of the legally-established procedure for artificial insemination. The fundamental problem was that assisted reproduction was only allowed for a married woman and only with her husband's sperm, in spite of the fact that, in 2000, there were already about 55,000 unmarried heterosexual couples in Lithuania and about 30 percent of children were born out of wedlock.[9]

The Order under discussion identified five possible assisted reproductive technologies: intrauterine insemination (IUI); gamete intrafallopian transfer (GIFT); *in vitro* fertilisation (IVF); intracytoplasmic sperm injection (ICSI); and zygote intrafallopian transfer (ZIFT).

According to Art. 3.1 of the Order, all the procedures of ART in Lithuania were based on several mandatory requirements:

– fertilisation could only be carried out for women over 18 years of age, and the procedure could only be provided for a married woman;

– a married woman could only be artificially fertilised with the written consent of her husband;

– the artificial insemination procedures could only be applied to women between the ages of 18 and 45;

– artificial insemination was only possible if the health of the woman and her husband allowed it;

– the woman and her husband had to be fully informed about the nature of the procedure. Before signing their consent, they had to have all ethical, medical and legal consequences explained;

– artificial insemination could only be performed by a physician who had the right to practice obstetrics/gynaecology and only in a healthcare institution which had the right (i.e., a licence) to perform the procedure;

– no more than three embryos could be placed in the woman's uterine cavity;

– the artificial insemination procedures would be paid for by the patient (the State Patient Fund did not compensate these procedures).

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[8] Dėl Lietuvos Respublikos sveikatos apsaugos ministro 1999 m. gegužės 24 d. įsakymo Nr. 248 "Dėl dirbtinio apvaisinimo tvarkos patvirtinimo," Valstybės žinios, 1999, Nr. 47-1497 [The Order of the Minister of Health No. 248 of 24 May 1999 on Artificial Insemination, State Gazette, 1999, No. 47-1497].

[9] *Moterys ir vyrai Lietuvoje* [*Women and Men in Lithuania*] 33 (Vilnius: Statistics Lithuania, 2005).

Despite the limitations of this legal act, ART procedures were widespread in Lithuania. Currently, Lithuania has 12 private clinics that are licensed to provide ART services.[10] The price of the treatment is around EUR 2,000,[11] and the number of treatments in 2008 was about 3,000.[12]

2. The New Civil Code

The legal regulation of ART by the Order of Ministry of Health was criticised from the beginning of its adoption. The drafting of a new Civil Code was a good opportunity to improve the situation. A proposal to regulate the issues relating to ART in the Civil Code was based on several arguments. First, given the importance of the problem, the issues of ART must be regulated by a legislative act, i.e., a legal act adopted by the Parliament of Lithuania (Parliament). Second, it is more difficult to change the rules of the Civil Code than the rules of a ministerial decree. Third, a consideration of a draft in Parliament would allow the opinions of all groups in society to be considered. For these reasons, Book Three of the draft Civil Code, entitled "Family Law," included a chapter on artificial insemination (Arts. 3.134–3.162). In the initial version of the draft, it was proposed to legalise fertilisation of woman's eggs by sperm other than that of her husband. However, after fully considering the problem, i.e., its special nature, its close link with several ethical questions, the experience of other states, ethical trends prevailing in Lithuanian society, Catholic teaching and its significant influence on society, and other aspects, the Working Group decided to propose alternatives to the regulation of ART. The two competing principled positions were submitted to be discussed by the public and politicians, thereby giving politicians the opportunity to decide which way to turn, i.e., to legalise the donation of sperm or only to allow fertilisation by the sperm of a spouse. As expected, the main debate was on the question of sperm donation. Though the discussions were not only on this issue. For example, the draft Civil Code was discussed from the point of view of the constitutional principles of equality before the law (e.g., whether to allow IVF procedures for unmarried as well as married women). Given the dominant opinions, especially that of the Catholic Church, the version which allowed the donation of the sperm of a donor was rejected. The final version of the draft Articles provided the following rules:

– all questions related to ART should be decided on the basis of the best interests of the child;

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[10] Fertility Clinics Lithuania, WhatClinic.com (Jan. 9, 2018), available at http://www.whatclinic.com/fertility/lithuania.

[11] Fertility Treatment in Lithuania, Fertility Treatment Abroad (Jan. 9, 2018), available at http://fertility.treatmentabroad.com/countries/lithuania.

[12] Patrick Präg & Melinda C. Mills, *Assisted Reproductive Technology in Europe: Usage and Regulation in the Context of Cross-Border Reproductive Care* in *Childlessness in Europe: Contexts, Causes, and Consequences* 289, 292 (M. Kreyenfeld & D. Konietzka (eds.), Berlin: Springer, 2017).

– ART could be used only by licensed healthcare institutions;
– the use of ART is possible if the women are from 18 to 45 years of age;
– the use of ART is prohibited in the event of medical contraindications;
– the use of the cells of a dead person is prohibited;
– the used of ART is only possible for married couples;
– only the sperm of the husband of the woman could be used;
– surrogacy is prohibited.[13]

However, even such a conservative draft did not receive support in Parliament. Therefore, in order not to prevent the adoption of the entire Civil Code, it was decided to eliminate the whole chapter on ART. What remained in the Civil Code was only Art. 3.154, which established a blanket rule that ART was allowed but that the concrete methods of ART and all other preconditions for ART services were to be left to a special separate law. The Civil Code was adopted on 18 July 2000. Under the Law on the Implementation and Entry into Force of the Civil Code, Parliament recommended that the Government prepare a special law on ART by 1 May 2002.

3. Unsuccessful Attempts to Adopt Law during the Period between 2000 and 2015

The first draft law on ART was prepared by the Ministry of Health in October 2002. This draft provided quite a liberal regulatory system for ART, including the possibility of using artificial insemination procedures for unmarried women and sperm and embryo donation.[14] In December 2003, the Ministry of Health further developed an improved the draft law on ART. Unfortunately, this draft abolished the rules of the former draft which enabled single women to seek fertilisation by donor sperm and embryo donation. In January 2004, a group of members of Parliament prepared an alternative draft. All three drafts received a wide range of criticism which led to the stalling of the adoption of the law. The "liberal" draft was criticised by ART opponents while ART proponents found fault with its "conservative" equivalent. ART opponents argued that the "liberal" draft law created preconditions for a risk of incest. The following arguments against the "liberal" draft were raised:

– the possibility that spouses or partners could be individuals born from the same donor gametes;
– the likely negative consequences for the small Lithuanian gene pool;
– the draft did not take into account a person's inherent right to know their origins;

[13] The Draft Civil Code of the Republic of Lithuania (Jan. 9, 2018), available at https://www.e-tar.lt/portal/lt/legalAct/TAR.8A39C83848CB.

[14] Lietuvos Respublikos pagalbinio apvaisinimo įstatymo projekto aiškinamasis raštas [Draft Law on Assisted Reproduction of the Republic of Lithuania: An Explanatory Note] (Jan. 9, 2018), available at http://www.lrs.lt/pls/proj/dokpaieska.showdoc_l?p_id=56058&p_query=&p_tr2=&p_org=&p_fix=n&p_gov=n.

– in order to protect the child's right to know their origin, the import of gametes should be banned;

– in order to guarantee the protection of embryos, the export of embryos should be banned;

– consent to ART procedures should be approved by a public notary;

– in the event of any negative consequences resulting from ART procedures, it would be necessary to offer psychological and social counselling which would be provided by persons not linked to ART services;

– since abuses of ART procedures could lead to serious consequences, it would be necessary to establish criminal liability for violations of unauthorised actions and manipulation of human gametes and embryos;

– ART services could be performed only for a married woman, and only using her husband's sperm *in vivo*;

– the development of germ cell banks allow commercial abuse and different legal and social problems;

– donation of germ cells denied the inherent right of the child to know their biological parents;

– the "liberal" draft legitimised the creation of an excess number of embryos, embryo destruction and indefinite embryo freezing, which would result in the killing of a huge number of unborn babies in order to allow parents to choose a phenotype, which could be equated to the eugenic manipulations condemned by the Nuremberg Tribunal.[15]

On the other hand, the alternative draft was criticised for its conservatism. It stipulated that ART procedures would only be allowed for married couples or unmarried heterosexual partners. This draft proposed allowing artificial insemination using only the spouse's or life partner's gametes and prohibited the donation of eggs and sperm. In 2006, both the "liberal" and "conservative" drafts were debated in a session of the Parliamentary Health Committee and the conclusion of the committee was to accept the "liberal" draft law but, at the Plenary session, Parliament returned the draft to its drafters for some improvements. However, the world financial crisis started in 2008 and pushed the issues of assisted reproduction into the background. Therefore, the improved draft was only returned to Parliament in 2010.[16] The draft established an opportunity to provide ART services to both married women and unmarried women living in with partners, legalised cell donation and germ cell banks, and also provided for

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[15] Lietuvos vyskupų spaudos konferencija dėl dirbtinio apvaisinimo [Lithuanian Bishops' Press Conference on Artificial Insemination] (Jan. 9, 2018), available at http://www.lcn.lt/bzinios/bz0210/210bl2.html/.

[16] Zubrauskaitė V. *Lietuvos politikai ignoruoja vienišas nevaisingas moteris*, Vakarų ekspresas, 27 spalio 2003 [Vaida Zubrauskaitė, *Lithuanian Politicians Ignore Lonely Infertile Women*, West Express, 27 July 2003] (Jan. 9, 2018), available at http://www.ve.lt/naujienos/lietuva/lietuvos-naujienos/lietuvos-politikai-ignoruoja-vienisas-nevaisingas-moteris-381434/.

ART procedures to be paid for out of the compulsory health insurance fund. Therefore, the "liberal" draft was submitted to Parliament once again. However, in a similar situation to that of 2002, this draft immediately attracted criticism and resistance, resulting in the registration of four alternative drafts. One of them prohibited gamete donation and excluded the possibility of ART procedures to being paid for out of the compulsory health insurance fund.[17] Another alternative draft established exclusively strict embryo protection conditions, and allowed for a maximum of three embryos to be created per procedure.[18] Due to the abundance of alternative drafts, Parliament only reached a decision on which version to discuss further at the end of 2015. The "conservative" version of the draft was selected by the majority of the members of Parliament. The debates over this draft lasted until mid-2016 and only in 28 June 2006 did Parliament adopt this law. 66 out of 74 members of Parliament voted in favour of the draft with three voting against and three abstaining.[19] Although the law allowed the use of ART procedures for spouses and unmarried heterosexual partners, it banned gamete donation. The law also imposed limitations on the creation embryos, i.e., no more than three embryos could be created. The law did not allow the financing of ART procedures from the compulsory health insurance fund. However, the law no longer determined the maximum age by which a woman could apply for an ART procedure. Such conservative law-making caused great dissatisfaction in Lithuanian society and among medical professionals. Numerous public organisations appealed to the President asking her to veto the law. Even the Ministry of Health asked the President for her veto.[20] The President did not sign the law, and, by a decree of 5 July 2016, returned the law to Parliament for revision. During repeated debates, Parliament substantially amended the draft and a more liberal law on assisted reproduction was adopted in 14 September 2016.[21] Such a long procedure for the preparation and adoption of this law – sixteen years – was caused by several reasons. First, the position of the Lithuanian Catholic Church.

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17 Dirbtinio apvaisinimo įstatymo projektas (Nr. XIP-2502) [Draft Law No. XIP-2502 on Assisted Reproduction] (Jan. 9, 2018), available at https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/TAIS.382967.

18 Pagalbinio apvaisinimo įstatymo projektas (Nr. XIP-2502(2)) [Draft Law No. XIP-2502(2) on Assisted Reproduction] (Jan. 9, 2018), available at https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/TAIS.399026.

19 Pagalbinio apvaisinimo įstatymo projektas (Nr. XIP-2502(6)) [Draft Law No. XIP-2502(6) on Assisted Reproduction] (Jan. 9, 2018), available at http://www3.lrs.lt/pls/inter/w5_sale.klaus_stadija?p_svarst_kl_stad_id=-23609.

20 Meta Adutaviciute, *Ultraconservative Assisted Reproduction Law Crushes the Hopes of 50,000 Couples*, Liberties, 8 July 2016 (Jan. 9, 2018), available at https://www.liberties.eu/en/news/lithuania-assisted-reproduction-law; Lithuanian Seimas Passes Assisted Insemination Law, The Baltic Course, 29 June 2016 (Jan. 9, 2018), available at http://www.baltic-course.com/eng/legislation/?doc=122581.

21 Dėl Lietuvos Respublikos Seimo priimto Lietuvos Respublikos pagalbinio apvaisinimo įstatymo Nr. XII-2491 grąžinimo Lietuvos Respublikos Seimui pakartotinai svarstyti (2016 m. liepos 5 d. Nr. 1K-704) [Decree No. XII-2491 on the Reconsideration to Parliament of the Republic of Lithuania of the Law on Assisted Reproduction] (Jan. 9, 2018), available at https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/930e9e7042ed11e68f45bcf65e0a17ee?jfwid=-wd7z7l9la.

According to the population census data, 80% of Lithuanian citizens consider themselves Catholics.[22] During the Soviet period, the Catholic Church was oppressed by the regime and was one of the main institutions of resistance against the Soviet regime. Therefore, the popularity of the Church and its position in society is high. For example, public opinion polls conducted by the company *Vilmorus* between 1 and 10 July 2016, showed that about 54 percent of respondents trusted and respected the Catholic Church.[23] The history of the legal regulation of ART in other countries also confirms that conservative laws were adopted precisely in those countries where the Catholic Church's influence on society was significant (Italy, Spain, Portugal).[24] Second, political parties that promote liberalism have little influence in Lithuania. Since 1990, Lithuanian political parties that represent liberal views have never had a parliamentary majority and have either been in opposition or the smallest coalition partner. Meanwhile, the conservative parties usually have a majority in Parliament, or act as the biggest partners in ruling coalitions. After a Constitutional Court ruling in 2011 which recognised that a family could be created not only by marriage but also by an heterosexual partnership, conservative members of Parliament initiated an amendment to Art. 38 of the Constitution of Lithuania. Draft Art. 38 of the Constitutional amendment law stipulates that marriage is the only basis for the creation of a family. As many as 101 members of Parliament (out of the total number of 141) voted in favour of this draft. If this draft is adopted, heterosexual partnership will no longer have a legal basis and heterosexual couples will be banned.[25] Some of the conservative members of Parliament also initiated a draft law to provide for an absolute protection of the embryo and a ban on abortion. Third, there has not been enough use of the comparative legal method during the legislation process.

4. The Main Features of the Law of 14 September 2016

The main innovation of this law is that it has legalised donation of reproductive cells when one of the spouses or partners have damaged or insufficient reproductive cells which cannot be used for assisted fertilisation, as well as in cases when they have a high risk of transmitting a disease likely to cause significant disability. The law established

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22 Pagalbinio apvaisinimo įstatymo projektas (2016 m. birželio 28 d. Nr. XII-2491) [Draft Law No. XII-2491 on Assisted Reproduction] (Jan. 9, 2018), available at https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/d065c8a042a411e69f7afa4bbf73635e.

23 *Ar Jūs pasitikite, ar nepasitikite šiomis Lietuvos institucijomis?*, Vilmorus [*Do You Trust or Do Not Trust These Lithuanian Institutions?*, Vilmorus] (Jul. 20, 2017), available at http://www.vilmorus.lt/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=2&cntnt01returnid=20.

24 Giovanni Comandé, *Medical Law: Italy* in *International Encyclopaedia of Laws: Medical Law* 268 (H. Nys (ed.), The Hague: Wolters Kluwer, 2016); Carlos M. Romeo-Casabona, *Medical Law: Spain* in *Id.* at 176; Paula Lobato de Faria, *Medical Law: Portugal* in *Id.* at 137.

25 Konstitucijos 38 straipsnio pakeitimo įstatymo projektas (Nr. XIIP-1217(2)) [Article 38 of the Constitution: Draft Law for Amendment] (Jan. 9, 2018), available at https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/0be20cb0348411e6a222b0cd86c2adfc.

that gametes and embryos cannot be an object of commercial transactions. At the same time, the law establishes the right of gamete donors to compensation for the donation of gametes. The Government, or an institution authorised by the Government, has to set the order of compensation procedure and payment procedures. Nevertheless, the law has banned embryo donation (Art. 3(8)) and surrogacy (Art. 11).

The law provides for access to a healthcare institution which provides ART services to take gametes and preserve fertility in case of certain health or potential health problems, or when prescribed treatment raises reasonable doubt as to that person's subsequent fertility and the abovementioned conditions are confirmed by the relevant conclusions of a doctor (Art. 9). If a person whose gametes are stored in the bank dies, the bank is to destroy the gametes (Art. 8). A deceased person's gametes can be used for an individual assisted fertilisation if that person gave his consent to the use of gametes before his death. Nevertheless, the law prohibits the removal of gametes from a dead person and/or using them for ART (Art. 8(2)).

In addition, the law provided a conservative regulation of the use and the protection of embryos. The law provides that it is permitted to create as many embryos as it is possible to create at one instance, but that the final decision on the number of embryos is made by both spouses (partners) in consultation with a doctor (Art. 9). Before transfer to the woman's body, embryos can be grown *in vitro* (outside the woman's body) for up to six days after fertilisation (zygote formation). At the same time, the law provides that the number of embryos transferred to the woman's body at a time cannot exceed three. The created embryos that are not transferred to the woman's body are stored in a germ cell bank. When embryos are stored in a germ cell bank, other embryos of the same woman cannot be created for ART. The Minister of Health prescribes the requirements for the storage and usage of germ cell bank embryos for the purposes of healthcare. The law establishes that biomedical research on embryos may be carried out only in accordance with the Law on Ethics of Biomedical Research (adopted on 11 May 2000).[26] Lithuania has ratified the Convention on Human Rights and Biomedicine adopted by the Council of Europe in 1997. The Law on Biomedical Research sets very strict rules for biomedical research with embryos. According to Art. 3 of the Law on Biomedical Research, creation of human embryos for biomedical research purposes is prohibited. Biomedical research can only be performed if the expected benefit to the human embryo and on the human foetus outweighs the risks. It is prohibited to carry out biomedical research on human embryos and foetuses that died after an abortion performed at a woman's request in the absence of medical problems. Biomedical research with human embryos or foetuses, during which or after which a human embryo or human foetus is destroyed or the human embryo is not transferred to the

[26] Lietuvos Respublikos pagalbinio apvaisinimo įstatymas (2016 m. rugsėjo 14 d. Nr. XII-2608) [Law No. XII-2608 on Assisted Reproduction] (Jan. 9, 2018), available at https://www.e-tar.lt/portal/lt/legalAct/074c2b707e7311e6b969d7ae07280e89.

woman's uterus, is also prohibited. It is also prohibited either to import to, or export from, the territory of the Republic of Lithuania, human embryonic tissues, embryonic stem cells and their cell lines or foetal tissue taken from their stem cell lines.

The law also establishes that ART services can be provided for both married women and those living in a registered partnership (Art. 1). This is also considered progress because ART procedures were previously only permitted for married women.

The law also sets other conditions for the application of ART procedures. The techniques of ART comprise artificial insemination *in vivo* and artificial insemination *in vitro*. However, the law does not cover all the possible procedures of ART, while Art. 6 provides that the ART techniques have to be approved by the Minister of Health.

According to Art. 5, ART procedures can be performed only when infertility cannot be cured by any other treatment or the said procedures do not ensure a real chance of success, as well as in those instances when it is desired to avoid occurrence of severe disability caused by diseases, the criteria for which are established by the Minister of Health, or to provide its treatment. ART is prohibited in the presence of medical contraindications included in the list approved by the Minister of Health.

The law provides that all matters relating to ART must be addressed in the context of the best interests of the child who will be born as a result of ART and giving priority to the woman's health considerations. All decisions relating to ART must be taken upon assessing the benefits and the possible harm to the mother and/or child, and exercised with caution (Art. 3(3)).

Before the start of ART, the healthcare provider who carries out the ART must clearly inform both spouses (partners) of the anticipated employment of ART techniques, any alternatives, the benefits, risks, possible procedures for medical, psychological consequences of multiple pregnancy, the risks to the mother and the foetus, the probability of success of ART by indicating clinical pregnancies and births attributable to the prospective application method (Art. 7). The information provided before beginning ART is to be submitted in writing and spouses (partners) shall complete and sign the patient's informed consent form. Before signing the informed consent form, the spouses (partners) shall be notified in writing of the estimated price of ART. The time period between the day of the signing and the day of ART must be at least seven calendar days.

ART techniques cannot be applied as a tool for germline genetic identity modification. ART procedures cannot be used to provide certain features for a child, including the desired sex, unless the aim is to avoid severe disabilities caused by the diseases, the list of which is established by the Minister of Health, or to treat such diseases (Art. 3(5)).

The law also establishes the principle of confidentiality: the personal data of the germ cell recipient, the germ cell donor, and the child, are confidential. The identity of the donor is not disclosed to the germ cell recipient, his or her spouse (partner), or to children born using a donor gamete. The identity of the germ cell recipient, his spouse

(partner) and the child's identity are not disclosed to the donor either. However, a child who was born using donor gametes and germ cell donors can get confidential information with court permission if this information is necessary for the health of either the child or the donor or for any other important reasons (Art. 3(10)).

ART services and/or gamete banking services may be provided in Lithuania only by a legal entity or by a branch of a foreign legal person entity or other organisation established in Lithuania and, as provided for in the law, having been granted a licence to provide healthcare stating that they have acquired the right to provide licensed ART and/or gamete banking services (Art. 4). Licensed healthcare clinics and germ cell banks are obligated to provide registration and investigation of any serious adverse events and to inform a competent authority of the same. They are also obligated to keep records of gametes and embryos, their use, acquisition, handling, storage, and distribution. All data about germ cell storage in the bank, their distribution and use, the methods of ART, the number of transferred embryos, and the number of pregnancies and births after ART must be recorded in the ART system which has been established by the Government of Lithuania. All data must be kept for at least 30 years after the use of gametes or the storage deadline (Arts. 13, 14). The law also requires that the Minister of Health appoint a competent authority to supervise the taking, examination, preparation, storage and distribution of the reproductive cells; to supervise the development and implementation of a system for germ cells and embryonic traceability and exercise the monitoring of this system; to organise inspections and take control in the eventuality of any serious adverse event and/or reaction; to perform an audit at least every two years in order to establish whether or not the ART services offered comply with the requirements determined by legal acts and to make public the conclusions of the audit (Art. 15).

5. The Amendments of 17 January 2017

In October 2016, a new political force, the political party of Farmers and Greens, won the parliamentary elections and formed the majority in Parliament. The parliamentary faction of Farmers and Greens immediately initiated amendments to the Law on Assisted Reproduction which was not yet in force. On 1 December 2016, 57 members of this faction registered a draft which proposed abolishing the possibility of payment of compensation to donors; lifting donor anonymity; prohibiting gametes and embryo imports and exports, except when they are intended for autologous use; generating no more than three embryos; and postponing the entry of the law into force until 30 June 2017.[27] Another parliamentary group presented an

[27] Pagalbinio apvaisinimo įstatymo Nr. XII-2608 3, 10 ir 17 straipsnių pakeitimo ir papildymo įstatymo projektas (Nr. XIIIP-169) [Law No. XII-2608 on Assisted Reproduction: Draft Law No. XIIIP-169 of Amendment and Additions of Articles 3, 10 and 17] (Jan. 9, 2018), available at https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/e1d6f430b7a011e6a3e9de0fc8d85cd8.

alternative draft which allowed for embryo donation as well as limited anonymity of donors.[28] When debates erupted not only in Parliament but also in society at large, Parliament decided to request an independent legal opinion regarding both drafts.[29] Professors of Vilnius University and Kaunas University of Health Sciences provided an independent legal opinion. The experts unanimously supported the more liberal version of the draft.[30] On 10 January 2017, the Parliamentary Committee on Health Affairs also approved the more liberal version of the draft[31] and, on 17 January, Parliament adopted amendments to the law, with 96 out of 100 members of Parliament present voting in favour and two abstaining.[32] These amendments are important for several reasons. First, they have legalised embryo donation. According to para. 8 of Art. 3, donation of embryos stored in the germ cell bank is possible if the spouses (partners) reject the embryo in writing. Such refusal is not possible before the expiry of two years after the beginning of ART. Second, the amendments abolish the right of a gamete donor to claim compensation. Third, limited anonymity for donors and recipients has been established. According to Art. 3.10, a court may permit disclosure of information about the donor(s) and children if this information is necessary for the child's or the donor's health or for any other valid reasons. When a child born using ART procedures reaches 18 years of age, the donor's identity may

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[28] Pasiūlymas dėl Pagalbinio apvaisinimo įstatymo Nr. XII-2608 3, 10 ir 17 straipsnių pakeitimo ir papildymo įstatymo projekto (Nr. XIIIP-169) [Law No. XII-2608 on Assisted Reproduction: Draft Law No. XIIIP-169 of Amendment and Additions of Articles 3, 10 and 17. The Proposition] (Jan. 9, 2018), available at https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/b2181e50c2d011e682539852a4b72dd4?jfwid=-wd7z7l4wg.

[29] Dėl Lietuvos Respublikos pagalbinio apvaisinimo įstatymo Nr. XII-2608 3, 10 ir 17 straipsnių pakeitimo ir papildymo įstatymo projekto Nr. XIIIP-169 ir Seimo narių pasiūlymų dėl šio įstatymo projekto nepriklausomo ekspertinio įvertinimo (2016 m. gruodžio 13 d. Nr. SV-S-45) [Law No. XII-2608 on Assisted Reproduction: Draft Law No. XIIIP-169 of Amendment and Additions of Articles 3, 10 and 17 and Proposal for an Independent Expert Assessment, 13 December 2016, No. SV-S-45] (Jan. 9, 2018), available at https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/562bbde2c1fe11e682539852a4b72dd4?jfwid=-wd7z7l4wg.

[30] Ekspertinio įvertinimo išvada dėl Pagalbinio apvaisinimo įstatymo Nr. XII-2608 3, 10 ir 17 straipsnių pakeitimo ir papildymo įstatymo projekto (Nr. XIIIP-169) [Law No. XII-2608 on Assisted Reproduction: Draft Law No. XIIIP-169 of Amendment and Additions of Articles 3, 10 and 17. The Conclusion of Independent Expert Assessment] (Jan. 9, 2018), available at https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/7282ce60ce6611e6a476d5908abd2210?jfwid=-wd7z7l4wg;https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/a79d2aa0ce6611e6a476d5908abd2210?jfwid=-wd7z7l4wg.

[31] Pagrindinio komiteto išvada dėl Pagalbinio apvaisinimo įstatymo Nr. XII-2608 3 ir 10 straipsnių pakeitimo įstatymo projekto (Nr. XIIIP-169(2)) [Law No. XII-2608 on Assisted Reproduction: Draft Law No. XIIIP-169 of Amendment and Additions of Articles 3, 10 and 17. The Conclusion of the Main Committee] (Jan. 9, 2018), available at https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/e9581ec0d7ce11e69c5d8175b5879c31?jfwid=-wd7z7l4ij.

[32] Pagalbinio apvaisinimo įstatymo Nr. XII-2608 3 ir 10 straipsnių pakeitimo įstatymo projektas (Nr. XIIIP-169(2)) [Law No. XII-2608 on Assisted Reproduction: Draft Law No. XIIIP-169(2) of Amendment of Articles 3 and 10] (Jan. 9, 2018), available at http://www.lrs.lt/sip/portal.show?p_r=15275&p_k=1&p_a=sale_klaus_stad&p_moment=20170117&p_kl_stad_id=-59827.

also be disclosed with the latter's consent. Fourth, import of gametes and embryos into Lithuania is allowed. Nevertheless, the import of gametes and embryos into Lithuania may be carried out only by the university hospitals which are licensed to provide ART procedures and offer germ cell bank services (Art. 3(11)). Fifth, it has been decided not to restrict the number of created embryos. Art. 10(1) provides that as many embryos can be created as it is possible to create at a time, and the final decision on the number is taken by the spouses (partners) in consultation with the doctor. However, no more than three embryos can be transferred to a woman's body at a time. The law prohibits destruction of an embryo which has been developed but not transposed into a woman's body (Art. 10(7)).

Conclusion

The adoption of the first Law on Assisted Reproduction in Lithuania is commendable. However, not all the problems associated with ART have been solved. In addition, there are some gaps in the law and these gaps will undoubtedly create several problems in the course of its application. First, it is forbidden to perform ART procedures for single women. Therefore, single women will travel from Lithuania to those countries where such restrictions are not applied, thereby promoting fertility tourism. Second, although the law allows ART procedures for unmarried heterosexual partners, they have not been able to use them yet. The Civil Code of 2000 legalised registered partnerships between couples of opposite sexes (Arts. 3.229–3.235), but for these rules to enter into force, adoption of a special law on the procedure of registration of partnership is necessary. Regretfully, such special law on the procedure of registration of partnership still needs to be adopted. In the meantime, it is not clear when Parliament will adopt such a law, because the relevant draft has been rejected several times. Therefore, unmarried heterosexual couples living as partners have no possibility to prove their partnership. Third, the law does not regulate the time limit for embryo storage or the reimbursement of storage costs. Fourth, although ART procedures are expected to be financed from the health insurance budget funds, due to a lack of funds, it will be impossible to ensure full coverage. Fifth, it is not clear who will perform the functions of the competent authority. Sixth, the law does not regulate the right of spouses (partners) to withdraw their consent to germ gamete (embryo) donation. Taking into account that every second marriage is terminated in Lithuania,[33] there are likely to be far more than a few instances when, after a divorce, a former spouse (partner) would cancel their previous agreement. Seventh, the law does not provide for the number of times the same donor gametes can be used for artificial insemination. The main reasons for the abovementioned shortcomings of the new law are insufficient use of the comparative legal method

[33] Available at https://osp.stat.gov.lt/statistiniu-rodikliu-analize?indicator=S3R224#/.

and the unwillingness of the legislators to benefit from the experience of foreign countries where these issues are clearly regulated. Sooner or later, the legislator will be forced to fill in these gaps. And which will undoubtedly mean a return to a stormy debate. Thus, the battle for the legal regulation of ART in Lithuania is not yet over.

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RECENT CASES

R V. JOGEE: A CASE FOR COMPARATIVE STUDY

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Criminal cases, being almost entirely domestic in their nature, rarely draw comparative attention. But R v. Jogee, decided by the UK Supreme Court in 2016, is exceptional in its nature. It provoked a new discourse on a mental element in complicity in a highly controversial situation where the principal went beyond the scope of what was agreed, or in civil law language, excessu mandati. Following Jogee, common law is likely to move in the direction of implementing in a more coherent way the idea of a subjective fault standard for a mental element in complicity. Paradoxically, civil law systems are now much closer to pre-Jogee jurisprudence so there is good reason to conduct comparative analysis at this point.

Keywords: complicity; foresight; intention; secondary party's liability; mental element; principal; comparative criminal law.

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Introduction

Over the 16 years that I have taught a course on comparative criminal law, I have found it as difficult to explain the concept of "parasitic criminal liability" and its legal intricacies in English common law as the tripartite structure of crime in Germany (*Tatbestand – Rechtswidrigkeit – Schuld*) or the notion of criminal deed in Eastern legal

philosophy. Born in *R v. Chan Wing-Siu*,[1] coined in *R v. Powell; English*,[2] left untouched as "a matter for the legislature, not the courts" in *R v. Rahman and others*,[3] it has now, finally, been ruined by the courts in the landmark decision of *R v. Jogee; Ruddock*.[4]

The subject matter of *Jogee* is "the secondary party's liability where the principal has allegedly gone beyond the scope of what was agreed or encouraged,"[5] or more precisely, the exact nature of the mental element necessary for a secondary party to be convicted in such a situation. After *Chan Wing-Siu*, foresight was "the Gordian knot" of this mental element but now it is construed as evidence of intent to assist[6] and not as a proper *mens rea* for a crime charged.

Although I must leave the extensive discussion of *Jogee*'s effects to more learned scholars,[7] it can be mentioned here that foresight in complicity is probably one of those points of common comparative interest which creates a certain "unity amongst diverse systems of criminal justice."[8] While post-*Jogee* jurisprudence in England and Wales (and some other common law jurisdictions) has taken one direction, other jurisdictions have taken another, for instance, my native civil law tradition[9] which is now more favourable to foresight in complicity.

1. Civil Law System: Outline of Accomplice's Liability *in Excessu*

Looking back at the history of continental criminal law, detailed analysis of an accomplice's liability in a set of cases concerning non-liability was proposed in Tiberio Deciani's "*Tractatus criminalis*" (1590).[10] In another famous practice book of that time, Giulio Claro's "*Sententiarum*" (1568), an attempt was made to distinguish cases of instigation to acts lethal and not in their nature and to differentiate liability on this basis.[11]

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1 [1985] AC 168 (PC).

2 [1999] 1 AC 1 (HL).

3 [2008] UKHL 45, [2009] 1 AC 129 [103].

4 [2016] UKSC 8, [2016] UKPC 7, [2016] 2 WLR 681.

5 [2016] UKSC 8 [17].

6 *Jogee* [2016] UKSC 8 [87], [100].

7 *See* Jeremy Horder, *Ashworth's Principles of Criminal Law* 446–459 (8th ed., Oxford: Oxford University Press, 2016); Matthew Dyson, *Shorn-Off Complicity*, 75(2) Cambridge Law Journal 196 (2016); Damian Warburton, *Supreme Court and Judicial Committee of the Privy Council Secondary Participation in Crime: R v Jogee [2016] UKSC 8 Ruddock v The Queen [2016] UKPC 7*, 80(3) Journal of Criminal Law 160 (2016).

8 George P. Fletcher, *Basic Concepts of Criminal Law* 4 (New York: Oxford University Press, 1998).

9 Taking as an example two cornerstone jurisdictions, France and Germany, and Russian criminal law which I am familiar with.

10 Tiberio Deciani, *Tractatus criminalis. Vol. 2* 238–241b (Turin, 1593).

11 Giulio Claro, *Receptarum sententiarum opera omnia* 258 (Geneva, 1625).

The first general provision on non-liability of an accomplice *in excessu* was also seen early on, at least as early as Benedict Carpzov's "*Practica*" (1638).[12] The roots of this rule can be traced to the Roman law on liability of an agent for a breach of a principal's instructions.[13]

However, until the end of the 19th century the non-liability rule was not definitely established despite having been much discussed in scholarly works. For example, one of the leading French scholars of that time, Joseph Ortolan, generally relied on knowledge as a basis for aggravation or mitigation of liability and proposed different rules with regard to personal or factual circumstances of a deed as accordingly non-imputable or imputable to an accomplice.[14] However, he conceded that practice was, in general, ignorant of such finely-tuned theoretical distinctions. Following Art. 59 of the *Code pénal* of 1810,[15] French case law extended responsibility of an accomplice for all aggravating circumstances of the planned deed.[16] However, a completely new crime, committed by a principal outside of an agreed plan, relieved an accomplice from criminal liability for this new crime. In 1896, the court acquitted as an accomplice in a murder a man who lent another a gun only for hunting.[17]

The leading Russian scholar of late Imperial Russia, Nikolay Tagantsev (the principal co-author of the Criminal Code of 1903) on the one hand limited criminal liability of accomplices by their prior arrangement with a principal but on the other, as a general rule, admitted responsibility of accomplices in a case where a principal committed a crime that was aggravated by some circumstance more than was agreed upon except in a situation where this aggravation was not and could not be foreseen by an accomplice.[18] An intensive discussion was also concerned with the possibility of the liability of an accomplice for a negligent crime *in excessu*.[19] Only by enrooting individual fault as a proper basis for liability did criminal legislation begin to take a modern shape in this area.

Nowadays, in the civil law system an accomplice is not usually responsible for crimes committed outside the scope of what was aided or instigated. French criminal

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12 Benedict Carpzov, *Practica nova imperialis Saxonica rerum criminalium. Pars I* 22 (6th ed., Wittenberg, 1670).

13 *Cf.* D. 17.1.5.pr. *et seq*.

14 *See* Joseph Ortolan, *Éléments de droit pénal* 566–570 (Paris: Plon frères, 1855).

15 This Article provided that: "*Les complices d'un crime ou d'un délit seront punis de la même peine que les auteurs mêmes de ce crime ou de ce délit, sauf les cas où la loi en aurait disposé autrement.*"

16 *See* Ortolan 1855, at 576–577.

17 Cited by Catherine Elliott, *French Criminal Law* 90 (Abingdon and New York: Routledge, 2011).

18 *See Таганцев Н.С.* Уголовное уложение 22 марта 1903 г. [Nikolay S. Tagantsev, *Criminal Code of 22 March 1903*] 111–112 (St. Petersburg, 1904).

19 *See Колоколов Г.Е.* О соучастии в преступлении [Georgy E. Kolokolov, *On Complicity in a Crime*] 191–198 (Moscow: University Printing House (M. Katkov), 1881); *Жиряев А.С.* О стечении нескольких преступников при одном и том же преступлении [Alexander S. Zhiryaev, *On the Confluence of a Number of Criminals with the Same Crime*] 69–71 (Derpt: Tip. G. Laakmanna, 1850).

law excludes criminal liability of an accomplice if the committed offence had different *éléments constitutifs*, or *actus reus*.[20] In the widely-cited case of *Nicolaï* in which the appellant gave the principal two revolvers only for intimidation, the appellant was not convicted for the murder as an accomplice in it because of lack of knowledge.[21]

In Germany, the rule on *Mittäterexzess* does not allow the aggravation of the liability of a co-principal (a similar rule is applicable also to aiders and abettors) if the other "carries or uses a weapon that differs substantially from what was agreed upon… acts in an excessive manner not agreed by the others or commits another offence altogether."[22]

The Russian Criminal Code of 1996 provides (Art. 36):

> The commission of a crime that is not embraced by the intent of other accomplices shall be deemed to be an excess of the perpetrator. Other accomplices to the crime shall not be subject to criminal liability for the excess of the perpetrator.

"The excess of the perpetrator" is divided into qualitative (i.e., other offence)[23] and quantitative (i.e., the same offence with aggravating or mitigating circumstances).[24]

2. Extending the Scope of Accomplice's Liability

However, there is also evident erosion of the rule of non-responsibility and a trend to lowering the *mens rea* standards of an accomplice's liability. In France, the courts have upheld the difference between *éléments constitutifs* (an act (omission) and a result) and secondary circumstances of the same deed, e.g., aggravating circumstances.[25] In the latter situation, the accomplice is criminally responsible and his responsibility is based on a duty to foresee all circumstances which might follow from a deed without the need to know them. In 1996, an accomplice was held liable for an armed assault despite his request not to go further than assaulting the victim with insulting words because "*le complice encourt la responsabilité de toutes les circonstances qui qualifient*

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20 Jean Pradel, *Droit penal* 491 (11th ed., Paris: Dalloz, 1996).

21 Cour de cassation, Crim, 13 January 1955.

22 Michael Bohlander, *Principles of German Criminal Law* 165 (Oxford: Hart, 2009). *See also* Johannes Wessels et al., *Strafrecht: Allgemeiner Teil* 218–219 (44th ed., Heidelberg: C.F. Müller, 2014).

23 In case S. and B., both were convicted, *inter alia*, for an armed robbery and murder; the Supreme Court quashed B's conviction for murder because the agreed plan was only to use a weapon for intimidation of the victim and an intention to murder was secretly held by S. (SupCt, No. 74-O09-1, 2 April 2009).

24 In case D., G. and I., all three were convicted for an armed robbery with infliction of serious bodily harm; in the superior court, conviction of D. and G. was reduced to a lesser included crime, an armed robbery, because using a metallic tube for infliction of serious bodily harm by I. was not agreed beforehand (BelgorodRegCt, No. 22-2140/2014, 8 December 2014).

25 This practice has an evident analogy with division of "an excess of the perpetrator" in Russian law into two types (*see supra* notes 23, 24 and accompanying text), although in Russia in both cases an accomplice is not responsible.

l'acte poursuivi, sans qu'il soit nécessaire que celles-ci aient été connues de lui."[26] This distinction, based on the foreseeability of a circumstance (or a consequence), may be traced back to the early history of criminal law. It was considered for the first time in the 18th century with reference to Claro's "*Sententiarum*"[27] in the last classic treatise on criminal law of the *Ancien Régime* written by Daniel Jousse.[28] Later, it was refined by Ortolan and through the case law of his time.[29]

German law is more self-restrained in allowing exceptions (if any) to this. It admits the responsibility of the co-principal if he is aware of the risk of committing an excess and decides to go ahead, ignoring the risk, because in this case he has *dolus eventualis* – a sufficient *mens rea* for complicity.[30] In a typical case concerning a violent crime, the Federal Supreme Court considered the situation of violent robbery (§ 250(2)(3)(a) StGB). The court held that all the co-principals were rightly convicted of this crime despite the fact that only two of them used the serious violence which had clearly not been agreed upon before entering the dwelling. The reasoning was that, although a person is responsible only for his or her intent, the acts which may be expected according to the circumstances of the case should be treated as covered by such intent. In this case, the defendants did not meet the victim before and did not know whether he was armed or not so the court held that the serious violence covered by § 250(2)(3)(a) StGB was admitted by all of them.[31] The more interesting rule relates to "neutral contributions to the crime," or *neutral Handlung*.[32] Here, criminal responsibility of the assistant, who is simply exercising professional functions, will be based on his knowledge that the crime will be committed and the presence of clear evidence of the principal's intention. However, it is not necessary for the assistant to wish for or approve the deed.[33]

Russian criminal law requires intentional support, i.e., an intention to assist and an intention as to the crime committed (Arts. 32, 36 of the Criminal Code of the Russian Federation). Usually, the last intention is explained as knowledge of the essential elements of the crime designed and either a wish to commit this crime (*dolus directus*) or a conscious allowance or indifference to its commission (*dolus eventualis*). In case law, there is a strong evidentiary rule which states that using a different weapon is indicative evidence in favour

[26] Cour de cassation, Crim, 21 May 1996.

[27] *See supra* note 11 and accompanying text.

[28] *See* Daniel Jousse, *Traité de la justice criminelle de France. Vol 1* 27–28 (Paris, 1771).

[29] *See supra* notes 14–17 and accompanying text.

[30] Kai Ambos & Stefanie Bock, *Germany* in *Participation in Crime: Domestic and Comparative Perspectives* 323, 332 (A. Reed & M. Bohlander (eds.), Farnham and Burlington: Ashgate, 2013). *See also* Ingeborg Puppe, *Der gemeinsame Tatplan der Mittäter*, Zeitschrift für Internationale Strafrechtsdogmatik 234, 242–243 (2007).

[31] *See* BGH 5 StR 575/12, 19 March 2013.

[32] *See* Ambos & Bock 2013, at 335, and *cf.* with *Jogee* [2016] UKSC 8 [10], an example in the last two sentences.

[33] *See* interesting case on assistance by bank officer in transferring assets abroad, BGH 5 StR 624/99, 1 August 2000, BGHSt 46, 107.

of "an excess of the perpetrator" that is not imputable to other accomplices (e.g., the liability of an assistant for murder is excluded because of the unexpected use of an axe during a theft;[34] all accomplices are liable for robbery except for the one who used a knife and who is liable for armed robbery[35]). However, there is also an obvious tendency to a wide interpretation of an intention as to the crime committed where the foreseeability of another crime as possible (and not knowledge of it as certain, or definitely agreed upon) becomes a sufficient mental element for an accomplice's liability. Therefore, and in contrast to "a different weapon" rule where an accomplice knows about a specific weapon which may be used during the crime, he is held responsible for all violent crimes because all of them are treated as foreseeable and embraced by his intent.[36] This tendency is more clearly demonstrated by the courts in organized criminality cases. According to Art. 35(5) of the Criminal Code of the Russian Federation:

> A person who has created an organized group or a criminal community (criminal organization), or has directed them, shall be subject to criminal liability for their organization… and also for all the offences committed by the organized group or the criminal community (criminal organization), if they have been embraced by his intent.

This mode of liability is a constructive crime because there is no requirement for the conduct element in order to impute the crime committed. As such, the courts easily interpret the "embracement" element as satisfied by the simple probability of the crime's commission. In case B., the accused was the leader of an organized group. In May 2011, he was also a fence for some stolen goods and informed the principals that in future he would help them again. In July 2011, they again committed a theft, and the court held that the past promise (i.e., probability of future crime) was a sufficient mental element to bear responsibility for this theft too.[37]

Conclusion

It is not realistic to explain the reasons behind these exceptions in a universal way. However, two points must be mentioned especially. Firstly, in cases of an accomplice's liability *in excessu* a requirement of intentional support is often treated as fulfilled by assistance with knowledge or even with foresight of the possibility of another crime. However, following the common line of mental element analysis in the civil law tradition, knowledge and foresight are only one of the constituent parts of this mental element. *Dolus* (required for complicity) consists of *conscientia* and *volo*.

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[34] SupCt, No. 208-O13-1, 16 April 2013.

[35] Moscow CityCt, No. 10-13441, 6 October 2015.

[36] *See, e.g.*, Moscow CityCt, No. 4y/6-2671, 22 June 2015; No. 10-5733, 22 July 2013; Sverdlovsk RegCt, No. 22-7106, 16 July 2008.

[37] Orenburg RegCt, No. 22-2882, 10 July 2012.

Knowledge and foresight constitute only the first part of *dolus*, being usually used as one of the elements in defining of different types of *dolus*. As only one of these elements, they are combined with will and its variances, and only thereafter is *dolus* constructed as a legal concept.[38] By construing on the basis of knowledge or foresight a sufficient mental element for an accomplice's liability, this inevitably admits a lower standard for such an element. The second constituent part of *dolus* may be tacitly implied on the basis of knowledge or foresight[39] but *post hoc* reconstruction through scholarly analysis alone is not the same as proving this in court.

Secondly, one of the strongest reasons for such an approach emerges today more clearly than ever. Complicity (and especially organized criminality) is considered a matter for serious concern both for politicians and for society.[40] The idea to "push on criminality" is easily accepted by ordinary people not inclined to delve into the legal intricacies. As such, the mental element in complicity is often sacrificed in this politically motivated fight with criminality.

To summarise, in my opinion, the subjective element of "foreseeability" is one of the yardsticks not of intention[41] but of the repressiveness of criminal law, when strict requirements of fairness and legality are sacrificed in favour of being tough on criminality. Moreover, it is evident that to find a proper balance here is a real puzzle both for legislatures and for courts in different jurisdictions.[42] *Jogee* represents a step in the right direction towards a truly subjective mental element as a proper fault requirement for criminal liability and that is why it is a good case for comparative study.

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[38] In German law, *dolus directus* of both types and *dolus eventualis* are defined with regard to different combinations of *conscientia* (*Wissenselement*) and *volo* (*Willenselement*). Moreover, recklessness (*bewussten Fahrlässigkeit*) and *dolus eventualis* having the same element of *conscientia* are separated in case law according to their element of will. *See* Wessels et al. 2014, at 91–100. In Russia, both types of *dolus* are a combination of knowledge, foresight and will. *Dolus directus* is defined (Art. 25(2) of the Criminal Code of the Russian Federation) as a case where "the person was *conscious* of the social danger of his acts (omission), *foresaw* the possibility or the inevitability of the onset of socially dangerous consequences, and *willed* such consequences to ensue" (emphasis added); *dolus eventualis* (Art. 25(3) of the Criminal Code of the Russian Federation) refers to cases where "the person was *conscious* of the social danger of his acts (omission), *foresaw* the possibility of the onset of socially dangerous consequences, *did not wish but consciously allowed these consequences or treated them with indifference*" (emphasis added).

[39] Or inferred in most cases of such type; *cf.* the critical approach to this in *Jogee* [2016] UKSC 8 [40], [65]–[66], [73], [95].

[40] *Cf. Powell* [1999] 1 AC 1 (HL) 14, 25–26.

[41] *Cf. Jogee* [2016] UKSC 8 [87].

[42] *Cf.* also the *ad hoc* international criminal tribunals jurisprudence on the issue, poisoned by the abovementioned rules and based on concepts of natural and foreseeable consequences and willingly taking the risk of their occurrence. *See* Gerhard Werle, *Principles of International Criminal Law* 175 (2nd ed., The Hague: T.M.C. Asser Press, 2009).

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