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Citations in footnotes must conform to *The Bluebook: A Uniform System of Citation*. A References section is required: entries must conform to the author-title system, such as that described in the *Oxford Style Manual*.

TABLE OF CONTENTS

Articles:

Joseph Lutta (Eldoret, Kenya)
How Russian Intervention in Syria Redefined the Right to Protect in Armed Conflict 4

Tikhon Podshivalov (Chelyabinsk, Russia)
Protection of Property Rights Based on the Doctrine of Piercing the Corporate Veil in the Russian Case Law 39

Sergey Shakhray (Moscow, Russia)
Andrey Yanik (Moscow, Russia)
On the Constitutional Model of the Russian Economy 73

Nikita Lyutov (Moscow, Russia)
Svetlana Golovina (Yekaterinburg, Russia)
Development of Labor Law in the EU and EAEU: How Comparable? 93

Elena Salogubova (Moscow, Russia)
Alan Zenkov (Moscow, Russia)
Roman Law's Influence on Russian Civil Law and Procedure 118

Comments:

Max Gutbrod (Moscow, Russia)
A Study about the Use of the Term "Legal Facts" 134

Thomas Kruessmann (Tartu, Estonia)
The Compliance Movement in Russia: What is Driving It? 147

ARTICLES

HOW RUSSIAN INTERVENTION IN SYRIA REDEFINED THE RIGHT TO PROTECT IN ARMED CONFLICT

JOSEPH LUTTA,
High Court of Kenya (Eldoret, Kenya)

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The use of military force to forestall humanitarian crisis remains a controversial issue in international law. This strategy is considered antithetical to the sovereignty and territorial integrity of the host country. This legal quandary emanated in 1998 after NATO launched a series of airstrikes against the Yugoslavian forces under the doctrine of humanitarian intervention. This legal conundrum prompted the United Nations to craft comprehensive legal principles to determine the parameters of foreign interventions in armed conflict. The objective was realised in 2005 after the UN adopted the Right to Protect (R2P) as means of resolving humanitarian crisis. This doctrine intended to harmonise the foreign intervention in light of the shortcomings of unilateral humanitarian intervention. However, the abysmal failure in resolving the Libyan crisis exposed its soft underbelly as tool for perpetuating regime change against unpopular leaders. Subsequently, when Security Council proposed similar remedy for Syrian conflict, Russia strenuously objected and advocated for a political and diplomatic solution. This geopolitical gridlock prompted the divided council to adopt a different scenario in dealing with the Syrian conflict with the west supporting the rebels while Russia stood by Assad. This prompted Assad to appeal for assistance from Russia in counteracting ISIS and rebel forces that threatened to depose his government. In 2017 President Putin announced the success of the Russian intervention and called for peace talks among the various warring factions. As such Russia had realised the humanitarian objective behind R2P while respecting the sovereignty of Syria.

Keywords: Syria; Russia; armed conflict.

Recommended citation: Joseph Lutta, *How Russian Intervention in Syria Redefined the Right to Protect in Armed Conflict*, 6(2) Russian Law Journal 4–38 (2018).

Table of Contents

Introduction
1. General Background on the Right to Protect (R2P)
1.1. The Pre-Unilateral Humanitarian Intervention Era
1.2. Unilateral Humanitarian Intervention
1.3. The Right to Protect
2. The Syrian Conflict
2.1. Brief History of Syria
2.2. Origins of the Syrian Civil War
2.3. Non-State Parties to the Syrian Conflict
2.3.1. The Syrian Rebel Movement/Free Syrian Movement
2.3.1.1. Legal Implication of the Syrian Rebel Movement
2.3.2. The Islamic State of Iraq and Syria/ISIS/Islamic State/Daesh
2.4. The Right to Protect and the Syrian Conflict
3. The Russian Intervention in Syria
3.1. Brief Background of President Vladimir Putin's Ascension to Power
3.2. Russia and Military Intervention
3.3. Russia and Syrian Intervention
4. Legal Consequences of Western Intervention in Syria
4.1. The Concern about Aggression and State Sovereignty
4.2. Belligerent Occupation
4.3. Negligent Support of Rebels
4.4. The Obligation to Protect Human Rights During Armed Conflict
4.5. Regime Change by Other Means
Concluding Remarks

Introduction

The political turmoil in Syria remains one of the most volatile and catastrophic phenomenon of the 21st century.[1] This appraisal is drawn from the horrific statistics which indicate the conflict has left close to 100,000 civilians dead while displacing almost 9 million with most of them seeking refuge in the Middle East and Europe.[2] In essence, this multifaceted conflict has fragmented the country along the fault

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[1] Laurie R. Blank & Geoffrey S. Corn, *The Law of War's Essential Role in Containing Brutality: Syria's Painful Reminder*, Global Policy Essay (2013) (Jun. 5, 2018), available at https://www.globalpolicyjournal.com/articles/conflict-and-security/law-wars-essential-role-containing-brutality-syrias-painful-reminder.

[2] Azfer Ali Khan, *Can International Law Manage Refugee Crises?*, 5 Oxford University Undergraduate Law Journal 54 (2016).

lines of religion, ethnicity and to some degree geopolitical interests.[3] On one hand, the government forces loyal to President Bashar al-Assad are battling the western supported rebels informally known as "Free Syria Movement" who are seeking to gain control of the country. Conversely, the ultra-fundamentalist Islamic State (used interchangeably with ISIS and Daesh) intends to establish a religious caliphate traversing the entire Middle East region.[4] This terror group has committed countless of violence against the Yazidi women including sexual enslavement, honour killings and human trafficking.[5] Furthermore, its adherents are accused of perpetrating religious cleansing against minority Christians and plundering their property and holy sites.[6]

Throughout the course of the conflict the west has vilified President Assad as the principal perpetrator of the atrocities besetting the country.[7] This blanket condemnation prompted the North Atlantic Treaty Organisation (NATO) aligned states to shore up support for the rebels as strategy of expelling President Assad from office.[8] The Arab league followed suit by slapping Syria with sanctions and demanding the immediate resignation of President Assad.[9] However, this indictment is biased and inconclusive after the United Nations (hereinafter the UN) prepared a comprehensive report which incriminated both sides for the atrocities.[10]

On the opposite end of the spectrum Russian President Vladimir Putin has remained steadfast in supporting the regime. He has reiterated President Assad is the legitimate leader of Syria and should be involved in any dispute resolution mechanism.[11] Furthermore, Russia has vetoed any resolution by the Security Council (used interchangeably with the council) seeking to invoke military intervention in

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3 Alex Schank, *Sectarianism and Transitional Justice in Syria: Resisting International Trials*, 45 Georgetown Journal of International Law 557, 559 (2014).

4 Emin Daskin, *Justification of Violence by Terrorist Organisations: Comparing ISIS and PKK*, Journal of Intelligence and Terrorism Studies 1, 6 (2016).

5 Mah-Rukh Ali, *ISIS and Propaganda: How ISIS Exploits Women*, Reuters Institute for the Study of Journalism (2015) (Jun. 5, 2018), available at http://reutersinstitute.politics.ox.ac.uk/sites/default/files/research/files/Isis%2520and%2520Propaganda-%2520How%2520Isis%2520Exploits%2520Women.pdf.

6 Michael Solomatin, *The Unjust War in the Syrian Arab Republic and the Protection of Syrian Churches as Cultural Property*, 6 Ave Maria International Law Journal Spring 88, 99 (2017).

7 Matthew C. Waxman, *Syria, Threats of Force, and Constitutional War Powers*, 123(6) Yale Law Journal 297 (2013).

8 Amos N. Guiora, *Intervention in Libya, Yes; Intervention in Syria, No: Deciphering the Obama Administration*, 44 Case Western Reserve Journal of International Law 251, 271 (2011).

9 Thilo Marauhn, *Sailing Close to the Wind: Human Rights Council Fact-Finding in Situations of Armed Conflict – The Case of Syria*, 43 California Western International Law Journal 402, 411 (2013).

10 Draft UN Resolution, UN Doc S/2012/77, 4 February 2012.

11 Muditha Halliyade, *Syria – Another Drawback for R2P?: An Analysis of R2P's Failure to Change International Law on Humanitarian Intervention*, 4(2) Indian Journal of Law & Social Equality 215, 215 (2016).

Syria for fear of regime change. President Putin drew a perfect comparison with Libya where NATO used humanitarian concerns as an excuse to dislodge Colonel Gaddafi from power only to leave behind a failed and fractured state.[12] Subsequently, Russia offered the regime military support in combating the rebels and jihadist who were determined to gain control of the country. This last resort measure has prompted the west to accuse Moscow of complicity to the alleged atrocities committed by the Assad regime.[13]

However, in September 2015 this conflict took a totally different turn after Russia became actively engaged in the conflict at the behest of the President Assad. The Russian armed forces launched a series of surgical air strikes and deployed ground troops to reinforce the government forces in countering the Islamic State.[14] After two years of vigorous battles ISIS was ultimately neutralised thereby enabling the regime to regain significant control of the country. In December 2017 President Putin made a victory tour of Syria to commemorate the successful military campaign whereupon he announced the partial withdrawal of Russian troops from the county.[15] Furthermore, he expressed his desire to mediate post-conflict reconciliation among the various factions in the country.[16] Despite this self-evident triumph the west has viewed the Russian support with suspicion of protecting its economic and geopolitical interests in the region.[17] Some analysts argue Russian support for the Assad regime is the precursor to the resumption of a "new cold war."[18] Nonetheless, these concerns seem antiquated since Russia has always advocated for a political and diplomatic solution to the conflict while strenuously opposing the use of force.[19]

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12 Jon Austin, *US and NATO Want Syria to Be the Next Libya – Claims Assad and Putin "GOOD Guys" of Conflict*, Express, 2 August 2017 (Jun. 5, 2018), available at https://www.express.co.uk/news/weird/836154/Syria-War-Vladimir-Putin-Russia-President-Assad-good-guys-Nato.

13 Derek Averre & Lance Davies, *Russia, Humanitarian Intervention and Responsibility to Protect: The Case of Syria*, 91(4) International Affairs 813, 814 (2015).

14 Marauhn 2013, at 414.

15 Nathan Hodge, *Putin Declares Victory in Surprise Stopover in Syria*, Wall Street Journal, 11 December 2017 (Jun. 5, 2018), available at https://www.wsj.com/articles/putin-declares-victory-in-surprise-stopover-in-syria-1512994876.

16 Raf Sanchez, *Bashar Al-Assad Thanks Putin for "Saving Our Country" as Russian Leader Prepares for Talks on Ending Syrian War*, The Telegraph, 21 November 2017 (Jun. 5, 2018), available at https://www.telegraph.co.uk/news/2017/11/21/bashar-al-assad-says-ready-syria-peace-talks-rare-meeting-vladimir/.

17 Caitlyn A. Buckley, *Learning from Libya, Acting in Syria*, 5(2) Journal of Strategic Security 82, 83 (2012).

18 *Russia, Syria, and the "New Cold War,"* Journal of Middle Eastern Politics and Policy, 18 December 2016 (Jun. 5, 2018), available at http://jmepp.hkspublications.org/2016/12/18/syria-russia-new-cold-war/.

19 Reuters Staff, *Russia Says Opposes Any Resolution Threatening Force Against Syria*, 22 September 2013 (Jun. 5, 2018), available at https://www.reuters.com/article/syria-crisis-russia/russia-says-opposes-any-resolution-threatening-force-against-syria-idUSL5N0HI0A020130922.

Looking at the bigger picture Russian intervention in Syrian falls well within the ambit of the Right to Protect (used interchangeably with R2P) under international humanitarian law. This amorphous policy formulated in 2005 maps out the terrains of foreign humanitarian assistance during armed conflicts.[20] Secondly, Russian intervention safeguarded Syria's sovereignty since it was undertaken at the behest of President Assad who is the *de facto* leader of the country.[21] In stark contrast the western countries decision to support the rebels was initiated in flippant disregard of principle of international law that prohibits illegal use of force against a sovereign state.[22] As the ICJ held in *Nicaragua v. USA* and *DRC v. Uganda* funding of armed resistance is tantamount to infringing upon a country's sovereignty and territorial integrity.[23] As I shall argue the approach by NATO raises serious legitimate issues regarding the culpability of the Syrian rebels as active participants in the conflict.

This brief historical antecedent forms the focal point of this manuscript. Broadly speaking I argue the Russian military support of the Assad regime falls well within the scope of the Right to Protect. In contradistinction the western approach of supporting the rebels is blotted with serious legal ramifications in both international and humanitarian laws. This manuscript is divided into five major segments. The first portion underscores an elaborate discussion of the historical development of the doctrine of the Right to Protect (R2P). It outlines the legal position of this doctrine in light of the ever changing dynamics of the international law. The second segment shall discuss the Syrian conflict. This portion forms the main focus of this paper by expounding on the international humanitarian issues about the conflict. The third portion shall encompass a comprehensive discussion of the Russian intervention in Syria. Furthermore, it will give a brief synopsis of Putin's ascension to power and how his foreign policy transformed the geopolitical landscape. The fourth portion shall flesh out the fundamental distinction between the Russian and Western intervention in Syria. Moreover, this segment shall discuss the jurisprudence on this subject matter as enunciated by the International Court of Justice (ICJ).[24] The fifth portion shall entail a general overview of the problem together with some concluding remarks from the author.

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[20] Tomas Königs et al., *Responsibility to Protect: Implementing a Global Norm Towards Peace and Security*, 29(76) Utrecht Journal of International and European Law 109, 110 (2013).

[21] Samuel Mercier, *The Legality of Russian Airstrike in Syria and "Intervention by Invitation,"* E-International Relations, 29 April 2016 (Jun. 5, 2018), available at http://www.e-ir.info/2016/04/29/the-legality-of-russian-airstrikes-in-syria-and-intervention-by-invitation/.

[22] Julian E. Barnes et al., *Obama Proposes $500 Million to Aid Syrian Rebels*, The Wall Street Journal, 26 June 2014 (Jun. 5, 2018), available at https://www.wsj.com/articles/obama-proposes-500-million-to-aid-syrian-rebels-1403813486.

[23] Alexis Goh & Steven Freeland, *The International Court of Justice and Recent Orders on Provisional Measures*, 11 Australian Journal of International Law 47, 48 (2004).

[24] A. Mark Weisburd, *The International Court of Justice and the Concept of State Practice*, 31(2) University of Pennsylvania Journal of International Law 295, 297 (2009).

1. General Background on the Right to Protect (R2P)

1.1. The Pre-Unilateral Humanitarian Intervention Era

By and large, international law enshrines the norms governing the relationship among nation states. This unique framework is largely attributed to Hugo Grotius who popularised the term *jus gentium* (laws of the nation) which envisages a community nations posited within a common legal order.[25] This notion was later codified in 1648 when European powers signed the treaty of Westphalia thereby ending the thirty years war.[26] This futuristic document laid the foundation for modern precepts of sovereignty and statehood by defining territorial integrity and state autonomy.[27] Despite these tremendous steps interstate relationships were inundated with legal loopholes and frictions that erupted into World War I in 1914.[28] After the war the allied victors envisioned a new world order governed by the League of Nations.[29] However, this supranational organisation failed to realise its objective after Europe relapsed into a diabolical arms race and annexations which triggered the outbreak of World War II.[30] Similarly, the ultimate defeat of the axis powers reshaped the international legal order after the allies lobbied for the formation of the United Nations (hereinafter the UN).[31] This global body succeeded the defunct League of Nations in overseeing the relationship among the member states.[32] This led to the promulgation of the United Nations Charter in 1945 which delineated the boundaries on the use of force by the member states.[33] Pursuant to Arts. 2(4) and 51 of the charter the use of force is restricted to the purpose of self-defense.[34] By narrowing this scope, the framers of the charter intended to safeguard the territorial integrity of the member states

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25 Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106(8) Yale Law Journal 2559, 2605 (1997).

26 Leo Gross, *The Peace of Westphalia, 1648–1948*, 42(1) American Journal of International Law 20, 22 (1948).

27 Daud Hassan, *The Rise of the Territorial State and the Treaty of Westphalia*, 9 Yearbook of New Zealand Jurisprudence 62, 63 (2006).

28 Talbot C. Imlay, *The Origins of the First World War*, 49(4) The Historical Journal 1253, 1255 (2006).

29 Anne Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87(2) American Journal of International Law 205, 210 (1993).

30 Robert J. Delahunty & John C. Yoo, *Peace Through Law – The Failure of a Noble Experiment*, 106 Michigan Law Journal 923, 926 (2007).

31 John Humphrey, *The Main Functions of the United Nations in the Year 2000 A.D.*, 17(1) McGill Law Journal 219, 220 (2000).

32 Leland M. Goodrich, *From the League of Nations to United Nations*, 1(1) International Organization 3, 9 (1947).

33 Charter of the United Nations and Statute of the International Court of Justice (San Francisco 1945) (Jun. 5, 2018), available at https://treaties.un.org/doc/publication/ctc/uncharter.pdf.

34 David K. Linnan, *Self-Defense, Necessity and U.N. Collective Security: United States and Other Views*, 1 Duke Journal of Comparative & International Law 57, 66 (1991).

from needless infringement by powerful and aggressive countries.[35] Eugene Rostow noted these dual provisions chrystallised the use of force strictly for the purpose of self-defense as part of customary international law.[36] In addition to these clauses, the obligation to preserve international peace and stability was bestowed upon the Security Council which comprised of the former allies powers during the war.[37]

Aside from the UN Charter, the global human rights regime underwent a metamorphosis after the adoption of the Convention on the Prevention of Genocide and the Geneva Conventions on the Laws of War.[38] The spirit behind these futuristic documents was to prevent the recurrence of mass atrocities reminiscent of World War II.[39] From another perspective, some scholars argue this legal change obligated third parties to avert genocide and other mass forms of mass atrocities.[40] The previous regime placed no legal obligation on foreign states to intervene during such scenarios thereby opening the leeway for autocrats to commit mass atrocities against helpless civilians the most striking example being the holocaust.[41]

In spite of this transformative concrete framework and institutions there was a resurgence of incursions and barbarism as several UN members flouted the charter in pursuit of their geopolitical interests. A case in point was the Belgian invasion of the Republic of Congo (Kinshasa) after the secession of the mineral rich Katanga region.[42] At face value Belgium justified its decision as means of preventing the ethnic cleansing and persecution of its civilians residing in Katanga. However, this humanitarian measure morphed into a full blown civil war pitting the Western backed Katanga against the Soviet supported African nationalist government led by Patrice Lumumba.[43] Thereafter, this trend was replicated in three countries; India (East Pakistan) in 1971, Tanzania (Uganda) in 1978 and Vietnam (Kampuchea) in

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35 Richard B. Lillich, *Intervention to Protect Human Rights*, 15(2) McGill Law Journal 205, 208 (1969).

36 Eugene V. Rostow, *The Legality of the International Use of Force by and from States*, 10 Yale Journal of International Law 286, 286 (1985).

37 Ian Hurd, *The UN Security Council and the International Rule of Law*, 7(3) Chinese Journal of International Politics 361 (2014).

38 Convention on the Prevention and Punishment of the Crime of Genocide, adopted by resolution 260 (III) A of the United Nations General Assembly on 9 December 1948; Geneva Conventions of the Laws of War, 12 August 1949.

39 Henry T. King Jr. et al., *Origins of the Genocide Convention*, 40(1) Case Western Reserve Journal of International Law 13, 17 (2007).

40 Eyal Mayroz, *The Legal Duty to "Prevent": After the Onset of "Genocide,"* 14(1) Journal of Genocide Research 79, 81 (2012).

41 Daniel Levy & Natan Sznaider, *The Institutionalization of Cosmopolitan Morality: The Holocaust and Human Rights*, 3(2) Journal of Human Rights 143, 145 (2004).

42 Jonathan J. Cole, *The Congo Question: Conflicting Visions of Independence*, 43(1) Emporia State Research Studies 26, 33 (2006).

43 Nicole Hobbs, *The UN and the Congo Crisis of 1960*, Harvey M. Applebaum '59 Award, Paper 6 (2014).

1978 all of whom intended to oust callous regimes.[44] To some degree these actions were reminiscent of Hitler's invasion of Sudetenland in former Czechoslovakia and Poland under the pretext of liberating the ethnic Germans from persecution.[45] This worrisome state of affairs prompted the famed international scholar Thomas Franck to pose the serious question "who killed Article 2(4) of the UN Charter?"[46] Despite the perpetual discussion on this emotive subject the global community failed to reach a consensus on how to reconcile dynamics of international law with the demands of humanitarian protection thereby leaving a glaring lacuna on this subject matter.

1.2. Unilateral Humanitarian Intervention

The last decades of the 20th century are classified as one of the grotesque periods in human history.[47] This description stems from the waves of civil wars and ethnic conflicts that engulfed the global south countries.[48] This conundrum reached the climax after the Rwandan genocide of 1994 and Yugoslavian conflict that dominated the better part of this epoch.[49] This worrisome trend prompted some western countries to lobby for the right to intervene during internal conflict as means of averting humanitarian crisis.[50] In 1998 this humanitarian concern impelled NATO unilaterally pierced the veil of sovereignty and launch a series of airstrikes against Yugoslavia under the banner of "humanitarian intervention." As David Robertson notes humanitarian intervention is

> a doctrine under which one or more state may take action inside the territory of another state in order to protect those who are experiencing serious human rights persecution, up to and including attempts at genocide.[51]

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44 Nadia Banteka, *Dangerous Liaisons: The Responsibility to Protect and a Reform of the U.N. Security Council*, 54 Columbia Journal of Transnational Law 382 (2016).

45 Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100(1) American Journal of International Law 107, 113 (2006).

46 Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64(5) American Journal of International Law 809, 810 (1970).

47 Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6(11) Duke Journal of Comparative & International Law 11, 41 (1995).

48 Andreas Wenger & Simon J.A. Mason, *The Civilisation of Armed Conflict: Trends and Implications*, 90(872) International Review of the Red Cross 835, 841 (2008).

49 Jane Stromseth, *Pursuing Accountability for Atrocities after Conflict: What Impact on Building the Rule of Law?*, 38 Georgetown Journal of International Law 251, 267 (2007).

50 Dabiru Sridhar Patnaik, *International Law and Responsibility to Protect: South Asian Perspective*, Doshisha Global Studies Journal 173, 176 (2013).

51 David Robertson, *A Dictionary of Human Rights* 119 (2nd ed., London: Europe Publications, 2004).

Despite the benevolent objectives behind the military campaign, this decision raised the critical issue of whether the NATO was justified to use force against a sovereign state.[52] Consequently, the aggrieved government of Federal Republic of Yugoslavia filed a memorial with the International Court of Justice (ICJ) against NATO which states a case later known as *Legality of Use of Force*.[53] The applicant applied for temporary halt of the airstrikes arguing they were illegal and calamitous under Art. 9 of the Genocide Convention.[54] In its cautious and one-dimensional verdict the court expressed "deep concerns" about the humanitarian tragedies in the region which raised "serious issues" of international law.

However, the thrust of the decision revolved around the preliminary objection raised by NATO states which questioned the plaintiff's legal standing. The majority judges argued Serbia and Montenegro lacked the *locus standi* to lodge the matter since they failed to meet the threshold of a UN member state as envisaged in Art. 35 of the ICJ Charter.[55] Ensuing from this substantive technicality the court resolved that the applicant lacked the capacity to institute the proceedings and their case was summarily dismissed. Nonetheless, the applicants had a strong case since Arts. 2(4) and 51 of the UN Charter proscribes the use of force beyond the purview of self-defense contrary to NATO's actions.[56] Furthermore, the court failed to issue legal guidelines on foreign intervention thereby de-escalating the dire humanitarian situation in the region and did not restore certainty on this subject matter for posterity purposes.[57] From another perspective, by failing to seal this legal lacuna the court opened the floodgates for individual member states to interpret the charter in accordance to their personal objectives.[58] This legal quandary was exposed after the U.S. led invasion of Iraq to depose Iraqi strongman Saddam Hussein who was accused of possessing Weapons of Mass Destruction and sponsoring terrorist organisations including Al-Qaeda.[59] This legal pitfall spurred the call to reform the

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52 Daniel H. Joyner, *The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm*, 13 European Journal of International Law 597, 600 (2002).

53 *Yugoslavia v. NATO*, 1999 I.C.J. 916.

54 Convention on the Prevention and Punishment of the Crime of Genocide, adopted by resolution 260 (III) A of the United Nations General Assembly on 9 December 1948.

55 Article 35(1) of the Statute states that Courts shall be opened to the states to the present Statute.

56 Ian Hurd, *Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World*, 25(3) Ethics & International Affairs 293, 301 (2011).

57 Christine Gray, *The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force after Nicaragua*, 14(5) European Journal of International Law 867, 870 (2013).

58 Goodman 2006, at 108.

59 Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35(3) Cornell Journal of International Law 533, 540 (2012); Judith Miller, *Comments on the Use of Force in Afghanistan*, 35(3) Cornell Journal of International Law 605, 605 (2012).

doctrine of humanitarian intervention for being susceptible to manipulation by individual countries.[60]

1.3. The Right to Protect

This origin of this principle is attributed to the emphatic speech by former UN Secretary General Kofi Annan as published in the UN Millennium Report of 2001.[61] He stated in part:

> If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?[62]

Secretary Annan's concern exposed the inextricable conflict between sovereignty and the use of force in protecting fundamental rights and freedom.[63] In hindsight, the framers of the UN Charter envisaged Arts. 2(4) and 51 as limiting the use of force to purposes of self-defense.[64] Therefore, expanding this scope to encompass humanitarian interventions would trigger a paradigmatic shift in the international legal order. In order to harmonise this process the UN convened an *ad hoc* committee on the International Commission on Intervention and State Sovereignty (ICISS). This committee was comprised of seasoned experts in international humanitarian law who prepared a report that recommended a novel doctrine called the "Responsibility to Protect."[65] This proposal was deeply anchored in the laxity and reticence of the global community in addressing the genocides in former Yugoslavia and Rwanda.[66]

At a glance this R2P stands on three major pillars as tools of averting civilian atrocities during armed conflict.[67] The first is the *responsibility to prevent* which entails

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60 Peter Hilpold, *Humanitarian Intervention: Is There a Need for a Legal Reappraisal?*, 12(3) European Journal of International Law 437 (2001).

61 United Nations General Assembly, We the Peoples: The Role of the United Nations in the Twenty-First Century, Report of the Secretary-General, 27 March 2000 (Jun. 5, 2018), available at http://unpan1.un.org/intradoc/groups/public/documents/un/unpan000923.pdf.

62 *Id.* at 35, para. 217.

63 Sandra Fabijanić Gagro, *The Responsibility to Protect (R2P) Doctrine*, III(1) International Journal of Social Sciences 61, 63 (2014).

64 *Id.* Arts. 2(4) and 51 of the UN Charter.

65 International Commission on Intervention and State Sovereignty, The Responsibility to Protect, Report (December 2001) (Jun. 5, 2018), available at http://responsibilitytoprotect.org/ICISS%20Report.pdf.

66 Alex J. Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, 20(2) Ethics & International Affairs 143, 148 (2006).

67 Gabija Grigaitė, *Responsibility to Protect Concept and Conflict in International Law*, 83 Teise 174, 177 (2012).

tackling the root causes that may culminate in internal conflict.[68] This requirement intends to strike a balance between state sovereignty and humanitarian concerns by engaging the relevant stakeholders in redressing the dispute. This mechanism intended to cure the shortcoming of humanitarian intervention which solely relied on the unilateral use of force in redressing gross human rights abuses. Conversely, the *responsibility to react* empowers countries to respond to humanitarian concerns through various means including sanctions, international prosecution but resorting to military intervention only as the last option.[69] This proposal intended to offer viable options other than force in resolving armed conflict. Finally, the *responsibility to rebuild* underscores the duty to reconstruct countries torn apart by armed conflict through infrastructural development and post-conflict reconciliation.[70]

In addition to these principal obligations R2P stands on precautionary principles on the use of force. Ramesh Thakur one of the foremost authorities in this subject and an ICISS committee member explains the use of force should be the last resort and not the tool of choice when confronting human rights atrocities.[71] Therefore, these supplementary principles intend to protect the sanctity and integrity of R2P as a benign remedy to armed conflict. First is *right intention principle* which stipulates the primary obligation of the intervening state is to halt human suffering. Second is the *last resort principle* which limits the use of military force as the measure of last resort. The third *principle of proportional force* prescribes the proportionate force at par with the nature and degree of the conflict. Finally, *reasonable prospects principle* which provides there for a proper assessment on the use of force to ensure that the consequences of the action does not outweigh the ultimate consequences of inaction.[72] The commission further recommended the permanent members of the Security Council to craft the guidelines of enforcing the doctrine.[73] This resolution was subsequently adopted at the UN summit in 2005 but the divided Security Council failed to delineate the concrete boundaries on the implementation of the principle.[74]

Noteworthy, R2P is distinguishable from humanitarian intervention since its overarching objective is to protect civilians vulnerable to the atrocities of armed conflict

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68 Grigaitė 2012.

69 *Id*.

70 *Id*.

71 Ramesh Thakur, *R2P after Libya and Syria: Engaging Emerging Powers*, 36(2) Washington Quarterly 61, 73 (2013).

72 Mitsuhisa Fukutomi, *Humanitarian Intervention in Libya: Is It Causing Internal War?*, 45(2) Hitotsubashi Journal of Law and Politics 23, 26 (2017).

73 Herbert Hirsch, *The Responsibility to Protect and Preventing Genocide in the Twenty-First Century*, 1(2) Journal of African Conflicts and Peace Studies 68, 73 (2009).

74 Scott Straus, *Rwanda and Darfur: A Comparative Analysis*, 1(1) Genocide Studies and Prevention: An International Journal 41, 44 (2006).

rather than the determining the rights of intervening states.[75] Furthermore, R2P utilises a spectrum of mechanisms to redress conflict with the use of force being the last resort. In contradistinction humanitarian intervention gives utmost priority to using force in resolving gross violation of human rights.[76] Finally, Ramesh Thakur differentiates R2P from humanitarian intervention since it requires approval from the UN compared to the latter which is prone to unilateral initiative by the intervening country.[77]

Despite these changes there is legitimate concern the Security Council may improvise the R2P doctrine into a tool for condemning weaker nations especially in the global south to the International Criminal Court (ICC).[78] Secondly, the Libyan intervention demonstrated this doctrine may give preference to regime change rather to humanitarian concerns after NATO instigated the downfall of Colonel Muammar Gaddafi.[79] This myopic and messy approach to the conflict left behind a failed state embroiled in sectarian violence, terrorist insurgency and human trafficking.[80] This failed Libyan experiment cast serious aspersions on this principle as budding concept in international humanitarian law thereby inhibiting its application in other jurisdictions like Syria.[81] Despite the obvious challenges the adoption of R2P played a significant role in charting the course towards redressing gross violation of human rights violation during armed conflict.

2. The Syrian Conflict

2.1. Brief History of Syria

The origin of the modern Syrian state is broadly traced to the great Ottoman Empire that spanned across the entire Middle East region.[82] After the defeat during

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75 Eve Massingham, *Military Intervention for Humanitarian Purposes: Does the Responsibility to Protect Doctrine Advance the Legality of the Use of Force for Humanitarian Ends?*, 91(876) International Review of the Red Cross 803, 815 (2009).

76 Karina Sangha, *The Responsibility to Protect: A Cosmopolitan Argument for the Duty of Humanitarian Intervention*, Expressions: The Journal of the Canadian Political Science Students' Association (2012), at 2 (Jun. 5, 2018), available at http://web.uvic.ca/~cpssa/articles/2012winter001.pdf.

77 Ramesh Thakur, *The Responsibility to Protect at 15*, 92(2) International Affairs 415, 418 (2016).

78 Kirsten Ainley, *The Responsibility to Protect and the International Criminal Court: Counteracting the Crisis*, 91(1) International Affairs 37, 41 (2015).

79 Jeffrey Bachman, *R2P's "Ulterior Motive Exemption" and the Failure to Protect in Libya*, 3(4) Politics and Governance 56, 60 (2015).

80 Emin Poljarevic, *Libya: A Case Study of a Failed Revolution*, 2nd International Conference on Social Sciences, 2–3 April 2016, Istanbul, Turkey, at 73, 75.

81 Rafał Tarnogórski, *Libya and Syria: Responsibility to Protect at a Crossroads*, 26 The Polish Institute of International Affairs 1, 4 (2012).

82 American Society of International Law, *French Mandate for Syria and Lebanon*, 17(3) American Journal of International Law 177, 177 (1923).

World War I this vast empire collapsed and the League of Nations granted France the mandate rule over the Syrian territory.[83] This imperialist ruling ignited the nationalist armed struggle which led to independence in April 1946.[84] Nonetheless, this autonomy was momentary since the country was beset with both internal and external conflicts. Domestically, the ruling Arab Socialist Baath regime began crumbling under the weight of political infighting leading to a string coups and countercoups that ultimately propelled the Minister of Defense Hafez al-Assad into power.[85] Despite being an Alawite minority Hafez built an omnipotent political dynasty that dominated the country for decades.[86] Externally, the country was entangled in endless and volatile conflicts with its arch-nemesis Israel, a position which was aggravated by the humiliating defeat during the six day war.[87] However, Assad redeemed his image when the Arabs triumphed during the Yom Kippur war by forcing Israel to cede the Sinai Peninsula to Egypt and thereafter peace accords at Camp David.[88]

Despite these challenges Hafez cemented his iron fisted rule for 29 years until his death in 2000 when he was succeeded by his son Bashar. The introverted western oriented ophthalmologist became the polished image of a modern and reformed Syria compared to his abrasive ultra conservative father.[89] During his first term he embarked on ambitious reforms including liberalising the economy, secularising the country and releasing political prisoners.[90] Nonetheless, these changes did not appease some factions leading to the resurgence of political dissidence supported by the western countries.[91] Noteworthy, the demographics of Syria is that of a predominantly Sunni Muslim country with significant pockets of Shiite, Christian

[83] Ayse Tekdal Fildis, *The Troubles in Syria: Spawned by French Divide and Rule*, 18(4) Middle East Policy Council 129, 130 (2011).

[84] Amanda Pitrof, *Too Many Cooks in the Kitchen: Examining the Major Obstacles to Achieving Peace in Syria's Civil War*, 15(1) Pepperdine Dispute Resolution Law Journal 157, 160 (2015).

[85] Malcolm H. Kerr, *Hafiz Asad and the Changing Patterns of Syrian Politics*, 28(4) International Journal 689, 701 (1973).

[86] Uğur Ümit Üngör, *Mass Violence in Syria: A Preliminary Analysis*, 3 New Middle Eastern Studies 1, 3 (2013).

[87] Kardo Karim Rached Mohammad, *The Six-Day War and Its Impact on Arab and Israeli Conflict*, 7(2) History Research 90, 91 (2007).

[88] Louis Kriesberg, *Negotiating the Partition of Palestine and Evolving Israeli-Palestinian Relations*, 7(1) Brown Journal of World Affairs 63, 68 (2000).

[89] Najib Ghadbian, *The New Asad: Dynamics of Continuity and Change in Syria*, 55(4) Middle East Journal 624, 626 (2001).

[90] Louise Arimatsu & Mohbuba Choudhury, *The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya*, Chatham House (March 2014) (Jun. 5, 2018), available at https://www.chathamhouse.org/sites/default/files/home/chatham/public_html/sites/default/files/20140300ClassificationConflictsArimatsuChoudhury1.pdf.

[91] Jānis Bērziņš, *Civil War in Syria: Origins, Dynamics, and Possible Solutions*, National Defence Academy of Latvia Center for Security and Strategic Research (August 2013) (Jun. 5, 2018), available at https://ru.scribd.com/document/277150579/Berzins-pdf.

and Alawite populations.[92] Despite this cultural and religious admixture the country managed to surmount the sectarian aggression and remained relatively peaceful compared to its neighbours.

2.2. Origins of the Syrian Civil War

On 17 December 2010 Mohamed Bouazizi young Tunisian street vendor self-immolated in defiance of the rampant corruption and repression that bedeviled the country.[93] What began as personal protest sparked off a radical wave of revolution that forced the long time Tunisian autocrat Ben Ali to cede power and seek exile in Saudi Arabia.[94] This movement later spread like wild fires across the entire Middle East region, leading to the downfall of long term rulers in Egypt, Libya and Yemen.[95] In the Syrian context the trigger cause of the demonstrations is fraught with speculation and conspiracy theories. However, it is alleged the protests began after a group of juveniles' scrawled anti-government graffiti in the town of Daraa.[96] Another viewpoint argues the uprising was caused by a combination of sectarian violence and religious extremism fuelled by external forces.[97] Gradually, the clash between security forces and the demonstrators exploded into a full blown civil war that left close to 100,000 people dead and millions displaced with most of them migrating to Europe.[98]

By and large, the western nations blamed President Assad for the atrocities while Russia, China and Iran remained highly skeptical of this sweeping indictment.[99] This platitude hit a peak in March 2013 after a chemical gas attack in Southern town of Khan al-Assal which left 25 dead and scores injured. The regime denied these allegations since it had submitted a comprehensive report to the UN

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92 Esther van Eijk, *Pluralistic Family Law in Syria: Blane or Blessing?*, 2 Electronic Journal of Islamic and Middle Eastern Law 73, 73 (2014).

93 Matt J. Duffy, *Arab Media Regulations: Identifying Restraints on Freedom of the Press in the Laws of Six Arabian Peninsula Countries*, 6 Berkeley Journal of Middle Eastern and Islamic Law 1, 1 (2014).

94 Zoltan Barany, *Comparing the Arab Revolts: The Role of the Military*, 22(4) Journal of Democracy 28, 28 (2011).

95 Jordan J. Paust, *International Law, Dignity, Democracy and Arab Spring*, 46(1) Cornell Journal of International Law 1, 5 (2013).

96 Patrick B. Grant, *Islamic Law, International Law, and Non-International Armed Conflict in Syria*, 35 Boston University International Law Journal 1, 4 (2017).

97 Artur Malantowicz, *Civil War in Syria and the 'New Wars' Debate*, 5(3) Amsterdam Law Forum 52, 55 (2013).

98 Joseph Klinger, *Counterintervention on Behalf of the Syrian Opposition? An Illustration of the Need for Greater Clarity in the Law*, 55(2) Harvard Journal of International Law 483, 484 (2012).

99 Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 4 June 2013 (Jun. 5, 2018), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-23-58_en.pdf.

denying possession of any chemical weapons.[100] Furthermore, the UN prepared a comprehensive investigation report which confirmed the use of the chemical weapons but could not determine the perpetrator.[101] This incident was followed by a series recurrent gas attacks scattered across the country which led to the UK and France attributed to the regime.[102] This prompted President Obama to issue stern warning to the Syrian government of "dire consequences" should it "cross the line."[103] Conversely, Russian leader Vladimir Putin adopted a more objective and cautious approach by demanding independent and credible investigations by the UN into the alleged incidents.[104] This back and forth failed to avert the conflict which continued to claim more civilian casualties thereby prompting the Human Rights Council to classify the situation as "non-international armed conflict."[105]

2.3. Non-State Parties to the Syrian Conflict

2.3.1. The Syrian Rebel Movement/Free Syrian Movement

This resistance comprises of several anti-Assad movements supported by countries from the West and Middle East. The major groups include the National Coordination Committee (NCC) and the Syrian National Council (SNC). The former is a secular and political movement seeking democratic reforms while the latter is affiliated with the Muslim brotherhood and is more militant in nature.[106] This insurgent movement is buttressed by the "White helmet paramilitary" which comprises of mercenaries funded by NATO, Turkey and Saudi Arabia.[107] This movement merged

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100 United Nations Security Council, Note Verbale dated 7 November 2005 from the Permanent Mission of the Syrian Arab Republic to the United Nations addressed to the Chairman of the Committee, 10 November 2005 (Jun. 5, 2018), available at http://dag.un.org/bitstream/handle/11176/23813/S_AC.44_2004_(02)_70_Add.3-EN.pdf?sequence=3&isAllowed=y.

101 Petra Perišić, *Implications of the Conflicts in Libya and Syria for the "Responsibility to Protect" Doctrine*, 67(5) Zbornik PFZ 783, 799 (2017).

102 René Pita & Juan Domingo, *The Use of Chemical Weapons in the Syrian Conflict*, 2 Toxic 391, 393 (2014).

103 Jillian Blake & Aqsa Mahmud, *A Legal "Red Line"?: Syria and the Use of Chemical Weapons in Civil Conflict*, 61 UCLA Law Review 244, 245 (2013).

104 Ole Solvang, *Putin Calls for Investigations of Chemical Attack in Syria*, Human Rights Watch, 11 April 2017 (Jun. 5, 2018), available at https://www.hrw.org/news/2017/04/11/putin-calls-investigations-chemical-attack-syria.

105 Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 16 August 2012, para. 143 (Jun. 5, 2018), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-50_en.pdf.

106 Sertif Demir & Carmen Rijnoveanu, *The Impact of the Syria Crisis on the Global and Regional Political Dynamics*, 8(1) Journal of Turkish World Studies 55, 58 (2013).

107 Christina Lin, *White Helmets – US Hybrid Warfare For Regime Change Operations?*, ISPSW Strategy Series: Focus on Defense and International Security (October 2016) (Jun. 5, 2018), available at http://www.ispsw.com/wp-content/uploads/2016/10/456_Lin-1.pdf.

into a formidable rebellion that launched a series of brutal attacks on both security forces and pro-regime civilians. For instance in 2014 the rebels shelled the pro-regime neighbourhood of Mahatta in Daraa killing dozens of unarmed civilians.[108]

2.3.1.1. Legal Implication of the Syrian Rebel Movement

Despite the possible culpability on both sides western countries and human rights organisation have swiftly and repeatedly condemned the Assad regime for the atrocities while overlooking the actions of rebels.[109] A case in point is a human rights council report accused the regime of summary execution, torture and illegal detention despite the situation being classified as armed conflict.[110] In *Prosecutor v. Dusko Tadic* the International Criminal Tribunal on former Yugoslavia (ICTY) stated:

> An armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state.[111]

This implication of this conclusion means the parties to the conflict including the rebels are bound by humanitarian obligations as underscored in common Art. 3 of the Geneva conventions.[112] As Antonio Cassese notes the spirit behind the protocol is protecting the unarmed civilian population (non-combatants) from the atrocities of internal armed conflict by holding the participants accountable for their actions.[113]

Moreover, this obligation to avert the atrocities is non-derogable irrespective of whether the parties are non-signatories to the relevant conventions.[114] This holding was amplified in the *Tadic case* where the appellate chamber of the ICTY stated:

> …an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and

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[108] Kheder Khaddour, *The Assad Regime's Hold on the Syrian State*, Carnegie Middle East Center (July 2015) (Jun. 5, 2018), available at http://carnegieendowment.org/files/syrian_state1.pdf.

[109] Leila Nadya Sadat, *Genocide in Syria: International Legal Options, International Legal Limits, and the Serious Problem of Political Will*, 5 Impunity Watch Law Journal 1, 1 (2015).

[110] Human Rights Council, Report of the Human Rights Council on Its Seventeenth Special Session, 22 August 2011 (Jun. 5, 2018), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/ColSyria/ResS17_1.pdf.

[111] *Prosecutor v. Dusko Tadic aka "Dule" (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction)*, IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995, para. 96.

[112] *Id*.

[113] Antonio Cassese, *The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law*, 3 UCLA Pacific Basin Law Journal 55, 86 (1984).

[114] Andrew Clapham, *Human Rights Obligations of Non-State Actors in Conflict Situations*, 88(863) International Review of the Red Cross 491, 493 (2006).

> organized armed groups or between such groups within a State… international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[115]

Similar sentiments were later echoed in *Prosecutor v. Sam Hinga Norman* of where the appeals chamber of the Special Court for Sierra Leone stated:

> It is well settled that all parties to an armed conflict, whether states or non-state actors are bound by international humanitarian law, even though only states may become parties to international treaties.[116]

In the view of the foregoing legal principles the Syrian rebels are equally culpable for the atrocities committed during the course of the conflict.

2.3.2. The Islamic State of Iraq and Syria/ISIS/Islamic State/Daesh

The Islamic State is a sadistic and ultra-fundamentalist group that intends to establish a Salafist caliphate across the region. A comprehensive study carried out by the Brookings institution indicates the IS is a caricature mini-state complete with rules and regulations defined by hard line *Shariah* law.[117] These archaic norms are built upon capital and corporal punishments which forced a majority of the civilians to flee northwards. Furthermore it is driven by gross misogyny that proscribes women from economic participation through destruction of businesses, markets and farms.[118]

Its' origin is attributed to the rogue Jordanian Mujahideen Abu Musab al-Zarqawi who commanded the Al-Qaeda faction in Iraq.[119] After a string of guerilla and suicide bomb attacks on the U.S. and Iraqi forces he merged the group together with other insurgencies to form the Islamic State of Iraq (ISI). After Zarqawi was killed by a U.S. airstrike in 2006 Abu Bakr al-Baghdadi assumed leadership of the group.[120] The fiery

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115 *Prosecutor v. Dusko Tadic*, *supra* note 111, para. 70.

116 *Prosecutor v. Sam Hinga Norman* (Case No. SCSL-2004-14-AR72(E)), Decision on preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, para. 22.

117 Mara Revkin, *The Legal Foundations of the Islamic State*, The Brookings Project on U.S. Relations with the Islamic World, Analysis Paper No. 63, 12 July 2016 (Jun. 5, 2018), available at https://www.brookings.edu/wp-content/uploads/2016/07/Brookings-Analysis-Paper_Mara-Revkin_Web.pdf.

118 Marwa Shalaby & Ariana Marnicio, *The Effect of the Presence, Duration, and Intensity of Armed Conflict on Women's Formal and Informal Economic Participation: A Case Study of the 2003 Iraqi War and the Recent Rise of the Islamic State in Iraq and Syria*, 3 Journal of Women and Human Rights in the Middle East 5, 13 (2015).

119 Chanchal Kumar, *Islamic State of Iraq and Syria (ISIS) a Global Threat: International Strategy to Counter the Threat*, 1(4) Journal of Social Sciences and Humanities 345, 347 (2015).

120 *Id*.

and eloquent cleric used his sublime oratory skills to recruit volunteers from across the world thereby creating a large militia which ultimately conquered the city of Mosul.[121] This expansion was subsequently aggravated by the Arab Spring which left a significant power vacuum for encroachment into Egypt, Libya and Yemen.[122] After the Syrian crisis, it operated through an affiliate organisation called "Al-Nusra Front" which later merged with ISI to form the Islamic State of Iraq and Syria (ISIS).[123] It is widely believed due to its' Sunni underpinnings ISIS wanted to use Syria as the platform for penetrating the impregnable Shiite crescent of Lebanon and Iran.[124]

Apart from the ultra-religious fanaticism, ISIS is feared for its signature medieval barbarism which includes suicide bombings, beheading of infidels, enslaving women, public execution of sexual minorities and forceful conscription of child soldiers. The group is also blamed for the rape, enslavement, trafficking and honour killings of Yazidi women and girls who are derided as unclean and sub-human.[125] Surprisingly, the sinister and callous insurgent group continues to attract young volunteer fighters from across the world with most of them coming from Western Europe and Australia.[126] This international recruitment stands on the anti-western sentiments that engulfed the region after the U.S. led invasion of Afghanistan and Iraq.[127] Under the command of Baghdadi Daesh unleashed brutal attacks on both the Syrian army and civilians through suicide bombings and beheading of the state soldiers.

2.4. The Right to Protect and the Syrian Conflict

The Syrian conflict presented a tough and awkward situation for the UN to implement the right of protect. Firstly, the contentious Libyan intervention had sullied the status of this doctrine after NATO clamoured for the downfall and execution of Muammar Gaddafi.[128] This discrepancy culminated into mounting skepticism against

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121 Kumar 2015.

122 *Id*.

123 David Sverdlov, *Rape in War: Prosecuting the Islamic State of Iraq and the Levant and Boko Haram for Sexual Violence Against Women*, 50 Cornell Journal of International Law 333, 335 (2017).

124 Michael Stathis, *ISIS, Syria, and Iraq: The Beginning of a Fourth Gulf War?*, 8(1) Critical Issues in Justice and Politics 1, 11 (2015).

125 Lisa Davis, *Iraqi Women Confronting ISIL: Protecting Women's Rights in the Context of Conflict*, CUNY Academic Works (2016), at 101, 107 (Jun. 5, 2018), available at https://academicworks.cuny.edu/cgi/viewcontent.cgi?referer=https://www.google.ru/&httpsredir=1&article=1120&context=cl_pubs.

126 Tanya Mehra, *Foreign Terrorist Fighters: Trends, Dynamics and Policy Responses*, ICCT Report (December 2016), at 3, 5 (Jun. 5, 2018), available at https://icct.nl/wp-content/uploads/2016/12/ICCT-Mehra-FTF-Dec2016-2.pdf.

127 Tom Pettinger, *What is the Impact of Foreign Military Intervention on Radicalization?*, 5 Journal for Deradicalization 92, 96 (2015–2016).

128 Sarah Brockmeier et al., *The Impact of the Libya Intervention Debates on Norms of Protection*, 30(1) Global Society 113, 126 (2016).

this doctrine which was perceived as a travesty for regime change.[129] Furthermore, there was profound optimism post-Gaddafi Libya would evolve in the beacon of liberal democracy in the Arab world. However, this optimism turned ominous after the country disintegrated into a dystopian state haunted by terrorist insurgency, sectarian violence and human trafficking.[130]

Subsequently, when the Security Council debated the resolution to intervene in Syria, Russia and China voted against the suggestion for fear of replicating the Libyan failure in the Middle East. These divergent viewpoints split the council right down the middle pitting the USA, France and UK supporting the rebel movement while Russia and China affirming their support for the regime.[131] The latter states advocated for political and diplomatic solution that included President Assad being a legitimate stakeholder. They further argued military intervention would be analogous to infringing upon the sovereignty and domestic issues of Syria.[132] However, after the terrorist attack in Paris, France on 13 November 2015 the UN Security Council passed a resolution calling on the member states to take all necessary measures to avert future attacks by the Islamic State.[133] This resolution known as "necessary measures" offered the council the wide latitude to use force against ISIS which posed an existential threat to global peace and stability.[134] However, since there was no consensus among the members of the Security Council, each faction decided to tackle the problem in a manner that befitted their agenda.

3. The Russian Intervention in Syria

3.1. Brief Background of President Vladimir Putin's Ascension to Power

President Vladimir Putin is one of the most enigmatic and dominant figure in contemporary global politics. The tough talking judo *sensei* began his career as a KGB agent stationed in Dresden, East Germany during the Cold War. After the collapse of the Soviet Union he meandered his way through local politics rising to the level of Deputy Mayor of his native city of St. Petersburg. In 1998 his political

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129 Chelsea O'Donnell, *The Development of the Responsibility to Protect: An Examination of the Debate over the Legality of Humanitarian Intervention*, 24 Duke Journal of Comparative & International Law 558, 576 (2014).

130 Perišić 2017, at 804.

131 Andrew Garwood-Gowers, *The Responsibility to Protect and the Arab Spring: Libya as the Exception, Syria as the Norm?*, 36(2) University of New South Wales Law Journal 594, 600 (2013).

132 Halliyade 2016, at 216.

133 United Nations, Unanimously Adopting Resolution 2253 (2015), Security Council Expands Sanctions Framework to Include Islamic State in Iraq and Levant, 7587th Meeting, 17 December 2015 (Jun. 5, 2018), available at https://www.un.org/press/en/2015/sc12168.doc.htm.

134 Patrick Terry, *Germany Joins the Campaign against ISIS in Syria: A Case of Collective Self-Defence or Rather the Unlawful Use of Force?*, 4(1) Russian Law Journal 26, 28 (2016).

career took a giant leap after he was appointed to head the Russian intelligence, then renamed Federal Security Service of the Russian Federation (FSB).[135] This position granted him leverage to forge strategic political networks that propelled him to the Premiership in August 1999 after the aging and ailing Yeltsin anointed him as his successor. This political change offered Russia the perfect window of opportunity to reclaim its international image in a unipolar world controlled by the USA. The Yeltsin rapprochement with west had sacrificed at considerable expense Russia's national pride and hegemony.[136] For example he abandoned the "parity doctrine" which forced Russia to relinquish its nuclear rearmament ambition of being at par with the Americans. Furthermore, his ambition to remodel the economy around the western oriented free market system aggrieved both the nationalist and communist who lampooned him as the "America's yes man."[137] At the turn of the millennium Yeltsin resigned as President thereby paving way for Putin's leadership which intended to build Russia's image on the geopolitical platform.[138]

3.2. Russia and Military Intervention

After World War II the Soviet Union became one of the permanent members of the UN Security Council. After the disintegration of the Soviet Union in 1991, Russia inherited the Soviet seat in the Security Council with Boris Yeltsin elected President.[139] Although Yeltsin was ambivalent towards reinstating the Russian geopolitical dominance, his successor was determined to forge strategic alliances with several countries in Eastern Europe, Asia and South America. Upon embarking on this volatile mission Putin found himself ensnared in a geopolitical impasse with NATO. This military organisation was aggressively expanding eastwards after engulfing significant portions of Eastern European countries including Poland, Hungary and Czech Republic.[140] This global confrontation hit a peak after Russia's unilateral military intervention in Georgia in support of the renegade regions of South Ossetia and Abkhazia.[141] The West assailed Russia for violating its' international

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135 Padma Desai, *Russian Retrospectives on Reforms from Yeltsin to Putin*, 19(1) Journal of Economic Perspectives 87, 91 (2005).

136 Robert H. Donaldson, *Boris Yeltsin's Foreign Policy Legacy*, 7(2) Tulsa Journal of Comparative & International Law 285, 308 (1999).

137 Andrei Shleifer & Daniel Treisman, *A Normal Country: Russia after Communism*, 19(1) Journal of Economic Perspective 151, 153 (2005).

138 Peter Rutland, *Putin's Path to Power*, 16(4) Post-Soviet Affairs 313, 318 (2000).

139 Yehuda Z. Blum, *Russia Takes Over the Soviet Union's Seat at the United Nations*, 3 European Journal of International Law 354, 356 (1992).

140 Amiran Kavadze & Tina Kavadze, *NATO Expansion to the East: Georgia's Way to NATO Membership, Perspectives and Challenges*, 3(2) Journal of Social Sciences 21, 22 (2014).

141 Gregory Hafkin, *The Russo-Georgian War of 2008: Developing the Law of Unauthorized Humanitarian Intervention after Kosovo*, 28 Boston University Law Journal 219, 224 (2010).

law obligation by invading and occupying a foreign sovereign state. More specifically, the western countries read mischief in Russia's "peacekeeping efforts" after it supported the minority Abkhaz resistance against the Georgian army.[142] Nonetheless, the deployment of Russian forces in the region was well within the international legal order as it was strictly restricted within the disputed regions. Furthermore, the Georgian intervention was the final resort after Russia had relentlessly tried to engage all stakeholders in resolving the dispute diplomatically.[143]

This geopolitical antagonism was exacerbated in 2013 after the Crimean region of Ukraine held a referendum and unanimously voted to join the Russian Federation.[144] However, the west ignored the underlying self-determination concern and viewed it as Russia' annexation of Ukraine.[145] This prompted President Obama and other western countries to impose the disingenuous sanctions against Russia as countermeasure the Crimean "annexation."[146] In 2014, the former American Secretary of Defense Robert Gates labeled Putin the biggest threat to global stability who was determined to avenge the west for the collapse of Soviet Union.[147] He then proposed a continuum of stringent measures to constrain this objective including substituting Russia as the biggest supplier of oil and gas in Western Europe.[148] Despite the countervailing opposition from the NATO Putin's leadership has reinstated Russia as a force to reckon in the geopolitical landscape.[149]

3.3. Russia and Syrian Intervention

The warm relationship between Russia and Syrian goes back to the Cold War era when the Soviet Union supported Syria during its perennial conflicts with Israel.[150]

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142 Noelle M. Shanahan Cutts, *Enemies Through the Gates: Russian Violations of International Law in the Georgia/Abkhazia Conflict*, 40(1) Case Western Reserve Journal of International Law 281, 294 (2007–2008).

143 Nicolai N. Petro, *Legal Case for Russian Intervention in Georgia*, 32(5) Fordham International Law Journal 1524, 1526 (2008).

144 Khazar Shirmammadov, *How Does the International Community Reconcile the Principles of Territorial Integrity and Self-Determination? The Case of Crimea*, 4(1) Russian Law Journal 61, 63 (2016).

145 Ines Gillich, *Illegally Evading Attribution? Russia's Use of Unmarked Troops in Crimea and International Humanitarian Law*, 48 Vanderbilt Journal of Transnational Law 1191, 1198 (2015).

146 John J.A. Burke, *Economic Sanctions Against the Russian Federation are Illegal under Public International Law*, 3(3) Russian Law Journal 126, 129 (2015).

147 Robert M. Gates, *Putin's Challenge to the West: Russia Has Thrown Down a Gauntlet That is Not Limited to Crimea and Even Ukraine*, The Wall Street Journal, 25 March 2014 (Jun. 5, 2018), available at https://www.wsj.com/articles/robert-gates-putins-challenge-to-the-west-1395780813.

148 *Id*.

149 Nazir Hussain & Fatima Shakoor, *The Role of Leadership in Foreign Policy: A Case Study of Russia under Vladimir Putin*, 7(1) IPRI Journal 1, 13 (2017).

150 Andrej Kreutz, *Syria: Russia's Best Asset in the Middle East*, Russian NIS Center, 22 November 2010 (Jun. 5, 2018), available at https://www.ifri.org/sites/default/files/atoms/files/kreutzengrussiasyrianov2010.pdf.

With regards to the present conflict Moscow defended the Assad government arguing it was using proportionate force against armed militants targeting both civilians and public infrastructure.[151] Furthermore, Russia was averse to any form of regime change arguing President Assad was the legitimate leader of the country.[152] This affirmation intended to avert the likelihood of replicate another Libya where NATO used R2P as the perfect vehicle for regime change.[153] Consequently, the Russian mission to the UN successfully vetoed a series of resolutions that intimated military intervention in Syria.[154] A majority of these resolutions were geared towards punishing the government while conveniently overlooking the atrocities committed by the various rebel splinter groups.[155]

In 2015 President Assad requested Russian military and financial assistance in counteracting the incursion by domestic and foreign parties.[156] This military intervention was three dimensional in nature by pooling together air strikes, naval support in Tartus and reinforcing the Arab Syrian army with Russian ground troops.[157] The Russian military campaign became a success after aiding the regime in reclaiming the Southern city of Aleppo from ISIS and rebels.[158] In this case the Russian intervention fits neatly within the overall objectives of the Right to Protect. In terms of Pillar 1 Russia was firmly committed to addressing the root causes of the conflict by proposing a round table discussion among the various parties. This mechanism would have addressed the root causes of the conflict thereby curtailing the situation from culminating into a full blown civil war. However, due to the hard stance adopted by the west it was virtually implausible for parties to attempt this any reconciliation which led to other means including the use of force. Conversely, Pillar 2 demands capacity building as a means of deescalating the gross violation of human rights.[159] This stipulates the domestic

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151 Garwood-Gowers 2013, at 600.

152 Nathalie Tocci, *Europe, the United States and Global Human Rights Governance: The Responsibility to Protect in Libya and Syria*, The Transatlantic Relationship and the Future Global Governance, Working Paper No. 42 (October 2014) (Jun. 5, 2018), available at http://www.iai.it/sites/default/files/tw_wp_42.pdf.

153 Garwood-Gowers 2013, at 613.

154 United Nations Security Council, 6627th Meeting, 4 October 2011 (Jun. 5, 2018), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.6627.

155 *Id.* at 3–5.

156 Markus Kaim & Oliver Tamminga, *Russia's Military Intervention in Syria*, SWP Comment 2015/C 48 (November 2015).

157 Maks Czuperski et al., *Distract, Deceive, Destroy: Putin at War in Syria*, The Atlantic Council (April 2016) (Jun. 5, 2018), available at http://publications.atlanticcouncil.org/distract-deceive-destroy/assets/download/ddd-report.pdf.

158 James Sladden et al., *Russian Strategy in the Middle East*, Rand Corporation (November 2015) (Jun. 5, 2018), available at https://www.rand.org/pubs/perspectives/PE236.html.

159 Ramesh Thakur, *The Responsibility to Protect: Retrospect and Prospect* in *Responsibility to Protect and Sovereignty* 209 (C. Sampford & R. Thakur (eds.), Farnham: Ashgate, 2013).

government should be supported to the point of assuming control whereupon those responsible for the atrocities should be held culpable.[160] Furthermore, this obligation demands spontaneous reaction to emancipate civilians from the atrocities of armed conflict. By supporting the Syrian government Russia bolstered the fight against ISIS and other radical groups responsible for the atrocities in the conflict thereby restoring normalcy in the country.[161] Pillar three entails the implementation of post-conflict reconstruction and reconciliation as means of restoring rule of law and normalcy after the conflict. President Putin has taken the personal initiative of mediating peace talks among the various warring factions as means of restoring peace and stability in the fractured country. However, there is legitimate concern his impartiality and objectivity may be clouded because of his close proximity to President Assad.[162] In spite of these concerns President Putin has reiterated his support for tripartite peace talks overseen by a third party including the UN.[163]

In the same vein, Russia's "invited intervention" respects Syria's sovereignty and territorial integrity since it acted at the behest of the legitimate government.[164] This point is anchored on the fact that President Assad being the legitimate authority of the country should be supported in his quest to restore order. According to Jean d'Aspremont in his paper "Legitimacy of Governments in the Age of Democracy" the legality of any government is determined from both internal and external perspectives.[165] Internal factor imply the regime is duly recognised by the majority of the people who comply with its public policies and laws. Furthermore, a normative interpretation of this concept implies the ruler has the power to impose sanction on the norms and behavior of the subjects within its territories.[166] Conversely, the litmus test for determining external recognition is how the regime relates with the governments of other countries. In superimposing this school of thought in the Syrian context, it is cogent to argue President Assad is

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160 Alise Coen, *R2P, Global Governance, and the Syrian Refugee Crisis*, 19(8) International Journal of Human Rights 1044, 1047 (2015).

161 Anshel Pfeffer, *Two Years in Syria: Putin's Success Story*, Haaretz, 22 September 2017 (Jun. 5, 2018), available at https://www.haaretz.com/middle-east-news/two-years-in-syria-putin-s-success-marred-by-ukrainian-debacle-1.5452162.

162 Assaad al-Achi, *Russia's Syria Talks in Sochi are Destined for Failure*, Al Jazeera, 26 January 2018 (Jun. 5, 2018), available at http://www.aljazeera.com/indepth/opinion/russia-syria-talks-sochi-destined-failure-180126154408884.html.

163 Peter Heinlein, *Trump, Putin Agree to Support UN in Syrian Peace Process*, Voice of America, 21 November 2017 (Jun. 5, 2018), available at https://www.voanews.com/a/trump-putin-talk-syrian-peace-process/4128537.html.

164 Christian Henderson, *The Provision of Arms and "Non-lethal" Assistance to Governmental and Opposition Forces*, 36(2) University of New South Wales Journal 642, 650 (2013).

165 Jean d'Aspremont, *Legitimacy of Governments in the Age of Democracy*, 38 New York University Journal of International Law and Politics 878, 883 (2006).

166 Ian Hurd, *Legitimacy and Authority in International Politics*, 53(2) International Organization 379, 381 (1999).

the legitimate leader. This is because he enjoys the unwavering support of the Syrian people especially after his re-election in 2004 compared to the rebels and the Islamic state who are relegated to their controlled territories. Internationally, President Assad is widely regarded as the leader of the country by both his allies and adversaries. In light of the foregoing legal principles Russia intervention cannot be classified as illegal use of force against a sovereign state.

4. Legal Consequences of Western Intervention in Syria

4.1. The Concern about Aggression and State Sovereignty

The Russian intervention in Syria has been opposed especially the Western countries who are determined to topple the Assad regime. However, a cursory glance of the NATO led mission in Syria demonstrates a false moral equivalence between Assad and ISIS as equal perpetrators of the conflict. This erroneous approach has prompted the west to support the rebels as the means of toppling the regime. However, this approach is tantamount to form of aggression against the sovereignty and integrity of the Syria. In his opening address before the Nuremberg tribunal, former U.S. Attorney General and Supreme Court Judge Robert H. Jackson defined aggression to include:

> Provision of support to armed bands formed in the territory of another state, or refusal, notwithstanding the request of the invaded state, to take in its own territory measures in its power to deprive those bands all assistance or protection.[167]

Secondly, supporting the rebel movement instead of the regime is antithetical to the principle of sovereignty and territorial integrity under international law. As Olivier Corten and Vaios Koutroulis note there is no general rule in international law that permits any state to support rebels in overthrowing a government, even if it is responsible for gross violation of human rights.[168] The Assad regime is the legitimate government of Syria which pursuant to the UN Charter can only be attacked for purpose of self-defense purposes. This position is echoed by the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States* which stipulates:

> No state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state…

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[167] Christi Scott Bartman, *Lawfare and the Definition of Aggression: What the Soviet Union and Russian Federation Can Teach Us*, 43(1) Case Western Reserve Journal of International Law 423, 425 (2010).

[168] Olivier Corten & Vaios Koutroulis, *The Illegality of Military Support to Rebels in the Libyan War: Aspects of Jus Contra Bellum and Jus in Bello*, 18(1) Journal of Conflict and Security Law 59, 63 (2013).

> No state shall organise, assist, foment, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another state, or interfere in the civil strife in another state… Every state has the inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another state…[169]

In extrapolating this point to the R2P Hideo Yamagata observes it granted foreign states the power to support the host state in protecting the populace within its' territories unless there is compelling evidence of gross laxity or complicity to the atrocities.[170] In this case the lack of persuasive evidence of Syrian government being complicit to the atrocities implies the intervening state has the duty to respect and preserve the sovereignty of host country.

By the same token the principle of sovereignty and territorial integrity were well enunciated by the ICJ in *Nicaragua v. USA*.[171] In this case the socialist Sandinista government of Nicaragua accused the USA of supporting and training renegade groups of right wing paramilitaries based in Honduras called the *contras*. These groups launched systematic campaigns of civilian terror which caused widespread carnage and displacement. It was later alleged the *contras* had committed numerous atrocities including rape, torture, assassinations, civilian executions and displacement against perceived Sandinista sympathisers. Subsequently, Nicaragua argued by providing material and financial support to the *contras*, USA should be held liable for the atrocities. However, the U.S. raised a preliminary objection challenging the authority of the ICJ to adjudicate the matter. It argued the 1946 declaration of consent to the compulsory jurisdiction of the court could not apply to the court.[172] Nonetheless, the court dismissed the objection arguing Art. 36(5) of the Statute clothed it with the unfettered jurisdiction to adjudicate the matter.[173]

Subsequently, the critical issue was whether by funding of the contras the United States had violated customary international law obligation to respect the domestic

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169 United Nations General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Resolution 2625 (XXV), 24 October 1970 (Jun. 5, 2018), available at http://www.un-documents.net/a25r2625.htm.

170 Hideo Yamagata, *Responsibility to Protect Democracy as a Robust International Legal Order*, 7 Ritsumeikan International Affairs 21, 26 (2009).

171 *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. 1.

172 Thomas J. Pax, *Nicaragua v. United States in the International Court of Justice: Compulsory Jurisdiction or Just Compulsion?*, 8(2) Boston College of International and Comparative Law Review 471, 474 (1985).

173 This clause states that "Declarations made under Article 36(5) of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with the terms."

affairs of Nicaragua. The court responded in the affirmative by holding the USA responsible for interfering in the internal affairs of Nicaragua contrary to the UN Charter. The court went ahead and compartmentalised the nature of infringement into *direct control* and *indirect control*. *Direct control* applies the groups which are funded and controlled by a foreign state while *indirect control* pertains to groups that exercise a degree of autonomy. In the latter phase there must be sufficient evidence to prove the controlling state was in control and aware of the operations that culminated into the offences. In this case the contras fell within the second group and the USA could not be held culpable for their actions since it did not control their activities. By adopting this complex reasoning the court invoked such high standards that insulated the funding state from criminal liability of supporting armed movements in foreign jurisdictions. The USA being the commanding organ ought to have anticipated the likelihood of the contras using the funds, artilleries and tactics to commit atrocities against innocent Nicaraguans. In light of this verdict, there is an inextricable connection between the use of force and the doctrine of R2P since it defines the parameters of military purpose strictly for protecting the civilians.[174] However, if this sacrosanct objective is substituted with regime change then it nullifies the humanitarian purpose thereby necessitating from criminal sanctions.

In the *Oil Platforms case* the Islamic Republic of Iran sued the United States for breach of sovereignty and freedom of commerce after the bombing its oil platforms near the coast of Bahrain.[175] The U.S. argued self-defense under Art. 51 of the UN Charter after two of its merchant vessels were allegedly sunk by Iranian firepower within the vicinity of the Bahraini coast. The court held the U.S. reaction was unjustified since it failed to meet the threshold of necessity or self-defense under international law. However, the action did not amount to breach of freedom of commerce due to the inanimate existence of commercial relationship between the two countries which negated the claim for reparations.[176]

This legal issue resurfaced in the *Armed Activities case* where the Democratic Republic of Congo (DRC) lodged a memorial against Uganda.[177] The gravamen of this dispute began when President Laurent Desire Kabila issued a moratorium demanding Uganda and Rwanda to withdraw all their troops stationed in the Eastern border town of Goma. In retrospect, the latter two countries supported his armed struggle that led to the overthrow of longtime Kleptocrat President Mobutu Sese

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174 Marcelo Kohen, *The Principle of Non-Intervention 25 Years after the Nicaragua Judgment*, 25(1) Leiden Journal of International Law 157, 160 (2012).

175 *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, 2003 I.C.J. 1.

176 Shai Dothan, *How International Courts Enhance Their Legitimacy*, 14(2) Theoretical Inquiries in Law 455 (2013).

177 *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 2005 I.C.J. 168.

Seko in 1997. Nonetheless, Uganda defied this directive and deployed its troops to the western town of Kitona then controlled by the anti-government MLC armed rebels. The DRC further alleged Uganda offered substantial material and military support to these insurgents who launched a string of armed operations seeking to overthrow the Kabila government.

This sudden change in loyalty and friendship forced President Kabila to solicit for military aid from his Southern allies Angola, Zimbabwe and Namibia whose swift onslaught quelled the rebellion and restored temporary normalcy in the country. After several peace talks and agreements the two countries reached a ceasefire and in 2003 Uganda agreed to withdraw its troops from the Congo.[178] Despite this accord the DRC alleged Uganda left behind "a complex network of warlords" along the border region of Ituri which orchestrated military incursions and plundering of the vast mineral wealth.[179] It further averred these military actions amounted belligerent occupation and infringement upon its territorial integrity as envisaged by Arts. 2(4) and 51 of the UN Charter.

In response, Uganda leveled similar accusation against the DRC after state forces stormed its Embassy in Kinshasa, harassed the diplomatic staff and confiscated their personal belongings. Uganda argued these actions were undertaken in flippant disregard of various provisions of the Vienna Convention on Diplomatic Relations of 1961.[180] In the verdict, the majority of the judges held that Uganda's military activities in the DRC contravened Art. 2(4) of the UN Charter.[181] Conversely, Uganda's counterclaim for self-defense was dismissed since the framers of the Charter never envisaged the applicability of Art. 51 after the occurrence of an armed attack. Furthermore, Uganda failed to tender sufficient evidence of the legal and factual circumstances that would have warranted armed intervention.[182] By and large, the common thread of reasoning that runs through these landmark decisions is that customary international law prohibits the disproportionate use of force against a sovereign state except during self-defense. Therefore, a similar argument can be raised against the inordinate use of force by NATO states against Syrian government.

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178 These peace agreements include the Lusaka Agreement in August 1999, Kampala Plan of 8 April 2000 and Harare Plan of 6 December 2000.

179 *Democratic Republic of the Congo v. Uganda*, *supra* note 177, para. 54.

180 Articles 22, 29 and 30 of the Vienna Convention on Diplomatic Relations, signed on 18 April 1961 and entered into force on 24 April 1964.

181 Faustin Z. Ntoubandi, *The Congo/Uganda Case: A Comment on the Main Legal Issues*, 7(1) Africa Human Rights Law Journal 162, 163 (2007).

182 Guy Fiti Sinclair, *Don't Mention the War (on Terror): Framing the Issues and Ignoring the Obvious in the ICJ's 2005 Armed Activities Decision – Case Note*, 8(1) Melbourne Journal of International Law 124, 130 (2007).

4.2. Belligerent Occupation

It would be prudent to delve deeper into the issue of belligerent occupation of foreign territories since it introduces new dimension to the concept of sovereignty. This amorphous term describes the illegal use of military force to invade and occupy foreign territory.[183] As Faustin Ntoubandi notes the legal principles pertaining to this subject matter are enunciated in Rules 42–56 of the Hague Rules[184] and Arts. 27–36 and 47–78 of the Fourth Geneva Conventions,[185] general principles of international law and customary international law.[186] Generally speaking if the host government grants consent to foreign troops within its territories there is no international armed conflict hence it cannot be classified as "belligerent occupation."

This legal quandary was expounded by the ICJ in the *Legal Consequences of Wall Case*. The cardinal issue was whether Israel was justified to erect walls and barricades in occupied Palestinian territories.[187] The court admitted Israel by virtue of its founding in 1948 was not a signatory to the Hague Rules and Geneva Convention.[188] Nonetheless, international law had undergone a paradigmatic change that chrystallised these principles into customary international law which bound the parties to the dispute.[189] The court further held that Israel had infringed upon the Palestinian territory by building the wall in the occupied regions of West Bank and Gaza Strip which prohibited the movement of Palestinian settlers.[190] In light of this cogent verdict it is fair to surmise that any form of unwarranted occupation that inhibits the civilian population is tantamount to infringement of territory. The benchmark in determining is whether the occupation changes sovereignty but whether it interferes with the effective control of the country.[191]

In the *Armed Conflict case* it was held that the fact that Uganda had stationed its troops in the Eastern Region of the DRC amounted to belligerent occupation.[192]

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183 Adam Roberts, *What Is a Military Occupation?*, 55(1) British Yearbook of International Law 249, 261 (1985).

184 Laws and Customs of War on Land (Hague, IV), signed on 18 October 1907.

185 Geneva Conventions Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

186 Ntoubandi 2007, at 174.

187 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 136.

188 *Id.* para. 89.

189 Fr. Robert J. Araujo, *Implementation of the ICJ Advisory Opinion – Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Fences [Do Not] Make Good Neighbors?*, 22 Boston University International Law Journal 349, 351 (2004).

190 David Kretzmer, *The Law of Belligerent Occupation in the Supreme Court of Israel*, 94(885) International Review of the Red Cross 207, 211 (2012).

191 Orna Ben-Naftali et al., *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23(3) Berkeley Journal of International Law 551, 601 (2005).

192 *Democratic Republic of the Congo v. Uganda*, *supra* note 177, paras. 177–178.

Unlike the *Nicaragua decision*, there was profound optimism this judgement would encourage state parties to engage in diplomatic dispute resolution mechanism rather than armed conflict for fear legal repercussions like Uganda.[193] Similar obligation extends to the R2P whose principle objective is to safeguard the human rights during armed conflict. However, if any country not permitted by Syria deploys troops or supports resistance intending to overthrow the Assad regime would be culpable of "belligerent occupation." The principle requirement for this doctrine is the presence of troops on foreign soil and the ability of an occupying power to exert its authority over their activities.

4.3. Negligent Support of Rebels

By funding the armed rebels in Syria to fight their "proxy war" with the Assad regime the western countries are susceptible for "negligent support" under international humanitarian law. Mojtaba Mahdavi amplifies this observation by noting the military assistance to the opposition forces turned the Syrian spring into a proxy war and exacerbated an ugly and bloody civil war among ethnic and religious minorities.[194] This legal concept applies to countries that support armed insurgencies that are likely to cause unexpected violation of human rights.[195] This doctrine was enunciated in the *Tadic case* where the ICTY grappled with the cardinal issue as to whether the Bosnian Serb paramilitary militias were acting on behalf of Bosnia. The tribunal aptly observed:

> …States are not allowed on the one hand to act *de facto* through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law.[196]

In juxtaposing this doctrine with the Syrian context, it is cogent to argue the countries supporting the Syrian rebels should be vicarious culpable for their actions. The states exercise a considerable degree of control by funding and training the rebels intending to overthrow the Assad regime. Judging by the volatile and antagonistic relationship among the parties to the conflict it is quite possible for the any foreign state to preempt the possible extermination of Syrian civilians perceived as sympathisers to the regime.

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193 Benedict Kingsbury & Joseph H.H. Weiler, *Preface: Studying the Armed Activities Decision*, 40(1) International Law & Politics 1, 2 (2008).

194 Mojtaba Mahdavi, *A Postcolonial Critique of Responsibility to Protect in the Middle East*, 20(1) Perceptions 7, 22 (2015).

195 Graham Cronogue, *Rebels, Negligent Support, and State Accountability: Holding States Accountable for the Human Rights Violations of Non-State Actors*, 23 Duke Journal of Comparative & International Law 365, 373 (2013).

196 *Prosecutor v. Dusko Tadic*, *supra* note 111, para. 117.

4.4. The Obligation to Protect Human Rights During Armed Conflict

On a more abstract level customary international law recognises the preventions of genocide, war crimes, crimes against humanity and crimes of aggression as *jus cogens*.[197] This means the obligation to prevent these atrocities cannot be shirked by any member states irrespective of whether they are signatories to their respective conventions. This principle was enunciated by in the *Legality of the Threat or Use of Nuclear Weapons* where the ICJ stated:

> It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case (*I.C.J. Reports* 1949, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.[198]

Against the backdrop of this quote, it is reasonable to argue the countries supporting the rebel movement are culpable of offenses should they be committed irrespective of their capacity and jurisdictions. This principle applies to the Syrian situation is inherently skewed in favour of the regime fighting various rebel factions that does not nullify its status and obligation as participants in non-international conflict.[199]

4.5. Regime Change by Other Means

The hybrid version of R2P invoked by NATO seeking to oust President Assad is analogous to rehashing the failed campaign in Libya. Colonel Gaddafi ruled the country with an iron fist for four decades rule and was accused of sponsoring global terrorism the most prominent incident being the Lockerbie bombing in 1986.[200] Despite the limited democratic space Libya boasted of high living standards compared to other "hydrocarbon economies" which are epitomised by endemic corruption and abject poverty. Furthermore, he ensured relative stability by repressing the various Islamist movements in the country.[201] In 2003 Libya initiated

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197 Rafael Nieto-Navia, *International Peremptory Norms (Jus Cogens) and International Humanitarian Law* (Jun. 5, 2018), available at http://www.dphu.org/uploads/attachements/books/books_4008_0.pdf.

198 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, para. 79.

199 Tilman Rodenhäuser, *International Legal Obligations of Armed Opposition Groups in Syria*, 2 International Review of Law 1, 5 (2015).

200 Steve Emerson, *The Lockerbie Terrorist Attack and Libya: A Retrospective Analysis*, 36(2) Case Western Reserve Journal of International Law 487, 490 (2004).

201 Alan J. Kuperman, *Lessons from Libya: How Not to Intervene*, Quarterly Journal: International Security (September 2013) (Jun. 5, 2018), available at https://www.belfercenter.org/sites/default/files/files/publication/Kuperman%20policy%20brief%20published%20version%202.pdf.

rapprochement with the west by paying compensation to the victims of Lockerbie, extraditing the chief suspects of the attack, abolishing its nuclear weapons and renouncing global terrorism.[202]

When the Arab spring poured into Libya it morphed into an organised armed rebel movement in Benghazi seeking to oust Gaddafi from power.[203] This insurgency known as the Rebel Council (RC) comprised of government defectors, disgruntled Islamist militias and several political dissidents all of whom were supported by the west. The Security Council passed resolutions number 1970 and 1973 informally known as "Operation Unified Protector" as the blue print for military intervention.[204] Noteworthy, Russia and China strenuously opposed military intervention against Libya citing it would be tantamount to infringing upon Libya's sovereignty. On the 15 April 2011 Russian Foreign Minister Sergei Lavrov reiterated the need for a political and diplomatic solution since UN lacked the mandate to initiate regime change.[205]

This resolution provided for the alternative of military intervention by an international coalition incase diplomacy failed to remedy the situation.[206] In attempting to remedy the situation NATO states issued a "no fly zone" in Libya and thereafter launched a series of airstrike against the Gaddafi forces.[207] This double edged approach was construed as a means of the R2P to prevent the civilian atrocities. Nonetheless, it turned ominous after the ultimate downfall and gruesome execution of Gaddafi by the rebels. However, a cursory glance of this doctrine as implemented by the NATO countries was tarnished with undertones of "regime change" and to some degree the expansion of "western imperialism."[208] This grim reality was confirmed after the U.S. Secretary State Hilary Clinton appeared on live television applauding Gaddafi's death by quipping "We came, we saw, he died!"[209]

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202 Christopher Fermor, *NATO's Decision to Intervene in Libya (2011): Realist Principles or Humanitarian Norms?*, 8 Journal of Politics & International Studies 323, 342 (2012–2013).

203 Chris Townsend, *Civil-Military Relations in Tunisia and Libya through the Arab Spring*, 6(2) Journal of Defense Resources Management 5, 8 (2015).

204 United Nations Security Council, Resolution 1970 (2011) adopted by the Security Council at its 6491st Meeting on 26 February 2011; United Nations Security Council, Resolution 1973 (2011) adopted by the Security Council at its 6498th Meeting on 17 March 2011.

205 Geir Ulfstein & Hege Føsund Christiansen, *The Legality of the NATO Bombing in Libya*, 62(1) International & Comparative Law Quarterly 159, 166 (2013).

206 Paul R. Williams & Colleen Popken, *Security Council Resolution 1973 on Libya: A Moment of Legal & Moral Clarity*, 44(1) Case Western Reserve Journal of International Law 225, 226 (2011).

207 Christo Odeyemi, *R2P Intervention, BRICS Countries, and the No-Fly Zone Measure in Libya*, 2(1) Cogent Social Sciences 1, 8 (2016).

208 Pierre Thielbörger, *The Status and Future of International Law after the Libya Intervention*, 4(1) Gottingen Journal of International Law 11, 23 (2012).

209 Hillary Clinton "We Came, We Saw, He Died" (Jun. 5, 2018), available at https://www.youtube.com/watch?v=FmIRYvJQeHM.

This abnormal euphoria surrounding the humiliating downfall of Colonel Gaddafi confirmed suspicions that the intervention was driven by economic interests rather than humanitarian concerns.[210]

In light of Pillar 3 of the R2P NATO just like any other international stakeholder had the obligation to initiate post armed conflict reconciliation and reconstruction.[211] This duty would be instrumental in restoring harmony and the rule of law in a country that came apart under tribal and sectarian violence. But NATO shirked this responsibility by failing to put in place concrete efforts to enhance reconstruction and reconciliation in the country. This obligation to rebuild is instrumental in restoring normalcy after the armed conflicts.[212] In Libya the downfall of Gaddafi left a volatile power vacuum which culminated into the socio economic disintegration, sectarian violence, human trafficking and terrorist insurgency.[213] As at 2015 the once prosperous nation was downgraded into a failed state with insurgence groups loyal to the Islamic State controlling large swaths of the country.[214] This failure prompted Russia to pour scorn over R2P as tool for redressing humanitarian concern in Syria.

Concluding Remarks

In summary, the Right to Protect (R2P) supports measures to protect civilians from genocide, war crimes, crimes against humanity and crimes of aggression.[215] Nonetheless, its abysmal failure in Libya has resulted in widespread skepticism towards its viability in redressing humanitarian crises.[216] This uncertainty spurred Russia to oppose its application in Syria for fear of replicating into regime change and igniting into a full blown regional conflict.

Furthermore, the Russian intervention in Syria is bound to elicit mixed reactions across the geopolitical spectrum. On one hand, the west has considers it as the

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210 Ronald Chipaike, *The Libya Crisis: The Militarisation of the New Scramble and More*, 2(8) International Journal of Human and Social Science 43, 44 (2012).

211 Malissa M. Tucker, *Lines in the Sand: Drawing Meaningful Contours for the Responsibility to Protect Doctrine (In a World at War)*, 5(2) National Security Law Brief 25, 37 (2015).

212 Erfaun Norooz, *Responsibility to Protect and Its Applicability in Libya and Syria*, 9(3) Vienna Journal on International Constitutional Law (ICL Journal) 1 (2015).

213 Mukhtar Imam et al., *Libya in the Post-Gaddafi Era*, 2(2) International Journal of Social Sciences and Humanities Invention 1150, 1161 (2012).

214 Jonathan F. Kotra, *ISIS Enters the Stage in the Libyan Drama – How the IS Caliphate expands in Northern Africa*, International Institute for Counter-Terrorism (Fall 2015) (Jun. 5, 2018), available at https://www.ict.org.il/UserFiles/ICT-ISIS-in-Libya-Kotra.pdf.

215 Michael Ramsden, *"Uniting for Peace" and Humanitarian Intervention: The Authorising Function of the UN General Assembly*, 25(2) Washington International Law Journal 267, 268 (2016).

216 Ilia Xylopia, *The Rocky Road Ahead to Peace: The Arab Uprisings and the Conflict in Libya*, 3(1) Journal of Global Faultlines 50, 51 (2016).

permutation of the cold war in the region with Russia flexing its military muscles. Conversely, Russian support has contributed to the sustenance of the Assad regime and the ultimate annihilation of the Islamic State and rebels who threatened civilian welfare. Against this backdrop the overall objective of the intervention falls well within the purview of Pillar 2 of the R2P which intends to safeguard both national sovereignty and humanitarian welfare.[217] Furthermore, President Putin's commitment to ensure post-conflict reconciliation and reconstruction is representative falls in line with Pillar 3 of the principle which demands restoration of the rule of law and normalcy.

In stark contrast, the NATO intervention is beset with overtures of regime change after their repeated calls for overthrowing of the Assad regime. This position is augmented is by their overt support of the Syrian rebels who are active participants in the conflict. As held in the *Nicaragua v. USA* and *DRC v. Uganda* cases this approach infringes on Arts. 2(4) and 51 of the UN Charter. In addition, there is inherent risk NATO states will be held liable for the atrocities committed by the Syrian rebels under the doctrine of "belligerent occupation." In light of these divergent strategies and opinions it would be prudent for all the material stakeholders to adopt a more efficient and cohesive form of post-conflict resolution mechanism in restoring normalcy in the country.

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[217] Paul R. Williams et al., *Preventing Mass Atrocity Crime: The Responsibility to Protect and the Syrian Crisis*, 45 Case Western Reserve Journal of International Law 473, 487 (2012).

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PROTECTION OF PROPERTY RIGHTS BASED ON THE DOCTRINE OF PIERCING THE CORPORATE VEIL IN THE RUSSIAN CASE LAW

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In the Russian justice system, the doctrine of piercing the corporate veil was developed at the case law level and is used to prevent abuse in corporate relationships on the part of those who control a legal entity in detriment to the property rights of the legal entity's creditors. Since the principle of limited liability is important for Russian civil circulation, it is necessary to identify the relevant grounds for the application of said doctrine and its application criteria. Our objective is to justify not only the need for preservation of the doctrine of piercing the corporate veil in the Russian legal system, but also the development of the doctrine by giving it concrete substance based on generalization of existing case law. The criteria for applying the doctrine of piercing the corporate veil are: monitoring the activities of a legal entity by another entity which can influence commercial companies' decision making, actually or legally; violations or abuse of rights; existence of a cause-and-effect relationship between a violation or an abuse of rights on the part of the beneficiary and the creditor's losses; the existence of exceptional circumstances in which it is impossible to protect the creditors' legitimate interests with other legal measures; and dispute arising from private law relations. The main consequence of applying the doctrine of piercing the corporate veil is the disregard for the corporate entity. Autonomy can manifest in three areas (extension of a party's debts to the legal entities under its control; acknowledgement that the rights and liabilities are actually vested in the party which managed the legal entity; acknowledgement of the legal entity as a representative of the controlling legal entity).

Keywords: property rights; corporate law; corporate veil; piercing the corporate veil; good faith; claims in rem; abuse of rights; affiliation; private international law; conflict of laws; beneficial ownership.

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Table of Contents

Introduction
1. The Principle of Good Faith as a Basis for Applying the Doctrine of Piercing the Corporate Veil in the Russian Legal System
2. The Doctrine of Piercing the Corporate Veil in Foreign Systems of Justice
3. Implementation of the Doctrine of Piercing the Corporate Veil in the Russian System of Justice
4. Attempts of Normative Consolidation of the Doctrine of Piercing the Corporate Veil in the Russian Legislation
5. Criteria for the Application of the Doctrine of Piercing the Corporate Veil by Russian Courts
6. The Reasons Behind the Rare Application of the Doctrine of Piercing the Corporate Veil by Russian Courts
7. The Consequences of Applying the Doctrine of Piercing the Corporate Veil
8. The Conflict-of-Laws Aspect of Applying the Doctrine of Piercing the Corporate Veil
Conclusion

Introduction

Russian corporate legislation concerning the liability of founders and members of commercial companies is built on the principle of separation – a distinct separation of the company's debts and the member's debts and limitation of the founder's liability for the company's debts. The separate legal entity principle is important in all developed legal systems.[1] To expound the main idea of this principle, courts refer to the Latin aphorism "*Eripitur persona, manet res*" ("Man dies, the case remains").[2] R.B. Thompson stated that

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[1] *See* Andrea Boggio, *Linking Corporate Power to Corporate Structures: An Empirical Analysis*, 22(1) Social & Legal Studies 107, 107–108 (2013); Lorraine Talbot, *Critical Company Law* 23–24 (London; New York: Routledge-Cavendish, 2007); Muhammad Zubair Abbasi, *Legal Analysis of Agency Theory: An Inquiry into the Nature of Corporation*, 51(6) International Journal of Law and Management 401 (2009).

[2] Ian M. Ramsay & David B. Noakes, *Piercing the Corporate Veil in Australia*, 19 Company and Securities Law Journal 250, 251 (2001).

> as a general principle, corporations are recognized as legal entities separate from their… liability of the entity and not of the shareholders, directors, or officers who own and/or act for the entity.[3]

However, implementation of this principle enables the abuse of corporate rights; the framework of the commercial company can be used to create a risk-minimization scheme wherein the debts are consolidated in one legal entity and the assets in another entity while both entities are controlled by one beneficiary. In this case, the beneficiary builds a chain of controllable and interconnected legal entities. In case of insufficient capitalization of such controllable legal entities, their creditors are unable to protect their property rights. This common situation in Russian civil circulation raises the issue of defining the available and efficient methods of protecting creditors' property rights, both *in personam* and *in rem*.

In striving to find a balance between the interests of the parties controlling the legal entity and its creditors, the doctrine of piercing the corporate veil was developed in the Russian case law. It is important to point out that the achievements of the law of England and the USA, where the Piercing the Corporate Veil Doctrine was originally developed, were taken as a basis for the development of the Russian Piercing the Corporate Veil Doctrine.[4] English corporate law has been evolving over a longer time frame than the corporate law of most countries in continental Europe and Russia. Localization twists this doctrine out of shape to such a degree that all that remains from the original English legal constructs, more often than not, is the idea that gave rise to the doctrine.

The doctrine proceeds from the premise that the party with actual or legal control of a debtor's activities shall defend the creditor's suit in a situation in which a legal entity has been established for appearances or to avoid liability. The corporate veil can be pierced when the court, in spite of the legal entity's autonomy, forces the organization to disclose information on its beneficiary to recover the debts there from, but not from the legal entity itself.

Of particular dispute is the question of defining the legal basis and the content of this doctrine, both at the theoretical level and in case law.

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[3] Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76(5) Cornell Law Review 1036 (1991).

[4] *See* Maurice I. Wormser, *Piercing the Veil of Corporate Identity*, 12 Columbia Law Review 496 (1912); Otto Kahn-Freund, *Some Reflections on Company Law Reform*, 7(1–2) Modern Law Review 54 (1944); Jonathan M. Landers, *A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy*, 42(4) University of Chicago Law Review 589 (1975); Simon P. Ville, *Judging Salomon: Corporate Personality and the Growth of British Capitalism in a Comparative Perspective*, 27(2) Federal Law Review 203 (1999).

1. The Principle of Good Faith as a Basis for Applying the Doctrine of Piercing the Corporate Veil in the Russian Legal System

Not having a regulatory basis in the form of a special rule adopted at the legislative level, the doctrine of piercing the corporate veil is based on general provisions of civil legislation. The principle of good faith (cl. 3 of Art. 1 of the Civil Code of the Russian Federation (hereinafter the RF CC)),[5] and its counterpart – knowingly unfair acts, abuse of rights, evasion of the law (Art. 10 of the RF CC) play the main role in regulatory justification of the doctrine.

When establishing controllable legal entities (most frequently in the form of commercial companies), the entity in favor of which the business is structured substantially abuses its right as it gains undue profit at the cost of the legal interests of the creditors of the controllable legal entities. In accordance with Art. 10 of the RF CC it is prohibited to exercise civil rights with the goal of abusing other rights.

All jurisdictions with developed legal systems have the so-called business judgement rule – the owner (shareholder) who makes key decisions on the core aspects of the company's operations is immune to claims for damages as a result of his corporate decision if made within the limits of reasonable business risk.[6] This is precisely the bona fide requirement for a corporate decision.

The literature mentions that piercing the corporate veil gives rise to competition between the principles of legality and equality of civil circulation members (and the equal right to protect their interests) and the principles of autonomy and limited liability of legal entities.[7] Moreover, in applying the doctrine of piercing the corporate veil, the court resolves the issue of the competition of the principle of good faith with the principle of legality and the principle of limited liability of members and founders.

The noted problem of the competition of the civil rights principles can be solved by defining a hierarchy of principles and their subordination. As an alternative, when defining the system of civil rights principles, it is possible to proceed from the premise that the more abstract and universal the idea reflecting a given principle, the more significant it is in the hierarchy of principles. The more abstract the principle, the more exclusive nature it has based on the rule of *lex specialis derogat lex generalis*.

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[5] Гражданский кодекс Российской Федерации (часть первая) от 30 ноября 1994 г. № 51-ФЗ, Собрание законодательства РФ, 1994, № 32, ст. 3301 [Civil Code of the Russian Federation (Part One) No. 51-FZ of 30 November 1994, Legislation Bulletin of the Russian Federation, 1994, No. 32, Art. 3301].

[6] *See* Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57(1) Vanderbilt Law Review 83 (2004); Robert W. Baxt, *The Battle Resumes for a Better Business Judgment Rule*, 90(3) Australian Law Journal 167, 167–168 (2016); Adina Ponta, *The Business Judgment Rule – Approach and Application*, 5(2) Juridical Tribune (Tribuna Juridica) 25, 25–26 (2015).

[7] *Гольцблат А.А., Трусова Е.А.* Снятие корпоративной вуали в судебной и арбитражной практике России // Закон. 2013. № 10. С. 51 [Andrey A. Goltsblat & Elena A. Trusova, *Piercing the Corporate Veil in the Russian Judicial and Arbitrazh Practice*, 10 Law 49, 51 (2013)].

The most abstract, universal and exceptional principle is the principle of good faith, and the issue of the subordination of civil law principles can be solved in favor thereof. Of course, this approach is ambiguous, but the issue of the subordination of principles is raised not even by the civil law theory, but by the case law. There is a notable statement by one English judge in a settlement of a similar dispute:

> Good faith is the most important principle prevailing even over the fundamental principle of the company's separate legal personality.[8]

It is difficult to formulate a definition of the principle of good faith, and this situation is typical for Russian law as well as for foreign legal systems. Scientists of common law countries are skeptical about the possibility of successful formulation of the definition, but at the same time, the effect of the principle of good faith is actively researched especially in contract law.[9]

Various points of view on the definition of the principle of good faith proceed from the different ideas that form the basis of the definition. It is often stated that it is necessary to consider good faith through morals and morality. This principle is related to honesty, justice, and rationality prevailing in society.[10]

It was proposed to articulate the concept of good faith through a negative definition by reference to absence of bad faith.[11] In English case law there are more capacious definitions of good faith – honesty, contractual fidelity, and compliance with business standards (*Yam Seng Pte. Ltd. v. International Trade Corp. Ltd.*[12]).

In U.S. law, the legal concept of implied covenant of good faith and fair dealing arose in the mid-19th century.[13] In 1933, in the case of *Kirke La Shelle Co. v. Paul Armstrong Co. et al.*[14] the New York Court of Appeals said:

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[8] Ruth Bonnici, *The Principle of Separate Corporate Personality*, Gћ.S.L. Online Law Journal (2013) (May 3, 2018), available at http://perma.cc/9M4N-RA7K.

[9] *See* John W. Carter & Wayne Courtney, *Good Faith in Contracts: Is There an Implied Promise to Act Honestly?*, 75(3) Cambridge Law Journal 608 (2016); Jay M. Feinman, *The Duty of Good Faith: A Perspective on Contemporary Contract Law*, 66(4) Hastings Law Journal 937, 938 (2015); Anthony Gray, *Good Faith in Australian Contract Law after Barker*, 43(5) Australian Business Law Review 358 (2015); Chris D.L. Hunt, *Good Faith Performance in Canadian Contract Law*, 74(1) Cambridge Law Journal 4 (2015); David Campbell, *Good Faith and the Ubiquity of the "Relational" Contract*, 77(3) Modern Law Review 475 (2014); Todd D. Rakoff, *Good Faith in Contract Performance: Market Street Associates Ltd. Partnership v. Frey*, 120(5) Harvard Law Review 1187, 1188 (2007).

[10] John F. O'Connor, *Good Faith in English Law* 102 (Aldershot: Dartmouth Publishers, 1990).

[11] Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54(2) Virginia Law Review 195, 202 (1968).

[12] *Yam Seng Pte. Ltd. v. International Trade Corp. Ltd.* [2013] E.W.H.C. 111, Rn. 137 ff.

[13] Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic*, 80(2) St. John's Law Review 559, 561 (2006).

[14] *Kirke La Shelle Co. v. Paul Armstrong Co. et al.*, 263 N.Y. 79; 188 N.E. 163 (N.Y. 1933).

> In every contract there is an implied covenant that neither party shall do anything, which will have the effect of destroying or injuring the right of the other party, to receive the fruits of the contract. In other words, every contract has an implied covenant of good faith and fair dealing.

In the American Uniform Commercial Code good faith is defined as "honesty in fact" and "compliance with reasonable commercial standards of fair dealing in trade" (Art. 2-103(1)(b)).

In the countries of continental Europe, good faith is thought of as a standard of conduct. Article I.-1:103(1) of the Draft Common Frame of Reference states:

> The expression "good faith and fair dealing" refers to a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question.[15]

The principle of good faith is necessary because in the modern conditions of developing civil circulation it is rather difficult to find the border between situations in which laws are infringed and observed. There is a "grey" zone wherein the entity's actions do not infringe on the law and, moreover, formally abide by it, but there are negative consequences of such actions.

Bad faith is a deviation from common, accepted, and widespread norms of behavior. In scientific literature, the principle of good faith is most often defined as a behavioral norm which allows for assessment of the behavior of members in a relationship.[16] Unfair acts are characterized by artificiality and farfetchedness.

Following this line of reasoning, the creation of a chain of interconnected, controllable legal entities which provide the opportunity to influence corporate decisions is, formally, legal. However, if these actions create unfavorable consequences for any third parties, they can be assessed as knowingly unfair. The issue is that such business structuring allows for the redistribution of risk from the controller to the creditors of the controllable entity, which will not be able to receive consideration in the event of the debtor's insufficient capitalization. In connection with this, it should be understood that by virtue of cl. 4 of Art. 1 of the RF CC, nobody is entitled to benefit from one's own inequitable conduct.

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[15] *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR). Outline Edition* (C. von Bar & E. Clive (eds.), Munich: Sellier European Law Publishers, 2009).

[16] *Болдырев В.А.* Содержание государственных реестров как фактор, влияющий на оценку добросовестности участников гражданского оборота // Нотариус. 2015. № 5. С. 3–5 [Vladimir A. Boldyrev, *The Content of State Registers as a Factor Influencing the Assessment of Integrity of Participants in Civil Turnover*, 5 Notary 3 (2015)].

2. The Doctrine of Piercing the Corporate Veil in Foreign Systems of Justice

The doctrine of piercing the corporate veil was formed due to legal precedents in the countries with the Anglo-Saxon legal system. It was formulated for the first time in England in *Salomon v. Salomon & Co. Ltd.*,[17] in which the court refused to assert the main shareholder's liability for the company's debts due to the absence of exceptional circumstances allowing for the legal entity's autonomy to be ignored. The case can be summarized as follows: Solomon, who owned a shoe company, established a new company, Solomon & Co., jointly with his family members (he registered 99.97% of shares under his own name and brought in his family members due to the limits on the minimum number of participants – seven), to which he sold the enterprise at a monumental price with security of all of the company's property. After some time, Solomon & Co. went bankrupt, and Solomon received all the assets using the security advantage. The company's creditors attempted to levy execution on Solomon's personal property, but failed. This judicial dispute is of note because the court developed the principle of separate legal personality applied to a situation in which a company is fully controlled by one person. The importance of this case for the development of the doctrine of piercing the corporate veil is that within the framework of the dispute settlement there were arguments concerning usage of the legal entity's framework to deceive the creditors and the permissibility of extending the member's liability for the company's debts.[18]

In English law and in American law, there are several stages of the application of the doctrine of piercing the corporate veil, described in detail in the literature which describes the modern stage of the doctrine's development as a period of decline and seldom use of the concept.[19] Given the availability of a sufficient number of literary sources, it is unnecessary to refer to the history of the establishment of the considered doctrine in England within this paper. Instead, we shall pay attention to the current status of the doctrine's application.

Prest v. Petrodel Resources Ltd.,[20] resolved by the Supreme Court of Great Britain, was a dispute concerning the division of property over the course of divorce proceedings. The husband owned several oil companies registered in different

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17 *Salomon v. Salomon & Co. Ltd.* [1896] U.K.H.L. 1, [1897] A.C. 22.

18 Alan Dignam & John Lowry, *Company Law* 18–22 (New York: Oxford University Press, 2009).

19 *See* Laurence C.B. Gower, *The Principles of Modern Company Law* 207–208 (London: Stevens, 1957); Thomas K. Cheng, *The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines*, 34(2) Boston College International and Comparative Law Review 329, 334 (2011); Thompson 1991, at 1066.

20 *Prest v. Petrodel Resources Ltd.* [2013] U.K.S.C. 34, [2013] 2 A.C. 415.

jurisdictions, and some of these companies owned real estate in the United Kingdom, including a house where the spouses lived. In the first instance, the court levied execution upon the real estate in favor of the wife, including the family house owned by the companies, thus acknowledging that the husband fully controlled them and was a beneficiary.

Upon consideration of the case, the Supreme Court of the United Kingdom determined that the real estate was officially registered with the companies, however they were just nominal holders, i.e. acted as a trustee in the trust, while the husband was the beneficiary of this trust; the companies did not purchase this real estate with their own funds, and use thereof was not directly connected with business operations. In this case, the Supreme Court took the side of the first instance court, but the doctrine of piercing the corporate veil was not applied, and the court used another tool – the concept of trust.

The court found that it was possible to impose the company's actions and assets on the controller not just within the framework of piercing the corporate veil but also in the following situations: when an individual acted as the company's agent (agency theory) or jointly with the company (a joint actor); in cases where company owns assets as a nominee or a trustee; and in cases provided for by corporate law. According to the court, there is no need to pierce the veil if the offender simply hides under the mask of a company, as the court can hold him accountable without this. The corporate veil can be pierced only if the company is being used according to the evasion principle – if a person tries to avoid responsibility for outstanding liabilities, using a company for this purpose.

When the Supreme Court discussed the inapplicability of the doctrine of piercing the corporate veil to the case, it was stated that there were no cases of applying the doctrine properly and successfully; it was impossible to clearly formulate the doctrine itself, its principles and applicability. In this regard, the court advocated to maintain the doctrine of piercing the corporate veil in English law, however, its application was limited. First, only in case of evasion of the law (evasion of an outstanding liability). Second, it can be applied only as an exceptional remedy and can be used only when all the other available methods have been depleted.

In American law, the doctrine of piercing the corporate veil is applied often and has a more utilitarian nature: there is a developed system of tests, as well as a so-called "laundry list" of legal offenses and their manifestations which help the judge to define the applicability of the doctrine to a certain case. The list of 20 partially duplicated clauses is provided in the references.[21] The courts use lists of texts, which, to the contrary, prove the necessity of rejecting the claim for piercing the veil.[22]

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[21] Mark Loewenstein, *Veil Piercing to Non-Owners: A Practical and Theoretical Inquiry*, 41(3) Seton Hall Law Review 839, 846–847 (2011).

[22] William J. Rands, *Domination of a Subsidiary by a Parent*, 32(2) Indiana Law Review 421, 434–435 (1999).

The classic criteria for applying the doctrine are the following circumstances: the corporation has no autonomy or signs of actual existence; the corporation is used for illegal means; the presence of cause-and-effect relationship between abuse of corporate rights and the claimant's losses. All criteria of application of the Piercing the Corporate Veil Doctrine existing in the USA are based on lack of separate identity of a company in decision-making (instrumentality doctrine, alter ego doctrine, lack of separate identity, sham (shell) doctrine).

In American law, the doctrine of piercing the corporate veil is applied only to closed corporations for which the justification of limited liability is weaker. In general, as American lawyers admit, the question of the applicability of the doctrine of piercing the corporate veil is most intricate in corporate law, in which it is impossible to find distinct and clear rules.[23]

The statutory concept of the Piercing the Corporate Veil takes place in the law of Belgium, Germany, France, the Netherlands, and other EU countries.[24] In the Romano-Germanic law family (in Germany for example) the doctrine was developed predominantly at the theoretical level, was rarely used in practice, and took the name of "piercing liability" (Durchgriffshaftung and Zurechnungsdurchgriff[25]).

If in Anglo-Saxon law the application of the doctrine of piercing the corporate veil is characterized by utility and pragmatism, in German law it is characterized by the drive to understand the nature of an institution. Thus, the Supreme Court of Germany hesitated when defining the legal basis for imposing liability for the debts of a limited liability company violation of "corporate good faith" (gesellschaftsrechtliche Treu in 1975); application of joint-stock legislative rules to groups of GmbH companies on the annual indemnity of losses on an analogical basis in 1985; introduction of a structure of certain liability for "destructive interference in the company's affairs" (existenzvernichtende Eingrif) in 2001; and application of the general provisions to delict (para. 826 of the German Civil Code) in 2007. The delictual nature of the controller's liability for the debts of a controllable company allows for resolution of the issue of insufficient legislative regulation on the doctrine of piercing the corporate veil. Piercing liability is of delictual nature in Netherlands Law as well.[26]

In Austrian law, one of the most frequently applied legal grounds for piercing the corporate veil is a company's insufficient capitalization on the part of the founder, which increases the risk of default through fault of the founder. In addition, the

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23 *Piercing the Corporate Veil* 5 (E.S. Fenton (ed.), Mechanicsburg: Pennsylvania Bar Institute, 2012).

24 Karen Vandekerckhove, *Piercing the Corporate Veil: A Transnational Approach* 11 (Alphen aan den Rijn: Wolters Kluwer Law & Business, 2007).

25 Chee H. Tham, *Piercing the Corporate Veil: Searching for Appropriate Choice of Law Rules*, 1 Lloyd's Maritime and Commercial Law Quarterly 22, 23–24 (2007).

26 *See* Karen Vandekerckhove, *Piercing the Corporate Veil: A Transnational Approach*, at 24–25; Karen Vandekerckhove, *Piercing the Corporate Veil*, 4(5) European Company Law 191, 192 (2007).

grounds for piercing the corporate veil can be a mixture of the company's property and the founders' personal property, as well as a mixture of the companies' business spheres.[27]

3. Implementation of the Doctrine of Piercing the Corporate Veil in the Russian System of Justice

The doctrine of piercing the corporate veil was introduced in the Russian justice system at the level of a legal determination by the Supreme Arbitrazh Court of the Russian Federation (hereinafter the SAC RF) Presidium. The doctrine of piercing the corporate veil was mentioned for the first time by the SAC RF Presidium in the case of *Parex Bank* (resolution of the SAC RF Presidium No. 16404/11 of 24 April 2012). Based on this legal determination, a branch or a representative office is deemed to exist even if the legal entity has no legal subdivision on the territory of a foreign state but, nonetheless, carries out its activities in said territory via an independent company with a similar name which does business on its behalf and in fact acts as a subdivision of this legal entity.

In this regard, by force of p. 4 of Art. 170 of the Arbitrazh Procedure Code of the Russian Federation,[28] arbitrazh courts are entitled to refer to the resolution of the SAC RF Presidium in the statement of reasons. We can conclude that the approach to implementation of the doctrine of piercing the corporate veil formulated by the SAC RF has a precedential power regarding disputes considered by arbitrazh courts of various instances.

It should be noted that in said resolution the doctrine was not clearly formulated, which leaves the issue of justifying its application open. Russian court authorities interpret the doctrine of piercing the corporate veil rather extensively, deviating from the classical understanding developed in the Anglo-Saxon law. In theory, the doctrine of piercing the corporate veil implies that the founders of a legal entity which was established only for appearance (as an operating legal entity established to withdraw from responsibility) are held responsible. The conclusions made by the SAC RF in the example differ from this framework in terms of application and results. It appears that the framework used by the SAC RF as piercing the corporate veil differs from the classical doctrine. The preceding legal case formed the grounds for implementing the doctrine in the Russian system of justice, although in a unique form.

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[27] Суханов Е.А. Ответственность участников корпорации по ее долгам в современном корпоративном праве // Проблемы современной цивилистики: Сборник статей, посвященных памяти профессора С.М. Корнеева [Evgeny A. Sukhanov, *Liability of a Corporation's Participants for Its Debts in Modern Corporate Law* in *Problems of Modern Civil Law: Collection of Articles in Memory of Professor S.M. Korneev*] 107 (Moscow: Statut, 2013).

[28] Арбитражный процессуальный кодекс Российской Федерации от 24 июля 2002 г. № 95-ФЗ, Собрание законодательства РФ, 2002, № 30, ст. 3012 [Arbitrazh Procedure Code of the Russian Federation No. 95-FZ of 24 July 2002, Legislation Bulletin of the Russian Federation, 2002, No. 30, Art. 3012].

The SAC RF applied the mechanism of piercing the corporate veil previously but it did not name it in the text of the court order. It is stated in the resolution of the SAC RF No. 17095/09 of 20 April 2010 with regard to case No. A40-19/09-OT-13 that the matter of taking measures to secure the claim filed to the International Arbitration Court was submitted for new consideration to the court of cassation, as the SAC RF had the expertise to consider disputes on taking measures in the form of a seizure of a private individual's property to secure a claim resulting from the economic (business) relationship which was considered in the arbitrazh court, and therefore, the court had no grounds to terminate the proceedings and cancel the injunctive remedies. In the case under consideration, the debt of the private individual occurred due to the issue of a guarantee to secure the legal entity's obligations for payment for the purchased shares. In this regard, the individual acted as a party controlling the activities of this legal entity. This conclusion was made upon consideration of the nature of the economic relationship in which the individual took part. The individual controlled the activities of the company, which acted as a buyer under a contract for which the individual himself was a grantor, and also issued a bill to the company in which the individual specified himself as a beneficiary owner. As a result, the court resolved that the personal property of the private individual had been involved in carrying out economic (business) activities by piercing the corporate veil of the participants of the transaction considered in the case.

This practice changed due to the liquidation of the SAC RF. The Supreme Court of the Russian Federation (hereinafter the SC RF) waived this approach in the spring of 2015 The issue of the jurisdiction of disputes between a creditor (legal entity) and a grantor (private individual) who is the beneficiary of a debtor (legal entity) was resolved in favor of the jurisdiction of the general jurisdiction courts (Judicial Review of the SC RF No. 1 (2015) (approved by the SC RF Presidium on 4 March 2015)).

We believe that the legal stance that the stated category of cases must be within the jurisdiction of the arbitrazh court is more consistent and logical. The grantor's actions are aimed to ensure financing of the business activities of the legal entity which is under its control and in which he is a beneficiary. Acting as a grantor in such situation, the private individual voluntarily pierces the corporate veil, revealing the business structure.

In the practice of first instance arbitrazh courts there were cases of applying the considered doctrine even before adoption of the legal position of the SAC RF. The resolution of the Arbitrazh Court of the Krasnoyarsk Territory with regard to case No. A33-18291/2011 is of interest because it considered both the regulatory and the doctrinal bases of applying the mechanism of piercing the corporate veil in reasonable detail. According to court documents, a dispute arose between a municipal unitary enterprise and the individual entrepreneur (IE) Zykov concerning cold water supply and waste water collection. The municipal unitary enterprise demanded the collection of debt from IE Zykov as an entity consuming electric energy. IE Zykov objected,

noting that Zykov & Co. Limited Liability Company was liable for the debts, as the contract of energy supply had been signed with this company.

In satisfying the demands for collection of the debt from the IE under the contract, the arbitrazh court pierced the corporate veil of Zykov & Co. LLC and acknowledged IE Zykov to be a defendant in the case. To justify its position, the court stated that

> the legal entity is an independent participant of civil circulation, however, essentially, it is a legal fiction.

In addition, it was determined that S.N. Zykov had been engaging in economic turnover using two forms of individual participation in the business activity – as an individual entrepreneur and by establishment of a legal entity in which he was the sole founder and director. The court concluded that IE Zykov had actually gained profit from the economic relationship, irrespective of the fact that the contract had been renewed in favor of the company. In addition, the court concluded that the defendant's actions have

> signs of abuse of the law in the form of circumvention of his counterparty regarding the interests of which economic entity he represented – himself as an individual entrepreneur, the limited liability company as a director, or an authorized person.[29]

In its resolution, the court stated that the doctrine of piercing the corporate veil exists in the civil law,

> which states that if a legal entity has been established only for appearance or to evade responsibility, the actual business owner shall defend a suit.

In the appeals instance, the Third Arbitrazh Court of Appeal upheld the first instance judgement by its resolution of 29 May 2012, though it used slightly different arguments. The court simply noted that the user changed in the legal sense, while one and the same person gained profit in the economic sense, and the renewal of the contract from IE Zykov to Zykov & Co. LLC was purely formal.[30]

This judgement was very progressive, as it was the first time in the Russian case law when the court not only referred to the existence of the doctrine of piercing the corporate veil but also applied this doctrine to protect the creditor's property rights.

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[29] Решение Арбитражного суда Красноярского края от 15 февраля 2012 г. № А33-18291/2011 [Judgement of the Arbitrazh Court of the Krasnoyarsk Territory of 15 February 2012 with regard to case No. A33-18291/2011].

[30] Постановление Третьего арбитражного апелляционного суда от 29 мая 2012 г. по делу № А33-18291/2011 [Resolution of the Third Arbitrazh Court of Appeal of 29 May 2012 with regard to case No. A33-18291/2011].

In this case, the court concluded that the legal entity's responsibility should rest with its controllers. The act of ignoring the legal entity's autonomy was preconditioned by the fact that it was operative, i.e. it was not established for carrying out autonomous activities, but to serve the activities of another legal entity.

4. Attempts of Normative Consolidation of the Doctrine of Piercing the Corporate Veil in the Russian Legislation

The doctrine of piercing the corporate veil is opposed by the theory of affiliation of parties in the Russian system of justice. Affiliation of parties refers to parties interested in closing some sort of deal or an interrelationship of parties based on a common goal, economic similarities, and financial and organizational interests. Opposite to this framework, the doctrine of piercing the corporate veil is linked to a more private situation – control over the activities of a formally-autonomous legal entity. In affiliation, there is a concordance of will based on the community of interests and the presence of an interconnection between the entities. The corporate veil is pierced in situations where the legal entity's will is controlled by another party influencing the economic entity's decision-making.

The acknowledgment of a party as an affiliate of another party who is interested in completing a business deal results in legal consequences in the form of the acknowledgement of the particular party interested in completing the given business deal. In accordance with corporate legislation, an interested, affiliated party shall be deprived of the right to vote with all its voting shares at shareholder meetings when voting on the approval of an interested-party transaction.

Of the two competing legal frameworks, Russian legislators have chosen the path for developing the institution of affiliation introduced by Art. 53.2 in the RF CC on 1 September 2014, subject to which:

> In cases where this Code or any other law puts forth the occurrence of legal consequences conditional upon the existence of interrelations (affiliation) between parties, the presence or absence of such relations is determined in accordance with the law.

It should be noted that the initial draft of changes to the RF CC based on the Civil Legislation Development Concept contained two special articles which fixed the definition of a party controlling a legal entity (Art. 53.3) and liability of such parties.[31]

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[31] Проект федерального закона «О внесении изменений в части первую, вторую, третью и четвертую Гражданского кодекса Российской Федерации, а также в отдельные законодательные акты Российской Федерации» [Draft federal law "On Amendments to Parts One, Two, Three and Four of the Civil Code of the Russian Federation, as Well as Individual Legislative Acts of the Russian Federation"] (May 4, 2018), available at www.rg.ru/2012/04/06/gk-popravki-site-dok.html.

However, the above articles were excluded from the draft in further readings and Art. 53.2 was considerably shortened.

Out of the large number of norms offered in the Civil Legislation Development Concept and the draft of changes to the RF CC on piercing the corporate veil, the law included only the rule of cl. 3 of Art. 53.1, subject to which

> A party actually able to define the legal entity's actions, including the ability to give instructions to the parties named in clauses 1 and 2 herein, shall act in the best interest of the legal entity, reasonably and in good faith, and be liable for the losses caused to the legal entity due to its fault.

The sphere of application of this norm concerns only the losses of the company itself and not the losses of creditors of the legal entity's controller. However, the ability itself to recover losses from the party which actually controls the legal entity's activities is significant, and the law also defines losses of the controllable legal entity itself. However, this law can be also applied to piercing the corporate veil through analogy of the statute. Clause 3 of Art. 53.1 validates the concept of "shadow directors," i.e. a person whose instructions are followed by the heads of the company despite the person not being official member, shareholder, or head of said legal entity.[32]

This assumption suggests that piercing the corporate veil will remain a judicial doctrine for a long time and will not be validated by statute. The doctrine under consideration will surely not be left without a legislative framework, it can be applied by virtue of cl. 3 and cl. 4 of Art. 1 and Art. 10 of the RF CC.

5. Criteria for the Application of the Doctrine of Piercing the Corporate Veil by Russian Courts

It is not possible to pierce the corporate veil arbitrarily; application of said doctrine by the court requires detailed justification. To justify the usage of the mechanism of piercing the corporate veil it is necessary to draw from the following criteria, which are conditions for application of the doctrine.

First, control over a legal entity's activities by another party which has actual or legal influence on decision-making by said economic entity.[33] Edward Herman directly links corporate control to influence over corporate decision-making.[34]

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[32] Colin R. Moore, *Obligations in the Shade: The Application of Fiduciary Directors' Duties to Shadow Directors*, 36(2) Legal Studies 326 (2016).

[33] Ian F. Fletcher, *Insolvency in Private International Law* 357 (Oxford: Oxford University Press, 2005).

[34] Edward S. Herman, *Corporate Control, Corporate Power* 17, 19 (New York: Cambridge University Press, 1981).

For example, the resolution of the Arbitrazh Court of the West Siberian District of 13 April 2016 with regard to case No. A03-14308/2015 states that

> the claimant's judgement that the mechanism of "piercing the corporate veil" is applicable to Shulginsky Brewery LLC and Shulginskoe LLC in the form of a "crossover penetration" is unsound, as there is no common subject of control in the composition of the controllers of Shulginsky Brewery LLC and Shulginskoe LLC, on the one hand, and Shulginsky Brewery CJSC, on the other hand, which would govern its actions, including those which led to the claimant's losses.

The absence of the identity of the two legal entities due to the absence of "a common subject of control" of the old and the new company points to the absence of the control criteria, which served as grounds for not applying the doctrine of piercing the corporate veil.

In another example, in consideration of case No. A51-21076/2009 on the vindication of property items, the Arbitrazh Court of the Far Eastern District stated in resolution No. F03-786/2016 of 11 May 2016 that

> inasmuch as the matter of recovery of the corporate control was not the subject of examination in this dispute and the annulment of the contract of sale of the share in the company's registered capital was denied per the enforceable court rulings in case No. A45-7713/2011… the judicial board believes that the doctrine of piercing the corporate veil cannot be applied in this case, as the company ArtemInvestStroy is an autonomous economic entity in proprietary relations.

It is important to understand that control over a legal entity's activities by another party is not enough alone for application of the doctrine. Although it should be noted that in the Russian case law there are cases in which the court's decision was based solely on the control on the part of the beneficiary. Upon consideration of case No. 11-16173, the Moscow City Court levied execution on real estate items which had been owned by the legal entities controlled by Russian entrepreneur S. The court established the fact of control over the legal entities on the part of entrepreneur S. Apart from this fact, the court did not establish any other breaches of the law on the part of Mr. S., including any abuse of the law (appellate ruling of the Moscow City Court of 2 August 2012 with regard to case No. 11-16173).

For example, the United States Supreme Court in *United States v. Bestfoods*[35] concluded that ordinary interrelation between companies can't be considered legal

[35] *United States v. Bestfoods*, 524 U.S. 51 (1998).

basis for the piercing the corporate veil. A similar conclusion has been drawn in scientific research as well.[36]

In and of itself, one legal entity controlling another is not an offense, even if it is actual control. To utilize the doctrine under consideration, other circumstances must also be present.

Second, the corporate veil is pierced in case of an offense or an abuse of a right, including in the form of evasion of a law or any other knowingly unfair act. "Institutional abuse" is a criterion pointing at the need to pierce the corporate veil to identify a party which must reimburse the creditors' losses.

Cases when knowingly unfair acts constitute grounds for application of said doctrine can be exemplified by the business structuring scheme widespread in the sphere of cargo transportation: an individual entrepreneur leases his title to a vehicle to an economic entity established and controlled by him to transfer the ownership status of a source of increased danger and to limit his liability under Art. 1079 of the RF CC. This form of LLC incorporation eliminates the risk of any losses being imposed on the controllers.

In the decision of the Eighth Arbitrazh Court of Appeal No. 08AP-4159/2015 of 25 May 2015 with regard to case No. A75-8869/2014 the court referred to Art. 10 of the RF CC and concluded as follows:

> In the case under consideration, IE Volchansky B.K. and SeverSpetsServis LLC, using the seemingly legal mechanism of vesting the company with vehicle owner status by giving appearance of lease relations under a formal contract of lease, burdened the latter with the risk of losses of IE Volchansky B.K. from the special equipment owned and operated for his own purposes and for his benefit. Thus, the court of appeal states that IE Volchansky B.K. is a proper defendant in the case, and the claimant's losses must be collected from him.

Third, the doctrine of piercing the corporate veil is applied if there are unfavorable civil legal consequences to creating a corporate shield. The most widespread consequence is the presence of debts of the controllable legal entity when it does not have enough property to redeem the debts, i.e. in case of a material undercapitalization.[37] The founder does not sufficiently finance the controllable legal entity, which puts into question the legal entity's ability to fulfill its obligations. Without adequate financing, the participant shows clear negligence of the creditors' interests, enriching himself with the amount of savings.[38]

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[36] Douglas G. Smith, *Piercing the Corporate Veil in Regulated Industries*, 4 Brigham Young University Law Review 1165, 1173 (2008).

[37] Jonathan Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100(1) Cornell Law Review 99, 101 (2014).

[38] Thomas K. Cheng, *Form and Substance of the Doctrine of Piercing the Corporate Veil*, 80(2) Mississippi Law Journal 497, 577 (2010).

An example of this criterion is the cassational ruling of the SC RF No. 3-UDp14-2 of 30 July 2014, in which the doctrine of piercing the corporate veil is not named, but applicability of the mechanism itself was pointed out by the court.

The sole participant and the general director of a LLC was accused under cl. "b" of p. 2 of Art. 199 of the RF CC of evading taxes from the organization. Within the criminal case, a claim for recovery under Art. 1064 of the RF CC, which consisted of a VAT refund illegally obtained by the LLC from the federal budget, was filed by the tax authority against said person. The inferior courts rejected the claim of tax authority on the assumption that the general director was not a taxpayer, and actual imposition of tax collection from the person was impossible in that case. However, the SC RF submitted the case for new consideration, pointing out:

> In the course of the new consideration of the case, the court must cumulatively analyze the interrelations of the criminal, criminal procedure, civil, and tax legislative norms regulating the procedure of reimbursement of damages caused by a crime, including a crime connected with tax evasion, carefully check the arguments of the prosecution on the necessity to apply this procedure to accused Z. and the justification of the claims stated against Z., and make a legal and reasonable decision within the civil legal proceedings based on the obtained results.

It should be noted that the approach of the court to such claims is not quite logical, as public tort (nonfulfillment of the tax payment obligation) cannot serve as grounds for civil liability (reimbursement of damages) together with the application of the private law mechanism of piercing the corporate veil. The sole executive authority is liable for his or her own unfair or injudicious actions to the legal entity itself (cl. 1 of Art. 53.1 of the RF CC) but not to the state. In the case under consideration, the tax arrears resulted from non-payment due to the actual operating activities of the legal entity, not from artificial operation.

As shown in case law, holding a party criminally responsibility for a crime provided for by Art. 199 of the RF CC does not give rise to his obligation to reimburse for damages in the form of taxes unpaid by the organization at its own cost, as the party legally obliged to pay taxes (reimburse for the damage in the form of compulsory payments not received by the state) is not a private individual accused of a crime but a taxpaying organization; the defendant's crime, evasion of taxes payable by the organization, does not change the nature of the monetary funds unpaid to the federal budget.[39]

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[39] Апелляционные определения Свердловского областного суда от 25 июля 2014 г. по делу № 33-9255/2014 и от 19 марта 2014 г. по делу № 33-3329/2014 [Appellate rules of the Sverdlovsk Regional Court of 25 July 2014 with regard to case No. 33-9255/2014 and of 19 March 2014 with regard to case No. 33-3329/2014].

Moreover, there is a long-held belief in court practice that the doctrine can only be applied in the sphere of private-law disputes, as will be described below.

Fourth, to pierce the veil there must be a cause-and-effect relationship between the offense or abuse of a law on the part of the beneficiary and the losses of the creditor acting as claimant.

Case No. F04-7094/2011 serves as an example of this. The claimant claimed for joint damages in the form of profits lost from non-participation in a strategic partnership in favor of a third party. Per the claimant (shareholder), the defendants, being parent companies, exploited the opportunity to shape the decisions made by the company by blocking its participation in the strategic partnership, which resulted in its losses. By the ruling of the West Siberian District No. F04-7094/2011 of 6 June 2012 with regard to case No. A70-7811/2011, the case was submitted for new consideration, as no consideration was given to the fact that the directors whose voting blocked the company's participation in the strategic partnership were not independent directors.

Fifth, the doctrine of piercing the corporate veil can be applied only if there are exceptional circumstances due to which no other remedies can be used to protect the creditors' legal interests. The exceptionality of the doctrine of lifting the corporate veil is noted by R.B. Thompson. He writes that

> piercing the corporate veil refers to the judicially imposed exception to this principle by which courts disregard the separateness of the corporation and hold a shareholder responsible for the corporation's action as if it were the shareholder's own.[40]

The doctrine of piercing the corporate veil is an equitable remedy. In the ruling of the West Siberian District of 13 April 2016 with regard to case No. A03-14308/2015 it is stated that:

> The judicial instances have reasonably stated that the reference by Vneshekonombank to the defendants' abuse of the law is subject to rejection, as the claimant itself did not take any reasonably necessary actions to protect its interests.

On the grounds that piercing the corporate veil is an equitable remedy, the court rejected its application with a reference to the claimant's ability to protect its property rights with other civil remedies.

The exceptionality of the mechanism for piercing the corporate veil is shown in that in when property interests can be protected by application of other legal frameworks, their competition is inadmissible. For example, there is an alternative

[40] Thompson 1991, at 1036.

method in taxation to achieve the same goal for which piercing of the corporate veil is usually applied. We are referring to the judicial doctrine of unjustified tax benefit, the final edition of which was formed by the resolution No. 52 of the SAC RF Plenum entitled "On the Arbitrazh Courts' appraisal of the validity of the taxpayer's obtaining of a tax benefit." One of the aspects of this approach to the fight against abusive taxpayers comes from the acknowledgement of a company's activities by the activities of the party controlling it for taxation purposes. In case of competition in applying these two doctrines, the one deemed more specific, i.e. the doctrine of unjustified tax benefit, should be prioritized.

Sixth, the doctrine of piercing the corporate veil can be applied only to private-law relationships in any spheres of civil regulation: corporate law, material law, contractual law, etc. Thus, in the resolution of the Federal Arbitrazh Court of Moscow District of 5 September 2013 with regard to case No. A40-41781/13-69-197 it is stated that

> the doctrine of piercing "the corporate veil" can be applied only to private-law relationships formed between the founders of a legal entity and the legal entity itself, as well as between legal entities of one economic group, but not to public relationships, the relationship between the city of Moscow and the Department of Construction being one of such.

Transfer of the case to the SAC RF Presidium was denied, and in the ruling of the SAC RF No. VAS-16126/13 of 23 December 2013 concerning this case it was stated that the doctrine of piercing "the corporate veil" was inapplicable because "such relationships are not private-law in nature."

The conclusion made by the SAC RF is the most logical one; in modern practice of the SC RF, the doctrine of piercing the corporate veil is often applied by courts in tax disputes which are difficult to classify as private-law disputes.[41] Moreover, the tendency which appeared after liquidation of the SAC RF is that is it more difficult to achieve application of the considered doctrine in a dispute between individuals, while courts more consistently refer to the possibility of piercing the corporate veil to identify the interrelation of parties in disputes involving tax authorities.

6. The Reasons Behind the Rare Application of the Doctrine of Piercing the Corporate Veil by Russian Courts

Despite the fact that interrelated chains of legal entities, including offshores and trusts, are widely used in structuring large business in the Russian economy, the

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[41] *See* кассационное определение Верховного Суда РФ от 30 июля 2014 г. № 3-УДп14-2; определение Верховного Суда РФ от 14 января 2016 г. № 305-КГ15-11546 по делу № А40-138879/14-75-404 [Cassational ruling of the SC RF No. 3-UDp14-2 of 30 July 2014; ruling of the SC RF No. 305-KG15-11546 of 14 January 2016 with regard to case No. A40-138879/14-75-404].

doctrine of piercing the corporate veil is not utilized very often in court practice. Let us discuss the main reasons the doctrine of piercing the corporate veil is rarely applied in courts.

First, there is no agreement among Russian civil law scholars on the implementation of the doctrine under consideration. According to professor Evgeny Sukhanov, application of the doctrine piercing the corporate veil in the Russian law is incorrect, as it ignores the autonomy of the legal entity, which does not only lead to the incorrect interpretation of the legal entity but also to an incorrect understanding of the subject of law in general, turning the structure of the legal entity into fiction.[42] We submit that the doctrine of piercing the corporate veil is not so harmful for the Russian legal system and it can be an efficient remedy against offshore schemes. In addition, it is necessary to prove the legal entity's lack of autonomy and control over its activities on the part of the beneficiary to pierce the corporate veil, as it is the control of the beneficiary itself which puts the autonomy of the legal entity under question.

In many respects, the goal in creating a legal entity is the creation of a "corporate shield," i.e. a legal barrier, between the creditors and the founders of the legal entity. In global legal practice, there are three models to ensure the proper use of the corporate shield determined by the specific nature of an establishment and the incorporation of legal entities.

The European continental model (inlet control) is based upon requirements being strictly fixed into law, making the establishment of a legal entity more difficult and allowing for the elimination of cases of establishment of nominal legal entities (those created without the goal of carrying out economic activities).

In the Anglo-Saxon model (outlet control), the procedure for establishing a legal entity is rather simple, but there is strict liability for any breaches of corporate law. For example, up to one third of the norms of the UK Companies Act of 2006 provide for criminal liability. It is easy to raise the corporate shield, but it is also easy to knock it down.

The Russian model (current control) comes from the premise that the legislation sets a simple establishment procedure and a simple liquidation procedure, but there are powerful capabilities for auditing the legal entity's activities on the part of the public authorities. In the formal approach of interpreting corporate legislation, the Russian structure of legal entities allows the founders and beneficiaries to abuse their rights, as in this situation the corporate shield protects only them and becomes impenetrable for the creditors, which destabilizes civil circulation. It is quite logical that the simplified establishment of a legal entity must be predicated by ease in piercing the corporate veil. In this regard, non-disclosure of the identity of the beneficiary controlling the legal entities already suggests that a business was structured to gain unjustified advantages.

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[42] Суханов Е.А. Сравнительное корпоративное право [Evgeny A. Sukhanov, *Comparative Corporate Law*] 152 (Moscow: Statut, 2014).

Second, Anton Ivanov, former chairman of the SAC RF, identified the factors which impede a broad implementation of the doctrine into legal practice in one of his interviews:

> The issue is the mentality of judges who were brought up with a commitment to formalism and the parties who do not assert such claims… But the time will come when courts will consider the problems of "piercing the corporate veil." If the parties assert and justify such claims, the courts will be obliged to consider them.[43]

Rare attempts by Russian enforcers to apply the doctrine under consideration were not successful due to the formal approach in interpretation of the law by the courts[44] which leads to a lack of protection of the creditors' interests.

For example, in the resolution of the Thirteenth Arbitrazh Court of Appeal of 1 October 2012 with regard to case No. A56-38334/2011 it is stated:

> An appeal to apply the doctrine "of piercing the corporate veil" is actually a presentation of the claimant's position on the merits of the dispute, which is subject to appraisal upon consideration of the appeal. Application of any doctrine in the course of proceedings as a separate procedural step of the RF Arbitrazh Procedure Code is not provided.

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[43] Иванов А.А. Государство рискует лишиться крупных активов // Коммерсантъ. 31 июля 2012 г. [Anton A. Ivanov, *The State Risks Losing Major Assets*, Kommersant, 31 July 2012], available at www.kommersant.ru/doc/1991007.

[44] *See* постановления Федерального арбитражного суда Восточно-Сибирского округа от 10 февраля 2014 г. по делу № А33-6328/2013, от 17 сентября 2013 г. по делу № А19-11062/2011; Федерального арбитражного суда Дальневосточного округа от 12 августа 2013 г. № Ф03-3534/2013 по делу № А73-15127/2012; Федерального арбитражного суда Западно-Сибирского округа от 6 июня 2012 г. по делу № А70-7811/2011; Федерального арбитражного суда Северо-Западного округа от 20 февраля 2013 г. по делу № А56-38334/2011; Арбитражного суда Московского округа от 21 января 2015 г. № Ф05-15548/2014; Федерального арбитражного суда Уральского округа от 24 марта 2005 г. № Ф09-2962/04-ГК, от 12 мая 2012 г. № Ф09-727/10 по делу № А60-1260/2009; Пятого арбитражного апелляционного суда от 3 июля 2014 г. № 05АП-6119/2014 по делу № А51-40718/2013; Тринадцатого арбитражного апелляционного суда от 21 января 2013 г. по делу № А56-14749/2010, от 17 июня 2014 г. по делу № А56-55593/2008; Девятого арбитражного апелляционного суда от 15 января 2014 г. № 09АП-42967/2013 по делу № А40-89799/2013 [Resolutions of the Federal Arbitrazh Court of the East Siberian District of 10 February 2014 with regard to case No. A33-6328/2013, of 17 September 2013 with regard to case No. A19-11062/2011; Federal Arbitrazh Court of the Far Eastern District No. F03-3534/2013 of 12 August 2013 with regard to case No. A73-15127/2012; Federal Arbitrazh Court of the West Siberian District of 6 June 2012 with regard to case No. A70-7811/2011; Federal Arbitrazh Court of the North Western District of 20 February 2013 with regard to case No. A56-38334/2011; Arbitrazh Court of the Moscow District No. F05-15548/2014 of 21 January 2015; Federal Arbitrazh Court of the Ural District No. F09-2962/04-GK of 24 March 2005, No. F09-727/10 of 12 May 2012 with regard to case No. A60-1260/2009; Fifth Arbitrazh Court of Appeal No. 05AP-6119/2014 of 3 July 2014 with regard to case No. A51-40718/2013; Thirteenth Arbitrazh Court of Appeal of 21 January 2013 with regard to case No. A56-14749/2010, of 17 June 2014 with regard to case No. A56-55593/2008; Ninth Arbitrazh Court of Appeal No. 09AP-42967/2013 of 15 January 2014 with regard to case No. A40-89799/2013].

The court referenced other grounds for the non-application of the doctrine, but the cited passage demonstrates both the court's confusion of material and procedural legal institutions and a misreading of the doctrine under consideration.

Application of this doctrine is most frequently denied because the circumstances of the current case differ from those in the cases in which the SAC RF did apply the doctrine. In the resolution of the Fifth Arbitrazh Court of Appeal No. 05AP-6119/2014 of 3 July 2014 with regard to case No. A51-40718/2013 it was stated:

> the circumstances which served as grounds for forming the practice of applying "the doctrine of the corporate veil" do not coincide with the circumstances of the current case.

Such argument is universal, as there are no identical legal cases when it comes to the application of frameworks based on a principle as complicated as the principle of good faith.

There are even more original and flagrant arguments by courts refusing to apply the legal opinion of the SAC RF regarding the possibility of piercing the corporate veil. For example, in the resolution of the Arbitrazh Court of the West Siberian District of 13 April 2016 with regard to case No. A03-14308/2015 the court stated, *inter alia*, that the claimant's claim of grounds for application of cl. 4 of Art. 10 of the RF CC is meritless, as the relationship to which the claimant refers in the claim occurred before the date of enactment of cl. 4 of Art. 10 of the RF CC (from 1 March 2013). For this reason, this legal norm is not subject to application. If one follows the court's logic in this reasoning, if a party abused the law and it resulted in an abuse of the other party's right before 1 March 2013, the party is not obliged to reimburse for the losses – a victory of formalism over common sense.

Application of the doctrine of piercing the corporate veil is denied since it can only be applied in a situation when the claimant asserts a claim to bring a parent company or a founder to responsibility. The doctrine cannot be restricted to the category of cases provided above. Such restrictive interpretation can be exemplified by case No. A73-8193/2014. The claimant demands the contracts of purchase and sale of the organizations' shares be recognized as invalid and the application of the consequences of these transactions' invalidity in the form of return of the monetary funds and shares. The claimant believes that the contracts are void, as the parties of these transactions were interested not in shares in the organizations, but in the leasehold rights to the wood plots, and the rights abuse occurred at the conclusion thereof. Upon consideration of the case, the court stated that the argument of the cassation appellant concerning the necessity to apply "the principle of piercing the corporate veil" cannot be acknowledged as justifiable in this case. In the resolution of the Arbitrazh Court of the Far Eastern District No. F03-1778/2015 of 19 May 2015 with regard to case No. A73-8193/2014 it is stated that

> as it has been correctly noted by the first instance court, the doctrine mentioned by the claimant cannot be applied to this dispute as the claims do not concern holding the parent company or founder liable.

Third, courts often apply the doctrine of piercing the corporate veil but do not name the framework used.[45]

7. The Consequences of Applying the Doctrine of Piercing the Corporate Veil

As you can see, in Russian court practice the results of applying this doctrine vary widely. The consequences depend directly on the circumstances supporting the application of this doctrine. A common consequence of applying this doctrine that the court can assert the legal entity's responsibility against its controllers. However, this consequence can have different modifications. Upon analysis of current Russian court practice, we can outline the following consequences of applying the doctrine most frequently used by the courts.

1. Ignoring the legal entity's autonomy. This consequence is applicable if the legal entity is used as an operating or nominal entity. In foreign practice, such grounds are called "use of the legal entity's framework as one's own alter ego or façade." In this situation, the legal entity is used only to veil the activities of another party.

The corporate veil is subject to piercing when the legal entity's structure is used as a nominal party – i.e., it was not established for carrying out direct economic activities. Nominal parties are most frequently established for the formal consolidation of property which must not be connected to the actual owner. This is confirmed by the fact that the legal entity has no signs of real existence: no assets, employees, or office; the post of the sole executive body is occupied by a person who cannot exercise management functions based on his/her work experience, etc.

The corporate veil must be also pierced when a transaction is made by an operating legal entity – an economic entity established to accompany the activities of another legal entity but not for its own autonomous activities. In France there is a concept of "a fictitious organization" ("société fictive") – a legal entity established only to veil the activities of another entity, thus eliminating its risks.[46]

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[45] *See* постановления Арбитражного суда Волго-Вятского округа от 15 октября 2014 г. по делу № А79-8878/2013; Арбитражного суда Западно-Сибирского округа от 4 июня 2015 г. № Ф04-18515/2015 по делу № А45-12142/2014; Западно-Сибирского округа от 6 июня 2012 г. № Ф04-7094/2011 по делу № А70-7811/2011; Восьмого арбитражного апелляционного суда от 25 мая 2015 г. № 08АП-4159/2015 по делу № А75-8869/2014 [Resolutions of the Arbitrazh Court of the Volga-Vyatka District of 15 October 2014 with regard to case No. A79-8878/2013; Arbitrazh Court of the West Siberian District No. F04-18515/2015 of 4 June 2015 with regard to case No. A45-12142/2014; West Siberian District No. F04-7094/2011 of 6 June 2012 with regard to case No. A70-7811/2011; Eighth Arbitrazh Court of Appeal No. 08AP-4159/2015 of 25 May 2015 with regard to case No. A75-8869/2014].

[46] Vandekerckhove, *Piercing the Corporate Veil: A Transnational Approach*, at 363–365.

In Russian practice, this scheme is widespread: fixed production assets are recorded as assets of one legal entity, all the necessary production items are purchased via a second legal entity, the finished products are sold via a third legal entity, and labor relations with the employees are formalized via a fourth legal entity. The latter three legal entities enable the activities of the first one without carrying out any autonomous activities. In this regard, in accordance with cl. 1 of Art. 48 of the RF CC a legal entity is an autonomous organization which has *solitary* assets and is liable to the full extent of *its* assets.

In case of such a business structuring scheme, the commingling of assets (French "confusion de patrimoines", German "Vermögensvermischung") often occurs both between legal entities and between legal entities and private individuals. This occurs, for example, when personal debts are redeemed with the legal entity's assets; the controller actually uses the assets formally owned by the controllable entity, and *vice versa*.

The legal consequence in question manifests in three variants. *First*, the legal entity can be acknowledged as a representative of another (controlling) legal entity.

The application of the doctrine of piercing the corporate veil to oppose the usage of operating legal entities formed the basis of the resolution of the SAC RF No. 16404/11 of 24 April 2012 with regard to case No. A40-21127/11-98-184 on the claim of Olimpia LLC against Parex Bank. In said Resolution, the SAC RF Presidium specified that the company's registration as a permanent representative and the company's ability to conclude contracts on behalf of the foreign organization did not constitute a characteristic criterion to qualify the organization's activity as a dependent agent. The following criteria were named as characteristic: 1) clear understanding of the service users that the company is a permanent representative; 2) ability of the service users to make transactions at the company's location without direct contact with the headquarters.

Another example is case No. A40-138879/14-75-404, in which the courts of all instances acknowledged the legitimacy of tax claims against the Russian division of Oriflame Cosmetics due to the illegal application of a royalty scheme under the contract of commercial concession, referencing the dependent nature of the activities carried out by the legal entity who served as royalty payer. The subsidiary of Oriflame Cosmetics LLC registered in Russia was acknowledged to be a representative of Luxemburg Oriflame Cosmetics S.A. In the ruling of the SC RF No. 305-KG15-11546 of 14 January 2016 concerning this case it is stated that the courts ruled upon the establishment of a permanent representative of Oriflame Cosmetics S.A. on the territory of the Russian Federation and not an autonomous legal entity.

In the judicial decision of the Arbitrazh Court of Moscow of 4 December 2014 in regard to this case, it is stated that the content of this or that phenomenon or circumstance shall be subject to appraisal in isolation from their legal implementation. On these grounds, the first instance court found that it was necessary to pierce the corporate veil in this case.

Second, acknowledgement that the rights and obligations were in fact exercised by the private individual or legal entity which actually managed the legal entity.

This is exemplified by case No. A33-18291/2011 of the Arbitrazh Court of the Krasnoyarsk Territory. The court established the fact that Mr. Zykov was exercising control over legal entity Zykov & Co. LLC and additionally "discovered signs of abuse of the law in the form of systematic circumvention of its counterparty," as within the contractual relationship, Mr. Zykov simultaneously acted on his own behalf as an individual entrepreneur and on behalf of Zykov & Co. LLC as its representative. In other words, Zykov used the framework of a legal entity as a façade, in contrast to its actual purpose, which served as grounds for applying the provisions of the doctrine of piercing the corporate veil and acknowledging Mr. Zykov as a proper defendant despite the fact that the contract had been concluded with Zykov & Co. LLC (judgement of the Arbitrazh Court of the Krasnoyarsk Territory of 15 February 2012 with regard to case No. A33-18291/2011).

Third, expansion of the party's debts to its controllable legal entities if the assets of these legal entities were formed by the debtor to veil property from creditors.

It is possible to provide example of the application of the mechanism of piercing the corporate veil by the courts of general jurisdiction. Cyprian legal entity Dalemont Ltd. filed a claim to the court to recover debt from Mr. S, which arose out of the guarantee of unrecovered credit granted by a Russian bank. Subject to the appellate ruling of the Moscow City Court of 2 August 2012 with regard to case No. 11-16173, the first instance court satisfied the claimant's claims, recovering the debt to the bank from Mr. S, and levied execution on several property items. It should be noted that this property was not owned by the person himself but by several Russian legal entities controlled by this person. It is specified in the court's ruling that

> the first instance court has established that S. has beneficiary possession of the property via all the legal entities brought into the proceedings as defendants, i.e. he is the actual owner of the property subject to execution as per the claim… S. is the owner of real estate though a chain of corporate (joint-stock) control, in which the defendants are the final links.

This finding by the court allowed it to levy execution upon the legal entities' assets to recover the debt of the private individual. It is evident from the judicial acts that "the chains of corporate control" did not only consist of legal entities owning shares and portions of other legal entities, but also Anglo-Saxon trusts and the Jersey foundation.

In terms of legislation and the doctrine, the judicial act under consideration is quite progressive, but was weakly justified by the court. In this case, the courts did not clearly formulate which actions by S. served as grounds for applying the doctrine to his controllable legal entities. Many terms and legal frameworks used

by the court are completely unknown in Russian Law. The court did not refer to the fact that creation of the chain of legal entities was aimed at veiling property from the creditors. This judicial act was partially cancelled out by the ruling of the SC RF No. 5-KG13-61 of 18 June 2013: two items out of several dozens of property items were excluded from the list of the foreclosed property. The remainder of the judicial act was upheld, including the justification of the judgements.

In the above case, the corporate veil was pierced in an opposite way. In fact, it was not piercing of, but penetration from under the corporate veil: from the member (founder) to the controllable legal entity. It should be noted that the court did not invent such framework but rather took foreign practice as basis for its use. In the Anglo-American law, the relevant doctrine is called "reverse piercing" and has two types: outside reverse piercing and inside reverse piercing. In outside reverse piercing, a claim is filed by the creditor of the party controlling the company at which the assets veiled from the creditor are recognized; in inside reverse piercing a claim is filed on behalf of the legal entity's members who wish to obtain execution from the third parties or to protect their assets from a claim by a third party.[47]

The progressiveness of the above judicial act lies in the fact that the court applied reverse piercing of the corporate veil. However, the situation is uncertain because the court neglected to offer detailed reasoning for the application of this framework. Such practice is substantially situational and does not constitute a legal proposition.

2. Refusal to protect the rights acquired with application of non-public offshore companies. The use of non-public offshore companies which do not disclose information on their beneficiary (figuratively and poetically called non-disclosing offshores).

The legislation of offshore zones often permits the establishment of non-public economic entities, which are not obliged to disclose the composition of their members and the identity of the final beneficiary to any third parties. Russian judicial practice has developed a mechanism to encourage these offshore companies to disclose such information. If an offshore company does not disclose its beneficiary, it is a sign of the bad faith of said entity. In the resolution of the SAC RF Presidium No. 14828/12 of 26 March 2013, upon consideration of a dispute concerning the application of an action in replevin, the court expressed an opinion, in accordance with which,

> if a question of applying the provisions of Russian legislation protecting third parties concerns an offshore company, the burden of proving presence or absence of circumstances which protect the offshore company as an autonomous entity in its relationship with any third parties shall be vested with the offshore company. It is possible to prove this, primarily, by disclosure

[47] Nicholas B. Allen, *Reverse Piercing of the Corporate Veil: A Straightforward Path to Justice*, 85(3) St. John's Law Review 1147, 1153–1154 (2011).

> of information on the party backing of the company, i.e. disclosure of information on its final beneficiary.

In the case under consideration, the defendant was judged to be acting in bad faith in accordance with Art. 302 of the RF CC on the assumption that it was connected to the first real estate buyer via an offshore. Consequently, a legal entity which does not disclose information on its beneficiary bears the risk of the consequences provided for in Art. 10 of the RF CC, which is a retaliatory measure against inequitable conduct. In this regard, it should be noted that in the case under consideration, an action in replevin was claimed, and the court analyzed the applicability of Art. 302 of the RF CC, which provides for, *inter alia*, the defendant's good faith to restrict the replevin.

This application of the doctrine cannot be called definitive as if an offshore does not disclose the beneficiary it is impossible to pierce the corporate veil. It appears that the doctrine is only effective if the beneficiary is voluntarily disclosed, i.e. additional conditions are required. Therefore, the negative consequences in said example were not vested in the undisclosed beneficiary but with the offshore company itself.

3. The unfair acts of parties controlling a legal entity have no legal consequences. In the resolution of the Eighth Arbitrazh Court of Appeal No. 08AP-4159/2015 of 25 May 2015 with regard to case No. A75-8869/2014, the court found that actions within an attempt to eliminate the risk of losses being imposed on the controllers by assigning a source of increased danger to a LLC controlled by the owner of said source of increased danger were in bad faith. It served as grounds for the non-application of the consequences from concluding a lease contract and the formal transfer of ownership of the source of increased danger. It was specified in this judicial act that

> The failure to protect the right of the party which abused the right implies protection of the infringed rights of the party whose rights were abused. Therefore, the direct objective of said sanction is not punishment of the abuser but protection of the rights of the party exposed to the abuse. Consequently, to protect the infringed rights of the complainant, the court can refrain from accepting the abuser's claims substantiating correspondence of its actions in exercising its rights with the formal legislative requirements.

4. Reimbursement of losses. Such measures can only be applied if the controller's actions resulted in an infringement of the rights of another party which can claim reimbursement of losses under p. 4 of Art. 10 of the RF CC.

An example of this is case No. A45-12142/2014, wherin the doctrine of piercing the corporate veil was applied. The claimant filed a claim for joint recovery of damages in the form of funds paid under a credit agreement. The claimant (creditor) specified that upon liquidation of the debtor, it suffered damages in the form of the

amounts paid to settle the liabilities of the debtor, for which it acted as a guarantor. The claimant's claim was approved, since the debtor's liquidation procedure was violated, as the liquidator did not notify the creditor of the liquidation in writing, did not take its debts into account, did not make settlements with the creditor, and the liquidation balance sheet did not contain exact information about the debt.

In the resolution of the Arbitrazh Court of the West Siberian District No. F04-18515/2015 of 4 June 2015 with regard to case No. A45-12142/2014, it is specified that considering the liquidation of MOKOM subsidiary (debtor) was initiated by Gamma Unipak parent company, the liquidator (defendant) is the head of Mokom LLC and Gamma Unipak LLC (defendant) which are interconnected by a parent company-subsidiary corporate relationship and by a creditor-debtor relation under the credit agreement, the courts came to the justified conclusion that the liquidator and Gamma Unipak LLC could not be unaware of such relationship. Having determined the defendants' actions to be aimed at depriving the claimant of the opportunity to receive reimbursement per the debt service obligations performed for the debtor (Art. 387 of the RF CC) as a rights violation, the court concluded that there were grounds to recover damages jointly from the liquidator and Gamma Unipak LLC, in accordance with Arts. 15, 322, and 1080 of the RF CC.

8. The Conflict-of-Laws Aspect of Applying the Doctrine of Piercing the Corporate Veil

It is often necessary to apply the doctrine of piercing the corporate veil in relationships complicated by a foreign element or in international private law. When considering these categories of cases, the selection of the applicable law is particularly significant.

Within the framework of restructuring civil legislation, it has been suggested to settle the matter of piercing the corporate veil of foreign legal entities when considering disputes in Russian courts. Thus, it is specified in cl. 1.9 of sec. III of the Civil Legislation Development Concept that the penalty for an offshore company failing to meet their obligation of deposing information in the Russian register will be the joint liability for the offshore company's debts by the parties which determine, legally or actually, the actions of such company and/or are authorized to act on its behalf.[48] This suggestion resulted from the development of the idea to include the principle of good faith in the Russian civil legislation, including in the collision law.

The aforementioned provision of the concept was partially transferred into current legislation. By virtue of cl. 9 of p. 2 of Art. 1202 of the RF CC, the personal law of the

[48] Концепция развития гражданского законодательства Российской Федерации (одобрена Советом при Президенте РФ по кодификации и совершенствованию гражданского законодательства 7 октября 2009 г.) [The RF Civil Legislation Development Concept (approved by the Presidential Council for Codification and Improvement of the Civil Legislation on 7 October 2009)].

legal entity shall be applied, *inter alia*, in the settlement of disputes concerning the liability of the organization's founders and members for its obligations. P. 4 of Art. 1202 of the RF CC sets an exception to this rule. If an entity established abroad carries out business activities predominantly in the territory of the Russian Federation, its creditor is entitled to choose which state's legislation will be applied to the requirements for liability of a legal entity's obligations on the part of its founders, participants, or other parties entitled to give instructions or those who are otherwise able to determine its actions. In this case, it is necessary to apply Russian law or, at the creditor's choice, the personal law of such legal entity. Consequently, p. 4 of Art. 1202 of the RF CC sets a complex alternative conflict-of-laws norm, wherein the creditor is empowered to choose one point of contact.

Not only Russian courts face such problems. In the *VTB case*, the English claimant demanded the piercing of the corporate veil of a Russian legal entity to vest liability under contracts which complied with the English law with principal from Russia and the British Virgin Islands. In this case, the Supreme Court of England refused to consider the idea of choosing an applicable law. However, the court mentioned that different connecting factors could be applied: (a) the law of the country where the company is incorporated (rule of incorporation); (b) the law of the court; (c) any other law, for example, the law of the place where the contract was executed. The judge additionally emphasized that it was impossible to choose one rule to determine the law for consideration of the case.[49]

Several approaches can be offered to solve the issues of choosing an applicable law in piercing the corporate veil in a dispute complicated by a foreign element. The first approach is based on ability to use the connecting factor of the personal law of the legal entity by determining the applicable legislation according to the national affiliation of the debtor. This is the easiest variant to determine the applicable law, as personal law regulates the basic organizational and corporate matters of the legal entity's status (cl. 2 of Art. 1202 of the RF CC).

This approach is widely applied by foreign jurisdictions, such as the USA, England, and Canada. For example, in the case of *Risdon Iron and Locomotive Works v. Furness*,[50] the English court ruled that the personal liability of the shareholder of the company, which was established in accordance with the English laws, must be regulated by the English law, despite the fact that the shareholder concluded and executed contracts in accordance with the law of California.

The first approach has several weaknesses: first, the criteria of national affiliation of legal entities vary and are defined not at the level of international unifications but on the basis of the applicable national legislation. In addition, there can be even a more complicated situation in which the legal entity will be vested with double nationality due to differences in the criteria of national affiliation. For example, a legal

[49] *VTB Capital plc. v. Nutritek International Corp.* [2013] U.K.S.C. 5, [2013] 2 A.C. 337.

[50] *Risdon Iron and Locomotive Works v. Furness* [1906] 1 K.B. 49 (CA).

entity incorporated in Cyprus, which has incorporation criterion (the nationality of the legal entity is set at the place of its incorporation), but carrying out its production activities on the territory of Greece, which has operation center criterion (according to the place where basic economic activities are carried out).

Second, it's impossible to exclude the development of a situation in which legal entities will be deliberately incorporated in jurisdictions where application of the doctrine of piercing the corporate veil is barred. In this case, it is highly improbable that the creditor will be able to pierce the corporate veil from a legal entity.

In accordance with the second approach, it is proposed to follow the personal law of the party held accountable for the debtor's actions. In this case, the applicable law shall be determined by the personal law of the party which actually or legally controls the debtor and which is the final beneficiary.

The strong point of such approach is that the personal law of the entities generally remains unaffected during the entire period of the legal entity's activities. Consequently, the creditor does not raise questions concerning the jurisdiction of the entities. In this case, the court can qualify the manipulation of personal status to encumber selection of the applicable law as a knowingly unfair act.

Difficulties in applying the second approach arise if the final beneficiaries of the legal entity to which the doctrine of piercing the corporate veil is applied are not fully known. This happens most frequently if the corporate veil of offshore companies is pierced, as offshore jurisdictions often legislatively permit the incorporation of non-public companies, which are not obliged to disclose the composition of their founders nor the final beneficiary to any third parties. In this case, the court is unable to request disclosure of the information from the offshore company, as within the framework of this approach it is impossible to determine the applicable law without identifying the beneficiary.

The third approach in choosing the applicable law is based on applying the connecting factor of the law of the court's land, which can be applied as a result of making a public policy clause claim.

The use of the connecting factor under the law of the court's land is particularly efficient in cases of public policy if the corporate veil is pierced from legal entities registered in offshore jurisdictions. If an offshore legal entity is not obliged to disclose its final beneficiaries but its activity poses a threat to the public policy of the Russian Federation, the Russian court has grounds for applying Russian law to protect the interests of the company and the state.

Incorporation and activity of an offshore company do not constitute a violation or an evasion of law.[51] There exists, for example, the resolution of the SAC RF Presidium No. 14828/12 of 26 March 2013, which contains the following legal opinion:

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[51] *Подшивалов Т.П.* Обход закона в международном частном праве // Журнал российского права. 2016. № 8. С. 150 [Tikhon P. Podshivalov, *Evasion of Law in Private International Law*, 8 Journal of Russian Law 145, 150 (2016)].

> Registration of a title for real estate located in the Russian Federation with a legal entity which is incorporated in the offshore zone and, therefore, did not disclose its beneficiary, is not a violation of the law in and of itself.

Despite the importance of such approach (protection of the interests of the company and the state), it seems to be rather hazardous for the normal development of civil circulation. The interests of the state are often placed ahead of the interests of other business entities despite the equality of the participants of a civil relationship (cl. 1 of Art. 1 of the RF CC) and the prevalence of the private interests over public (Art. 2 of the RF Constitution).

Another option for determining the applicable law for piercing the corporate veil can be the application of *lex loci delicti commissi* (the law of the place where the delict was committed). The fourth approach has also been applied in the practice of foreign courts. In the case of *Foresight Shipping Co. v. Union of India*,[52] the Canadian court determined that it was necessary to apply *lex loci*, to be more exact – *lex loci delicti commissi* (incident) (paras. 11–13). Application of this option is rather limited as it is necessary to prove all the component elements of the civil crime: damage, illegality, cause-and-effect relationship and, most importantly, guilt. Beyond this, there can be different readings of *lex loci delicti commissi*.

Selection of applicable law depends mainly on the grounds for piercing the corporate veil. In addition, the court must proceed with the law that can achieve the most efficient result in a dispute settlement. In a dispute concerning the usage of a legal entity as an operating, nominal entity, to transfer risks and liability, it is logical to use the laws of incorporation for such entity.

We believe that out of all the above options, the approach of applying the personal law of the debtor is the most justified. When the court decides to pierce the corporate veil, it primarily deprives the legal entity of its autonomy, making its beneficiary accountable for its liabilities. Such a resolution must comply with the law applicable to the establishment of the legal entity. In this case, to achieve flexible regulation it is prudent to determine an alternative connecting factor, in which the first option for the applicable law is the personal law of the legal entity and the second option is up to the court's discretion. Based on the aforementioned, we believe that the Russian legislative resolution which determined the alternative connecting factor for choosing the applicable law in cl. 4 of Art. 1202 of the RF CC is correct.

Conclusion

In summarizing the research on protecting property rights based on the application of the doctrine of piercing the corporate veil, we can make a series of strategic conclusions.

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[52] *Foresight Shipping Co. v. Union of India* [2004] F.C. 1501.

First, piercing the corporate veil is a delicate tool for professionals which requires detailed justification from the enforcer when considering a specific civil dispute. Naturally, piercing the corporate veil nullifies the issue of the autonomy of the controllable legal entity and the limited liability of its members, but only as an exceptional measure used in a situation when it is impossible to otherwise protect the third parties' interests. The modern Russian system of justice needs the doctrine of piercing the corporate veil.

Second, the doctrine of piercing the corporate veil was implemented into the Russian judicial practice by the SAC RF, was accepted by the system of arbitrazh courts of all instances and was applied by the general jurisdiction courts. Currently, the SC RF does not mention the legacy of the SAC RF in its acts, but it does apply the construct of piercing the corporate veil.

Third, the doctrine under consideration is applied by the Russian courts rather inconsistently, which has been repeatedly noted above. For example, the doctrine has a wide sphere of application in the Russian judicial practice, but in addition to this, in disputes between two private entities, courts resort to piercing the corporate veil less often than in disputes of tax authorities with tax payers. In an ideal scenario, it should be *vice versa*, as the doctrine under consideration concerns only private relationships. In the interest of fairness, it must be noted that there are no distinct criteria for application of this doctrine even in the countries of the Anglo-Saxon legal system where it appeared.

The doctrine of piercing the corporate veil has today evolved from a specific legal mechanism to an abstract framework and is applied by the SC RF strictly on a case-by-case basis. Moreover, courts a quo perceive this doctrine as an odd thing or as a "strange magical wand" which can help justify judgment in situations of legal uncertainty. This tendency can be broken using scientific research to systematize the available judicial acts. The generalizations offered in this paper can help make the doctrine of piercing the corporate veil more precise.

Fourth, it is necessary to preserve the initiative by the SAC RF to expand debts from the economic entity under control to the controller's property. Moreover, the doctrine under consideration has been successfully integrated into the Russian legal system and fully complies with the Russian system of establishing legal entities governed by the current principles of control. If the requirements posed to legal entities are tightened, at least as it pertains to increasing the size of the registered capital subject to the "inlet" control model, there will be no need to apply the doctrine. But before this, the doctrine of piercing the corporate veil must remain an operational mechanism.

Fifth, piercing the corporate veil is a remedy against unfair acts of the legal entities' beneficiaries. Therefore, the legal consequences of piercing the corporate veil are identical to the consequences fixed in Art. 10 of the RF CC which define knowingly illegal practices.

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ON THE CONSTITUTIONAL MODEL OF THE RUSSIAN ECONOMY

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The article focuses on the analysis of the constitutional model of the Russian economy, including its conceptual underpinnings, fundamental principles, and overall design. Particular attention is paid to the problem of so-called "conflicting values" that are equally recognized by the constitutional foundation of the Russian economy. For example, the values of economic freedom and the usefulness of state regulation, and the importance of supporting competition and guaranteeing of social justice, are discussed as examples of conflicting principles. The authors conclude there is no irresolvable conflict. These equal constitutional values (i.e. the principles of economic freedom and the social nature of the state) create a "corridor of opportunities" which the state's socioeconomic policy is balancing within in order to contribute to stability and sustainable development. It is noted in the article that the welfare state constitutional model becomes ineffective in modern conditions. In practice, excessive state social commitments lead to the exhaustion of the sources of growth, and to the slowdown and deterioration of human capital. The implementation of the concept of the workfare state is considered as the most promising. Furthermore, the authors show that the idea of the "neutrality" of the Constitutional Court in an assessment of economic regulations facilitates unlimited state expansion into the economy, provokes economic inequality and the decline of guarantees of economic liberties, and, as a result, leads to an economic slowdown.

Keywords: Russia; constitution; constitutional economics; economic federalism; social state; economic rights; economic justice.

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Table of Contents

Introduction: Conceptual Underpinnings of the Constitutional Model of the Russian Economy
1. Key Principles
2. The Free Market Economy
3. The State's Regulatory Role
4. Economic Federalism
5. The State's Tax and Budget System
6. Mechanisms for Guaranteeing the Stability of the Monetary System
Conclusion: "Conflicting" Constitutional Values as a Source of Development

Introduction: Conceptual Underpinnings of the Constitutional Model of the Russian Economy

The *impact of constitutional provisions on economic reality* is perhaps one of the most complicated and promising research subjects for both theory and practice.

Economists, legal scholars, and political scientists consider these issues from different perspectives. Economists went beyond the boundaries of "ordinary" economic analysis of constitutions and created a new discipline, i.e. constitutional economics (the term was born in the early 1980s in the United States). This research program examines how constitutional rules (principles, institutions) affect the freedom of choice and the activities of economic and political agents. In addition to analyzing constitutional provisions as external constraints, they are trying to determine the origin of these rules.

As is widely known, one of the founders of constitutional economics was the American economist, Nobel laureate (1986) James M. Buchanan (1919–2013).[1] Together with his colleague Gordon Tullock (1922–2014) and other members of the Virginia school of Economics,[2] he made an exceptional contribution to the

[1] *See*, for example, the historical essay on this topic in the discussion papers: Viktor J. Vanberg, *Constitutional Political Economy*, Freiburger Diskussionspapiere zur Ordnungsökonomik 15/06 (2015) (May 3, 2018), available at http://hdl.handle.net/10419/118597.

[2] *See* Francesco Parisi et al., *Gordon Tullock and the Virginia School of Law and Economics*, 28(1) Constitutional Political Economy 48 (2017).

development of public choice theory,[3] which has extended economic methods to issues traditionally related to the political sphere. By developing these ideas, constitutional economists direct their interest

> to the working properties of rules and institutions within which individuals interact, and the processes through which these rules and institutions are chosen or come into being.[4]

In modern Russia, the ideas of constitutional economics entered into scholarly discourse around the mid-1990s. This period saw a surge of positivism in Russian socio-economic sciences, so the constitutional economics theory transferred to Russian soil without its philosophical and methodological background. The Western intellectual heritage was not close to the worldview of a large part of Russian scholars formed in the Soviet socio-cultural and political reality. Leaving aside the issues of economic philosophy, Russian legal scholars and economists focused on applied problems related to the analysis of the impact of constitutional principles on an economy in transition. Among other things, experts who backed the Russian reformers highly appreciated the idea that the establishment of the economic rules and limits in the constitution (the Fundamental Law) could contribute to the rule of law in Russia, the transition to a market economy, and economic development.

As pointed out by Pyotr Barenboim and Natalya Merkulova in their essay, dedicated to the 25th anniversary of constitutional economics,

> We believe that one of the ways for the Rule of Law and economic development to expand beyond the business and corporate law perspective is through adopting fundamental principles resulting from constitutional and institutional analysis. The constitutional approach is not purely theoretical and is meant to be utilized to serve more practical tasks discussed within the Rule of Law concept.[5]

As a result, Russia has gradually developed a new discipline based on the approaches and methods of institutional economics and constitutional law, i.e. *konstitutsionnaya economica*.

This Russian term sounds similar to the English "constitutional economics." Therefore, in order to underline the difference between the Western and Russian

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[3] The public choice theory emerged in the 1940s and was developed in the 1960s.

[4] James M. Buchanan, *The Domain of Constitutional Economics*, 1(1) Constitutional Political Economy 1 (1990).

[5] Pyotr Barenboim & Natalya Merkulova, *25th Anniversary of Constitutional Economics: The Russian Model and Legal Reform in Russia* in *The World Rule of Law Movement and Russian Legal Reform* 161 (F. Neate & H. Nielsen (eds.), Moscow: Yustitsinform, 2007).

approaches, Russian literature often uses the terms Constitutional Economic Theory or Constitutional Political Economy to specify the intellectual heritage of Buchanan and his followers, and the term Constitutional Economics to specify the Russian research tradition.[6] The Russian model of the constitutional economics analyzes the constitutional and legal prerequisites for the effective development of an economy; studies the impact of economic crises on the state's constitutional institutions, as well as the impact of constitutional crises on the economy; explores the consequences of the globalization of the international economy for the constitutional processes in individual countries, etc. Furthermore, as noted in the work by Barenboim and Merkulova already cited, constitutional economics became a basis for legal reform in Russia as well as in post-Soviet and other transitional countries. This discipline provides a practical methodology for evaluating legislation, especially budget legislation.

The most comprehensive works in the field of constitutional economics belong to the renowned Russian scholars Pyotr Barenboim, Gadis Gadzhiev, Vladimir Lafitskiy, Vladimir Mau, Veniamin Yakovlev, and others.[7]

Few people remember this today, but the question of the "level" of a legal act which aims to establish the new model of the Russian economy, was discussed between Russian experts and experts of the Council of Europe. The papers of the Moscow seminar (January 1993) with the participation of representatives of the Venice Commission (European Commission for Democracy through Law)[8] gives vivid evidence. The Russian experts defended the position that the Fundamental Law only has the proper level of legal value to enshrine the basis of the new economic order and to foster economic transition.

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[6] *See, e.g.*, *Белокрылова О.С.* Конституционная политическая экономия в контексте теории и практики // Вопросы регулирования экономики. 2014. № 5(1). С. 6–12 [Olga S. Belokrylova, *The Constitutional Political Economy in the Context of Theory and Practice*, 5(1) Journal of Economic Regulation 6 (2014)].

[7] *See, e.g.*, *Гаджиев Г.А., Баренбойм П.Д., Лафитский В.И., Мау В.А., Захаров А.В., Мазаев В.Д., Кравченко Д.В., Сырунина Т.М.* Конституционная экономика [Gadis A. Gadzhiev et al., *Constitutional Economics*] (G.A. Gadzhiev (ed.), Moscow: Yustitsinform, 2006); *Гаджиев Г.А.* Конституционные принципы рыночной экономики // Развитие основ гражданского права в решениях Конституционного Суда Российской Федерации [Gadis A. Gadzhiev, *The Constitutional Principles of the Market Economy* in *Development of the Fundamentals of Civil Law in the Decisions of the Constitutional Court of the Russian Federation*] (Moscow: Yurist, 2004); Конституционная экономика и антикризисная деятельность центральных банков: Сборник статей [*Constitutional Economics and Anti-Crisis Activities of the Central Banks: Collection of Articles*] (S.A. Golubev (ed.), Moscow: LUM, 2013); *Болдырев О.Ю.* Конституционное право и экономика: поиск методологии и бегство от идеологии // Конституционное и муниципальное право. 2015. № 4. С. 9–14 [Oleg Yu. Boldyrev, *Constitutional Law and Economics: Search of Methodology and Escape from Ideology*, 4 Constitutional and Municipal Law 9 (2015)]; *Самигуллин В.К.* Экономический потенциал конституции // Конституционное и муниципальное право. 2015. № 4. С. 6–8 [Venir K. Samigullin, *The Economic Potential of the Constitution*, 4 Constitutional and Municipal Law 6 (2015)].

[8] The European Commission for Democracy through Law, better known as the Venice Commission, is an advisory body of the Council of Europe created in 1990 for the purpose of providing constitutional assistance in Central and Eastern Europe.

> The basic question to be asked is whether the economy should be regulated within the rigid framework of the Constitution, and if so to what extent, or if it would not be better left to ordinary law. The Russian participants considered that the Constitution should contain at least the fundamental provisions protecting the weak against the possible abuses of a free market economy.
>
> On the same line of thought, the Constitution should contain provisions guaranteeing the protection of social rights, even though the Courts would not be in a position to apply them directly. It should be remembered that this was part of the Russian tradition, and that the people would not understand a different approach.[9]

The constitutional model of the Russian economy is based on the concept of sustainable development, equal protection of all kinds of property, and the combination of advantages associated with the market and state regulation. On the whole, it is consistent with the *welfare state* model. The selection of this particular economic concept is determined by the *social nature of the state*, which is established by Art. 7(1) of the Constitution of the Russian Federation. This implies that the state is obligated to build such a system for distributing social wealth that would ensure a dignified life and free personal development of every citizen as well as support for vulnerable social groups.

In the Russian Constitution, in their organic unity, practically all norms and provisions have a bearing on the country's socioeconomic system, establishing the basic principles and the logic of its development. At the same time, no separate chapter is expressly devoted to the economic agenda as such; instead, entire text of the Basic Law relates to it, including its preamble.

The Constitution establishes the basic principles of the economic system, enshrines the most important economic rights, defines the economic functions of the bodies of state power, and regulates the most significant issues of the functioning of individual institutions that are directly involved in the implementation of economic policy.

The most important conceptual feature of the current Russian Constitution is political and economic *liberalism*. At the same time, it contains the entire complex of ideas and principles developed by the democratic tradition of the last two centuries. The Venice Commission mentioned as a positive fact that the Russian Constitution has eliminated the difference between the "classical" human rights that include

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[9] *Transition to a New Model of Economy and Its Constitutional Reflections: Proceedings of the UniDem Seminar Organized in Moscow on 18 and 19 February 1993 in Co-operation with the Supreme Soviet of the Russian Federation, the Moscow State University, the Constitutional Court of Russia, the Constitutional Commission, the Ministry of Foreign Affairs and the Parliamentary Centre of the Supreme Soviet* 28 (Strasbourg: Council of Europe Press, 1993).

civil and political rights, and the economic, social and cultural rights. According to international experts, enshrining a wide range of economic, social, and cultural rights in the Basic Law is a positive and progressive fact, as it reflects the traditions of Russia's previous constitutional development and

> in a sense, is a working people's social achievement not to be given up, particularly since the said rights were recognized in the international legal instruments concerned with the human rights.[10]

In practice, the new Russian Constitution was the first to attempt to ensure the organic unity of the *liberal principles of Natural Law with the social tradition of contemporary times*.

This was reflected in an extremely condensed form in the economic provisions of Chapters 1 and 2 of the Constitution, which contain the fundamental principles of the state, social and political system and may not be changed other than by changing the entire Basic Law.

1. Key Principles

The most important principles underpinning the constitutional model of the economic system of the Russian Federation are economic sovereignty and economic security of the state; a single monetary system; multiple forms of ownership, including private, state (federal and that of constituent entities of the Russian Federation), and municipal; the social function of ownership; the market economy; state regulation of economic activity; free enterprise and freedom of other types of economic activity; labor rights and liberties; free competition; economic and budgetary federalism; an effective tax and budget system; pursuing the goal of a reduction in social disparity; promoting the national economy; and providing conditions for the effective integration of the Russian economy in the global economy.

The entire logic of the Russian Constitution is based on a *combination of the principles of freedom and responsibility*. The ideas of freedom are implemented through ensuring pluralism in the political (multipartyism and political freedom), economic (pluralism of the forms of ownership and freedom of enterprise), and ideological (inadmissibility of recognizing any ideology as prevailing) spheres.

The Constitution of the Russian Federation specifies the following basic economic rights and liberties:

– the freedom to perform economic activities (Art. 8(1));

– the right to the free movement of goods, services and financial resources (Arts. 8(1), 74);

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[10] Cited from *Вирук Н.В.* Верность Конституции [Nikolay V. Vitruk, *The Commitment to the Constitution*] 48–49 (Moscow: Russian Academy of Justice, 2008).

– the guarantees of equal recognition and protection of any forms of ownership, including private ownership (Art. 8(2));

– the freedom of movement and the freedom to choose a place in which to stay and reside (Art. 27);

– the freedom of labor (Art. 37(1 and 2);

– the freedom to choose an occupation, including choosing between entrepreneurship (self-employment) and employment (Arts. 34(1), 37(1));

– the freedom of enterprise (Art. 34(1);

– supporting the competition and protecting free competition (Arts. 8(1), 34(2));

– the legislative guarantees of protection of private ownership rights (Art. 35(1));

– the freedom of creative activities (Art. 44(1));

– the guarantees of legislative protection of intellectual property (Art. 44(1)); etc.

The *rights to the freedom of movement, freedom of enterprise, and freedom of contract* are of particular importance. It is the implementation of these constitutional norms that makes political, economic and individual rights and liberties an indispensable part of public practices rather than a mere declaration.

2. The Free Market Economy

The free market economy provides the most important foundation for the constitutional system of the Russian Federation. The creators of the Russian Constitution aimed to provide "competitive advantages" for the implementation of the new model of the economic order. Constitutional provisions designed to promote market transition combine guarantees of personal and economic freedoms, social responsibility, and obeisance to the rule of law by the state. As noted by the researchers, a distinguishing feature of the 1993 Constitution is the supremacy of *actual* understanding of the principles of free market economy over their *formal* understanding.[11] Indeed, both the notion of "market economy" proper and a section expressly devoted to the country's economic system are formally lacking in the Constitution of the Russian Federation. This is an objective fact that reflects a certain political and ideological compromise. The fact is that the ideas of the free market and market economy do not rank among the values shared by the majority of the Russian citizens. Moreover, even after many decades since the beginning of the reforms, the very terms "market" and "market economy" still remain semantically non-neutral.

As noted by Prof. Sergey Stepashin, for a considerable part of the population, market reforms are directly associated with personal social failure and profound

[11] *See e.g.*, *Степашин С.В.* Конституционный аудит [Sergey V. Stepahshin, *Constitutional Audit*] 178–194 (Moscow: Nauka, 2006); Gadzhiev et al. 2006.

social upheaval while the term "market" became synonymous with the "shock reforms" and the subsequent serious social and economic problems.[12] This does not mean that the market and market methods are bad as such. The problem is that the application of objectively neutral economic knowledge (methodologies, tools and standard technologies) in a concrete social context often leads to the formation of an emotional, and often disapproving, attitude towards both the knowledge itself and those who apply this knowledge. In case of the shock methods used to "restart" the Russian economy in the early 1990s, the lingering echo of extremely negative social consequences led to bitter resentment of not only the model of market relationships but even of the words from the liberal vocabulary among a part of Russian society.

Nevertheless, the development of the private sector and the rational use of market instruments for regulating economic relationships are objectively beneficial and necessary for the modernization of the Russian economy.

As declared by the President of the Russian Federation, Vladimir Putin, in his Address to the Federal Assembly on 12 December 2012,

> the economic freedom, private property, competition and *a modern market economy* [emphasis added], rather than state capitalism, must comprise the core of the new model of growth.[13]

Article 8 of the Constitution of the Russian Federation contains a rather exhaustive description of the *principles of the market economy* reflected in its main characteristics: the guarantees of the rights of ownership; the freedom of enterprise; the support of competition; and the unity of economic space. Among the most important functions of the state that determine the limits of its possible intervention in economics, the Constitution first and foremost emphasizes fundamental liberal values such as protection of property and support of competition.

Other elements of the market economy that are directly enshrined in the Constitution of the Russian Federation are property, enterprise and labor. At the same time, the economic function of the state is essentially transformed: instead of managing the national economy in the context of the nationalization of property, the state becomes a regulator of economic relationships, retaining its function of managing public property only (federal property or property belonging to constituent entities of the Russian Federation).[14]

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[12] Stepahshin 2006, at 184.

[13] Послание Президента Российской Федерации Федеральному Собранию Российской Федерации, 12 декабря 2012 г. [Presidential Address to the Federal Assembly of the Russian Federation, 12 December 2012] (May 3, 2018), available at http://eng.kremlin.ru/transcripts/4739.

[14] *See Эбзеев Б.С.* Человек, народ, государство в конституционном строе Российской Федерации [Boris S. Ebzeev, *Man, people, state in the constitutional system of the Russian Federation*] 405 (Moscow: Yurizdat, 2005).

3. The State's Regulatory Role

Although there is no direct statement of the importance of the state's regulatory role in the Russian Constitution which is based on the ideas of civil society detached from the state, this role is, nevertheless, obvious and reflected in many provisions of the Basic Law. For instance, it is the state that regulates the institution of property, labor and principles of distribution; establishes the minimum wage and the taxes; forms and spends the state budget; and pursues the state investment policy.

It should also be mentioned that there is no public consensus concerning not only "market values" but also over the values of the "welfare economy," state paternalism, and the limits of state intervention in economic life in contemporary Russia.

For instance, self-supporting constituent entities often regard the extended social commitments of the state and the policy of state paternalism as a cause of social dependency and civil passivity. It is obvious, however, that a socially-responsible economy is a normatively endorsed benefit for a significant part of the populace and, therefore, enshrining this principle in the Basic Law became one of the key underlying elements of the new social consensus.

The social nature of the state, declared in Art. 7(1) of the RF Constitution, implies that the state is obliged to create a development model that would guarantee the principles of social equality, solidarity and mutual responsibility.

The Constitution of the Russian Federation reflects the idea of the *social function of property*. This follows from the abovementioned principle of the welfare state as well as from a systemic interpretation of provisions of Art. 9, which establishes that the land and other natural resources may be in private, state, municipal and other forms of ownership (Art. 9(2)) but, at the same time, stipulates that they should be used and protected in the Russian Federation as the basis for the life and activity of the peoples living in the territories concerned (Art. 9(1)). The social function of property also follows from Art. 35(3), which allows for the forcible alienation of property for state needs, Art. 36(2), according to which the private owners of land may freely exercise their powers as long as it does not cause damage to the environment or infringe upon the rights and lawful interests of other persons; while Art. 34(2) of the Constitution of the Russian Federation forbids any economic activity aimed at monopolization and unfair competition.[15]

As noted above, there is also no public consensus on the permissible "depth of immersion"[16] of the state in economic regulation. According to the ideas of constitutionalism, the Basic Law should establish the limits of state interference in economic life, and, first and foremost, in the private sector of the economy. However, due to the historical features of the Constitution of 1993, these limits

[15] Ebzeev 2005, at 407.

[16] A quote from Gadis Gadzhiev, a Russian Constitutional Court judge.

were not defined strictly and unambiguously. As is well known, the Constitution of Russia arose in a time of opposition between political elites and competition between ideas about the model of the new social and economic order, about the purposes of social development and the ways to achieve the same. In the context of the escalation of the political struggle and civil confrontation, the Constitution was designed primarily to provide a basis for the restoration of social unity and harmony. That is why the Constitution enshrined the most general principles and declarations, accepted by all political opponents, to create the core for consensus but did not specify the details to avoid a new burst of conflicts. The frame and procedural nature of the Constitution also stems from the fact that this document was developed in the situation of transition and, therefore, it objectively could not contain a detailed description of the institutions that were still in the process of formation.

Being an instrument of "compulsion to consensus," the Constitution of 1993 provides the rules and tools for the establishment of a new system of state power based on the principles of division of powers and their mutual deterrence. Furthermore, the Basic Law provides a set of efficient mechanisms and algorithms to maintain the proper balance of powers, to maintain social harmony, and to prevent and resolve possible conflicts at various levels. It is noteworthy that the mentioned mechanisms and algorithms have no political overtones. It does not matter who the current president, chairman of the federal government, or head of the region is. The persons may change, but the procedures resulting in consent remain standard and work effectively.

However, even if the authorities and political elites agree to follow the established constitutional procedures, this does not give a 100% guarantee of the successful implementation of constitutional principles. A political and legal culture, respect for the rule of law, and unity in understanding the ideas of the Basic Law are even more critical factors for success.

When the first State Duma appeared in Russia, Pyotr Stolypin[17] wrote about the crucial importance for the branches of power to find a common language. He believed that such a "common language" should be found in the unified understanding of national and state objectives.[18] In fact, a constitution adopted by all branches of government and by political forces is created precisely to ensure "a unified understanding of national and state objectives." This understanding was particularly important in an era of large-scale societal transformation, when the country is choosing a new trajectory for development.

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[17] Pyotr Stolypin (1862–1911) was a Russian statesman, reformer and Prime Minister from 1906 to 1911.

[18] *Столыпин П.А.* Нам нужна Великая Россия. Полное собрание речей в Государственной думе и Государственном совете. 1906–1911 [Pyotr A. Stolypin, *We Need a Great Russia. A Full Collection of Speeches in the State Duma and the State Council. 1906–1911*] 62–65 (Moscow: Molodaya Gvardiya, 1991).

Unfortunately, even today, such a unified understanding of constitutional principles has not yet developed. Although, for constitutional experts, the principles and logic setting the limits for state intervention are apparent. According to the Russian Constitutional Court judge Gadis Gadzhiev,

> almost all constitutional norms that establish economic freedom, the rights of citizens in the economic sphere, the limits of their restrictions genetically related to civil law… The state, by establishing, in the Constitution, the rules on its functions in the economy, undertakes a new constitutional obligation.

If the state guarantees to protect fundamental economic rights, it is obliged to be reasonable in its application of restrictive legal tools.[19] This also means that constitutional provisions set the limits for state intervention and presence in the area of private entrepreneurship, as well as the personal lives of citizens.

Since society and political elites did not fully perceive the ideas of constitutionalism, a lack of unity in the understanding of the constitutional principles leads to a lack of agreement in the interpretation of norms establishing the limits of state intervention in the economy. As a result, practice shows that the scope of state regulation is continually expanding, while the volume of economic freedoms is decreasing.

Nevertheless, the expert position that constitutional provisions are "guilty" in the situation when "courts and practice have the opportunity to evaluate such rules in their interests"[20] (in other words, interpret them in favor of the state) is, at least, naive, because it mixes causes and consequences. The conclusion saying that the "ambivalence" of the norms of the Constitution became the basis for "neutrality" declared by the Russian Constitutional Court in the assessment the economic policy pursued by the state[21] demonstrates a similar substitution of cause and consequence.

As practice shows, this kind of "neutrality" is a political and legal choice that ultimately affects the economy. The current "depth of immersion" of the state in the economy is beginning to interfere with economic development. As President Vladimir Putin noted in his Address to the Federal Assembly on 1 March 2018,

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[19] *Гаджиев Г.А.* Экономическая Конституция. Конституционные гарантии свободы предпринимательской (экономической) деятельности // Конституционный вестник. 2008. № 1(19). С. 249–263 [Gadis A. Gadzhiev, *Economic Constitution. Constitutional Guarantees of Freedom of Entrepreneurial (Economic) Activity*, 1(19) Constitutional Bulletin 249 (2008)].

[20] *Нефедов Д.В.* Экономическая теория как основание конституционного толкования // Правоведение. 2013. № 5(310). С. 220 [Dmitriy V. Nefyodov, *Economic Theory as a Foundation of the Constitutional Interpretation*, 5(310) Jurisprudence 215, 220 (2013)].

[21] Gadzhiev 2008, at 251.

> In order for the economy to work in full force, we need to radically improve the business climate, and ensure the highest level of entrepreneurial freedoms and competition. I want to outline a principled position here. The state's share in the economy should gradually decline.[22]

In fairness, we have to note that the decision of the courts to side with the state and large corporations is a widespread phenomenon. In fact, the Russian courts are going, with some delay, through the same evolutionary path as the economic justice of the United States. American legal history knows a period called the "Lochner era" (1897–1937). It was a time when the U.S. Supreme Court found it necessary and useful to strike down economic regulations adopted by a state if these laws were held to be infringing on economic liberty or private contract rights. But, since the end of the Lochner era, the concept that "the Constitution generally should leave economic policy decisions to the legislative and executive branches"[23] has prevailed in the USA.

According to the American Professor Martha T. McCluskey, this approach has led to the fact that the American Dream gradually disappears because the principles of freedom and equal economic opportunity are no longer protected by the Constitution and the courts:

> Not only has the U.S. Supreme Court turned away from the constitutional protection of those with modest resources, but it also has increasingly (though often subtly) used the Constitution to limit political branches' discretion to promote equality.[24]

The author considers it is time for an ambitious constitutional vision of economic justice and the creation of mechanisms to ensure constitutional protections against economic inequality.

4. Economic Federalism

Yet another key principle of the organization and functioning of the state, social and economic system in Russia is *federalism*, which is reflected in many provisions of the Constitution of the Russian Federation. One of the fundamental principles of federalism is the unity of economic space (Art. 8(1)), supported by the provisions of Art. 74(1) stating that

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[22] Послание Президента Российской Федерации Федеральному Собранию Российской Федерации, 1 марта 2018 г. [Presidential Address to the Federal Assembly of Russian Federation, 1 March 2018] (May 3, 2018), available at http://www.kremlin.ru/events/president/news/56957#sel=155:1:1kp, 155:4:vpk.

[23] Martha T. Mccluskey, *Constitutional Economic Justice: Structural Power for "We the People,"* 35 Yale Law & Policy Review 271 (2016).

[24] *Id.*

> No customs borders, duties, levies, or any other barriers to the free movement of goods, services, or financial means shall be permitted in the territory of the Russian Federation.

Among other federalist provisions we can mention the equality of rights of the constituent entities of the Russian Federation (Art. 5(1 and 4)), the principle of a single monetary system (Art. 75(1)), the unity of the system of executive bodies in the Russian Federation at the federal and regional levels within the exclusive jurisdiction of the Russian Federation and the RF's powers concerned with the matters within the joint competence of the Russian Federation and its constituent entities, which allows a uniform and cohesive policy to be pursued across the entire country (Art. 77(2)).

An important principle of federalism consists in the participation of constituent entities of the Russian Federation in decision-making concerned with the federal budget; federal taxes and levies; financial, currency, monetary and customs regulation; and the issue of money. To implement this principle, the Constitution enshrined mandatory consideration by the Chamber of Regions (the Federation Council) of the relevant federal legislation adopted by the State Duma of the Federal Assembly of the Russian Federation (Art. 106(a, b, c)).

The constitutional model of *economic federalism* enables the effective implementation of the principle of "unity in multitude." On the one hand, the exclusive competences of the Russian Federation include establishing a legal framework for the single market; financial, currency, monetary and customs regulation; the issue of money; pricing policy guidelines; federal economic agencies including federal banks (Art. 71(g)); as well as determining the basic principles of federal policy and federal programs concerned with the country's economic development (Art. 71(f)). On the other hand, the constituent entities of the Russian Federation enjoy full state power and freedom of choice (including in the field of economic decision-making) outside the exclusive jurisdiction of the Russian Federation and the RF's powers concerned with the matters within the joint competence of the Russian Federation and its constituent entities (Art. 73). The Constitution thus provides a framework for creating a mechanism for fine-tuning the strategy and tactics of the federal socioeconomic policy to the specific needs of concrete constituent entities of the Russian Federation, so as to ensure the equal standards of wellbeing and development possibilities across the entire country.

5. The State's Tax and Budget System

The Constitution of the Russian Federation also enshrines the fundamental principles for the state's *tax system*. In particular, it is established that the federal taxes and levies are within the exclusive jurisdiction of the Russian Federation (Art. 71(h))

while the general principles of taxation and levying in the Russian Federation are within the joint jurisdiction of the Russian Federation and its constituent entities (Art. 72(i)). According to the Constitutional Court of the Russian Federation,

> taxes are the most important source of budget revenue at the expense of which compliance with, and protection of, citizens' rights and liberties, as well as the exercising of the state's social function, shall be ensured (Arts. 2 and 7 of the Constitution of the Russian Federation). Without the proceeds of tax payments to the budget, the financing of enterprises fulfilling the government contracts, as well as public health institutions, education, army, law enforcement agencies, etc., would be impossible, as would the payment of wages to public-sector employees.[25]

The Constitution obliges everyone to pay the legally established taxes and levies, at the same time, establishing a rule under which the laws introducing new taxes or deteriorating the taxpayers' position shall have no retroactive effect (Art. 57).

Draft laws introducing or abolishing taxes and exemptions from the payment thereof may only be introduced following a resolution of the Government of the Russian Federation (Art. 104(3)) while, as already mentioned, the tax laws adopted by the State Duma are subject to obligatory consideration by the Federation Council of the Federal Assembly of the Russian Federation (Art. 106(b)).

The constitutional codification of the principles of *budgetary relationships*, and the definition of the place, role, and functions of the *state budget* comprises an essential element of the fundamentals of the economic system. All modern constitutions contain requirements to include all the state's revenue and expenditure in the budget. This is a general principle, the observance of which is strictly controlled in every country.

The Constitution of the Russian Federation only establishes general principles for the budget and budgetary relationships, giving enough latitude in the complicated process of formation of the country's budget system that is best suited for addressing the socioeconomic development objectives and contemporary challenges.

Under the Basic Law, the federal budget is the exclusive competence of the Russian Federation (Art. 1(h)). The federal budget is developed and submitted for the State Duma's approval by the Government of the Russian Federation, which then

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[25] *See* Постановление Конституционного Суда Российской Федерации от 23 декабря 1997 г. № 21-П "По делу о проверке конституционности пункта 2 статьи 855 Гражданского кодекса Российской Федерации и части шестой статьи 15 Закона Российской Федерации 'Об основах налоговой системы в Российской Федерации' в связи с запросом Президиума Верховного Суда Российской Федерации," Собрание законодательства РФ, 1997, № 52, ст. 5930 [Ruling of the Constitutional Court of the Russian Federation No. 21-P of 23 December 1997. The Case of Testing the Constitutionality of Paragraph 2 of Article 855 of the Civil Code of the Russian Federation and Part Six of Article 15 of the Law of the Russian Federation "On the Fundamental Principles of the Tax System in the Russian Federation" in Connection with the Request of the Presidium of the Supreme Court of the Russian Federation, Legislation Bulletin of the Russian Federation, 1997, No. 52, Art. 5930].

works to ensure the execution of the budget approved by federal law, and submits the annual report to the parliament (Art. 114(a)).

Any draft laws making provisions for the expenditures covered by the federal budget may only be introduced to the State Duma following a resolution of the Government of the Russian Federation (Art. 104(3)).

The federal laws adopted by the State Duma and concerned with the federal budget issues are subject to obligatory consideration by the Council of the Federation (Art. 106(a)).

To control the execution of the federal budget, the Federation Council and the State Duma form the Accounts Chamber whose composition and operating procedures are controlled by federal law (Art. 101(5)). The Accounts Chamber, acting on behalf of the taxpayers and in the best interests of society, appears in parliament to present its evaluation of the draft budget and report the results of the audit of budget execution.

The Budget Code of the Russian Federation regulates budgetary relationships in more detail.[26] In particular, the Budget Code defines the budget in general terms as a form of generation and disbursement of monetary assets intended for financial backing for the objectives and functions of the State and local self-government (Art. 6).

As a legal category, the budget is:

– the national fund of public monetary assets created to meet the government expenditure;

– the state's financial plan specifying its revenue and expenditure;

– the principal (main) financial plan in the country since, apart from the state budget, other financial plans also exist such as the plans of enterprises, agencies, and organizations (balance sheets, budget estimates);

– the object of budgetary legal relationships, reflected in the legal budgetary provisions.

As a financial category and a link in the country's financial system, the state budget is a special form of redistribution relationships, associated with a part of a national income being transferred into the ownership of the state (or a constituent entity of the Russian Federation) and utilized to meet the needs of the entire society and its individual territorial entities. The budget redistributes national income and a part of national wealth between the territorial entities and national economy sectors. More than other links of the financial system, the redistribution of national income using budgetary methods is determined by the needs of extended reproduction in general and the objectives facing the society at each stage of its historical development.

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[26] Бюджетный кодекс Российской Федерации от 31 июля 1998 г. № 145-ФЗ, Собрание законодательства РФ, 1998, № 31, ст. 3823; 2018, № 1 (ч. 1), ст. 18 [Budget Code of the Russian Federation No. 145-FZ of 31 July 1998, Legislation Bulletin of the Russian Federation, 1998, No. 31, Art. 3823; 2018, No. 1 (Part 1), Art. 18].

The budget is a public law category, normatively consolidated and exclusively used to express the national interest, and, therefore, relationships in this sphere are mainly regulated by the binding norms.

The Budget Code of the Russian Federation also provides a legislative definition of the notion of the "*budget system of the Russian Federation*." Such system understood as a combination of federal budget, the budgets of constituent entities of the Russian Federation, municipal budgets, and the budgets of the state extra-budgetary funds, which is based on the economic relationships and state structure of the Russian Federation and regulated by the RF legislation.

The following main constitutional and legal principles underpin the budget system of the Russian Federation:

– the unity of the country's budget system;

– the autonomy of budgets, i.e. budgets of different levels having their own sources of revenue and enjoying a right to determine how to disburse this revenue;

– transparency and accountability of the government bodies' activities as regards budget formation and execution;

– delimitation of revenue and expenditure between the levels of the budget system of the Russian Federation;

– budget balance (ensuring the matching of expenditure against revenue, as well as the development and implementation of measures aimed to increase budget revenue and cut budget expenditure);

– effectiveness and economy of the use of budget funds;

– coverage of total (aggregate) expenditure;

– budget validity (the budget ought to be based on reliable indicators of the forecast of socioeconomic development of a territory and the realistic estimates of budget revenue and expenditure); and

– budget funds targeting.

6. Mechanisms for Guaranteeing the Stability of the Monetary System

One of the important aspects of the constitutional model of Russia's economy is the *principle of independence of the Central Bank of the Russian Federation*, enshrined in the Basic Law. According to Art. 75(2) of the RF Constitution, the main function of the Central Bank of the Russian Federation, performed independently of other bodies of state power, is protecting and ensuring stability of the ruble. According to Art. 75(1), only the Central Bank is entitled to issue money in Russia.

The idea of central banks being independent from the executive and legislative bodies of state power first emerged in the late 19th century but began to be implemented in constitutional and legal reality in the second half of the 20th century.

Rather than with the theoretical matters, the constitutional codification of the principle of independence of the Bank of Russia was largely associated with the

practical need to create additional mechanisms to guarantee the stability of the monetary system of the young state that was compelled to carry out reforms in a situation of financial and economic crisis that had erupted in the last few years of the USSR's existence.

As is well known, the profound budgetary and financial crisis inherited from the Soviet Union produced a very negative impact on the development of the new model of Russia's economy. At the same time, the crisis was so protracted largely because of the lack of consistency in the policies of the different branches of the new Russia's power in the early 1990s. Any positive effect of the Government's measures aimed at reducing inflation and promoting macroeconomic stabilization often came to naught because of the inflationist policy of the deputy corps. This process was particularly vividly manifested in 1992–1993 when the Supreme Soviet of the Russian Federation could directly intervene in the Central Bank's financial policy.

Therefore, enshrining the independent status of the Bank of Russia in the constitution reduces the risks of political expediency affecting the stability of the country's monetary and credit system as well as the banking sphere, and helps curb inflation.

Conclusion: "Conflicting" Constitutional Values as a Source of Development

To sum up, the Constitution of 1993 has some inherent traits, which seem contradictory, at first glance. On the one hand, it is a rigorous codification of fundamental principles, including a complicated procedure for making amendments to the text of the Constitution. On the other hand, it is the absence of prohibitions on the broadest political and legal creativity within the existing constitutional limits.

Some economists consider it a serious problem that the current Russian Constitution equally defends the principles of economic freedom and, at the same time, the social nature of the state. For instance, there exists an opinion that the first two chapters of the Constitution

> contain more liberal provisions than other sections. The implementation of the liberal principle declared in the Fundamentals of the Constitutional System and Individual Rights and Freedoms becomes difficult when it comes to the concrete problems in the functioning of the economic and political system. This is caused by the conflict between liberalism declared by the Constitution and the actual possibilities for its implementation in the post-socialist society. This gap is clearly discernible if we consider the authorities of the bodies of state power (including those associated with the adoption of regulatory legal acts) to interfere with the freedom of economic activity, being governed by various "public" interests. Such interests, first and foremost,

include the state's constitutional obligation to guarantee social protection to the populace.[27]

The problem of *social justice* is another difficult problem. It is well known that the interpretation of the principle of justice depends on the worldview and concrete stage in the development of a society. This principle may be understood both as ensuring maximum material equality of all members of society; as preventing an excessive gap between the rich and the poor; creating equal start conditions for each individual; as the state's obligation to provide support to the most vulnerable groups; and as provision of a minimum set of basic social guarantees to all citizens. The right choice of "criteria of justice" and the effective practical implementation of a suitable policy provides an important basis for the stability of democratic systems because a profound social inequality undermines the political and economic stability of society, while an excessive concentration of public resources in the hands of a minority destroys the principles of democracy and creates a barrier to steady social and economic development.

In fact, however, there is no irresolvable conflict between the principles of economic freedom and the social nature of the state. These values are equal; they create a "corridor of opportunity" within which the state's socioeconomic policy is balancing. On the one hand, it is extremely important to find the right balance between the provision of the conditions of freedom for the development of private initiative, and social responsibility; between the interests of free individual and the interests of society. On the other hand, it is no less important to maintain the right balance between achieving social justice for individual groups, and the need to ensure the incentives for the development of the economy in the best interests of the whole society.

Continuous expansion of the social functions of the state increases the risk of the country falling into the *trap of paternalism*, thus reducing the chances for the country's successful transition to the model of innovational development. A strongly paternalistic society does not, objectively, need any changes and innovations: a stable and guaranteed access to a slice of public cake (even if it is not too big) is much more important than a possibility to act independently and risk for a possible (although not guaranteed in advance) increase of the level of one's own and one's family's wellbeing. Paradoxical as it may seem, maintaining the situation when a great number of citizens receive various benefits from the public sector is advantageous for bureaucracy whose "bureaucratic rent" continuously increases due to public sector growth.

Practically no doubt remains today that the welfare state model in its pure form is not sufficiently effective. The facts indicate that, when the state's social commitments fall outside the bounds of what reasonable and fair, this leads to the exhaustion of

[27] Gadzhiev et al. 2006, at 31–32.

the sources of growth, slowdown, and deterioration of human capital due to growing welfare mentality.

Therefore, the concept of a *workfare state* is gaining ground.[28] According to this approach, solely partnership and mutual responsibility of the state and its citizens can be a source of the growth of social welfare: a modern social state must only provide for the basic needs of the individuals (minimum subsistence level, education, health care, infrastructure, etc.) while the citizens must invest their own labor in the development of society to receive their proportional shares of public benefits.[29] The concept of a workfare state rejects the welfare mentality and the citizens' propensity for free rider behavior,[30] and expects higher civil conscientiousness and social activity from each citizen.

Only an *effective state working in partnership with free and responsible citizens* is able to address the problem of combining market methods with a socially responsible economy.

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[28] *See, e.g.*, Christopher Deeming, *Foundations of the Workfare State – Reflections on the Political Transformation of the Welfare State in Britain*, 49(7) Social Policy & Administration 862 (2015); Zoltán Lakner & Katalin Tausz, *From a Welfare to a Workfare State: Hungary* in *Challenges to European Welfare Systems* 325 (K. Schubert et al. (eds.), Heidelberg; New York; Dordrecht; London: Springer, 2016); Alice Kessler-Harris, *The Workfare State: Public Assistance Politics from the New Deal to the New Democrats*, 104(1) Journal of American History 260 (2017), and others.

[29] *See, e.g.*, *Хабриева Т.Я., Чиркин В.Е.* Теория современной конституции [Taliya Ya. Khabrieva & Veniamin E. Chirkin, *The Theory of Modern Constitution*] 195–198 (Moscow: Norma, 2003).

[30] The *free rider problem* was first mentioned in the works of the American political economist Mancur L. Olson (1932–1998). The essence of the free rider problem is that the citizens usually do not want to bear the costs of generating public benefits but want to enjoy these benefits.

Vanberg V.J. *Constitutional Political Economy*, Freiburger Diskussionspapiere zur Ordnungsökonomik 15/06 (2015) (May 3, 2018), available at http://hdl.handle.net/10419/118597.

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DEVELOPMENT OF LABOR LAW IN THE EU AND EAEU: HOW COMPARABLE?

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As of 2015 Armenia, Belarus, Kazakhstan, Russia and (since May 2015) Kyrgyzstan have entered into the Eurasian Economic Union (EAEU) with the ambitious goal of ultimately transforming it into a "Eurasian Union" with a deeper confederative structure in the future. Parallels between this regional integration project and the European Union integration process are emerging. But there are also marked differences between them.

The article highlights those parallels and differences in order to assess the general prospects for harmonizing labor law among the member states and to clarify how much of the EU experience in the harmonization of labor law may be applicable to the Eurasian integration project.

The completely different roots and ways to harmonize the national labor law systems within the EU and the EAEU are also discussed in the article. The authors claim that the approaches to harmonizing labor law in the two regions are mirror images of each other. While the EU project attempts to provide at least a partial common legal framework for certain separate aspects of legal regulation of labor among the very diverse national labor law systems, the EAEU currently refuses even to address the harmonization of national labor laws. However, the national labor law systems of EAEU member states are already much more homogenous than in the EU. Therefore, labor law harmonization in the EAEU may develop as a consequence of its economic integration and single market.

Keywords: labor law; harmonization of law; Eurasian integration; Eurasian Economic Union; European Union.

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Table of Contents

Introduction
1. EU and EAEU Labor Law Integration: Different Starting Points
2. Actual Impact of the EU and Potential Influence of EAEU Processes on the National Labor Law of Their Member States
Conclusion

Introduction

The Treaty on the Eurasian Economic Union (EAEU Treaty) came into force on 1 January 2015.[1] At the beginning of 2015 it established a new regional international organization that includes Belarus, Kazakhstan, Russia, and Armenia. In May 2015 the Republic of Kyrgyzstan also joined the EAEU.[2] This new regional integration structure was created to replace its predecessor – the Eurasian Economic Community (EurAsEC) that has terminated its activity due to the establishment of the Eurasian Economic Union (EAEU).[3]

The EurAsEC was intended not only as a common economic area, but also as a platform to harmonize and unify the laws of its member states within the framework of its customs union.[4] In contrast, the EAEU specifies the areas for legal

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1 *See* Договор о Евразийском экономическом союзе (Астана, 29 мая 2014 г.) [Treaty on the Eurasian Economic Union (Astana, 29 May 2014)] (May 20, 2018), available at http://www.pravo.gov.ru.

2 The Republic of Kyrgyzstan signed the EAEU Treaty on 23 December 2014. Information is published on the Eurasian Economic Commission website (May 20, 2018), available at http://www.eurasiancommission.org/ru/nae/news/Pages/01-01-2015-1.aspx.

3 Договор о прекращении деятельности Евразийского экономического сообщества (Минск, 10 октября 2014 г.) [Agreement on the Termination of the Eurasian Economic Community (Minsk, 10 October 2014)] (May 20, 2018), available at http://www.pravo.gov.ru.

4 Article 2 of the Treaty on the Establishment of the Eurasian Economic Community (hereinafter the EurAsEC Treaty) included a proposal for creation of the customs union. Договор об учреждении Евразийского экономического сообщества (Астана, 10 октября 2000 г.) [Treaty on the Establishment of the Eurasian Economic Community (Astana, 10 October 2000)] (May 20, 2018), available at https://base.garant.ru/2561051/. Article 7 of the Treaty on Customs Union in turn is intended to finalize the harmonization of law among the member states. Договор о Таможенном союзе и Едином экономическом пространстве (Москва, 26 февраля 1999 г.) [Treaty on the Customs Union and Common Economic Space (Moscow, 26 February 1999)] (May 20, 2018), available at https://base.garant.ru/12118938/.

harmonization and unification[5] and does not mention labor law among them. The EAEU Treaty limits the coordination of labor law systems of its member states to the free movement of labor,[6] cooperation on the issues of labor migration,[7] and basic labor rights[8] of workers.[9] This limitation of the integration process brings the EAEU project closer to the goals of European Union labor law integration than to the previous attempts at integration by post-Soviet countries.

Despite the fact that EAEU member state leaders have declared several times that the new integration structure is aimed only at economic but not political integration,[10] the association of the EAEU with another regional integration project, namely the European Union, is obvious. Even the name of the EAEU clearly resembles the EU.

However, this resemblance may be misleading. The very origins, philosophy, trends in development, and even the flaws in labor law within the two regional integration structures are quite different. In our article we will try to judge how comparable the two regional integration projects are and whether it is possible for EAEU labor law to learn some lessons (both positive and negative) from the more mature EU project.

There are also reasons to expect that the logic of economic integration will dictate the need to harmonize labor law of EAEU member states in the future. If this hypothesis is right, the EU experience of integration in the field of labor law may become more relevant for the EAEU.

In order to reach our goal we start the comparison of the EU and EAEU with a short overview of the different starting points in labor regulation (Section 1). This Section shows that regional integration in the EU and EAEU has started from opposite directions: in the EU independent countries with very different legal and political backgrounds have been slowly creating a single market and supranational legislation. In the EAEU, on the contrary, the former parts of the USSR came to

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5 The *harmonization* of law is defined in Art. 2 of the EurAsEC Treaty as convergence of member states' law which is to establish matching (comparable) normative legal regulation in separate areas; while the *unification* of law is understood there as convergence of the member states' law which is to establish identical mechanisms of normative legal regulation in separate areas defined in the EAEC Treaty. Hereinafter translation of laws and legal terminology is by the authors of this article.

6 Art. 97 of the EAEU Treaty.

7 *Id.* Art. 96.

8 *Id.* Art. 98.

9 Workers are defined in Art. 96, para. 5 of the EAEU Treaty as persons who work according to employment contracts (i.e. employees) and civil law contracts.

10 Лукашенко не видит необходимости в единой валюте и единой надстройке в ЕЭС // Tengrinews. 2 октября 2013 г. [Lukashenko Does Not Consider Necessary Single Currency and Governance in the EAEU, Tengrinews, 10 February 2013] (May 20, 2018), available at http://tengrinews.kz/sng/lukashenko-vidit-neobhodimosti-edinoy-valyute-politicheskoy-nadstroyke-ees-242805/.

discussion of their joint economic issues after about two decades of a deliberate process of detachment. However, the very fact of creation of a single market in the EU has led to a so-called "spill-over effect" by which a purely economic integration has turned into deeper political and legal coherence. We speculate about the possibilities of the same effect for the EAEU after the creation of a single economic and labor market by the EAEU Treaty.

Further, we discuss the influence of the EU on the national labor law of its member states and how this influence may be compared with possible EAEU impact on its member states' national labor law (Section 2). Because of its genesis from independent and quite different legal systems, EU influence on the national labor law and policy of its member states has seemed fragmentary and has touched only upon certain separate aspects of labor and employment relations. By contrast, EAEU integration has started with the legal systems of its member states already very much alike. It is easy in theory to imagine the creation of a supra-national Labor Code for the EAEU.

We conclude the article with an analysis of the prospects for and threats to EAEU labor law integration with reference to the EU experience.

1. EU and EAEU Labor Law Integration: Different Starting Points

The EU and the countries that emerged from the USSR have very different origins for their respective integration efforts.

European integration is rooted in World War II and is based on an understanding that there is a vital necessity to create a system of such deep economic interdependence that it would prevent wars between the European countries in the future, to make war "not merely unthinkable, but materially impossible."[11] The starting point of what is now called the EU was the co-existence on the relatively confined territory of Europe of countries very different in size and culture but rather densely populated. Although some of these countries, such as Germany or France, were larger and more influential than others, none of them was overwhelmingly dominant. In labor and employment relations each European country had its own independent legal system. It is also very important to note that Europe has different sets of traditions in labor relations within its different regions. It is common to speak[12] about four specific social models in the EU: Continental, Anglo-Saxon, Nordic, and Mediterranean.

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[11] *See* the "Schuman Declaration" that was presented by French foreign minister Robert Schuman on 9 May 1950 (May 20, 2018), available at https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en.

[12] *See, e.g.*, André Sapir, *Globalization and the Reform of European Social Models*, 44(2) Journal of Common Market Studies 369 (2006).

For quite a long period of time the European integration process was limited to purely economic issues. The creation of a common economic (and labor) zone within the territory of the modern EU had been proceeding quite slowly and cautiously since 1951 when the European Coal and Steel Community (ECSC) was established.[13] The founding European Economic Community (EEC) Treaty[14] was aimed at free movement of goods, services and capital within the territory of member states. Only one provision[15] dealt with prevention of the so-called "race to the bottom."[16] As Barnard shows, the member states' decision to give priority to economic issues over social matters has led to downgrading social policy.[17] As a result, the EEC had to react by incorporating social matters into its policy and law. The first action of this kind was the adoption of the Social Action Programme in 1974.[18] The necessity of including social matters in regional policy was described in the EEC and later in the EU in terms of a "*spill-over effect*"[19] in which initial economic goals had to be combined with protection of workers and more general social protection of citizens.

This process has been anything but smooth over the decades of European integration when the periods of social policy progress were offset by the waves of stagnation or even deregulation.[20] While the 1970s were a period when the Community paid attention to social issues, probably motivated by the unrest in Western Europe in 1968,[21] the first half of 1980s was marked by stagnation in

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13 It was founded by the Treaty establishing the European Coal and Steel Community (Paris, 18 April 1951) (May 20, 2018), available at http://www.cvce.eu/obj/treaty_establishing_the_european_coal_and_steel_community_paris_18_april_1951-en-11a21305-941e-49d7-a171-ed5be548cd58.html.

14 Treaty establishing the European Economic Community (Rome, 25 March 1957) (May 20, 2018), available at http://www.cvce.eu/en/obj/treaty_establishing_the_european_economic_community_rome_25_march_1957-en-cca6ba28-0bf3-4ce6-8a76-6b0b3252696e.html (hereinafter the Treaty of Rome).

15 Art. 49(d) of the Treaty of Rome.

16 The term "race to the bottom" is commonly used to describe the competition between the developing countries to attract investment from the TNCs leading to the deterioration of the labor standards in these countries. This term is also applied to the competition between companies with the same goal. *See* Definition of Race to the Bottom, Financial Times (May 20, 2018), available at http://lexicon.ft.com/Term?term=race-to-the-bottom.

17 Catherine Barnard, *EC Employment Law* 7–8 (4th ed., Oxford: Oxford University Press, 2012).

18 Council Resolution of 21 January 1974 concerning a social action programme, 1974 O.J. (C 13) 1.

19 *See* Frank Hendrickx & Stefano Giubboni, *European Labour Law and the European Social Model: A Critical Appraisal* in *Comparative Labor Law* 381 (M.W. Finkin & G. Mundlak (eds.), Northampton: Edward Elgar, 2015).

20 *See* more about the history of the EU social policy at Karl Riesenhuber, *European Employment Law: A Systematic Exposition* 18 (Cambridge; Antwerp; Portland: Intersentia, 2012); David O'Keeffe, *The Uneasy Progress of European Social Policy*, 2(2) Columbia Journal of European Law 241 (1996).

21 Mark Wise & Richard Gibb, *Single Market to Social Europe: The European Community in the 1990s* 144 (Harlow: Longman, 1993).

Community social policy and adoption of new legislation in the field of employment. This is usually attributed to the influence of the UK conservatives led by Margaret Thatcher. The new direction in social policy in the second half of 1980s started from the adoption of the Single European Act of 1986.[22] The social part of the new economic integration was very limited and emphasized job creation.[23] The only legal consequence of the Single European Act that affected social matters was the extension of the European Council's power to make decisions on issues impacting the health and safety of workers.[24] More significant measures were taken after the enactment of the non-binding Community Charter of Fundamental Social Rights of Workers of 1989,[25] which has triggered the adoption of the important Directives on working time,[26] on pregnant workers[27] and on young workers.[28] The conclusion of the Treaty on European Union (the Maastricht Treaty) in 1992[29] extended the field of social policy from just employment and social protection to the issues of education, vocational training and youth.[30] More importantly, a separate[31] Protocol and Agreement to the Maastricht Treaty (together referred to as the Social Policy Chapter) were signed to significantly extend EU authority in social matters.[32] This has resulted in the adoption of a new generation of EU labor legislation (*see* Section 2 below). The European Commission approach to social policy has been reflected in

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22 Single European Act, 17 February 1986, 1987 O.J. (L 169) 1, 25 I.L.M. 506.

23 Paolo Cecchini et al., *The European Challenge, 1992: The Benefits of a Single Market* (Aldershot: Gower, 1988), XIX.

24 Art. 119a of the Single European Act.

25 Community Charter of the Fundamental Social Rights of Workers, adopted on 9 December 1989 (May 20, 2018), available at http://www.eesc.europa.eu/resources/docs/community-charter--en.pdf.

26 Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time, 1993 O.J. (L 307) 18.

27 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), 1992 O.J. (L 348) 1.

28 Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work, 1994 O.J. (L 216) 12.

29 Consolidated version of the Treaty on European Union, 2012 O.J. (C 326) 13.

30 Correspondingly, the initial title of the Treaty of Rome (Social Policy) was relabeled as "Social policy, education, vocational training and youth."

31 They were signed separately because of the UK refusal to take part in the extension of the EU social policy. Since this time, the notion of "two speed Europe" regarding the EU integration started being used. *See* Brian Towers, *Two Speed Ahead: Social Europe and the UK after Maastricht*, 23(2) Industrial Relations Journal 83 (1992).

32 Barnard 2012, at 17–20.

important policy papers of 1993 and 1994.[33] Deeper integration of the EU after the signing of Amsterdam Treaty has also accorded more powers to the Council in issues of social and employment policy.[34] Some cosmetic changes in the powers of the EU with respect to social policy were made by the Treaty of Nice.[35]

Most notable was the introduction of so-called "Open Method of Coordination"[36] in the social sphere as a technique for exchange of information and good practices between the member states. On 1 December 2009 the Treaty of Lisbon[37] came to force. It gave legal power to the EU Charter on Fundamental Rights and further shifted the EU policy in favor of social matters. The most important policy measures that influence current labor law of the member states are the European Employment Strategy[38] and flexicurity[39] policy.

Up to now, the EU has declared the existence of a coherent social policy, including employment strategy and has adopted a certain amount of legislation and case law in a number of specific labor law issues.[40] Modern EU social policy is quite

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[33] Growth, Competitiveness, Employment: The Challenges and Ways Forward into the 21st Century – White Paper. Parts A and B. COM (93) 700 final/A and B, 5 December 1993. Bulletin of the European Communities, Supplement 6/93 (May 20, 2018), available at http://aei.pitt.edu/1139/; European Social Policy – A Way Forward for the Union. A White Paper. Part A. COM (94) 333 final, 27 July 1994 (May 20, 2018), available at http://aei.pitt.edu/1118/. *See* more Tiziano Treu & Marco Biagi, *The Role of a European Social Policy, Labour Law and Industrial Relations in the European Union*, 32 Bulletin of Comparative Labour Law and Industrial Relations 217 (1998).

[34] *See* Berndt K. Keller, *The Employment Chapter of the Amsterdam Treaty. Towards a New European Employment Policy?* in *Changing Industrial Relations and Modernisation of Labour Law: Liber Amicorum in Honour of Professor Marco Biagi* 234–235 (R. Blanpain & M. Weiss (eds.), The Hague: Kluwer Law International, 2003).

[35] Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, 2001 O.J. (C 80) 1.

[36] *See* more about it: Beryl P. ter Haar, *Open Method of Coordination. An Analysis of Its Meaning for the Development of a Social Europe* (Doctoral Thesis, Leiden: Leiden University Press, 2012).

[37] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 2007 O.J. (C 306) 1.

[38] *See* the information about the European Employment Strategy at the European Commission site (May 20, 2018), available at http://ec.europa.eu/social/main.jsp?catId=101. The effectiveness of this policy has come in for criticism at the level of the EU as a whole. *See* Paul Copeland & Beryl P. ter Haar, *A Toothless Bite? The Effectiveness of the European Employment Strategy as a Governance Tool*, 23(1) Journal of European Social Policy 21 (2013).

[39] Ton Wilthagen & Frank Tros, *The Concept of "Flexicurity": A New Approach to Regulating Employment and Labour Markets*, 10(2) Transfer: European Review of Labour and Research 166 (2004); Martin Keune, *Between Innovation and Ambiguity: The Role of Flexicurity in Labour Market Analysis and Policy Making* 8 (Brussels: European Trade Union Institute for Research, Education and Health and Safety (ETUI-REHS), 2008); Marc De Vos, *European Flexicurity and Globalization: A Critical Perspective*, 25(3) International Journal of Comparative Labour Law and Industrial Relations 209 (2009). There is specialized research on the prospects for implementing this policy in the former socialist countries of the EU: Sandrine Cazes & Alena Nesporova, *Flexicurity: A Relevant Approach in Central and Eastern Europe* (Geneva: ILO, 2007).

[40] *See further* in Section 2.

a complicated combination of rules derived from both hard and soft law but without very clear efficacy, and it is full of contradictions and afflicted by disputes between different member states, right and left political forces, and other actors.

The Eurasian situation is rather different. A little more than twenty years ago, all the countries in this regional integration project had been part of a single large country, the Soviet Union. From the legal perspective, the post-Soviet area is much more homogenous than the EU. Unlike the EU countries, all post-Soviet countries had a single starting point in common as they arrived at their current legal systems. Labor legislation was not an exception. Until the collapse of the USSR, the system of Soviet labor legislation had been based on the USSR Constitution of 1977,[41] the Bases of Legislation on Labor of the USSR of 1970,[42] and the Republican Codes of laws on labor that came into force in 1972[43] according to the common model introduced by the Bases of Legislation in 1970 and by various governmental and ministerial resolutions, orders and decrees. The labor codes of all the nominally separate republics within the Soviet Union were almost identical.[44]

This uniformity extended to more than mere legislation. There was also a single legal theoretical doctrine.[45] The existence of the Iron Curtain restricted any international discussion of legal issues mainly to the "socialist camp." Probably because there was so little provision for openly criticizing the basics of the state system and ideology, legal academic discourse in these countries has been heavily

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41 Конституция СССР от 7 октября 1977 г., Ведомости Верховного Совета СССР, 1977, № 41, ст. 617 [Constitution of the USSR of 7 October 1977, Gazette of the Supreme Soviet of the USSR, 1977, No. 41, Art. 617].

42 Закон СССР от 15 июля 1970 г. № 2-VIII «Об утверждении Основ законодательства Союза ССР и союзных республик о труде», Ведомости СССР, 1970, № 29, ст. 265 [Law of the USSR No. 2-VIII of 22 May 1970. On the Adoption of the Framework Labor Legislation of the Union of the SSR and of the Union Republics, Gazette of the Supreme Soviet of the USSR, 1970, No. 29, Art. 265].

43 Кодекс законов о труде РСФСР от 9 декабря 1971 г., Ведомости Верховного Совета РСФСР, 1971, № 50, ст. 1007 [Code of Laws on Labor of the RSFSR of 9 December 1971, Gazette of the Supreme Soviet of the RSFSR, 1971, No. 50, Art. 1007].

44 There were some minor differences between the texts of the Republican Codes of Laws on Labor, but these variations were purely cosmetic. The contents of different republican codes were presented in special comparative tables for convenient usage. *See Таїц И.* Кодексы законов о труде союзных республик: сопоставительные таблицы [Ilia Taits, *Codes of Labor Legislation of the Union Republics: The Comparative Tables*] 1 ff. (Moscow: Yuridicheskaya literatura, 1975).

45 Whether socialist law is a separate legal category or merely a part of a system of civil law is a matter under debate (for more on the issue *see* John Quigley, *Socialist Law and the Civil Law Tradition*, 37(4) American Journal of Comparative Law 781 (1989)). Very reputable scholars have no doubt that in Soviet times such a separate system existed, e.g.: René David & Camille Jauffret-Spinosi, *Les grands systèmes de droit contemporains* 178–206 (Paris: Dalloz, 2002); Raymond Legeais, *Grands systèmes de droit contemporain: une approche comparative* 179–211 (Paris: Litec, 2004); Peter Nayler, *Business Law in the Global Marketplace* 13 (Oxford, Eng.; Burlington, MA: Elsevier Butterworth-Heinemann, 2006). Regardless of how they may be classified formally, the common legal traditions in the EAEU countries are quite evident.

accented on theoretical (and in many respects merely scholastic) issues. The theory of law in socialist countries,[46] even the ones outside the USSR, has been operating with quite a specific set of concepts and terminology ("law relations," "legal facts," "legal capacity," specific attention to principles of law, etc.). In the more than twenty years since the dissolution of the Soviet Union, the labor law of its former republics has undergone quite significant changes. The introduction of market economy institutions that were alien to a planned economy required some adaptation of labor law. The labor law of all former republics of the USSR had to implement legislation on unemployment, to recognize freedom of association "in the capitalist sense," i.e. including the right to strike, and more liberal collective bargaining along with some other issues. However, scholars, officials and practitioners of labor law remained interconnected, and the direction those changes took was in many respects the same.[47] As the *lingua franca* of the region, the Russian language itself has been quite a significant factor in facilitating the common development of labor law.

Most of the former Soviet republics came into existence through a "civilized divorce" of the newly independent states. The first regional structure was established simultaneously with a declaration on behalf of Russia, Belarus and Ukraine that the USSR no longer existed and by the signing of the "Belavezha Accords" in December 1991.[48] The very name of the new regional structure, the "Commonwealth of *Independent* States", underlined that the project was aimed more at dis-integration than integration.

The uniform system of complex economic ties between the regions then released from the larger country was destroyed. This process of separation was accompanied by harsh neo-liberal economic reforms intended to open markets to foreign importers but without effective protection for the suddenly separated national industries. This policy soon led to very distressing humanitarian, social and economic consequences.[49]

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[46] By "socialist countries" (in the past) or "post-socialist" countries (currently) we refer to the East European countries of the Warsaw Pact up to the moment of its termination in 1991, i.e. Bulgaria, Czechoslovakia, East Germany, Poland, Romania, and the USSR (since 1990 the Baltic republics have been considered a separate category). *See* more details about the EU enlargement in Conclusion further.

[47] *See Козик А.Л., Томашевский К.Л., Волк Е.А.* Международное и национальное трудовое право (проблемы взаимодействия) [Andrei L. Kozik et al., *International and National Labor Law: The Issues of Interaction*] 135–136 (Minsk: Amalfeya, 2012); Svetlana Golovina, *The Harmonization of Labour Legislation in Former Soviet Union States* in *Labour Law in Russia: Recent Developments and New Challenges* 39 (V.M. Lebedev & E.R. Radevich (eds.), Cambridge: Cambridge Scholars Publishing, 2014).

[48] Соглашение о создании Содружества Независимых Государств (Минск, 8 декабря 1991 г.), Ведомости СНД и ВС РСФСР, 1991, № 51, ст. 1798 [Agreement establishing the Commonwealth of Independent States (Minsk, 8 December 1991), Gazette of the Congress of People's Deputies of the RSFSR and the Supreme Soviet of the RSFSR, 1991, No. 51, Art. 1798].

[49] One pertinent statistic is that life expectancy in Russia decreased from 69.19 years in 1990 to 63.85 in 1994. And it did not rebound to the 1990 level until now. Российский статистический ежегодник [Russian Statistical Yearbook] (Moscow: Russian Federal State Statistics Service, 2009) (May 20, 2018), also available at http://www.gks.ru/bgd/regl/b09_13/IssWWW.exe/Stg/html1/04-01.htm. It is difficult

The economy of all parts of the former USSR was substantially de-industrialized.[50] The disconnection of the former economic ties resulted in a marked degradation of the economies of all the countries of the region.

Another feature of the post-USSR situation is the dominance of Russia within the post-Soviet realm. Russia is much larger than all the other post-Soviet states taken together in terms of territory, population and economy. This situation elicits concerns in the currently independent countries that any integration project in which Russia participates is an imperialist attempt to adjoin and absorb the smaller countries into Russia. These misgivings are a serious obstacle to either economic or political integration within the region. It may explain why all previous attempts to integrate the fragmented parts of the USSR were unsuccessful.

The common necessity to retain economic ties between the countries that had been Soviet republics together with the concerns of the non-Russian components of the former USSR about possible Russian political domination in the region now influence the new shape of the current regional integration.[51] Therefore, as happened almost 60 years ago with the European integration process, the EAEU has started from purely economic issues. This new regional structure consists of a single economic area including a single labor market, but without abrupt attempts to unify the labor law system – at least at this stage of integration.

The intention of the countries of the Eurasian region to create a single economic market including a common labor market entails making the countries accessible to businesses from neighbor EAEU member states. This means that the rules of business conduct in the neighbor countries should be understandable and not fundamentally contradict the rules of the home country. One of the major issues concerning the rules of business conduct is employment and labor relations. Therefore, although the harmonization and unification of labor law is not mentioned as one of the EAEU goals in the EAEU Treaty (*see* Introduction above), the process of economic integration itself is an impetus to the harmonization of labor law. And *vice versa*, the harmonization of labor law will facilitate the process of economic integration of the region.

Also, as the EU experience shows, the concentration on purely economic issues for a certain time leads to a spill-over effect in which economics are combined with

to say how many human lives were sacrificed by recourse to what was called economic "shock therapy" because it is impossible to work out the direct or indirect causes of death in each particular case. Nevertheless, the number lost must be counted in millions. For more details *see* Доклад Комиссии по вопросам женщин, семьи и демографии при Президенте Российской Федерации «О современном состоянии смертности населения Российской Федерации» (1997) [The Report of the President of the Russian Federation Commission on the Issues of Women, Family and Demography "On the Current State of Mortality in the Russian Federation" (1997)] (May 20, 2018), available at http://cccp.narod.ru/work/book/demogr_1.html.

50 *See, e.g.*, Joseph Stiglitz, *The Ruin of Russia*, The Guardian, 9 April 2003 (May 20, 2018), available at http://www.guardian.co.uk/world/2003/apr/09/russia.artsandhumanities.

51 *See also* Vladimir Przhilenskiy & Maria Zakharova, *Which Way is the Russian Double-Headed Eagle Looking?*, 4(2) Russian Law Journal 6 (2016).

social policy because of the necessity to overcome the gap in incomes between the different member states and a resulting desire of the richer countries to protect their domestic labor markets from the poorer ones. Although, as experts have pointed out, social issues were not at the center of the initial European integration, social policy may remain a purely domestic issue only so long as national markets stay relatively closed. But as soon as countries create a common currency and a single market, their social policy becomes relevant to other nations.[52]

The very fact that the former parts of the USSR already have much more homogenous systems of national labor law makes the operation of a single labor market technically much easier than in the EU member states. However, this technical compatibility does not make political integration easier, especially in view of the current events in Ukraine.

It is still too early to state flatly that harmonization of labor law in the EAEU has already begun. However, if the logic of the self-stimulating integration in the EU that started some decades earlier continues to hold, then the spill-over effect should apply to the process of harmonizing labor law as well.

2. Actual Impact of the EU and Potential Influence of EAEU Processes on the National Labor Law of Their Member States

As shown in the previous section, joint social policy in the EEC and later in the EU has been unstable during the decades of integration. The common employment and labor legislation of the region has been following the trends of employment policy in general. Adoption of the Social Action Programme in 1974 (*see* Section 1 above) has launched legislative activity concerning employment. The Community Directives on sex discrimination,[53] collective redundancies,[54] transfer of undertakings,[55] and the

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[52] David M. Trubek & Louise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination*, 11(3) European Law Journal 343, 345 (2005). *See* for the EAEU discussion on the matter *Мрих А.С.* Нужна ли Евразийскому экономическому союзу единая социальная политика? // Трудовое право в России и за рубежом. 2016. № 1. С. 38–40 [Aleksandr S. Mrikh, *Does Eurasian Economic Union Need a Single Social Policy?*, 1 Labor Law in Russia and Abroad 38 (2016)].

[53] Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, 1975 O.J. (L 45) 19; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, 1976 O.J. (L 39) 40; Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, 1979 O.J. (L 6) 24.

[54] Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies, 1975 O.J. (L 48) 29.

[55] Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, 1977 O.J. (L 61) 26.

protection of workers in cases of employers' insolvency[56] were adopted during this period. After the pause in the promotion of social policy in first half of the 1980s, the end of 1980s and the 1990s were marked by the adoption of the Directives on working time,[57] on pregnant workers[58] and on young workers.[59] The non-binding Community Charter of Fundamental Social Rights has resulted in a number of official Directives on certain aspects of occupational safety and health,[60] on proof of employment contracts,[61] and on posted workers.[62] Somewhat later the Directives on European Works Council,[63] parental leave,[64] and part-time work[65] were adopted. In the 2000s EU legislation again addressed the issues of equal opportunity,[66] European

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[56] Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, 1980 O.J. (L 283) 23.

[57] Council Directive 93/104/EC, *supra* note 26.

[58] Council Directive 92/85/EEC, *supra* note 27.

[59] Council Directive 94/33/EC, *supra* note 28.

[60] Council Directive 89/654/EEC of 30 November 1989 concerning the minimum safety and health requirements for the workplace (first individual directive within the meaning of Article 16(1) of Directive 89/391/EEC), 1989 O.J. (L 393) 1; Council Directive 89/655/EEC of 30 November 1989 concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), 1989 O.J. (L 393) 13; Council Directive 90/269/EEC of 29 May 1990 on the minimum health and safety requirements for the manual handling of loads where there is a risk particularly of back injury to workers (fourth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) Objective, 1990 O.J. (L 156) 9; Council Directive 90/270/EEC of 29 May 1990 on the minimum safety and health requirements for work with display screen equipment (fifth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), 1990 O.J. (L 156) 14.

[61] Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, 1991 O.J. (L 288) 32.

[62] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, 1997 O.J. (L 018) 1.

[63] Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, 1994 O.J. (L 254) 64.

[64] Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, 1996 O.J. (L 145) 4.

[65] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, 1998 O.J. (L 14) 9.

[66] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 2000 O.J. (L 180) 22; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, 2000 O.J. (L 303) 16; Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, 2002 O.J. (L 269) 15; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, 2006 O.J. (L 204) 23.

Works Council[67] and transfers of undertakings.[68] Industrial democracy issues were handled by the adoption of the Information and Consultation Directive in 2002[69] and measures on consulting with employees in European companies[70] and European Cooperative Societies.[71]

Because these EU Directives have a horizontal effect and do not require any ratification by the member states, all these Directives have had a very significant impact on the national employment and labor law of the EU member states. This effect was further developed by the abundant case law of the European Court of Justice on the matter.[72] Nevertheless, the very list of topics of the Directives shows that, although they all touch upon very serious issues of employment, they do not form a coherent system of norms. Most authors informed on the topic consider that European employment supranational legislation is fragmentary and not sufficiently systematic.[73] The same may be said about the influence of the EU norms on the labor and employment law of its member states.

After the expansion of the EU so that it included the post-socialist East European countries, there has been a new and different experience in adapting EU legislation to the states that have recently transitioned from a planned to a market economy.[74]

The EAEU states are also still in the process of adapting their political, economic and legal systems to a market economy. The process of adaptation in those "new" EU member states may at certain points provide some lessons applicable to new supranational regulation in the EAEU. This is the case because both sets of post-

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67 Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, 2009 O.J. (L 122) 28.

68 Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, 2001 O.J. (L 82) 16.

69 Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community – Joint declaration of the European Parliament, the Council and the Commission on employee representation, 2002 O.J. (L 80) 29.

70 Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, 2001 O.J. (L 294) 22.

71 Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, 2003 O.J. (L 207) 25.

72 *See* Barnard 2012, at 33–48.

73 Abbo Junker, *Der EuGH im Arbeitsrecht – Die schwarze Serie geht weiter*, 39 Neue Juristische Wochenschrift 2527 (1994).

74 In fact, EU law had begun to influence the national labor law of these states even before their accession because the candidate states had to harmonize their law with the EU standards prior to actual accession.

socialist countries have rather similar flaws in the legal regulation of labor, flaws which are deeply rooted in their past and have persisted regardless of their current links with the EU or the EAEU.

Labor law in socialist countries even if they had not been part of the USSR had been modeled on more or less the same paradigm. In all the socialist countries the main source of law was statutory regulation, usually based on their labor codes, which provided quite rigid rules on the conclusion, modification and termination of employment contracts. Because collective labor law was mostly dependent on the statutory regulations of the state, any collective bargaining that occurred was mostly going through the motions to reach an outcome predetermined by the state. One other notable issue was the high level of bureaucratization of employment relations based primarily on the employer's obligation to issue so-called labor booklets and special documentation on personnel according to centrally mandated forms, etc.[75]

Therefore, when the new post-socialist member states joined the EU, the influence of the former paradigms for regulating labor was felt in each of them in a similar fashion. For example, all former socialist countries had problems with industrial democracy,[76] not only in collective bargaining as such, but also in keeping employees informed and consulting with them. When the Eastern European countries joined the EU, they were required to implement the EU Directives on information and consultations,[77] on the European Works Council,[78] and on workers' rights in European companies[79] and European Cooperative Societies.[80] However, experience has shown that incorporation of these Directives into national laws and practices was anything but smooth. Although some of the countries, such as Hungary, already had works councils before their accession to the EU, most of the new member states merely adopted the norms for workers' participation formally, but they failed to make industrial democracy a reality.[81]

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[75] For more on bureaucratic requirements *see* Erika Kovács et al., *Labor Law in Transition: From a Centrally Planned to a Free Market Economy in Central and Eastern Europe* in *Comparative Labor Law*, *supra* note 19, at 403–439.

[76] Trade unions and non-union workers' representative bodies in the socialist countries were very powerful. However, they were strongly affiliated with state. Therefore, trade union democracy was in many instances more an imitation of workers' taking part in decision making than a real process. However, this did not mean that other protective measures for workers were lacking. But these protective measures were centrally controlled by the state. For more details *see* Kovács et al. 2015, at 429–438; Nikita L. Lyutov & Daiva Petrylaite, *Trade Unions' Law Evolution in Post-Soviet Countries: The Experience of Lithuania and Russia*, 30(4) Comparative Labor Law and Policy Journal 779 (2009).

[77] Directive 2002/14/EC, *supra* note 69.

[78] Directive 2009/38/EC, *supra* note 67.

[79] Council Directive 2001/86/EC, *supra* note 70.

[80] Council Directive 2003/72/EC, *supra* note 71.

[81] For more on engagement with employees *see* Merle Muda, *The Impact of European Union Law on Employee Involvement in Estonia*, XV Juridica International: Law Review of University of Tartu 25 (2008); *Workers' Representation in Central and Eastern Europe: Challenges and Opportunities for the Works Councils' System* (R. Blanpain & N. Lyutov (eds.), Aspen: Wolters Kluwer, 2014).

Another serious gap in the labor law of these post-socialist countries, which adoption of EU regulations should have filled, was the lack of explicit prohibition of discrimination. Specific laws based on the EU Directives 2000/43/EC, 2000/78/EC, 2002/73/EC, 2006/54/EC[82] and others have been adopted in all the new member states.[83] Research[84] has also shown the importance of norms on transfer of undertakings, protection of employees in the event of the insolvency of their employer and, perhaps most importantly, in the regulation of working time. Just as with the EU in general, the impact of EU law on these countries was quite significant but fragmentary because it addressed only specific areas of legal regulation and not the legal system as a whole. However, as these countries made the transition from a planned to a market economy, membership in the EU has limited the neo-liberal kind of economic and labor law reforms that were instituted in other post-Soviet states.[85]

There has been discussion about borrowing some of the EU labor law mechanisms mentioned above for labor law of Russia, Belarus, and other countries of the post-USSR region.[86] However, these discussions do not go much beyond purely academic debates. Because of the current chill in political relations between Russia and the EU, it is highly unlikely that Russia will move toward harmonization of its laws, including labor law, with the EU in the near future. If some moves in that direction were made, they would be very partial and labelled as motivated by internal Russian or EAEU policy rather than moving in the direction of the EU.

As has already been said, the EAEU Treaty does not address the harmonization of the national labor law systems among its member states. However, harmonization of labor law may follow as a "spill-over" consequence of economic integration as

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82 *Supra* note 66.

83 European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, The Evolution of Labour Law in the EU-12 (1995–2005). Vol. 3 (November 2008), at 12 (Bulgaria), 108 (Czech Republic), and others (May 20, 2018), available at http://ec.europa.eu/social/BlobServlet?docId=2347&langId=en. For Estonia *see* Merle Muda, *Impact of the European Community Labour Law on Estonian Labour Legislation* in *Labour Law in United Europe. 2003 m. spalio 16–18 d. Tarptautinės mokslinės konferencijos medžiaga* 93 (Vilnius: UAB "Forzacas," 2004).

84 Muda 2008; *Мумрус М.* Польское трудовое право после вступления Польши в Европейский Союз // Российский ежегодник трудового права. 2007. № 3. С. 450–458 [Leszek Mitrus, *Polish Labor Law after the Polish Accession to the European Union*, 3 Russian Labor Law Annual 450 (2007)].

85 For the perspectives of adaptation of some EU approaches to the employment discrimination *see* Nikita Lyutov, *Russian Law on Discrimination in Employment: Can It Be Compatible with International Labor Standards?*, 4(3) Russian Law Journal 7 (2016).

86 *See* Kirill Tomashevski, *Sources of the Belarus Labour Law vs. EU and CIS Global Processes*, 13(1) Transition Studies Review 63 (2006); Трудовое право России и стран Европейского союза [*Labor Law of Russia and the European Union Countries*] (G.S. Skachkova (ed.), Moscow: Rior, 2012); *Мрих А.С.* Трудоправовая интеграция государств Европейского союза и государств Евразийского экономического союза: сравнительно-правовой анализ: Дис. … канд. юрид. наук [Aleksandr S. Mrikh, *The Labor Law Integration in the European Union and the Eurasian Economic Union: A Comparative Analysis: Ph.D. thesis in law*] (Yekaterinburg, 2017).

explained in Section 1 above. Therefore, it seems to be useful and interesting to understand to what extent current domestic labor law of the EAEU member states is suitable for possible harmonization in the future.

In general, the legal systems of the EAEU member states are based on very much the same principles and legal doctrines. The main laws within the field of labor in all these countries are the labor codes which usually regulate the majority (but not all) of the issues concerning labor.[87] More technical norms are usually left to governmental and ministerial decrees. Even the structure of the labor codes is very much alike. Although the sequence of the different sections of the codes is not identical, the contents of chapters and the very wording of the text in them are rather similar. All five EAEU member states adopted new labor codes after the dissolution of the Soviet Union. These codes are not identical and reflect the changes in the political, legal and social situations within each of the countries.

Labor legislation in *Belarus* (its Labor Code, along with a set of independent laws and presidential decrees as well as certain other legislation acts) was drafted with an emphasis on the supremacy of state regulation and a certain degree of authoritarianism. The Labor Code of Belarus[88] (BLC) is coupled with a presidential decree[89] that provides for the conclusion of temporary employment contracts with employees and additional disciplinary measures that significantly degrade the legal position of employees compared to the BLC itself. The BLC stands out among the labor codes of the other former USSR republics because of the low status it has in the hierarchy of laws compared to presidential decrees. In another well-known case President Alexander Lukashenko at the end of 2012 issued a notorious decree[90] suspending the freedom of workers at certain woodworking enterprises to terminate their employment contracts on their own initiative without the employer's consent. This decree clearly contradicts the basic international labor standards concerning the prohibition of compulsory or forced labor. No less notorious is the introduction

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87 *See, e.g.*, *Томашевский К.Л.* Источники трудового права государств – членов Евразийского экономического союза (проблемы теории и практики) [Kirill L. Tomashevski, *The Sources of Labor Law in the Eurasian Economic Union Member-States: The Issues of Theory and Practice*] 128–303 (Minsk: MITSO, 2017).

88 Трудовой кодекс Республики Беларусь от 26 июля 1999 г. № 296-З [Labor Code of the Republic of Belarus No. 296-Z of 26 July 1999] (May 20, 2018), available at http://www.tamby.info/kodeks/tk.htm.

89 Декрет Президента Республики Беларусь от 26 июня 1999 г. № 29 "О дополнительных мерах по совершенствованию трудовых отношений, укреплению трудовой и исполнительской дисциплины" [Decree of the President of the Republic of Belarus No. 29 of 26 June 1999. On Additional Measures on Advancement of the Employment Relations, and on Strengthening of Labor and Executive Discipline] (May 20, 2018), available at http://base.spinform.ru/show_doc.fwx?rgn=18103.

90 Декрет Президента Республики Беларусь от 7 декабря 2012 г. № 9 "О дополнительных мерах по развитию деревообрабатывающей промышленности" [Decree of the President of the Republic of Belarus No. 9 of 7 December 2012. On Additional Measures on Development of the Wood Processing Industry] (May 20, 2018), available at http://president.gov.by/ru/official_documents_ru/view/dekret-9-ot-7-dekabrja-2012-g-1493/.

of the so-called "tax on social parasitism" (*nalog na tuneyadstvo*) in April 2015[91] which led to street protests in Belarus[92] and was repealed in 2018.

Kazakhstan is an example of another trend in the development of post-USSR labor legislation. The Labor Code of Kazakhstan[93] (KazLC 2007) that was adopted in 2007 was the most neo-liberal labor code in the EAEU area, and consequently employers enjoy more flexibility in employment relations than in other countries of the EAEU. For example, an employer in Kazakhstan is entitled to conclude a temporary employment contract without any restriction,[94] while the labor codes of other countries in the EAEU contain exhaustive lists of grounds justifying the conclusion of such temporary contracts.[95] In 2015 a new Labor Code (KazLC 2015) was adopted and came into force on 1 January 2016.[96] It introduces even more flexibility for employers compared to the KazLC 2007. Most notable are the flexible norms on the unilateral amendment of employment contracts at the employer's initiative for economic reasons and the introduction of part-time work, as well as additional grounds for dismissal and some others.[97]

Russian post-socialist development of labor legislation may be briefly described as a complicated mixture of authoritarian trends, neo-liberal policies, and compromises with civil society. The current RLC was adopted at the end of 2001 after more than a decade of very intense political struggle over its ideology. It gives very weak opportunities for collective bargaining (accompanied by loud declarations about trade union rights) combined with institutional guarantees for the continued existence of the huge "old" trade unions which are based on a philosophy of collective labor law which is more typical of a planned economy.[98]

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91 According to the Presidential Decree of 2 April 2015. Декрет Президента Республики Беларусь от 2 апреля 2015 г. № 3 "О предупреждении социального иждивенчества" [Decree of the President of the Republic of Belarus No. 3 of 2 April 2015. On Prevention of the Social Parasitism] (May 20, 2018), available at http://www.mintrud.gov.by/ru/decret_o_igd.

92 *See Радийчук В.* Борьба за тунеядство: 5 главных вопросов о протестах в Беларуси // NEWSONE. 17 февраля 2017 г. [Vladislav Radiychuk, *The Fight for Parasitism: 5 Major Questions Regarding the Protests in Belarus*, NEWSONE, 17 February 2017] (May 20, 2018), available at https://newsone.ua/news/politics/borba-za-tuneyadstvo-5-glavnyx-voprosov-o-protestax-v-belarusi.html.

93 Трудовой кодекс Республики Казахстан от 15 мая 2007 г. № 251-III [Labor Code of the Republic of Kazakhstan No. 251-III of 15 May 2007] (May 20, 2018), available at http://online.zakon.kz/Document/?doc_id=30103567.

94 Art. 29, para. 2 of the KazLC 2007.

95 *See, e.g.*, Art. 17 of the BLC; Art. 57 of the Russian Labor Code (RLC) (Трудовой кодекс Российской Федерации, Собрание законодательства РФ, 2002, № 1, ст. 3 [Labor Code of the Russian Federation, Legislation Bulletin of the Russian Federation, 2002, No. 1, Art. 3]).

96 Трудовой кодекс Республики Казахстан от 23 ноября 2015 г. № 414-V [Labor Code of the Republic of Kazakhstan No. 414-V of 23 November 2015] (May 20, 2018), available at http://online.zakon.kz/Document/?doc_id=38910832#sub_id=2040000.

97 Art. 46.1, Art. 52, para. 3 and some others of the KazLC 2015.

98 For more details *see* Nikita Lyutov, *Freedom of Association: The Case of Russia*, 32(4) Comparative Labor Law and Policy Journal 933 (2011).

This division of the trade unions into "old" and "new" is quite common in the EAEU region as a whole. The "old" trade unions were a very important quasi-governmental institution functioning as an intermediary between workers and employers during the socialist period. Having outlived the socialist system, they have been privatized. But in the majority of cases these "old" trade unions never really became independent representatives of employees. Newly formed trade unions must often compete with these older organizations.

The Labor Code of *Kyrgyzstan* (KyrLC) was adopted in 2004.[99] Most of its articles repeat the initial version of the RLC word for word. Sometimes the sequence of articles or wording is slightly different, but in the majority of cases it is almost the identical law. Some regional specifics were taken into account by the legislators of Kyrgyzstan. Instead of Russian norms on work in the Far North,[100] the KyrLC deals with regulation of work in the high mountain regions where natural resources are extracted;[101] special attention is paid to rotational work[102] that is also characteristic of resource extraction, which is an especially important sector of Kyrgyzstan's economy.[103]

The *Armenian* Labor Code (ALC) was also adopted in 2004[104] under the apparent influence of the RLC and other regional labor codes. The structure, contents and ideology of most of its norms repeats or at least resembles Russian law. This applies to the definition of employment relations and employment contracts, the typology of labor disputes, basic principles of labor law listed in the text of the Code, issues of collective bargaining and strikes, material liability of employers and employees towards each other, labor discipline and others. On certain issues the ALC looks more protective of workers than the other EAEU labor codes. For example, there is a limitation of the maximum term of a temporary employment contract to five years for situations in which a number of consecutive short-term contracts

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[99] Трудовой кодекс Кыргызской Республики от 4 августа 2004 г. № 106 [Labor Code of the Kyrgyz Republic No. 106 of 4 August 2004] (May 20, 2018), available at http://online.adviser.kg/Document/?doc_id=30296269&mode=all.

[100] Chapter 50 of the RLC; Закон РФ от 19 февраля 1993 г. № 4520-I "О государственных гарантиях и компенсациях для лиц, работающих и проживающих в районах Крайнего Севера и приравненных к ним местностях," Ведомости СНД и ВС РФ, 1993, № 16, ст. 551 [Law of the Russian Federation No. 4520-I of 19 February 1993. On the State Guarantees and Compensations for the Persons Working and Living in the Far North Regions and the Surrounding Areas, Gazette of the Congress of People's Deputies of the Russian Federation and the Supreme Soviet of the Russian Federation, 1993, No. 16, Art. 551].

[101] Chapter 33 of the KyrLC.

[102] Chapter 30 of the KyrLC.

[103] For more details *see Раманкулов К.С.* Трудовое право Кыргызской Республики [Kubanychbek S. Ramankulov, *The Labor Law of the Kyrgyz Republic*] (Bishkek: Turar, 2008).

[104] Трудовой кодекс Республики Армения от 9 ноября 2004 г. [Labor Code of the Republic of Armenia of 9 November 2004] (May 20, 2018), available at http://www.parliament.am/legislation.php?sel=show&ID=2131&lang=rus.

are concluded.[105] Other regional codes limit only the maximum duration of each individual employment contract. Unlike Russian and other EAEU labor codes that give only a three-month term for employees to appeal to court for the resolution of a labor dispute, the ALC provides a general civil law term of three years and for certain types of disputes (such as disputes about wages and others) employees are not limited by any term at all.[106] On certain issues Armenian employers have more powers than in other regions. For example, the material liability of employees (except for specific situations listed in the law) is limited to one monthly salary in most EAEU countries but to three months' salary in Armenia.[107] There are some specific general provisions of the ALC that exist only there but not in other EAEU codes, such as the definitions of the legal capability of employees and employers,[108] the notion of "illegal work"[109] and others. However, the ALC also looks in general quite compatible with other regional labor codes.

A closer look at the contents of the above-mentioned codes also shows many signs of suitability for harmonization. All the codes, as well as the legal doctrines of the EAEU countries, treat the employment contract as the central feature of labor law. The rules concerning concluding, modifying and terminating an employment contract are rooted in the same foundations developed in Soviet times. For example, the regulations on dismissal of an employee have very distinct characteristics in these codes. In the majority of countries in the world an employment contract may be terminated on the initiative of the employer for "valid reasons" where these reasons are not specified directly in the legislation but defined in case law.[110] The labor codes of the post-Soviet countries use a different approach derived from the labor codes of the USSR republics. All specific grounds for dismissal are exhaustively listed in the labor codes or some other laws covering specific categories of workers. There are a few exceptions for separate categories where additional grounds may be stated directly in the employment contract, but they are rather rare (company directors, domestic and distance workers and certain others). The great majority of grounds for dismissal are either identical or very much alike in all these nominally different labor codes. Even the sequence of grounds for dismissal is the same, sometimes including logical gaps in the texts where special and general grounds mingle in the same articles along with references to other special grounds in separate articles.

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105 Art. 95 of the ALC.

106 *Id.*

107 *Id.* Art. 239.

108 *Id.* Art. 15.

109 *Id.* Art. 102.

110 General Survey on the Termination of Employment Convention (No. 158) and Recommendation (No. 166), 1982, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III, International Labor Conference, 82nd Session, 1995 (Geneva: ILO, 1995), at 31–61.

Parallels in the legal regulation of employment relations may be found in any provision of labor law in the countries of the EAEU region: working hours, disciplinary actions, occupational safety and health, setting wages, etc. The methods for resolving labor disputes are also very similar. Even the flaws in the labor codes of the EAEU countries seem to be alike or the same. For example, Kazakhstan and Russia have unique definitions of a lock-out[111] that state that a lock-out is a termination of the employment contract by the employer because of the employee's participation in a legal strike or a collective labor dispute. "Lock-outs" defined in this idiosyncratic way are explicitly prohibited in both labor codes. That prohibition does not ban an employer from refusing to give strikers access to the territory of the company if they want to participate in a sit-in strike, i.e. the employer is permitted to declare a defensive lock-out in the sense of that term as it is understood almost everywhere else.[112]

Another example is the prohibition of forced labor: Belarus and Russian Labor Codes contain[113] a general prohibition of forced labor combined with prohibition of some of its specific forms mentioned in the International Labour Organization (ILO) Convention No. 105.[114] Such a construction seems illogical and can lead only to practical confusion. If some specific forms of forced labor are prohibited, does this mean that forced labor in general is not? Law makers in both countries failed to take into account the earlier ILO Convention No. 29[115] on the matter which contains a weaker regime of prohibition of forced labor with a special "transitional period"[116] during which it is still allowed in a limited fashion. That is why the newer Convention No. 105 was needed to provide for the immediate prohibition of specific forms. Obviously there was no such need in the much more up-to-date national labor codes.

Sometimes the legal norms of one country in the region reflect the academic and political discussions of another. For example, there has been a discussion in Russia lasting over ten years about how the shamefully low[117] level of the minimum

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111 Art. 415 of the RLC; Art. 178 of the KazLC 2015.

112 Antoine T.J.M. Jacobs, *The Law on Strikes and Lockouts* in *Comparative Labor Law and Industrial Relations in Industrialized Market Economies* 707 (R. Blanpain (ed.), 10th ed., Aspen: Wolters Kluwer, 2010), 707; *Strikes and Lock-Outs in Industrialized Market Economies* (R. Blanpain & R. Ben-Israel (eds.), The Hague: Kluwer Law International, 1994).

113 Art. 13 of the BLC; Art. 4 of the RLC.

114 ILO, Abolition of Forced Labour Convention (No. 105), 25 June 1957 (May 20, 2018), available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312250:NO.

115 ILO, Forced Labour Convention (No. 29), 28 June 1930 (May 20, 2018), available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312174:NO.

116 *Id.* Art. 1, para. 2.

117 As of 1 May 2018 the monthly minimum wage in Russia has been set at 11,163 rubles, i.e. about 146 euros (April 2018 exchange rate). *See* Федеральный закон от 7 марта 2018 г. № 41-ФЗ "О внесении изменения в статью 1 Федерального закона 'О минимальном размере оплаты труда,'" Собрание

wage must at least exclude the additional payments to a worker such as regional payments associated with the severe climate of the Far North, family benefits etc. so that those payments would be paid over and above the minimum wage level. Up to now Russian law has not favored these claims on behalf of workers. Unlike the Russian Labor Code, the ALC and KazLC 2015 explicitly declare[118] that these additional payments are not to be included in the minimum wage. This declaration on the issue seems to be a clear reflection of the discussion in Russia.

These examples, which may be multiplied,[119] show that authors of labor legislation in the region use the doctrine and laws from neighboring countries as a source of inspiration much more frequently than they use international labor standards or legislation of non-Russian speaking countries. Even the norms that were adopted after the collapse of the USSR are nevertheless dependent on previous socialist legal doctrines and the debates arising from their application in changed circumstances.

Compared to the EU region, national labor law of the EAEU member states is already *almost* harmonized. Nevertheless, there are some differences in the labor legislation and practice within the EAEU region which are in contradiction to the economic need of employers to have predictable rules and to conduct their business in a uniform way within the territory of the EAEU once they have freedom to provide services anywhere within the borders of the member states. These differences are aggravated by the freedom of member states to change labor law at their own discretion, and this may prompt a future political discussion about the creation of some kind of unified law, including even the creation of a supranational EAEU Labor Code. However, any such discussion is probably doomed to failure in the near term because of political tensions.

In addition to concerns about Russian domination over the region, another serious political obstacle to regional labor law integration is the lack of a clear and concise social policy in each of the EAEU member states. Despite the declaration of the goals of social and employment policy in the constitutions and legislation of each of the states, their practical implementation is highly questionable. For example, in Kyrgyzstan the greatest risks and obstacles to reforming labor relations derive from a lack of strategic and coordinated government interventions accompanied by institutional weakness of the social partners. The principal government agency that

законодательства РФ, 2018, № 11, ст. 1576 [Federal Law No. 41-FZ of 7 March 2018. On Amendment to Article 1 of the Federal Law "On Minimum Wage Amount," Legislation Bulletin of the Russian Federation, 2018, No. 11, Art. 1576].

118 Art. 179, para. 1 of the ALC; Art. 104, para. 1 of the KazLC 2015.

119 For more about such prospects *see Головина С.Ю.* Перспективы развития трудового законодательства в рамках Евразийского экономического сообщества // Российский ежегодник трудового права. 2008. № 4. 351–368 [Svetlana Yu. Golovina, *The Prospects of the Labor Law Development Within the Eurasian Economic Community Framework*, 4 Russian Labor Law Annual 351 (2008)].

is responsible for labor policy in Kyrgyzstan has been so incessantly restructured and subjected to so many changes of leadership[120] that it could not possibly establish a coherent and lasting labor policy. In interviews it was noted that the Ministry's staff is not well qualified and is currently not much prepared to administer matters related to labour and social development; the staff does not take the initiative or have their own position on most of the matters that come under their purview.[121] The situation in other EAEU states is not identical with Kyrgyzstan's, but the ability of those states to sustain a coherent social and labor policy is still very much in question. Creation of a supranational labor law policy framework for the EAEU with clearly specified goals and benchmarking may serve as a partial solution of this problem at the national level for each of the EAEU member states.

To sum up this Section, we can conclude that EU influence on the labor law of its member states was quite significant albeit fragmentary and non-systematic. By contrast, in the EAEU countries the technical and legal potential of member states to harmonize their labor law is much greater because their current legal systems are already much closer to each other than the laws of the EU member states. However, we can only speak about the potential influence of the EAEU on the labor law of its member states because this integration process is still at an early stage, and it is far from clear what the prospects are for its further development in the future.

Conclusion

Coming back to the question that was raised in the title of this article, whether the basic features and trends of development of EU and EAEU labor law are comparable, the answer must be generally positive. However, it is also clear that although two systems are comparable, they are so different that they look like mirror images of each other in certain respects.

While the EU project is an attempt to apply some general common legal frameworks to certain separate aspects of legal regulation of labor in the very diverse national labor law systems, the EAEU currently refuses even to formulate the harmonization of labor law among its member states as a goal. Nevertheless, as the EU experience shows, integration that starts as a purely economic process has a tendency to turn into deeper political and legal integration. Therefore, labor law harmonization in the EAEU may arise as a consequence of economic integration and the creation of a single market.

Inasmuch as the national labor law systems of EAEU member states are already much more homogenous than in the EU, there is no *technical* problem in creating

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[120] 16 chiefs in the 26 years since Kyrgyzstan gained its independence, which means that the average stay in office was about 1.5 years.

[121] The information gathered in the process of preparation of the Issues Paper on the prospects for the labor law reform in Kyrgyzstan for the ILO by one of the authors of this article in 2017.

common labor legislation for the Eurasian region which could be much more coherent and unified than the EU labor law. All the labor law systems of the EAEU countries belong to a single family and theoretically may be harmonized rather easily. Within this process of harmonization some common flaws in the legislation may be amended and best practices from other countries and international labor standards may be adopted. Some good examples for adaptation may be found in such EU norms as those on the protection of workers in the process of ownership changes of an enterprise, establishment of underwriting agencies in case of an employer's insolvency, stronger mechanisms for informing and consulting with workers, better collective bargaining rights, etc.

However, *political* factors, i.e. the current chill in relations between Russia and the EU states, may be an obstacle to including these beneficial features of EU supranational labor law norms in the legal order of the EAEU. Nevertheless, such borrowing would not necessitate any political labelling that would indicate that the EU is its source, and it may readily be declared an autonomous initiative of the EAEU. This is especially so because that EAEU framework would have the technical potential to address a much wider spectrum of supranational regulation of labor issues than the EU labor norms.

EAEU labor law integration is much more difficult from still another *political* point of view. Despite the economic benefits of a larger integrated economy, concerns about Russian regional domination may be a very serious obstacle to tighter integration. Moreover, it is questionable to what extent each individual EAEU member-state itself is capable of erecting and maintaining coherent labor law and employment policy at the national level. Whether the supranational structure would compensate for the lack of national policy is very much open to question.

This means that, although there is a good technical and legal potential for integrating labor law within the Eurasian region, the prospects of such integration are far from clear at present.

It seems that the current neo-liberal economic policy of the EAEU member countries that has its roots in early the 1990-s along with large gaps in income and a worsening economic situation may lead to political and social instability[122] which may in its turn push governments to begin experimenting with legitimate social policies. Labor law may be one of the pillars of such policies.

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[122] There are serious signs of such instability growth in Russia at the time of writing. *See Бизюков П.* Первые признаки большого цунами // Газета.Ru. 18 января 2016 г. [Pyotr Bizyukov, *The First Sights of the Big Tsunami*, Gazeta.Ru, 18 January 2016] (May 20, 2018), available at http://www.gazeta.ru/comments/2016/01/15_a_8023709.shtml. Information about Kazakhstan is available in *Ткачев И., Волкова О., Химшиашвили П., Ратников А., Сухаревская А.* Обвал по просьбе трудящихся: чем закончится девальвация в Казахстане // РБК. 20 августа 2015 г. [Ivan Tkachev et al., *The Fall According to the Worker's Demand: What Will Be the Outcome of the Kazakhstan Devaluation*, RBK, 20 August 2015] (May 20, 2018), available at http://www.rbc.ru/economics/20/08/2015/55d6168d9a794727e7b4739e.

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ROMAN LAW'S INFLUENCE ON RUSSIAN CIVIL LAW AND PROCEDURE

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The subject of the research in this article is the influence of Roman law on Russian civil procedure. Roman law has undoubtedly had a huge impact on the development of civil legislation in many countries of the continental legal system, in particular on Russian law. But the importance of the institutes developed by Roman lawyers of different eras, has not received a decent assessment of experts. In this article, the authors propose to the reader the concept that Roman civil procedure, finally formed during the reign of Emperor Justinian, is the foundation for the development of civil proceedings in Russia at different during key stages of its development. It is also suggested that Roman law was indirectly received with the help of nineteenth-century German scholars. Full use of the potential of Roman civil procedure in Russian civil procedure is difficult, because in the Russian legal science researchers have paid little insufficient attention to the correlation of such an important stage in the development of Roman, Russian and the continental law. And yet the theoretical legal basis laid by Roman law, well-developed by Roman lawyers, with procedural institutions that have had a significant impact on Russian law. The degree of such influence on Russian law in different periods of history varied. The institutions of the claim, representation in civil procedure, as well as evidence and proof, were most affected by Roman law, although the importance of other institutions of Roman civil procedure should not be underestimated. This article is intended to initiate more fundamental analysis of the impact of Roman law on Russian civil procedure.

Keywords: Roman and Byzantine law; civil procedure; influence on the Russian legal system; stage of influence; Pandect system; evidences; claim; oath; presumption; representatives; litis contestatio.

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Table of Contents

Introduction
1. Byzantine Law's Influence on Russian Legislation (10th–17th Centuries)
2. Western Europe's Influence on Russian Legislation
3. Soviet and Modern Periods of Development
Conclusion

Introduction

This paper's purpose is to inform the reader about the stages in Roman and Byzantine legislation that influenced Russian civil procedure. Contrary to the experience of other European countries, Roman law has more theoretical than practical significance on Russian jurisprudence. Although some norms of the Digests and other Roman sources were accepted, Roman law was never absolutely accepted by the Russian legal system.[1]

In the 19th century, three major theories were expounded, describing how Roman law influenced Russian law:

1) S. Muromtsev and F. Leontovich's theory that Russian law historically developed independently from Roman law;[2]

2) K. Kavelin's theory that Russian law entirely developed from Roman law;[3]

3) the concept of partial borrowing by Russian law of certain Roman institutions and concepts (N. Rozhdestvenskiy, N. Duvernua, A. Gulyaev).[4]

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[1] *Перетерский И.С.* Дигесты Юстиниана. Очерки по истории составления и общая характеристика [Ivan S. Pereterskiy, *Justinian's Digests. Overview of the History of Their Creation and Major Characteristics*] 99 (Moscow: Gosyurizdat, 1956).

[2] *Муромцев С.А.* О консерватизме римской юриспруденции [Sergey A. Muromtsev, *On the Conservatism of Roman Jurisprudence*] 182 (Moscow: Tip. A.I. Mamontova i Co., 1875). In his opinion, Roman law had no influence on the Russian system of law, it has only historical significance and should be evaluated only in this aspect. The most zealous advocate of this theoretical point of view, was M. Speranskiy: "From antiquity to the times of our Russian legislation, excluding the two epochs, at Yaroslav and Peter the Great, acted and escalated by separate natural forces and, perhaps, one throughout Europe, almost nothing was gleaned in the General source of laws, in Roman law, to add to this should that other peoples have entered into civil life with a great legacy, we on the contrary, we have hardly inherited anything from the Romans, and very little from the Greeks. All our wealth in this way is our own, well-received."

[3] *Шершеневич Г.Ф.* Наука гражданского права в России [Gabriel F. Shershenevich, *The Science of Civil Law in Russia*] 238 (Kazan: Tipografiya imperatorskogo universiteta, 1893). Proponents of this concept believed that Russian law – the product of Roman law and its origins lie in the Roman and Byzantine traditions.

[4] *Дювернуа Н.Л.* Источники права и суд в Древней России [Nikolay L. Duvernua, *Sources of Law and Court in Ancient Russia*] 40–42, 172–175 (Moscow: Universitetskaya tipografiya, 1869). N.L. Duvernua

Modern Russian legal science follows the third theory. Modern scholars accept the dominant influence of Roman law on Russian civil legislation and split this Roman influence into two major stages: the Byzantine period, from the 10th century; and the Western period that started with Peter the Great's reforms in the late 17th and early 18th centuries.

1. Byzantine Law's Influence on Russian Legislation (10th–17th Centuries)

The Treaties of Princes Oleg and Igor with Greece (*Dogovory Knyazey Olega i Igorya s Grekami*) were the first Russian legal acts influenced by Roman law. The first of those treaties was signed by Russian Prince Oleg and Byzantine Emperors Leo and Alexander in 911. It included Roman procedural and evidentiary norms – introducing the Russian legal system to Roman ideas of oath taking, searches and witness testimony. Roman inheritance law and the concept of a will, theretofore unknown in Russia, were also introduced in this treaty. Other Byzantine concepts newly brought to Russia in this treaty were the ideas for setting monetary fines at double the price of stolen goods or property, and for redeeming military captives.[5] The second treaty, signed by Russian Prince Igor and Byzantine Emperors Leon and Alexander, generally followed the provisions of the first one.

When Russia proclaimed Christianity as its official state religion in 988,[6] Russian church courts (*tserkovnye sudy*) began to directly implement Byzantine law. The Byzantine *Nomocanon* was, therefore, partially included into the *Tserkovnye Ustavy* of Princes Vladimir, Yaroslav and Vsevolod, which contained procedural rules of the church courts and other rules governing church activities.[7] Nearly all cases arising out of family relations (divorces, disputes between parents and children, inheritance and guardianship), and crimes against public morality and church laws were solved under the rules of the *Tserkovnye Ustavy*.[8]

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and other representatives of the third concept, analyzing the old Russian legal sources came to the conclusion that in certain periods of the history of Russian law found traces of Roman influence.

5 *Сергеевич В.И.* Лекции и исследования по древней истории русского права [Vasiliy I. Sergeevich, *Lectures and Researches in Ancient History of the Russian Law*] 126 (2nd ed., St. Petersburg: Tipografiya M.M. Stasyulevicha, 1899).

6 The proclamation of Christianity as an official Russian religion made revolutionary changes in all the spheres of the country's legal life. Many Russian law rules created before that event became conflicting with the rulings of Christian morality and Christian Church laws (e.g. polygamy, the marriage ceremonies, etc.). This could lead to the full replacement of native Russian law by foreign and Church rules. But because of its stability and firmness, Russian law was changed only partly.

7 *Самоквасов Д.Я.* Древнее русское право [Dmitriy Ya. Samokvasov, *The Ancient Russian Law*] 202 (Moscow: Universitetskaya tipografiya, 1903).

8 *Беляев И.Д.* Лекции по истории русского законодательства [Ivan D. Belyaev, *Lectures on History of the Russian Legislation*] 69 (2nd ed., Moscow: Tip. A.A. Kartseva, 1879).

The *Nomocanon* was also partially incorporated into the *Sudniy Zakon Lyudem* (code of secular court procedure, hereinafter *Sudniy Zakon*), adopted in the 11th century under the rule of Prince Vladimir.[9] The *Sudniy Zakon* controlled all civil disputes. Following the Justinian Code (*Corpus Juris Civilis*), which established that witnesses were the major source of evidence in civil proceedings, the *Sudniy Zakon* stated that no civil suit may be tried unless witnesses (*svideteli*) are present. The *Sudniy Zakon*'s articles on the number of witnesses required in a civil case, and those on conditions that make witness testimony unreliable, were also adopted from Byzantine law. For instance, the total number of witnesses in complicated civil cases could not be less than 18, and three to seven witnesses were allowed in less complicated cases. The *Sudniy Zakon*, again following the Byzantine tradition, introduced punishment for perjury, prevented slaves (*holopy*) from testifying as witnesses, and required that testimony be given under oath.[10]

The next source of Russian law influenced by Byzantine legal traditions was the *Russkaya Pravda*, in force, with various modifications, from the 11th to the 14th century. The *Russkaya Pravda* was partially copied from the *Sudniy Zakon*. In addition, from Byzantine law, and especially from the *Ecloga*, it took provisions on liability of the master for criminal actions of a slave, and some rules of inheritance. Corporeal punishments, which were popular in Russia before the *Russkaya Pravda*, were changed, in some circumstances, to fines equal to three *grivnas*. The *Russkaya Pravda* introduced Byzantine institutes whereby defendants made monetary guarantees equivalent to the amount of the suit, in particular bail.[11] Based on Byzantine concepts, Russia, at this time, started to divide civil actions into actions *in personam* and actions *in rem*. In addition, *Russkaya Pravda* created a distinction between purgatory and supplementary oaths.[12]

In different periods of time nine sources of law, either direct translations of Byzantine law or Russian incorporations, were included into the *Kormchaya Kniga* that became a guiding book for the Russian Church.[13] The first translated source was the *Nomocanon of Johannes Scholasticus* in the 6th century. It included several novels of Emperor Justinian, which determined the civil rights and obligations of the priesthood, and the privileges of the Church and monasteries. Second, *Ecloga*

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9 *Щапов Я.Н.* Новый памятник русского права XV в. // Славяне и Русь [Yaroslav N. Shchapov, *A New Monument of Russian Law of the 15th Century* in *Slav Nations and Russia*] 375–382 (Moscow: Nauka, 1968).

10 *Владимирский-Буданов М.Ф.* Обзор истории русского права [Mikhail F. Vladimirskiy-Budanov, *Overview of the History of Russian Law*] 94 (5th ed., St. Petersburg: Lito-tipografiya Tovarishchestva I.N. Kushnerev i Co., 1907).

11 Belyaev 1879, at 120.

12 Samokvasov 1903, at 345.

13 *Рождественский Н.Ф.* Рассуждение о влиянии греко-римского права на российские гражданские законы [Nikolay F. Rozdestvenskiy, *Thoughts About Influence of Greek and Roman Law on Russian Civil Legislation*] 216–218 (St. Petersburg: Tip. Shtaba voen.-ucheb. zavedeniy, 1843).

by the Greek Emperors Leo III and Constantine V of 741 was translated.[14] These were included in the *Kormchaya Kniga* in the 16th century. The third source of Byzantine legislation added to the *Kormchaya Kniga* was the *Prochiron* by Basil the Macedonian. This was translated into Russian in the 13th century, where it was commonly known as the *Gradskie Zakony*. The *Nomocanon* by Patriarch Photius, of the 9th century, was the fourth source. The fifth, sixth and seventh sources included the *Zakon Sudniy Lyudem,* the *Corpus Legum* by Emperors Roman and Constantine, and the *Legislation of Alexius Comnenus*, dated in the 10th century. The *Byzantine Matrimonial Law* was the eighth source, and the ninth was the *Hexabiblos*. The *Hexabiblos (Ruchnaya Kniga Zakonov)* was written by Constantine Harmenopoulos in the 14th century, however, its strongest effect on Russian legislation came later. It entered the legal system in the Western regions of the Russian Empire (Bessarabia) and started to be implemented in central Russia since 1831. In 1652, during the rule of Tsar *Aleksey Mikhailovich* the first printed version of the *Kormchaya Kniga* appeared. It contained the first eight sources of Byzantine law. One thousand two hundred books were printed and sent to civil courts "for application of this obligatory law."[15] Significantly, the *Kormchaya Kniga* was implemented in some parts of the Russian Empire until the 19th century. This is a record of longevity for Russia.

In 1497, the *Sudebnik* (Code) *of Ivan III*, "Great Prince and Autocrat of All Russia" was passed. It also showed some influence of Byzantine law. For the first time in Russia the Roman *restitutio in integrum* was introduced. Under this concept, if a master or respected landlord (*boyarin)* entered a "judgement" on an issue under the jurisdiction of the court, then the decision was "invalid and if anything was done towards its practical implementation everything had to be returned to the state it was before such activities."

Although the Byzantine legislation discussed above was most actively used in the 16th century church courts (because at this time the influence of the Church greatly increased), these Byzantine sources lost their influence in other courts. Secular courts had to follow the procedural and substantive rules of the *Sobornoe Ulozhenie* of Tsar Aleksey Mikhailovich (father of Peter the Great). These were adopted in 1649 and used until the beginning of the 19th century.

The *Sobornoe Ulozhenie* was not only based on Russian experience, but also on some Roman and Greek legal sources[16]. Its construction had much in common,

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[14] This source of law contained rules on contracts, inheritance, guardianship and matrimony. *See Щапов Я.Н.* Римское право на Руси до XVI в. // Феодализм в России [Yaroslav N. Shchapov, *Roman Law in Russia Before 16th Century* in *Feodalizm in Russia*] 216 (Moscow: Nauka, 1987).

[15] Raoul C. van Caenegem, *History of European Civil Procedure* in *International Encyclopedia of Comparative Law. Vol. XVI: Civil Procedure* 83 (M. Cappelletti (ed.), Tübingen: J.C.B. Mohr, 1973).

[16] *Гуляев А.М.* Об отношении русского гражданского права к римскому [Alexey M. Gulyaev, *On the Relationship Between Russian Civil Law and Roman Law*] 6 (Kiev: Tip. Imp. Un-ta sv. Vladimira V.I. Zavadskogo, 1894).

systematically, with the *Justinian Code*. It started with provisions on religion, the Church, and various sects; it continued with norms of state law and the structure of the court system; and it finished with criminal law. Besides their common construction, the major tracts of Chapter X of the *Sobornoe Ulozhenie*, on the judiciary, is equivalent to Books III–VI of the *Justinian Code*.

The *Sobornoe Ulozhenie*'s provisions on witnesses also follows the major requirements for witnesses prescribed by the *Digests*: (i) an age limitation (persons 20 or more years old could be witnesses); (ii) persons with certain physical or mental disorders could not be called; (iii) children could not testify in their parents' cases; (iv) slaves generally could not testify; and (v) witnesses could not testify if they had a hostile relationship to one of the parties.[17] Following Russian tradition, the *Sobornoe Ulozhenie* set a thirty year statute of limitations for bringing civil claims. For the first time, the *Sobornoe Ulozhenie* introduced the Roman law institute of servitude into Russian legislation.

In summary, Roman legal influence on the Russian legal system, from the 10th century until the reign of Peter the Great, generally was rendered through the Byzantine Empire, where, until the 15th century, Roman law continued to be implemented. Roman and Greek legal norms were of a subsidiary, auxiliary nature for the developing Russian legal system. The Russian priesthood also included many Greek priests who were familiar with both Canon law and civil Byzantine legislation. Thus, the priesthood were the most active followers of the Roman tradition. Traces of Roman law's implementation can be most vividly seen in the legal documents of the Russian Church, while less influence is seen when examining secular civil legislation.[18]

2. Western Europe's Influence on Russian Legislation

A new stage of Roman law influence on Russian law started with the rule of Peter the Great (Peter I) (1682–1725). Peter's reforms changed Russian legislation substantially. During this period Roman law began to come to Russia through Western Europe and West European legal norms started to have a great influence on Russia.

Peter's acquaintance with Western laws, led him to issue decrees and regulations mirroring some of the Roman law institutes that had caught on in Western Europe. Roman legal elements can be seen, for example, in the trade ordinance (*Torgoviy Ustav*), the Sea Ordinance (*Morskoy Ustav*), the Craftsmen's Ordinance (*Remeslennyi*

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[17] Дигесты Юстиниана: Избранные фрагменты в переводе и с примечаниями И.С. Перетерского [*Justinian's Digests: Selected Fragments in Translation and with Notes by I.S. Pereterskiy*] 361–366 analyzing Sobornoye Ulozheniye (Ch. X, Art. 181) and Digests (Moscow: Nauka, 1984).

[18] *Салогубова Е.В.* Римский гражданский процесс [Elena V. Salogubova, *Roman Civil Procedure*] 25 (Moscow: Gorodets, 2018).

Ustav), the Military Ordinance (*Voinskiy Ustav*) in its norms on the judiciary, on defendants and on evidence, the Religious Ordinance (*Dukhovnyi Ustav*) and the *Reglament Kommerts-kollegii* also reflected Roman law.[19] Peter's legislative reforms also resulted in eleven new types of contracts coming into use in Russia. These included purchase and sale contracts; donation; lease contracts; contracts for deposit, credit, rent, and storage; as well as partnership agreements. Finally, Roman law also significantly influenced Russian family law. Many norms of Roman matrimonial law were incorporated into the Russian legal system, including the description of marriage given by the Roman lawyer *Modestinus*.[20]

At this time, Russia, formerly largely sequestered from Western influence in its legal and governmental institutions, turned outward and started to take from and follow Western norms. Russian historian K. Nevolin stated:

> Before Peter the Great, the Russian nation, living in close unity with nature, created its rules of life itself with a little influence from the Eastern world and with even less influence from Western traditions.[21]

Added another well-known historian, F. Leontovitch,

> Russian law from the time of Peter the Great actually started to obey the rules of Western European legal systems, which is the main difference of [this time] with the law that existed before the great emperor of Russia.[22]

In short, Roman law had a constantly increasing influence on the structure of the Russian legal system. This started in the period prior to Peter the Great and increased greatly in form and tempo during his reign. During Peter's reign this influence started to be seen in many fundamental provisions of Russian law.

Roman law's influence can also be seen during the epoch of Catherine II (1762–1796) and Emperor Alexander I (1801–1825). At the time of ruling of Catherine II the draft of the new *Ulozhenie* was prepared. The Empress, in an instruction entitled Instruction to Legislative Commission on Draft of a new *Ulozhenie* ("*Nachertanie o privedenii k okonchaniyu komissiey proekta novogo ulozheniya*"), which contained

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[19] *Энгельман И.Е.* Курс русского гражданского судопроизводства [Ivan E. Engelman, *The Course of Russian Civil Procedure*] 48 (3rd ed., Yuryev: Tipografiya K. Mattisena, 1912).

[20] *Попов Н.А.* О значении германского и византийского влияния на русскую историческую жизнь в первые два века ее развития // Московские университетские известия. 1871. № 1. С. 145 [Nil A. Popov, *On the Significance of Influence Caused by Germany and Byzantine on Russian in First Two Centuries of Russian History*, 1 Moskovskie universityetskie izvestiya 145 (1871)].

[21] *Неволин К.А* Энциклопедия законоведения. Т. 2 [Konstantin A. Nevolin, *Encyclopedia of Law. Vol. 2*] 98 (Kiev: Universitetskaya tipografiya, 1840).

[22] *Леонтович Ф.И.* История русского права [Fyodor I. Leontovich, *History of Russian Law*] 11 (Odessa: Imp. Novoros. un-t, 1869).

the working guidelines for the Commission drafting the *Ulozhenie*, ordered that it should follow the institutional scheme of Roman law. Also, the description of the term "contract" was taken from Roman law.

The text of the *Ulozhenie* that Catherine had commissioned was never approved, and thus did not become law; however, its contents were used to further future legislative work. Thus, the Roman law concepts it contained were, nonetheless, carried forward through this abortive legal reform effort.

Under the reign of Alexander I, a Legislative Commission under the Russian Ministry of Justice, headed first by Baron Rosenkampf and later (from 1809) by a famous politician Mikhail Speranskiy, was formed to prepare a new *Grazhdanskoe ulozhenie* (analogous to a civil code). The Legislative Commission headed by Baron Rosenkampf created an unsuccessful draft of the *Grazhdanskoe ulozhenie* which copied the Napoleonic Code of 1804.

After that Speranskiy was appointed to head the Commission. He was ordered by the Emperor to leave the continuation of the work on the *Grazhdanskoe ulozhenie* and started the creation of the *Svod zakonov Rossiyskoy imperii* (hereinafter *Svod zakonov*). The drafting of *Svod zakonov* was fraught with conflict over the extent to which Russia should follow European norms. Mikhail Speranskiy was notoriously against European influence. In his words,

> With the knowledge of Roman law sources and Roman language it is possible to draft legislation directly from them without the necessity to copy foreign laws and study in German or French universities.[23]

Nonetheless, the *Svod zakonov* was also influenced by the Napoleonic Code and European envisionments of Roman law.

During this period (middle 18th–19th centuries) University law faculties were formed in Russia. As the education in these faculties was modelled on Western Europe, they became active followers of Roman law concepts and traditions, helping to further spread Roman law norms throughout Russia.

The government of Alexander II (1855–1881) undertook considerable reforms of the Russian court system, including civil and criminal procedure. Civil procedural reform, especially, reflected Roman law. In 1864, Alexander passed the *Ustav grazhdanskogo sudoproizvodstva* (hereinafter *Ustav*) – analogous to a code of civil procedure which was based on the experience of the French Code of Civil Procedure of 1806.[24]

The *Ustav* introduced major Roman civil procedure principles into Russian law. For example, it introduced the Roman principles of optionality, adversary character of the judicial process, publicity of the trial and oral nature of judicial proceedings.

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[23] Gulyaev 1894, at 9.

[24] Судебные уставы 20 ноября 1864 года [*Judiciary Charters of 20 November 1864*] 50–60 (St. Petersburg: Gosudarstvennaya kantselyariya, 1866).

The *Ustav* generally adopted the Roman evidentiary system. For example, the Roman principle of *onus probandi* was accepted. Roman provisions on witness testimony, which had been included in the *Sobornoe ulozhenie* of 1649, were copied with some changes into the *Ustav*. Additionally, list of persons who could refuse to testify (that included close relatives of the sides) was, while not directly copied, nonetheless conceptually influenced by Roman law. Some oaths used in Roman law were also incorporated into Russian law – the *jusjurandum voluntarium* and the *jusjurandum necessarium*.[25]

The *Ustav* also adopted the Roman division of written evidence into public documents (*publicum tabulae*) and private documents (*instrumenta privata*). Roman rules on treating trade books as documentary evidence were accepted by Russia, together with rules on presumptions (*praesumptio*): *nemo ignorantia juris resucare potest; quisque praesumitur bonus, donec probetur contrarium.*

Rome's influenced the *Ustav* in more than more evidentiary rules: major procedural institutions were adopted. The creators of the *Ustav* borrowed the Roman rule of judgement rendered against defendant in his absence (judgement by default), and the institute of appeal. The idea of dividing litigants' representatives into voluntary representatives and those "listed by law" (parents, guardians and close relatives for example) came from Rome. The *Ustav* also included the Roman preclusion against certain persons, for instance priests and government officials, acting as representatives of a party.

Roman law also greatly affected the development of procedural terminology in Russian law. The meanings of the terms "claim," "evidence," "representation of the sides," and "appellate procedure" were influenced by Roman norms. Russian legal science started using Roman names for claims such as *actio negatoria*, *actio vindicatio* and *actio praedicia*.[26]

Roman civil procedure authorizes the use of presumptions, while Roman law distinguished two kinds of presumptions: legal presumption and the factual presumption. Legitimate presumptions are assumptions that are directly or indirectly enshrined in the law and therefore have legal significance. The factual presumption is the assumption, not expressed in the law, and therefore do not have legal value.

Legal presumption of the Roman law:

The presumption of paternity – a child born in a legal marriage, recognized as legal, his father was considered the husband of his mother.

The presumption of good faith, which was that everyone, until proven otherwise, was considered a good citizen.

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[25] *Малышев К.И.* Курс гражданского судопроизводства. Т. 1 [Kronid I. Malyshev, *The Course of Civil Procedure. Vol. 1*] 301–306 (St. Petersburg: Tipografiya M.M. Stasyulevicha, 1876).

[26] *Васьковский Е.В.* Курс гражданского процесса. Т. 1 [Evgeniy V. Vaskovskiy, *The Course of Civil Procedure. Vol. 1*] 606 (Moscow: Izdaniye Br. Bashmakovykh, 1913).

The presumption of knowledge of the law – no one can be dissuaded by ignorance of the law.

The *Ustav* established the possibility of using lawful presumption, but did not allow for the existence of factual presumption.

The rules of Roman law contained important provisions on procedural representation. Under Roman law, certain categories of persons were prohibited from being represented in court on the grounds of deprivation of their honour. Under Roman law, there were two groups of persons deprived of their honour:

1) persons who have committed any dishonorable act or engaged in certain activities. To this group were: wife, caught in adultery; widows married prior to the expiration of the mourning period; persons who were simultaneously in two marriages or betrothals; persons who lead a dissolute life or were pimping. By profession, the first category included gladiators, actors, loan sharks, soldiers;

2) persons who have lost honor after a judicial sentence or been discharged from service.

Shame in Roman law remained for life.

The *Ustav* borrowed certain provisions of the Roman law on procedural representation. Roman law established the institution of legal representatives who, in the process, defended the interests of minors, the mentally ill and the wasteful. One of the forms of legal representation under Roman law was guardianship over the property of persons who themselves were not able to manage it. The *Ustav* also provided for legal representation. Legal representation under the *Ustav* took place in relation to minors, as well as persons suffering from mental or physical illness. A special kind of representatives in Rome were *defensory*, persons who did not receive any specific powers, assumed the protection in court of the interests of the absent parties.

The difference between representation and law enforcement was that the representative acted as a procedural backup of the party, i.e. he assumed the conduct of another's case. Lawyers and speakers were not procedural representatives. They participated in the process to assist both the parties to the dispute and the court itself with their advice and speeches. The *Ustav* also provided for the possibility of conducting a case through a representative. Representatives can be attorneys, which established the moral and mental qualifications.

The jurors performed two functions: on the one hand, they acted as representatives of the proceedings, and on the other hand, acted as law enforcement officers, i.e. assisted the court.

The Rome regulations provided for two types of power of attorney: a special power of attorney, which defined all powers individually and a General power of attorney, which contained the authority to conduct litigation. The Charter of civil procedure also provided for two types of powers of attorney. The Charter allocated special powers (the right to appeal, termination of the case by settlement agreement,

election as an intermediary for arbitration proceedings, the right to transfer powers to conduct the case to another person), which were to be specified in the power of attorney separately.[27]

In sum, from the time of Peter the Great, Roman law became influential on Russian civil legislation without significant pressure from the Church. The cause of this influence was the Russian royal family's and legislature's increasing acquaintance with Western European civil legislation, including the French codes. The Digest-based Pandects doctrine influenced law in general and, most significantly, affected the formation of civil law and civil procedural theory in Russia. This influence is seen most prominently in the second half of the 19th century.

3. Soviet and Modern Periods of Development

After the October Revolution of 1917 traces of Roman law in Russia almost completely disappeared, as there were fundamental changes in the Russian legislation, which was completely updated. Nevertheless, not all the valuable heritage of the past has been forgotten. Something was perceived by the Soviet law of the new country.[28]

After 1917, opinions were expressed about the rejection of some of the principles in legal proceedings as purely bourgeois and therefore alien to proletarian law and proletarian justice with a revolutionary sense of justice. These included, for example, a formal prosecution, transparency, adversarial process, the right to protection, etc.[29] Attempts were made to abandon some of the basic concepts in law by referring to them as bourgeois, for example, the concept of guilt. However, as noted by P. Stuchka, one of the most prominent Marxist theorists in the field of law, in-depth scientific formulation of these issues forced the creators of the new socialist justice to conclude that these legal principles are cultural gains that should be preserved by socialist law.[30]

In the conditions created by the socialist revolution, the relative independence of law was eroded and its structure underwent fundamental changes. The division into private and public law disappeared. Different in their settings and methodology of

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[27] David Johnston, *Roman Law in Context* 128 (Cambridge: Cambridge University Press, 1999).

[28] *Черниловский З.М.* Социалистическое право переходного периода: проблема преемственности // Советское государство и право. 1977. № 10. С. 27–36 [Zinoviy M. Chernilovskiy, *Socialist Law of Transition: The Problem of Continuity*, 10 Soviet State and Law 27 (1977)].

[29] *Вершинин А.П.* Упрощение и ускорение советского гражданского процесса: опыт теории и практики (20-е годы) // Вестник Ленинградского университета. 1988. № 2(13). С. 60–64 [Alexander P. Vershinin, *The Simplification and Acceleration of Soviet Civil Procedure: Experience of Theory and Practice (1920s)*, 2(13) Bulletin of the Leningrad University 60, 60–64 (1988)].

[30] *Стучка П.И.* Избранные труды по марксистско-ленинской теории права [Pyotr I. Stuchka, *Selected Works on Marxist-Leninist Theory of Law*] 436 (Riga: Latv. gos. izd-vo, 1964).

the bourgeois school of law descended from the stage, and with them a large part of the designs, concepts and definitions.

1920s were a period of revolution in law and in the science of law. Some elements of the old law that were initially taken, either ended up dying off, or have held on longer and were transformed to fit the modified socialist society. Under the influence of the revolution, with the right to change its former shape and design, new institutions, born of the planned economy and new forms of legal regulation, were caused by the new type of Federal state. Nevertheless, in the special fields of law and legal doctrine, it is possible to observe the dialectical perception of some elements developed by the previous theory and practice: presumption, concepts, terms without which it is impossible the functioning of the law, methods and techniques of interpretation of the rule, its structure, the law in time and space, division of treaties into real and consensual, complicity, and so on.

The first Civil Code of the RSFSR of 1922, was first made known by the old school lawyers (Krasnokutskiy, Wolf, etc.). Apparently, because of this, the Code was created with reliance on Pandect system. Unfortunately, later the old school lawyers were removed from work in the legislative Commission. Describing the first Soviet Civil Code, P. Stuchka wrote:

> Our Code in view of short term of its production was necessary almost entirely and literally to write from the best samples of civil law of the West; we could not set the goal to create something original, because then we in the civil sphere could not determine exactly the limits of the final retreat or give new forms of construction.[31]

The advantages of the Pandect system were taken into account in developing the RSFRS Civil Code of 1922.[32] Some of these advantages were used in the creation of the later Soviet legislation.

In the early years of socialist legal science, some theorists denied continuity between historical types of law, and especially between bourgeois and socialist. To some extent, this process of forced separation can be compared with what happened in the 19th century in Germany under the influence of the historical school of law. In case of Germany, law was not, as argued by F.C. von Savigny, purely a construct of reason, as the natural lawyers had presented it, but a product of the tradition and ethos of a particular society. Each nation's institutions, such as its language and its law, reflect this popular character and should change as society changes. Legislation

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[31] *Стучка П.И.* 13 лет борьбы за революционно-марксистскую теорию права: Сборник статей (1917–1930) [Pyotr I. Stuchka, *13 Years of Struggle for the Revolutionary Marxist Theory of Law: Collection of Articles (1917–1930)*] 125 (Moscow: Gosyurizdat, 1931).

[32] *Давыдов В.И.* Проблемы кодификации гражданского законодательства [Vladimir I. Davydov, *Problems of Codification of Civil Legislation*] 7–9 (Kishinev: Shtiintsa, 1973).

is too blunt an instrument for legal development, which should be shaped by custom and practice in the early stages of society and by juristic debate as society becomes more developed. Law grows "by internal silently operating forces, not by the arbitrary will of a law-giver." In the early period of a society, law is not sufficiently technical to be put into the form of a code; in the declining period of a society, the expertise for creating a code is lacking. The only possible period is the middle period, when there is maximum popular participation and a high level of technical expertise, expressed not by legislators but by academic jurists. But precisely because of those factors, such an age has no need of a code.

Savigny's scheme of legal development was clearly a generalisation of a view of Roman legal history which saw the law of the republic as undeveloped, regarded Justinian's law as the product of a society in decline and identified the classical period as that of maturity. Ignoring the traces of disagreement among the classical jurists, F.C. von Savigny held that, far from engaging in polemics, their works show far less individuality than other types of writing; "they all cooperate, as it were, in one and the same great work." Their whole mode of proceeding has the certainty of mathematics. So they were able to introduce new institutions without jettisoning the old: "a judicious mixture of the permanent and progressive principles."[33]

F.C. von Savigny did not seek to apply his scheme of legal evolution to all societies but only to the "nobler nations," a category which for him clearly included not only the Romans but also the Germans. There were, however, difficulties in applying his scheme of continuous historical development to German legal history in view of the break caused by the reception of Roman law. Savigny regarded this as the result of internal necessity. For Germans there was no alternative to adopting Roman law in the 16th century. Roman law was not a national but a super-national law, which, he declared, could no more be considered an exclusive national possession then could religion or literature.[34]

Vladimir Morozov wrote:

> Soviet law as a legal institution does not know succession in principle... Succession in Soviet law can be said only within a very limited framework, and during the initial period of Soviet power. Thus, the Soviet state allowed the use of some bourgeois law in the struggle for a new revolutionary order at an early stage of its development.[35]

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[33] *Савиньи Ф.К. фон.* Система современного римского права. Т. 8 [Friedrich Carl von Savigny, *System of Modern Roman Law. Vol. 8*] 590 (Moscow: Statut, 2015).

[34] Peter Stein, *Roman Law in European History* 118 (Cambridge: Cambridge University Press, 2010).

[35] *Морозов В.П.* Правовые взгляды и учреждения при социализме [Vladimir P. Morozov, *Legal Approaches and Institutes in Socialism*] 39 (Moscow: Izd-vo Mosk. un-ta, 1967).

At the present stage of development of the Russian system of law and civil procedural law, in particular, it is impossible to say that there is a direct borrowing of the norms of Roman law. But the principles of civil procedure that exists under the current Civil Procedure Code were borrowed from previous Russian legal acts. But, of course, many of them originate in the Roman legal tradition, as shown earlier.

It is worth paying attention to the influence of stage that separated *in jure* and *in judicio* stages of the Roman formal process *litis contestatio*.

Litis contestatio as a procedure had both private law and public law aspects. It was in the way that the litigants, the plaintiff and the defendant, agreed to pursue the dispute on the basis of the Pretoria formula.

Litis contestatio had in the ancient Roman civil procedure three meanings for the parties and the magistrate:

1) innovator: the obligation existing between the plaintiff and the defendant ceases, in exchange for which there is a new obligation – to obey a court decision;

2) preservative: claims will be treated as they existed at the time of fixing the subject matter of the lawsuit;

3) exclusive: with the witness of the litigation comes a time when it will be impossible to repeat the dispute on the same subject.[36]

The impact of this procedure on Russian civil procedure can be seen in the following:

1) in modern designs of a stage of preparation of the case for trial (the judge in this case is analogous to the ancient Roman praetor). The initiation of civil proceedings by the court is a kind of contest, during which the court records the basis and subject matter of the claim, as well as all the essential aspects of the dispute. It follows that the identical claim (on the same basis and subject matter) will not be considered in the proceedings;

2) in the grounds of various judicial conciliation and conciliation procedures, which is clearly observed in the development of private law and private law methods of the process. It is the emphasis on the private legal beginning of *litis contestatio* that gave birth to the modern theory of procedural agreements in the French procedural doctrine, which was developed and applied in the Russian Federation.

It should also be noted that the *litis contestatio* procedure has influenced the development of the theory of correlation and joint and several obligations. In the 19th century German Pandects tried to explain the termination of obligations of one joint and several obligor making *litis contestatio* with the creditor to another obligor under the same obligation. These theoretical arguments of German jurists were helpful and the basis for the development of solidar obligations in Russia.

Some borrowing can also be found in the area of evidence and proof. In Rome, there was a clear and comprehensively developed system of evidences,

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[36] *Тололаева Н.В.* Модель пассивных солидарных обязательств // Вестник гражданского права. 2016. № 2. С. 9 [Natalia V. Tololaeva, *Passive Solidary Obligations Model*, 2 Civil Law Review 7, 9 (2016)].

subsequently perceived by Russia. The subject of proof in the Roman civil trial were only controversial facts. The burden of proof lay with both the plaintiff and the defendant, depending on which party supported its arguments. In the Digests of Justinian, you can find a quote from the sayings of Paul, indicating that the proof rests on who asserts, not on who denies. In fairness, it should also be noted that the same lawyer makes an exception for cases of release from the power of the father. Confirmation of this borrowing can be found in the *Ustav*: the plaintiff must prove his claim. The defendant objecting to the plaintiff's claims must prove his/her objections.

In Rome, approximately at the end of the 1st century, began to be consolidated in the practice of proving the idea, which will later be called the formal theory of evidence. It consists of the fact that the judge is not free to assess the evidence at his discretion, as the normative acts previously defined by the meaning of a particular evidence in the case.

The system of formal evaluation of evidence, which replaced the court fights in continental medieval Europe, reflected purely mathematical (numerical) jurisprudence. The law usually specialized in regulating how many non-conflicting witnesses were required to confirm different categories of assumptions (proposition) and to determine exactly how many witnesses of a particular class and gender were required to refute the testimony of one higher-level witness. It was a medieval law brought up on the abstract concepts of scholasticism, striving for mathematical accuracy in order to avoid the risk of irrational and subjective resolution of the case.

Number of phenomena that make up the subject of the theory of formal evidence is present in modern Russian civil procedure: evidentiary presumption; circumstances that were not a subject to proof and are considered established; rules of admissibility and relevance; rules of collection, research and evaluation of certain types of evidence; the necessary evidence; evidence with increased force of persuasion and rules of prejudice. All of these rules are designed to work to help the court, the parties, and it is unlikely that civil procedure will benefit if these designs are excluded.

Conclusion

In conclusion, this article is intended to initiate more fundamental analysis of the impact of Roman law on Russian civil procedure. We accomplished this by examining Byzantine, Tzar, Soviet and Modern periods and the ways in which the laws were influenced by Roman law during those periods.

The author's position is that Roman law impacted Russian civil procedure by Russian law using borrowed institutions, and many of the principles and norms that have their origin in the Roman legal sources. It is also affected by the fact that the Russian legal system belongs to the continental legal family, the cornerstone of which is Roman law and Roman legal tradition.

Throughout the history of its development, Russian law gradually borrowed such legal structures as procedural representation, the principle of adversarial dispositivity, as well as the institute of various types and forms of procedural evidence.

Russia's close diplomatic and economic contacts with the Byzantine Empire predetermined the development of the Russian legal system in general and civil procedure in particular. Today, Roman law has a great influence on the theory of civil procedure. Also study helps in the correct understanding of the existing rules of Russian civil procedure.

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COMMENTS

A STUDY ABOUT THE USE OF THE TERM "LEGAL FACTS"

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The article describes, referring to characteristic examples, the use of term "legal facts." Referring to a study of the Brazilian scholar Thiago Reis, the article explains why, in the beginning of Savigny's career the term "legal facts" had importance as a manner to summarize the hitherto separated forms of possession, and how the term continued to be central to Savigny's thinking, now turning into a central point of reference for legal science which was thought as being independent from philosophy and religion. Reis' study furthermore allows to describe how the term was used thereafter in Germany, namely mostly to defend the achievements of legal science against new approaches and losing sophistication. When, using presentations made at a seminar that was held in 2015 in Almaty, the article further describes the use of the term "legal facts," it argues that the higher reliance on the term throughout the CIS as compared to Germany may be linked to the lesser degree of detail knowledge about the historical contexts in which the term has been used, but also the lower degree of certainty about the benefit of the rules in the context of which the term "legal facts" is used. In other words, the same ambiguity typical for the use of the term in Germany exists throughout the CIS, and the term seems to lead to the expectation that there is an objective rule for the issue to be dealt with, it being unclear where the basis for such rule is.

Keywords: civil law; property law; history of law; theory of law; legal terminology; German law; CIS legal theory; studies about Savigny.

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1. The Ambit of this Article

This article describes a discussion about "legal facts" which has taken place in 2015.[1] In doing so, it focusses on an ambiguity and misunderstandings which appear to be characteristic for legal theory at large when using terms that are similarly abstract like the term "legal facts." Better understanding this very ambiguity and the mentioned misunderstandings can be helpful in order to avoid those very misunderstandings and mistakes, and improve the use of abstract terms. Relating to the very term "legal facts," it is likely that similar terminological problems come up again, for instance in the context of the digitalization.

2. The Almaty Civil Law Seminars

In 2015, the 20th in the series of well recognized conferences[2] on Civil Law in Almaty took place. As usual for this series of seminars sponsored by the GIZ, the topic of the seminar was determined during the conference in the previous year. In relation to 2015, the Kazakh side had proposed the topic "legal facts," which the German side felt uneasy about given the theoretical tendency presentation using this topic would likely have, but the German side ended up agreeing with the topic. When preparing for the seminar, Rolf Knieper found the dissertation of a Brazilian scholar, Thiago Reis,[3] who had researched and tried to trace the context of the use of the term in the context of the scientific work of Savigny. Thiago Reis, in turn, had looked into the manner in which the theoretical work of Savigny developed, was understood and used, including by Brazilian scholars.[4]

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1 *See* the discussion reflected in *Гутброд М.* Последствия признания регистрации ценных бумаг юридическим фактом // Юридические факты как основания возникновения, изменения и прекращения гражданских правоотношений: Материалы Междунар. науч.-практ. конф. в рамках ежегодных цивилистических чтений, посвященных 20-летию НИИ частного права и 10-летию Казахстанского Международного Арбитража (Алматы, 21–22 мая 2015 г.) [Max Gutbrod, *Consequences of Recognition of Securities Registration as a Legal Fact* in *Legal Facts as Grounds for the Appearance, Change and Termination of Civil Legal Relations: Materials of the International Scientific and Practical Conference Within the Framework of Annual Civil Readings Dedicated to the 20th Anniversary of the Private Law Research Institute and the 10th Anniversary of the Kazakhstan International Arbitration (Almaty, 21–22 May 2015)*] 371–377 (M.K. Suleimenov (ed.), Almaty, 2016) (hereinafter *Seminar Materials*).

2 *See* a history of the conferences also contained in *Seminar Materials*, at 8.

3 *Книпер Р.* Юридические факты: возникновение и упадок одного правового института в немецком праве [Rolf Knieper, *Legal Facts: Emergence and Decline of a Legal Institute in German Law*] in *Seminar Materials*, at 55.

4 The key work by Reis is Thiago Reis, *Savignys Theorie der juristischen Tatsachen* (Frankfurt am Main: Vittorio Klostermann, 2013) with *infra* notes to this footnote to be understood as reference to this book. Worth of comparing to the understanding of the term "legal fact" in the CIS is also Reis' description of elements of the reception of Savigny in Brazil, *see* Thiago Reis, *Teixeira de Freitas, lector de Savigny*, 49 Revista de Historia del Derecho 181, 181–221 (2015) (Jun. 2, 2018), also available at https://www.academia.edu/25842511/Teixeira_de_Freitas_lector_de_Savigny_Revista_de_Historia_del_Derecho_n._49_2015_.

Whilst, this article can only look at some aspects of the debate, it will also attempt to determine the rationale under which the thoughts have been presented. This article will first trace the historical use of the term in the work of Savigny (*see* below Section 3), in German debate (Section 4) and in the CIS (Section 5).

3. Emergence of the Term "Legal Fact"

The use of the term "legal fact" changed throughout the work of Savigny.

3.1. Use of Term in Relation to Property Law and Possession

Reis traces the manner in which the term "legal fact" has come into existence, namely as an abstraction of the two possible situations of possession, that is, for a good to be either held directly for the owner or possession being held for another one (for instance if a stolen good has been leased).[5] It becomes quite clear from Reis description of the debate at the time what a progress the emergence of such an abstract term was as compared to casuistic previous thinking that stressed the difference among direct holding and transferring possession to another person.[6] It is also obvious in Reis' description of thinking at the time how similar this type of abstraction was to the abstract thinking that generally emerged at the time, in particular philosophies of the likes of Kant and Hegel.[7] The reference to facts in the term "legal fact" seems to have been felt do be particularly helpful in summarizing all those cases in which court interference was required to give the owner of the right the physical good from the one that was in possession of this good, but at the same time the use of this factual element faced criticism by those who felt the relevant object of the court interference should be more detailed.[8]

The manner in which the German Civil Code has set rules relating to possession and transfer of ownership[9] can be seen as a confirmation of the fact that the value given to abstract terms in general and in relation to things in the discussions started by Savigny was seen as being useful to encourage a the use of terms with a similar degree of abstraction. Whilst, therefore, the generally accepted ideas of Savigny's can be seen as a point of reference for discussion of the rules of the German Civil

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5 *See supra* note 4, at 33 ff. For the even more differentiated way of looking at the situation from the perspective of Roman law *see supra* note 4, at 46; *see also supra* note 4, at 186.

6 *See supra* note 4, at 50.

7 The relation to scholars following Hegel for instance is discussed in *supra* note 4, at 64. In *supra* note 4, at 102 there is a comparison with Gans who, very much like his teacher Hegel, argued that everything factual had an intellectual component.

8 *See supra* note 4, at 36 ff. about Binz.

9 *See* in particular Bürgerliches Gesetzbuch [BGB] [German Civil Code] § 929 and the following paragraphs and the focus of discussion on their interpretation to this day, *see* Dorothee Einsele, *Wertpapierrecht als Schuldrecht* 101 ff. (Tübingen: Mohr, 1995).

Code,[10] the rules of the German Civil Code related to property law would probably more appropriately be referred to as being an object of interest, but not being a point of reference, at least not outside of Germany.[11] Rather, the solutions German law reached and in particular the fiduciary property which has at least in a broader sense been made possible by the mentioned rules has typically been criticized including by German scholars and other countries including CIS countries have generally not adopted the solution proposed by the German Civil Code.[12]

3.2. Use in Savigny's System

It seems that later, when, in conceptualizing his system and therefore Savigny had to address the whole of legal relations existing, he used the term "legal fact" more generally for the situation that, in Savigny's understanding, would be characteristic for every legal dispute, namely when the relevant will of two parties conflicts.[13]

3.2.1. Importance of the Term "Legal Facts" in the Context of Savigny's Thinking

In this context, on the one hand, one could argue that the very term "legal fact" does not have relevance for the understanding the work of Savigny because the use of the term changed over time and the term has not been explained by Savigny.[14] On this basis, one could assume that the convincingness of the whole of the text of Savigny's description of the system was more important to Savigny and his followers than to define the insulated term "legal fact."[15] Also, the term "legal fact" appears to have been

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[10] *See* in general terms, Rolf Knieper, *Gesetz und Geschichte* 199 (Baden-Baden: Nomos, 1996) and directly tracing the abstract manner in which the transfer of property is regulated in the BGB to Savigny at 200. In Franz Wieacker, *Privatrechtsgeschichte der Neuzeit* 523 (2nd ed., Göttingen: Vandenhoeck & Ruprecht, 1967) the level of arguments made by Savigny and other scientists of their time is taken as a basis for the criticism of the BGB. Characteristically, the position Savigny had on the desirability of codifications in general, *see Id.* at 39 and in particular *see Id.* at 398, does not predicate the influence Savigny's thinking had.

[11] For instance, Wieling in Hans Josef Wieling, *Sachenrecht* 827 (5th ed., Berlin: Springer, 2008) argues that fiduciary property is a consequence of the practical need for a security and the decision of the BGB relating to the pledge, namely those in § 1205 and the following paragraphs, require possession for such security to exist. In Changmin Chun, *Cross-border Transactions of Intermediated Securities: A Comparative Analysis in Substantive Law and Private International Law* 193 ff. (Berlin: Springer, 2012), and Einsele 1995, at 545, there are reform proposals for securities settlement under German law without discussion of the specifics of German property law.

[12] Which typically took the form of criticism of the court practice implementing the BGB, *see* in particular Wieacker 1967, at 522 on fiduciary property. Knieper 1996, at 142–143 criticizes the openness in contractual implementation of the reservation of title, and at 200, the abstraction of property contracts in the BGB.

[13] *See* the main text around *infra* note 15. That the elements of will that conflict are difficult to articulate in this very general form is also evidenced by the problems in clearly delineating the general prohibition of a waiver of one own rights, *see* Гражданский кодекс Российской Федерации (часть первая) от 30 ноября 1994 г. № 51-ФЗ, Собрание законодательства РФ, 1994, № 32, ст. 3301 [Civil Code of the Russian Federation (Part One) No. 51-FZ of 30 November 1994, Legislation Bulletin of the Russian Federation, 1994, No. 32, Art. 3301], Art. 9(2).

[14] For the history and the changes in use *see supra* note 4, at 176 ff.

[15] *See supra* note 4, at 178.

chosen on purpose in order to relate to, in an abstract fashion, the situations that required regulation because different wills contradict each other.[16] Furthermore, the term "legal fact" was a good basis to discuss how far humans were to be understood as being well intentioned or, to the opposite, their intentions as being immoral.[17]

On the other hand, however, the term seems to have had key importance with the context of Savigny's thinking in that it had the function to find a way to address the importance and, potentially, the objectivity of legal rules,[18] without such legal rules having to refer to philosophical systems[19] or without it becoming clear whether only the one or the other rule is equitable.[20]

3.2.2. The Abstractness of the Term "Legal Facts" as Characteristic of the Level of a Debate Reached in Savigny's System

Viewed from a different angle, the increased level of abstraction of the rules which had been required to give a general denomination to the right to possess seems to first have been used by Savigny in relation to property rights. Afterwards, when Savigny's perspective became more general, he seemed to have integrated the method used in connection with property law into the totality of questions which he found relevant for legal debate and which came to constitute his system of law. This integration appears to have been based on Savigny's conviction that terms of a similar plausibility to those related to possession could be found by research whenever the need for such terms arose. Accordingly, when working on his system, he would use an abstract term such as the term legal fact in order to reach and maintain a certain level of abstraction in his thought.[21] The material he used and the way he would argue would typically be, in some not overly transparent manner, interrelated with legal history,[22] but would not necessarily need to be only

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16 *See supra* note 4, at 121 for Savigny.

17 *See* the relation to religion and the thought that only "Naturrecht" would include those ill-disposed, *supra* note 4, at 120, tellingly, Savigny excluded family relations, apparently as they were seen as being counterintuitive to the rules driven legal regulation.

18 Reflected in as "Rule for the artificial setting and increasing the natural border for individual freedom" ("Regel für die künstliche Bestimmung und Erweiterung der Naturgränze individueller Freiheit"), cited after *supra* note 4, at 122 (my translation).

19 *Supra* note 4, at 124.

20 Again best evidenced in relation to possession and the (open) discussion in this relation, *see supra* note 4, at 82.

21 That is the most plausible interpretation of the account of the use of the term "legal facts," *see supra* note 4, at 175.

22 The selective use of history by Savigny is stressed in Gerhard Dilcher, *The Germanists and the Historical School of Law: German Legal Science between Romanticism, Realism, and Rationalization*, 24 Rechtsgeschichte Legal History 20, 20–23 (2016) (Jun. 2, 2018), available at http://data.rg.mpg.de/rechtsgeschichte/rg24_020dilcher.pdf.

based on legal history.[23] Similar like with legal history, the intuitive, not explained choice of a central term like the term "legal facts" in Savigny's system seems to be interrelated to the ambiguity of Savigny's position on legislation. It remains an object of speculation whether or not Savigny believed that it was possible to determine legal issues by positive legislation such as the civil codes[24].

4. The Further Development of the Term into Modern German History

In the further German debate as traced by Reis, there is continuity in some of the topics being addressed, but the meaning of the term "legal facts" changes. In any instance, whilst, as in more detail described below, the term lost the more detailed context to the totality of legal phenomena, it at least partially continued to be treated as confirming major importance.

4.1. Positivism and Legal History

It would seem natural that positivism, the focus on the letter of the law that is frequently associated with Kelsen, gains in importance after the civil law codification had been introduced Accordingly, also the previous speculation about theories could have become obsolete, and, starting with the implementation of the new legislation, interpretation of law could have become central for legal science. Accordingly, alongside with the acceptance of Kelsen's theory the previous debate about the origins of law that was linked to Savigny's system and the term "legal fact" (*see* above Section 3.2) could have become obsolete. To the opposite, in the summarizing view by Reis a main difference between Kelsen and others is that Kelsen and Kelsen's predecessor referred to a different source than the others for the origin of equity and the law that is to be accepted as being stronger than legislation, with the real difference between Savigny's and Kelsen's remaining unclear.[25] In particular, Kelsen did not criticize the ambiguity in Saviginy's relation to legislation. Characteristically, the part of theory that, according to Kelsen and his group, has become obsolete appears to not be easy to determine in that it is defined more by reference to individuals (Puchta and Savigny) as opposed to clearly defined modes of thought, and the main criticism is more lack of clarity on whether equity is sought in history of law or philosophical necessity[26]. Moreover, there seems to be acknowledgement

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[23] Reluctantly, because neither based on Roman law nor on statute, *see* the reference to the rules on international private law being in formation in Friedrich Carl von Savigny, *System des heutigen Römischen Rechts* V (Berlin: Veit, 1849).

[24] *See* the discussion in Wieacker 1967, at 394.

[25] Namely in the reference of Kelsen to Bergbohm, see *supra* note 4, at 85 ff., in particular 88–90.

[26] *Supra* note 4, at 90.

by Kelsen and his group of legal positions that are stronger than positive law, and the relation of what could also be referred to as natural law to the positive law appears to have become even less clear than before.[27]

4.2. The Term "Legal Fact" as a Relict and the Debate in National Socialism

It seems plausible that the very term "legal facts" only is taken up again after Kelsen had already formulated his position.[28] Indeed, Reis relates how the term "legal fact" had importance in the 30-ies. One possible reason for the term to not be used for an active debate earlier is that the underlying options about the origins of law, in spite of, as discussed, not being overly clear, were addressed by descriptions of the origins rather by terms. Furthermore, had the term been used earlier, one could speculate, this used would have forced those who used the term to make choices which scholars did tend to avoid. When the term "legal facts" was attacked by von Hippel as a reason for which the real sociological, historical and philosophical causes not being considered in what von Hippel desired to be a long-term working program for legal science,[29] it seems the term "legal facts" was mostly associated with formalistic reasoning and to what was understood as legal technical constructions. The attack on terms that were associated with formalism as "legal fact" was, in national socialism, very much in line with the fashion of the day. Nevertheless, the main defender of legal facts was, in the debate initiated by von Hippel, a scholar that had lost his professorship through the upheaval of national socialist students. In an attempt to regain recognition this scholar referred to the time now being different new, insisted, without much depth in any new arguments, in the term being important and replaced the Latin translation of the first word of term "legal facts" with the German one (instead of "juristische Tatsachen" he used "rechtliche Tatsachen").[30]

4.3. The Term "Legal Fact" and the Freedom of Will

As if it were for testing a bigger selection of possibilities to use the term, the term "legal facts" is also frequently used in the context of another phenomenon of substantial relevance for civil law, namely the consequences an act of will can and should have,[31] and how – by specific legislation (as has, after some time, been done in Germany[32]), or interpretation of existing law (seemingly based on considerations derived from natural law which again were understood as having a force bigger

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27 *Supra* note 4, at 90.

28 Reis in *supra* note 4, at 90, sees the beginning of the very school of Kelsen in 1911, but going back to 1892.

29 *Supra* note 4, at 11 (n. 1).

30 "Rechtlich" instead of "juristisch," *supra* note 4, at 6 (n. 1).

31 *See* the link in particular to related works of Manigk *supra* note 4, at 9.

32 For the relatively speed history *see infra* note 35, at 173.

than that of positive law, that is, being a basis for arguments against possible plans for legislation[33]) those consequences are to be regulated. However, not really surprisingly, the term "legal fact" does not seem to have had real (as opposed to emotional[34]) impact on the debate.[35] Nevertheless, the debate seems to have called attention and a more fundamental change in approach in that the act of will is at least by some being understood as having a content that can be determined without referring to the will of the party that can be empirically determined.[36]

4.4. Perception on the Contemporary German Debate

More recently, the term appears to have lost relevance in the German debate.[37] Rules are now generally seen as being based on what law establishes, and when law does not establish satisfactory rules, be it because it law implemented is incomplete or the law rules give non satisfactory results, a case by case review is seen as being more appropriate.[38] At the same time, it does seem to be characteristic that this very case by case approach quickly resorts to general terms such as good faith.[39] Such tendency does seem to confirm the dynamics of the use of terms, the fact that some abstraction is seen as being helpful and more easy to understand and

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[33] *See* Jürgen Habermas, *Faktizität und Geltung* 117 (Frankfurt am Main: Suhrkamp, 1992): "the scientific discussion about the subjective right was from the beginning characterized by subjective rights with independent content which were to be given a higher degree of legitimacy as opposed to the politically set laws" (my translation).

[34] *See* Thomas Lobinger, *Werner Flume (1908–2009)* in *Deutschsprachige Zivilrechtslehrer des 20. Jahrhunderts in Berichten ihrer Schüler. Bd. 2: Eine Ideengeschichte in Einzeldarstellungen* 323, 327 (S. Grundmann & K. Riesenhuber (eds.), Berlin: Walter de Gruyter, 2010): "in a time that has lost its ability to appropriately evaluate" (my translation), or "somehow, this type of dogmatics has lost importance for me" (my translation) in Hans Schulte, *Harry Westermann (1909–1986)* in *Deutschsprachige Zivilrechtslehrer des 20. Jahrhunderts in Berichten ihrer Schüler. Bd. 1: Eine Ideengeschichte in Einzeldarstellungen* 305, 317 (S. Grundmann & K. Riesenhuber (eds.), Berlin: Walter de Gruyter, 2007). In contrast, when Stefan Gernhuber, *Die Billigkeit und ihr Preis* in *Summum ius summa iniuria* 205, 216 (Universität Tübingen. Rechts- und Wirtschaftswissenschaftliche Fakultät. Rechtswissenschaftliche Abteilung; Tübingen: Mohr, 1963) refers to the feeling that an irreversible process is taking place, he directly refers to the increase of relevance of court decisions and indirectly to the ability to find abstract rules.

[35] In Reinhard Zimmermann, *The New German Law of Obligations* 174 (Oxford: Oxford University Press, 2005) the origin of the concept of general conditions of sale, which had been linked to the debate, is remembered as being with Raiser, but non of the theoretical is remembered, at 177 reference to the "model of society."

[36] *See supra* note 33.

[37] Even a scholar interested in history would not have known about the term before the discussion referred to happened, *see supra* note 3, at 54.

[38] *See* the description of the methodology preferred in Germany in Max Gutbrod, *Review of Deutschsprachige Zivilrechtslehrer des 20. Jahrhunderts in Berichten ihrer Schüler No. 2.4* (unpublished manuscript) (on file with Review of Central and East European Law (RCEEL)); *see also Шрамм Х.-Й.* Факты и право: Фридрих Карл фон Савиньи и учение о "юридических фактах" [Hans-Joachim Schramm, *Facts and Law: Friedrich Carl von Savigny and the "Legal Facts"*] in *Seminar Materials*, at 63, 70 ff.

[39] Schramm 2016, at 63, 70.

that this level of abstraction is more easily found in property law, but that the level of abstraction itself is not an object of attention and that conclusions (in this case the inappropriateness of abstraction) are drawn without having regard to this concrete abstraction the level of abstraction is not a matter to itself be followed.[40] As a consequence, it would now not surprise to find a reference to doctrinal structures without it becoming clear what doctrinal structures are, and the term of doctrinal structure appearing in the very text or in the index[41].

5. Notes on Use in Post-Soviet Debate

The seminar in Almaty and the book published with the contributions to it, whilst certainly not comprehensive, gives, I would believe, a worthwhile overview of the ways the term "legal facts" is used and where it is believed the origins of this term, but also its potential challenges are.

5.1. Overview of the Articles in the Seminar Materials

In the articles, the origins of the term "legal fact" are mostly seen in Soviet[42] and the theory of post-Soviet countries,[43] partially in French science,[44] without much attention given to the time or circumstances when the text referred to has been written.[45] Like if it were a law, the importance of the terms seems to be self-understood,[46] but at the same time at least its extent is also seen as being based on law,[47] that is, not requiring any further basis. On the other hand, a legal fact is seen in a reality that has to be taken into account by legislation[48] or to which law is to adapt.[49]

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40 Schramm 2016, at 63, 70.

41 *See supra* note 35, at 226.

42 Numerous notes in *Seminar Materials*, at 30, 42 ff., among them, for instance, works dated 1916, 1946, 1957, 1959, 1960 and 1974, also 1954, *Seminar Materials*, at 47, but as well contemporary textbooks, among those most frequently mentioned from Soviet times are Agarkov, *Seminar Materials*, at 30, Tolstoy, *Seminar Materials*, at 42, Krasavchikov, *Seminar Materials*, at 119, 516 (without citation of the work referred to).

43 Reference, for instance, is made to a work by Krasovska, in Ukrainian and a work dated 2006, *Seminar Materials*, at 89.

44 *Сулейменов М.К.* Юридические факты в гражданском праве: проблемы теории и практики [Maidan K. Suleimenov, *Legal Facts in Civil Law: Problems of Theory and Practice*] in *Seminar Materials*, at 15.

45 *See* the time of publications mentioned in *supra* note 42.

46 Suleimenov 2016, at 11.

47 *Id*.

48 In an as morally loaded relationship like marriage, *see Гонгало Б.М.* Юридические факты в системе "женщины-мужчины" [Bronislav M. Gongalo, *Legal Facts in the System "Women-Men"*] in *Seminar Materials*, at 143.

49 *Кострyба А.В.* Правопрекращающие юридические факты в механизме правового регулирования гражданских имущественных отношений [Anatoliy V. Kostruba, *Right-Terminating Legal Facts in the Mechanism of Legal Regulation of Civil Property Relations*] in *Seminar Materials*, at 89.

In other contexts, the legal fact is seen as the reason for legal consequences to arise or end.[50] Such facts can be based on the will of the parties[51] or an official.[52] Sometimes, reference is made to facts that are to be evidenced[53] and which are to be documented.[54] At times, rather, reference is made to something that happened in reality, is complex,[55] has legal consequences[56] or needs to have those consequences for social reasons.[57] In yet other contexts, the term legal facts allows to make the link to the need of new norms that are to be based on what is common internationally[58] or socially relevant.[59]

In other contexts, it is stressed that the term is unclear,[60] contradictory,[61] too narrow in the sense that it does not include long term relations like marriage or labor relations,[62] that further research is needed[63] and that a wealth of views about the terms exists.[64] Nevertheless, the discussions occurring[65] in the context of the term "legal facts" are

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50 Kostruba 2016, at 91. *See also Ярков В.В.* Особенности познания и доказывания процессуальных юридических фактов [Vladimir V. Yarkov, *Aspects for Understanding and Establishment of Procedural Legal Acts*] in *Seminar Materials*, at 492 ff. – the term "legal facts" appears to be used for every circumstance a court takes into account.

51 *Осипова С.* Нотариальный акт как юридический факт [Sanita Osipova, *Notarial Act as Legal Fact*] in *Seminar Materials*, at 365 on the right to establish facts by others than the court in Latvia.

52 *See supra* note 48, at 141 for the preconditions for the right to marry earlier.

53 *Куйкабаева Д.Б.* Юридические факты в гражданском процессуальном праве Казахстана [Dinara B. Kuikabaeva, *Legal Facts in Civil Procedure Law of Kazakhstan*] in *Seminar Materials*, at 518.

54 *See Андреева Л.А.* Договор как юридический факт в трудовом праве России [Lyubov A. Andreeva, *Contract as Legal Fact in Russian Labor Law*] in *Seminar Materials*, at 552 for labor law.

55 *Кунигенас Г.В.* Юридические факты в гражданском праве Республики Казахстан и других стран [Galina V. Kunigenas, *Legal Facts in Civil Law of Kazakhstan and Other Countries*] in *Seminar Materials*, at 117.

56 *See supra* note 44, at 15. *See also supra* note 53, at 519 in particular for circumstances like prior decisions which lead to procedures to be stopped.

57 *See supra* note 54, at 553 for labor law.

58 *See supra* note 54, at 553 for collective employee rights.

59 *See supra* note 54, at 553 for insurance.

60 *See supra* note 55, at 117.

61 *See supra* note 55, at 117.

62 *See supra* note 44, at 42.

63 *Кузнецова Н.С.* Юридические факты в механизме гражданско-правового регулирования общественных отношений в соответствии с законодательством Украины [Natalya S. Kuznetsova, *Legal Facts in the Mechanism of Civil-Legal Regulation of Public Relations According to the Ukrainian Legislation*] in *Seminar Materials*, at 123 in relation to acts by public administration.

64 *See supra* note 44, at 38.

65 *See supra* note 63, at 119 ff.

seen as allowing to determine the right place of the discussion of a program[66] and allowing to raise the incompleteness of the law.[67]

In a sense a more eloquent than typical summary of all those positions is the hope that either a rule or a legal fact provide answers for the questions at hand.[68]

5.2. Potential Use of the Term for Property Law?

One discussion returned, in a sense, to the area of law from which the term originated, namely property law.[69]

Addressing the use of the term legal facts for the registration systems for securities seemed appropriate because the registration of securities has been referred to as legal fact in Russian literature[70] and, more generally, because there is a broad international discussion about whether there is a need for or a benefit of new legislation for securities given that they are not necessarily physical goods.[71] Furthermore, in a context where registration can easily be made accessible to a large group of people, including potential transferors and transferees of rights as well as creditors of both, and relevant information can be recorded in a timely manner, the principles applicable to physical things can be taken as guidance for the treatment of registrations and adapted to such registrations. For instance, it can be made sure that that not more information is disclosed than needed for this one transaction, in other words, that the securities are individualized.[72]

As related issues have been broadly discussed in the literature in both Russia and Germany and also being addressed on the level of a proposed international convention, there are plans to expand on those beginnings.

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[66] *Камышанский В.П., Гряда Э.А.* Решение о резервировании земель как юридический факт [Vladimir P. Kamyshanskiy & Eleonora A. Griada, *Decision on Reservation Lands as Legal Fact*] in *Seminar Materials*, at 587; *see also supra* note 63, at 119 referring to the difference between contracts and other reasons for obligations as an example.

[67] *See* Kamyshanskiy & Griada 2016, at 589 relating to construction licenses.

[68] *See supra* note 49, at 86.

[69] *See* Max Gutbrod, *The Term "Legal Facts" and the Theory of Property Law* (Jun. 2, 2018), available at https://www.academia.edu/13498139/The_Term_Legal_Facts_and_the_Theory_of_Property_Law_Russian_.

[70] That even beyond the discussion of Savigny property law attracted attention to the term of a legal fact is visible of Ioffe in *supra* note 44, at 47.

[71] *See*, for instance, the contributions to *Unkörperliche Güter im Zivilrecht* (S. Laible et al. (eds.), Tübingen: Mohr, 2011).

[72] Individualisation is broadly discussed in literature on securities holdership, *see*, for instance, Erica Johansson, *Property Rights in Investment Securities and the Doctrine of Specificity* 171 (Berlin; Heidelberg: Springer, 2009).

Conclusion

Whilst the title for the discussion at the seminar seemed narrow and theoretical, one might say that, in not keeping with the narrow theoretical topic the discussion did not really focus on what was intended, namely on developing the term "legal facts." Nevertheless, an evaluation of this discussion, as described above, allows significant conclusions.

On the one hand, the discussions confirm how a theoretical and abstract debate can appear to be absolute and encompassing, but in reality depend on the very specific circumstances in which the term is used.[73]

Furthermore, although the overview is partial, it allows a typology of the use of abstract terms. A very general term like "legal facts," in its origin, was used to unite seemingly different subcategories for possession. Later on, the term was used in relation to key elements of legal science in general. The term ends up being used as an addition to the line of thought that could also be referred as strengthening or as embellishment of a legal argument.

When, like in Germany, the term is used keeping the surroundings of the term in mind, the use of the term tends to be connected to an ambiguity the term has. Namely, on the one hand, it is stressed that the term can help in formulating rules. On the other hand, there is a tendency to use the term as a confirmation for rules, in particular rules that have been introduced after the term "legal fact" started to be broadly known, with the term then being seen as a reason to keep with the existing rules.

The, compared to Germany, higher reliance on the term throughout the CIS appears to be linked to the lesser degree of detail knowledge about the historical contexts in which the term has been used, but also the lower degree of certainty about the benefit of the rules in the context of which the term "legal facts" is used. In other words, the very same ambiguity with which the term is linked in Germany also exists throughout the CIS, but this ambiguity leads to other results because the rules are not seen as being as stable as in Germany.

In both cases, at times the use of the term, both based on its history and its abstractness, seems to be linked to the expectation that there is something like an objective rule for the issue to be dealt with. It would however, in a quite similar way as at the time of the origin of the term, be unclear whether those rules are such of local law, theory of law, usefulness, foreign jurisdictions or history. Often, my impression is that the use of the term leads to underestimating the intricacy of such rules by the very legal scientists that to use such abstract terms, and that the abstractness of the terms hinders debate about the detail of the consequences of regulation, and accordingly makes it more difficult to convince those that are not

[73] *See supra* note 4, at 33 Reis arguing to this effect.

natural participants of the mentioned debate of the results the debate around the term leads. On the other hand, the term may, from time to time, encourage more fundamental, systematic thinking.

In summary, theoretical assertions are frequently misunderstood when they are applied to different circumstances. Nevertheless, they can be hugely helpful when adapted to the circumstances in question.

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THE COMPLIANCE MOVEMENT IN RUSSIA: WHAT IS DRIVING IT?

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The introduction of compliance management systems is becoming more and more important in Russian companies. Initially limited to anti-corruption compliance and driven by foreign extraterritorial legislation, corporate leaders are now considering the benefits of enhanced risk management systems. From a corporate law perspective, the driving force behind this is the business judgement rule. Corporate leaders should be encouraged to take reasonable entrepreneurial risks without fearing liability. Therefore, by adopting compliance and risk management systems corporate leaders will be able to exculpate themselves when business decisions go wrong and losses are suffered. But the question is who will be the driving force in the Russian corporate context: the executive director or the board of directors? This paper examines two strands of domestic compliance regulation: anti-corruption compliance and the 2014 Code of Corporate Governance. It shows that while there are grounds for the possibility that in Russia the executive directors will be the drivers of compliance, the greater likelihood is that the board of directors will be collectively responsible. Important incentives for the day-to-day management of the companies will therefore most likely be missed.

Keywords: compliance management system; risk management; business judgement rule; Code of Corporate Governance; anti-corruption.

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Corporate compliance is becoming increasingly popular in Russian companies. No doubt, a certain part of this movement is in response to extraterritorial anti-

corruption legislation, such as the U.S. Foreign Corrupt Practices Act or the UK Bribery Act. By comparison, the Association of European Businesses[1] has started to promote codes of good practices for various branches of industry, most notably the automobile and pharmaceutical industries, which also include compliance commitments. But beyond such foreign-induced influences, what is really driving the compliance scene in Russia? And how deeply can we expect Russian companies to adopt such practices?

The questions raised go to the heart of compliance program because, as the ISO 19600:2014 standard illustrates, every compliance management system should be of a cyclical nature. There should be an ongoing process of monitoring and adjusting the company's compliance efforts to variations in risk factors, internal (re-) organizations and changing external influences. Given that all organizations possess a kind of institutional inertia and are averse to change, it is critical to understand what will be driving the compliance movement in Russia.

1. Pro-Compliance Incentives in Corporate Law

When going through the various standards of corporate governance, compliance and risk management, there is no clear indication who should be behind such programs beyond the so-called gate-keepers, i.e. the chief compliance officer (CCO) or the chief financial officer (CFO). Principle VI of the G20/OECD Principles of Corporate Governance places an emphasis on the monitoring function of the board vis-à-vis the management:[2]

> The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders.

In the sphere of banking, the Basel Committee on Banking Supervision, on the other hand, emphasizes the senior bank management's responsibility for effective management and limit the bank's board to a supervisory role:[3]

> Principle 1:
> The bank's board of directors is responsible for overseeing the management of the bank's compliance risk. The board should approve the bank's compliance

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[1] Association of European Businesses (Jun. 2, 2018), available at https://www.aebrus.ru/.

[2] G20/OECD Principles of Corporate Governance, OECD (2015), at 51 (Jun. 2, 2018), available at http://dx.doi.org/10.1787/9789264236882-en.

[3] *See* Compliance and the Compliance Function in Banks, Basel Committee on Banking Supervision (April 2005), at 9–10 (Jun. 2, 2018), available at https://www.bis.org/publ/bcbs113.pdf.

policy, including a formal document establishing a permanent and effective compliance function. At least once a year, the board or a committee of the board should assess the extent to which the bank is managing its compliance risk effectively.

Principle 2:

The bank's senior management is responsible for the effective management of the bank's compliance risk.

Principle 3:

The bank's senior management is responsible for establishing and communicating a compliance policy, for ensuring that it is observed, and for reporting to the board of directors on the management of the bank's compliance risk.

Principle 4:

The bank's senior management is responsible for establishing a permanent and effective compliance function within the bank as part of the bank's compliance policy.

So, while having a corporate compliance program in place is most likely a function of strategic planning and thus primarily associated with the board of directors, the day-to-day operations and the continuous improvement and adjustment are closer to the executive function. Therefore, it is arguably the executive directors' fear of personal liability which is the driving force behind the institutional evolution of compliance management systems. Especially incoming directors are rightly concerned that they are unable to oversee in their new function the entire gamut of their companies' dealings, and they critically depend on management procedures to identify risks in an appropriate way.

The director's role as the driving force of his or her company is recognized by the so-called business judgement rule. Put most simply, corporate leaders will not be held liable for losses of the company, as long as they observe all reasonable precautions and act in the best interest of the company. Obviously, the purpose of this rule is to distinguish regular entrepreneurial risk-taking from those cases in which corporate leaders act either not in the interest of the company or, believing to do so, omit reasonable precautions. Arguably, the business judgement rule creates the most important incentive for innovating compliance and risk management systems. Having such systems alert and up-to-date, corporate leaders can exculpate themselves, when business decisions go wrong and shareholders threaten legal action.

In most countries of the continental legal system, the source of the business judgement rule is statutory law. This also holds true for Russia, but here the situation is less well-defined. The fundamental problem with the business judgement rule

in Russia is that there is a statutory presumption in the Civil Code[4] that a director is presumed to have acted in good faith and in a reasonable manner, unless there is proof that he did otherwise. So, in case shareholders want to bring legal action against the director, the burden of proof is on the shareholders to show that there are objective grounds for assuming that the director acted not in good faith or in an unreasonable manner. This legal situation left it practically to the courts to decide what strength the legal presumption would hold and what amount of objective grounds was necessary to tip the burden of proof. Obviously, in large companies in which directors were politically well-connected, it was fairly easy to use behind-the-scenes influence on the courts to prevent any major legal challenge from arising.

This situation changed in 2013 when the Plenary of the Supreme Arbitration Court of the Russian Federation (*Vysshiy Arbitrazhnyi Sud Rossiyskoy Federatsii*) adopted a ruling[5] that meant to address this detrimental inversion of the burden of proof by introducing fresh business judgment rule thinking into the statutory framework. At para. 1, it injected a degree of risk analysis by claiming that there should be no liability for losses if the management decision was within the limits of regular entrepreneurial risk-taking. And it also proposed check-lists of cases and red flags to determine when a director's action can be assumed to be not in good faith and/or to be not reasonable.

Examples of behavior that is not in good faith include the following:[6]

– situations of conflict of interest;

– hiding or presenting incomplete information on agreements entered into;

– agreements entered into without the required consent of corporate bodies or the regulator;

– after the end of his or her tenure withholding documents on agreements entered into during his or her tenure;

– actual or inferred knowledge that at the time of concluding an agreement this was not in the best interests of the company.

In addition, the Ruling gives a number of instances in which behavior is considered to be unreasonable:[7]

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[4] Гражданский кодекс Российской Федерации (часть первая) от 30 ноября 1994 г. № 51-ФЗ, Собрание законодательства РФ, 1994, № 32, ст. 3301 [Civil Code of the Russian Federation (Part One) No. 51-FZ of 30 November 1994, Legislation Bulletin of the Russian Federation, 1994, No. 32, Art. 3301], Art. 10(5).

[5] Постановление Пленума Высшего Арбитражного Суда Российской Федерации от 30 июля 2013 г. № 62 "О некоторых вопросах возмещения убытков лицами, входящими в состав органов юридического лица" [Ruling of the Plenary of the Supreme Arbitration Court of the Russian Federation No. 62 of 30 July 2013. On Some Questions of Compensating Losses Caused by Persons, Being Members of the Bodies of Legal Persons] (Jun. 2, 2018), available at http://www.consultant.ru/document/cons_doc_LAW_150888/.

[6] *Id.* Para. 2.

[7] *Id.* Para. 3.

– decisions are taken without considering relevant information;

– before decisions were taken, there was no effort to obtain the amount of information necessary in the light of normal business practices;

– contracts were concluded without observing the usual internal procedures.

The detailed check-lists were meant to give guidance to the lower arbitration courts when assessing the concrete situation in which a decision was taken or an agreement concluded. But it is currently difficult to say how lasting the impact of these interpretations will be. Only a few months later, in November 2013, the State Duma of the Russian Federation adopted a Law that abolished the system of specialized arbitration courts and merged their functions with the ordinary courts.[8] However, Plenary Rulings of the Supreme Arbitration Court of the Russian Federation remain in force until the Plenary of the Supreme Court of the Russian Federation adopts its own decision.[9] So, for the time being the abovementioned Plenary Regulation of July 2013 is still applied by the ordinary courts.

The business judgement rule is tailored to the executive level where operational decisions are being taken. And it favors the position of the executive director as the main driver of compliance. The alternative, i.e. leaving responsibility to the board, seems less suitable. There is, of course, much to be said for using the company's supervisory mechanism to adopt responsibility also for the company's compliance management system. But there are also some significant flaws to this idea:

– the board of directors (obviously) does not run the day-to-day operations of the company;

– the board of directors exercises its duty primarily by creating committees and supervising their activity. As a rule, the risk management committee as well as the other related committees (audit, internal controls) do not report to a specific member of the board of directors, but respond to the board of directors on the whole;

– the Law on Joint-Stock Companies limits the possibility for individual shareholders to bring action against members of the board of directors.[10] A minimum

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[8] Закон РФ о поправке к Конституции РФ от 5 февраля 2014 г. № 2-ФКЗ "О Верховном Суде Российской Федерации и прокуратуре Российской Федерации," Собрание законодательства РФ, 2014, № 6, ст. 548 [Law of the Russian Federation No. 2-FKZ of 5 February 2014. On the Supreme Court of the Russian Federation and the Prosecutor's Office of the Russian Federation, Legislation Bulletin of the Russian Federation, 2014, No. 6, Art. 548].

[9] Федеральный конституционный закон от 4 июня 2014 г. № 8-ФКЗ "О внесении изменений в Федеральный конституционный закон 'Об арбитражных судах в Российской Федерации' и статью 2 Федерального конституционного закона 'О Верховном Суде Российской Федерации,'" Собрание законодательства РФ, 2014, № 23, ст. 2921 [Federal Constitutional Law No. 8-FKZ of 4 June 2014. On the Introduction of Changes to the Federal Constitutional Law "On Arbitration Courts in the Russian Federation" and to Article 2 of the Federal Constitutional Law "On the Supreme Court of the Russian Federation," Legislation Bulletin of the Russian Federation, 2014, No. 23, Art. 2921].

[10] Федеральный закон от 26 декабря 1995 г. № 208-ФЗ "Об акционерных обществах," Собрание законодательства РФ, 1996, № 1, ст. 1 [Federal Law No. 208-FZ of 26 December 1995. On Joint-Stock Companies, Legislation Bulletin of the Russian Federation, 1996, No. 1, Art. 1], Art. 71(5).

of 1% of voting stock is required for shareholders to claim compensation for losses incurred by the company. But if the substance of the claim is that the member of the board of directors was negligent in establishing or maintaining an up-to-date compliance management system, the individual member would be able to "hide" behind the collective failure to act. Rarely would an individual behavior (e.g. persistent obstruction of a vote on introducing a compliance management system) give rise to individual responsibility.

All in all, it appears that by localizing the compliance function among the board of directors and not the executive directors, the threat of shareholder action is significantly diminished and an important incentive for innovating compliance management systems not realized.

2. Additional Sources of Compliance

While there is uncertainty about the effectiveness of the aforementioned Regulation of the Plenary of the Supreme Arbitration Court, clarification may come from another corner. In fact, by 2013 there were at least two other strands of developments emerging which worked towards establishing compliance mechanisms in Russian companies. The one is anti-corruption compliance, the other (general) compliance in joint-stock companies. A third very important field, i.e. Central Bank regulation in the banking sphere and the wider financial services industry, plays also an important role, but is rather separate as a source of influence. Both beforementioned strands of developments have their particular antecedents, and it is unclear at this stage how they are going to merge in the future.

2.1. Anti-Corruption Compliance

Anti-corruption is one policy field in which the Government has taken a high-profile stance. In 2012, the Government introduced a new Art. 13.3 into the Federal law of 25 December 2008 No. 273-FZ "On Counteracting Corruption"[11] which required that "organizations" must establish anti-corruption compliance programs. In referring to "organizations," the Law chooses to address both the public and the private sector, thus making anti-corruption compliance mandatory both for the administrative and the corporate sphere including state-owned enterprises of all shades.

[11] Федеральный закон от 3 декабря 2012 г. № 231-ФЗ "О внесении изменений в отдельные законодательные акты Российской Федерации в связи с принятием Федерального закона 'О контроле за соответствием расходов лиц, замещающих государственные должности, и иных лиц их доходам,'" Собрание законодательства РФ, 2012, № 50 (ч. 4), ст. 6954 [Federal Law No. 231-FZ of 3 December 2012. On the Introduction of Changes to Several Legal Acts of the Russian Federation in Connection with the Adoption of the Federal Law "On the Control of the Correspondence of Expenditures by Persons Having State Offices, and Other Persons with Their Incomes," Legislation Bulletin of the Russian Federation, 2012, No. 50 (part 4), Art. 6954].

Article 13.3 was implemented by Presidential decree[12] which at para. 25 tasked the Ministry of Labour and Social Protection of the Russian Federation, in cooperation with other interested Federal agencies and in collaboration with the Russian Federation Chamber of Commerce and Industry, the "Russian Union of Industrialists and Entrepreneurs" and the business associations "Delovaya Rossiya" and "OPORA Rossiya," to develop so-called methodological recommendations. The result of this collaboration, entitled "Methodological Recommendations for the Development and Implementation of Measures to Prevent and Counteract Corruption" was adopted on 8 November 2013.[13] It comprises 47 pages plus 55 pages of attachments including a so-called Anti-Corruption Charter of Russian Business.[14]

The sheer size of this work, combined with the fact that it contains "only" sets of recommendations, may have diminished its chances for success from the very beginning. Indeed, it would be an exaggeration to say that the document has made its mark in the literature.[15] But there are, indeed, novel features both in terms of substance and in the particular mode of creation and dissemination which make it an interesting case.

Let us first take a look at the substance of the Recommendations. What is striking when going through the bulk of the text is the clear treatment of risk management. Chapter 1, para. 2 gives a definition of compliance which is, on the one hand, attuned to the role of extraterritorial legislation in anti-corruption regulation, and, on the other hand, offers a vision for the entire field of compliance in Russia. According to para. 2,

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[12] Указ Президента РФ от 2 апреля 2013 г. № 309 "О мерах по реализации отдельных положений Федерального закона 'О противодействии коррупции,'" Собрание законодательства РФ, 2013, № 14, ст. 1670 [Decree of the President of the Russian Federation No. 309 of 4 April 2013. On Measures for Realizing Several Provisions of the Federal Law "On Counteracting Corruption," Legislation Bulletin of the Russian Federation, 2013, No. 14, Art. 1670].

[13] Методические рекомендации по разработке и принятию организациями мер по предупреждению и противодействию коррупции [Methodological Recommendations for the Development and Implementation of Measures to Prevent and Counteract Corruption] (Jun. 2, 2018), available at http://rosmintrud.ru/docs/mintrud/employment/26.

[14] Attachment No. 6.

[15] The Recommendations are rarely mentioned and even more rarely discussed. Exceptions include *Иванов Э.А.* Антикоррупционный комплаенс-контроль в российских компаниях // Международно-правовые чтения. Вып. 12. Воронеж: ВГУ, 2014. С. 91 [Eduard A. Ivanov, *Anti-Corruption Compliance Control in Russian Companies* in *International Law-Readings. Issue 12* 91 (Voronezh: Voronezh State University, 2014)] and *Smith D.* Assessing Compliance with Requirements for Anti-corruption Compliance Programs // Материалы III Международного Конгресса "Предпринимательство и бизнес в условиях экономической нестабильности" [David Smith, *Assessing Compliance with Requirements for Anti-corruption Compliance Programs* in *Materials of the III International Congress "Entrepreneurship and Business under Conditions of Economic Instability"*] 133–135 (Moscow: Financial University under the Government of the Russian Federation, 2015).

> Compliance is the process of making sure that the activity of the organization is in line with requirements of Russian and foreign law as well as other binding obligations from regulatory documents, *and also* the creation of mechanisms within the organization to analyze, detect and evaluate spheres of activity with heightened corruption risks and to guarantee the complex defense of the organization.[16]

We thus see a dual approach in the definition which combines traditional elements of legislative compliance with a risk-management perspective. This duality is continued into the list of key principles which stands at the beginning of the operative part of the Recommendations.[17] It is surely not by chance that the first principle places an emphasis on legislative compliance: "Compliance of the organization's policies with the law in force and universal norms." Principles two and three are more or less common-place from a Western perspective, but then the fourth principle stands out: "Proportionality of anti-corruption procedures with corruption risks." The same is true for the eighths principle: "Permanent control and regular monitoring." Both thoughts are not entirely novel, of course, but rarely have they in Russian legal history been expressed as key principles.

The next highlight from a risk-management point of view is Chapter 3 "Evaluation of Corruption Risks." It sets out:

> The goal of the evaluation of corruption risks is the identification of concrete business processes and transactions in the activity of the organization which carry the highest risk of corruption violations by the organization's staff both for the purpose of obtaining a personal benefit and for giving the organization a benefit. The evaluation of corruption risks is the most important element of anti-corruption policies.

This quote could have been taken from any state-of the-art Western textbook on compliance. Chapter 3 continues in this spirit, recommending organizations to draw up a map of corruption risks of the organization and to define critical junctures where corrupt practices can most likely be expected. Hidden in the voluminous text of the Recommendations, these prescriptions are extremely valuable because they open up the perspective of a progressive, dynamic, and risk-based corruption analysis.

Since the Recommendations address any organization, defined as a legal person independently of ownership status, legal form and sector affiliation,[18] they cannot be very specific in explaining who should be in charge of implementing these

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[16] Italics are not in the original.

[17] Chapter 3.

[18] Para. 2, lit. "v" of the Methodological Recommendations.

policies. There is only the general guideline that every organization should create a structural sub-unit or designate a staff member who is in charge of anti-corruption policies depending on the organization's needs and capabilities. Furthermore, the Recommendations state that this sub-unit or designated staff member should be directly subordinate to the organization's leadership and should be endowed with the powers necessary to implement anti-corruption policies even with a view to those persons who hold leadership positions in the organization. So, the Recommendations actually envision anti-corruption policies not as a paper tiger, as is the case so often, but as a real force in holding the organization's leadership accountable. It is not to be excluded that this rather aggressive pitch is the reason why the Recommendations have not gained wider popularity.

Let us now take a look at the mode of creation and dissemination of the Methodological Recommendations. It was in a Federal law that the initiative was formulated for the first time, then taken up by Presidential decree and implemented by the Ministry of Labour and Social Protection. Interestingly only, para. 25 lit. "b" of the Presidential decree of 2 April 2013 ordered the Ministry to develop the Recommendations by inviting the following four explicitly named business associations to collaborate:

– the Chamber of Commerce and Industry of the Russian Federation;

– the Russian Union of Industrialists and Entrepreneurs;

– the All-Russian social organization "Delovaya Rossiya";

– the All-Russian social organization of small and middle-sized businesses "OPORA Rossii."

For lack of deeper knowledge on the actual consultations that have taken place (if any), let us observe that the chosen format does not, of course, amount to a full-fledged public consultation. It does not give voice to other business associations outside the four explicitly named ones. We may even assume that given their officially recognized role as business associations, they have had ample opportunity to lobby on the follow-up to the newly introduced Art. 13.3 of the Federal law "On Counteracting Corruption" and include themselves into the subsequent procedure for realization.

From looking purely at the Methodological Recommendations, there is not much evidence that the abovementioned associations have had any impact. To a large extent, the Recommendations appear to be a result of the Ministry's stock-taking, paraphrasing already existing legislation and including specific anti-corruption topics from the field of labor relations which are not commonly discussed, but which show the Ministry's handwriting. When mentioning the follow-up to the Recommendations, it is probably here that the abovementioned business associations have taken the greatest interest. The last chapter of the Recommendations introduces a set of suggestions for collective action which includes:

1) joining the Anti-Corruption Charter of Russian Business;

2) using in contracts standard anti-corruption reservations;

3) publicly rejecting collaboration with individuals or organizations charged with corruption-related crimes;

4) organization of joint training activities on preventing and counteracting corruption.

In fact, the annexes to the Methodological Recommendations include a document called "Anti-Corruption Charter of Russian Business"[19] and a road-map for joining the Charter.[20] So, by all likelihood, it was expected by the Ministry that the Charter would act as a transmission belt for bringing the substance of the Recommendations to businesses, using their membership in the four named business associations and an internet-based, publicly accessible register of Charter members.[21] The truth, however, is different. The Charter begins with a list of nine fundamental principles which ideally should mirror the eight fundamental principles contained in the Recommendations. However, this is absolutely not the case. The Charter's fundamental principles are mostly a watered-down set of commonplace notions without any mentioning of the risk-based anti-corruption strategy that is the highlight of the Recommendations. Even when giving credit to the creative freedom of the authors of the Charter, it would have been clearly in the spirit of the Recommendations to use the Charter as a kind of executive summary, giving membership in the Charter clear contours and a firm guidance for corporate practice. Sadly, none is the case. Without further background information, it is not serious to speculate on the reasons for this, but it appears that the process of implementing the Recommendations has effectively been hijacked by the business associations with the purpose of emaciating them and turning them into a paper tiger.

Whether this conclusion is true or not remains to be seen. This is because beyond the mandate of the Recommendations the four business associations have used the Charter to create a mechanism that is similar to the UN Global Compact, but more tightly focused on anti-corruption. The Register of Charter members which at the time of writing (November 2017) contains a total of 352 entries, is the basis for asking every Charter member to fill in declarations every two years in which they describe their activities related to anti-corruption. In addition, it is possible to undergo an independent anti-corruption audit by the two partner auditors of the Charter and receive a certification. The bi-annual declaration of activities may be just enough to satisfy the requirements of Art. 13.3 of the Federal law "On Counteracting Corruption," so, in fact, there is a high likelihood that Charter membership in practice is equal to an exercise in ticking boxes. The voluntary certification, on the other hand, is

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19 Annex 6.

20 Annex 5.

21 Антикоррупционная хартия российского бизнеса [Anti-Corruption Charter of Russian Business] (Jun. 2, 2018), available at http://against-corruption.ru/ru/.

a potentially serious tool. One of the two accredited auditors is Ernst & Young. So, if the Charter mechanism induces companies to undergo an anti-corruption audit, it is surely not a bad idea. The question remains, whether such sectoral initiatives will really help companies to establish comprehensive systems of compliance, at least by taking the lessons learned from anti-corruption and transferring them to other areas of risk exposure.

2.2. Compliance as Part of Corporate Governance Standards

In Russia, the first-ever Code of Corporate Governance was introduced by the Federal Securities Commission back in 2002 following Government approval in 2001.[22] It is foremost a recommendation to all joint-stock companies founded on the territory of the Russian Federation, combined with an invitation to annually report on the Code's implementation. In addition, it addresses the stock exchanges in the country and recommends that only stock of companies should be traded which are able to demonstrate to the stock exchange that they follow the prescriptions of the Code of Corporate Governance.

This first Russian experiment in corporate governance codes is arguably an interesting one, and it came at an interesting time. After the nineties had seen the heyday of "Wild East" capitalism, corporate law in the early years of the millennium was still far from consolidated. But the overall economic situation became more optimistic, and there were increasing forecasts that Russia would be entering a period of growth.[23] Against this background, the Federal Securities Commission felt that because strengthening the corporate law framework was still a long way off, it was important to bring at least new standards of best practice and ethical behavior to Russian companies. It decided to do so by imposing a kind of "soft law," using the leverage that the stock exchanges had over the joint-stock companies whose shares were publicly traded. Whether this innovation in rule-making was successful is difficult to say even with the benefit of hindsight. Russian literature on this first Code of Corporate Governance is scarce, and there has obviously never been an attempt to measure changes in corporate behavior.

In terms of substance, the 2002 Code turned out be an exercise in bringing U.S. practices to Russia. For some reason, the Federal Securities Commission in collaboration with the European Bank for Reconstruction and Development (EBRD)

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[22] Распоряжение Федеральной комиссии по рынку ценных бумаг от 4 апреля 2002 г. № 421/р "О рекомендации к применению Кодекса корпоративного поведения" [Order of the Federal Exchange Commission No. 421/r of 4 April 2002. On Recommendations to Apply the Code of Corporate Behavior] (Jun. 2, 2018), available at http://www.consultant.ru/document/cons_doc_LAW_36269/.

[23] *Семенов А.С.* В России появился новый Кодекс корпоративного управления // Акционерное общество: вопросы корпоративного управления. 2014. № 6(121). С. 55–60 [Alexander S. Semenov, *A New Code of Corporate Governance Appeared in Russia*, 6(121) Joint-Stock Company: Corporate Governance Issues 55 (2014)].

chose a consortium that was made up primarily of U.S. advisors (Coudert Brothers, Ethics Resource Center and Sovereign Venture Inc.).[24] When it came to compliance, however, the advice was solidly in line with OECD standards. Most importantly, the 2002 Code required the board of directors, in representing the interests of the company's shareholders, to establish a risk management system to pro-actively identify risks in the course of business activity and to minimize their potentially negative outcomes.[25] While this was obviously a very important point in line with compliance management, the Code was decidedly vague in guiding companies how to achieve this goal. The only clue to implementation was suggesting that the board of directors, in addition to four mandatory committees (strategic planning, audit, HR/remuneration and corporate conflicts) may create a committee for risk management and an ethics committee.[26] This approach was in line with conventional corporate organization of joint stock companies in Russia and did not in any way address the philosophy of having an independent compliance function, as is the current standard word-wide. It also missed the point that compliance, in the light of the OECD principles on corporate governance, is a tool for strategic management and is therefore arguably close to the tasks of the strategic planning committee.

It would be an exaggeration to say that this first Code of Corporate Governance had been making waves in Russia. In fact, only when the second Code of Corporate Governance was enacted in 2014, there appeared a sizable literature discussing its role and effect.[27] This second Code of Corporate Governance was adopted by the Central Bank of the Russian Federation on 10 April 2014[28] after having been approved by the Government of the Russian Federation on 13 February 2014. Again, it relied on the leverage that the Central Bank had vis-à-vis joint-stock companies the

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[24] Поведение акционерных обществ будет регулироваться кодексом // Со-Общение. 2001 [Behavior of Joint-Stock Companies Will Be Regulated by Code, Co-Mmunication (2001)] (Jun. 2, 2018), available at http://www.soob.ru/n/2001/11/news/0.

[25] Para. 1.2.2.

[26] Para. 3.3.

[27] *Островская М.Ю.* Инновационные положения кодекса корпоративного управления // Государство и бизнес. Современные проблемы экономики: Материалы VII Международной научно-практической конференции (Санкт-Петербург, 22–24 апреля 2015 г.). Т. 2. С. 121–123 [Marina Yu. Ostrovskaya, *Innovative Provisions of the Code of Corporate Governance // State and Business. Modern Problems of Economics: Materials of the VII International Scientific and Practical Conference (St. Petersburg, 22–24 April 2015). Vol. 2*] (Jun. 2, 2018), available at http://to-future.ru/wp-content/uploads/2015/06/%D0%93%D0%B8%D0%91_2015_%D0%A2%D0%9E%D0%9C2.pdf; *Шашкова А.В.* Значение Кодекса корпоративного управления Банка России 2014 г. // Вестник МГИМО Университета. 2014. № 4(37). С. 253–263 [Anna V. Shashkova, *The Meaning of the Code of Corporate Governance of the Central Bank of Russia*, 37(4) MGIMO Review of International Relations 253 (2014)].

[28] Письмо Банка России от 10 апреля 2014 г. № 06-52/2463 "О Кодексе корпоративного управления" [Letter of the Central Bank of the Russian Federation No. 06-52/2463 of 4 April 2014. On the Code of Corporate Governance] (Jun. 2, 2018), available at http://www.consultant.ru/document/cons_doc_LAW_162007/.

shares of which were publicly traded. But in contrast to the First Code, the Federal Government, via the Federal Agency for State Property Management, adopted the policy that all companies with a state share of at least 50% must adopt "road maps" on the implementation of this Code.[29] So, the new Code acquired binding force in a much larger share of the Russian economy than it appears at first sight.

Compared to its predecessor, the 2014 Code gives detailed guidance on compliance. Commentators agree that it pursues a substantially different approach, synthesizing the Russian experiences in the development of the corporate sector in the first decade of the 21st century and encapsulating both the lessons from the years of the oil boom and of the financial crisis.[30] No less important is the WTO accession of Russia in 2012. Commentators see it as giving thrust to the idea of compliance in Russian companies because they will be increasingly facing international competition on global markets.[31]

The 2014 Code represents a fundamentally new approach to compliance, introducing the idea of a so-called "system of risk management and internal control" ("*sistema upravleniya riskami i vnutrennego kontrolya*"). Paragraph 259 defines this system as the

> …totality of organizational measures, methods, procedures, norms of corporate culture and activities, undertaken by the organization to achieve the optimal balance between increasing the value of the organization, its profitability and risks, to maintain the financial stability of the organization, the effectiveness of its economic operations, to protect the integrity of assets, compliance with legislation as well as the organization's statute and other internal documents and the timely preparation of accountability reports.

In this definition, the traditional positivist understanding of legislative compliance appears only as one among many factors within a determinedly holistic approach to

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[29] Директива Правительства Российской Федерации от 2 сентября 2014 г. № 5667п/П13 [Directive of the Government of the Russian Federation No. 5667/p/P13 of 2 September 2014]; *see also Кашеварова А., Панов П.* Госкомпаниям рекомендовали перейти на Кодекс корпоративного управления // Известия. 12 мая 2015 г. [Anastasia Kashevarova & Pavel Panov, *State Companies Were Recommended to Move to the Code of Corporate Governance*, Izvestiya, 12 May 2015] (Jun. 2, 2018), available at https://iz.ru/news/586040.

[30] Semenov 2014.

[31] *Доева Ф.Н., Гиголаев Г.Ф.* Роль системы комплаенс в управлении рисками банка // Развитие экономики и менеджмента в современном мире: Сборник научных трудов по итогам II Международной научно-практической конференции [Fatima N. Doeva, Georgy F. Gigolaev, *The Role of the Compliance System in Risk Management of the Bank* in *Development of Economics and Management in the Modern World: A Collection of Scientific Works on the Results of the Second International Scientific and Practical Conference*] 169–172 (Voronezh: Innovative Center for the Development of Education and Science, 2015).

risk management. This notion is underscored by the recommendation to draw on the universally accepted enterprise risk management standards contained in the COSO "Enterprise Risk Management-Integrated Framework" and also the ISO 31000:2009 risk management standard, among others.[32]

A second element of the 2014 Code's approach is to place risk management into a wider evaluation mechanism by the company's audit function. So, the audit function is not to deal with certain types of risks, but bears an overall responsibility for the functioning of the risk management. To this end, the 2014 Code elaborates a complex structure.

The 2014 Code proposes a highly sophisticated and multi-layered system of risk management. Perhaps the most significant feature of it, and the one that clearly continues the regulatory impulse of the 2002 Code of Corporate Governance, is to assign the ultimate responsibility for risk management and thus compliance to the board of directors: the board is responsible for choosing the principles and approaches to organizing the system of risk management and internal control.[33] How the chosen principles and approaches are to be realized is answered by the 2014 Code in a way that is characteristically different from the previous regulatory experience. Whereas early regulations had simply demanded the creation of a dedicated compliance sub-unit, the 2014 Code envisions a solution that embraces all levels of management and is built on the distinction between an operational and an organizational dimension. Operationally, the Code addresses the management of *all* corporate levels[34] with the task of finding specific risk management solutions for all the various business processes concerned.[35] Consequently, the roles and functions of the board of directors, management, revision commission (*revizionnaya kommissiya*), internal audit and other sub-units shall be formalized in the internal documents of the joint-stock company.[36] Organizationally, the Code provides for the creation of a cross-cutting coordination mechanism, i.e. a separate structural sub-unit for risk management and internal control.[37] The purposes of this structural sub-unit are described in the following way:

– to provide overall coordination for risk management;

– to develop methodological documents to support risk management processes;

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[32] Para. 252 and concomitant footnote 15.

[33] Para. 251.

[34] This is expressed by using the term "executive organs" ("*ispolnitel'nye organy*") in the plural. If this phrase were meant to address only the executive function under corporate law, it would invariably have to be singular because a joint-stock company has only one executive organ, either an executive director or an executive board.

[35] Para. 257.

[36] Para. 255.

[37] Para. 258.

– to organize staff trainings in the areas of risk management and internal control;

– to analyze the risk portfolio of the company and to propose reaction and risk mitigation strategies;

– to introduce accountability and reporting tools;

– to operatively control the policies of risk management related to specific business processes in the company's sub-units and also in affiliate companies, where applicable;

– to prepare feedback on the effectiveness of the risk management systems to the board of directors and the various levels of management.

The board of directors is asked to check at least once a year into the organization, the functioning and the effectiveness of this system of risk management and internal control and to publish the results in the company's annual report.[38]

Now, the major novelty of the 2014 Code consists in the fact that this entire system is subject to an internal audit function, tasked with working continuously on a "systematic and independent" monitoring.[39] It is perhaps here where the international standard for an independent compliance function is most clearly expressed. The Code suggests to the board of directors to create this internal audit function in the shape of a separate structural sub-unit. Its hallmark should be its independence, and this independence shall be guaranteed in a dual fashion:

– administratively, by subordinating the internal audit function to the single (*edinolichnyi*) executive director with the goal of providing the audit function with the needed amount of financial resources from the company's budget and also to open up channels of accountability;[40]

– functionally, by subordinating the audit function directly to the board of directors or its audit committee.[41]

3. Normative Cohesion

The 2014 Code recommends the creation of two sub-units within joint-stock companies: a "risk-management and internal control" unit to coordinate enterprise risk management procedures to be integrated into the various layers of the company and its business processes, and an "independent" internal audit sub-unit, subordinated to the board of directors or, alternatively, to the board's audit committee as one of the core standing committees introduced by the 2002 Code of Corporate Governance. So, the 2014 Code invariably preserves a compliance model that is geared to the board of directors without fully integrating the proposed model

38 Para. 262.

39 Para. 5.2.

40 Para. 268.

41 Para. 267.

into the legal structure of joint-stock companies. This raises the question how well-suited this model is for the given corporate structure.

A second point to note is that there is obviously no attempt at coordination between the Methodical Recommendations on anti-corruption compliance of November 2013 and the 2014 Code. The latter's para 260 calls on joint-stock companies to reconsider their anti-corruption policies in the light of the system of risk management and internal control proposed by the new Code. And there are obviously no real frictions because the 2014 Code, in addressing only joint-stock companies compared to the broader "organizations," has a deeper and more comprehensive approach. But it is potentially problematic to have one set of recommendations, bolstered up by business interests' support, to create anti-corruption compliance, and to have a second regulatory approach tied to the legal form of a joint-stock company. In the last paragraph of the "Introduction" to the 2014 Code, the authors express the hope that the Code's recommendations, although geared to joint-stock companies with a large number of shareholders, can *mutatis mutandis* be applied to other types of legal persons.

Hoping for such an outcome may in fact not be enough. While complexity in models is good and variation is certainly needed, the question is whether the specific arrangement chosen in any given company is capable of capturing all the risks the company is faced with. Natalya Ermakova and Chulpan Akhunyanova refer to a study by PricewaterhouseCoopers[42] according to which the practice of creating compliance committees (e.g. a committee for corporate control and audit next to the standard audit committee under the board of directors) is in most cases not capable of covering the major risks a company is confronted with.[43]

Conclusion

Following the 2014 promulgation of the Code of Corporate Governance, a great number of Russian joint-stock companies have adopted codes of corporate management and are reporting annually on their compliance activities. The most prominent one is Sberbank which even obtained ISO 19600:2014 certification from the International Compliance Association in December 2016. Looking at Sberbank's Code of Corporate Governance (adopted 20 April 2015), it clearly proclaims that the Supervisory Council (Sberbank's version of a board of directors) is responsible "for the definition of principles and approaches to the organization of a system of internal controls and risk management in the bank." By comparison, the executive organs

[42] Unfortunately, no reference is given.

[43] *Ермакова Н.А., Ахуньянова Ч.Ф.* Комплаенс-контроль в системе внутреннего контроля корпорации // Международный бухгалтерский учет. 2014. № 3. С. 9 [Natalya A. Ermakova, Chulpan F. Akhunyanova, *Compliance Control in the System of Internal Control of the Corporation*, 3 International Accounting 2, 9 (2014)].

of the company are in charge of taking care of the founding and the functioning of efficient mechanisms of internal controls and risk management in the bank as well as implementing all decisions of the Supervisory Board. Using the word "taking care" in the Russian original signals an activity on the level of implementation which is clearly subordinated to the "being responsible" which is ascribed to the Supervisory Board.

All things taken together, chances are that the Russian version of the compliance movement will retain its focus on the board of directors and will be less driven by the Western, perhaps individualistic, idea of director's fear of liability. Hence, there is the danger that some important incentives in keeping compliance systems alert are not realized and a greater likelihood that compliance in Russia will not move beyond a corporate exercise in ticking boxes.

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