

## CONFERENCE REVIEW NOTES

### RUSSIAN LAW AND GLOBALIZATION

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The Faculty of Law of the University of Helsinki is committed to diverse and internationally collaborative approaches to studying various legal systems in the context of comparative law, and UHLS and the Law Faculty of the National Research University, Higher School of Economics have developed an ongoing program to undertake this effort. The original annual conference series on the Development of Russian Law was launched in 2008 as an initiative to further knowledge and critical thinking about Russian law during its period of transition and modernization. The conference is held annually and brings together legal practitioners and scholars from Russia, Finland and elsewhere to discuss important matters of Russian law, legal reform, and legal practice. Prior years' Conference themes have included discussions of legal reforms, the justice system, the Russian legal profession, human rights, civil and business law, legal policy, rule-of-law and market economy.

This year's program was designed to attract law faculty, scholars from different disciplines, and also practicing lawyers, to address a wide range of topics grouped around the general theme of how the phenomenon and challenges of globalization affect Russian legal system development. The call for papers included: (i) Relationships between Russian domestic and international law, (ii) The impacts of international legal institutions on the development of Russian law(s), (iii) Globalization in the field of business law, (iv) Global law & Russian legal theory, (v) Regional models of legal cooperation and Russia's participation, (vi) Transnational legal problems in areas such as constitutionalism and rule-of-law, (vii) Theoretical and applied implications of the concept of global transplants, and (viii) A global human rights agenda, including Russia's place in this agenda.

This was a very ambitious and multi-faceted undertaking. Through a process of careful evaluation, the Conference organizers produced a very diverse and challenging program, consisting of 8 Sessions, (7 panels and one round-table devoted to specific Session themes), along with a general Round-table discussion on the subject of Russian-Finnish legal cooperation partnering.<sup>1</sup> The two-day Symposium, October 6–7, was preceded by a Wednesday afternoon PhD student seminar. At this seminar, there were presentations by *Dr. Ari Hirvonen (University of Helsinki)* on Finnish doctoral education in law and *Dr. Svetlana Vasilieva (Higher School of Economics, Moscow, Russia)* on Russian PhD education in law, followed by presentations by PhD students of their works-in-progress.<sup>2</sup> Professor *Pia Letto-Vanamo, Director of the Doctoral School at the University of Helsinki*, then delivered the Keynote Lecture – *Methodological Challenges of Legal Research, followed by a Reception for participants*. In this lecture, she highlighted how global agenda influences national legal issues and what it is to practice good lawyering.

## 1. Russian Constitutional Law and Global Issues

Prof. *Pia Letto-Vanamo (University of Helsinki)* introduced the first Session on Russian Constitutional Law and Global Issues. *Dr. Kirill Koroteev (head lawyer, Memorial, Moscow, Russia)* opened the Symposium with a thoughtful historical analysis of how defenders of human rights in Russia have utilized a “legalistic” approach to constitutional rules, both during the former Soviet Union and in more recent discussions of alternative drafts of the 1993 Russian Constitution. Koroteev’s presentation covered the full historical landscape, beginning with arguments for “openness” during the 1960’s trials of Sinyavskiy and Daniel, the samizdat bulletins during the discussions of 1977 constitutional reforms, and the constitutional ideas of Alexander Yesenin-Volpin, Boris

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<sup>1</sup> This Roundtable also included a presentation by David Fishman, co-author of this article, on ways to attract U.S. counterparts to the Symposium. As described in his remarks, the potential scope of common interests is illustrated by extensive professional activities - including an annual Moscow Conference analogous to the Symposium – which are undertaken by the American Bar Association, Section of International Law, its Russia-Eurasia Law Committee, and individual members in their personal and professional capacities.

<sup>2</sup> PhD student presentations included Andrey Bystrov – “The Political and Legal Ideas of Alexei Borovoy”; Andrey Lans – “The Balance Between Public and Private Interests: Epistemological and Logical Legal Analysis of Constitutional Values”; Maxim Sorokin – “The Evolution of the French Parliamentarism in Eurasian Perspective”; Alexandra Denisova – “The Concept of a Fee as a Public Law Payment in the Russian Federation”; Elianora Miagkova – “Features of Legal Regulation of Labor of Scientific Workers”; Vladislav Bakanov – “Restrictions on Transferring Data Abroad in Russia and EU: Comparative Perspective”; Anna Petrik – “Customs Valuation in Russia: The Role of International Standards”; Olga Podoplelova – “Affirmative Action Policies in the Russian Federation: Regulation and Practical Implementation”; Vladimir Churakov – “Regional Practice of Regulatory Impact Assessment”; Denis Shedov – “Legal Culture of Moscow’s Moslems”; Maria Redchits – “The Issues of Legal Protection of the Cultural Heritage”; and Olga Kiseleva – “The Activity of the European Commission for the Efficiency of Justice as One of the Forms of Assistance in the Realization of the Right to Fair Trial Standards in Russia.”

Yefimov, Sofia Kallistratova, and others emerging from dissident circles. Koroteev continued the historical discussion through the participation of various human rights defenders – Sergey Kovalev, Kronid Lyubarskiy, and Boris Zolotukhin – in the debates at the Constitutional Commission of the Congress of Peoples' Deputies, the Constitutional Convention, and the resulting 1993 Russian Constitution.

Koroteev analyzed how the constitutional rules adopted in 1993 aimed to attain global modern standards on human rights, judicial review, and relations between domestic and international law. Besides the focus on rights and freedoms in the context of dissident political thinking and criminal defense procedural issues, his presentation touched on the value of understanding the history of Russian debates about these issues for critical thinking about the legitimacy of political leadership, public service, church-state relations, judicial independence, and the role of a constitutional court. Koroteev's observation that the historical record of prosecution of dissidents for the dissemination of their ideas rather than the implementation of these ideas deserves admiration is worth keeping in mind in the contemporary world's intellectual climate, and the specific historical scholarship this presentation manifests warrants careful study.

The follow-on presentation of *Grigory Vaipan (Lomonosov State University, Moscow, Russia)* continued an ongoing thematic discussion of the interplay between the Russian Constitutional Court and the European Court of Human Rights that has been the subject of successive Symposiums. Vaipan's contribution examined the issue of prisoner's voting rights as the most recent example of the Russian Constitutional Court asserting its independent role as guarantor of the Russian national constitutional framework in determining whether and when to accept rulings on applicable legal standards from the European Convention on Human Rights. The 2013 ECHR judgment in the Anchugov and Gladkov case(s) found that Russia's automatic and indiscriminate ban on prisoners' voting rights violated the European Convention on Human Rights. In April 2016, the Russian Constitutional Court, applying for the first time a position it had previously declared as a general principle, ruled that this ECHR judgment was partially unenforceable in Russia to the extent it departed from interpretations of the Russian Constitution that the Russian Constitutional Court was empowered to render.

Vaipan's presentation went into substantial and productive detail about the Russian Constitutional Court's interpretation – specifically that voting rights determinations for Russian prisoners do distinguish between different classes of Russian prisoners, depending on the seriousness of their crimes. His presentation forcefully and persuasively pointed out two main flaws in the Russian Constitutional Court's reasoning: (i) that there was no articulation of the general principles upon which this particular decision was based, (ii) that there was no explanation of how application of the ECHR decision to Russia would in any way diminish or undermine the Russian Constitution, which is the sole legal justification for the Russian Constitutional Court reaching the determination that an ECHR decision should not be adopted.

The concluding presentation for this Session, by *Ivan Grigoriev (Higher School of Economics, St. Petersburg, Russia)*, raised the important practical question of why constitutional tribunals reject some petitions, while ruling on others. From one perspective, the question is answered simply if the court operates under a legalist standard of accepting all petitions that meet the legal criteria for judicial review. But determining what these legal criteria are requires much more complex analysis, and this analysis certainly benefits from empirical inquiry about the operation of the Russian Constitutional Court in practice.

Grigoriev's paper, based on preliminary analysis of a quantitative data-set of all decisions produced by the Russian Constitutional Court (RCC) from 1995–2015 (N 22334) presented a rich field of study for future work. Why do some cases become rulings (*postanovlenie*) while others get resolved by rejection of a full hearing through determinations (*opredelenie*)? Does it depend on the type of litigant – individual versus governmental body? Does it depend on the legal subject matter? Does it depend on the identity or predilections of the judge/*rappporteur*? These are important questions, well worth further analysis.

## 2. Human Rights and Global Challenges

Session 2 was devoted to human rights and global challenges, with four presentations on topics that illustrated the diverse issues in this area. *Tatiana Glushkova's (Memorial, Moscow, Russia)* presentation focused on legal recognition of transgender persons' gender identity. Glushkova pointed out that while the principle that governments are obliged to allow citizens to change their legal gender has been accepted by international human rights institutions, the requirements which must be met for this principle to apply are still being determined. In Russia, the applicable standards developing appear to be "medical" in nature rather than the "de-medicalization" which appears to be the global trend. There does appear to be growing progress internationally away from abusive treatment interventions and prejudicial categorization towards a conception of gender incongruence, which more neutrally identifies a true individual situation. Glushkova also observed that achieving true gender legal equality will be required if the reliance on a person's self-proclaimed gender identity is not to lead to abuses such as escaping military conscription or receiving pensions at an earlier age.

*Konstantin Kokarev's (Russian Academy of National Economy and Public Administration, Moscow, Russia)* presentation looked at possible change in the institutional role of the ombudsman as offering an avenue for improving administrative justice for ordinary citizens in Russia. From Kokarev's perspective, the traditional concept of the ombudsman as advocate for a human rights agenda, working closely with the NGO community, may not be promising in contemporary Russia. But the fact that the institution of the ombudsman has developed with significant public, bureaucratic, and even political support at the regional level makes it worth taking seriously.

*Mariya Riekenin's (Åbo Akademi University, Turku, Finland)* presentation focused on issues of participation of minors in public affairs in Russia, consistent with standards set by the U.N. Convention on the Rights of the Child and the Council of Europe. Allowing minors to express views regarding matters affecting them in judicial and administrative processes, while avoiding their exploitation, requires a careful balancing of interests. Riekenin's presentation suggested both general principles and specific legislative approaches to achieve this objective.

*Nadezhda Knyaginina and Szymon Jankiewicz's (Higher School of Economics, Moscow, Russia)* presentation focused on affirmative action in education as a means to help people who are disadvantaged in their opportunities due to culture, disabilities, gender, language, politics, socio-economic status, and other factors. But, as this paper noted, affirmative action, sometimes also described as positive discrimination, carries with it issues of possible infringement on others' interests and violation of principles of formal equality. Knyaginina's presentation outlined Russian experience with this dilemma and progress towards resolving it constructively.

### **3. Sanctions and Business and Eurasian Economic Union**

Sessions 3 and 4 dealt with the impact of sanctions on business and a new addition to international justice – the Court of Eurasian Economic Union. Session 3 addressed issues related to sanctions and business from various perspectives. *Maria Keshner's (Kazan Federal University, Russia)* presentation looked at Russian legislative definition of sanctions from a conceptual standpoint. Keshner pointed out that there are open questions regarding both effectiveness and costs associated with Russia's use of sanctions against other economic actors.

*Paul Kalinichenko's (Kutafin Moscow State Law University, Moscow, Russia)* presentation focused more narrowly on the relationship between Russia and the EU with respect to sanctions in the aftermath of Crimea. Kalinichenko's analysis stressed that the mutual "war of sanctions" between Russia and the EU has been costly and counter-productive for both sides.

*Soili Nysten-Haarala's (University of Lapland and Luleå University of Technology, Finland)* presentation assessed contract law conceptually regarding the tensions between the need for flexibility in contracting practices to allow maximum collaborative efforts between parties and traditions, emphasized by the Soviet experience, of law as a mechanism for prioritizing, settled and formal institutional norms. Her presentation described how this tension creates particular problems for foreign business people working in the Russian market, which in many respects still remains behind the times in adopting needed changes.

Session 4 focused on various issues related to the very new institutional development of the Eurasian Economic Union. *Ekaterina Dyachenko's (Court of the Eurasian Economic Union, Minsk, Belarus)* presentation described the relationship between the Russian Supreme and Constitutional Courts and the laws of the EEU as

one where the Russian Courts are prepared to recognize EEU proceedings so long as they do not depart from Russian legal holdings. *Maksim Karliuk's (Higher School of Economics, Moscow, Russia)* presentation added the observation that the Russian Constitutional Court's reservation of the right to disagree with the European Court of Human Rights also would apply to EEU legal decisions. *Kirill Entin's (Court of the Eurasian Economic Union, Minsk, Belarus)* presentation noted that there have been very few applications to the EEU courts and that once decisions begin to come out, the institution will become better known.

#### **4. Legal Transplants & Russian Law**

Session 5 focused on legal transplants into Russian law in both practice and in theory. *Dr. Vladislav Starzhenetsky's (Higher School of Economics, Moscow, Russia)* paper analyzed a concrete transplant institution – the use of statutory damages as “compensation for violation of exclusive rights” in the Russian legal regime for intellectual property (IP) infringements. Statutory damages, based on the idea that actual damages cannot be calculated, combine both a compensatory and a punitive function, awarding monetary sums often disproportionate to any reasonable measure of harm. Though very popular with IP rights holders, this “transplant” presents issues of legal certainty, proportionality, and justice, i.e., not distinguishing between intentional and inadvertent violations. Russian courts – in particular the Supreme Court (after the Commercial Court merger) Intellectual Property Court, and Constitutional Court, have yet to resolve these issues.

The other three papers in this Session were more theoretical in nature. *Antonios Platsas's (Higher School of Economics, Moscow, Russia)* paper set out an inclusive ideational map of how both philosophical and economic currents are bringing about legal harmonization as a process of convergence of major industrial societies around the world. *Laura Lassila (University of Helsinki)* applied a similar analytical lens to the trend to interpret international contract laws according to uniform contract law principles. *Ekateriana Mouliarova's (Lomonosov State University, Moscow, Russia)* contribution described the limitations on legal transplants taking root in the Russian context where traditional and cultural values and ongoing political uncertainties continue to play an important role.

#### **5. Russian Tax Law in the Context of a Globalizing Economy**

Session 6 was devoted to specific areas of Russian tax law, with three inter-connected presentations that painted a more optimistic picture of Russia's legal environment than several of the other sessions. *Alexander Pogorlesky's (St. Petersburg State University, St. Petersburg, Russia)* paper summarized how, notwithstanding geopolitical controversies, Russia's international tax regime has largely come into harmony with OECD and U.S. norms and standards. *Victor Matchekhin's (Linklaters Russia)* paper honed in on specific

issues of how Russia's "De-offshorization" project has modified its legal and regulatory environment since 2014 to combat BEPS, (Base Erosion and Profit Shifting), abusive practices in generally internationally accepted ways. *Wilhelmina Shavshina's* (DLA Piper, Russia) presentation added specific technical description of the different ways tax and customs authorities address and regulate transfer pricing documentation; how government agencies and courts resolve disputes that arise; and how businesses should conduct themselves to comply with domestic and international norms. Each of these papers covered quite technical issues, and they are well worth the attention of readers with specific issues in this field.

## 6. Global Context of Russian Labor Law

Session 7 provided a roundtable-format description of various Russian labor law issues, much less "upbeat" than the preceding session. *Nikita Lyutov's* (Kutafin Moscow State Law University, Moscow, Russia) presentation pointed out that the worsening economic situation in Russia is leading both to declining labor protections and a growing resistance, on patriotic grounds, to international criticisms of Russia's labor and human rights environment. *Daria Chernyaeva's* *Platsas's* (Higher School of Economics, Moscow, Russia) paper focused primarily on the Eurasian Economic Union and pointed out that economic difficulties are undercutting the integrative function hoped for from the EEU. *Olga Chesalina's* (Max Planck Institute for Social Law and Social Policy, Germany) work described how the combination of diminished unemployment benefits and more onerous qualifying requirements have undermined the social protection system. *Elena Gerasimova's* *Platsas's* (Higher School of Economics, Moscow, Russia) presentation provided statistical data showing that based on new Russian enabling legislation, more employers were imposing harsher conditions on employees and even suspending collective bargaining agreements based on worsening financial conditions. Finally, *Elena Sychenko's* (State Institute of Economics, Finance, Law and Technology, Gatchina, Russia) presentation posed the question of whether there are any viable avenues, e.g. the European Court of Human Rights, to challenge erosions in worker compensation, pension amounts, and other austerity measures.

## 7. Russian Financial Law and Globalization

Session 8 encompassed a diverse mix of Russian financial law and globalization issues. *Nataliya Bocharova's* (Lomonosov State University, Moscow, Russia) presentation set out the issues for determining how and when business arbitration awards that impact the interests of third parties will be enforced. *Vladimir Ermolin's* paper set out, on a comparative basis, the regime for legal regulation of payment services in Russian and the EU. *Kirill Molodyko's* (Higher School of Economics, Moscow, Russia) paper described a template for best practices in the legal regulation of credit rating agencies, also drawn from EU materials. Finally, *Vladimir Malyaev* (Higher School of Economics, Nizhniy

*Novgorod, Russia*) provided an overview of how, in light of the negative impact U.S. and EU sanctions are having on the Russian economy, it is worth exploring how Russia might obtain alternative sources of financing from Islamic markets, and, if so, what are the particularities of Islamic financing practices that need to be understood.

## 8. Conclusion

The Symposium's format allowed both academics and practitioners, mainly from Finland and Russia, to present their ongoing research and analysis of recent and current issues in law-making and the application of law in an atmosphere of constructive discussion and critical thinking, together with an audience which included legal practitioners from Russian and Finnish law firms, undergraduate and postgraduate students of law and other disciplines, representatives of public agencies, and colleagues from Finnish and Russian universities. Their discussions covered themes of constitutionalism, rule-of-law in application in a wide variety of areas ranging from affirmative action to customs regulation to ombudsman to sanctions, along with recent legislation and decisions of the Constitutional Court and ECHR, and the roles of legal regulation and political decision-making in the current economic crisis.

The Higher School of Economics/University of Helsinki Law School Symposium provides an excellent opportunity for Russian academics and practitioners to get together with Finnish and other international counterparts and present their work in an environment that is both supportive and intellectually challenging. Both institutions express appreciation to our presenters and other participants and attendees. Moreover, as described at the Thursday afternoon Roundtable, both Higher School of Economics and University of Helsinki have progressed from the last years 'Building on this experience and engaging in active discussions about how to broaden and deepen this effort', to agreement on a concrete agenda for faculty, student, and other institutional collaboration that will almost certainly make next years' Symposium an even richer and more rewarding experience for participants. Yet there still remains much to be done to attract broader international attention to the experience of Russians in using their legal system and to the outputs of this system – court decisions in particular and thoughtful analysis and commentary as well – to provide useful materials for academic study and practitioner input that will hopefully strengthen rule-of-law institutions in Russia.

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