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CHIEF EDITOR'S NOTE ON 2013 RUSSIAN LEGAL EVENTS

DMITRY MALESHIN,
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The title 'Russian Law Journal' has different meanings. It could denote a journal of Russian law, or else be understood to refer to a Russian journal of law. This is no coincidence; indeed, it is the very idea behind this journal. We are simultaneously both a comparative and a national journal. Both types of article are published: comparative papers and articles on Russian law – though, of course, Russian law remains the priority given the journal's origins.

Some crucial legal events have occurred in Russia in 2013.

First, the 20th anniversary of the Constitution of the Russian Federation. Adopted by national referendum on 12 December 1993 with 54.5% of the vote, the Constitution took effect on the day it was published – 25 December of the same year. It set out the fundamentals of government as well as proclaiming the rule of law, the ideological neutrality of the state, political pluralism, competitive elections and a separation of powers, guaranteeing fundamental human rights to the Russian people. The Constitution establishes a semi-presidential system that encompasses strong executive power and increased independence for the president. Few amendments have been made to the Constitution since its adoption. The most significant of these was made in 2008. It concerned the term of office to be held by the President of the Russian Federation, which was increased from four to six years. Many lawyers and politicians have recently proposed a more rigorous revision of the Constitution. Constitution Day was the culmination of anniversary events that continued throughout the entire year. A special amnesty resolution was devoted to the 20th anniversary of the Constitution, releasing from criminal liability those citizens who had committed crimes as minors, women with dependent children, pregnant women, women over the age of 55 and men over the age of 60, persons with disabilities, participants in the Chernobyl Nuclear Power Station rescue operation, military service members, internal affairs staff members and other individuals who have defended Russia. It granted freedom to around 25,000 prisoners, including Michael Khodorkovsky, punk protest group Pussy Riot and Greenpeace Arctic demonstrators.

Second, the unification of the Russian judiciary. Until 2013 there had been two parallel court systems: courts of general jurisdiction and arbitrazh (commercial) courts. Arbitrazh (commercial) courts were charged with settling economic disputes, while courts of general jurisdiction handle disputes between individual citizens. The Arbitrazh (commercial) courts system was founded in 1991 after the collapse of the Soviet Union and the adoption of a market economy. According to the 2013 reform the Supreme Court and Supreme Arbitrazh (Commercial) Court will be united in 2014. This reform has been undertaken at the initiative of the President Vladimir Putin under the 'About the Supreme Court of the Russian Federation and Prosecutor's Office of the Russian Federation' Bill. This means that the Constitution will be changed for the second time since its adoption, because it regulates the structure of the judicial system. The Supreme Arbitrazh (Commercial) Court will be abolished and its functions transferred to the Supreme Court. This reform idea has proved highly controversial. With advantages and disadvantages, it is hotly debated amongst lawyers and members of the judicial community, attracting criticism from some. More than 100 law offices signed a petition to stop the reform's progress, arguing that the work of the Supreme Arbitrazh (Commercial) court has been most effective. On the other hand, authors of the reform assert the need to eliminate differences and contradictions in the judicial practice of both supreme courts.

Third, the Criminal, Civil and Criminal Procedure codes have seen amendments. Criminal liability was established to sanction calls to separatism and any other action that would threaten Russia's territorial integrity, prescribing jail terms of up to six years. Civil Code amendments deal primary with securities as well as legal entities, powers of attorney, transactions, contract law, intellectual property and international private law. New provisions in Criminal Procedure Code determine the territorial jurisdiction of cases involving crimes against Russian citizens committed outside of Russia.

Finally, some legal statistics: in 2013 Russia had around 2,500 courts of general jurisdiction and 111 arbitrazh (commercial) courts; and around 30,000 judges, including 4,000 arbitrazh (commercial) judges and 7,400 peace justices.

This journal's next priority after Russian law is integration legislation among Eurasian countries, primarily intergovernmental acts between Belarus, Kazakhstan, Russia, the Ukraine and other countries. The Custom Union is one example of such integration. Established on 19 December 2009, it started to function on 1 January 2010 and is composed of three members: Belarus, Kazakhstan and Russia. This union was started by the introduction of a uniform customs tariff. Its goal is the creation of a common customs territory where no customs duties or economic restrictions apply, as well as to introduce uniform trade regulation. New agreements were signed in 2013. These included several acts concerning Armenia's accession to the Customs Union and regulations governing the movement of narcotic and psychotropic substances.

Another example of such integration legislation can be found in the Eurasian Economic Community (EurAsEC). This community was founded on 10 October 2000 and aims at the development of common foreign economic regulation and a common market. It has five members: Belarus, Kazakhstan, Kyrgyzstan, Russia, and Tajikistan; with Moldova, Ukraine and Armenia having observer status. Some new agreements were signed in 2013, including the agreement on Cooperation in Provision of High-Tech Medical Assistance to Citizens of Eurasian Economic Community Member States.

Some of the legal developments referred to above are discussed by our authors in this issue.

WELCOME

INTERNATIONAL ASSOCIATION OF JUDICIAL INDEPENDENCE AND WORLD PEACE

WELCOME NOTE

SHIMON SHETREET,
Hebrew University of Jerusalem (Jerusalem, Israel),
President of the International Association of Judicial Independence
and World Peace

Due to the development of comparative law, the world has knowledge about the laws in the Russian jurisdiction. But it is obvious that a great work has yet to be done in order for Russia to integrate into the international law environment. Within the clearly defined aims of the International Association of Judicial Independence and World Peace there are several aims which certainly correspond with the essential need to bring the Russian academic legal tradition onto the international level. These include the need to promote the principle of judicial independence as a central foundation for democracy, and, internationally, the need to revise international standards of judicial independence, based on the work and deliberations of an international team of jurists, to help judges, judiciaries and jurists, to initiate educational projects promoting judicial independence and other fundamental values of the justice system. The International Association of Judicial Independence and World Peace has been active since 1980 and its activity is aimed at sharing the knowledge and experience and to encourage and support the building of a legal culture of judicial independence worldwide.

The innovative concepts of judicial independence are essential for democracy, liberty, world peace and international trade. In comparison with former Soviet Union, The Russian Federation has accomplished a great step forward in order to prosper in the named fields. So I am looking forward to experience the bright and incentive

change on occasion of the next annual conference of the JIWP which will take place in 2014 in Moscow. Until then creating the *Russian Law Journal* as a prosperous platform for a cross-cultural dialogue is a guarantee of a successful and productive exchange of ideas and experience with Russian colleagues.

On behalf of The International Association of Judicial Independence and World Peace, I wish this publication great success and a fruitful academic discourse and useful contributions to the legal systems of all the countries involved in the production of the *Russian Law Journal*.

INTERNATIONAL SOCIETY OF FAMILY LAW

WELCOME NOTE

PATRICK PARKINSON,
University of Sydney (Sydney, Australia),
President of the International Society of Family Law

It is my pleasure to greet the birth of the new, but long awaited, *Russian Law Journal* on behalf of the International Society of Family Law. The goals of the Journal correspond with the principles of the International Society of Family Law: to promote research on subjects of worldwide interest, to encourage interdisciplinary work, and to advance legal education. ISFL was founded in 1973 as an independent, international scholarly association dedicated to the study and discussion of family law. The function of the Society is to provide an international forum for analysis of legal policy applied to family relationships. It exists to bring together scholars of any relevant discipline, as well as practitioners, policy makers and others with an interest in this area of law.

The fascinating developments in Russian/Soviet family law in the 20th century are of international importance. Russian family law was in the vanguard of legislating for the equality of men and women in family relations, no-fault divorce, and the equal status of children born in and outside of marriage. All these norms which are now broadly accepted got their starting push in Russia in 1917. Current developments in Russian family law also seem interesting, but the sources of information in this field are limited these days. The new Journal should help to fill this gap and provide the international family law community with substantial academic information about legislative, judicial and doctrinal developments in Russia. As well, the Journal might be a forum for worldwide family law scholars to provide information to Russian colleagues about current developments in other countries.

I wish the *Russian Law Journal* a long and successful life full of first rate and challenging articles written by the best authors and engendering, lively, scholarly discussion.

COURT OF THE EURASIAN ECONOMIC COMMUNITY

WELCOME NOTE

ANNA SOKOLOVSKAYA,
President of the Court of the Eurasian Economic Community (Minsk, Belorussia)

As the President of the Court of the Eurasian Economic Community I am very proud to appear on the pages of *Russian Law Journal*, a new promising project initiated by leading Russian scholars.

The *RLJ* is of a particular interest for the Court of the Eurasian Economic Community, a body hearing cases involving companies from all over the world in relation to the Customs Union of Belarus, Kazakhstan and Russia, since its' main purpose is to expand cross-fertilization between the legal cultures. This purpose is very important in course of the Eurasian integration which will culminate in 2015 with creation of the Eurasian Union, transforming markets of the member states into the large single one.

I am wishing the *RLJ's* Editorial Council and Board productive work in establishing this forum for discussion.

UKRAINIAN BAR ASSOCIATION

WELCOME NOTE

DENYS BUGAY,
President of the Ukrainian Bar Association (Kiev, Ukraine)

On behalf of the Ukrainian Bar Association, I am pleased to take this opportunity and welcome the creation and launch of a brand new magazine for lawyers – the *Russian Law Journal*. Due to its launch the English-speaking audience will get acquainted with the latest trends in Russian law. At the same time the country's leading lawyers will have an opportunity to convey more effectively their ideas to the international legal community. I'm sure that the professional editorial board and comprehensive coverage of topics of current importance will assure the Journal's success in the relevant media sector.

The Ukrainian Bar Association, the most numerous and dynamic organization that unites Ukrainian lawyers, attorneys, judges, state officers and scholars hereby declares its readiness for mutual cooperation and implementation of interesting projects. The objectives of our organization are similar to those supported by the *Russian Law Journal's*, therefore we'll be happy to join forces and bring the legal profession to a new quality level together. I'm sure that the journal will find its target audience in our country, while the leading Ukrainian lawyers will contribute to its success.

We highly appreciate the opportunity to share the experience with Russian colleagues, therefore we cordially welcome our dialogue within the framework of our events and projects of the *Russian Law Journal*.

We wish the magazine a plenty of interesting materials, authoritative opinions, professional discussions and high ratings!

ARTICLES

INTERPRETATION OF WRITTEN CONTRACTS IN ENGLAND

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This article examines the leading principles governing interpretation of written contracts under English law. This is a comprehensive and incisive analysis of the current law and of the relevant doctrines, including the equitable principles of rectification, as well as the powers of appeal courts or of the High Court when hearing an appeal from an arbitral award. The topic of interpretation of written contracts is fast-moving. It is of fundamental importance because this is the most significant commercial focus for dispute and because of the number of cross-border transactions to which English law is expressly applied by businesses.

Key words: contract; interpretation; English law; appeal courts.

1. Introduction[1]

On this fundamental topic the English approach is in vivid contrast with that adopted within other jurisdictions.[2] In English law the search is for the objective meaning of the language appearing in the parties' written contract. The English courts do not allow the parties to give evidence of their personal and subjective understanding of those words. Nor is it normally permissible for a party to produce evidence of the pre-contractual dealings – the negotiations – in order to elucidate the

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[1] *Textbooks*: Neil Andrews, Contract Law 14.01–14.32 (Cambridge University Press 2011) (for the same author's examination of civil processes *see* 1 Andrews on Civil Processes ch. 15 (Intersentia 2013); on appeals from arbitral awards on points of English law, 2 Andrews on Civil Processes (Intersentia 2013)); Kim Lewison, Interpretation of Contracts (5th ed., Sweet & Maxwell – Thomson Reuters 2011; and first supplement due Dec. 2013); Gerard McMeel, The Construction of Contracts: Interpretation, Implication and Rectification (2nd ed., Oxford University Press 2011) [hereinafter McMeel, The Construction of Contracts] (*see also* Gerard McMeel, *The Interplay of Contractual Construction and Civil Justice: Procedures for Accelerated Justice*, 2011 European Business L. Rev. 437–449 [hereinafter McMeel, *The Interplay of Contractual Construction*]); Catherine Mitchell, Interpretation of Contracts (Routledge-Cavendish 2007); (from an Australian perspective) John W. Carter, The Construction of Commercial Contracts (Hart 2013). *Other discussion*: Lord Bingham, *A New Thing Under the Sun: The Interpretation of Contract and the ICS Decision*, 12 Edinburgh L. Rev. 374 (2008); Richard Buxton, *'Construction' and Rectification after Chartbrook*, 2010 CLJ 253; Andrew Burrows, *Construction and Rectification*, in Contract Terms 88 ff. (Andrew Burrows & Edwin Peel, eds.) (Oxford University Press 2007); John Cartwright, *Interpretation of English Law in Light of the Common Frame of Reference*, in Content and Meaning of National Law in the Context of Transnational Law (Henk Snijders & Stefan Vogenauer, eds.) (Sellier 2009); Lord Grabiner, *The Iterative Process of Contractual Interpretation*, 128 LQR 41 (2012); Lord Hoffmann, *The Intolerable Wrestle with Words and Meanings*, 1997 South Africa L. J. 656; Ewan McKendrick, *The Interpretation of Contracts: Lord Hoffmann's Re-Statement*, in Commercial Law and Commercial Practice (Sarah Worthington, ed.) (Hart 2003); David McLauchlan, *Contract Interpretation: What is it About?*, 31 Sydney L. Rev. 5 (2009); Lord Nicholls, *My Kingdom for a Horse: the Meaning of Words*, 121 LQR 577 (2005); Lord Phillips, *The Interpretation of Contracts and Statutes*, 68 Arbitration 17 (2002); Spigelmann CJ, *From Text to Contract: Contemporary Contractual Interpretation*, 81 ALJ 322 (2007); Christopher Staughton, *How Do The Courts Interpret Commercial Contracts?*, 1999 CLJ 303; for comparative literature, *see infra* n. 2.

[2] For comparative observations on interpretation of contracts *see* Michael J. Bonell, *The UNIDROIT Principles and CISG – Sources of Inspiration for English Courts?*, 11 Uniform L. Rev. 305 (2006); The UNIDROIT Principles in Practice: Case Law and Bibliography on the UNIDROIT Principles of International Commercial Contracts 144 (Michael J. Bonell, ed.) (2nd ed., Transnational Publishers 2006); Eric Clive, *Interpretation*, in European Contract Law: Scots and South African Perspectives 183 (Hector MacQueen & Reinhard Zimmermann, eds.) (Edinburgh University Press 2006) ; Edward A. Farnsworth, *Comparative Contract Law*, in The Oxford Handbook of Comparative Law 920 ff. (Mathias Reimann & Reinhard Zimmermann, eds.) (Oxford University Press 2006); Catherine Valke, *On Comparing French and English Contract Law: Insights from Social Contract Theory*, 2009 J. Comp. L. 69–95 (cited as 'illuminating' by Lord Hoffmann in the *Chartbrook* case ([2009] UKHL 38; [2009] 1 AC 1001, at [39])); *idem.*, *Contractual Interpretation: at Common Law and Civil Law: An Exercise in Comparative Legal Rhetoric*, in Exploring Contract Law 77–114 (Jason W. Neyers, Richard Bronaugh, Stephen G. A. Pitel, eds.) (Hart 2009); Stefan Vogenauer, *Interpretation of Contracts: Concluding Comparative Observations*, in Contract Terms ch. 7 (Andrew Burrows & Edwin Peel, eds.) (Oxford University Press 2007); Commentary on the UNIDROIT Principles of International Commercial Contracts 311 (Stefan Vogenauer & Jan Kleinheisterkamp, eds.) (Oxford University Press 2009); Konrad Zweigert & Hein Kötz, An Introduction to Comparative Law ch. 30 (Tony Weir, trans.) (3rd ed., Oxford University Press 1998) (although their discussion of English law is now out-of-date, because of the developments explained in, especially, sect. 2 of this article).

finally agreed terms. To this last proposition there is a large exception when a party seeks the equitable remedy of rectification. That remedy is considered in sect. 3 of this paper. In essence, rectification is an equitable remedy enabling the court to *insert new words to reflect the true consensus, as objectively ascertained, and which stood immediately preceding formation*:[3] thus rectification enables the court to declare that the written terms must be altered if it is shown that, in their final formulation of the contract's written terms, the parties have failed to reproduce accurately their prior and uninterrupted consensus; that consensus will be determined objectively; and it must have an outwardly discernible subsistence.

Finally, the civilian lawyer will find it remarkable that in this entire area the legislature has not intervened. All the rules governing interpretation of contracts, as well as the equitable doctrine of rectification, are the creature of judicial decision-making resulting mostly from appellate review of first instance judicial decisions or of arbitral awards in which English contract law has been applied.[4] This judicial monopoly of this important field of contract law has worked well. For the courts retain the power to refine, sometimes to develop quite boldly, the governing principles of interpretation. In fact this is regarded as not only the most important topic in English contact law, from a practical perspective, but the most dynamic modern doctrine.

2. Interpretation

Appellate Revision: Construction of Written Contracts is a Question of Law and Not One of Fact: If English law governs the relevant agreement, interpretation of (wholly) 'written contracts' (including electronic documents)[5] is a question of law,[6] whereas interpretation of contracts not wholly contained in writing (whether oral, or part written and part oral) is a 'matter of fact.' Appeal courts have power to review first instance errors of law, but in general defer to findings of fact.[7]

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[3] *See* Andrews, Contract Law, *supra* n. 1, at 14.33–14.51; Chitty on Contracts 5-110 ff. (31st ed., Sweet & Maxwell 2012); David Hodge, Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake (Sweet & Maxwell 2010); McMeel, The Construction of Contracts, *supra* n. 1, ch. 17; Snell's Principles of Equity ch. 16 (32nd ed., Sweet & Maxwell 2010); Edwin Peel, Treitel on the Law of Contract 8-059 (13th ed., Sweet & Maxwell 2011); Marcus Smith, *Rectification of Contracts for Common Mistake*, 123 LQR 116 (2007); David McLauchlan, *The 'Drastic' Remedy of Rectification for Unilateral Mistake*, 124 LQR 608 (2008); Burrows, *supra* n. 1, at 77.

[4] In the case of arbitration references where the 'seat' in within England and Wales, the High Court in London must first give permission for an appeal on a point of English law to proceed to the High Court: Arbitration Act, 1996, sect. 69(2) and sect. 69(3) (England and Wales).

[5] *See* Chitty on Contracts, *supra* n. 3, at 12-048.

[6] *See id.* at 12-046.

[7] *See* 1 Andrews on Civil Processes, *supra* n. 1, ¶¶ 15.12 and 15.72 ff.

Objectivity: The 'objective principle of agreement' precludes reference to a party's undisclosed and personal understanding of the written terms' meaning and effect.[8] Lord Hoffmann, in the *Investors Compensation Scheme* case (1998), said: 'Interpretation [of written contracts] is the ascertainment of meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.'[9]

Context: The courts will adopt a contextual approach to interpretation rather than a narrow 'dictionary meaning' approach: *see* Lord Hoffmann's seminal statement in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* (1998)[10] (which he traced to decisions in the 1970s).[11] The courts permit the parties to refer to the contractual setting, expressed variously as the transaction's 'commercial purpose,' 'genesis,' 'background,' 'context,' its location in the relevant 'market,'[12] or its 'landscape.'[13] It must be emphasized, however, that 'background' *does not extend to pre-contractual negotiations* (on that, see below; however, in the case of applications for rectification, there is an exception to the bar on evidence of pre-contractual negotiations: see further below).

Need for Procedural Discipline: Lord Hoffmann in the *BCCI* case (2001) said that courts and arbitrators should curb attempts by parties to adduce excessive quantities of background information.[14] Subject to that, in *Procter and Gamble Co. v. Svenska Cellulosa Aktiebolaget SCA* (2012)[15] the Common Law tool of pre-trial disclosure of documents[16] was noted by Rix LJ as an important accompaniment to construction of documents.

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8 *Reardon Smith Line Limited v. Hansen Tangen*, [1976] 1 WLR 989, 996, HL, *per* Lord Wilberforce.

9 [1998] 1 WLR 896, 912–913, HL.

10 [1998] 1 WLR 896, 912–913, HL; McKendrick, *supra* n. 1, at 139–162.

11 *See Prenn v. Simonds*, [1971] 1 WLR 1381, 1384–1386, HL; *Reardon Smith Line Limited v. Hansen Tangen*, [1976] 1 WLR 989, HL; in the *Prenn* case, at 1384, Lord Wilberforce traced the 'anti-literal' approach to mid-nineteenth century case law.

12 The leading comment is by Lord Wilberforce in *Reardon Smith Line Limited v. Hansen Tangen*, [1976] 1 WLR 989, 995–996, HL; *see* Staughton, *supra* n. 1, at 303 (on the problem of the 'factual matrix').

13 *Charter Reinsurance Co. Ltd. v. Fagan*, [1997] AC 313, 384, HL, *per* Lord Mustill: 'The words must be set in the landscape of the instrument as a whole.'

14 [2001] 1 AC 251, at [39], HL.

15 [2012] EWCA Civ 1413, at [38]: 'In English law we have eschewed asking what the parties have actually intended, thinking that the question of contractual intention is to be derived objectively from their agreement, and that when it comes to a dispute the question of actual intention is likely to be submerged in wishful thinking. In the civil law, matters are looked at differently, with the court free, as I understand matters, to look at everything for the purpose of deriving the actual, as distinct from the imputed, intention of the parties. Even so, for different reasons, English law is much more willing than the civil law, again as I understand matters, to accommodate disclosure of documents and cross-examination, even though they add to the cost of litigation. In matters of contractual interpretation there is an irony in this combination of approaches. Nevertheless, willingly applying as I do the current understanding of contractual interpretation in English law, which has become increasingly open to the influences of considerations of factual matrix and purposive construction, I am unable to create an agreement which the parties might, or might not, have arrived at, had they thought of and discussed the problem which has overtaken them.'

16 The leading rules are codified at CPR, pt. 31: for comment on these procedural rules *see* 1 Andrews on Civil Processes, *supra* n. 1, ch. 11.

Accessibility of Background Material: The relevant 'background' must have been accessible to the present parties: in the *Sigma* case (2009) Lord Collins emphasised this last point.[17] It should not be buried in the archaeological remains of an original transaction formed between different persons or entities – as where a standard document was created by parties X and Y, long ago, but the current dispute concerns A and B, who are strangers to the original document, but have adopted it, along with many hundreds or even thousands of other contracting parties in the relevant 'market.'

Pre-Contractual Negotiations Bar: Interpretation: The English rule – not followed in most other jurisdictions around the world – is that, when seeking to interpret written contracts (as distinct from oral or partly written contracts), a party cannot adduce, without his opponent's permission, evidence of the parties' *prior negotiations*. The five-fold rationale for this bar is (rationales collected by Briggs J,[18] at first instance in *Chartbrook Ltd. v. Persimmon Homes Ltd.* (2007), drawing upon Lord Nicholls' famous lecture, 'My Kingdom for a Horse' lecture):[19] (i) avoidance of 'uncertainty and unpredictability,' (ii) the fact that interested third parties cannot be guaranteed access to such negotiation history, (iii) such dealings are notoriously shifting and so such evidence would be unhelpful, (iv) one-sided impressions might contaminate the inquiry so that the objective approach to interpretation would be undermined, and (v) 'sophisticated and knowledgeable negotiators would be tempted to lay a paper trail of self-serving documents.'[20]

Pre-Formation Negotiations Relevant to Rectification Claims: Such evidence is to be adduced for the purpose of rectification, an independent equitable remedy (*see infra*). And so claims for rectification are often brought in conjunction with a pleading based on ordinary 'interpretation.'[21]

Post-Formation Conduct: A written contract should not be construed by reference to the parties' conduct subsequent to the contract's formation.[22] However, there

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17 But in the *Sigma* case ([2009] UKSC 2; [2010] 1 All ER 571; [2010] BCC 40, at [35]–[37]) Lord Collins (with the support of Lords Mance and Hope) disapproved too broad a search for background information when, as in the *Sigma* case itself, the parties to the relevant transaction might not have been present at its birth, and had instead become second-hand or remoter recipients of others' contractual text which had been in circulation in the relevant financial market.

18 [2007] EWHC 409 (Ch), at [23].

19 Nicholls, *supra* n. 1, at 577; in his note on the House of Lords' decision in the *Chartbrook* case, David McLauchlan (*see Commonsense Principles of Interpretation and Rectification*, 126 LQR 8, 9–11 (2010)) rejects these various suggested justifications.

20 *Chartbrook v. Persimmons*, [2008] EWCA Civ 183; [2008] 2 All ER (Comm) 387, at [111], *per* Collins LJ; this argument is described as unconvincing by David McLaughlan (*see Commonsense Principles of Interpretation and Rectification*, *supra* n. 19, at 11).

21 On this two-pronged approach *see* McMeel, *The Interplay of Contractual Construction*, *supra* n. 1, at 437–449; Buxton, *supra* n. 1, at 253; Burrows, *supra* n. 1, at 88 ff.

22 *See Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd.*, [1970] AC 583, 603, HL, *per* Lord Reid.

are two exceptions: (1) if it can be shown that the parties had specifically *agreed to vary or discharge the agreement;*[23] *or (2) if the doctrine of estoppel by convention* can be established, that is, proof that, *subsequent to formation, the parties had implicitly agreed on how the written terms should be interpreted or modified*.[24]

Commercial Common-Sense: The courts should construe written instruments, including contracts, in a 'commercial' way, with sensitivity to business 'common-sense.'[25] There are many statements supporting this.

(1) Lord Diplock said in *Antaios Cia Naviera SA v. Salen Rederierna AB* (1985):[26] 'if detailed semantic and syntactical analysis of words in a commercial contact is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.'

(2) Lord Steyn said in *Mannai Investment Co. v. Eagle Star Life Assurance* (1997):[27] 'Words are . . . interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.'

(3) Lord Hope endorsed this approach in the Supreme Court in *Multi-Link Leisure v. North Lanarkshire* (2010),[28] noting that this was consistent with Lord Hoffmann's principles in *Investors' Compensation Scheme Ltd. v. West Bromwich Building Society* (1998).[29]

(4) The Supreme Court has confirmed this approach in the *Rainy Sky* case (2011),[30] where Lord Clarke said:

> [20] It is not in my judgment necessary to conclude that, unless the most natural meaning of the words produces a result so extreme as to suggest that it was unintended, the court must give effect to that meaning . . . [21] . . . If there are two possible constructions, the court is entitled to prefer the

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23 *See* Chitty on Contracts, *supra* n. 3, at 12-111.

24 To establish such an estoppel, an implicit agreement must be manifested in their pattern of behaviour and interaction: *Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd.*, [1982] QB 84, 120, CA, *per* Lord Denning MR: 'So here we have . . . evidence of subsequent conduct to come to our aid. It is available-not so as to construe the contract-but to see how they themselves acted on it. Under the guise of estoppel [by convention] we can prevent either party from going back on the interpretation they themselves gave to it.'

25 *Antaios Cia Naviera SA v. Salen Rederierna AB*, [1985] AC 191, 201, HL, *per* Lord Diplock.

26 [1985] AC 191, 201, HL.

27 [1997] AC 749, HL (a majority decision concerning a rent notice); Paul V. Baker, *Reconstructing the Rules of Construction*, 114 LQR 55–62 (1998).

28 [2010] UKSC 47; [2011] 1 All ER 175, at [21].

29 [1998] 1 WLR 896, 913, HL.

30 *Rainy Sky SA v. Kookmin Bank*, [2011] UKSC 50; [2011] 1 WLR 2900.

> construction which is consistent with business common sense and to reject the other . . . [40] Since the language of [the relevant contractual stipulation] is capable of two meanings it is appropriate for the court to have regard to considerations of commercial common sense in resolving the question what a reasonable person would have understood the parties to have meant.

(5) And the Court of Appeal in *Procter and Gamble Co. v. Svenska Cellulosa Aktiebolaget SCA* (2012) emphasised that the *Rainy Sky* case is not a warrant for re-writing a contract to achieve a 'fairer result' (even assuming that this can be perceived). In the *Procter and Gamble* case Moore-Bick LJ said that where there is no ambiguity, the court should give effect to the contract's clear meaning.[31]

Interpretation by Re-construction of the Text:[32] The House of Lords in *Chartbrook Ltd. v. Persimmon Homes Ltd.* (2009)[33] held that a judge can 'construe' a contract by wholly recasting a relevant phrase or portion of a written contract when (i) it is obvious that the drafting has gone awry and (ii) it is also obvious, as a matter of objective interpretation, what was the parties' true meaning. Thus both ordinary interpretation principles and the doctrine of rectification can have the effect of revising a document. The safer course is for a party who is seeking a favourable judicial decision on a disputed written contract to plead both 'construction' (in the 'reconstructive' style just explained) and 'rectification' (summarised below).[34] There

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[31] [2012] EWCA Civ 1413, at [22], *per* Moore-Bick LJ: '[T]he starting point must be the words the parties have used to express their intention and in the case of a carefully drafted agreement of the present kind the court must take care not to fall into the trap of re-writing the contract in order to produce what it considers to be a more reasonable meaning. In my view the Agreement, considered as a whole, is not reasonably capable of being given two possible meanings.' Rix LJ added at [38]: '[W]illingly applying as I do the current understanding of contractual interpretation in English law, which has become increasingly open to the influences of considerations of factual matrix and purposive construction, I am unable to create an agreement which the parties might, or might not, have arrived at, had they thought of and discussed the problem which has overtaken them.' *On the facts of the Proctor & Gamble* case, the court held that the parties had agreed that the price for expensive plant would be in Euros, but the payment of such sums would be in pounds. The parties had not agreed a fixed rate of conversion of Euros to pounds. After formation, the Euro/pound exchange rate moved disadvantageously for the buyer. But the buyer could not show, whether by a process of interpretation, implication of terms, or rectification, that there was a consensus that Euros were to be converted to pounds at the rate (favourable to the buyer) prevailing at the date of the contract, as distinct from the subsequent dates of delivery. One of the commercial documents exchanged by the parties bore an annotation giving a rate of exchange applicable at that date. But this was not intended to impose a fixed exchange rate. It merely recorded a process of calculation made on the spot at that juncture of the parties' dealings. In the absence of a fixed currency provision, the adverse currency movement was to be borne by the buyer, and it was not the court's task to save that party from this economic result.

[32] *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 WLR 896, 912–913, HL (propositions (iv) and (v)).

[33] [2009] UKHL 38; [2009] 1 AC 1101; noted David McLauchlan (*see Commonsense Principles of Interpretation and Rectification*, *supra* n. 19, at 8–14).

[34] On this two-pronged approach *see* McMeel, *The Interplay of Contractual Construction*, *supra* n. 1, at 437–449; Buxton, *supra* n. 1, at 253; Burrows, *supra* n. 1, at 88 ff.

are many examples of the courts invoking this style of interpretation: *Holding & Barnes PLC v. Hill House Hammond Ltd. (No. 1)* (2001);[35] *Littman v. Aspen Oil (Broking) Ltd.* (2005);[36] *KPMG LLP v. Network Rail Infrastructure Ltd.* (2007);[37] *Springwell Navigation Corporation v. JP Morgan Chase* (2010);[38] *Pink Floyd Music Ltd. v. EMI Records Ltd.* (2011).[39]

Situations where Re-Construction is ***Not Available****:* Such a reconstruction will not be possible if:

(1) The only real complaint is that both parties have misunderstood the extent of the subject-matter: *Bashir v. Ali* (2011);[40] or

(2) where a clause is flawed but does not contain an inner solution: the Court of Appeal in *ING Bank NV v. Ros Roca SA* (2011)[41] held that it was not possible, on the facts, to apply the technique of 'reconstructive' interpretation to re-write a clause concerning an investment bank's 'additional fee.' Similarly, the task of reconstructing the text was declared impossible in *Fairstate Ltd. v. General Enterprise & Management Ltd.* (2010),[42] where the judge said:[43] 'the defects in the agreement recorded in the

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35 [2001] EWCA Civ 1334; [2002] L & TR 103.

36 [2005] EWCA Civ 1579.

37 [2007] EWCA Civ 363; [2007] Bus LR 1336.

38 [2010] EWCA Civ 1221; [2010] 2 CLC 705, at [132]–[140].

39 [2010] EWCA Civ 1429; [2011] 1 WLR 770 (Lord Neuberger MR and Laws LJ held that an agreement for exploitation of the 'records' of Pink Floyd could be construed as embracing digital recordings by the same band. To decide otherwise would run counter to the obvious commercial purpose of the transaction. However, Carnwath LJ dissented, finding there was no such obvious mistake).

40 [2011] EWCA Civ 707; [2011] 2 P & CR 12, at [39], *per* Etherton LJ: '[T]his is not a case . . . in which the wording used by the parties, on one construction, leads to arbitrary and irrational results.'

41 [2011] EWCA Civ 353; [2012] 1 WLR 472 (but the court was able to achieve a favourable outcome for the bank by employing the doctrine of estoppel by convention to take account of post-formation dealings: *see* [111]–[112], *per* Rix LJ, notably this passage at [111]: '[E]stoppel is a flexible doctrine which can take account of . . . the honest and responsible interaction of business parties to a contract. Where there is room for disagreement as to the meaning or effect of a contract but the parties have clearly chosen (or purported to choose) their own understanding of it and have dealt with one another on the basis of that understanding, whether that mutuality is found in a common assumption, or in acquiescence, or in one party's reliance on another's representation, the doctrine of estoppel allows the court in a proper case to give effect to the parties' objectively ascertainable and mutual dealings with one another.'

42 [2010] EWHC 3072 (QB); [2011] 2 All ER (Comm) 497; 133 Con LR 112 (Richard Salter QC, Deputy).

43 *Id.* at [94]: 'the defects in the agreement recorded in the Guarantee Form are so fundamental and extensive that they cannot sufficiently be cured, either by purposive construction, or by rectification, or by any combination of those approaches.' Guarantees require clarity, *id.* at [93]: 'it is particularly important that the Court should require clarity as to all (and not just some of) the material terms of the transaction in cases, such as the present, where it is asked to use its powers of purposive construction or of rectification to correct errors in the wording of a document which is relied upon to satisfy the requirements of the Statute of Frauds 1677 s 4. To do otherwise risks undermining the protection that the statute was intended to confer.' As for the creditor's claim that the purported guarantor was estopped (estoppel by representation by tendering the document) from denying the validity of the document, the

Guarantee Form are so fundamental and extensive that they cannot sufficiently be cured, either by purposive construction, or by rectification, or by any combination of those approaches.' (And rectification failed because there had been no clear prior consensus concerning the effect and scope of the guarantee.)

Court not to Overstrain its Powers of Interpretation: The courts must not illegitimately rewrite the contract if its meaning is clear and does not lead to commercial absurdity. Lord Mustill in *Charter Reinsurance Co. Ltd. v. Fagan* (1997) warned that it is illegitimate for courts or arbitrators to 'force upon the words a meaning which they cannot fairly bear', since this would be 'to substitute for the bargain actually made one which the court believes could better have been made.'[44] Similarly, Rix LJ said in *ING Bank NV v. Ros Roca SA* (2011):[45] 'Judges should not see in *Chartbrook Ltd. v. Persimmon Homes Ltd.* ([2009] AC 1101) an open sesame for reconstructing the parties' contract, but an opportunity to remedy by construction a clear error of language which could not have been intended.'

3. Rectification[46]

The Two Grounds: There are two separate grounds for rectifying written contracts: (1) common intention rectification based on a mismatch between the earlier outwardly manifested version of the transaction and the parties' finally agreed written terms; or (2) unilateral mistake, where party B has reprehensibly failed to point out to party A that the written terms of their imminent transaction will not accord with A's mistaken understanding concerning the contents of that written agreement. These two heads will now be taken in turn.

Common Intention Rectification: A contract can be rectified to bring a written contract into conformity with the parties' pre-contractual and shared understanding of its terms, provided (i) there is some outward manifestation of that understanding;[47] and (ii) the 'understanding' is ascertained and construed by resort to the objective method. It is not enough that both parties had mistakenly thought that they were dealing with subject-matter 'X' and so used that label throughout their dealings.

judge said, *id.* at [97]: 'it is hard to see why any signatory to a defective agreement of guarantee would not similarly be estopped. In that respect, the position here seems to me to be very similar to that considered by the House of Lords in *Actionstrength Limited (t/a Vital Resources) v. International Glass Engineering In.Gl. En. Spa* ([2003] UKHL 17; [2003] 2 AC 541), where the plea of estoppel was unanimously rejected.'

44 [1997] AC 313, 388, HL.

45 [2011] EWCA Civ 353; [2012] 1 WLR 472, at [110].

46 *See* Hodge, *supra* n. 3; Snell's Principles of Equity, *supra* n. 3, ch. 16; *see also* Andrews, Contract Law, *supra* n. 1, at 14.33–14.51; Chitty on Contracts, *supra* n. 3, at 5-110 ff.; Peel, *supra* n. 3, at 8-059 ff.; Smith, *supra* n. 3, at 116, especially 130 to end; McLauchlan, *The 'Drastic' Remedy of Rectification for Unilateral Mistake*, *supra* n. 3, at 608, especially 608–610, 639–640; Burrows, *supra* n. 1, at 77, especially 90 to end.

47 *Joscelyne v. Nissen*, [1970] 2 QB 86, CA.

If the written contract then records the subject-matter as 'X,' there is no scope for rectification because there is no mismatch between their outward prior consensus and the eventual written terms.[48] The court has no 'roving commission to do whatever it regards as fair in relation to a claim for rectification.'[49]

Need for an Unbroken Continuing Intention: If the earlier stage of the negotiations involves the parties agreeing a set of terms 'A, B, and C,' but the final version is a set of terms 'X, Y, and Z,' it might be clear that the parties have substituted for elements 'A, B and C' new elements 'X, Y and Z.' If that is the case, there should be no scope for rectifying the contract to restore the terms 'A, B, and C.' The simple reason for rectification being denied is that the parties have freely substituted new terms and agreed on those terms. It follows that rectification will be appropriate only if there has been a *continuing and unbroken intention to enter into a contract based on terms 'A, B, and C.'* On the facts just mentioned no such unbroken consensus exists and thus the final terms should stand: 'X, Y, and Z.' The need for the common intention to subsist in unaltered form arose in dramatic form in the *Daventry* case (2011),[50] a majority decision of the Court of Appeal (Toulson LJ and Lord Neuberger MR; Etherton LJ dissenting; and overturning Vos J). The surprising majority decision appears to conflict with the elementary process of negotiation just mentioned.[51] It will be disappointing if this troublesome decision survives. It cannot be right that English law should allow rectification to occur when, during the negotiations, there has been a clear break in the pattern of the relevant contractual language, and one party's preferred version has

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48 *Rose (Frederick E) (London) Ltd. v. Wm H Pim Junr & Co. Ltd.*, [1953] 2 QB 450, CA.

49 *Holaw (470) Ltd. v. Stockton Estates Ltd.*, (2000) 81 P & CR 404, at [41], *per* Neuberger J.

50 *Daventry District Council v. Daventry & District Housing Ltd.*, [2011] EWCA Civ 1153, at [210], *per* Lord Neuberger: 'it was being made clear by DDH. . . . that they were including a term whose effect was that DDC would pay the pension deficit, and, indeed, that this was consistent with clause 14.10.2, which had been included in the draft contract almost from the beginning.' Noted Paul S. Davies, *Interpreting Commercial Contract: A Case of Ambiguity?*, 2012 LMCLQ 26.

51 In the *Daventry* case the District Council [hereinafter DCC] successfully obtained rectification despite the fact that the opponent, a housing association [hereinafter DDH, had clearly introduced into the second phase of the negotiations a competing clause which unequivocally contradicted DDC's preferred version, and to which DDC, on legal advice, objectively appeared to assent by entering into the final written contract on DDH's preferred terms. Surprisingly, a majority of the Court of Appeal (Toulson LJ and Lord Neuberger MR) reversed Vos J. In the majority's opinion, the original version of the document, as found by Vos J, allocated the financial burden for the pension shortfall to DDH. During these early stages of the negotiation, DDH's main negotiator perceived that this wording might not be water-tight in favour of DDC, but he had not intervened to ensure that the parties focused specifically on this textual uncertainty. Toulson LJ, at [178], and Lord Neuberger MR, at [213] to [225], (the latter 'not without hesitation,' at [227]) held that the subsequent change, notably insertion of clause 14.10.3, initiated by DDH (this clause unequivocally placed the financial burden upon DDC), had not been clearly enough signalled to DDC. Therefore, objectively, in the majority's opinion, this change had not overtaken the preceding version. The majority reached this conclusion even though this final wording clearly contradicted the earlier version and even though this final version was available to be read by DDC's officials and their lawyers. But, with respect, Toulson LJ's and Lord Neuberger MR's decision is unconvincing.

manifestly prevailed (applying ordinary principles governing sequential negotiations). If the other party has failed to raise objection to this clearly contradictory new clause or new set of terms, and there is no finding of unconscionable dealing at this stage, the contract should proceed on these finally settled terms.

Unilateral Mistake Rectification: The general rule is that the court will not grant rectification simply to reflect one party's mistaken understanding.[52] However, the exception to this arises if party B is aware that party A is mistaken concerning the contents or meaning of the written terms. Where that exception applies, rectification is available, therefore. For this purpose, B will be 'aware' of the other's error in any of three situations: (1) if he had actual knowledge; or (2) was wilfully blind to an obvious fact; or (3) he wilfully or recklessly failed, contrary to the notion of reasonableness and honesty, to inquire whether there had in fact been a mistake.[53] Although it has been said that the law does not require proof of 'sharp practice,'[54] it seems clear that all three situations necessarily import a lack of good faith, or want of probity, on B's part.[55] Equity takes the view that, in situations (1) to (3), if B stays silent, B cannot take advantage of A's mistake: and that the contract can be rectified in A's favour.[56] This is justified on the basis of B's unconscionable, bad faith, or reprehensible acquiescence in A's error. This is a strong equitable intervention because the mistaken party achieves 'total victory:' a contract is recast to reflect his unilateral understanding, even though there was no shared understanding supporting this version of the contract.[57]

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52 *Riverlate Properties v. Paul*, [1975] Ch 133, CA.

53 *Commission for New Towns v. Cooper (GB) Ltd.*, [1995] Ch 259, 281 D, 292 F, CA; *George Wimpey UK Ltd. v. VI Construction Ltd.*, [2005] EWCA Civ 77; [2005] 2 P & CR DG5, at [79]; *Traditional Structures Ltd. v. HW Construction Ltd.*, [2010] EWHC 1530 (TCC).

54 *Thomas Bates Ltd. v. Wyndham's (Lingerie) Ltd.*, [1981] 1 WLR 505, 515 H, CA, *per* Buckley LJ: 'Undoubtedly I think in any such case the conduct of the defendant must be such as to make it inequitable that he should be allowed to object to the rectification of the document. If this necessarily implies some measure of "sharp practice," so be it; but for my part I think that the doctrine is one which depends more upon the equity of the position.'

55 *George Wimpey UK Ltd. v. VI Construction Ltd.*, [2005] EWCA Civ 77; [2005] 2 P & CR DG5, at [79].

56 *A Roberts & Co. Ltd. v. Leicestershire CC*, [1961] Ch 555, 570, Pennycuick J (noted Robert E. Megarry, 77 LQR 313–316 (1961)); *Etablissements Georges et Paul Levy v. Adderley Navigation Co Panama SA ('The Olympic Pride')*, [1980] 2 Lloyd's Rep. 67, Mustill J; *Thomas Bates Ltd. v. Wyndham's (Lingerie) Ltd.*, [1981] 1 WLR 505, CA; *Agip SpA v. Navigazione Alta Italia SpA ('The Nai Genova and the Nai Superba')*, [1984] 1 Lloyd's Rep. 353, 365, CA; *Commission for New Towns v. Cooper (GB) Ltd.*, [1995] Ch 259, CA (noted David Mossop, *Rectification for Unilateral Mistake*, 10 JCL 259–263 (1996)); *George Wimpey UK Ltd. v. VI Components Ltd.*, [2005] EWCA Civ 77; [2005] 2 P & CR DG5; *Traditional Structures Ltd. v. HW Construction Ltd.*, [2010] EWHC 1530 (TCC), at [25]–[31]; McLauchlan, *The 'Drastic' Remedy of Rectification for Unilateral Mistake*, *supra* n. 3, at 608–640 (who thinks this category of rectification has been misunderstood; although a first instance judge is not at liberty to reconsider this category of rectification because he is bound by Court of Appeal authority: *Traditional Structures Ltd. v. HW Construction Ltd.*, [2010] EWHC 1530 (TCC), at [32] and [33]; on this point, *see* Andrews, *supra* n. 1, at 14.47).

57 *Rowallan Group Ltd. v. Edgehill Portfolio No. 1 Ltd.*, [2007] EWHC 32 (Ch); [2007] NPC 9, at [14], *per* Lightman J: 'the remedy of rectification for unilateral mistake is a drastic remedy, for it has the result

Residual Status of Rectification: Rectification need not be invoked if the court can, as a matter of simple 'construction' (as explained in section II of this article), revise the relevant document. The latter is possible if (a) it is clear that the present wording makes no commercial sense, and (b) it is apparent how the document should be reconstructed.[58] But rectification is a doctrine of last resort in this respect. This doctrine applies only if other techniques, such as common law interpretation, or even the implication[59] of terms at common law,[60] do not yield a solution.[61]

'Explosion' of Rectification Litigation: Although, as just mentioned, rectification is a doctrine of last resort, there has been an 'explosion' of claims for rectification. This is attributable to these three factors: first, to the increasing complexity of commercial and other written contracts; secondly, to the tendency for successive drafts to be composed using the 'cut and paste' style of word-processing; the increasing length, multi-jurisdictional, and multi-partite nature of modern agreements; and, finally, to the richness of accessible electronic records of negotiations.[62]

Rectification and Evidence: The party seeking rectification must satisfy a high standard of proof, especially where both parties have been professionally advised.[63] Rectification admits much greater light into the process of illuminating the dark corners of the written text than the process of common law interpretation. When considering a claim for rectification, the court can admit extrinsic evidence, that is, evidence of discussion or documentary material outside the text of the written agreement. Thus rectification is an exception to the 'parol evidence rule' (this is

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of imposing on the defendant . . . a contract that he did not, and did not intend, to make.' Hodge, *supra* n. 3, at 4-90 to 4-93.

58 *Holding & Barnes PLC v. Hill House Hammond Ltd. (No. 1)*, [2001] EWCA Civ. 1334; [2002] L & TR 103; *Littman v. Aspen Oil (Broking) Ltd.*, [2005] EWCA Civ 1579; *Nittan (UK) Ltd. v. Solent Steel Fabrication Ltd.*, [1981] 1 Lloyd's Rep 633, CA.

59 On implied terms generally, *see* Andrews, *supra* n. 1, ch. 13.

60 *Holaw (470) Ltd. v. Stockton Estates Ltd.*, (2000) 81 P & CR 404, at [41], *per* Neuberger J, at [44] (if a point is so obvious that it goes without saying, the judge said that the appropriate doctrine is implied terms, rather than equitable rectification).

61 Snell's Principles of Equity, *supra* n. 3, at 16-002: 'Rectification will not be decreed if the desired result can conveniently be achieved by other means: by reliance upon common law rights, or by agreement between the parties.' Snell's Principles of Equity, at 16-009, also notes that the 'touchstone' for implied terms, including in the context of written contracts, remains a demanding matter of 'necessity,' as noted by Sir Anthony Clarke MR in *Mediterranean Salvage & Towage Ltd. v. Seamar Trading & Commerce Inc. ('The Reborn')* ([2009] EWCA Civ 53; [2009] 2 Lloyd's Rep 639, at [18]); on this case and its attractively sceptical reception of Lord Hoffmann's discussion in *Attorney-General for Belize v. Belize Telecom Ltd.* ([2009] UKPC 10; [2009] 2 All ER 1127, at [16]–[27], especially [21]), *see* Andrews, *supra* n. 1, at 13.15; *see also* McMeel, The Construction of Contracts, *supra* n. 1, chs. 10 and 11.

62 *See* Lord Neuberger MR, *Foreword* to Hodge, *supra* n. 3, at (vii).

63 *See James Hay Pension Trustees Ltd. v. Hird*, [2005] EWHC 1093 (Ch), at [81]; *Surgicraft Ltd. v. Paradigm Biodevices Inc.*, [2010] EWHC 1291 (Ch), at [69], *per* Christopher Pycroft QC (Deputy High Court Judge); *Traditional Structures Ltd. v. HW Construction Ltd.*, [2010] EWHC 1530 (TCC), at [34].

the special English rule governing written contracts – that evidence outside the written contract cannot be used by a party to vary, supplement, or contradict that document's contents).[64] And so the parol evidence rule does not restrict the process of discerning the parties' pre-contractual intentions and negotiations for the purpose of rectification.

Nor does an 'entire agreement' clause bar external evidence if that evidence is adduced during an application for rectification of a written contract. An 'entire agreement' clause is a stipulation in the main contract stating that the parties agree to exclude from their agreement any prior and external assurances or warranties or promises. It has been suggested at first instance that it would be inappropriate for the 'entire agreement' clause to exclude such evidence in this context because the function of such a clause is to bar resort to oral undertakings or satellite written assurances independently of the main written contract (prior or collateral promises). By contrast, rectification is invoked to show that the main contract does not record accurately the parties' true consensus.[65]

4. Appeals on points of interpretation or rectification[66]

If English law is applicable to the relevant transaction, interpretation of (wholly) 'written contracts' (including electronic documents)[67] is a question of law.[68] This means that (if permission to appeal is obtained – and permission is a requirement for an appeal in an English civil case)[69] an appellate court will have the opportunity to reconsider the lower court's view of the contract's effect[70] (or the point *might* be subject to appeal to the English High Court, namely the Commercial Court, from an arbitration tribunal, if the High Court gives permission).[71]

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64 Generally on this rule, *see* Andrews, *supra* n. 1, at 14.26 ff.

65 *See Surgicraft Ltd. v. Paradigm Biodevices Inc.*, [2010] EWHC 1291 (Ch), at [73], *per* Christopher Pycroft QC (Deputy High Court Judge); Snell's Principles of Equity, *supra* n. 3, at 16-008; Chitty on Contracts, *supra* n. 3, at 5-112.

66 On the system of appeal in English court proceedings, *see* 1 Andrews on Civil Processes, *supra* n. 1, ch. 15; on appeals from arbitral awards on points of English law, *see* 2 Andrews on Civil Processes, *supra* n. 1, ¶¶ 18.67 ff.

67 Chitty on Contracts, *supra* n. 3, at 12-048.

68 *Id.* 12-046.

69 CPR, pts. 52.3(1), 52.4(2).

70 *See, e.g.*, *AXA Reinsurance (UK) v. Field*, [1996] 1 WLR 1026, HL.

71 Arbitration Act, 1996, sect. 69 (England); scope for granting leave to appeal from an arbitrator's decision is constrained: *id.* sect. 69(3).

By contrast, appellate courts are generally reluctant to re-open findings of fact made by first instance courts (although the precise scope of appeals against matters of fact has become a complex field of procedure):

> [T]he approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the greater that advantage the more reluctant the appellate court should be to interfere.[72]

The 'advantage' is the lower court's monopoly (under modern practice) upon hearing live testimony.

High Court or appeal court decisions on interpretation of written contracts supply valuable precedent decisions on standard words or phrases in commercial documents. Those decisions will be binding on all lower courts, and on arbitrators applying English law.

As for the equitable remedy of rectification (*see supra* sect. 3), a leading textbook notes:[73]

> although the applicable principles underpinning rectification are a question of law, whether or not a particular instrument should be rectified is a question of fact; [whereas] the correct construction of a particular written contract is a question of law. Thus appeals concerning interpretation are much more common than appeals on the issue of rectification.

5. Concluding remarks

Modern English courts, and arbitrators applying English law, are no longer tied to the literal wording of the written contract, but can consider the parties' common intention against the background of the transaction. In the face of more than one possible meaning, it is legitimate for the courts to prefer a meaning which better reflects the commercial realities of the relevant contract or contractual clause.

English courts, and arbitrators applying English substantive principles, possess a liberal power to interpret a written contract so as to make new sense of it, provided it is objectively clear that it has been defectively written and provided also that its true meaning is obvious. This last condition must remain strict. The court should not engage in guess-work or creative re-drafting which is unsupported by the

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[72] *Assicurazioni Generali SpA v. Arab Insurance Group*, [2002] EWCA Civ 1642; [2003] 1 WLR 577, CA, at [15], *per* Clarke LJ.

[73] Snell's Principles of Equity, *supra* n. 3, at 16.11.

clear implication: 'this is what we truly intended and had agreed, although the final document has not intelligibly or accurately reflected this.'

English contract law does not allow reference to pre-contractual negotiations when interpreting written contract. To this last proposition there is a large exception when a party seeks the equitable remedy of rectification.

Appeal courts can review a first instance court's decision (or an arbitral tribunal's award where English substantive law has been applied)[74] on a point of interpretation if the relevant contract is wholly contained in writing. This is because interpretation of such a document is classified as an issue of law, as distinct from one of fact (findings of fact, if they turn on the trial court's appreciation of oral evidence, tend not to be disturbed on appeal). However, civil appeals, even concerning points of law, are not automatically available. An appellant must first apply to the first instance court or the relevant appellate court to give permission for an appeal to take place. If such permission is given, the appellate court can pronounce authoritatively on the point of interpretation.[75] The appeal court's statement of the relevant methodology for eliciting meaning will then be binding on the lower courts and upon arbitral tribunals applying English law. The meaning of the relevant written terms, at least in that immediate context, will also be binding. In this way English courts have constructed a rich stock of precedent decisions concerning standard phrases in commercial use. These decisions help to promote predictability.[76]

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[75] On the system of 'permission' for appeals in English court proceedings, *see* 1 Andrews on Civil Processes, *supra* n. 1, at ¶¶ 15.25 ff.

[76] McMeel (*see The Interplay of Contractual Construction and Civil Justice*, *supra* n. 1, at 438, n. 6) collects judicial statements in favour of commercial certainty, especially Lord Bingham in the *Homburg Houtimport BV v. Agrosin Private Ltd. ('The Starsin')* ([2003] UKHL 12; [2004] 1 AC 715, at [13]) and Lord Steyn in *Jindal Iron and Steel Co. Ltd. and others v. Islamic Solidarity Shipping Co. Jordan Inc. ('The Jordan II')* ([2004] UKHL 49; [2005] 1 WLR 1363, 1370).

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BASIC LAW AS AN INSTRUMENT FOR LEGAL AND SOCIO-POLITICAL TRANSFORMATIONS (TOWARDS THE 20TH ANNIVERSARY OF THE CONSTITUTION OF THE RUSSIAN FEDERATION)

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This paper is devoted to a new approach to understanding the role of the Basic Law in the life of society as a tool for managing major social and economic changes. Analyzing the distinctive features of the emergence, internal structure and functioning of the current Constitution of the Russian Federation, the author substantiates the assertion that 'the constitution is a way by which one social system gives rise to another social system.'

Key words: Constitution of the Russian Federation; state and law; constitutional law; constitutional models and processes; transformation processes; social order and social control; history of contemporary Russia.

The role of constitutions generally, and the Russian Constitution, in particular, is difficult to overestimate. A constitution provides the basis for the legitimacy of power. It is the core of legal consciousness and a pillar of civil society. The stability of the Basic Law is a guarantee of the political stability and successful development of any state. A modern constitution determines the fundamental principles underlying relationships within the individual – society – state system; it codifies the foundations of the political system, outlines the functions of the state, establishes the structure and relationships of public administration and governance bodies (the form of government), and – first and foremost – it provides the supreme legal guarantees of human and civil rights and liberties.

A constitution is not only a symbol and a supreme legal act. It is a living, operational, self-enforcing document that not only exists in a complicated and dynamic relationship with socio-political and legal reality but also directly affects the course of a country's contemporary history, determining the unique features of the new social system and state that have emerged from the chaos of change.

Even in the late 20th century the constitution was regarded as the legal implementation of the victory of the political class or as an expression of a kind of 'social contract' that captures the current state of affairs, consolidating the existing political landscape and the consensus of elites. At the turn of the 21st century, however, scholars became increasingly skeptical about the adequacy of such views. Now, specialists working at the interface of political theory and practice tend to arrive at the conclusion that in today's world the constitution, rather than being the codification of existing public consensus, is a special mechanism necessary for the construction of a new social order. In other words, it is little more than an instrument for managing social transformations.[1]

Seeing a democratic constitution as a self-enforcing act and an instrument for the management of profound social transformations is rather new to classical constitutional law. This approach, however, is effectively employed in political science, public choice theory, constitutional economics, and other humanities.

In recent years, the crisis of the so-called Washington Hypothesis[2] has seen a number of international projects implemented to find a correlation between the inner workings of democratic constitutions, their stability and their ability to provide the necessary conditions for the emergence and sustenance of new social orders.[3] Moreover, the analysis of the normative image of the 'new world' described in constitutions, comparison of the constitutional model with the social order actually created, and studies of the causes and effects of possible gaps between the planned and the factual, enable scholars not only to revisit the role of constitutions in the life of society but also to effectively link the abundance and diversity of empirical political science and sociological data with political theories explaining these data. This approach allows us to see the Russian Constitution at work and to determine its place and role in the large-scale systemic transformations of the late 20th to early 21st century.

One of the topical research themes at the interface of constitutional law and political science is the attempt to understand why some constitutions are capable

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1 *See, e.g.,* Barry R. Weingast, *Constitutions as Governance Structures: The Political Foundations of Secure Markets*, 149(1) JITE 286, 289 (1993); Susan Alberts, *Why Play by the Rules? Constitutionalism and Democratic Institutionalization in Ecuador and Uruguay*, 15(5) Democratization 849, 850 (2008); Daron Acemoglu & James A. Robinson, *A Theory of Political Transitions*, 91(4) The American Economic Review 938 (2001); Sonia Mittal & Barry R. Weingast, *Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century* (American Political Science Association 2010 Annual Meeting), available at <http://papers.ssrn.com/abstract_id=1643199> (accessed March 3, 2014) *etc.*

2 The Washington hypothesis (a kind of 'political dimension' to the standard package of macroeconomic reforms known as the Washington Consensus) is the idea that the globalization of liberal economy promotes the emergence and development of liberal democracy. For more detail, *see* Andrey Yanik, История современной России: Истоки и уроки последней российской модернизации (1985–1999) [The History of Contemporary Russia: The Origins and Lessons of the Latest Russian Modernization (1985–1999)] 214 (Contemporary History Fund – Moscow University Publishing House 2012).

3 *See, e.g.,* Comparative Constitutions Project, <http://www.comparativeconstitutionsproject.org> (accessed March 3, 2014), and its Resources for Constitutional Design.

of successfully transforming social reality while others, practically perfect in form and content, remain but lifeless and barren political artifacts. From this standpoint, analysis of constitutions adopted in situations of political conflict accompanying processes of systemic transformation of the state and society is of particular interest. As is well known, it is exactly in such a situation that Russia's current constitution was adopted.

In today's world, the fact that this document has not been born of the true consensus of elites is the norm rather than the exception. In any country going through a period of major socio-economic change there is an ongoing competition between different and sometimes directly opposite visions of the objectives of transformation, of a desirable future, of adequate state machinery and social relations, backed by various political forces. Therefore it is extremely important to understand which factors most affect the ability of a constitution born in such circumstances to ensure public consent and effectively implement the plan inherent in that constitution: is it the new Basic Law's inner workings or the 'surrounding landscape' (the concrete cultural and historical context)?

On the one hand, the words comprising the self-enforcing constitution are hardly endowed with a special magic force that can change the world by reciting aloud the correct constitutional formulas. Various projects comparing the formal characteristics of modern constitutions such as the total number of words in the texts of Basic Laws, the length of preambles, the ratio between substantive and procedural norms, *etc*.,[4] have identified some interesting facts and correlations,[5] but can hardly provide the answer to the question of what makes some constitutions capable of ensuring the sustainability of democratic regimes while others are not. Back in 1936, Edwin Samuel Corwin, the then President of the American Political Science Association, noted that the Constitution 'is not the cause, but consequence, of personal and political freedom; it grants no rights to the people but is a creature of their power.'[6]

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[4] *See* Tom Ginsburg, *Constitutional Specificity, Unwritten Understandings and Constitutional Agreement* (University of Chicago Law School Public Law and Legal Theory Working Paper No. 330), available at <http://papers.ssrn.com/abstract_id=1707619> (accessed March 3, 2014).

[5] For instance, according to Ginsburg, the shortest written constitution is the 1908 Constitution of Bhutan comprising only 165 words, and the longest is the Constitution of India, which has been amended many times and, together with its numerous amendments, is comprised of 117,820 words. The 1789 U.S. Constitution comprises 7762 words and formed the basis for a remarkably stable institutional construction, which suggests that the Americans prefer short framework constitutions. *See* Daniel J. Elazar, *Constitution-making: The Pre-Eminently Political Act*, in Redesigning the State: The Politics of Constitutional Change in Industrial Nations 232–248 (Keith G. Banting & Richard Simeon, eds.) (University of Toronto Press 1985); Christopher W. Hammons, *Was James Madison Right? Rethinking the American Preference for Short Framework Constitutions*, 93 American Political Science Review 837 (1999).

[6] Edward S. Corwin, *The Constitution as Instrument and as Symbol*, 30 American Political Science Review 1071 (1936), as cited in Ginsburg, *supra* n. 4, at 69–70.

On the other hand, if we agree that the successful implementation of ideas set forth in a constitution depends not so much on what is stated in the constitution as on what remains beyond the text – the ideas and values shared by society and its elites, established political customs and traditions, strategic and tactical agreements between the different political forces – then a question naturally arises: why do we need written constitutions in today's world?

The question of what comes first for a constitution to be effective – its design or socio-political context – is a rather rhetorical question similar to the chicken-or-egg dilemma posed by the Ancient Greek philosophers. It is obvious that both the well-designed text of Basic Law and the specific conditions for its creation and successful functioning are equally important. A 19th century iconoclastic English author Samuel Butler, however, proposed an original solution to this problem, having stated that 'a hen is only an egg's way of making another egg' (Samuel Butler, Life and Habit 134 (Trübner 1878)). Following this logic, it would not be a gross overstatement to say that a constitution is one social system's way of making another social system.

However, for a new social system to be sustainable, a self-enforcing constitution ought to be effective and stable. Therefore one of the topical problems currently occupying the minds of not only constitutional theoreticians but also political practitioners is identifying the external and internal factors on which the lifespan of self-developing constitutions is predicated. Contemporary American researchers who study problems of correlation between constitutional design and the written constitution's longevity sadly conclude that 'Most democratic constitutions fail to endure. The estimated half-life of a democratic constitution adopted between 1789 and 2005 is just sixteen years.'[7]

As is well known, in December 2013, the current Russian Constitution will celebrate its 20th anniversary. The very fact that the current Constitution of the Russian Federation is the second in longevity among all Russian constitutions[8] indicates its effectiveness and stability, making it an exceptionally interesting object for comparative legal and political science studies.

It is of particular interest for researchers that the 1993 Russian Constitution was born in a situation of escalating political and economic crisis, the slowing of reforms, and a split among elites competing for 'command heights' in the new state and for the right to determine the strategy for the further development of society. In such a context the drafters of the Basic Law faced a difficult task. They had to find

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[7] Susan Alberts et al., *Countermajoritarian Institutions and Constitutional Stability*, <http://www.law.yale.edu/documents/pdf/LEO/LEO_Weingast.pdf>. *Editor's comment*. The source cited by these authors states that since 1789 the average constitutional lifespan has comprised of 17 years. *See* Thomas Ginsburg et al., *The Lifespan of Written Constitutions*, Alumni Magazine, Spring 2009, available at <http://www.law.uchicago.edu/alumni/magazine/lifespan> (accessed March 5, 2014).

[8] Among the Russian constitutions, the 1937 Constitution of the RSFSR ranks first in longevity, having existed until 1978.

a practical answer to a question: how to design a constitution capable of facilitating the restoration of public consent and, at the same time, serve as an effective tool for the transformation of the socio-economic system – or in other words, effectively work – in a situation of societal schism?

A general conceptual approach to tackling this task was quite obvious: the new national act of supreme legal force was to become a nucleus for the crystallization of order in the chaos of an era of change. Therefore the new constitution had to be of a skeletal nature so that, when immersed in a supersaturated 'social solution,' a durable framework of key ideas and principles would provide the support required for the growth of a new structure. To ensure the durability of the new Constitution, special constructive elements were built into the body of the Basic Law to preserve its viability and stability in spite of possible fluctuations in the external environment.

To sum it up, this conceptual approach was implemented as follows.

First, a number of ideas and principles of equal importance to all citizens regardless of their political views were embedded in the new Russian Constitution: acknowledgement of the supreme value of the human being, individual rights and liberties; the political stability and territorial integrity of the country; the social and secular nature of the State; elected public authorities and local self-government; respecting the cultures and traditions of all ethnicities comprising the multiethnic people of Russia; ideological diversity and political plurality; and equal recognition and protection of all forms of ownership including private ownership. Having enshrined these and many other fundamental provisions, the Constitution had thus laid the necessary ideological foundation for public consent because it incorporated the ideas and principles equally shared by conservatives, communists and democrats.

Second, in a situation characterized by acute conflict and impossibility of achieving consensus, a special technology was employed to tackle problems, whereby instead of focusing on the points at issue, algorithms for consensus seeking were captured. These algorithms did not depend on the nature of the conflict and were essentially neutral.

On this basis, the Constitution was written as a short and a largely procedural document. As such, it is not instructional in nature and does not offer ready answers to the questions that objectively arise (and they did arise!) in the course of building a new state and policy. Rather, it describes the process and procedures that are to be used in tackling problems that arise. In particular, the Constitution contains the rules and procedures to follow in case of a conflict between the branches of power or between the federal center and the regions.

Third, and obviously most importantly, the Basic Law was designed in the image of a desirable future rather than a reflection of the situation existing at the time it was adopted. Thus, from a historical standpoint, the Constitution was not the cause of changes. It played the role of an organizing principle. On the one hand, the Constitution set boundaries for the untamed element of public creativity, having confined it within

a rigid corridor of available existing political and legal options. On the other hand, it set forth clear motion vectors and strategic objectives for the development of the state and society to be implemented through concrete legal acts, decisions and actions.

As a result, from a historical and political standpoint, rather than being an ideological declaration, the new Constitution became a cohesive and, crucially, legally-enshrined nationwide project of building the new Russia.

Analyzing the meaning and importance of the 1993 Constitution, it is important to take into account the dynamics of changes in how this document was seen in the context of concrete historical realities. The historical era in which the new Russian Constitution was created is receding further into the past. The details of those dramatic events that influenced the development of the conception and drafting of the text of the Basic Law are practically erased from the memory of contemporaries. At the same time, both in our country and abroad, new scientific theories were being actively developed, our practical knowledge base was expanding, and views and expert judgments were changing. From the height of the accomplishments of modern legal and political science, many of the discoveries and truly creative solutions of twenty years ago seem to be almost obvious. First and foremost, we refer to the attitude towards the Constitution as a tool for managing social change.

It is important, however, to keep in mind that twenty years ago this scientific baggage and such approaches did not exist. In the early 1990s, ideas about the design and function of Russia's Basic Law originated not from desktop research or mathematical calculations. They were the result of lively and creative legal work and political art. In a situation of profound political conflict, a unique constitutional act was created that contained, in compressed form, the models of the new social order. It was able not only to implement and deploy these models in the real world, but also to become the foundation for restoring public consent.

Constitutions capable of reshaping reality in the intended direction in spite of an absence of political consensus in the country and the temporary weakness of state institutions are now called self-enforcing constitutions.

It is also distinctive that the 1993 Constitution was the first constitutional act in the history of our country that, despite numerous initiatives, was not amended after a new leader came into presidency in 2000. As emphasized by the President of the Russian Federation, Vladimir Putin, during his meeting with RF Constitutional Court judges on Dec. 12, 2012,

> Basic Law . . . is a living instrument but, at the same time, its fundamental pillars must be treated with great care. Basic Law ought to be stable. And it is this very stability that comprises a significant part of the stability of the state itself and of the basic rights and liberties of the citizens of the Russian Federation.[9]

[9] *See* the speech of the President of the Russian Federation, Vladimir Putin, at the meeting with the RF Constitutional Court judges on Dec. 12, 2012, <http://www.kremlin.ru/news/17119> (accessed March 5, 2014).

This position has deep philosophical and, at the same time, practical implications. A necessary condition for the transition to a post-industrial society and knowledge-based economy is reawakening the people's internal motivation for the maximum realization of their creative potential. For such a mechanism of creative self-development to finally begin to work, requires special preconditions – the condition of freedom that, as noted by 1998 Nobel Prize winner in economics, Amartya Sen, must be understood as not only as the guarantees of human and civil rights but also as freedom from poverty and violence, from the scarcity of economic opportunities and systematic social deprivation; from the abandonment of public services and the intolerance or excessive intervention of repressive agencies.[10]

Such special conditions do not emerge all by themselves and they do not exist in a vacuum. Strong state institutions and an effective legal system are needed to create, develop and preserve such conditions. The experience of the last decades of the 20th century has convincingly demonstrated that real freedom is only possible in an effectively functioning state with a stable constitution. Today, in practically every sustainably developing (meaning constantly changing) country, the adaptability of the legal system and the creativity of political practices coexist with the stability of currently effective Basic Law.

Nevertheless, discussions over the need to revisit Basic Law, which started after the adoption of the 1993 Constitution, continue to this day. Such ideas circulate not only among political and expert communities but also among the wider public. Long-term studies conducted by the Russian Public Opinion Research Center (WCIOM) consistently produce similar results year on year: less than $^1/_5$ of the population have read the Constitution of the Russian Federation but almost half of respondents believe that it must be changed.[11]

Such moods create risks for both the stability of the Constitution and overall political stability since 'the dilution, the loosening of Basic Law implies a forerunner for the dilution and loosening of the state itself.'[12] Generally speaking, a propensity to think that the only way to counter the imperfections of life – from corrupt public officials to a boiler that freezes every winter – is to immediately amend the country's Constitution is indicative of adolescent black-and-white thinking rather than of Basic Law weaknesses.

In contrast to the general public, which tends to be emotionally judgmental, experts in the field substantiate their attempts to push constitutional reform with various theoretical arguments. One often hears that it is the fact that practically

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[10] For details, *see* Amartya Sen, Development as Freedom (Oxford University Press 1999).

[11] *See, e.g.,* Russian Public Opinion Research Center (WCIOM), Конституция России: менять или не менять? [The Constitution of Russia: To Change or Not to Change?], Press-release No. 2186 (Dec. 2012), <http://wciom.ru/index.php?id=459&uid=113463> (accessed March 5, 2014).

[12] *See* the speech of the President of the Russian Federation, Vladimir Putin, at the meeting with the RF Constitutional Court judges on Dec. 12, 2012.

any modern reality can fit within the framework of the current Constitution that comprises its main weakness. That there is too much 'space' in the text of Basic Law, *i.e.* too much latitude, too much freedom for political improvisation.

You can never have 'too much' freedom. In fact, attempts to turn the Constitution into a bureaucratic instruction that would regulate in detail every step to the left or to the right are only indicative of the immaturity of the ruling class and civil society. In an advanced democracy, mature elites can comply with principles and laws regardless of how severe the sanctions for non-compliance are.

There are other circumstances that from time to time provoke modern elites and society to call for a revisiting of currently active constitutions on the pretext that it is necessary to make them more specific and less ideologized.

One such circumstance is the global spread of information technologies and the cultural paradigm of scientific rationality typical of the Western world. According to Max Weber, a classic of German sociology, it is the formal rationality inherent in this civilization that could be one of causes of the emergence of science, advanced legal systems, bureaucratic organization and capitalism in the West.[13]

George Ritzer, an American sociologist, has thus formulated the main features of formal rationality in the West:

(1) emphasis on quantification;

(2) propensity for effectiveness;

(3) search for predictability;

(4) tendency towards replacing humans with machines; and

(5) seeking control over uncertainty.[14]

Thus, the spread of fashion for effective management and the desire to prevent uncertainty and control every possible risk including those associated with lively socio-political creativity provokes the bureaucracy's desire to make the current Constitution 'more specific.'

Another, no less important circumstance is society's desire to protect itself with the letter of the Constitution from those bureaucratic actions that are inconsistent with the constitutional spirit (which returns us to the argument that mature elites are capable of adhering to principles and agreements regardless of legal sanction).

The practical implementation of the basic liberal democratic principle that 'everything which is not forbidden is allowed' led to unanticipated consequences, which dictated the need for special mechanisms to limit potential 'excesses of freedom.' This greatly extended the scope of application of risk management technologies while the degree of detail in agreements, contracts and legal acts began to tend towards infinity.

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[13] Max Weber, *Протестантская этика и дух капитализма* [*The Protestant Ethic and the Spirit of Capitalism*], in Max Weber, Selected Works: Translated from German (Yury Davydov, ed., Piama Gaidenko, foreword) (Progress 1990).

[14] George Ritzer, Sociological Theory 139 (McGraw-Hill 1992).

Thus, in 1995, the text of the federal law on the election procedure for the Council of Federation of the Federal Assembly of the Russian Federation comprised 700 characters only, while the currently effective law (the edition as of April 2, 2013) amounts to more than 25 thousand characters. While in 1995 legislators used little more than 17 thousand words (17,290) to regulate the State Duma election procedure, the current federal law comprises almost 58 thousand words (about half a million characters).[15] At the same time, this is not to say that the number of criticisms or complaints about the elections has declined.

Aside from this, the fashion for libertarian ideas that from time to time emerges in Russian public discourse (particularly, the view of the constitution as a social contract) also provokes the general public to advocate for more detailed regulation of relationships with the state in an updated constitutional act.

Indeed, comparative analysis of more than 300 written constitutions conducted by American researchers suggests that the closer to the present day we get, the longer and more detailed the constitutions become.[16]

Paradoxical as it may seem, however, the constant elaboration and improvement of constitutional acts makes them increasingly more unstable. In their large-scale comparative study, Thomas Ginsburg, Zachary Elkins, and James Melton found that before World War I the average constitutional lifespan comprised 21 years and that after the War this had decreased to only 12 years.[17]

The problem may possibly be that reality can pose more unexpected and creative challenges than the most sophisticated experts could ever foresee. It was noted by the aforementioned G. Ritzer that one of the objective consequences of the triumph

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[15] Federal Law, О выборах депутатов Государственной Думы Федерального Собрания Российской Федерации [On the Election of Deputies to the State Duma of the Federal Assembly of the Russian Federation], May 18 2005, No. 51-FZ, 2005(90/91) Парламентская газета [Parliamentary Gazette]; Federal Law, О внесении изменений в отдельные законодательные акты Российской Федерации в связи с повышением представительства избирателей в Государственной Думе Федерального Собрания Российской Федерации [On Making Amendments in Certain Legislative Acts of the Russian Federation in Connection with Increased Voter Representation in the State Duma of the Federal Assembly of the Russian Federation], 2009(25) Парламентская газета [Parliamentary Gazette].

[16] *See* Ginsburg et al., *supra* n. 7.

[17] *Id.* Authors also state:

> Interpreted as the probability of survival at a certain age, the estimates show that one-half of constitutions are likely to be dead by age 18, and by age 50 only 19 percent will remain. Infant mortality is quite high – a large percentage, approximately 7 percent, do not even make it to their second birthday. Also, we see noticeable variation across generations and across regions. For example, Latin American and African countries fit the joke of the French-constitution-as-periodical much better than does France itself. Our current analysis suggests that the mean lifespan in Latin America . . . and Africa is 12.4 and 10.2 years, respectively, with 15 percent of constitutions from these regions perishing in their first year of existence. Constitutions in Western Europe and Asia, on the other hand, typically endure 32 and 19 years, respectively . . . Finally, unlike the trend of improving human health, the life expectancy of constitutions does not seem to be increasing over the last 200 years.

of formal rationality is the constant emergence of irrational and unforeseen effects. The modern expansion of over-regulation and political risk management therefore begets its own opposite – the emergence of unanticipated challenges for which political elites may find themselves unprepared, especially if they have lost their ability to adequately act in crisis situations in line with the challenges and adhering to principles rather than complying with regulations only.

It is believed that, with the advancement of science and the adoption of innovative technologies, public administration becomes increasingly effective all by itself. Experience has shown that this assertion is rather debatable. On the one hand, many new social instruments, technologies, and approaches have indeed appeared that allow for an improvement in both our 'informational armament' and our understanding of current socio-political and economic processes. On the other hand, one of the decision-making paradoxes is the fact that one can only be 100% sure of the success or failure of a chosen strategy only after this strategy has been implemented.

Therefore, in spite of any preliminary debate, discussion and consideration regarding which alternative might be the most successful, a final decision is always a voluntary choice made in a situation of incomplete information (indeed, the 1993 Russian Constitution was nothing but such a voluntary choice). Moreover, the very idea that, with the growth of information about the external world, such voluntary choices can become increasingly 'objective' contains an inherent trap.

Neither an elaborate constitution, nor detailed regulations, nor large information systems can create for a decision-making leader a comfortable situation of Aristotelian logic where one has to choose between true and false – in other words, between right and wrong – and the experts and procedures are on hand to help one to do so. On the contrary, in a modern, complicated world one has to choose from several alternatives which, with a certain degree of probability, can be right (successful) under one frame of reference and, with a certain degree of probability, wrong (unsuccessful) under another frame of reference. In such situations, choice always implies risk. This is why the underside of any political or economic decision is the acknowledgement by the politician or the expert of their personal responsibility both for their choice and for its consequences.[18]

The experience of constitution building during Russia's era of change is interesting not only from the standpoint of history or theory. It demonstrates how certain decisions concerning the design of the new Russian Constitution and, hence, the model of a desirable future and strategy for the further development of our country where made – that is, in what historical context and what circumstances were taken into account. This experience is extremely topical for contemporary practices of social

[18] For more details, *see* Svetlana Popova et al., *Измерения прогресса* [The Dimensions of Progress] 272 (Nauka 2010).

change management, both during periods of stability and in the times of crisis and upheaval.

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CIVIL JUSTICE SYSTEMS AND CIVIL PROCEDURES IN A CHANGING WORLD: MAIN PROBLEMS, FUNDAMENTAL REFORMS AND PERSPECTIVES – A EUROPEAN VIEW

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Whilst the article will address the problems and reforms of civil procedure and the law relating thereto, its principle consideration focuses on issues surrounding reform problems among present and future 'civil justice systems' in Eastern and Western Europe as a whole. This consideration will not simply concentrate on mere single 'tendencies,' trends or shifts of civil procedural developments, but on the reform processes of justice systems. These processes have transpired to be strong, actual, and occasionally observable globally. They are in part similar and in part different, and are really fundamental movements towards reform of civil justice systems in Eastern and Western European nations. Although this report concentrates on the present situation in Europe, similar and even the same situations can also be found in other parts of the world.

Key words: reform movements of civil justice systems; electronic civil justice; international civil justice; civil justice systems of the future.

1. General characteristics of civil justice systems as criteria for comparison

To enable the critical analysis and comparison of Eastern and Western, mainly European, civil justice systems, four aspects or criteria will be highlighted which act as main sources of problems and even crisis, as well as indicators for reform movements addressed later in this paper. These four criteria are:

1) *power* (including authority, autonomy, independence, influence, acceptance, trust, *etc.*);

2) *volume* (including size, resources, personnel, units, facilities, *etc.*);

3) *structure* (including organization, construction, diversification, specialization, *etc.*);

4) *efficiency* (including management of workload, work-rates, disposal of cases, duration, expenditure, costs, *etc.*).

When we look at the entire scope of different present-day justice systems, particularly in Eastern and Western Europe, we generally find, in accordance with these four characteristics, on one end of the spectrum a number of very strong, large, diversified and efficient systems, whilst at the other end a number of very weak, small, simple and inefficient ones; meanwhile, many systems are also located between these two poles. Among the group or block of nations with, in short, rich justice systems belong, in the opinion of the author, the majority of Western European nations – those being so called 'developed countries' or capitalist countries. To the group or block of countries with justice systems that remain impoverished belong a series of Eastern European nations which are so called 'developing countries,' 'countries in transition' or 'countries in conversion.' Among these states are particularly those still struggling to overcome a communist or socialist past, one-party regimes, and dictatorships or military juntas – nations that will not be named by the author so as not to embarrass. Nevertheless, I may remark, that at least some Eastern European newcomers to the EU, as well as some of those states on the waiting list, continue to suffer from comparatively very poor justice systems.

Regardless, we also have to recognize that at the extreme of the spectrum on the side at which developed countries are located, we can find some justice systems that are not only powerful but overpowered, not only voluminous but oversized, not only well structured but over-complex, and last but not least, not only heavily loaded with cases but overloaded – though they remain nevertheless efficient.

For such a '*hypertroph*' justice system, my own country, the *Federal Republic of Germany*, is a good example of bad development. To illustrate this, just some figures have been taken from the official statistics.

State organization: A federal republic consisting of 16 States.

Population: c. 83 million.

Courts: A Federal Constitutional Court with 2 senates, a Federal Court of Justice (Ordinary Jurisdiction with 10 senates for civil cases, 12 senates for criminal cases and more senates for other cases), as well as a Federal Labor Court, a Federal Administration Court, a Federal Social Court, a Federal Financial Court and other federal courts. Furthermore, there are 15 State Constitutional Courts, including ordinary courts; 675 local courts with numerous departments; 116 district courts with 1,521 chambers for civil cases and 1,618 for criminal cases; 25 higher district courts with 485 senates for civil cases and 94 senates for criminal cases; as well as many labor, administration, social, and financial courts, in addition to more courts on different levels and with different instances.

Jurisdictions: Federal Constitutional Jurisdiction, State Constitutional Jurisdiction, Ordinary Jurisdictions divided into civil, criminal, family,

and voluntary jurisdictions, as well as a labor jurisdiction, administration jurisdiction, financial jurisdiction, social jurisdiction and many others.

Officials and Professionals: 20,395 federal and state judges, 5,106 prosecutors, nearly 9,000 notaries and other judicial personnel, and about 140,000 lawyers.

Workload: The annual filing of civil cases with civil courts (excluding family cases before the family courts) is composed of the following: first instance cases before local courts number about 1.5 million, with about the same number of disposals; incoming first instance civil cases before district courts number around 42,600 cases, with nearly the same number of disposals; numerous appellate proceedings for civil cases are initiated before district courts, higher district courts, and the Federal Court of Justice; about 12 million payment-order proceedings at local courts and millions of cases in the realm of voluntary jurisdiction, provisional legal protection, execution procedures and others are also filed.

Having such enormous justice machinery and a large and mighty judiciary, at the top of which sits an immensely powerful Federal Constitutional Court, it is understandable that some scholars look at the German Judicial system (normally called the 'third power,' though nowadays the 'first power') as stronger than the Executive and the Legislature for many reasons and in many respects. No wonder therefore that Germany, known throughout the world as a 'rule-of-law-state' ('Rechtsstaat'), is nowadays criticized for being a 'justice-,' 'judges-,' or 'judicial-state' ('Justizstaat', 'Richterstaat', 'Rechtsprechungsstaat').

On the opposite edge of the range of justice systems, with all their similarities and divergences, there remain a few systems that can only hardly, if at all, be called a 'System of Justice' or a real 'third power' in the true sense of these words and/or from a democratic understanding. This mainly holds true for those systems that are not only small in respect of personal resources and office facilities, not only simple in their organization and diversification, not only ineffective in the number of incoming and disposed cases or the duration of proceedings. This holds true also for those systems that are – and this is their most severe deficit – extremely weak because they are not esteemed nor accepted, are scarcely used by the people, and in particular because these so called 'third powers' are dependent on the government/executive or authoritarian rulers and because in the worst cases their judges and courts are corrupt.

2. Main reform movements

Such a situation of judicial poverty on one side and of judicial richness or even luxury on the other has led and still leads to just opposite reform movements.

2.1. (Re-)Construction vs. destruction of civil justice systems

Among one block of nations we can observe more or less evident reform intentions and efforts expressly directed at revising the existing justice system or, more simply, to the totally new *construction* or *re-construction* of national justice administration and court establishments which strive to be more powerful and independent, larger, more diversified in respect of jurisdictions, courts and competences and, as a result, more effective judiciaries. The concrete results of such developments can be seen in enrichments among traditional ordinary jurisdictions (containing sometimes only a civil and criminal branch) by voluntary, family, labor, administrative and/or constitutional jurisdictions and courts, newly equipped with an increasing number of scientifically educated, practically trained, legally qualified and upright judges, lawyers or other legal professionals, those nations have been lacking of before.

Whilst we can observe here a so-called '*set-up*' of judicative, procedural and professional facilities we can see in the other block of nations an opposite move, a so called '*cut-down*' in judicial installations and procedural establishments, marked by catch words and goals like 'lean justice,' 'lean procedure,' and the 'rationing,' 'rationalization' or 'economization' of legal services, or its 'reduction,' 'centralization,' 'concentration' or 'simplification.' In short: in these countries the overwhelming tendency is respectively towards retrenchment, which occasions a *destruction* of civil justice systems.

For this development my own country, Germany, is again an illustrative example. Here, this quite fundamental, destructive and consequently constitutionally questionable reform movement is not only still heavily debated and the subject of much contest, but has partly already been realized. Under discussion or already in force are, for example, replacements for fully-fledged procedures for speedy, petty, mini or small claims trials; the promotion of simplified, summarized or concentrated procedures; the abolition or combination of jurisdictions, judicial branches, courts and competences; the cut-off or limitation of appeal-instances; the replacement of panels by judges sitting alone; and – most importantly – an aggravation of constitutionally guaranteed open access to state justice by new mandatory non-state and out-of-court pre-trials, as well as by further official demands for using so-called 'alternatives' to traditional state conflict resolution facilities. This leads to the next obvious reform movement.

2.2. Nationalization vs. privatization of civil justice systems

In some nations among the above-mentioned judicially poor countries state powers are trying hard to get control over an uncontrolled 'wild growth' of dubious, even criminal, types of private justice and self-help or private, professional help to self-help (including tribal justice, folk justice, mafia justice, gang justice, *etc.*). Moreover, such states have started to legalize, regulate and control certain forms of the so-called Alternative Dispute Resolution (ADR), whilst simultaneously offering 'better justice' via an increased state judiciary. All these phenomena are indications

for a *nationalization*, including the legalization and legal control of what were formerly private – whether permitted or not – forms of conflict resolution.

Again we can find a just opposite development among judicially rich countries, *i.e.* a presently strong movement towards *privatization* of parts of former purely state civil justice services, particularly in those nations where the state judiciary suffers heavily from an overload of work.

In the view of most government officials, justice reformers, ministries of justice and high ranking judges, responsible for court administration and management, the 'main evil' of the state judiciary and court procedures is to be found in the aforementioned *overload* of the courts. This has turned out to be the main reforming impulse, the motor and rotor of all new and recent legislative reforms the area of judicative law and procedure law. This overload raises the question of how to manage it, leading to the consideration of best strategies. There are four such strategies under discussion: maximizing, optimizing or minimizing the state offer of legal services on one side or steering, damping down, diverting or absorbing the immense public demand for legal services on the other. About the substitution or complementing of a state's judiciary and court procedures using so-called ADR, *e.g.*, through non-state or out of court conflict resolution instruments, like conciliation, negotiation, mediation and arbitration; we are all well informed. There is therefore no need for further explanation in this regard about the initiation and legitimation, roles, functions, advantages and disadvantages, *etc.* of such an approach.

This ADR-movement has already existed for some decades in Europe and continues to increase, being certainly the most important, though not the only, indicator of the privatization of state justice.

Forms of 'outsourcing' what have formerly been state duties and fields of work is also under discussion or has already been realized, not only in the area of state administration, such as the executive, but also in adjudicative areas, like private pre-trials or post-trials preceding or following a main state trial, as well as private police, private prisons, intra-trial and extra-trial private facts-discovery and proof-taking, the private execution and enforcement of court decisions by private bailiffs and marshals or private debt-collection companies, inkasso bureaus and, in some cases, even by criminal gangs and so called 'black sheriffs,' specialized in money-collection using criminal methods.

Nevertheless, there is insufficient time to discuss this obvious withdrawal of the state from the exercise of state powers vis-a-vis its traditional duties and responsibilities.

2.3. Electronification as formalization of civil justice systems

Caused by the above-described miseries of justice systems in East and West and boosted by the turn of the millennium and an upcoming atmosphere of a totally 'new era in the history of mankind,' there is another tendency worth mentioning. This

tendency can be referred to by the term '*modernization*.' It is a term most likely to be used by ministries of justice, legislators and politicians and is also found as slogan or goal used in many justice reform projects, being a declaration about how to make judicial administration more effective and court proceedings 'speedier, cheaper, and better' or more attractive for the people. However, when we look behind this term, there is mostly not much more to detect than the mere recently planned or already practiced introduction of so-called 'modern media' or tele-techniques, like tele-information and telecommunication, to improve only the bureaucratic and organizational side of justice administration and the technical, operational or processing side of court management and court procedures.

This tendency, which I will call '*electronification*' in accordance with often used abbreviations like 'e-justice,' 'e-procedure,' 'e-law, '*etc.*, is also named 'technicalization,' 'virtualization,' 'digitalization' or 'computerization.' These terms are used to denote an ongoing permeation or infiltration of the antiquated judicial administration, old fashioned court office equipment and outdated procedural operations by the installment of new media and its possibilities.

When one looks particularly at new 'e-procedural law' or 'e-justice administration law' (like, for example, the new German Judiciary Modernization Act of 2003 or the German Judiciary Communication Act of 2003) or at new splinters of scattered single 'e-norms,' that have just been slipped over certain provisions in old Codes of Procedural Law (like, for example, the German Code of Civil Procedure of 1877), one gains the impression, that all these legislative novelties offer little more than a new format. This is, in the first place, the '*electronic form*,' replacing or augmenting the traditional mainly '*paper form*' – respectively, the '*written form*' or '*text form*.' Meanwhile, the substantive content, action, reactions and interactions or working processes behind these laws remain unchanged.

As with all formats, the electronic format has the function of preserving and conserving its content. This means that exactly that reform movement that sounds like it is the most progressive, is in reality an utmost *conservative* one as long as so called modernization is concerned with little more than a purely new format. It is to this extent a mere '*reform of the form*,' and not a '*reform of the content*.'

This substitution or enrichment of the mainly traditional written form by the new electronic form, particularly in the field of information and communication, finds its expression for example in e-registers, e-files, e-documents, e-signatures, e-databanks or e-mails. This allows us to describe this as an 'exchange' of one 'data storage media' by another.

In other words: the official and almost euphorically and emphatically praised so-called 'modernization of justice' by new media often means little more than replacing or augmenting the conventional form of actions, reactions and interactions of procedural or administrative working processes, which all over Europe remains the '*paper form*.' This form finds, for example, its expression in procedural law vocabulary

using words like 'register,' 'catalogue,' 'list,' 'document,' 'signature,' 'booklet,' 'docket,' 'writs,' 'file,' 'paper,' 'binder,' 'index,' 'certificate,' 'transcription,' 'copy,' 'protocol,' 'record,' *etc*. Compared with this traditional paper form the electronic form presents itself in part as a 'step-up' from the conventional paper form or as a 'hybrid.'

Moreover, in some countries also another electronic form is being prospected or under construction. This is namely the – up to now still imperfect – supplementation of in-court 'live' oral communications and negotiations with 'virtual' audio-visual transmissions of motion-pictures and sounds into a courtroom (*video conferences*).

All this allows 'modernizers' to appear simply to be 'formalizers,' concerned almost only with forms and not with content, which itself urgently needs to be reformed. To briefly illustrate the indisputable need for such 'material' or 'substantive' justice-modernization it must suffice to highlight that business-accountants and management-consultants chartered by the German Ministry of Justice to analyze the present judicial realities, have been extremely shocked by the circumstantiality, intricateness, formality, heaviness, slowness, costliness and complicatedness of traditional court management and court proceedings, as well as the immense waste of time, manpower and money incurred.

These factual deficiencies are mainly occasioned by widely inflexible and obsolete legal over-regulation in contemporary judicature acts and procedure codes, which – at least in Western Europe – often stem from the 19th century. Moreover, if later emended, enacted or imported by one nation from another, such acts remain pedominatly deeply rooted in their own or in a foreign legal history, gluing on old patterns. In sum, such codes are, perhaps with the rare exception of faintly modernized newer codes, outdated, retrospective and past-orientated. Truly 'modern,' *i.e.* updated, prospective and future-orientated justice administration codes, court acts or procedural orders, are, as far as I am informed, until now nowhere in existence.

Returning to the so-called electronification of justice systems and court procedures, it is essential to highlight the presumption that this will be ongoing (with ultimate aims like totally '*virtual court procedures*' or pure '*tele-courts*' already being uttered here and there), a trend that will be – regardless of the extent to which it is achieved – *irresistible*, regardless of the questions it raises, how necessary it is and how useful its outcomes will be.

Already now this just started development has created for us, as proceduralists, severe theoretical and practical problems. For example, the rapidly ongoing electronification of court procedures, accompanied by more and more so called 'e-procedure-law,' forces us to reconsider nearly all of our trusted *procedural principles*, like the principle of accessibility, the principle of submission (in modern terminology: 'principle of information'), the principle of factual negotiation (in modern terminology: 'principle of communication'), the principle of directness, the principle of presence, the principle of publicity, the principle of effectiveness,

and others. Additionally, we have to recognize that our court proceedings, despite the (though not universally) accepted principle of orality (*i.e.* formlessness), are in their most important respects a '*file process*' or '*paper process*,' characterized and described as a '*data processing system*,' an '*information system*' and a '*communication system*. As such, our old-styled court procedures on one side and the new world of tele-techniques with their, '*electronic data processing*,' '*tele-information*' and '*tele-communication*' on the other side show a great deal of reciprocal attractions, affinities and compatibilities. This makes it apparent, that court proceedings in particular, and judicial administrative systems in general, are fields lying fallow or open flanks, which will sooner or later be, to a greater or lesser extent, conquered by new media. It holds true, even it will no doubt be proven, that fully electronic or partly electronically supported court procedures will be not always be 'faster, cheaper and better' than the old fashioned system. Here, we have to keep in mind the high *costs* of buying, installing, maintaining and up-dating hard- and software, as well as the fact that, for example, whilst using E-mails only means that *information-transfer-speed* can be reduced to splits of a second, this does not at all mean that proceeding as a whole (including hearings, proof-taking, negotiation, decision-making, *etc.*) will become faster. Last but not least, we should consider the opinion of experts who state that a 'court procedure without any paper' could never exist. This opinion raises the option of a future 'double-track' model, which would certainly not be cheaper or faster than a one-track procedure using the old or the new style.

One more remark to finish this chapter: the ongoing legalization of judicial or procedural phenomena by the creation of e-justice or e-procedural norms also represents a strong move towards what is here called '*formalization*' *or even hyperformalization, to an extent never before seen in history.* It is a move towards a new quantity or quality of '*formalism*' in our procedural law, which is anyway still characterized as a 'formal' or even formalistic field of law, neglecting all its 'material,' 'substantial' and even 'constitutional' impacts and values.

In this regard, formalization, particularly of procedural law, is to a certain extent unavoidable. As a centuries old development it seems nothing more than a newer or more recent tendency, which we are looking at in this conference. But with regard to this latest developmental step, electronification, it is a new tendency that runs contrary to a very large movement, which will be addressed next: the movement of 'materialization.'

2.4. Constitutionalization as materialization of civil procedural law

Picking up the just mentioned catch-word of '*materialization*' of judicial and procedural law, such materialization can be of a social (socialization), economic (economization) and, amongst others, political nature (politicalization). Of these, political materialization is quite often seen to encompass the key-words of '*humanization*' or '*democratization*,' which are mostly synonymous in the broad sense

that they mean carrying out democratic and/or human ideas and ideals, values and goals, including within the filed of judiciaries and procedures.

Today, we can find such shifts – whether weak or strong, recent or longstanding – in nearly all nations regardless of their present political, governmental or constitutional systems. As such, we can find such shifts even in nations that continue to struggle to overcome dictatorship, juntas or one-party governments as well as in more democratic systems based in the first place on the separation of state powers and on a truly independent 'third power' in accordance with the idea of a rule-of-law state ('Rechtsstaat') and respect for '*fundamental*' and '*human rights*,' with rulers and oppositions still fighting for more or less success.

Particularly in so-called 'countries in transition' referred to above, transformations or conversions are mostly initiated, accompanied by or based upon *national constitutions* – whether old, revised or totally new – as well as on international conventions, treaties or proclamations. These mostly contain (like, for example, the European Convention on Human Rights or the Charter of Fundamental Rights of the European Union) quite a number of fundamental, basic or constitutional guarantees and principles as well as fundamental or human rights, which also relate to the third power.

In most western European nations we had already for decades had, and continue to have, broad discussions on topics such as '*constitution and civil procedure*' and/or '*constitutional law and civil procedure law*.' These discussions are often occasioned by leading and binding decisions issued by constitutional or supreme courts concerned to ensure the conformity of certain judicial or procedural regulations and official actions, in particular court decisions, with the constitution. This has led to a steady increase in the penetration of simple procedural law by constitutional law and furthermore to the (re-)discovery of the so-called 'substantive values' of procedural norms, including the specific field of 'substantive procedure law.' This development was followed by more and more questions about the '*legitimacy*' behind the legality of procedural provisions, by the idea and theory of so-called '*procedural justice*' and by the growing importance of the already well-established and oft used 'constitutional method' of interpretation and the application of legal rules in general and procedural rules specifically. As a result, it finally became the widely accepted view that many parts of procedural law had to be seen as 'applied' or 'concretizised' constitutional law. This development as a whole is nowadays called '*constitutionalization*.'

These developemnts have also been accompanied by a change in the public's basic understanding of justice systems, procedures, courts, judges and lawyers; what they are, what they should be and what they are good for. For instance, the justice system is no longer understood as a purely unknown, strange and distant machinery, demonstrating its authority and power by a coercive pacification of litigants or by a coercive suppression of conflicts for the sake of law and order. It is now also or only seen as a state institution that serves the people through the supply of legal protection as a 'legal services provider.'

This constitutionalization movement, as just outlined, has up until now remained quite weak in Eastern Europe, and in some eastern nations it does not yet even exist, whilst in western Europe there is, or at least seems to be, nothing new about this phenomenon. As such, one may ask why this move could or should represent a recent or new tendency of civil procedure within the formulation of the general topic with which we are dealing at this international conference.

There are two points worth mentioning in this context to answer this question. The first is related to the situation in Eastern Europe, and the second relates to the situation in Western Europe.

Firstly, looking at the impressive mass of new codifications, constitutions, acts, codes or drafts in Eastern European EU member states or member states to be, we have to bear in mind – and this is conceded also by our Eastern European colleagues – that many of the new norms promulgated are, up to now, merely '*paper law*,' '*letter law*' or '*law in the* b*ooks*,' which must be, as the next step, established in a new thinking and way to behave. This means implementing the newly formulated ideas and requirements into legal opinions, legal practice, society's mentality and into the people's legal consciousness as an attempt to transform this paper law into so-called '*living law*,' '*law in practice*' or '*law in action*.'

In the *implementation* of new laws and particularly new constitutions in the face of old attitudes, routines and habits among the people, the legal professions and judicial officials of some Eastern European nations still have quite a long way to go. But there is warrant for hope that a new generation of well-educated young jurists will improve this situation within a reasonable time.

Secondly, looking at the constitutionalization movement in Western Europe, most of us will agree with its positive outcomes. This constitutionalization of simple judicative law and procedural law, also described as 'legitimation' and 'materialization,' has greatly helped to overcome the centuries old discrimination among these fields of law, seen as merely formal, practical, technical or organizational, bare of values, morals or politics and having only a 'serving function' in respect of substantive law, being therefore the opposite to real, true, material or substantive law. Although it is common among the proceduralists to look at the norms of CPOs as an 'applied' or 'concretisized' constitutional law, which mirrors contemporary political systems, the leading opinion among highly academic, dogmatic and positivistic traditional jurisprudence in Western Europe nevertheless looks at CPOs as something akin to a set of tools to put conflicts about real substantive law into an orderly 'canalized' form, or else as akin to a mere manual for judicial craftsmen, or a compendium of instructions and directives for trial lawyers.

However, supported by the new theory of 'proceduralization' and other theoretical considerations, such as legitimation by procedure in all the categories of 'procedural justice,' we should not give up the hope, expressed already in the early 1970s by Mauro Cappelletti, that the sentiment that 'procedure law today has become the

most important branch of law' will become a common understanding. Moreover, whilst there is nothing new about this phenomena in Western Europe, we can nevertheless discover in some Western European nations at least, a new shift in the big constitutionalization movement. This is a shift worth mentioning, and one of which Germany is again a good example of a bad development.

Here, an opinion is gaining ground that Germany suffers from the so-called '*hyper-constitutionalization*' of procedure law through an overexpansion of its constitutional relevance. This view criticizes a certain inclination among German scholars and judges to make a heavy constitutional affair out of even petty procedural questions, as well as out of those of an undoubtedly purely formal nature. For example, in Germany it is quite usual among professors, judges, lawyers and politicians to attack legal provisions, legislative drafts or court decisions simply by using an argument that is both popular and trivial: 'It's against constitution' or 'It's against the *Rechtsstaat*.' The critical observers of this trend complain also that our *Federal Constitutional Court* has increasingly exceeded the boundaries of its specific constitutional role and function by interfering in the competences and responsibilities of the ordinary courts and by meddling with broad fields of simple law. This had and still has many *negative consequences* for the Federal Constitutional Court itself (catch-words: mutation to a super-appeal instance or an all-round remedy institution), as well as for constitutional law (catch-words: inflation, disqualification, dilution), the ordinary courts (catch-words: overload, overstrain, lacking and failing capacities and abilities), ordinary procedure law (catch-words: destabilization, fractions of systematic, canonization, cementation) and, last but not least, also for the legal professions. The latter are affected for the following reason: our Federal Constitutional Court has rendered a number of decisions containing the expressive as well as excessive demand, addressed to all official functionaries of the judiciary – to judges, judicial officers and even bailiffs – to consider and control everywhere and always the constitutional conformity of their professional activities by themselves functioning as 'mini-constitutional courts' all over the country. This dubious delegation of these specific responsibilities by our highest German court is based on the hope that this will lower the self-generated heavy workload of Germany's Federal Constitutional Court – a workload that is one of the signs of its present day '*crisis*.'

2.5. Internationalization and transnationalization, unification and harmonization of civil procedural law

In carrying out law and justice reforms, it is quite common, particularly in so-called developing countries, not only to stick to that country's own factual and legal situations and conditions, its own national resources or home-made reform ideas, following its own legal history, but also to look for '*models*' or '*patterns*' to borrow and imitate from foreign law; namely, from that of neighbor or partner nations belonging to the same *'legal circle*,' '*legal family*' or '*legal culture*,' or else the same

association, federation, community or union. This operation may be described as a bi- or multinational comparison, followed – should the occasion arise – by a punctual and partial or total 'reception' (also called 'import' '*implantation*' or 'transplantation') of foreign legal concepts and texts.

Here, we can observe all over a so-called '*internationalization*,' '*transnationalization*,' or even the rare 'globalization' of certain fields of law, which has reached and seized the judicative and procedural services and their respective regulations in many parts of the world. Although these movements are no longer really new they will be briefly touched upon in the fifth and last chapters concerning the main developments in the area of civil justice systems. Their principle target (to overcome national legal and judicial divergences) encompasses the aim of creating unified, identical or at least similar national laws, and, in more advanced cases, an unique transnational law mainly for groups of nations that are member states to certain unions, associations, federations or communities. Examples include the Association of South-East Asian Nations (ASEAN), the British Commonwealth, the Organization of Ibero-American States (OEI), the Community of Independent States (CIS) formed by former member states of the collapsed Soviet Union, the *Organisation pour L'Harmonisation des Affairs du Droits en Afrique* (OHADA), and, last but not least, the European Union (EU).

Of all these regional or geo-political movements of '*unification*' or '*similarization*,' Europe's movement towards the '*europeanization*' of different national laws, has nowadays turned out to be the strongest. However, to date such endeavors remain much more concentrated on the final or provisional results of ensuring similarity, proximity, harmony or compatibility than on securing unity or uniformity. No wonder, therefore, that to this extent the terms most used to describe these processes are '*equalization*,' '*similization*,' '*approximation*' and (especially) '*harmonization*' (besides an more rarely used '*compatibilization*' and '*coordination*'). These are words that are widely used in many EU documents, proclamations and especially treaties, as well as in academic publications.

There is no need to address all this in detail and nor, particularly, to talk about the 'Europeanization of Civil Procedural Law' to the here assembled well informed proceduralists and experienced comparatists. I would therefore like only to point out that, as a result of these afore mentioned movements of internationalization and transnationalizion, including the unification and harmonization of European law in general, and European civil procedural law in particular, the disciplines or methods of '*comparative law*' as well as of '*comparative procedural law*' as their own and perhaps one of the most actual branches of comparative law, have gained immense importance. This importance places them not only in the ranks of different specific legal fields of law, but also among the fundamental legal subjects that form the foundation of legal education and legal science. This holds true in spite of the fact that in the legal education systems of many countries comparative law still plays a minor or totally insignificant role.

Analyzing this method of – according to German terminology – '*comparison of law*' ('Rechtsvergleichung'), we have to recognize the growth of a new branch or sub-method, which we may call – again, according to the German terminology – the '*similization of law*' ('Rechtsangleichung'). We had a chance to work on the substantial and theoretical problems involved in this field at the famous colloquium 'The Coming Together of Procedural Laws in Europe' in Brussels in 2001, where we intensively discussed the difficult questions of 'why?,' 'what?,' and 'how?' to harmonize the different existing national European civil procedural laws.

As I had been at that time involved in the questions, 'how' to harmonize, what the expression 'harmonization' could theoretically mean in which context, how such harmonization could be practically realized and what the declared pursued goal named 'harmony' between different laws in respect of civil procedural law, and indeed in respect of law at all, could or should mean, please allow a last remark to this chapter sketching my own standpoint.

Answers to the above raised questions are rare, not very precise and not fully convincing. Moreover, they are quite different. Nevertheless, one can get the impression that the majority of scholars understand 'harmonization' – as long and as far as unique commune laws, like a European Civil Procedure Code, do not yet exist – as a process to produce similar, unified or identical national laws by striving for 'harmony' between the hereto quite different national laws (in quantity and quality – especially in the field of civil procedural law) of all 28 (!) member states of the EU, all of whom belong to different 'legal families' and are embedded in different 'legal cultures.' Where such europeanization leads to the intended 'laws in harmony' or 'harmony of laws,' it seems that such an outcome is understood to be the result of compromise, compilation, the multi-mix or medley of all these up until now different national regulations, being later at the same average level. Furthermore, we can find many opinions that characterize in advance the perhaps at least harmonized laws as a result, with which all European nations can identify themselves, in which their own legal concepts and understandings are somehow incorporated and represented and with which they are all content. This is because harmonized laws will – as is intended – provide a feeling of closeness, familiarity, togetherness and even happiness, while carrying out EU dictated 'harmony.' Regarding the harmonization of civil procedural laws in Europe, such ideas had already been criticized as illusionary and spoofed as a 'love parade' of European laws that would for some Europeans be a dream, though for others a nightmare.

Instead of such a questionable and still substantially unclear concept for the harmonization of presently existing legal orders, I would personally therefore plead for a future orientated so-called '*optimal law approach*.' This would mean to strive for and work out a common European Civil Procedural Code as a totally new and unique construct, for which the best or better parts and points of presently existing national regulations might be (but not must be) mere single bricks and patterns, in addition to newly invented building materials.

3. Speculations about civil justice systems of the future

To conclude this paper with some *speculations* about the '*civil justice systems of the future*' it is worth remembering that our International Association of Procedural Law (IAPL) had for the first time picked up a challenging topic in a round table discussion about 'Procedure Law for the Third Millennium.' It did so at the splendid colloquium on the general topic 'A Procedure Law for all Seasons – from Charles V. to the Third Millennium,' organized in Gent in 2000 and encompassing about 2,500 years of past, present and future procedural law. It is a difficult task to deal with a topic like '*the future of justice systems*,' *i.e.* of systems that are present, about which we know and in regard to which we may be able to prognosticate their evolutionary reform-steps in the upcoming decades. However, it is an even more difficult task to speculate about '*justice systems of the future*,' *i.e.* about systems that do not yet exist, about which we do not yet, but which we will have to face perhaps in a near or far future and which will perhaps be created by truly fundamental, radical or revolutionary, not even 're-forms' of the old forms, but formations of something new.

To dare such a look into the future of justice systems as well as to justice systems of the future we as jurists are not well prepared and not well accustomed because we are all past-orientated, present-orientated, but not at all future-orientated persons – if not by inclination then by legal education, professional training and practical routine. To this extent, we are all to a certain degree historians, conservatives and even reactionaries, when and while dealing with cases that have already happened, laws that have already been enacted, judgments that have already been pronounced, literature that has already been already written, and ideas that have already been thought. No wonder, then, that disciplines like 'legal prognosis,' 'legal politics,' 'future law' or – most advanced – 'legal futurology' are nearly unknown. Moreover, our European national legislations are mostly – in the words of legal sociologists – just 'reactive impulse legislations.'

Although a scientific foundation or theory for the following look at 'Civil Justice Systems of the Future' is therefore missing, some mere speculations, pure visions or thinkable as well as unthinkable science fictions will be allowed, limited to some sketchy *sceneries of future civil justice systems,* related to the *five movements* considered above and described now only by catchwords:

Ad 2.1. (Re-)Construction vs. destruction of civil justice systems:

The reduction of a variety of jurisdictions to a civil and a public jurisdiction only, next to a constitutional one strictly restricted to constitutional affairs / the total revision of the court hierarchy, denying the stereotype 'the higher the court, the better the judgment' / the limitation of instances to one entrance instance and one appeal instance only / decision control by a court of the same instance and not by a higher court: decision control by a highest courts only in public interest cases and only in cases with a significant public importance / the substitution of

panels of judges for judges sitting alone in the first instance and the second instance as well, denying the stereotype that 'the more judges, the better the judgment' / employment of the best qualified judges and best paid judges in the first instance to make appellate procedures unattractive / cutting down the number of judges and increasing the number of auxiliaries / centering judges´ work on judging only / transformation of the legal professions from nowadays mass-professions to elite professions / cutting down court units to a minimum whilst widening their competences / making mini-, speedy- or pre-trials for petty cases and small claims, as well as simplified, concentrated or summarized proceedings the norm and fully fledged procedures the exception.

Ad 2.2. Nationalization vs. privatization of civil justice systems:

Private justice respectively non-state or out-of-court conflict resolution as the norm and state justice as an exception reserved for cases of high importance to the state or society / the outsourcing of nowadays state duties and official responsibilities in the realm of justice administration and procedural work to a significant extent / fact-finding and the gathering of factual as well as legal information in pre-trials, dominated by private parties or their lawyers, only exceptionally followed by a state main trial, dominated by judges / the merging of state court procedures and ADR-activities like conciliation, mediation, negotiation and arbitration / the construction of a so called 'planetary system' or an 'optimal model' as a new type of conflict resolution system, combining the nowadays two basic contrarian conceptions of the advisory, contradictory, confrontation or litigation concept, typical of Western 'conflict-promotion culture,' on one side, and the communicative, cooperative and compensative concept, typical of Far-Eastern 'conflict reconciliation culture,' on the other side / the reactivation of still underdeveloped and underestimated 'negotiation' in its true sense as a principle of real communication and not of mere information as the missing link for the composition of a new justice system.

Ad 2.3. Electronification as formalization of civil justice systems:

The substitution or combination of traditional forms of administration and proceedings by so called 'electronic forms' or by a totally or partly 'virtual justice administration' and by 'virtual court proceedings' / the introduction of so-called 'tele-courts'/ the enactment of own 'tele-court-acts,' or 'tele-procedure-acts,' of own chapters for 'e-proceedings' in the traditional procedure codes, or of 'e-justice law' / the expansion of already punctually or partly existing 'e-civil procedure law' and 'e-civil justice law'/ new and more regulations of 'e-ADR law' regarding already existing 'e-conciliation,''e-mediation' and 'e-arbitration'/ the substitution or complementation of traditional hearings with audio-video conferences.

Ad 2.4. Constitutionalization as materialisation of civil procedure law:

The acceptance of a 'hyper-constitutionalization' of plain procedural law and of overpowered constitutional courts and chambers for constitutional law in Supreme Courts / the disempowerment of the nation's highest courts through a concentration

of their responsibilities and by restricting the extent of their control strictly to constitutional issues.

Ad 2.5. Internationalization and transnationalization, unification and harmonization of civil procedure law:

The creation of a European Civil Procedure Code on the basis of 'model-laws,' worked out by individuals, institutions, organizations, working groups or academic associations, accepted and enacted by whichever body of the EU, the Council, the Commission or an empowered European Parliament / the expansion of European jurisdiction and European Courts / the dominance of more and more European courts and their jurisdictions over national judiciaries and their jurisdictions / the abolition, reduction or disempowerment of national courts and their jurisdictions / the development of a 'unified Europe in all its national variety,' also in respect of justice systems, whatever this paradox could or should mean.

The 'new age,' the rapidly changing world and the beginning of the Third Millennium in which we live, imply a mass of challenges for us as both proceduralists and comparatists.

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DEBATES ON CRITERIA OF COPYRIGHTABILITY IN RUSSIA[1]

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In codifying intellectual property rights, Russian legislators have left the issue of what standards of originality and creativity form the criteria for copyrightability a matter of debate.

Nevertheless, this issue is crucial to answering questions about where the lower threashold for the copyrightability of a work lies. Indeed, it is essential to determining which intellectual works with an insignificant creative component but of high economic importance (e.g., databases, computer software, advertisement slogans or design work) are to be copyrightable.

Analyses of debates in legal literature and court rulings issued over the past few years warrant the conclusion that there is a trend in favor of setting more relaxed standards of originality and creativity and granting copyright protection to works of low authorship.

This article addresses the problem of identifying criteria for copyrightability and non-copyrightability in the Russian legal system. It models various types of demarcation criteria, and analyzes their strengths and weaknesses. It also describes the trend in Russian judicial practice of granting copyright protection to works of low authorship, whilst outlining some of the problems and contradictions that this entails. The article compares principles that have evolved under Russian law with similar principles used abroad, mainly in Germany.

Key words: copyright; intellectual property; intellectual rights; personal non-property rights; exclusive rights; copyrightable work; copyrightability; works of low authorship; originality; creativity.

1. Introduction

Russia's integration into the global economy, with its landmark accession to the World Trade Organization on Aug. 22, 2012, has increased the need for national mechanisms for the protection of intellectual property to meet generally accepted international criteria.

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Over the past two decades, Russia has taken a series of important steps to bring its legislation on intellectual property in line with the highest European standards. One such step is Part Four of the Civil Code of the Russian Federation, 'Rights to Results of Intellectual Work and Means of Individualization,' which entered into force on Jan. 1, 2008.

The presence of a creative component in a work has usually been prescribed as the main copyrightability criterion in both Soviet-era and post-Soviet Russian legislation. The Law on Copyright and Related Rights of July 9, 1993,[2] which has since been repealed, offered copyright protection to any creative work of science, scholarship, literature or art regardless of its purpose, its standards, and the means of expression that it employed (Art. 6).

Today's Part Four of the Civil Code,[3] does not directly establish that creativity must be the main criterion of copyrightability. For instance, Art. 1259, 'Copyrightable Works,' merely lays the basis for a broader use of copyright protection than before, without taking into account the standards, purpose or means of expression of works of science, scholarship, literature or art in deciding their copyrightability. The article lists copyrightable types of work (Cl. 1), prescribing that a work must exist in some objective form – as a written, oral (such as a public reading or other public performance), graphic or three-dimensional representation, an audio or video recording, *etc.* (Cl. 3) – as a requirement for its copyrightability.

Nevertheless, Art. 1257 and Cl. 1 of Art. 1258 of the Civil Code do imply that a creative component is an essential criterion of copyrightability. Article 1257 confers authorship rights to a work of science, scholarship, literature or art upon the individual who has *created* such work.[4] Under Art. 1258, two or more individuals who have *jointly created* such a work are to be considered its co-authors. However, the law fails to clarify what is meant by the creative component of a work and sets no standards for this criterion. Consequently, the questions to which this gives rise are answered by reference to doctrine and judicial practice records.

2. Debates in legal literature

2.1. Former dominant opinion

The creative component of a work is a notion that has never been given a clear definition in Russian law. For this reason, it has never become a specific subject of debate. As such, the minimum standard of creativity required of a work for it to be

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[2] *See* 1993(147) Российская газета [Russian Gazette].

[3] *See* 2006(289) Российская газета [Russian Gazette].

[4] Комментарий к части четвертой Гражданского кодекса Российской Федерации (поглавный) [Chapter-by-Chapter Commentary on Part Four of the Civil Code of the Russian Federation] 387 (Alexander Makovsky, ed.) (Statut 2008).

to be recognized as copyrightable has never been singularly addressed. Rather, this issue forms part of a general discussion on copyrightability criteria – those being originality, novelty, and uniqueness – because authors feel that these standards significantly depend on the criteria that have been chosen.[5]

Before the advent of Part Four of the Civil Code, and under the influence of works by V. A. Dozortsev,[6] originality, novelty and uniqueness had predominantly been seen in legal literature as the sole acceptable criteria of copyrightability. In terms of traditional interpretations, in continental European copyright doctrine,[7] there is an internal contradiction in the use of originality, novelty and uniqueness characteristics as criteria. Nevertheless, it was considered justifiable to apply these concepts as criteria because during that period the definition of those terms was unambiguous. Indeed, there were not usually any specific meanings attached to these terms and they were normally used either as synonyms or as definitions of each other.[8] This mainly applies to originality, which was more often taken to mean the novelty[9] or uniqueness[10] of a work, whereas uniqueness was often regarded as a qualified version of objective novelty.[11] Thus, there is no established or clear contrast in Russian doctrine between originality as a manifestation of an author's personal individuality

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5 The substance of Russian-language debates on this subject is somewhat difficult to convey in English as the terms 'originality' and 'creativity' have many meanings in American literature and the corresponding Russian terms in Russian law, judicial practice and legal doctrine have rather blurred meanings.

For this reason, the term 'creativity' is used in this article as a general designation for the creative component of a work as a criterion of copyrightability that may have various interpretations – as independent creation ('originality' in American doctrine); as a reflection of the unique identity of the author ('originality' in continental Europe's *droit moral* tradition) – and that should not thus be seen as identical in meaning to the homonymous American term (*see Feist Publications, Inc. v. Rural Telephone Service Co*., 499 U.S. 340, 361 (1991)). Practically the same holds true for the use of the term 'originality' in this article; the corresponding Russian term has various meanings in Russian jurisprudence.

6 Viktor Dozortsev, Интеллектуальные права. Понятие. Система. Задачи кодификации [Intellectual Rights: Concept, Systems and Tasks of Codification] (Statut 2003).

7 *See, e.g.,* Torsten Bettinger, Der Werkbegriff im spanischen und deutschen Urheberrecht 23 ff. (C. H. Beck 2001); Harald P. Knöbl, Die 'kleine Münze' im System des Immaterialgüter- und Wettbewerbsrechts. Eine rechtsvergleichende Analyse des deutschen, schweizerischen, französischen und US-amerikanischen Rechts 195 ff. (Dr. Kovac 2002); Thomas Dreier & Gernot Schulze, Urheberrechtsgesetz Kommentar § 2, Rn. 18–19 (C. H. Beck 2004).

8 *See, e.g.,* Alexander Sergeyev, Право интеллектуальной собственности в Российской Федерации [Intellectual Property Law in the Russian Federation] 111 (2nd ed., Velbi 2003).

9 *See id.*

10 *See* Eduard Gavrilov, Комментарий к Закону об авторском праве и смежных правах [Commentary on the Law on Copyright and Related Rights] Art. 6, Cls. 4–6 (Pravovaya Kul'tura 1996); *idem.*, Оригинальность как критерий охраны объектов авторских прав [Originality as a Criterion of Copyrightability] (a paper written for ConsultantPlus System 2005).

11 Which, strictly speaking, is incorrect. While it is true that a unique work is always new, the logic of determining if a work is new is essentially different from the logic of determining whether it is unique: in the former case, a disputed work is compared with works that have been created before, while in the latter such a work is itself assessed, or, more precisely, analyzed as to whether another author may have created a similar or identical work.

(as a criterion of eligibility for copyright protection) and objective novelty as distinct from existing works (used in patent law).

The use of the uniqueness criterion was based on the logic of copyright. If exclusive rights are modelled on the absolute right of full control over a work, the emergence of such rights by virtue of the actual fact of its creation is only possible if this work is unique.[12] The uniqueness of copyrightable works precludes inevitable conflicts between unconnected holders of such exclusive rights to identical works if such works are created independently of each other and are recognized as copyrightable.

Such conflicts would have been unresolvable within the limits of copyright alone, primarily due to the absence of mechanisms for determining which author was the first to create the work. Thus, given the large-scale existence of mutually duplicating creative projects, the parallel existence of exclusive rights to the same object, just as postponing the establishment of precedence until the moment a copyright dispute goes to court, would trigger a sharp increase in legal indeterminacy and instability in the legal positions of the parties to such disputes.

Russian practice uses relatively inefficient means to determine whether something is part of the public domain – that is: anything that is part of general historical or cultural experience or the nature of things or human relationships; is available from generally accessible sources such as nature or common ideas; or can be naturally reproduced by anyone with medium capabilities, *e.g.*, language, facts, discoveries, widespread and standard images, ideas and esthetic devices.[13]

This means that the copyright protection of non-unique works poses a risk of creating the direct or indirect monopolization of parts of the public domain, and consequent limitations on their public use.

As such, any model for granting exclusive absolute rights to non-unique works (granting rights to a non-unique work to its first creator or to anyone else who has created it independently) would give rise to increasingly frequent situations in which authors held indeterminate legal positions since in the absence of a registration system for third parties such rights are impossible to identify. This and the absence of precedence registration mechanisms raises the risk of chaos in the copyright system.

Use of the originality and uniqueness criteria meant the use of what, by today's standards, would be quite high standards for the assessment of the creative aspects of copyrightable works.[14]

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[12] *See* Dozortsev, *supra* n. 6, at 13–14.

[13] For an interpretation of the public domain concept used in this study *see, e.g.,* Max Kummer, Das urheberrechtlich schützbare Werk 47–48 (Stämpfli 1968); Heinrich Hubmann, Das Recht des schöpferischen Geistes 17 ff. (de Gruyter 1954); *idem*., Urheber- und Verlagsrecht 31 ff. (6th ed., C. H. Beck 1987); Britta Stamer, Der Schutz der Idee unter besonderer Berücksichtigung von Unterhaltungsproduktionen für das Fernsehen 38–39 (Nomos 2007); Eugen Ulmer, Urheber- und Verlagsrecht 275 ff. (3rd ed., Springer 1980).

[14] Although, effectively, such standards are not excessively high. Moreover, critics have argued that Max Kummer's uniqueness concept means a model where works with insignificant creative aspects are to be copyrightable. *See* Kummer, *supra* n. 13, at 30. For a critical analysis, *see* Peter Girth, *Individualität und Zufall im Urheberrecht*, 48 UFITA 30 ff. (1974).

The dominant rule in that period was that it was insufficient to prove that a work was produced by the author's own intellectual efforts instead of being borrowed or copied; an intellectual product had to be new and unique at the very least.

2.2. Latest debates

The reason for new debates on copyrightability standards from the point of view of creativity is the increasingly frequent emergence in Russia of works of low authorship, primarily computer software and databases. In this respect, Russia follows the worldwide trend towards a reduction in copyrightability standards in the face of pressure exerted by the need to protect intellectual products of this kind.[15]

Some papers published in recent years[16] have formulated the principle that independent creation, namely a work that is not a deliberate copy of someone else's work and is novel even from the subjective point of view of its author, must be an essential criterion. Such papers criticize the above-described principle that copyrightability must be conditional on objective novelty – defined as different from any other available works, or any third party's unawareness of those results – or, more emphatically, on uniqueness.

One of the more serious arguments propounded by advocates of the independent creation criterion is that there is a social need for the legal protection of a large category of works, primarily works of low authorship, that may independently duplicate one another.

However, this argument is only convincing if one can prove that copyright is applicable in this context, and that use of the independent creation criterion offers the optimum, or at least a 'lesser-evil,' solution. No one in Russian legal literature has provided sufficient evidence to support the assertion that copyright protection for works of this kind is a better, more effective solution than the use of alternative systems.[17] For instance, there has been no analysis of the potential social effects of

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[15] Similar processes have taken place in Germany, with computer programs being a case in point. *See, e.g.,* Eva-Irina Gamm, Die Problematik der Gestaltungshöhe im deutschen Urheberrecht 61 ff. (Nomos 2004).

[16] Mark Chizhenok, *Критика объективной новизны* [*Criticism of Objective Novelty*], 2004(6) Патенты и лицензии [Patents and Licences] 41 ff.; Maxim Labzin, *Оригинальность объектов авторского права* [*Originality of Copyrightable Works*], 2007(7/8) Патенты и лицензии [Patents and Licences]; *idem*., Еще раз об оригинальности объектов авторского права (Once Again on the Originality of Copyrightable Works), 2008(4) Патенты и лицензии [Patents and Licences]; Vladimir Korneyev, Программы для ЭВМ, базы данных и топологии интегральных микросхем как объект интеллектуальных прав [Computer, Databases and Integrated Circuit Topologies as Copyrightable Works] 37 (Statut 2010); Alexander Savelyev, Лицензирование программного обеспечения в России. Законодательство и практика [Licensing of Software in Russia. Legislation and Practice] ch. 1, § 3 (Infotropic Media 2012).

[17] *E.g.,* competition law mechanisms, related rights law, and various mechanisms *sui generis.* In some instances, patent law and protection mechanisms for industrial secrets are applicable. *See, e.g.,* Knöbl, *supra* n. 7, at 311 ff.; Hans-Heinrich Schmieder, *Die Verwandten Schutzrechte: ein Torso?*, 73 UFITA 65 ff. (1975); Frank Thoms, Der urheberrechtliche Schutz der kleine Münze: Historische Entwicklung – Rechtsvergleichung – Rechtspolitische Wertung 322 ff. (Florentz 1980); Gernot Schulze, Die kleine Münze und ihre Abgrenzungsproblematik bei den Werkarten des Urheberrechts 301 ff. (Hochschul Verlag 1983).

such an approach nor the likelihood of it rendering the copyright mechanism as a whole dysfunctional to a serious extent.

Another argument supporting the independent creation concept as the main criterion for copyrightability is the assumed justification of the copyrightability of results of parallel creation. This is a key aspect of this concept since it entails advocacy for lower standards for the creative character of a work, which sharply raises the risk of the independent creation of identical works by unconnected persons.

Two alternative solutions are offered to this problem.

Some insist that copyright for a work be granted to the person who was the first to create it,[18] which, in fact, meets the novelty criterion but does not automatically imply the use of the independent creation criterion.

Others believe that it is possible to give the same rights to the authors of all mutually duplicating works created independently of each other.[19]

However, both options would involve a sharp decline in creativity standards.

Advocacy of the former option, the *novelty criterion,* denies that its use would cause serious dysfunctionality in the copyright mechanism. Proponents of this approach argue that it is by no means necessary to have an a priori system for determining the absolute novelty of a work. First of all, there have been instances in the majority of legal systems where legal protection was granted to a product of intellectual work that duplicated another product and was created after it, *e.g.*, trade names or useful models. It is thus similarly seen as acceptable that would-be copyright holders should have somewhat indeterminate legal positions to the extent that a work may consequently fail to meet copyrightability criteria in a dispute.

Secondly, it seems possible to presume that a work is novel even though this presumed novelty may be refuted in a court dispute. In principle, authorship disputes in Russia follow similar logic today due to the presumption principle enshrined in Art. 1257 of the Civil Code, under which it is considered to be important in some cases which work was the first to be published (under Art. 1257, the person who is named as the author in the original work or in any of its copies is to be considered its author unless the opposite is proved). This makes any other mechanism for determining the absolute novelty of a work unnecessary.

It appears that quite a wide range of objections to this scheme may be put forward. Many of them, in one way or another, stem from an evaluation of the extent of acceptable indeterminacy of the legal positions of parties – be they authors, their counterparties or duplicators who are involuntary violators of copyright – arising from this novelty criterion model. Let us just note that the degree of such indeterminacy is directly dependent upon the characteristics of a disputed work, and consequently on the likelihood of its duplication.

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[18] *See* Labzin, *supra* n. 16; Vadim Khokhlov, Авторское право: законодательство, теория, практика [Copyright : Legislation, Theory and Practice] 51 (Gorodets 2008).

[19] *See* Chizhenok, *supra* n. 16; Korneyev, *id.* at 37.

This is an effective scheme if applied to traditional-type works with a high-standard creative component. If, however, it is applied to works of low authorship, where the probability of independent duplication is quite high, legal indeterminacy and its potential adverse social effects may quickly reach prohibitive proportions.

Another set of objections has it that, due to the absence in Russian law of principles for the identification of parts of the public domain in a work that are similar to principles existing in German law,[20] this model involves a high risk of monopolization of elements of the public domain in dealing with works of low authorship. This is because the probability of duplication is directly dependent on the role that has been played in the creation of a work by general historical and cultural experience, natural and social laws, generally accessible sources, and standards accepted in a specific industry, *etc.* It is easy to imagine a situation where an idea that is generally accessible is expressed in one or several standard forms, and that granting copyright protection to such work – if it meets the novelty criterion – would therefore result in the so-called indirect monopolization of the ideas that it expresses.[21] Consequently, the monopolization of elements of the public domain would make it impossible to define a third party's eligibility for copyright.

A second model for solving the duplication problem involves copyright protection for each author and is based on the *principle of the coexistence of independent exclusive rights* to the same production.

This model is based on similar examples from other subdivisions of Russian intellectual property law (protection of integrated circuit topographies, industrial secrets, collective trademarks, the name of the place of origin of a product). Moreover, examples can be cited of the recognition of independent rights to identical works in the world's leading legal systems.[22]

Let us just note here that making a sustainable case for the principle of the coexistence of independent rights to identical works requires, on the one hand, a meticulous comparative study of copyright mechanisms and mechanisms for the protection of other above-mentioned products of intellectual work.

In any case, it would have to be explained why, in a specific legal system, the coexistence of independent rights to identical works would involve – or, conversely, would not involve – an unacceptable degree of indeterminacy in the legal positions of copyright seekers, prohibitive dysfunctions or adverse social effects.

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[20] Determining the *Gestaltungsspielraum* (the scope of resources for the creation of an original work) via the identification of factors that rule out the creative character of the work.

[21] Christina Berking, Die Unterscheidung von Form und Inhalt im Urheberrecht 75 ff. (Nomos 2002).

[22] It is the dominant opinion in German doctrine and judicial practice that duplicating works are copyrightable (*see* Dreier & Schulze, *supra* n. 7, at 51, § 2, Rn. 17). U.S. law accepts the coexistence of two authors as being independent holders of copyright to the same work (see Melville Nimmer & David Nimmer, Nimmer on Copyright § 13.03, LEXIS 10441 (2004); Berking, *supra* n. 21, at 83–84). On the other hand, Italian doctrine predominantly rules out the copyrightability of such works (*see* Ulrich Fuchs, Der Werkbegriff im italienischen und deutschen Urheberrecht 40 (C. H. Beck 1996)).

One of the potential causes of the chaotization of a copyright system is the fact that a conflict of personal non-property rights and exclusive rights is difficult to resolve if the exclusive rights are absolute rights modelled on the right of monopolistic domination. In such a situation, an individual would find it hard to exercise rights that are formally reserved for them. Bearing in mind that the principle issue is rights to works of low authorship with their high probability of independent duplication, such situations are likely to become typical.[23] Until now advocates of the coexistence of rights principle in Russian jurisprudence have not analyzed this set of problems.

3. Judicial practice

3.1. Earlier practice

Judicial practice before the entry into force of Part Four of the Russian Civil Code generally complied with dominant doctrinal principle and stressed a high-standard creative component as its main criterion for copyrightability. As such, a work primarily had to simultaneously meet the originality, novelty and uniqueness criteria to be considered copyrightable while no unequivocal interpretation was put on those criteria.[24] It was insufficient to prove that a work was the result of the author's independent efforts, namely that it had not been a borrowing from or a copy of a work by someone else.

In the practice of higher courts, this principle was confirmed in Ruling No. 537-O of the Constitutional Court of the Russian Federation dated December 12 2005;[25] ¶ 21 of Resolution No. 15 of the Plenary Session of the Supreme Court of the Russian Federation dated June 19, 2006, 'Issues That Have Arisen in Courts of Law in the Consideration of Civil Cases Involving the Application of Copyright Law and

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[23] The movement of continental European copyright systems towards mechanisms that do not involve the granting of monopoly over the use of a work are a way to mitigate more acute copyright conflicts. Such mechanisms are a feature of competition law, of knowhow protection systems and, in effect, of Anglo-American copyright systems, and are based on the prohibition of certain kinds of activities, in this case the use of the results of somebody else's intellectual endevour without the investment of resources necessary for independent creation – use that is taken to be legally unacceptable. As a minimum, this model possesses what are the distinguishing characteristics of delictual mechanisms. *See, e.g.,* Jerome H. Reichman, *Legal Hybrids between the Patent and Copyright Paradigms*, 94 Col. L. Rev. 2432–2558 (1994); Lyman R. Patterson, *Copyright and 'the Exclusive Right' of Authors*, 1 J. Intell. Prop. L. 1–48 (1993). In Russia, there are no manifest processes of this kind yet.

[24] *See, e.g.,* Resolution No. A56-16934/0 of the Federal Court of Arbitration of the Northwestern District (Dec. 10, 2001) [hereinafter Resolution No. A56-16934/0]; Resolution No. A56-4615/2005 of the Federal Court of Arbitration of the Northwestern District (Jan. 27, 2006); Resolution No. A13-14361/2005-20 of the Federal Court of Arbitration of the Northwestern District (July 5, 2006); Resolution No. A05-6902/04-16 of the Federal Court of Arbitration of the Northwestern District (Oct. 24, 2006); Ruling No. A40-7353/04-26-41 of the Court of Arbitration of the City of Moscow (Febr. 8, 2005).

[25] The document was not published officially. Hereinafter court rulings whose sources of official publication are untraceable are cited from the ConsultantPlus System.

Legislation on Related Rights'[26] (the clause confirms the originality criterion); and ¶¶ 1 and 2 of Resolution No. 47 of the Presidium of the Russian Supreme Court of Arbitration dated Sept. 29, 1999, 'Review of the Practice of Disputes over the Use of the Law of the Russian Federation "On Copyright and Related Rights"'.[27]

On the whole, the distribution of the burden of proof that had taken shape by that time was arguably in line with the standards set for the creative component of a work. In effect, a court did not expect a claimant to produce any specific evidence of the originality, novelty or uniqueness of a work if the latter fell into the traditional category, and it was the defendant who had to prove the opposite to win the litigation. If a reason to question the creative nature of a disputed work could be established, such as where a work is of low authorship, the copyright seeker might have had their suit thrown out due to insufficient evidence of the originality of the work.[28] Notably, making it the responsibility of a defendant to prove the creative nature of any work without exception would have meant copyright protection for vast numbers of low authorship works.

3.2. Resolution No. 5/29

After the entry into force of Part Four of the Russian Civil Code, Russian judicial practice has, on the one hand, shown a lack of sensitivity to the above-mentioned discussions in legal literature and, on the other, in being forced to react to specific practical problems and contradictions, has been evolving balanced positions on key aspects of copyrightability criteria, on creativity standards, and on the distribution of the burden of proof.

Judicial practice has been seriously affected by a joint resolution of plenary sessions of the Russian Supreme Court and Supreme Court of Arbitration issued on March 26, 2009, entitled 'On Some Issues Caused by the Entry into Force of Part Four of the Civil Code of the Russian Federation' (Resolution No. 5/29).[29]

Paragraph 28 of the Resolution says that 'the lack of novelty, uniqueness and/or originality of a result of intellectual activity cannot *per se* be evidence that such a result is not the result of creative work and consequently is not copyrightable,' and that 'it must be borne in mind that a result of intellectual activity shall be presumed to be a result of creative work unless proved otherwise.'

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[26] *See* 2006(137) Российская газета [Russian Gazette]; 2006(8) Бюллетень Верховного Суда Российской Федерации [Bulletin of the Supreme Court of the Russian Federation].

[27] *See* 1999(221) Российская газета (Ведомственное приложение) [Russian Gazette (Agency Supplement)]; 1999(11) Вестник Высшего Арбитражного Суда Российской Федерации [Bulletin of the Supreme Court of Arbitration of the Russian Federation].

[28] *See, e.g.,* Resolution No. A56-16934/0, *supra* n. 24.

[29] *See* 2009(70) Российская газета [Russian Gazette]; 2009(6) Бюллетень Верховного Суда Российской Федерации [Bulletin of the Supreme Court of the Russian Federation]; 2009(6) Вестник Высшего Арбитражного Суда Российской Федерации [Bulletin of the Supreme Court of Arbitration of the Russian Federation].

These points unambiguously prescribe the use by courts of the independent creation criterion, which renders non-deliberate copying also acceptable, and introduces the principle of the presumed creative nature of a work.

It must be noted that neither the interpretation of the creativity criterion by the resolution nor less the above-mentioned presumed creativity principle follow directly from the above-cited sections of Arts. 1257–1259 of the Civil Code: the product of creative work is a concept that can have various interpretations while presumed authorship does not automatically imply the presumption of the creative nature of a work. In this sense, explanations by the supreme courts aimed at efficient regulation clearly go further than making interpretations of legislation.

Moreover, these points are in blatant contradiction of Ruling No. 537-O of the Constitutional Court dated Dec. 20, 2005, which remains in force, and states that 'copyright, while protecting an original result of creation, shall not protect parallel achievements, *i.e.* achievements by persons who have worked independently of each other.' This is a de facto prohibition on the use of the uniqueness criterion.

Let us analyze how much use lower courts and the supreme courts themselves make of Resolution No. 5/29 in dealing with specific disputes – namely, what standards of creativity and criteria for copyrightability they use, whether they grant simultaneous protection to mutually duplicating works, and what their principles are for distributing the burden of proof.

It should be noted at the outset that, despite the unambiguous wording of the afore-mentioned clause in Resolution No. 5/29, court rulings in specific cases far from always comply with this clause.

3.3. The latest judicial practice

3.3.1. Criteria for copyrightability

The most common method of dealing with a copyrightability dispute is to use Cl. 1 of Art. 1259 of the Civil Code, which lists types of copyrightable work.[30] Methods

[30] *See, e.g.,* Ruling No. VAS-100/12 of the Supreme Court of Arbitration of the Russian Federation (Febr. 8, 2012) [hereinafter Ruling No. VAS-100/12]; Ruling No. VAS-13931/11 of the Supreme Court of Arbitration of the Russian Federation (Dec. 5, 2011) [hereinafter Ruling No. VAS-13931/11]; Resolution No. A31-4368/2011 of the Federal Court of Arbitration of the Volga-Vyatka District (March 19, 2012) [hereinafter Resolution No. A31-4368/2011]; Resolution No. A17-4872/2010 of the Federal Court of Arbitration of the Volga-Vyatka District (Sept. 26, 2010) [hereinafter Resolution No. A17-4872/2010]; Resolution No. A17-4829-5892/2009 of the Federal Court of Arbitration of the Volga-Vyatka District (Aug. 13, 2010); Resolution No. A43-40479/2009 of the Federal Court of Arbitration of the Volga-Vyatka District (June 16, 2010); Resolution No. A41-44971/10 of the Federal Court of Arbitration of the Moscow (Nov. 3, 2011); Resolution No. KG-A40/6477-11-1,2 of the Federal Court of Arbitration of the Moscow District (July 20, 2011); Resolution No. A56-14726/2010 of the Federal Court of Arbitration of the Northwestern District (Febr. 24, 2011) [hereinafter Resolution No. A56-14726/2010]; Resolution No. A56-13796/2010 of the Federal Court of Arbitration of the Northwestern District (Febr. 16, 2011); Resolution No. F09-203/12 of the Federal Court of Arbitration of the Ural District (March 15, 2012); Resolution No. F09-121/12 of the Federal Court of Arbitration of the Ural District (March 13, 2012) [hereinafter Resolution No. F09-121/12]; Resolution No. A11-7400/2010 of the Federal Court of Arbitration of the Volga-Vyatka District

used for putting a work under one of these categories rarely involve any substantial discussion on whether the work in question meets the criteria of copyrightability. They are normally used if the defendant raises no objections to the work being ruled non-copyrightable or if the court, in assessing the evidence, finds no reason to question the copyrightability of the work.

This corroborates the thesis that methods used to place a work under a category are based on wholly different principles, namely non-legal conventional concepts of works, than those used to determine whether a work meets the general criteria of copyrightability.[31] For this reason, reference to the type of the work in question in a legal judgment can represent the use by the court of any criterion of copyrightability and any standard of creativity.

It is in fact a distinguishing feature of this method that it entails the use of indefinite notions of a work that do not involve determining whether that work meets copyrightability criteria.

Therefore, in trying to discern from any of such court ruling – *i.e.* a ruling that makes no direct references to copyrightability criteria – what copyrightability standards the court has used, one has to assume that, regardless of the formulae and declarations utilised, the main indicator of the use of the independent creation criterion (as distinct from the novelty criterion) is the court's stance on cases of parallel mutually independent instances of creation. Here, if the court rules that each of the mutually duplicating works is copyrightable, and if it generally accepts evidence offered for the independent creation of each work, it will be fair to assume that the court has used the former of the two above-mentioned criteria.

If, on the other hand, the court has not considered the possibility of parallel independent creation and evidence offered by the defendant is rejected for reasons that have nothing to do with proving that independent creation has occurred, and if the coincidence between the two works that are the source of the dispute is seen as grounds for concluding that one is a borrowing or derivative of the other and hence that a copyright violation has taken place, one may assert that the court has used the novelty criterion.

Finally, the use of the uniqueness criterion at the very least rules out the possibility of non-new works being declared copyrightable. In fact, rights disputes should involve debates on the possibility of the independent creation of identical works, including on factors that make such creation possible.

An analysis of a large number of rulings issued at various tiers of the judicial hierarchy shows that, besides the use of the categorization method, it has been

(Nov. 15, 2011); Resolution No. 09AP-6425/2010-GK of the 9th Arbitration Court of Appeal (Apr. 27, 2010); Ruling No. 33-1686 of the Moscow City Court (Febr. 8, 2011).

31 *See* Andrey Kashanin, *Развитие механизма демаркации в авторском праве континентальной Европы* [*Development of the Demarcation Mechanism in Copyright in Continental Europe*], 11(3) Вестник гражданского права [Civil Law Review] 61 (2011).

a dominant trend in recent years to make direct use of the principle of the presumed creative nature of a work as prescribed by Resolution No. 5/29, as well as of the thesis that neither novelty nor originality is a significant criterion.[32]

However, this trend usually manifests in fairly straightforward cases centered on traditional works with a prominent creative aspect (*e.g.*, large works of literature,[33] audio-visual productions[34]) or cases of indisputable copying (*e.g.*, reprinting more than 130 photographs[35]). One also sometimes comes across, though relatively seldom, the use of the independent creation criterion and the presumed creativity principle (which cannot be refuted by citing lack of novelty or originality) for works of low authorship (that may include small parts that are highly likely to be reproducing elements of the public domain).[36] This is usually the case when the defendant does not dispute the creative nature of the work in question or adduces no evidence to back up their position.

It happens no less frequently in difficult cases where works of low authorship are dealt with that courts directly disregard ¶ 28 of Resolution No. 5/29 and find a reason to throw out a suit. In some cases of this kind, courts cite Cl. 5, Subcl. 4 of Cl. 6, and Cl. 7 of Art. 1259 of the Civil Code.[37] In others, courts merely argue that the work in question fails to satisfy the novelty, originality and uniqueness criteria.[38]

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[32] *See* Resolution No. KG-A40/2047-11-4 of the Federal Court of Arbitration of the Moscow District (March 28, 2011) [hereinafter Resolution No. KG-A40/2047-11-4]; Ruling No. 4g/1-7255 of the Moscow City Court (Aug. 17, 2011) [hereinafter Ruling No. 4g/1-7255]; Resolutions No. 09AP-27804/2011-GK and No. 09AP-27909/2011-GK of the 9th Arbitration Court of Appeal (Nov. 14, 2011) [hereinafter Resolutions No. 09AP-27804/2011-GK and No. 09AP-27909/2011-GK]; Resolution No. 09AP-19512/2011-GK of the 9th Arbitration Court of Appeal (Sept. 7, 2011); Resolution No. F09-1009/12 of the Federal Court of Arbitration of the Ural District (March 19, 2012) [hereinafter Resolution No. F09-1009/12]; Resolution No. A31-4368/2011, *supra* n. 30.

[33] *See* Ruling No. 4g/1-7255, *supra* n. 32.

[34] *See* Ruling No. VAS-13931/11, *supra* n. 30; Resolution No. A31-4368/2011, *id.*

[35] *See* Ruling No. VAS-100/12, *supra* n. 30.

[36] *See* Resolution No. KG-A40/2047-11-4, *supra* n. 32; Resolution No. A40-7067/11-110-57 of the Federal Court of Arbitration of the Moscow District (Oct. 31, 2011) [hereinafter Resolution No. A40-7067/11-110-57]; Resolutions No. 09AP-27804/2011-GK and No. 09AP-27909/2011-GK, *supra* n. 32; Resolution No. F09-1009/12, *supra* n. 32.

[37] Under Cl. 5 of Art. 1259 of the Russian Civil Code, ideas, concepts, principles, methods, processes, systems, solutions to technical, organizational and other problems, discoveries, facts and programming languages are not copyrightable. Under Subcl. 4 of Cl. 6 of Art. 1259, reports on events or facts whose sole purpose is information (*e.g.*, reports on current political events, lists of television programmes in magazines, or train timetables) are not copyrightable either. Under Cl. 7 of the same article, part of a work, its title and the description of a character in a literary work are copyrightable if they are accepted as the result of the author's creative work.

[38] In such cases there remains a tendency for the simultaneous use of these criteria, which, strictly speaking, are based on incompatible theoretical tenets. This is because not all that is new can be considered unique while anything that is original, *i.e.* anything in which the author's individuality manifests itself, and anything that is unique, is new by definition. Thus, use of the novelty criterion

Apparently the reason for this state of affairs is that, in the absence of an effective means of defining the public domain, the independent creation criterion can be painlessly applied to high authorship works of the traditional kind. Low authorship works – or relatively small parts of other works, which is essentially the same thing – are to a greater extent based on the public domain. This means that unconditionally declaring such works to be copyrightable will entail the monopolization of parts of the public domain (this even applies to the recognition of parallel creation as copyrightable). Courts feel that this is unacceptable and for this reason they make use of available arsenals to reject copyright claims on such works. If, for whatever reason, the above-cited provisions of the Civil Code prove inapplicable – for example, if a work in question is on the whole banal or trivial or reproduces what is part of the public domain – courts, in the absence of other means, have to raise their copyrightability standards and make it the claimant's responsibility to prove that the work is creative in character.

The attitude in judicial practice to *parallel creation,* as an indication of the application of the independent creation or novelty criterion, is practically unambiguous. In a vast majority of disputes over works of low authorship (*i.e.* cases where there is no sufficient evidence of copying or that the defendant has created the disputed work independently), coincidence or similarity between the works created by the claimant and the defendant are seen as sufficient reason to assume that illegitimate borrowing and a violation of the claimant's rights have taken place.[39] As a rule, parallel creation does not even come into consideration.[40] The

is redundant. *See* Resolution No. F09-4849/08-S6 of the Federal Court of Arbitration of the Ural District (July 11, 2008) [hereinafter Resolution No. F09-4849/08-S6], which was left in force by Ruling No. 12879/08 of the Supreme Court of Arbitration of the Russian Federation (Oct. 17, 2008) [hereinafter Ruling No. 12879/08]; Resolution No. A40-133968/09-27-952 of the Federal Court of Arbitration of the Moscow District (March 28, 2012) [hereinafter Resolution No. A40-133968/09-27-952]; Resolution No. 09AP-27014/2011-GK of the 9th Arbitration Court of Appeal (Nov. 7, 2011) [hereinafter Resolution No. 09AP-27014/2011-GK]; Resolution No. 09AP-5916/2008-GK of the 9th Arbitration Court of Appeal (Nov. 18, 2010) [hereinafter Resolution No. 09AP-5916/2008-GK] (repealed afterwards); Resolution No. 09AP-31934/2011-GK of the 9th Arbitration Court of Appeal (Dec. 27, 2011) [hereinafter Resolution No. 09AP-31934/2011-GK]; Ruling No. VAS-5413/10 of the Supreme Court of Arbitration of the Russian Federation (June 15, 2010) [hereinafter Ruling No. VAS-5413/10]; Resolution No. KG-A41/13081-09 of the Federal Court of Appeal of the Moscow District (Jan. 19, 2010) [hereinafter Resolution No. KG-A41/13081-09]; Resolution No. A56-35168/2009 of the Federal Court of Arbitration of the Northwestern District (July 6, 2010) [hereinafter Resolution No. A56-35168/2009]; Ruling No. 33-36846 of the Moscow City Court (Nov. 26, 2010) [hereinafter Ruling No. 33-36846]; Resolution No. 09AP-13024/2009 of the 9th Arbitration Court of Appeal (Sept. 8, 2009) [hereinafter Resolution No. 09AP-13024/2009].

39 *See* Resolution No. F09-4849/08-S6, *supra* n. 38, left in force by Ruling No. 12879/08, *id.*; Resolution No. 09AP-13024/2009, *id.*; Resolution No. F09-5444/11 of the Federal Court of Arbitration of the Ural District (Sept. 1, 2011) [hereinafter Resolution No. F09-5444/11]; Resolution No. A43-4663/2008-7-119 of the Federal Court of Arbitration of the Volga-Vyatka District (Oct. 20, 2008) [hereinafter Resolution No. A43-4663/2008-7-119].

40 *See* Resolution No. 09AP-27014/2011, *supra* n. 38; Ruling No. VAS-2851/124 of the Supreme Court of Arbitration of the Russian Federation (March 19, 2012); Resolution No. F09-8434/11 of the Federal Court of Arbitration of the Ural District (Dec. 26, 2011).

principle used in foreign (including German) law that copying a work is acceptable provided the author of the later work has had access to the original if the latter has been published before[41] is not used in Russian judicial practice. Nor does Russian practice make provision for any specific procedure for verifying whether a work that duplicates or is similar to another is the product of independent creation.

Hence, it is obvious that, despite direct references to ¶ 28 of Resolution No. 5/29, courts give determining significance to the novelty criterion in the majority of difficult disputes over works of low authorship. However, individual cases where each mutually duplicating work is granted independent copyright protection do still arise,[42] which means that the independent creation criterion has been used for each of them. In some cases, courts directly use the novelty, originality and uniqueness set of criteria for disputable works.

3.3.2. Standards of creativity

An analysis of standards used by courts in evaluating the creative character of works produces a contradictory picture.

On the one hand, it is fair to conclude that, in effect, the use of ¶ 28 of Resolution No. 5/29 leads to lower standards in many cases. Indeed, the presumption of the creative character of a work and the refusal to verify that such a work meets the novelty, originality and uniqueness criteria provide a basis for works of low authorship, even if banal or trivial, to be recognized as copyrightable.[43] Moreover, courts seldom raise the issue of the reproduction of elements of the public domain, and this is one more factor behind the wide-scale use of copyrightability.

On the other hand, in numerous cases, especially where defendants raise objections amounting to allegations that a disputed work is non-creative, courts explicitly use higher standards, primarily based on novelty, originality and uniqueness criteria, sometimes putting the burden of proof on the claimant (more about this below). Here, they argue that a copyrightable work cannot be a mere technical manual, source of reference or reproduction of ideas that form part of the public domain.[44]

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41 *See* Dreier & Schulze, *supra* n. 7 at 51, § 2, Rn. 17; Berking, *supra* n. 21 at 83–84. For similar instruments in U.S. judicial practice *see* Nimmer & Nimmer, *supra* n. 22, at § 13.03.

42 This is not normally done offhand, and sometimes interpretations of court rulings are required to underlie such conclusions. *See* Resolution No. F09-6166/10-S6 of the Federal Court of Arbitration of the Ural District (Sept. 1, 2010); Resolution No. F09-9135/11 of the Federal Court of Arbitration of the Ural District (Jan. 26, 2012) [hereinafter Resolution No. F09-9135/11]; Resolution No. KG-A40/1594-09 of the Federal Court of Arbitration of the Moscow District (May 25, 2009).

43 *See* Resolution No. KG-A40/2047-11-4, *supra* n. 32; Resolution No. A40-7067/11-110-57, *supra* n. 36; Resolutions No. 09AP-27804/2011-GK and No. 09AP-27909/2011-GK, *supra* n. 32; Resolution No. F09-1009/12, *id.*

44 Incidentally, there have been cases where courts insisted on lower standards despite proof from the defendant that the disputed work was mainly based on standard elements. *See* Resolution No. 09AP-13024/2009, *supra* n. 38.

Cases where courts use specific standards of creativity are comparatively rare. Thus, one usually has to use indirect evidence to discern what standards have been used, *e.g.*, the character of the work, criteria used, instruments used in recourse to the public domain, and other circumstances.

Nevertheless, it is instructive to analyze such standards as applied to specific types of works.

First of all, courts rarely use any special copyrightability standards for works that normally have a prominent creative component. For example, in respect of works of literature and visual art, audiovisual works, and pieces of music, there is, as a rule, no need to prove the creative character of such works.[45] Quite often, courts directly argue that it is inappropriate to use any special creativity standards for such works.[46]

However, in some cases, higher copyrightability standards are used for works of this kind. This usually happens where such works have a significant non-creative component that entails a risk of monopolization of part of the public domain.

For instance, a work of literature will not be copyrightable if it uses information from a manufacturing company put in ordinary form (*e.g.*, booklets advertising a heated floor),[47] if it depends on external circumstances (*e.g.*, chronological or seasonal repertoires), if it is based on common concepts or intended for pragmatic use, borrows its main underlying concept and structure from an earlier edition, uses a standard layout (theatre programmes),[48] has fragments that coincide with specialist terms or classifications, schemes or business models, or uses information from generally accessible sources such as the Internet.[49]

A claimant seeking copyright for a short phrase such as the title of a work or an advertisement slogan will also have to offer substantial reasons for its copyright protection – they will need to prove its creative character,[50] novelty, originality

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[45] *See* Resolution No. A31-4368/2011, *supra* n. 30; Resolution No. A17-4872/2010, *id.*; Resolution No. F09-121/12, *id.*; Resolution No. A29-5892/2009 of the Federal Court of Arbitration of the Volga-Vyatka District (Aug. 13, 2010); Resolution No. 09AP-24568/2009-GK of the 9th Arbitration Court of Appeal (March 1, 2010) [hereinafter Resolution No. 09AP-24568/2009-GK]; Resolution No. A43-27386/2010 of the Federal Court of Arbitration of the Volga-Vyatka District (Oct. 12, 2011); Ruling No. 4g/1-7255, *supra* n. 32.

[46] *See* Resolution No. 09AP-24568/2009-GK, *supra* n. 45.

[47] *See* Ruling No. VAS-2305/11 of the Supreme Court of Arbitration of the Russian Federation (March 11, 2011) [Ruling No. VAS-2305/11]; Resolution No. F03-8505/2010 of the Federal Court of Arbitration of the Far Eastern District (Dec. 20, 2010) [hereinafter Resolution No. F03-8505/2010].

[48] *See* Resolution No. 09AP-27014/2011-GK, *supra* n. 38; Resolution No. A40-133968/09-27-952, *id.*

[49] *See* Resolution No. KG-A40/1795-10 of the Federal Court of Arbitration of the Moscow District (Apr. 5, 2010) [hereinafter Resolution No. KG-A40/1795-10]; Ruling No. A40-17182/09-51-199 of the Court of Arbitration of the City of Moscow (Nov. 24, 2009).

[50] *See* Ruling No. 33-10009/2011 of the Moscow City Court (Apr. 8, 2011) [hereinafter Ruling No. 33-10009/2011].

and individuality,[51] as well as establishing that it cannot be considered a phrase in common use.[52]

There have been cases where proof of creativity, originality and uniqueness is expected from seekers of copyright protection for *computer graphics*.[53]

More often, special standards of creativity are used for works whose authors have used considerations of functionality, various kinds of technical standard, elements of the public domain and other non-creative factors. *Computer programs* may be seen as an exception to this rule, possibly because courts mainly encounter cases of suspected piracy, *i.e.* the copying of a program as a whole without its revision or use of individual elements of it.[54]

The practice of dealing with similar results of intellectual work, such as works of industrial and architectural design, maps or photographs, remains inconsistent. Courts have gradually been developing a practice of denying copyrightability to works, or elements of works, that have a significant non-creative aspect to them. However, whereas in some cases recognition of the role of such factors in the creation of a work leads to higher copyrightability standards being set whereby authors are required to prove novelty, originality and uniqueness, in other cases, courts set lower copyrightability standards.

For instance, in some cases courts have declared a *work of design* copyrightable if a special selection or combination of available and standard means and resources were used by its creator (designs of cakes);[55] if there were differences between disputed works (cover designs of books);[56] if there were distinctions that ruled out the duplication of the entire set of artistic images (designs of Internet portals);[57] or if there were differences in the details of a newspaper design[58] while the general concept of the design was qualified as non-copyrightable.

Conversely, in other cases distinctions between non-complicated works of design were ignored. Here, one court assumed that similarities between two works (*e.g.*, designs of bread packaging)[59] were a sufficient reason to deny copyrightability to

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51 *See* Ruling No. VAS-5413/10, *supra* n. 38; Resolution No. KG-A41/13081-09, *id*.

52 *See* Ruling No. 33-36846, *supra* n. 38.

53 *See* Resolution No. 09AP-31934/2011-GK, *supra* n. 38.

54 *See* Ruling No. A11-7400/2010 of the Federal Court of Arbitration of the Volga-Vyatka District (Nov. 15, 2011).

55 *See* Resolution No. 09AP-13024/2009, *supra* n. 38.

56 *See* Resolution No. F09-9135/11, *supra* n. 42.

57 *See* Resolution No. A32-46580/200 of the Federal Court of Arbitration of the North Caucasus District (Dec. 6, 2010).

58 *See* Ruling No. 33-16364 of the Moscow City Court (May 30, 2011).

59 *See* Resolution No. F09-5444/11, *supra* n. 39.

one of them and did not attempt to find out whether there were any external factors behind such similarities.

There have been cases where courts directly tested such works against the originality and uniqueness criteria[60] or verified the copyrightable status of such works (*e.g.*, advertisement modules),[61] which de facto meant special discussion of their creative standards.

Standards set for *photographs* are equally inconsistent.

In some cases, courts unconditionally assume photos to be copyrightable and disregard the external factors behind their creation.[62] The author's ability to choose their specific approach to photography (*e.g.*, photographing a conveyor belt at a factory)[63] is *per se* deemed to represent the creative character of a photograph.

On the other hand, there have been non-copyrightability rulings in respect of photographs in the society sections of newspapers (their sources of information were used as the formal reason to deny them copyrightability),[64] as well as for 'handheld' pictures, where the author was able to choose the angle,[65] and pictures taken automatically (not to be confused with the non-copyrightability of CCTV footage).[66]

Copyright practice in *cartography* has been more consistent.

There is a clear trend in favour of setting minimal standards of creativity for maps, and in no case do such standards involve uniqueness verification. Maps are usually recognized as copyrightable *a priori*.[67] Even if a court brings up the issue of original or individual style, a map's design as chosen by its author and affecting its accuracy, informativeness, clarity and convenience of use, will normally meet this criterion.[68]

A court will argue that, while two different maps may have the same basis, they may significantly differ from each other in their detail, including volumes of information, graphic means and the use of certain elements. It is these characteristics that represent the author's distinctive style and make a map copyrightable. It is

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60 *See* Resolution No. A40-133968/09-27-952, *supra* n. 38.

61 *See* Resolution No. A64-5347/2010 of the Federal Court of Arbitration of the Central District (July 27, 2011).

62 *See* Resolutions No. 09AP-27804/2011-GK and 09AP-27909/2011-GK, *supra* n. 32; Resolutions No. 09AP-13192/2011-GK and 09AP-13193/2011-GK of the 9th Arbitration Court of Appeal (June 30, 2011).

63 *See* Resolution No. F09-1153/09-S6 of the Federal Court of Arbitration of the Ural District (Sept. 16, 2009).

64 *See* Resolution No. 09AP-19024/2011-GK of the 9th Arbitration Court of Appeal (Aug. 22, 2011).

65 *See* Ruling No. 33-1800 of the Moscow City Court (Jan. 24, 2012).

66 *See* Resolution No. 09AP-2257/2011 of the 9th Arbitration Court of Appeal (Apr. 20, 2011).

67 *See* Resolution No. 09AP-6425/2010-GK of the 9th Arbitration Court of Appeal (Apr. 27, 2010); Resolution No. A56-14726/2010, *supra* n. 30; Resolution No. A43-40479/2009 of the Federal Arbitration Court of Appeal of the Volga-Vyatka District (June 16, 2010).

68 *See* Resolution No. A43-4663/2008-7-119, *supra* n. 39; Resolution No. A43-10849/2009 of the Federal Court of Arbitration of the Volga-Vyatka District (Jan. 18, 2010).

impossible to single out any of the elements of a map, *e.g.*, the font, colours or street names, as the map as a whole is copyrightable.[69] In effect, it may be said that the independent creation criterion is used there.

In dealing with map copyright cases today, courts use none of the stricter criteria of creativity that the Presidium of the Supreme Court of Arbitration prescribes in ¶ 1 of Review No. 122 dated Dec. 13, 2007, which at minimum involve taking account of external factors such as generally accessible information or generally known facts.

On the other hand, there is no consistent practice for assessing the copyrightability of *architectural and other technical designs*.

In some instances, courts recognize such designs as creative without trying to find out how the supposed creative character of a design manifests itself.[70]

More often, however, courts take into account that such designs are based on considerations of functionality, on standard solutions, and on fundamental data stated in technical and regulatory documents, such as user requirement specifications or findings of geological explorations.

In some cases, such factors are directly indicated as grounds for ruling a design non-copyrightable or for denying any violation of copyright.[71] In others, the claimant is challenged to prove that their design is new, original and unique.[72]

3.3.3. Distributing the burden of proof regarding the creative character of a work

By and large, courts consistently follow the principle of the presumed creative character of a work prescribed in ¶ 28 of Resolution No. 5/29. We cannot cite any instance in the judicial practice of recent years where a court has thrown out a suit from the author of a work falling within the traditional high authorship category on the grounds the claimant failed to prove the creative character of the work.

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[69] *See* Resolution No. A28-19473/2005-393/25 of the Cassation Board of the Federal Court of Arbitration of the Volga-Vyatka District (Nov. 29, 2006). This resolution was repealed by Resolution No. 2096/07 of the Presidium of the Supreme Court of Arbitration of the Russian Federation (June 26, 2007) [hereinafter Resolution No. 2096/07].

[70] *See* Resolution No. F09-1009/12, *supra* n. 32; Resolution No. KG-A40/2047-11-4, *id.*

[71] Designing ventilated cladding for a building is a purely technical task, according to Ruling No. VAS-4707/11 of the Supreme Court of Arbitration of the Russian Federation (May 17, 2011) [hereinafter Ruling No. VAS-4707/11], and to Resolution No. A56-62462/2009 of the Federal Court of Arbitration of the Northwestern District (Dec. 15, 2010) [hereinafter Resolution No. A56-62462/2009]. The creation of design and construction documents is the technical and organizational task of optimizing the process of design and construction in the 'Standard Construction Units' category, according to Resolution No. 09AP-15365/2011-GK of the 9th Arbitration Court of Appeal (July 21, 2011) [hereinafter Resolution No. 09AP-15365/2011-GK].

[72] *See* Resolution No. F09-4849/08-S6, *supra* n. 38, left in force by Ruling No. 12879/08, *id.*; Resolution No. 09AP-5916/2008-GK, *id.*, which was repealed subsequently.

Nevertheless, it would be inaccurate to say that courts always follow the chief message of ¶ 28, which aims to loosen creativity standards and vastly expand the range of works eligible for copyright protection. The point at issue is what a court sees as outweighing the presumed creativity principle, and therefore as reason to impose the burden of proving the creative character of a work on the claimant.

An analysis of judicial practice shows that this takes place when the work in question can be categorized as a work of low authorship or a work without any creative aspect, because, for example, it merely reproduces part of the public domain. In such cases, neither formal reference to Cl. 5 or Subcl. 4 of Cl. 6 of Art. 1259 of the Civil Code, nor placing the disputable work within any of the categories listed in Cl. 1 of Art. 1259, nor the defendant's provision of evidence as to the non-creative character of the work (*e.g.*, an expert assessment) is of any decisive significance.

In some cases, courts have placed the burden of proof on the claimant at their own initiative, assessing such proof at their own discretion, with an assessment of a copy of the work presented to the court being accepted as a sufficient basis for this.[73] Quite often, in explaining a decision to place the burden of proof on the claimant, courts argue that the disputed work reproduces ideas from the public domain (Cl. 5 of Art. 1259 of the Civil Code),[74] or that it is a mere work of reference (Subcl. 3 of Cl. 6 of Art. 1259),[75] or that it comes under none of the types of work listed in Cl. 1 of Art. 1259.[76]

In some cases, courts interpret the claimant's duty to prove that their work is copyrightable broadly.[77]

Interestingly, in some cases, the transfer of the burden of proof is accompanied by higher creativity standards – namely, that the claimant is required to prove that the work is new, original and unique.[78] It appears that imposing the burden of proof on the claimant is a reaction by the courts to the increasing risk of monopolization of elements of the public domain as a result of the lowering of copyright standards that forms one of the objectives of Resolution No. 5/29.

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[73] *See* Ruling No. VAS-5413/10, *supra* n. 38; Ruling No. VAS-4707/11, *supra* n. 71; Resolution No. A56-62462/2009, *id.*; Resolution No. 09AP-5916/2008-GK, *supra* n. 38; Resolution No. A56-35168/2009, *id.*; Ruling No. 33-10009/2011, *supra* n. 50.

[74] *See* Resolution No. 09AP-27014/2011, *supra* n. 38.

[75] *See* Resolution No. A56-35168/2009, *supra* n. 38 (reference to the use of generally accessible sources of information); Ruling No. VAS-2305/11, *supra* n. 47 (a work reproducing information from the producer).

[76] *See* Resolution No. A56-62462/2009, *supra* n. 71.

[77] *See* Ruling No. VAS-5413/10, *supra* n. 38; Resolution No. A56-16934/0 of the Federal Court of Arbitration of the Northwestern District (Dec. 10, 2001); Resolution No. 09AP-5916/2008-GK, *supra* n. 38; Ruling No. 33-10009/2011, *supra* n. 50.

[78] *See* Ruling No. VAS-5413/10, *supra* n. 38; Ruling No. VAS-2305/11, *supra* n. 47; Resolution No. 09AP-27014/2011, *supra* n. 38; Resolution No. 09AP-5916/2008-GK, *id.*; Resolution No. A56-35168/2009, *id.*

3.3.4. An author's resources for the creation of an original work and factors ruling out the creative character of a work

Unlike doctrinal polemics that neglect the danger of monopolization of parts of the public domain as a result of lower standards of creativity, courts are forced to react to such risks by developing legal means to detect public domain elements in a work.

One such means is the thesis that general ideas that a work contains are non-copyrightable (Cl. 5 of Art. 1259).[79] Another is the qualification of a work, or parts of it, as a mere record of events or facts (Subcl. 4 of Cl. 6 of Art. 1259).[80] A third is direct reference to factors that, in the court's opinion, reflect the non-creative character of the work (*e.g.*, the use of generally accessible sources of information, including sources such as the Internet, access to which is completely unrestricted),[81] the compliance of the work with certain standards,[82] functionality requirements,[83] its pragmatic character,[84] external factors,[85] use of a general model,[86] certain underlying concepts,[87] the general character of the information the work is based on,[88] and the unity of information and facts.[89]

No comprehensive list of such factors has been compiled, and it is too early to say that this is a definitive instrument. Court rulings in such cases tend to be extremely casuistic, fail to show any connection between conclusions on the copyrightability or non-copyrightability of a work and the author's resources for self-expression and for the creation of an original work, and fail to describe factors that would rule out the creative character of a work.[90] Nevertheless, the above-cited court rulings are based on similar logic.

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79 *See* Resolution No. KG-A40/1795-10, *supra* n. 49; Resolution No. 09AP-15365/2011-GK, *supra* n. 71.

80 *See* Ruling No. VAS-2305/11, *supra* n. 47; Resolution No. F03-8505/2010, *id.* (use of information from a producer).

81 *See* Ruling No. VAS-2305/11, *supra* n. 47; Resolution No. F03-8505/2010, *id.*; Resolution No. KG-A40/1795-10, *supra* n. 49; Resolution No. A56-35168/2009, *supra* n. 38.

82 *See* Resolution No. 09AP-27014/2011-GK, *supra* n. 38; Resolution No. A40-133968/09-27-952, *id.*; Resolution No. 09AP-13024/2009, *id.*

83 *See* Resolution No. 09AP-15365/2011-GK, *supra* n. 71.

84 *See* Resolution No. 09AP-27014/2011-GK, *supra* n. 38.

85 *See* Resolution No. 09AP-27014/2011-GK, *supra* n. 38; Resolution No. A40-133968/09-27-952, *id.*

86 *See* Resolution No. A32-46580/2009 of the Federal Court of Arbitration of the North Caucasus District (Dec. 6, 2010) [hereinafter Resolution No. A32-46580/2009].

87 *See* Resolution No. 09AP-27014/2011-GK, *supra* n. 38.

88 *See* Resolution No. KG-A40/2047-11-4, *supra* n. 32.

89 *See* Resolution No. A43-4663/2008-7-119, *supra* n. 39.

90 In German law, this idea has become firmly established via the *Gestaltungsspielraum* general principle. *See* Gamm, *supra* n. 15, at 82 ff.; Fuchs, *supra* n. 22, at 54–56; Dreier & Schulze, *supra* n. 7, at 55, § 2, Rn. 33.

Moreover, Russian judicial practice has yet to address the problem of indirect monopolization of elements of the public domain. Courts have so far dealt with situations where parts of the public domain were expressed in one of several standard forms. Here, providing a work that includes such public domain elements with copyright protection would limit public use of such content even where a subsequent work is an independent and new creation.[91]

3.3.5. Copyright protection of smaller forms of art and parts of a work: the volume of copyright protection of a work

In the context of this article, one interesting aspect of the copyright protection of part of a work is the use by Russian courts of the above-quoted Cl. 7 of Art. 1259 of the Civil Code with a view to preventing the monopolization of any part of the public domain. Such a danger arises when the point of dispute is a comparatively small part of a work (*e.g.*, its title), or smaller forms of art whose copyright protection would essentially mean monopolization of artistic devices (*e.g.*, individual words, set phrases, or specific commonly used tonal ranges). In such cases, courts often deny protection, arguing that the claimant has failed to prove that such parts (or smaller works) are the result of their own independent creative work and meet the novelty, originality and uniqueness criteria.[92]

This means that providing or denying copyright protection to any such item does not depend on whether or not its author has been able to prove that it is the product of independent creation.

Moreover, this interestingly represents the use of high standards of copyrightability, as the author's individuality must manifest itself in the work to make it copyrightable.

This corroborates the hypothesis outlined above on the copyrightability of works of low authorship, namely that, on the whole, lowering copyrightability standards means that copyrightability assessment merely amounts to an assessment of the possibility to borrow individual parts of a work. Thus, it is possible for a work to be copyrightable as a whole but for any part of that work or, similarly, a work with minor changes, to be in free use.[93] In other words, the individuality criterion has not lost its legal significance but has begun to be used at a different stage in dispute resolution.

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[91] In the United States, the *merger doctrine* is used to eliminate such risks. *See Herbert Rosenthal Jewelery Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971); Nimmer & Nimmer, *supra* n. 22, at § 13.03[B][3]. In Germany, the *Gestaltungsspielraum* doctrine is used for this purpose. *See* Berking, *supra* n. 21, at 75.

[92] Ruling No. VAS-5413/10, *supra* n. 38; Resolution No. KG-A41/13081-09, *id.* (advertising slogans); Resolution No. A56-35168/2009, *id.* (advertising banners); Ruling No. 33-36846, *id.* (title of a work); Ruling No. 33-10009/2011, *supra* n. 50 (title of a work).

[93] *See* Knöbl, *supra* n. 7, at 157; Gerhard Rau, Antikunst und Urheberrecht 35 ff. (Schweitzer 1978).

Furthermore, the Russian practice of protecting elements and sections of works implies that Russian law is ready to accept a copyright scheme where the possibility of using elements in other works depends on their degree of individuality.[94]

3.3.6. Arguments accepted by courts as proof of the creative character of works

Quite often in copyright dispute resolution, evidence accepted by courts as proof of the creative nature of a work include a copy of the work (the court then draws its conclusions after examining this copy),[95] expert assessments,[96] and any agreement on the creation of the work and the transfer of rights to it[97] (though, strictly speaking, such agreements are the legal basis for the actual fact of its production rather than its creative character).[98]

One problem with the use of expert assessments is that an expert in a field other than law is given the legal task of determining whether a disputed work is new, original and unique.[99]

4. Principal conclusions

The Russian judicial practice of resolving disputes over whether a work is creative and therefore copyrightable is rather inconsistent. Nevertheless, there are obvious indications of a tendency to lower copyrightability standards for various reasons, primarily in order to protect works of low authorship, mainly computer programs and databases.

Originality, novelty and uniqueness have increasingly ceased to be the criteria for copyrightability, being replaced by the requirement of independent creation,

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94 *See* Ulmer, *supra* n. 13, at 275 ff.; Dreier & Schulze, *supra* n. 7, at § 24, Rn. 1, 4, 8. There exist similar procedures for comparing degrees of originality of works or parts of works in American copyright practice (in trying to determine whether a disputed work is a copy of another, a court looks for significant similarity between elements of the two works. Here, the degree of individuality of the elements is the determining factor). *See Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 361 (1991).

95 *See* Resolution No. A32-46580/2009, *supra* n. 86; Resolution No. F09-8434/11 of the Federal Court of Arbitration of the Ural District (Dec. 26, 2011); Resolution No. 09AP-24568/2009-GK of the 9th Arbitration Court of Appeal (March 1, 2010).

96 *See* Resolution No. A65-24595/2008 of the Federal Court of Arbitration of the Volga District (Dec. 13, 2010) [hereinafter Resolution No. A65-24595/2008]; Resolution No. F09-1153/09-S6 of the Federal Court of Arbitration of the Ural District (Sept. 16, 2009); Resolution No. 09AP-15365/2011-GK of the 9th Arbitration Court of Appeal (July 21, 2011); Resolution No. F09-4849/08-S6 of the Federal Court of Arbitration of the Ural District (July 11, 2008); Resolutions No. 09AP-13192/2011-GK and No. 09AP-13193/2011-GK of the 9th Arbitration Court of Appeal (June 30, 2011).

97 *See* Ruling No. A40-29046/10-12-177 of the Court of Arbitration of the City of Moscow (May 25, 2010); Resolution No. 09AP-17376/2010-GK of the 9th Arbitration Court of Appeal (Aug. 26, 2010).

98 As a curious point, it is interesting to cite a case where the actual existence of the dispute was used by the court as evidence of the copyrightability of the disputed work, for otherwise, the court argued, the dispute would be senseless. *See* Resolution No. A65-24595/2008, *supra* n. 96.

99 *See* Resolution No. 2096/07, *supra* n. 69.

which may involve non-deliberate copying. At the same time, since there are no definitively approved criteria for identifying possible elements of the public domain in a work, Russian judicial practice comes up against the growing risk of partial monopolization of the public domain. One way to eliminate such risks is to return to higher standards of copyrightability. Another is to evolve a methodology similar to methodologies existing in foreign legal systems.

Consequently, as in Germany, Russian judicial practice evinces signs of a trend to diversify standards of creativity for different types of works. If the point of dispute is a work of a traditional type with a prominent creative aspect, courts will use low standards of copyrightability, believing that proof of independent production is sufficient for the work to be ruled copyrightable. On the other hand, in dealing with works of low authorship, courts quite often set special, higher standards, making copyrightability conditional upon originality, novelty and uniqueness.

Distribution of the burden of proof is one more way in which differentiation between works of the traditional creative type and works of low authorship manifests itself. As the general rule, courts follow the principle of the presumed creative character of a work. However, in many cases where there are reasons to categorize a disputed work as a work of low authorship, courts transfer the burden of proving its creative character to the claimant who alleges that their exclusive rights have been violated.

Russian courts are gradually evolving a practice where works or elements of works are deemed non-copyrightable if a significant role has been played in their production by factors that rule out any creative aspect, *e.g.*, requirements of functionality, compliance with various standards or reproduction of elements of the public domain. This creates the basis for developing a construct similar to German *Gestaltungsspielraum*.

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COMMENTS

IMMORAL TRUTH VS. UNTRUTHFUL MORALS? ATTEMPTS TO RENDER RIGHTS AND FREEDOMS CONDITIONAL UPON SEXUAL ORIENTATION IN LIGHT OF RUSSIA'S INTERNATIONAL OBLIGATIONS

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Our obligation is to define the liberty of all,
not to mandate our own moral code.
Planned Parenthood of Southeastern Pa. v. Casey[1]

Wrong does not cease to be wrong
because the majority share in it.
Leo Tolstoy[2]

The recently adopted Russian federal legislation provides for imposition of the so-called 'administrative' sanctions for dissemination of any information regarding issues related to 'social equality' of diverse sexual orientations or gender identities 'among minors' for certain purposes (listed in the relevant provision). Under the new laws, such conduct qualifies as an administrative offence. In parallel with the aforementioned amendments, Art. 127 of the Family Code of Russian Federation was modified to prohibit adoptions by married same-sex couples and unmarried citizens of any state where homosexual marriage is permitted.

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[1] 505 US 833, 850 (1992).

[2] A Confession and Other Religious Writings 158 (Jane Kentish, trans.) (Penguin UK 1987).

The present article is written in the attempt to explore whether the recent Russian legislation is compatible with international standards of human rights protection deriving from the International Covenant on Civil and Political Rights and the European Convention on Human Rights and the relevant jurisprudence of international bodies. Is there any possibility to justify the restrictive laws under international law, bearing in mind the support of this legislative trend by the majority of the Russian population?

Keywords: propaganda of non-traditional sexual relationships; freedom of expression; freedom of assembly.

1. Introduction

The notion of the superiority of one social group over another was made notorious by events in the first half of the twentieth century. Now, in 2014, this idea has re-emerged in Russian legislation and is claimed to garner significant support among the country's populace. At the time of writing, this idea had taken the form of a legislative prohibition on the promotion of the 'social equality of traditional and non-traditional sexual relationships'[3] among minors in Russia. Already, some factions speak of an extending this prohibition to encompass the criminalisation of same-sex intercourse.[4]

Recently adopted Russian federal legislation provides for the imposition of so-called 'administrative' sanctions for disseminating 'among minors' for certain purposes (listed in the relevant provision), any information regarding issues related to the 'social equality' of persons with diverse sexual orientations or gender identities.[5] This legislation deems such conduct an administrative offence.[6] The legislation has lead to pickets among opponents, and the courts have already started to apply new administrative sanctions, sentencing picket participants to fines.[7]

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[3] Кодекс об административных правонарушениях Российской Федерации (КоАП РФ) [Code of Admin. Offenses of the Russian Federation], Dec. 30 2011, No. 195-FZ, Art. 6.21 (as of Oct. 21, 2013).

[4] *See* Trudy Ring, *Russian Church Leader Proposes Criminalizing Homosexuality*, Advocate.com (Jan. 10, 2014), <www.advocate.com/news/world-news/2014/01/10/russian-church-leader-proposes-criminalizing-homosexuality> (accessed March 5, 2014). Read more on the threat of possible criminalisation in the ILGA survey: Lucas P. Itaborahy & Jingshu Zhu, State-Sponsored Homophobia World Survey of Laws: Criminalisation, Protection and Recognition of Same-Sex Love 80 (8th ed., ILGA 2013), available at <http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2013.pdf> (accessed March 5, 2014).

[5] Russian law provides for a division between administrative and criminal offences, with administrative procedure providing fewer fair trial guarantees than criminal procedure – a point that is regularly scrutinised from a European Convention on Human Rights standpoint. *See, e.g.*, *Menesheva v. Russia,* no. 59261/00 Eur. Ct. H.R., 2006-III, ¶¶ 94–98 and *Zolotukhin v. Russia* [GC], no. 14939/03, Eur. Ct. H.R., 2009-I, ¶¶ 54–57.

[6] *See* more detailed discussion on recent developments in Russian law *infra*, sect. 2.

[7] *See First LGBT Activists Sentenced under Federal Propaganda Law*, Civil Rights Defenders (Dec. 10, 2013), <https://www.civilrightsdefenders.org/news/russia-first-lgbt-activists-sentenced-under-federal-propaganda-law/> (accessed March 5, 2014).

The end of 2013 also saw the State Duma (the lower chamber of the Federal Assembly – Russia's legislature) amend the Russian Federation's Family Code to prohibit married same-sex couples and unmarried citizens of states where same-sex marriage is permitted from adopting Russian children.[8]

These laws have been adopted notwithstanding the fact that Russia remains a party to the International Covenant on Civil and Political Rights[9] and its First Optional Protocol.[10] They come only fifteen years after the country ratified the European Convention on Human Rights and Fundamental Freedoms[11] to join the Council of Europe, a regional organisation created in the aftermath of World War II to prevent the reoccurrence of the abuses that characterised that conflict and the years preceding it. Both the ICCPR and the ECHR form part of a post-war rebirth enshrined in the United Nations Charter. This international movement emphasises the centrality of human rights protection[12] secured by international enforcement mechanisms to maintaining international peace and security. It represents a concerted international effort to stave off the deplorable fate suffered by the League of Nations in the 1930s.[13]

The Human Rights Committee [hereinafter HRC][14] and the European Court of Human Rights [hereinafter Eur. Ct. H.R.], entrusted with the interpretation and implementation of these instruments,[15] have already noted that the standards developed by Russia both in practice and, on the regional level, formally, are incompatible with Russia's international human rights obligations.[16]

Why has the Russian legislature, despite its awareness of its international obligations deriving from Eur. Ct. H.R. and HRC case law, adopted legislation that is so clearly discriminatory? Can this initiative potentially be justified by the need to protect traditional values and the child's best interests? Does it matter, in the end,

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[8] *See* Семейный кодекс Российской Федерации [Family Code of the Russian Federation], Dec. 29, 1995, No. 223-FZ, Art. 127(1) (as of Nov. 25, 2013).

[9] Int'l Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171, signed by the Soviet Union on March 18, 1968 [hereinafter ICCPR].

[10] Optional Protocol to the ICCPR, Dec. 16, 1966, 999 UNTS 302, to which Russia acceded on Oct. 1, 1991.

[11] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 221 [hereinafter ECHR].

[12] UN Charter, Preamble and Art. 1(3).

[13] *See, e.g.,* Johannes Morsink, The Universal Declaration of Human Rights: Origins, Drafting, and Intent (University of Pennsylvania Press 1999); Yakov Ostrovsky, UN and Human Rights (Mezhdunarodnyye otnosheniya 1968).

[14] The quasi-judicial United Nations body examining complaints under the International Covenant on Civil and Political Rights, to whose jurisdiction Russia submitted from Oct. 1, 1991.

[15] ECHR, *supra* n. 11, Arts. 19 and 32; ICCPR, *supra* n. 9, Art. 41 and Preamble to the Optional Protocol.

[16] *Fedotova v. Russia,* CCPR/C/106/D/1932/2010 (Human Rights Comm., Nov. 30, 2012); *Alekseyev v. Russia,* nos. 4916/07, 25924/08, 14599/09 (Eur. Ct. H.R., Oct. 21, 2010); *see* also the section concerning Russia's international obligations, *infra*.

whether national law is compatible with international standards when the majority of the population supports, rather than condemns 'anti-gay' amendments? These are precisely the questions that this article will seek to explore.

2. Recent developments in Russian legislation

2.1 Amendments concerning freedom of expression

Since 2014, Russian law has prohibited, at the regional and federal levels, propaganda supporting 'non-traditional sexual relationships.' In 2006, Russia became the first state in the world to pass such provisions into law through regional legislation.[17] This precedent was followed by several countries in Central and Eastern

[17] The Amending Law was preceded by nine regional laws using similar wording, the first being adopted in 2006 in the Ryazan Region of Russia, with the others following closely one after the other in 2011 and 2012.

The first Act was enacted by authorities of the Ryazan Region in 2006 (Ryazan Regional Law, О защите нравственности и здоровья детей в Рязанской области [On the Protection of the Morals and Health of Children in the Ryazan Region], Apr. 3, 2006, No. 41-oz [hereinafter Ryazan Regional Law No. 41-oz]). This initiative was then supported by the Republic of Bashkortostan, the regions of Arkhangelsk, Kostroma, Krasnodar, Magadan, Novosibirsk and Samara, and the City of St. Petersburg (*see* Republic of Bashkortostan Law, О внесении изменения в Закон Республики Башкортостан «Об основных гарантиях прав ребенка в Республике Башкортостан» [On Amending the Republic of Bashkortostan Law 'On Fundamental Safeguards of the Rights of the Child in the Republic of Bashkortostan'], July 23, 2012, No. 581-z; Arkhangelsk Regional Law, О внесении изменений и дополнений в областной закон «Об отдельных мерах по защите нравственности и здоровья детей в Архангельской области» [On Amending and Adding to the Regional Law 'On Specific Means of Protection of Health and Morals of Children in the Archangelsk Region'], Sept. 30, 2011, No. 226-24-oz; Kostroma Regional Law, О внесении изменений в Закон Костромской области «О гарантиях прав ребенка в Костромской области» и Кодекс Костромской области об административных правонарушениях [On Amending the Kostroma Regional Law 'On Safeguards of the Rights of the Child in the Kostroma Region' and Code of Admin. Offenses of the Kostroma Region], Febr. 15, 2012, No. 193-5-zko; Krasnodar Territory Law, О внесении изменений в отдельные законодательные акты Краснодарского края в части усиления защиты здоровья и духовно-нравственного развития детей [On Amending Specific Legislative Acts of the Krasnodar Territory as Regards the Stepping up of the Protection of Health and the Moral and Spiritual Development of Children], July 3, 2012, No. 2535-kz; Magadan Regional Law, О внесении изменений в отдельные законы Магаданской области в части защиты несовершеннолетних от факторов, негативно влияющих на их физическое, интеллектуальное, психическое, духовное и нравственное развитие [On Amending Specific Magadan Regional Laws as Regards the Protection of Minors from Factors Affecting Their Physical, Intellectual, Psychological, Spiritual, and Moral Development], June 9, 2012, No. 1507-oz; Novosibirsk Regional Law, О внесении изменений в отдельные законы Новосибирской области [On Amending Specific Laws of the Novosibirsk Region], June 14, 2012, No. 226-oz; Samara Regional Law, О внесении изменений в Закон Самарской области «Об административных правонарушениях на территории Самарской области» [On Amending the Samara Regional Law 'On Administrative Offences in the Samara Region'], July 10, No. 75-GD; St. Petersburg Law, О внесении изменений в Закон Санкт-Петербурга «Об административных правонарушениях в Санкт-Петербурге» [On Amending the St. Petersburg Law 'On Administrative Offences in St. Petersburg'], March 7, 2012, No. 108-18; Kaliningrad Regional Law, О внесении изменений и дополнений в Закон Калининградской области «О защите населения Калининградской области от информационной продукции, наносящей вред духовно-нравственному развитию» [On Amending and Adding to the Kaliningrad Regional Law 'On the Protection of the Population of the Kaliningrad Region from Information Harmful to Moral and Spiritual Development'], Jan. 30, 2013, No. 199).

Europe (Moldova and Hungary, with attempts undertaken by Ukraine, Lithuania and Latvia).[18] These developments finally led to the adoption of federal legislation in Russia in 2013.

On July 29, 2013, Federal Law No. 135-FZ amending certain laws of the Russian Federation with a view to protecting children from information propagating the negation of traditional family values, entered into force [hereinafter Amending Law on Propaganda].[19]

At the first reading of this proposed new law, in January 2013, the draft bill referred to 'propaganda of homosexual relationships' which was later replaced by 'propaganda of non-traditional sexual relationships.' The adoption of this amending legislation was said to be motivated by the need 'to protect the younger generation from the effects of homosexual propaganda,' which was said to take a 'sweep widely' in Russia, being 'delivered both through the media and through active social actions that promote homosexuality as a behavioural norm.'[20]

The Amending Law on Propaganda modified three federal acts: the Law on the Rights of the Child Law,[21] the Law on Protection of Children from Detrimental Information Law,[22] and the Code of Administrative Offences of the Russian Federation.[23]

The Amending Law on Propaganda has modified the Law on the Rights of the Child to oblige governmental authorities:

> [T]o adopt measures in order to protect the child from information propaganda and agitation detrimental to his/her heath, moral and spiritual development, including . . . information propagating non-traditional sexual relationships.

'Propagating non-traditional sexual relationships' was also included in the Law on Protection of Children from Detrimental Information as yet another type of

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18 *See* Report, The Article 19 Law Programme, *Traditional Values? Attempts to Censor Sexuality. Homosexual Propaganda Bans, Freedom of Expression and Equality* 7 (2013), <http://www.article19.org/data/files/medialibrary/3637/LGBT-propaganda-report-ENGLISH.pdf> (accessed March 7, 2014) [hereinafter Article 19].

19 The full text of the amendments in English is available at <http://www.threefold.ru/russian-laws-amended-federal-law-no-135-fz-amending-certain-laws-russian-federation-view-protect-children> (accessed March 7, 2014) (unofficial translation).

20 *See* Explanatory Note to Draft Law No. 44554-6, available at <http://asozd2.duma.gov.ru/main.nsf/%28Spravka%29?OpenAgent&RN=44554-6> (accessed March 7, 2014).

21 Federal Law, Об основных гарантиях прав ребенка в Российской Федерации [On the Principal Guarantees of the Rights of the Child in the Russian Federation], July 24, 1998, No. 124-FZ (as of July 2, 2013).

22 Federal Law, О защите детей от информации, причиняющей вред их здоровью и развитию [On the Protection of Children from Information Detrimental to Their Health and Development], Dec. 29, 2010, No. 436-FZ (as of July 2, 2013) [hereinafter Federal Law on the Protection of Children].

23 *Supra* n. 3.

prohibited action and content aimed at negating family values, which should not be communicated to children.[24]

To ensure compliance with the aforementioned provisions, a new offence was enshrined in the Code of Administrative Offences. This offence essentially entails the dissemination of any information aimed at

> forming non-traditional sexual attitudes among minors, attractiveness of non-traditional sexual relationships, a distorted image of the social equality of traditional and non-traditional sexual relationships, or the forced imposition of information about non-traditional sexual relationships, which can attract interest in such relationships.[25]

The penalties attached to this offence take the form of fines applied on a graded scale according to the identity of the accused and the extent of mass media use (including the Internet). These penalties range from 4,000 roubles (approximately EUR 90) to 1,000,000 roubles (approx. EUR 22,000) or administrative suspension of activity for up to 90 days (for legal entities). If the same actions are committed by a foreign national or a stateless person, the fine applies together with administrative expulsion from the Russian Federation or administrative arrest for up to 15 days followed by expulsion from the country.

The Amending Law on Propaganda effectively sums up and conclusively upholds at the federal level not only the Russian regional laws that set the ball rolling in 2006,[26] but also the practices of interference with freedom of expression that have regularly occurred in Russia even since before that time.[27] Such practices have been assessed to constitute both 'consistent' and 'escalating' interference with the freedom of expression[28] and have been found to be incompatible with Russia's international obligations.[29]

In gleaning a comparative perspective it is instructive to note that there are currently around 70 countries worldwide that prohibit the dissemination of information about homosexuality. However, in all such instances that prohibition goes hand in hand with the criminalisation of homosexual acts, attracting sanctions

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[24] *See* Federal Law on the Protection of Children, *supra* n. 22, Art. 5.

[25] *See* Code of Admin. Offences of the Russian Federation, *supra* n. 3, Art. 6.21.

[26] *See, e.g.*, Ryazan Regional Law No. 41-oz, *supra* n. 17.

[27] *See Gay Parades Banned in Moscow for 100 Years*, BBC News (Aug. 17, 2012), <http://www.bbc.co.uk/news/world-europe-19293465> (accessed March 7, 2014).

[28] Paul Johnson, *Homosexual Propaganda' Laws in the Russian Federation: Are They in Violation of the European Convention on Human Rights?* (University of York Working Paper [Draft 8th July 2013]), available at <http://papers.ssrn.com/abstract_id=2251005> (accessed March 7, 2014); for an overview, *see* ILGA-Europe, *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe* 187–189 (2013), available at <http://www.ecoi.net/file_upload/90_1369137411_ilga-europe-annual-review-2013.pdf> (accessed March 7, 2014).

[29] *See infra* n. 33 and 34.

the severity of which can extend to imprisonment and even death.[30] Whilst Russia's present day situation might not be so severe, it is undeniable that Russian legislation has lost its neutrality on homosexuality and is acquiring an increasingly restrictive character, raising concerns of potential criminalisation.

2.2. Amendments concerning the right to adopt a child

Parallel to the Amending Law on Propaganda, another act modifying certain laws regulating care for children without parental care entered into force on July 3, 2013 (Anti-Adoption Amending Law).[31]

This law was said to be aimed at improving 'the mechanisms of legal, organizational and psychological-pedagogical support of Russian citizens intending to adopt'[32] children and facilitating the procedure for adoption.

However, the same law amended Art. 127 of the Family Code, which now prohibits adoptions by two categories of potential parents:

(1) persons of the same sex, who had their marriage registered in any state where homosexual marriages are recognized; and

(2) unmarried citizens (irrespective of their sexual orientation) of any state where homosexual marriage is permitted.

As such, this law precludes both married homosexual couples *and* certain heterosexual couples from adopting children from Russia.

In sum, Russian law's recent prohibition of 'propaganda of non-traditional sexual relationships' under threat of administrative sanction and its preclusion of the adoption of Russian orphans by both married homosexual couples and the citizens of states recognizing such marriages, have both been founded on claims regarding the need to protect the child's best interests and 'traditional values.'

3. The positions taken by Russia's three branches of power

3.1 Russian case-law as the main contributor to the current wording of the Amending Law on Propaganda

The past seven years have seen regional bans on 'homosexual propaganda' assessed as violative of the ICCPR by the HRC in *Fedotova v. Russia*,[33] whilst a refusal

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30 *See* Article 19, *supra* n. 18; Itaborahy & Zhu, *supra* n. 4, at 80.

31 Federal Law, О внесении изменений в отдельные законодательные акты Российской Федерации по вопросам устройства детей-сирот и детей, оставшихся без попечения родителей [On the Amendments to Certain Russian Laws on Care for Orphans and Children Left without Parental Care], July 2, 2013, No 167-FZ.

32 *See* Explanatory Note to Draft Law No. 229781-6, О внесении изменений в отдельные законодательные акты Российской Федерации по вопросам устройства детей-сирот и детей, оставшихся без попечения родителей [On the Amendments to Certain Russian Laws on Care for Orphans and Children Left without Parental Care], available at <http://asozd2.duma.gov.ru/main.nsf/(spravka)?openagent&rn=229781-6> (accessed March 7, 2014).

33 *Fedotova,* CCPR/C/106/D/1932/2010, *supra* n. 16.

to allow the organisation of a gay pride parade was found incompatible with the ECHR by the Eur. Ct. H.R. in *Alekseyev v. Russia*.[34] However, the discriminatory laws and practices that pre-existed the Amending Law on Propaganda attracted no condemnation or criticism from the supreme judicial instances of the Russian Federation, including the Constitutional and Supreme Courts.

On the contrary, the Amending Law on Propaganda's wording has in fact been borrowed from case law on this subject developed over the past seven years by Russia's higher courts.

The Constitutional Court of Russia approved Ryazan Region's legislation on 'homosexual propaganda' in its Ruling No. 151-O-O (Jan. 19, 2010). This Ruling concerned an attempt to challenge certain regional laws, including the Law of the Ryazan Region on Administrative Offences, under which the applicants were punished for displaying banners near a school building that stated 'Homosexuality is normal' and 'I am proud of my homosexuality.'

The Constitutional Court emphasised that 'family, motherhood and childhood in traditional perception are those values which ensure continuous change of generations and preservation and development of the whole multinational people of the Russian Federation.'[35] For this reason special governmental protection of these values was deemed necessary. Moreover, the legitimate interests of minors was found to require that the State protect children from factors that negatively affect their physical, intellectual, mental, spiritual and moral development.

According to the Constitutional Court, since it was aimed at the realisation of these principles of Russian law, the Ryazan Region's ban on 'homosexual propaganda' was permissible. As such, the regional legislation at issue was found not to be discriminatory or in any other way improperly restrictive of freedom of expression.

Importantly, the Constitutional Court defined 'propaganda' as an activity of 'purposeful and uncontrolled dissemination of information, detrimental to health, [and] moral . . . development forming a distorted image of the social equality of of traditional and non-traditional relationships . . . '

The jurisprudence of the *Supreme Court of Russia* adopts a similar definition of 'homosexual propaganda,' evincing an analogous approach to the issue. In 2012, the judicial department of administrative affairs of the Supreme Court considered three cases involving the 'homosexual propaganda.'

The first case (Ruling dated Aug. 15, 2012)[36] saw the Arkhangelsk Region's legislation prohibiting sexual propaganda contested on the basis that it created legal uncertainty as a result of the use of vague terms such as 'propaganda' and 'homosexuality.'

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[34] *Alekseyev, supra* n. 16; *see also* the section concerning Russia's international obligations *infr*a.

[35] Ruling No. 151-O-O of the Constitutional Court of the Russian Federation (Jan. 19, 2010), ¶ 3.

[36] Ruling No. 1-APG12-11 of the Judicial Board on Administrative Cases of the Supreme Court of the Russian Federation (Aug. 15, 2012).

The Supreme Court did not find any ambiguity in the regional law's terminology, ruling that the words 'propaganda' and 'homosexuality' have well-known meanings. Here, propaganda was defined as 'an activity of natural or legal persons consisting in the dissemination of information, aimed at forming in the consciousness certain attitudes and stereotypes, or encouraging persons to whom it is addressed to commit something or refrain from it.'[37]

To summarise, the Supreme Court's reasoning in its Ruling of Aug. 15, 2012, was principally founded on two ideas: first, that propaganda of homosexuality denies traditional family values; and second, that a child cannot critically assess incoming information and that his or her own interest in non-traditional relationships can easily be incited despite the fact that such interest is not 'objectively' based 'on the physiological characteristics of the child.'

According to the Supreme Court's interpretation of the UN Convention on the Rights of Child and the UN Declaration on the Rights of the Child, the law in question is necessary to protect children's best interests and the State's obligation to protect the child's personality and self-identification from the negative effects of the active promotion of homosexuality.

The Supreme Court further concluded that the contested legislation was fully consistent with Russian and international law, because the only means of expressing one's opinion that had been prohibited was 'homosexual propaganda.' Neither the mere mention of homosexuality, nor discussion of the social status of minorities, falls under this notion, the court reasoned and thus everyone is free to receive and disseminate information containing general, neutral content, and to conduct public events or discuss the status of LGBT persons.

This is the approach that has been followed by the Supreme Court in later cases.[38]

This unanimity among the highest courts of the land regarding cases involving the assessment of anti-propaganda legislation was recently reconfirmed by the Constitutional Court in its Ruling No. 1718-O (Oct. 24, 2013).[39] Here, the Court restated its finding that regional law prohibiting homosexual propaganda (Law of St. Petersburg 'On Administrative Offences in St. Petersburg') is consistent with

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[37] Furthermore, a similar definition can be found in Art. 3 of the Model Law, О защите детей от информации, причиняющей вред их здоровью и развитию [On the Protection of Children from Information Detrimental to their Health and Development], Dec. 3, 2009 (adopted at the 33rd Plenary Session of the Interparliamentary Assembly of the CIS Member States).

[38] Ruling No. 78-APG12-16 of the Judicial Board on Administrative Cases of the Supreme Court of the Russian Federation (Oct. 3, 2012) (The applicant contested the legality of Saint-Petersburg's law 'On Administrative Offences in St. Petersburg,' which prohibits and penalises the propaganda of sodomy, lesbianism, bisexuality and transgenderism among minors); Ruling No. 87-APG12-2 of the Judicial Board on Administrative Cases of the Supreme Court of the Russian Federation (Nov. 7, 2012) (The applicant contested the legality of Kostroma Regional Law 'On Safeguards of the Rights of the Child in the Kostroma Region,' which prohibits homosexual, lesbian and transgender propaganda).

[39] Ruling No. 1718-O of the Constitutional Court of the Russian Federation (Oct. 24, 2013).

the Russian Constitution and international standards. The applicant in this case had been fined under the legislation at issue for standing near St. Petersburg City Administration Building with a banner quoting an aphorism by a famous Russian actress to the effect that 'Homosexuality is not a perversion. Lawn hockey and ice ballet are.'[40] The Constitutional Court reiterated its position, but made one interesting remark: that courts should employ (by analogy) the distinction made by the Constitutional Court between *information* and *campaigning* in the course of an electoral campaign in order to distinguish propaganda from other forms of information dissemination.[41]

While the approach of Russia's highest courts seems to be unanimous, at least in terms of a general attitude in support of the prohibition of homosexual propaganda, jurisprudence among the lower courts is less consistent.

As observed by the Venice Commission, 'it appears [that there are] divergent decisions on the application of provisions concerning 'homosexual propaganda' in different regions.'[42] For example, the magistrate judge of judicial district no. 8 of the city of Kostroma in its decision of March 23, 2012 did not consider a single picket with a poster stating 'Who will protect gay teenagers?' situated near a children's library to be 'homosexual propaganda.' However, the same person was punished under St. Petersburg Law 'On Administrative Offences' for holding up a banner with the aforementioned slogan describing ice ballet and lawn hockey as perversions. In March 2012, a demonstrator was convicted by Oktyabrskiy District Court of Arkhangelsk for having picketed with a banner that read: 'Among children there are no less gays and lesbians than among adults.' At the same time, the Leninskiy District Court of Kostroma acquitted another person who had been holding up a poster with the same content. Likewise, in March 2013, a Regional Court in the Kostroma Region granted an appeal brought by one of organisers of a gay pride parade, finding the refusal to authorise the public event illegal. The court further ruled that rallies and marches did not fall under the notion of 'propaganda of homosexuality' and could not be prohibited on that basis.[43]

Notwithstanding some positive examples in lower court practice, the uncertainty surrounding the application of laws prohibiting the propaganda of non-traditional

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[40] *See Gay Activist Fine with St. Pete Court Verdict*, RT (May 4, 2013), <http://on.rt.com/oygzvo> (accessed March 7, 2014).

[41] 'Agitation' (in contrast to 'information') is an activity aimed at inducing people into engaging in certain conduct; *see* Judgment No. 15-P of the Constitutional Court of the Russian Federation (Oct. 30, 2003).

[42] *See* Venice Commission, Opinion No. 707/2012, On the Issue of the Prohibition of So-Called 'Propaganda of Homosexuality' in the Light of Recent Legislation in Some Member States of the Council of Europe, 14–15 June, 2013, ¶ 33, available at <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)022-e> (accessed March 7, 2014).

[43] Human Rights First, *Convenient Targets, The Anti-'Propaganda' Law & the Threat to LGBT Rights in Russia* 8–9 (Aug. 2013), available at <http://www.humanrightsfirst.org/uploads/pdfs/HRF-russias-anti-gay-ban-SG.pdf> (accessed March 7, 2014).

sexual relationships remains most significant. Apart from restricting freedom of expression, as well as some forms of public assembly such as pickets with banners or pride parades, the anti-propaganda provisions also place limitations on freedom of association.

For example, in March 2012, the Pervomaisky District Court of Krasnodar was faced with a refusal by the Ministry of Justice's department in the Krasnodar Region to register a regional sports social movement called 'Pride House in Sochi.' Assessing the legality of the Department's decision, the Court noted, inter alia, that:

> [a]s far as the Articles of Association of . . . 'Pride House in Sochi' lists as one of its objectives informing people of the LGBT-movement in Russia, it [the movement] will be capable of having a massive ideological impact on citizens. However, the aims of the movement must not contradict principles of public order and public morals. Such objectives forming an understanding of the need to combat homophobia and the creation of positive attitudes towards LGBT-sportsmen contradict public morals as they are aimed at the augmentation of citizens belonging to sexual minorities, which violates the notions of good and evil . . . vice and virtue . . . existing in the society. . . . [M]oreover, it might undermine the sovereignty of the Russian Federation because of a decrease in its population.[44]

It is little surprise that having provided such reasoning, the Court upheld the departmental refusal to register the 'Pride House in Sochi' movement.

3.2. 'Chinese whispers' among Russian law makers

Russian politicians appear to share the views of the Russian higher courts on this issue.

In the parliamentary discussion at the first reading of the bill for the Amending Law on Propaganda, the head of the committee responsible for preparing of the draft law, State Duma Deputy Elena Mizulina, indicated her belief that the Duma had 'all legal grounds for adopting such a law.' In doing so, she referred specifically to the UN Convention on the Rights of Child. According to the Deputy, this convention 'obliges a state to protect children due to their immaturity . . . as they are incapable of critically assessing certain actions and protecting themselves.'

Ms Mizulina also referred to the 1981 judgment of the Eur. Ct. H.R. in the case of *Dudgeon v. the United Kingdom*.[45] The Deputy's reading of this judgment found that: (a) 'certain control over homosexual conduct is necessary in democratic society

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[44] Judgment No. 2-1161/12 of the Pervomaisky District Court of Krasnodar (Febr. 20, 2012).

[45] *See* transcript of the session of the State Duma (Jan. 25, 2013), <http://transcript.duma.gov.ru/node/3789/> (accessed March 8, 2014).

in order to prevent . . . corruption of especially vulnerable persons – children and teenagers;' (b) 'it is for the national authorities to decide which guarantees are necessary for the protection of morals in the country, in particular, they must define the age until which such guarantees will be provided for children and young people;' and (c) that 'the moral climate of the society must be taken into account – tolerance or intolerance to such conduct as well as religious factors. Russian society in this regard is very conservative, that is why the adoption of such a law is justified.'[46]

In an interview with a Russian newspaper, Deputy Mizulina noted that only information aimed at cultivating a certain way of thinking in a child would be regarded as propaganda under the new law. Any other information, such as news on LGBT issues, she said, would not fall within its ambit. Mizulina affirmed that pieces of art are altogether excluded from the Protection of Children from Detrimental Information Law, 'except for child pornography and obscene language.' She also stated that the law would not serve as a basis for the prohibition of gay pride events, which should be conducted in line with a special law on public meetings, except in so far as children should not take part in such events and they should not be held in close proximity to children's playgrounds, *etc.* [47]

In a recent address to the Parliamentary Assembly of the Council of Europe, State Duma speaker, Sergei Naryshkin, indicated that the new law 'takes into account national and cultural values, and at the same time retains in full all the rights of LGBT people.'[48]

Russian parliamentarians appear to sit in two camps in their attempts to justify the anti-propaganda law under international law, referring to both public morals and traditional values as the basis for the Amending Law on Propaganda.

One of the main proponents of the 'traditional values justification' is Chairman of the Constitutional Court of Russia, Judge Valery Zorkin. In a speech devoted to 20 years of the Russian Constitution, Judge Zorkin condemned Russia's obligations of so-called 'limitless tolerance' as 'tolerance of any vicious sexual or gender practices.' He also defined as dangerous for the social and cultural identity of Russia

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[46] *See* transcript of the session of the State Duma (Jan. 25, 2013), *supra* n. 45.

[47] Ekaterina Vinokurova, *Людей ведь раздражают не геи, а пропаганда: Интервью с Елена Мизулиной, председателем Комитета Государственной Думы по делам семьи, женщин и детей* [*People are Irritated, Not with Gays, but with Propagand: An Interview with Elena Mizulina, Head of the Duma Committee on Family, Womens and Childrens*], Gazeta.ru (June 10, 2013), <http://www.gazeta.ru/politics/2013/06/10_a_5375845.shtml> (accessed March 8, 2014).

[48] *Нарышкин позвал членов ПАСЕ в московские гей-клубы* [*Naryshkin Invited Members of PACE to Moscow Gay-Clubs*], Lenta.ru (Oct. 1, 2013), <http://lenta.ru/news/2013/10/01/naryshkin/> (accessed March 8, 2014).

attempts to forcibly impose (*i.e.* by means of propaganda and regulations) psychological and legal innovations that are unacceptable to Russian society, which is still deeply traditional.[49]

In Judge Zorkin's view, there is a rising conflict between the moral norms deeply rooted in society and the 'tendency of changes in the Russian reality which are propagated and observed,' and which, he states, threaten Russia's 'relative stability,' 'sociality' and 'statehood.'

Reference to the 'traditional values of Russian society' omits to take into account that such 'traditional values' have long existed not only in Russia but in virtually all other states around the world, with European countries and the US abandoning criminal sanctions for homosexuality only in the past 30 years.[50]

3.3 The realities of Russian law enforcement

The Federal Service for the Supervision of Communications, Information Technology and Mass Media [hereinafter Roskomnadzor] recently initiated a public discussion on the Children's Information Security Framework. This framework is intended to detail the legislation on the protection of children from detrimental information and 'flesh out' the relevant law enforcement procedures and general legal concepts.[51]

Together with Roskomnadzor's recently extended powers, which according to some reports include the power to extra judicially block online content, it is envisaged that the Framework will serve as the basis for censorship in Russia, including scientific censorship.[52]

As regards the subject of this article, the preamble to the relevant section under the Framework provides twelve criteria in four general categories, which are intended

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[49] Valery Zorkin, Конституционный вектор России. 20 лет реализации Основного закона страны [Russian Constitutional Vector. 20 Years of Implementation of the Basic Law], 2013(6236) Российская газета [Russian Gazette], available at <https://www.academia.edu/5355551/_20_> (accessed March 8, 2014).

[50] The Texas state law criminalising sodomy was struck down by the US Supreme Court in *Lawrence v. Texas,* 539 U.S. 558 (2003), a decision which, by precedent also obviated all the remaining sodomy laws of other U.S. states. *See also* George Painter, *The Sensibilities of Our Forefathers. The History of Sodomy Laws in the United States*, <www.glapn.org/sodomylaws/sensibilities/introduction.htm> (accessed March 8, 2014).

[51] *See* Концепция информационной безопасности детей [Children's Information Security Framework] (Roskomnadzor 2013), <http://rkn.gov.ru/mass-communications/p700/p701/> (accessed March 8, 2014).

[52] *See* Anna Leontyeva, *Концепция информационной безопасности детей как угроза профессиональной деятельности российских психологов* [*The Children's Information Security Framework as a Threat to Professional Activity to Russian Psychologists*], Русский журнал [Russian Magazine] (Jan. 8, 2014), <http://www.russ.ru/pole/Koncepciya-informacionnoj-bezopasnosti-detej-kak-ugroza-professional-noj-deyatel-nosti-rossijskih-psihologov> (accessed March 8, 2014).

to enable an assessment of the impropriety of information. Each criterion is provided with one specific example.[53]

These criteria include 'arguing that traditional families do not meet the needs of modern society or the modern individual' (which includes the idea that the traditional family model has 'lost many of its functions and become an obstacle to the free development of individuals'), websites that publish 'out-of-context' statistics about children adopted by gay and straight couples, which could lead children and teens to believe that gay couples are 'no worse than straight couples at coping with parental responsibilities,' using 'attractive' or 'repelling' images to discredit traditional and propagate alternative family models, which includes portraying a homosexual couple favourably and a heterosexual couple negatively, or publishing lists of famous living or deceased gay individuals – the latter being prohibited as information depicting gay people as role models.

At first glance, Roskomnadzor's assertion that only 'false information'[54] will fall within the scope of the Amending Law on Propaganda appears to represent a softer approach than that taken by Russia's Supreme and Constitutional courts, whose definition of propaganda encompasses the dissemination of any information, regardless of its veracity. However, the content of the Framework itself reveals that its authors have adopted their own standard for propaganda under which any positive information about homosexuality would fall foul of the prohibition.[55] In doing so, Roskomnadzor has clearly strayed beyond the stated intentions of lawmakers in introducing this legislation (*see supra*).

Thus, Russian authorities are likely to refer to the traditional values of Russian society supported by the vast majority of the populace, the desire to pursue Russia's demographic interests, and the claim that it is only propaganda and not the LGBT individuals themselves that is targeted by the law.[56] It appears that neither Russia's courts nor its legislators or enforcement agencies can conceive of the provisions restricting the rights of the LGBT community as contradictory to international law.

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53 Alexander Voiskunsky et al., *Раздел 6. Критерии вредного для здоровья и развития детей контента информационной продукции, распространяемой в информационно-телекоммуникационной сети Интернет* [*Part 6. Criteria of Internet Content Harmful for Children's Health and Development*] (Galina Soldatova, ed.) 79–83, in Children's Information Security Framework, *supra* n. 51, <rkn.gov.ru/docs/Razdel_6.pdf> (accessed March 8, 2014).

54 *Id.*

55 For example, under criteria 4.1.2. the disclosure of any positive information about raising children by homosexual couples will be qualified as prohibited propaganda.

56 As stated last spring by Russian President Vladimir Putin at a news conference in Amsterdam (*Gay Rights Not Violated in Russia – Putin*, RIA Novosti (Apr. 9, 2013), <http://en.ria.ru/russia/20130409/180521813/Gay-Rights-Not-Violated-in-Russia---Putin.html> (accessed March 8, 2014)).

4. Russia's obligations under international law

The Amending Law on Propaganda raises serious concerns about Russia's prevailing international obligations regarding the rights to freedom of expression and freedom of assembly, as well as the prohibition of discrimination, enshrined and guaranteed by the ICCPR and the ECHR. The Anti-Adoption Amending Law likewise raises concerns about non-discrimination obligations under these instruments.

Russia is a signatory to the UN Charter (since Oct. 24, 1945), the ICCPR (since March 18, 1968), the ECHR (since Febr. 28, 1996) and the Convention on the Rights of the Child [hereinafter CRC] (since Jan. 26, 1990). All of these treaties place a particular emphasis on human rights protection, with the ICCPR forming a part of the so-called International Bill of Rights,[57] and ECHR being the first convention drafted to reflect the provisions of the Universal Declaration of Human Rights in 1950.

As outlined above, in discussing the Amending Law on Propaganda, Russian lawmakers made brief reference to the CRC and the ECtHR judgement in *Dudgeon v. the United Kingdom*. Neither the practice of the Committee on the Rights of the Child nor the full test developed by the Court either at the time of *Dudgeon* (1981) or since, were addressed. Importantly, in adopting the Amending Law the State Duma failed to assess that law's compatibility with the prohibition on discrimination.

4.1. Compliance with international standards for the protection of freedom of expression

Freedom of expression is the right to hold opinions and to receive and impart information and ideas without interference from public authority, regardless of frontiers.[58]

Freedom of expression (speech) emerged in the United States together with the idea of 'legitimate and loyal opposition.'[59] It is essentially a guarantee against both the state and society when they seek to silence voices of disagreement. As such, freedom of expression applies even to those ideas or that information that might 'offend, shock or disturb the State or any sector of the population,' and not only to information or ideas that are favourably received or regarded as inoffensive or neutral.[60]

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[57] Consisting of the Universal Declaration of Human Rights, GA res. 217A (III), UN Doc A/810 at 71 (1948); the ICCPR with its two Optional Protocols, *supra* n. 9; and the International Covenant on Economic, Social and Cultural Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966).

[58] *See* Universal Declaration of Human Rights, *id.* at Art. 19; ICCPR, *id.* at Art, 19; ECHR, *supra* n. 11, at Art. 10.

[59] James Magee, Freedom of Expression 2 (Greenwood Publishing Group 2002).

[60] *Handyside v. United Kingdom,* ¶ 49, no. 24 (Eur. Ct. H.R. (Ser. A), Dec. 7, 1976).

Freedom of expression is closely related to freedom of assembly, which is the right to express an opinion by gathering together as a group.[61]

The rights to freedom of expression and assembly as enshrined in the ECHR and the ICCPR can be subject to restrictions. However, such restrictions must meet certain criteria (discussed *infra*) and comply with the general underlying rule that no such restriction may 'put in jeopardy the right itself.'[62]

The criteria to be met by any restriction constitute what is referred to as a 'three-part test' that has been developed by international and regional judicial and quasi-judicial tribunals: any limitation must be 'provided by law,' pursue a legitimate aim and be proportionate and necessary for achievement of that aim.[63] Failure to meet this criteria will render State interference with these rights unlawful in the eyes of a competent international tribunal.

Importantly, the ban of propaganda of homosexuality would ordinarily be considered by the Eur. Ct. H.R. and the HRC under freedom of expression provisions in conjunction with articles prohibiting discrimination.[64]

Below we will discuss whether Russia's recent legislative innovations comply with the aforementioned requirements elaborated by the Eur. Ct. H.R.

Criterion one: restrictions must be provided by law. Although the Eur. Ct. H.R. has consistently held that the interpretation of domestic law lies primarily within the prerogative of the domestic authorities, the Court regards the criterion 'prescribed by law' as having a so-called 'autonomous meaning.' Here, for a legal act to be recognised a 'law' within the meaning of the Convention, the mere existence of a legislative act or regulation in domestic law will not suffice. To fall within the ambits of Arts. 8–11, a law must possess the quality of law – that is, it must be accessible and 'foreseeable.' Foreseeability requires that such law is 'formulated with sufficient precision' to enable a person to determine (if need be with professional advice), 'to a degree that is reasonable in the circumstances, the consequences which a given action may entail,' and to regulate his or her conduct accordingly.[65]

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[61] *See* Universal Declaration of Human Rights, *supra* n. 57, at Art. 20; ICCPR, *supra* n. 57, at Art. 21; ECHR, *supra* n. 11, at Art. 11.

[62] UN Human Rights Comm., General Comment No. 10: Freedom of Opinion (Art. 19), ¶ 4, 19th Sess., UN Doc. HRI/GEN/1/Rev.1 (1994).

[63] *See* 'three-part test' applied by the Eur. Ct. H.R. to Art. 11 restrictions in *Bączkowski and Others v. Poland,* ¶ 69, no. 1543/06 (Eur. Ct. H.R., May 3, 2007); *Alexeyev*, *supra* n. 16, at ¶ 69; and to Art. 8 and Art. 14 restrictions in *X and others v. Austria* [GC], ¶ 98, no. 19010/07 (Eur. Ct. H.R., Feb. 19, 2013). *See also* Human Rights Comm., General Comment No. 34: Freedoms of Opinion and Expression (Art. 19), 102nd Sess., UN Doc. CCPR/C/GC/34 (2011).

[64] For cases discussing the right of non-discrimination on the basis of sexual orientation, *see, e.g., Kozak v. Poland,* ¶ 92, no. 13102/02 (Eur. Ct. H.R., Mar. 2, 2010); *Salgueiro da Silva Mouta v. Portugal,* ¶ 36, no. 33290/96 (Eur. Ct. H.R., Dec. 21, 1999); *Tooncn v. Australia,* CCPR/C/50/D/488/1992 (Human Rights Comm., Apr. 4, 1994).

[65] *See, e.g., Sunday Times v. UK (no. 1)*, ¶ 49, no. 30 (Eur. Ct. H.R. (Ser. A), Apr. 26, 1979); *Larissis and Others v. Greece*, Eur. Ct. H.R., 1998-I, 378, ¶ 40; *Hashman and Harrup v. United Kingdom* [GC], Eur. Ct. H.R., 1999-VIII, ¶ 3; *Rotaru v. Romania* [GC], Eur. Ct. H.R., 2000-V, ¶ 52.

Importantly, the Eur. Ct. H.R. has noted that, although a degree of vagueness will always be present in any law, 'legal discretion granted to the executive' should not be expressed 'in terms of unfettered power.' As such, law 'must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise.' Moreover, it should not entail 'the extensive application of a restriction to any party's detriment.'[66]

As indicated above, by adopting discriminatory blanket provisions, the Russian legislature has created a risk of abuse by the executive. The parliamentary discussion outlined in the previous section reflects a failure on the part of the Amending Law's drafters to foresee that the term 'propaganda' would be as expansively defined as it has been in the Framework – the subsidiary regulatory document developed by the Roskomnadzor. On the face of it, the Framework permits the assumption that one of its immediate effects will be to censor any medium of expression, including books, movies or exhibitions. This will negatively impact public debate on important social issues.

Furthermore, it remains unclear how the definitions of 'propaganda' and 'among minors' as defined in law (regionally and nationally) and interpreted by state authorities (in the Framework), meet the criterion of foreseeability as regards the issue of holding up banners that contain general statements regarding homosexuality.[67]

Taking into account the homophobic mood gripping Russian society,[68] it may further be argued that by adopting the Amending Law on Propaganda, which undoubtedly stigmatises the LGBT community (and the application of which starts to stigmatise particular individuals[69]), the authorities have created a potential for abuse at the local level, for example, at police stations or in prisons.

Criteria two and three: pursuit of a legitimate by necessary and proportionate means. In adopting the Amending Law on Propaganda, the domestic authorities referred to the aims of protecting morals and the rights of others, which are indeed legitimate pursuits under Art. 10 of the ECHR.

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[66] *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09 (Eur. Ct. H.R., June 7, 2012), ¶ 143; *see also Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94 (Eur. Ct. H.R., July 8, 1999), ¶ 36.

[67] *See*, on this issue, the section above devoted to Russian judicial practice and the Venice Commission's *Opinion, supra* n. 42, ¶ 33.

[68] According to a Levada Center survey, 67% of respondents would rather approve than condemn the adoption of 'anti-propaganda' law. *See* News Rel., *Россияне о репрессивных законах* [Russians on Repressive Laws] (Nov. 25, 2013), <http://www.levada.ru/25-11-2013/rossiyane-o-repressivnykh-zakonakh> (accessed March 8, 2014).

[69] For example, *see* information regarding a case reported to be the first one in Russia where a child was held liable under the new anti-propaganda legislation, in which a juvenile affairs commission defined a girl as 'openly admitting her non-traditional sexual orientation' and created a file on her with the commission for a 'systemic dissemination of information aimed at forming a distorted image of the social equality of traditional and non-traditional sexual relationships among minors' (in this case, the schoolmates). *See* Alexei Novoselov, *За гей-пропаганду впервые наказан ребенок* [*A Child Was First Time Held Liable for Gay-Propaganda*], Znak.com (Febr. 2, 2014) <http://www.znak.com/urfo/news/2014-02-02/1017612.html> (accessed March 8, 2014).

However, the choice of measures available to a State party in achieving such aims is not unlimited. As with the 'prescribed by law' criterion, the domestic authorities enjoy a considerable margin of appreciation in determining the necessity of any given measure – that is, the extent to which it satisfies a 'pressing social need.'[70] Nonetheless, this margin of appreciation is not absolute. Indeed, as the ECHR's enforcement body, the Eur. Ct. H.R. may render a final determination on whether a restriction meets the requirements of the relevant articles of the Convention.[71] In assessing 'pressing social need' the Court has developed a standard of proportionality that is required between the restriction and the pressing social need. It will also assess whether the authorities have had 'relevant and sufficient reasons' for the interference at issue.[72]

Furthermore, this limb of the threefold test can also entail enquiry by the Court into whether common ground exists between members states on a given matter – sometimes referred to as the 'European consensus' requirement. If similar regulation is adopted by other members states, the margin of appreciation will be narrower, and *vice versa*.[73]

According to the Eur. Ct. H.R., the reasons adduced by a state for adopting certain measures will require particularly convincing justification when it comes to differences in treatment on the basis of sexual orientation. The Court has unequivocally stated, in numerous cases, that mere reference to the sexual orientation of an individual as justification for a particular action will amount to a violation of Art. 14 of the ECHR.[74]

The HRC has adopted a very similar position. In the case of *Fedotova v. Russia*, the Committee found a violation of freedom of expression provisions under the ICCPR when read in connection with Art. 26 thereof prohibiting discrimination.[75]

While the protection of morals is a legitimate aim to pursue in seeking to limit freedom of expression under both the ECHR and the ICCPR, the Eur. Ct. H.R. normally regards only obscene expressions as contradicting public morals,[76] and the HRC evinces support for this inclination.[77]

The prohibition on the propaganda of homosexuality does not distinguish between obscene materials and any other type of content related to homosexuality. It is worded in a way that clearly targets same-sex relationships as such.

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[70] *Handyside, supra* n. 60, at ¶¶ 48–49; *Engel and Others v. the Netherlands*, ¶ 100, no. 22 (Eur. Ct. H.R. (Ser. A), June 8, 1976); *De Wilde, Ooms and Versyp v. Belgium,* ¶ 93, no. 12 (Eur. Ct. H.R. (Ser. A), June 18, 1971); *Golder v. the United Kingdom*, ¶ 45, no. 18 (Eur. Ct. H.R. (Ser. A), Feb. 21, 1975).

[71] ECHR, *supra* n. 11, at Art. 19; *Fressoz and Roire v. France* [GC], no. 29183/95, Eur. Ct. H.R., 1999-I, ¶ 45.

[72] *Sunday Times*, *supra* n. 65, at ¶ 62.

[73] *Rasmussen v. Denmark*, ¶ 40, no. 87 (Eur. Ct. H.R. (Ser. A), Nov. 28, 1984).

[74] *See Kozak*, *supra* n. 64, at ¶ 92.

[75] *Fedotova*, *supra* n. 16.

[76] Venice Commission's *Opinion, supra* n. 42, at ¶ 55.

[77] Sarah Joseph & Melissa Castan, The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary 626 (3rd ed., Oxford University Press 2013).

The Eur. Ct. H.R. has consistently held that the right to sexual orientation is included under Art. 8 of the Convention.[78] This right is also recognised under Art. 17 of the ICCPR.

In its General Comment No. 22, the HRC highlighted that 'the concept of morals derives from many social, philosophical and religious traditions,' and that limitations 'for the purpose of protecting morals must be based on principles not deriving from a single tradition.'[79]

The Eur. Ct. H.R.'s case law, as derived from *Dudgeon v. UK*, firmly rejects the notion that an 'erosion of existing moral standards' could serve as sufficient justification for an interference with the right to privacy under Art. 8.[80] In the recent case of *Alekseyev v Russia*, the Eur. Ct. H.R. noted, regarding freedom of assembly, that the rights of minorities cannot, under the Convention, be made conditional upon their acceptance by the majority.[81] Moreover, the Court most recently declined to find a violation of the freedom of expression in a case where the domestic courts had imposed sanctions for homophobic hate speech.[82]

In light of this, it would be very difficult, if not impossible, for Russia to defend its position to the effect that homosexuality, as such, is contrary to the 'morals' of Russian society.

As regards the aim of protecting the rights of children, the Eur. Ct. H.R. has already declined to accept that there is any 'scientific evidence or sociological data''suggesting that mere mention of homosexuality, or open public debate about sexual minorities' social status, would adversely affect children.'[83] The HRC has also observed, as regards Russia's earlier regional laws, that there is a significant difference between involving children in sexual activity and 'giving expression to [a person's] sexual identity.'[84]

Notably, in 2003 the Committee on the Rights of the Child explicitly extended the guarantees under Art. 2 of the CRC prohibiting all forms of discrimination against children to adolescents' sexual orientation.[85] Furthermore, in its 2002 Concluding Observations on the United Kingdom and Northern Ireland the CRC called upon the state to annul Sect. 28 of its domestic law on the promotion of homosexuality, after

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78 *See Kozak, supra* n. 64, at ¶ 83.

79 UN Human Rights Comm., General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art. 18), ¶ 8, 48th Sess., UN Doc CCPR/C/21/Rev.1/Add.4 (1993).

80 *Dudgeon v. United Kingdom*, ¶ 14, no. 7525/76 (Eur. Ct. H.R., Oct. 22, 1981); *see also Smith and Grady v. United Kingdom,* nos. 33985/96, 33986/96 (Eur. Ct. H.R., Sept. 27, 1999).

81 *Alekseyev*, *supra* n. 16, at ¶ 81.

82 *Vejdeland and Others v. Sweden,* no. 1813/07 (Eur. Ct. H.R., Feb. 9, 2012).

83 *Alekseyev*, *supra* n. 16, at ¶ 86.

84 *Fedotova, supra* n. 16, at ¶ 10.7.

85 UN Comm. on the Rights of the Child, General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child, ¶ 6, 33rd Sess., UN Doc CRC/GC/2003/4 (2003).

expressing concern that homosexual and transsexual young people had no access to appropriate information, support and necessary protection required to enable them to live their sexual orientation.[86] In its General Comment No. 3, the Committee on the Rights of the Child drew States parties' attention to the fact that 'children require relevant, appropriate, and timely information' in order to be able to deal with their sexuality and protect themselves from HIV. The Committee specifically underlined that 'effective HIV/AIDS prevention requires States to refrain from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information.'[87]

While the CRC's approach to matters of sexual orientation appears to be very firm, the Committee takes a clear stance regarding pornography, violence and racism as content that is harmful to children, sharing the Eur. Ct. H.R.'s approach to limiting freedom of expression in this regard.

Finally, the Eur. Ct. H.R. notably distinguishes between substantive rights and rights to campaign therefor the latter being protected under Arts. 10 and 11 of the Convention.[88] Thus, even in the absence of Convention protection for a particular right (such as, the right to same-sex marriage), any limitation upon the right to campaign for such a right would also need to pass the three-part test described above.

Therefore, because the margin of appreciation applicable to Russia's prohibition on the propaganda of homosexuality is in fact quite narrow, the rationale Russia has offered for the adoption of this prohibition is unlikely to be found by the Eur. Ct. H.R. as having preserved a balance between traditional family values and the rights of the sexual minority.[89]

4.2. Compliance with international standards on adoption rights

Cases concerning parental rights are usually considered by the Eur. Ct. H.R. under two provisions of the Convention: Art. 8, which guarantees the protection of private and family life and Art. 14 prohibiting any form of discrimination.[90]

In this regard, there is little consensus between the Council of Europe member states on substantive questions concerning the rights of same-sex couples.[91] The

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[86] UN Comm. on the Rights of the Child, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, ¶¶ 41 and 42(d), 31st Sess., CRC/C/15/Add.188 (2002), available at <http://www.essex.ac.uk/armedcon/story_id/000020.pdf> (accessed March 8, 2014).

[87] UN Comm. on the Rights of the Child, General Comment No. 3: HIV/AIDS and the Rights of the Child, ¶16, 33rd Sess., CRC/GC/2003/3 (2003), available at <http://www.unicef.org/aids/files/UNHCHR_HIV_and_childrens_rights_2003.pdf> (accessed March 8, 2014).

[88] *Alekseyev*, *supra* n. 16, at ¶ 84.

[89] *Cf. Kozak v. Poland*, *supra* n. 64, at ¶ 99.

[90] *See* in particular on the issue of adoptions in *X and others v. Austria*, *supra* n. 63; *Gas and Dubois v. France*, no. 25951/07 (Eur. Ct. H.R., March 15, 2012); *E.B. v. France*, no. 43546/02 (Eur. Ct. H.R., Jan. 22, 2008); *Fretté v. France*, no. 36515/97, Eur. Ct. H.R., 2002-I.

[91] *X and others*, *supra* n. 63, at ¶ 149.

Court has, therefore, used very careful and neutral language in the cases involving the issue of adoption, in contrast to its strict approach to many other issues related to homosexuality.[92]

The Eur. Ct. H.R. underlines that Art. 8 does not provide for the right to adopt,[93] and, as a result, has never held that the right to adopt a child must be granted to a homosexual person (or couple).

However, the Court has referred to the prohibition on discrimination as applicable to the enforcement of any restrictions of the rights guaranteed by the Convention in such matters.

In its most recent case on the matter, *X and others v. Austria*, the Court decided that the respondent State had behaved in a discriminatory manner by allowing second-parent adoption[94] for heterosexual couples while prohibiting such adoption for same-sex couples.[95]

Thus, while restrictions upon who can be a candidate as an adoptive parent are not challengeable before the Eur. Ct. H.R. *per se*, a failure by the state to provide an 'objective and reasonable justification for the impugned distinction'[96] vis-à-vis heterosexual parents has the potential for success before the Court. Moreover, the Anti-Adoption Amending Law can be reproached from the perspective of the quality of the legal requirement it enshrines. The law uses the term 'same-sex marriages,' which is not defined in Russian law, recognizing only the union of a man and a woman as marriage under Art. 1(3) of the Family Code. Thus, competent authorities will have to determine whether the laws of a foreign State (whose national intends to adopt a child in Russia) permit 'same-sex marriages.' This problem may particularly arise in applying the ban to the second category of 'prohibited' adopters: citizens of a state where homosexual marriages are permitted.

There is a risk that authorities not familiar with foreign law may extend the ban to countries where same-sex partnerships and other forms of same-sex union registration are allowed. Here, the new provisions give authorities a discretion that could lead to arbitrary refusals, creating uncertainty on the part of potential adoptive parents.

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92 Such as, for example, criminal liability for homosexual relations between adults, equality in tax matters, the right to succeed to a deceased partner's tenancy, and many other rights (for a recent overview of such rights, *see Alekseyev*, *supra* n. 16, at ¶ 83).

93 *X and others*, *supra* n. 63, at ¶ 135.

94 When 'one member of a same-sex couple, consisting of two women or two men living together as partners, seeks to adopt the child of the other partner, so that both partners have parental rights vis-à-vis the child.' *See X & others, supra* n. 63, written comments by FIDH, ICJ, ILGA-Europe, BAAF, NELFA, and ECSOL 1 (Aug. 1, 2012), available at <http://www.ilga-europe.org/content/download/23764/152109/file/Written%20comments%20on%20X%20&%20Others%20v.%20Austria.pdf> (accessed March 8, 2014).

95 *X and others*, *supra* n. 63, at ¶¶ 111–153.

96 *E.B. v. France* [GC], no. 43546/02 (Eur. Ct. H.R., Jan. 22, 2008), ¶ 91.

5. Conclusion

Following an examination of recent legislative amendments introduced in the Russian Federation, this article must inevitably conclude that a strong case can be made that Russia's prohibition on the 'propaganda of non-traditional sexual relationships' is incompatible with international law and that amendments concerning adoptive parents are potentially discriminatory in character.

Furthermore, an alarming trend that may not be as apparent to those who are outsiders to the Russian Federation, is that state-blessed homophobia is gathering pace and has already affected not only the minds of an abstract 'vast majority' but also those of the political elite and professional communities of lawyers, judges, and even scholars.

While the importance of freedom of expression and public dialogue in this very new area for human rights law cannot be overstated, the legislative approach currently under adoption in Russia is, on the contrary, clearly aimed at the degradation of existing international standards in this respect – pluralism, broadmindedness and tolerance being among them.

The cornerstone of Russian law, the 1993 Russian Constitution, declares, in line with international law that 'man, his rights and freedoms are the supreme value.'[97]

Whether democracy can remain constitutional where restrictions on human rights overstep internationally recognised boundaries and essentially negate their declared values, is one of the principle questions raised by this newly adopted legislation in Russia.

As Russian law moves further away from the standards of protection enshrined in international law regarding LGBT rights to freedom of expression and non-discrimination, the likes of cases such as *Alekseyev v. Russia* and *Fedotova v. Russia* are sure to become recurring entries on the judicial dockets of the Eur. Ct. H.R. and HRC.[98]

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97 Konst. RF Art. 2 (1993) (Russ).

98 In autumn 2013 the Eur. Ct. H.R. communicated the case of *Bayev v. Russia* (communicated case), no. 67667/09 (Eur. Ct. H.R., Oct. 16, 2013). Here, the applicants have complained of a violation of Arts. 10 and 14 of the ECHR. They argue that the prohibition on 'homosexual propaganda' constitutes a blanket discriminatory ban on the mere mention of homosexuality and that it applies irrespective of the content of the message.

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THE QUALITY OF LEGAL EDUCATION IN RUSSIA: THE STEREOTYPES AND THE REAL PROBLEMS

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The paper explores the three key issues that are often put forward as the main problems contributing to reportedly insufficient quality of legal education in Russia: superfluous number of law schools, lack of practical preparation of students, and lack of teaching of professional ethics. It is based on a research project that the Moscow office of PILnet conducted in 2010–2012, having interviewed over 130 legal professionals in four Russian cities – commercial and non-profit lawyers, government lawyers, law professors, law school administrators and students – to analyze their views and attitudes as to what defined the modern Russian lawyer and how the legal education system responded to the needs of the profession and the society.

Key words: legal education; legal profession; law school.

Recent years have seen Russian legal education become the subject of significant public criticism. The opinion that the quality of Russia's legal education is, at the very least, inadequate has become widespread.

Public criticism largely blames this poor quality of legal education on the existence of a superfluous number of law schools in Russia. Current public opinion has it that with the exception of a small number of well-established, elite institutions, the overwhelming majority of law schools are simply not able to provide the appropriate training. Their graduates are frequently unable to find jobs, and if they do become engaged in legal work either in government service or the private sector, their lack of expertise makes them more likely to do harm.

Indeed, the main complaint about Russian legal education is its lack of practical orientation. This encompasses both the inadequate preparedness of graduates

for legal work and the disparity between the level of their preparation and their employers' needs.

Among those legal education gaps that cause serious alarm is the lack of attention paid to questions of professional ethics. It is precisely this issue that people have in mind when they voice concerns over the willingness of graduates to become involved in corruption schemes, the lack of young lawyers with a legal conscience, and young lawyers failing to understand the moral foundations of the profession.

Is Russian legal education really so bad? Do these problems really exist? And if so, what is behind them?

Finding answers to these questions presupposes addressing the context in which law schools operate. First of all, the practices and experiences of the schools' instructors and administrations must be taken into account. It is also important to consider law schools in the context of actual legal practice and the various fields in which legal knowledge and skills are applied – contexts to which law schools should themselves refer and try to reflect if they are to be effective in preparing graduates for such work. For this reason, the context of a school's existence also includes its external environment, including the labor market. PILnet: the Global Network for Public Interest Law employed traditional sociological methodology in completing this study, relying primarily on informal interviews with people directly involved in the matters being investigated. PILnet's study was comprised of a series of expert and in-depth interviews with law school representatives, as well as 'customers' of legal education, namely, representatives from the legal profession, employers, students and young specialists. Interviews with law school representatives and practitioners yielded a detailed picture of what is currently taking place. Studying the experience of students and young lawyers provided the investigation with a kind of 'control group:' not directly invested in the 'corporate' interests of the law school environment, employers or professional legal community leaders themselves, these subjects nevertheless felt their influence. As such, they looked at problems of education and legal practice from an equidistant position.

Looking at the findings of this study we will examine to what extent the aforementioned claims about legal education are substantiated, as well as what real problems can be attributed to the existence of a large number of law schools, the practical preparation of students, and the teaching of professional ethics.

Claim No. 1. The surplus of law schools and the quality of a legal education

During public discussions about the state of Russian legal education, the low quality of graduate training is often tied to the surplus of institutions that offer programs in legal education. Many posit that because of the popularity of legal education, private and so-called low-profile institutions have opened law schools and

are graduating lawyers without the ability to provide them with high-quality training. This argument is supported by two widely held beliefs: First, that educational outputs, such as a graduate's knowledge and abilities, are wholly dependent on the institution that educated them. Second, a high-quality education can only be provided by a reputable, established institution employing traditional legal pedagogy.

Some proponents of this point of view explain their concern by asserting that poorly prepared graduates make a negative contribution to professional legal practice; for example, being employed in government institutions and making inappropriate use of their authority. Others state that substandard law schools are misleading their students because the level of training that they provide often does not leave those students sufficiently qualified to find work in their desired field.

The structure of the educational services market and the labor market, as detailed by the results of our study, suggests important corrections to this perspective.

Students and their families make various demands on law schools, which cannot but be reflected in the structure of the market place for legal education. Firstly, according to the law school faculties and students who took part in our study, far from every student enters law school with the intention of practicing law upon graduation. Reasons for pursuing a law degree are quite diverse.

Some people go to law school to acquire expertise they hope will allow them to succeed in fields other than law. Independent businessmen, managers at various levels, accountants and economists go to law school with this goal in mind. There are also many extremely particular reasons for pursuing a legal education. For example, one of our respondents went to law school to prepare for a career in journalism, specializing in reporting on legal issues.

Others enter law school to take advantage of aspects of a legal education that are ancillary to the actual study and practice of law. Here, training for the legal profession is not the priority. For example:

> I studied for ten years in a high school for linguistics, studied two languages, and basically needed some sort of educational institution that would teach languages and at the same time some specialization. Because to do this separately would take too long. There were two variants that would allow me to pursue both specialties . . . International economics and so on. They teach language very well there, but I decided against it – it was very complicated. And the other variant where they teach both language and a specialty was international law.[1]

Parents frequently send their children to law school so that they will get at least some kind of higher education. In this case, the institution is not so much expected

[1] From interview with student No. 1 (Febr. 2011).

to provide training for a profession, as to create conditions for the young person to be 'occupied with something.'

Clearly, after graduation those with 'non-law' motivations do not look for work as a lawyer. They do not perceive this to be a problem, nor do those around them:

> Those students become owners of small businesses. And they have a normal working life. They open fitness clubs. That is, they get settled in life. They didn't really need law school. But that doesn't affect their capacity to be normal functioning people.[2]

Of course, some students choose a legal education because they plan to practice law in the future. These students try to derive the maximum number of opportunities from their education. They not only do well in the obligatory part of educational programs, but also take an active part in various supplementary activities and programs provided by the law school, such as exchanges, competitions and mock courts.

Students planning for legal careers try to choose institutions that have reputations as high-caliber law schools. They have to take into consideration, however, the reduction in state-funded institutions and the increasing tendency on the part of law schools to charge for their services.

In practice this means that some motivated, diligent and talented young people cannot afford to attend prestigious law schools and so go where the training costs less. The existence of 'low-profile' and private institutions thus becomes the only opportunity for them to access a legal education and the profession.

> You see, I'm from a rural area [*i.e.* not from the capital]. I made the decision to study in a law school in the capital. I studied in a private law school. Well, it's difficult to get the free spots [in a prestigious government law school]. And it was 90,000 a semester then [to study in a government law school as a paying student]. I didn't have those kinds of financial resources. I looked for schools in which the instruction was more or less ok and where they didn't charge sky-high prices. Here it was 90,000, and there it was 30,000, an appreciable difference, but the instructors were the same . . . so in my opinion, I didn't lose anything. There was this moment: if you want to study, you'll learn in this institution, everything is set up nicely there.[3]

It should be noted that motivated students who have been unable to attend the most prestigious law schools can nevertheless demonstrate a sufficiently high level

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[2] From interview with a professor, law school instructor No. 1 (2012).

[3] From interview with a beginning investigator of the Committee of Inquiry (2011).

of preparation upon graduation. This is due to the fact that the outcome of education for each individual student depends not only on the school, but also on the student's own efforts. An unmotivated student will not benefit from the education offered even by a good school.

> Everything depends to a very large extent on the person. That is, right now we have a remarkable girl working for us from . . . a low-profile institution [name deleted]. Which I had considered a completely . . . worthless school, something awful. I had several people who had studied at a classic [well-established] law school [name deleted], who had absolutely no talent whatsoever. In other words, not everything depends on the institution. An awful lot depends on the person.[4]

Thus, capable graduates of low-profile and private law schools often prove themselves to good effect in a professional capacity, although it is more difficult for them to achieve growth in their careers quickly. The fact of the matter is that a diploma from a prestigious law school opens up more opportunities in the labor market. When recruiting, a number of employers, such as major law firms, only look at resumes from graduates of prestigious law schools.

At the same time, more demanding employers who offer big salaries and more opportunities for professional growth and development are not interested only in the graduates of prestigious schools, nor even in straight-A students, but in outstanding graduates.

> We know some students who have received named stipends for excellent academic work, but I'm not certain that we will be able to recommend them for job placement when employers come to us the next time for recommendations . . . [5]

Employers often encounter graduates of prestigious law schools who do not meet their requirements. Thus, a diploma from a prestigious institution is not by itself a guarantee for either an employer or a graduate.

Nevertheless, the results of this study show that practically all graduates who wish to practice law find employment, irrespective of their abilities and the prestige of their diploma. Of course, this assertion does not consider whether those graduates were satisfied with their place of work, nor the demand for their qualifications on the market, *etc.* However, what is important here is the plain finding that practically

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[4] From interview with the director of a small legal firm (2012).

[5] From interview with the deputy director of subunit No. 1 of a government institution of higher learning.

everyone found work as a legal professional of some sort. The highly diverse demands of the legal labor market are partially to thank for this reality. There is a demand for specialists with advanced legal training, capable of solving complex problems and at the same time there is also a need for people who can perform standard algorithms.

As far as graduates without the proper knowledge and skills ending up in government service is concerned, this problem cannot be attributed to law schools:

> A bureaucratic structure has taken shape, at least here, and everyone wants to find his way in, and stick to it like a leech. And a legal education is like a ticket in. They say why the hell do I need this Roman law, I've already got a place there, I'm going to be such-and-such a deputy district manager.[6]

> Graduates receive a diploma without receiving knowledge. If you factor in the level of protectionism, influence, nepotism and matchmaking, some end up in governmental authoritative structures.[7]

In other words, respondents see the problem as emanating from the unscrupulous recruitment policies of government agencies. Here, law schools that issue diplomas that are not backed by any real training are merely reacting to a market demand for 'sheepskins.'

One could say that the present diversity of law schools and the varying quality of student training are brought about by the diversity of external demand. Law schools adapt to meet the different functions demanded by the consumers of their educational services. There is a need for schools that teach law and prepare students to become lawyers, for others that keep students 'busy,' and a demand for others still that simply hand out 'sheepskins.' The results of the study show that in each particular region schools begin by specializing in one of the needs listed above. At the same time, even prestigious law schools that aim to provide high-caliber instruction and maintain a good reputation cannot wholly avoid students who matriculate with goals that are unrelated to getting a legal education.

Thus, improving the quality of legal education and the level of student preparedness by simply closing down 'inferior' schools is unlikely to succeed. The demand for diplomas not secured by knowledge or skills will simply be transferred to traditional institutions who are now trying to safeguard themselves against this.

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6 From interview with an instructor of civil law (2012).

7 From interview with director of sub-unit No. 2 of a state institution of higher learning (2011).

Claim No. 2. Legal education is insufficiently oriented toward practice

Perhaps the most common claim regarding Russian legal education is that there is a lack of practical training at law schools. As a rule, schools are criticized for their inability to prepare graduates for practical work and the disparity between graduates' abilities and their employers' expectations.

Our study shows that this claim is not without foundation. However, schools cannot solely account for the problem for two reasons. Firstly, what practitioners and employers expect from higher education is not only ambiguous or contradictory, but generally poorly articulated. Secondly, with rare exceptions, educational institutions experience problems in defining objectives, and to be more precise, in understanding whom they are preparing and for what.

Let's begin with the the unarticulated charging of law schools by the outside world. This problem is more clearly observable when law schools attempt to secure from employers and practitioners a list of requirements and wishes concerning the content and level of training for their graduates. Representatives from different law schools who took part in our study told us of their experiences of asking employers to formulate a list of qualifications, as well as how this endeavor ended.

Information obtained during our study indicated that many employers simply do not respond to a school's invitation to take part in dialogue:

> If truth be told, no one cooperates. We sit and stew in our own juices. Including, determining what the customer needs.[8]

On the other hand, when a dialogue does take place, the parties do not always understand one another. As the representative of one law school observed:

> None of the practical workers and directors can convey the qualifications that they would like to see.[9]

Having difficulty formulating qualifications for graduates does not mean that employers do not understand what sort of specialists they want to see in their organizations. Law schools, however, ask them to answer a specific question: to determine a list of skills and qualifications as goals for the education process that can then act as a foundation for the reworking of pedagogical plans. In other words, they are asking these employers to analyze their own experiences and the work of their organizations, and to use this analysis to formulate their response.

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[8] From interview with instructor of jurisprudence at a state institution of higher learning (2011).

[9] From interview with representative of a non-governmental institution of higher learning (2011).

Employers, by contrast, are engaged in resolving completely different professional tasks and do not therefore think of qualifications as requirements for the results to be achieved by law schools. In principle, this situation is perfectly natural. The task of communicating such requirements on the basis of an analysis of experiences in different spheres where legal knowledge and skills are applied is an independent matter and requires certain skills – it is not reasonable to ask employers to engage in such activity.

During the course of our study we tried to create a coherent list of the demands made in various fields of practice for professional qualities in lawyers, including those who are just beginning their careers. Although we did not set ourselves the goal of encompassing all fields of legal work, the results were sufficient to come to some conclusions about the significant variability and diversity of requirements.

One group of employers wants to hire for legal work only those lawyers who can immediately fulfill a certain set of functions without training. This demand is, in part, expressed by the requirement that applicants for even an entry-level position have some minimal work experience. These are employers who either cannot or do not want to invest their own resources in their employees' professional development. As a rule, they are small legal firms or some other type of small business where the enterprise's success depends on the worker's quick engagement with the work process and their performance. Employers in this case want the worker to have acquired practical skills and are not interested in where those skills were acquired, whether in law school or a previous place of work. However, being convinced that law schools are not equipped for the task of practical training, these employers often require work experience.

Other employers, by contrast, prefer to take students or graduates without practical experience and independently shape their professional aims and skills.

> You take a senior student, you work and work with him, and you teach and teach. If he makes consistent progress, you'll have a loyal, devoted specialist and, so to speak, someone honed and instructed to internal standards, whose approaches I think are the correct ones for the client, the job, the situation, everything. Experience shows that no matter who you take on, and no matter how many trial periods you have, no matter what kind of recommendations you get from the previous employer, the employees that come to us completely from the outside somehow don't take as well either to you or the company, to your clients and standards. I can say that still and all you need is to cultivate specialists.[10]

This position is generally taken by employers who represent large law firms, whether Russian or foreign. Moreover, the desire to create in the workplace the kind

[10] From interview with the director of Russian legal firm No. 1 (2011).

of specialists that the organization needs is typical of some government bodies, for example, investigation agencies and courts. The distinguishing trait in these fields is the goal of maintaining a 'corporate' standard of work. For a variety of reasons this standard is best inculcated by being inside the 'corporation.' Consequently, representatives of this type of employer do not expect law schools to prepare the specialist for their workplace. They are more interested in whether the law school provides good theoretical training. These employers, however, have an understanding of theoretical training that is different from academia. Good theoretical training for this type of employer means not only knowing the doctrine, sense and history of various legal institutions, the structure of legislation, the contents of key standard statutes and court decisions in this or that branch, and so forth. It also includes the graduate's ability to use the law as an instrument. That is, to know:

- how to analyze a situation and give it a legal definition;
- how to construct an algorithm of actions on the basis of legal norms;
- how to suggest variants for solving a problem using legal mechanisms;
- how to use legal sources of information;
- how to formulate and outline a position and arguments on the given question;
- how to state a point of view in a language understandable to both lawyers and non-lawyers.

In other words, it is not a matter of specific qualifications required for a particular position in a particular organization, but of universal skills that all lawyers should have.

Thus, employers have different expectations regarding the level and content of a young lawyer's practical training and hold differing opinions about what aspects of this practical training should be provided by law schools. It is worth repeating that these requirements and expectations are not clearly conveyed to law schools. This means that law schools are independently expected to answer the question of what is to be understood by practical training.

As of yet, law schools have been unable to answer this question. However, this does not mean that they have refused to look for an answer; indeed, they come up against serious difficulties in doing so. Some of these difficulties are caused by a lack of reciprocal ties between law schools and legal practice. Despite the fact that many instructors are practicing lawyers, their knowledge of the situation outside the walls of the law school does not encompass the true diversity of legal practice. Law schools generally have only a fragmentary knowledge of the current real world applications of legal education in the various spheres of professional legal work.

Another problem lies in disagreement over the role that law schools should play in training students for legal practice. This disagreement exists not only among representatives of law schools, but often among the opinions of particular instructors.

The common perception that the Russian judicial system is flawed and corrupt is another obstacle to the formation of a common point of view on practical training. Instructors cannot ignore corrupt practices, instances of misusing the law and official authority, nor the fact of lawyers' participation in the legalization of dubious actions that seem to run contrary to the spirit and letter of the law. Instructors do not wish to support the reproduction of such practices:

> More than anything I have misgivings about the ideas filtering down that lawyers should be taught in the real world. Guys, today if we're going to prepare an effective lawyer, then we should introduce a new foundations course – giving and receiving bribes. And a number of other such classes as well.[11]

Moreover, an understanding of the real problems of jurisprudence compels some in the academic community to reject the very notion of a law school's orientation toward practical training. Instructors who share this point of view set themselves the goal of giving students an ideal picture of how things should be, believing this to be the only possible response to lawlessness.

It would be an exaggeration to say that this point of view is the dominant one. Many instructors do not deny the importance of integrating practical training into the curriculum. But here as well there is a difference in views and approaches.

One position is to be attuned to the labor market and its current demands in all their diversity. An alternative point of view maintains that law schools should not engage in training personnel for a concrete employer. Here, the task is to see to the students' development. This point of view is based on two considerations. The first position holds that the labor market is so changeable that law schools cannot effectively react to the demands of specific employers.

> There was information that employers in the mass media needed qualified legal personnel. But lawyers do not study this field in detail – *i.e.* the operations of mass media organizations. And those who work in mass media – journalists, staff, administration and so on – don't know the law. And indeed there are a great many legal violations during the process of reporting information, editing and so forth. And so employers ask: 'Teach our workers the law.' One of the law schools acts right away and opens a master's program with the necessary orientation. Well, the first year they had 20 students. In other words, every city newspaper sent one person there to study. And next year? The demand had dropped. Employers sometimes say useful things, and you can take that into account. But you can't listen to them as the only truth! That is,

[11] From interview with a representative of the administration of subunit No. 1 of a government institution of higher learning (2012).

> you need to keep in mind the interests of the educational institution as well. Because before we open a new program, we prepare an enormous amount of methodological supporting materials, we prepare instructors, textbooks, pedagogical and methodological packages, educational materials and the like. And then all this simply goes to waste.[12]

The second consideration is the fact that law schools work in the interests of students, not employers. The students' interests are not served by acquiring one narrow specialization, since these will change during the course of their professional career. Therefore, it is important to provide students with the knowledge and skills that will help them to realize themselves professionally in various fields.

> He won't work his whole life in the same system and same job. The specialist might find himself in a completely different field. He might quit after a year or even a day after getting his diploma and go into something completely different, another field, and he's still going to need to show that as a lawyer he's capable, and that's why we try to prepare a well-rounded lawyer above all.[13]

Those who reject the idea of preparing students for a specific employer, in turn, offer two different approaches to the understanding of practical orientation. The first is to prepare the student to fulfill traditional professional roles: public prosecutor, investigator, advocate, *etc.* The second is to equip the student with a set of fundamental professional skills that are indispensable to anyone who wishes to work in the legal profession, regardless of position.

Both of these approaches are realized in current educational practice. In particular, one sees initiatives aimed at equipping students with a set of basic professional skills: legal clinics are created and new courses developed on the preparation of procedural documents, for instance. Simultaneously, the first approach is also being realized, *i.e.* the idea of preparing students to fulfill certain professional roles, and this is reflected in the educational programs and the organizational structure of law schools. For example, departments and sections for advocate practice and investigation are opened. Instead of specializing in a single branch of law (civil, criminal, constitutional, *etc.*) students can specialize in an area of practice: notary, customs, mediation, arbitration law, corporate lawyer and so forth.

The task of preparing a student for a certain professional role presupposes the creation of an ideal model, *i.e.* an ideal advocate, investigator, corporate lawyer, *etc.* This

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[12] From interview with representative of the administration of subunit No. 2 of a government institution of higher learning (2012).

[13] From interview with an instructor of an institution of higher learning sponsored by government agencies.

ideal model defines the results of educational work, that is, the goals of the educational process, from which targets for instructors are formulated, pedagogical methods chosen, and the content of educational programs defined. The task of formulating the basic skills for a lawyer also requires the creation of an ideal picture of what these skills represent and what they entail. Currently, law schools are not fully coping with the task of developing ideal constructions, in terms of both skills and professional roles.

> What is the model for the lawyer? The requirements for a lawyer and the model of the lawyer now are somewhat amorphous . . . And these practical requirements vary because the fields are different, so the practice differs as well . . . And the diversity of these requirements somewhat muddles how the training should proceed.[14]

The difficulties that law schools face in defining the model lawyer, as well as in compiling a list of fundamental skills and their meaningful fulfillment, arise as a consequence of the above-mentioned causes, namely, the lack of agreement between the appraisal of instructors and unarticulated requirements of practitioners. Additional complications are created by the refusal of many employers to work with the law schools, as also outlined above. All this taken together creates a deficit of information and disorients instructors.

In addition, there is one other serious problem that makes it difficult for law schools to prioritize the development of a practically oriented program of study. At the present time, law schools must essentially attempt to provide a continuation to general education. This is not merely a matter of fulfilling the requirements of the educational standard, which mandates that a set of disciplines outside of law be included in the law school's program of education as well as the development of a general culture competencies. Law schools have additionally recognized the need to compensate for gaps in high school education. They have started to see the matriculation of students who do not have certain fundamental skills, such as reading comprehension, making generalizations, paraphrasing a text, *etc.* Law schools must now often provide remedial education to their first-year students so that they can be in a position to master the legal disciplines.

Law Schools find themselves in a situation where they must fulfill several tasks within the framework of the bachelor's degree: fill the gaps left by inadequate education in grade school, give students the required set of disciplines unrelated to law, provide theoretical legal training, and prepare students for professional practice. Some argue that it is impossible to do all this without lowering the quality of one or more components in the program. Nevertheless, some instructors believe that law schools are capable of coping with all these tasks.

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[14] From interview with instructor of civil law, secretary of the dissertation committee (2012).

Doing this, however, is not simple since for quite some time now law schools have been engaged primarily in theoretical training. This has shaped a firm tradition that is expressed in teaching methods, in approaches to drawing up educational programs, in methods of instruction, and in the organizational structure of law schools. For this reason the integration of practical training into the pedagogical process whilst fulfilling all the other tasks to be met by these institutions will require a foundational restructuring of the educational process, a reconsideration of the programs' content, and changes in instructional methods.

In other words, it is not simply a matter of perfecting the existing model of the educational process, but rather of making fundamental changes. The possibility for making such changes is constrained by the institutional framework. Consequently, efforts to create alternatives to the models in place for the organization of legal education must come from the representatives of the milieu of law schools and not from external actors, for it is there that the tasks of the teaching process are realized.

Claim No. 3. Lack of attention paid to professional ethics

During public discussion on the deficiencies of the legal education system law schools are accused of not paying sufficient attention to the formation of legal conscience and instilling in students the moral foundations of the profession. An absence of moral foundations is seen as the reason for the irresponsibility of these new lawyers to society, their willingness to become involved in corruption schemes and commit abuses in the course of practicing law.

On the one hand, these misgivings are understandable and in certain instances are not groundless. On the other hand, and this is confirmed by the findings of this study, students and young lawyers, as a rule, share society's fundamental values and regard injustice, corruption and malfeasance negatively. Moreover, many quite sincerely wish to reform the world for the better, including by legal means.

However, as students they recognize the inescapability of confronting a complex reality that is far removed from ideals. This perspective alarms many, largely because it causes them to question whether they can put their values into practice upon graduation. Students need a detailed discussion on how to make complex ethical decisions and how they should conduct themselves in nuanced professional situations.

If we look to the experience of graduates who have already acquired professional experience, it becomes clear that they are made uneasy by attempts to drag them into corruption or actions that break the law. Moreover, our study indicates that some young lawyers have not encountered problems of this sort directly. However, within the framework of their jobs practically all young lawyers have encountered situations and problems that do not have a clear and simple solution in light of their personal and professional values. The interpretation of these sorts of situations and

the search for a way out of them is a complicated and sometimes even agonizing experience for the young lawyer. It seems that this experience might be less painful if these lawyers were taught before going into practice how to identify and resolve ethical conflicts brought on by the collision of several significant values. Moreover, the results of our study lead us to conclude that representatives from the legal profession understand professionalism to include following certain principles and rules. This includes rules that concern relations with clients (in the broader meaning of this word) or colleagues, and principles tied to a lawyer's 'social responsibility.' The requirement to observe these rules and principles is particularly pronounced in legal business, which regards the observation of certain norms of professional behavior as a guarantee of stable development.

For example, lawyers, including those practicing in the commercial sector, are under a duty to contribute to exposing and eliminating deficiencies in standard regulations. Law enforcement practice is explained by the fact that this widens the scope of a lawyer's own professional activities: the more effective the legal mechanisms, the easier it is to work as a lawyer. In other words, practicing lawyers understand professional ethics not as a set of abstract maxims, but as optimal forms of behavior that allow one to balance personal interests and the interests of the legal community.

Unfortunately, law schools so far offer little in the way of professional ethics training, despite the fact that instructors recognize their responsibility to train ethical lawyers. The fact of the matter is that special classes where law students can discuss the rational basis for professional conduct, and that would teach them how to identify and resolve ethical dilemmas, simply do not exist. Ethics courses in law schools are frequently taught in the sequence of philosophical disciplines and are devoted to the abstract examination of teachings on morals and morality. At best, students are introduced to codices of professional ethics for courts, lawyers, and civil servants.

One cannot say that questions of professional ethics are never touched upon in the course of a student's legal education. The issue is addressed within the framework of traditional law courses. Instructors relay certain values and professional aims when they express their evaluations and judgments regarding legal norms, when examining special cases with their students, when illustrating standard material with examples from practice, and when reacting to students' questions and comments. However, a detailed look at professional rules of conduct in the process of studying one or another field of law is distinctly absent.

Here, there is one other problem: this relay of values takes place without being fully realized or purposeful. Such tuition by instructors on professional ethics is complicated by the fact that in legal practice, alongside ethical conflicts, there are a host of direct infringements of the spirit and letter of the law.

On the one hand, there is the problem of mixing questions of professional ethics with questions of the commission of direct infringements of the law and crimes.

Giving bribes is not an ethical problem – it is criminal. On the other hand, instructors understand that in practice their students might encounter serious pressure from employers and other figures in a bid to coerce them into engaging in improper acts. Unfortunately, instructors do not always have the answers on how to stand up to these pressures.

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BOOK REVIEW NOTES

BILL BOWRING 'LAW, RIGHTS, AND IDEOLOGY IN RUSSIA'[1]

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Bill Bowring's *Law, Rights, and Ideology in Russia* is a collection of essays on Russian legal history. It contains a wide range of narratives about law and legal consciousness within the Russian tradition. The author starts with the beginnings of legal education in Russia in the late 18th century and finishes with the current controversies surrounding the human rights question.

I suppose this extensive frame of reference to be a very good one – necessary even, for an adequate comprehension of legal issues in the Russian context. The major difficulty that any researcher in Russian law has to face is that one witnesses legal phenomena in Russia that are seemingly identical to those in the West, and yet function in an entirely different way. This renders all attempts to understand legal developments in the Russian context by relying solely on authoritative texts, traditional taxonomies of comparative law and other formal techniques of that kind, futile and implausible. Only taking into account social-cultural variables can one understand anything. That's why broad references and wide ranging narratives are indispensable.

The book is highly informative. The author maintains a keen eye for detail, sometimes unknown amongst Russian lawyers. His knowledge of current debates is surprisingly extensive and precise.

There are, however, some disputable issues.

Confirming that Russian tradition 'has always been suffused, even saturated, with law,' Bowring argues that, 'the great debates, even in the midst of the Civil War that followed the Bolshevik revolution, have almost all been conducted in terms of and in the name of law.'[2]

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[1] Reviewed book: Bill Bowring, Law, Rights and Ideology in Russia: Landmarks in the Destiny of a Great Power (Routledge 2013).

[2] Bowring, *supra* n. 1, at 272.

The big question is whether these debates had any substantial relation to what was really going on. I have much doubt about that. Russian reality is very similar to the following description of the realities of 'the law-society nexus' at the time of the Empire:

> Yap had a legal system, with a legislature, a handful of judges and attorneys, a small police department, and a complete legal code based in its entirety on law transplanted from the United States. But vast portions of the Code had never been applied, few lay people had any knowledge of the content of the laws or of operation of the legal system, a large proportion of social problems were dealt with through traditional means without participation of the state legal system . . . Although the overwhelming majority of the populace lived in general disregard of the vast bulk of the rules of the legal system . . . I worked there as a busy assistant attorney-general for almost two years.[3]

Post-revolutionary praxis after the stabilization of the Bolshevik regime, and especially under Stalinism, have added another – but in some way key – feature: the imitation of the workings of a legal system. The Moscow Trials of 1936–1938 were only the most notorious exemplification of that trend.

Bowring himself cites the famous article of Bogdan Kistjakovskji about the predominance of legal nihilism within the Russian populace in general, and in intellectual circles in particular. Under these circumstances, the notion that 'debates in terms of law' can be considered reliable vestiges of a rich legal tradition is highly disputable.

One should also bear in mind the fact that the debates of the early post-revolutionary era, so admired by Bowring, were very limited in scope. The liberal conception of law was rejected as excessive. Within a decade or two 'free space' was narrowing: whereas in the early twenties Goikhbarg could afford to flirt with Duguit's 'fonction sociale,' by the end of the forties a mere reference to foreign doctrinal sources attracted suspicion.

All this brings us to the most important point: what does it mean to have a legal system?

Is it sufficient to issue authoritative legal texts? Or are faculties of law and law professors also required? The problem is that you can have both of these things, as well as courts, established procedures and trained staff, but still find the real impact of law negligible in the face of informal practice. Even more, legal instruments can be used in direct contradiction to their normal function to cover up and 'legitimize' crime, arbitrary decision-making, corruption, abuse of power, authoritarian practice and assaults on political opponents of ruling clans. Could it be that Pashukanis was right in his early writings, when he said that there is no law without a free market?

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[3] Brian Z. Tamanaha, A General Theory of Law and Society 145–146 (Oxford University Press 2001).

In other words, to date, we have had no reliable framework within which to plot an adequate description of the functioning of law in societies of nonorganic modernization. Without a framework like this, all comparisons, similarities and analogies are in vain.

I completely agree with Bowring's special emphasis on Pashukanis. In fact, Pashukanis is the sole Soviet Russian legal philosopher of world significance. However, I wouldn't recommend taking his late writings too seriously. The fact is that every intellectual writing in 1930s Russia faced the serious dilemma of intellectual liberty versus real life risk. The regime at that time no longer tolerated even moderate skepticism, requiring enthusiastic participation in what were in fact highly contestable and morally debatable activities. In such circumstances, every word, each written sentence, must have been very carefully weighted. Prominent Russian historian, Professor Andrey Yurganov, has masterfully depicted what he called 'the existential world of the Stalin-Period historians,' where indeterminacy, ambiguity and uncertainty became the prevailing management and repression strategy.[4] It was a social phenomenon typical to the experience of every intellectual living under totalitarianism.

Another very interesting theme is Bowring's reconstruction of the soviet doctrine of public international law. He claims that this reconstruction is systematically underestimated by western legal science. If I understand the matter correctly, Bowring sees its genuine originality in the special emphasis it always places on the principle of self-determination. I do not major in public international law, but intuitively I would rather endorse the critical stance expressed by western scholars of the 1960–1970s, cited by Bowring.

To begin with, soviet practice in that field has always been very pragmatic. The self-determination principle could not prevent the aggressive politics of territorial expansion that began from the early 1920s, and not only under Stalin. As to soviet doctrine itself, it was not very original. Korovin is not particularly interesting, from my point of view. Tunkin is worth a detailed comment. Undoubtedly, he is a first class academic. To my mind, the key to his success lies in a very clever synthesis of the old splendor of the European doctrine of the *Belle Époque* written into the objectives of that awesome mixture of Messianism and isolationism, typical of soviet international policy. Triepel is the chief character of this piece. Despite the fact, that his *Landesrecht und Völkerrecht* has never been translated into Russian, even today it remains opus magnum for conservative academics. Triepel's dualistic principle provides the necessary justification for a sort of 'legal impermeability' of 'sovereign' national legal orders, so desired by any national authoritarianism in the world. It is no pure coincidence that this particular type of out-of-date legal theory, typical

[4] Andrey Yurganov, Russian National State: The Existential World of the Stalin Period Historians (Russian State University for the Humanities 2011).

of the age of European wild nationalism, became one of the most in demand for soviet doctrine.

The problem, however, is that it became the sole type of western legal theorizing that was viably available to soviet scholars. All of the 20th century's legal theory from Kelsen to Luhman, Hart to Posner was practically unknown in Russia up until the 2000s. What I am trying to say is that the very existence of any original intellectual practice within a framework of ideological control seems doubtful.

The second element of Tunkin's synthesis is the 'treaty process' concept. Simply put, it means the conceptual assimilation of all sources of international law into treaty form. The goal is completely pragmatic – theoretical justification of the thesis that only these 'instruments' of public international law are binding on the Soviet Union, which itself expressly makes them binding. I can't resist pointing out that it is very comfortable doctrine to consider 'law' only that which you yourself treat as 'law.' All this is a very telling story and most informative to understanding the limits of legal consciousness during the soviet era.

The same 'instrumentalism' is typical of the legal-political agenda of the post-soviet Russia of 2000. Once again, the dualistic conception of Triepel is called for. As well as the Bismarckian and Wilhelmian concept of national sovereignty.

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CIVIL PROCEDURE IN CROSS-CULTURAL DIALOGUE: EURASIA CONTEXT[1]

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In September 2012, the International Association of Procedural Law organized its annual world conference in Moscow, Russia. A review of this event was published in the first volume of this law journal.[2] At the start of the conference, all participants received two marvelous books, one in English and one in Russian, containing the welcome[3] and keynote speeches,[4] general reports and national reports. Like the conference, the book is titled 'Civil Procedure in Cross-cultural Dialogue: Eurasia Context.'[5]

It was a breath of fresh air that the conference focused on the evolution of civil procedure in different societies – not only in the well-known civil or common law systems, but also in different countries of Eurasia. Because culture is one of the shaping factors of civil procedure, the conference organizers decided to center on these cultural aspects. The objective was to show that culture in the contemporary world has a much more important role regarding procedural justice than it had

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1 Reviewed book: Civil Procedure in Cross-cultural Dialogue: Eurasia Context: IAPL World Conference on Civil Procedure, September 18–21, 2012, Moscow, Russia (Dmitry Maleshin, ed.) (Statut 2012), available at <http://www.iaplaw.org/index.php/en/documents> (accessed March 9, 2014) [hereinafter Civil Procedure in Cross-cultural Dialogue: Eurasia Context].

2 Marcel Storme, *Moscow 2012 Conference – a Major Turning Point in International Association of Procedural Law History*, 1 RLJ 91 (2013).

3 By Loïc Cadiet (IAPL President), Valery Zorkin (Chairman Constitutional Court Russian Federation), Vyacheslav Lebedev (Chairman Supreme Court Russian Federation), Anton Ivanov (Chief Justice Supreme Commercial Court Russian Federation) and Pavel Krasheninnikov (Chairman Association of Lawyers of Russia).

4 Marcel Storme, *Best Science, Worst Practice?*, in Civil Procedure in Cross-cultural Dialogue: Eurasia Context, *supra* n. 1, at 17–26; Mikhail Treushnikov, *Evolution of the Russian Civil Procedure at the Beginning of the XXI Century*, in *id.* at 26–30; and Peter Gilles, *Some Reflections on the Keywords of the General Topic*, in *id.* at 31–36.

5 *See supra* n. 1.

centuries ago. Against the background of globalization and cultural interaction, the aim was to discuss and explore how the legislator in Russia and other Eurasian countries with mixed cultures draft effective civil procedural legislation at the cultural cross-road of West and East, of Europe and Asia.[6] In his keynote speech Peter Gilles defines the conference eye catchers: Eurasia, culture, un-culture and cross-culture.[7] He concludes that this is a challenging and complex undertaking.

All reports are categorized in six themes devoted to typical civil procedural problems in which cultural specificity plays an important role: (1) dispute resolution in different formal and informal procedures; (2) goals of civil justice; (3) civil procedural systems: pros and cons; (4) cultural dimensions of group litigation; (5) harmonization of civil procedure in Eurasia; and (6) commercial arbitration in Eurasia.[8]

1. Dispute resolution in different societies: formal and informal procedures[9]

In many parts of the world informal processes co-exist with formal adjudication. These include mediation, (informal) arbitration, and 'traditional' processes used by indigenous and other homogenous social groups for resolving intra-group controversies. This session deals with the function of these informal processes and how we can account for their role in modern societies.

The national reports underscore the reality that the development of 'alternative' methods of handling disputes – alternative, that is, to adjudication in state-sponsored and controlled courts – shows no sign of abating as the new century unfolds.[10] They all sharpen the understanding of the formal vs. informal debate by variously focusing on the roots of the informality movement, its achievements, its problems, and its perhaps unanticipated political and economic impact.[11]

Regarding the conceptual framework, attention is paid to the categorization of particular processes as formal or informal, the difficulties this entails, and the danger

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6 Dmitry Maleshin, *Foreword*, in Civil Procedure in Cross-cultural Dialogue: Eurasia Context, *supra* n. 1, at 8–9.

7 *See supra* n. 4.

8 The last chapter on commercial arbitration only contains two national reports by Evgeny Sukhanov (Russia) and Vladimir Musin (CIS). There is no general report. The reports simply provide an instructive overview of commercial arbitration in Russia and the CIS states. Therefore this chapter remains outside the scope of this review.

9 The general report was prepared by O Chase (USA). The national reporters were Vincenzo Varano & Alessandro Simoni (Italy), Neil H. Andrews (England & Wales), Jerome Cohen (China), Nataliya Bocharova (Russia), Tsisana Shamlikashvili (CIS) and Carrie Menkel-Meadow (USA).

10 Oscar G. Chase, *General Report*, in Civil Procedure in Cross-cultural Dialogue: Eurasia Context, *supra* n. 1, at 37.

11 *Id.* at 38.

of too-easy categorizations. Interesting examples are the criminal process in the USA and the frequent use of plea bargaining (report by Carrie Menkel-Meadow), the recently introduced informal 'reconciliations' as part of the Chinese criminal procedure (report by Jerome Cohen), and the formalization of mediation in Russia (report by Nataliya Bocharova). Some reports explicitly explore the implication of the definitional problem for evaluating the various processes discussed. A pertinent example is the distinct forms of Italian arbitration labeled 'arbitrato rituale' and 'arbitrato irrituale,' reflecting different degrees of formality of process (report by Vincenzo Varano & Alessandro Simoni). In her fascinating American report, Menkel-Meadow connects the issue of categorization to a normative assessment of the claims of the ADR adherents. By setting forth several formality indicia, she describes a range of processes as falling along a continuum rather than subject to clear categorization.

Other reporters note the role of alternative procedures in relieving the burdens on the courts. Andrews explains the dramatic rise of mediation as a dispute resolution tool in England in part by comparing the defects of court litigation. The Italian reporters clarify that the main purpose of ADR is to relieve the official machinery of civil justice which seems unable to meet the growing demand of justice (report by Vincenzo Varano & Alessandro Simoni). Menkel-Meadow emphasizes the 'quantitative-efficiency' and 'qualitative-party' aspects of less formal processes.

Another theme the reporters bring up is the role of cultural traditions. Striking examples are the traditional informal means of handling disputes used by homogenous social groups such as the people of Sardinia and Albania, in addition to the Roma (report by Vincenzo Varano & Alessandro Simoni), the millennia-long Confucian tradition that has emphasized consensual resolution of disputes in China (report by Jerome Cohen), and traditional informal dispute processes that prevailed in the former Soviet republics (report by Tsisana Shamlikashvili).

Notwithstanding the advantages of informal, non-judicial processes, most reporters accentuate the necessity of court proceedings. Andrews draws attention to the indispensable coercive powers of the judiciary, for example to protect parties against the other's non-compliance or bad faith. Varano & Simoni point out that the expansion of ADR can impose limits on access to justice by establishing a barrier that must be crossed before getting to a judge.

Menkel-Meadow expresses uneasiness related to the private nature of informal disputing in a system that largely depends upon a rule of law generated by publicly announced judicial decisions. She worries that 'increasing complexification, segmentation, and differentiation of process . . . potentially threatens other justice notions of consistency, transparency, true consent and knowledge, as well as equity, equal treatment, clarity, socially "uniform" and just solutions.'[12]

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[12] Chase, *supra* n. 10, at 40.

Chase concludes that reform movements are the product of overlapping and sometimes conflicting forces of culture, politics, and economics. The momentum of the informalist movement, which was fueled by a general political trend favoring privatization, was accompanied by the striking commitment in many nations to constitutional rights through formal courts. Among the many tasks facing proceduralists, the goal of defining and defending the boundaries between the two is among the greatest.[13]

2. Goals of civil justice[14]

This chapter starts with two basic inquiries: the role of civil justice in the contemporary world and how these goals differ from country to country. In his elaborate general report, Uzelac not only summarizes the ten national reports, but also contextualizes the issues treated.[15]

The national reports essentially focus on the two main goals of civil justice: the conflict resolution goal (the resolution of individual disputes) and the policy implementing goal (the implementation of social goals, functions, and policies). These goals are never fully separated, but the balance between them differs and shifts over time and space. The national reports depict civil justice systems positioning their role and social task somewhere in between.[16] The systematic position and relative importance of the first or second goal is, of course, different depending on the legal culture, as is illustrated by the Chinese and American systems (reports by Fu Yulin and Richard L. Marcus).

While most reports phrase the 'conflict resolution' goal in a similar way, the expression of the 'policy implementing' goal is less uniform. Uzelac lists a series of interpretations in terms of legal order (Hungary, China, Austria, and Russia), development and uniform application of private law (the Netherlands), social harmony (China and Russia), bare effectiveness (Italy), and proportionality (Hong Kong).[17]

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13 Chase, *supra* n. 10, at 41.

14 The general report was prepared by Alan Uzelac (Croatia). The national reporters were Christian Koller (Austria & Germany), Teresa A. A. Wambier (Brazil), Fu Yulin (China), David Chan & Peter C. H. Chan (Hong Kong), Miklós Kengyel (Hungary), Elisabetta Silvestri (Italy), Remco van Rhee (Netherlands, Belgium & France), Inge Lorange Backer (Norway), Dmitry Nokhrin (Russia) and Richard L. Marcus (USA).

15 Alan Uzelac, *General Report*, in Civil Procedure in Cross-cultural Dialogue: Eurasia Context, *supra* n. 1, at 111–136. The reports deal with the following topics: goals of civil justice, matters within the scope of civil justice, protection of individual rights vs. protection of the public interest, establishing the facts of the case correctly vs. the need to provide effective protection of rights within an appropriate amount of time, proportionality between case and procedure, multi-party litigation and collective actions, equitable results vs. strict formalism, problem solving vs. case processing, freely available public service vs. quasi-commercial source of revenue for the public budget, and user orientation.

16 Uzelac, *supra* n. 15, at 116.

17 *Id.* at 117–120.

Several national reports underline the fact that the policy goals and reasons are in the forefront in uncontested (or extra-contentious) cases – *i.e.* cases where judges do not adjudicate disputes, but perform a more or less administrative function. The transfer of more or less 'externalities' to courts – from the regulation of family relations to the control of local elections – depends on the political choices of each state at a particular moment of its own history. Contrary to, for example, the Netherlands (report by Remco van Rhee), the share of non-contentious matters is apparently higher in Austria and Germany (report by Christian Koller) and Italy (report by Elisabetta Silvestri). The Brazilian and Italian reporters rightly underline the concerns of intensive court involvement in non-contested matters (reports by Teresa A. A. Wambier and Elisabetta Silvestri), which could potentially distract the judiciary's attention from more pressing matters.

The national reports show that the tension between the approaches to civil justice focused on the protection of individual rights vs. the protection of the public interest, takes diverging forms. According to Marcus, the American civil justice not only takes on some essentially administrative tasks, it sometimes replaces state administration (report by Richard L. Marcus). It is therefore characterized by a judicialization of matters otherwise dealt with by state bureaucracies. In China, the consciousness of protection of public interest permeates civil justice (report by Fu Yulin). Accordingly, Chinese judges have a very large discretion to intervene for reasons of public interest into the parties' disposition of their private rights. The Russian approach is closer to the 'balance of private and public rights and interests' (report by Dmitry Nokhrin).

One goal related to the protection of public interests plays an important role in almost all contemporary systems of civil justice: the goal of efficient and fair administration of justice, which the general reporter defines as the *intrinsic* goal of civil justice. Active case management should be in the function of swift, streamlined, and inexpensive proceedings, foreseeable timing of the procedure, and prevention of abuse and delaying behavior of the parties (a poignant example is Hong Kong, report by David Chan & Peter C. H. Chan). In cases in which public interest elements are recognized, about half of the reported legal systems allow the participation or intervention in civil proceedings by a state prosecutor acting on the side of trans-individual interests (China, Russia, France, Brazil, the Netherlands, Germany and Austria).

Another topic of this chapter deals with the proportionality between case and procedure. Although in most countries some proportionality is aimed by channeling small claims to special courts or special summary proceedings, the general report surprisingly reveals that most civil law systems have an inclination to focus on the resolution of a large number of average and small cases, instead of targeting exemplary and social significant cases (a notable example is Italy, report by Elisabetta Silvestri). In other words, the goal of the system is first to survive the influx of cases, and only secondarily to produce high-quality justice. In such a situation, it is not

surprising that separate and out-of-court mechanisms are gaining momentum, such as arbitration that is taking over the primacy in dispute resolution of complex and valuable international commercial cases.

The general report also discusses the inclination towards substantive justice vs. formal legality, a shift from problem solving (*i.e.* finding adequate solutions to the problems underlying the disputes) to case management (*i.e.* efficiently processing cases within their jurisdiction, engaging the least effort and expense), and a trend towards the commercialization of civil justice (abandoning the idea that civil justice is a freely available public service). Finally, attention is paid to the unanswered question, if civil justice serves the interests of its users or if its users serve the interests of civil justice.

3. Civil procedural systems: pros and cons[18]

The third chapter starts from the following enquiries: what kind of civil procedural systems exist in the contemporary world? Is it still important and does it make any sense to distinguish opposite procedural systems? Could we propose any other classification than civil law vs. common law? Do we have any new criteria? What is the role of legal culture in the contemporary civil procedure?

In his general report, Maleshin goes to the essence of the conference and the book: discussing culture as one of the shaping factors of civil procedure.[19] Although legal systems are converging and procedural diversity is diminishing, he states that cultural diversity continues to be one of the most crucial factors that differentiates one procedural system from another. The frontier is not lying in the field of legislation or doctrine, but in the area of day to day practice and legal culture, in other words in the 'spirit of law.'

Maleshin starts from the traditional classification of civil law (*i.e.* codified systems) vs. common law (*i.e.* systems based on precedents), while recognizing that there are also mixed jurisdictions (Japan, China, and the Philippines). However, he considers this distinction outdated and puts forward culture as the main criterion for classification of procedural systems: 'dispute resolution is a reflection of culture in which it is embedded: it reflects and expresses its metaphysics, values, psychological imperatives, histories, economics, and political and social organization. Western society is litigation-oriented. In contrast, traditional and collectivistic societies do not use formal dispute resolution. They prefer conciliation or mediation by moral or

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[18] The general report was prepared by Dmitry Maleshin (Russia). The national reporters were David N. Bamford (Australia), Teresa A. A. Wambier (Brazil), Margaret Woo (China), Chiara Besso (Italy), Viktória Harsági (Hungary), Serban Vacarelu (Romania), Daniel van Loggerenberg & André Boraine (South Africa), Murat Ozsunay (Turkey) and Jeffrey E. Thomas (USA).

[19] Dmitry Maleshin, *General Report*, in Civil Procedure in Cross-cultural Dialogue: Eurasia Context, *supra* n. 1, at 235–244.

divine authority.' He illustrates this by referring to the similarities of the Japanese and German legal system, both having their roots in the German Code of Civil Procedure of 1877. Nevertheless, law in Japan is less effective in social regulation than non-legal mechanisms. The latter discourage antisocial conduct more effectively than any legal system. The Japanese tradition of emphasizing the ascendency of the group interest over the individual interests of its members takes its root from the Confucian thought. Although this theory reveals great insight into the analysis of law and legal systems, it may prove very difficult to classify Germany and Japan in different procedural traditions.

The national reports contain other examples. The recent governmental reforms in China have the goal to stabilize society and are based on the ideas of 'using mediation whenever possible, using adjudication whenever appropriate, and combining mediation with adjudication' because the courts are unable to constrain social discord (report by Margaret Woo). South African civil procedure is of common law origin, but also largely influenced by local African culture, which is reflected in the constant pressure to comply in order to meet the changing needs of society (report by Daniel van Loggerenberg & André Boraine). Hungarian civil procedure reflects a strange multi-layer culture (report by Viktória Harsági). In that same vein, the American reporter explains that the uniqueness of some exceptional US procedural features have their roots in culture: 'why is the US so committed to the jury system when other common law countries are not? It is because of the deep cultural suspicion that Americans have for the government. The jury system was a mechanism to counterbalance the power of the British government' (report by Jeffrey E. Thomas). The general reporter also illustrates this point by referring to the Russian legal system. Russian civil procedure is a unique system with exceptional features not existing in civil or common law. 'The tasks of the modern Russian legislator are to conduct detailed research about the moral ideas of the Russian citizens and to create rules of law which reflect the demands of both the society as a whole and its individual members. The Russian law should take into account both individualistic and collectivistic traditions, as well as ideas and moral views that exist in the Russian society. This means that in the process of legal regulation, a "golden mean" between two moral traditions should be found.'[20]

Based on this, Maleshin puts forward a new classification of civil procedural systems: collectivistic vs. individualistic, both corresponding with two widespread cultural models. The latter based on individualism, the former on collectivism. In collectivism, the law aims to protect the interests of society as a whole and to achieve common goals, while in individualism the law primarily protects the interests of individual members of society.[21]

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[20] Maleshin, *supra* n. 19, at 243.

[21] *Id.* at 244.

4. Harmonization of civil procedure law in Eurasia[22]

The fourth chapter focuses on the integration of civil procedure in Eurasia: discussing the main differences and similarities of civil procedure in the Eurasia countries, and inquiring whether uniform rules and principles could be devised for the region.

In his general report, Yarkov approaches the issue of harmonization in the light of civil justice developments in the post-Soviet region.[23] Based on a comparative analysis of civil procedure legislation in the Eurasia countries of Kyrgyzstan, Russia, Slovenia and Ukraine, he lists multiple similarities and differences in order to detect common trends. This is done from three angles: common spheres and institutes of civil procedure, such as similarities of the models of civil procedure, organization of the judicial power, similarity of the sources of civil procedure, similarity of the principles of court organization and court procedure, similarity of evidentiary rules, and differentiation of court procedures and efforts towards their simplification. Secondly, current issues and specific institutes of civil procedure, like access to justice and the mechanism of public interest protection, approaches to organization of judicial acts enforcement, implementation of information technologies, and methods of alternative dispute resolution. Finally, he deals with the receptivity of the national legal system to harmonization. The third is undoubtedly the most interesting aspect in the general report.

It is clear from the outset that all jurisdictional systems of the Eurasian countries, as opposed to the opaque Soviet system, operate in a context of competition with each other. This rivalry leads to convergence and approximation of rules and procedures.

Yarkov points out that present distinctions among the systems of civil procedure in each country do not influence the common trends of development. This is caused by multiple factors. First, all legal orders are based on common models of civil procedure. All countries of the post-Soviet region are to some extent influenced by the German legal tradition of civil legal procedure mixed with the traditions of the so-called 'socialist' law in varying degrees. Second, there is the continuity of some Soviet law institutes. Although the influence of the former USSR legislation displays variously in all countries concerned, it undoubtedly left a significant mark on the application and development of a number of procedural institutes. And finally, there are Yarkov detects similar directions of the gradual reforms of procedural legislation in all countries. These reforms are being carried out, *inter alia*, on the basis of adoption of experience from neighboring countries as well as aspiration to follow the world-wide trends in civil procedure development. However, there also seems to be some obstacles to harmonization, for example the various geopolitical

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[22] The general report was prepared by Vladimir Yarkov (Russia). The national reporters were Azamat Saliev (Kyrgyzstan), Viktor Blazheev (Russia), Aleš Galič (Slovenia) and Vyacheslav Komarov (Ukraine).

[23] Vladimir Yarkov, *General Report*, in Civil Procedure in Cross-cultural Dialogue: Eurasia Context, *supra* n. 1, at 335–365.

positions and stages of involvement in economic globalization that affect both law as a whole and civil procedure in particular.[24]

Nevertheless, the general reporter concludes, optimistically, that in spite of the different rates and directions of procedural law development in the Eurasian countries, the national legal orders have much in common – for example, with respect to the civil procedural model in general, sources of civil procedure and evidentiary rules – which can lead the pathway for further harmonization.[25]

5. Cultural dimensions of group litigation[26]

The fifth chapter deals with cultural dimensions of group litigation, discussing how culture influences the model of group litigation, and what kind of solutions exists in other countries than civil or common law.

In her detailed general report, Walker gives an overview of worldwide developments regarding group litigation.[27] She starts from the provocative question: who's afraid of US-style class actions?[28] While everyone, at least in principle, wants to develop better access to justice for victims of mass harms, some might not want to adopt US-style class actions in their legal systems.[29] This statement, of course, depends on the meaning of 'US-style.' To examine the precise nature of this argument, 11 national reporters were asked to address various aspects of the collective regimes

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[24] Yarkov, *supra* n. 20, at 364–65.

[25] *Id.* at 365.

[26] The general report was prepared by Janet Walker (Canada) (*see also* Janet Walker, *Who's Afraid of U.S.-style Class Actions?*, 15 Sw. J. Int'l L. 509 (2012)). The national reporters were Vicki C. Waye & Vincenzo Morabito (Australia), Ada Pellegrini Grinover (Brazil), Stefaan Voet (Belgium) (*see also* Stefaan Voet, *Cultural Dimensions of Group Litigation: The Belgian Case*, 41 Ga. J. Int'l & Comp. L. 433 (2013)), Jasminka Kalajdzic (Canada), Rachael Mulheron (England & Wales), Elisabetta Silvestri (Italy), Helene van Lith (Netherlands), Dmitry Tumanov (Russia), Henrik Lindblom (Sweden), Javier Lopez Sanchez (Spain) and Dmitry Magonya (Russia).

[27] Janet Walker, *General Report*, in Civil Procedure in Cross-cultural Dialogue: Eurasia Context, *supra* n. 1, at 413–458. For another recent overview of worldwide developments on class actions, *see* Antonio Gidi, The Recognition of U.S. Class Action Judgments Abroad, 37 Brook. J. Int'l L. 893, 926–27 (2012); and World Class Actions. A Guide to Group and Representative Actions around the Globe (Paul G. Karlsgodt, ed.) (Oxford University Press 2012).

[28] This question is not new. *Cf.* Richard O. Faulk, *Armageddon Through Aggregation? The Use and Abuse of Class Actions in International Dispute Resolution*, 37(3) Tort & Insurance L. J. 999 (2002) (arguing that there are plenty of reasons to fear adoption of class action in civil-law countries); Antonio Gidi, *Class Actions in Brazil. A Model for Civil Law Countries*, 51 Am. J. Comp. L. 311, 322 (2003) (arguing that 'the civil-law class action proceeding is likely to fit in well with approaches, practices, habits, and attitudes peculiar to a civil-law system. There is thus no reason to fear class litigation in any country'). *See also* the recent European Recommendation on Collective Redress Mechanisms (*see* Elisabetta Silvestri, *Towards a Common Framework of Collective Redress in Europe? An Update on the Latest Initiatives of the European Commission*, 1 RLJ 46 (2013)).

[29] Walker, *supra* n. 27, at 413–414.

implemented or contemplated in their countries, and more specifically to comment on the applicability of these regimes with US-style class actions.[30] The reports are structured around 6 themes: the objectives of group litigation (access to justice, judicial economy, and/or behavior modification?), the issue of representation (who can/should represent the interests of the claimants?), the vital funding and financing problem, the available reliefs (injunctive vs. compensatory), court involvement, and the compatibility with US-style class actions.

There is considerable agreement among the national reports that the objectives of group litigation are to advance access to justice, judicial economy, and behavior modification. Access to justice has particular significance among common law regimes, in which claimants ordinarily must finance the prosecution of their claims. In civil law countries, the improvements in access to justice tend to be more closely related to easing the burden on courts whose dockets would otherwise be clogged by large numbers of individual matters that could be aggregated. Behavior modification is the most controversial of the objectives and there has been considerable debate in civil law and common law countries alike over the extent to which civil litigation undertaken by private persons should serve this function.

Important distinctions exist between the approaches taken in the various legal systems to representing claimants. In general, in the common law, there is a well-established tradition of individual claimants framing and prosecuting their own claims through class attorneys. In the civil law jurisdictions, ideological plaintiffs, such as community organizations or the government are thought to be better able to meet the challenges of protecting the interests of the class.

In the US, contingency fees are regarded as essential to the successful operation of class actions. In other, mainly civil law, countries they are still regarded with suspicion. Nevertheless, even in legal systems that once considered conditional fees as fundamentally unacceptable, their merit in the context of group litigation has prompted reforms to relax restrictions.

Management of class actions creates new challenges for common law and civil law courts alike. Common law courts must develop ways to address the adversarial void in which the interests of class counsel and defense counsel in gaining approval for settlements are aligned so that the court is deprived of the fundamental forensic benefits of the adversarial system. In civil law jurisdictions, the parties may insist on greater involvement in the process than might ordinarily be expected. The particular responsibilities assigned to the court reflect important assessments of judicial competence and the requirements for oversight of group litigation.

In her conclusion Walker states that the national reports make clear that the strong reaction that seemed routinely provoked by the discussion of US-style class actions in many international settings was strangely muted. One explanation for this could be that the hostility and anxiety was borne largely of ignorance.

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[30] For this reason, there was no national report for the United States.

One of the core issues for most non-US observers is whether legal enforcement is ultimately an essentially entrepreneurial activity. According to Walker, this is neither clear in the civil law, nor in other parts of the common law world. The general reporter suggest a pragmatic solution: 'the only way to find the answers to these questions is to implement reform and observe the results . . . if entrepreneurship is an inevitable reality for effective legal enforcement, there is no need to lunge forward to embrace it – its necessity will eventually become apparent'[31] (Canada and Australia are notable examples where this happened; reports by Vicki C. Waye/Vincenzo Morabito and Jasminka Kalajdzic).

The general report concludes that the Dutch Collective Settlements Act (which is a settlement-only class action, *see* the report by Helene van Lith) seems to be the solution that promises to inspire the most confidence and, possibly, the least fear among those who seem most afraid of US-style class actions.[32] We do not think, however, that the Dutch system could be a model to any country for the reasons discussed in the book: this solution was created within a particular legal culture, that of the Dutch consensus-based, '*polder model*.' Transplanting it to other legal systems, based in an adversarial model will be challenging. Moreover, we have serious doubt whether this system would work even in the culture that created it.[33]

6. Conclusion

This wonderful multifaceted conference book is an exceptional addition to international civil procedure scholarship, spearheaded for many decades by the International Association of Procedural Law. Its focus on the legal culture of Eurasia is original, novel, and vivid. Undoubtedly, it will influence scholarship and possible legal reform for the years to come.

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31 Walker, *supra* n. 27, at 457.

32 *Id*. at 458.

33 *See* Gidi, *supra* n. 27, at 926–27.

CONFERENCES REVIEW NOTES

THE NATIONAL LEGAL CONGRESS: BUSINESS, THEORY, AND PRACTICE ON THE SAME PLATFORM

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The National Legal Congress, established in Moscow in 2011, has already become a platform recognized in the professional community, which traditionally brings together more than 250 representatives of the Russian courts, law firms, government and public organizations, business-structures, and prominent law and jurisprudence figures.

The organizers, participants and guests of the National Legal Congress annually seek to address important issues in the Russian legal sphere, prospects for improving justice and the development of the legal market in Russia. The fact that not only representatives from law firms, legal establishments and private corporations, but also from the legislative, executive and judicial authorities are among the Congress participants and speakers, attaches a great importance to the Congress.

In 2013, the Congress was officially renamed the National Legal Congress (NLC). The new name reflects the fundamental principles and objectives of the event, including a comprehensive review and evaluation of the changes taking place in the Russian legal market, promoting the improvement of legal culture, openness and transparency of the judicial system, and legal reforms in Russia.

The main objective of 2013 Congress remained unchanged: discussion of the developments in the Russian legal sphere, prospects for justice improvement and the development of the legal market in Russia.

In 2013, the program was divided into two main thematic blocks. The first day of the Congress was devoted to the topical issues of the Russian legal sphere and legislative changes. The second day of the Congress was organized to discuss further development of the professional legal services market.

At the plenary session of the National Legal Congress experts discussed Twenty Years of Constitutional Justice in Russia and the transformation of the socio-political and socio-economic systems.

To the surprise of those present at the plenary session, the authors of the Constitution abstained from discussing on its 20th anniversary the most urgent amendment thereto, namely, an amendment related to the merger of the courts.

Actually, the Constitution was amended only once, in 2008, when the presidential term and terms of State Duma deputies were increased, though no amendments were introduced to the bill, which was also initiated by the president. Thus, there is currently no experience of interpreting the procedural passage of amendments to the Constitution. It is unclear whether at the time of the Congress experts believed that attempts to amend the presidential bill are pointless and that it is a hopeless task to attempt to resist the presidential initiative by introducing the amendments. The issue failed to be discussed.

The merger of the courts, being a key legal topic of the year, was more willingly discussed by representatives of the legal community at the first session of the Congress. Discussion of the problem: 'Merger of the Supreme Court and Supreme Arbitration Court: The Formation of a Uniform Legal Practice! Pros and Cons!' sparked a disruptive reaction among Congress participants.

The process of the merger of the Supreme Court and Supreme Arbitration Court must be switched from a destructive to a constructive track – this view was expressed during the National Legal Congress by representatives from a number of major law firms.

According to experts, the very idea of merging the supreme courts gives rise to astonishment and incomprehension, although now that it is pointless to discuss this process, we should rather support it. Concern was also expressed that the reforms carried out in respect of the arbitration courts would be suspended or stopped after the merger. The distrust of the entire system of arbitration courts was expressed through merger of the courts. The experts believed that in the current situation it is important to preserve the personnel of the Supreme Arbitration Court, where a vast number of high-class professionals are employed, to solve probable problems with supervisory authority, and to make every effort to preserve the positive things achieved by the Supreme Arbitration Court over the years.

The next discussion was devoted to 'Russian Federation Civil Code Reform. Advocacy and Notaries: Improving Quality Standards of Legal Services.'

All participants in the discussion noted a direct relationship between the quality of legal aid and state regulation. Experts noted that it would be difficult for those engaged in advocacy bodies to find additional reserves to improve the quality of legal aid without increasing the wages of lawyers involved in criminal proceedings, and without regulating the legal aid sphere as a whole. Corporate self-cleansing works quite effectively: annually, approximately 500 lawyers lose their status, though

this effect is largely leveled due to the fact that expelled corporate personnel are free to continue legal practice in areas other than advocacy. Speakers stressed the need for urgent legislative solutions to tackling the unregulated part of the profession. Legal services are provided not only by individual entrepreneurs and businesses (LLC), but also by the persons who are neither registered, nor pay taxes, and often appear to be engaged in fraudulent activities. The speakers noted that general quality standards (including the availability of a relevant university degree, qualification examination, the professional code of ethics, disciplinary liability) are currently set only by advocacy companies. As such, it is necessary to implement a justice project in order to establish a monopoly on legal representation in certain categories of case for lawyers. However, one must not forget that the foundations for the provision of legal aid are laid during one's student days; as such, quality of education is an important issue that the legal community must address by actively participating in the training of future lawyers.

Discussion on the future of the legal profession was continued during the session on 'Interaction of High School and Practice. Crisis of Supply and Demand.'

Currently, Russia is in a paradoxical situation: despite an enormous number of law school graduates, we face a lack of qualified personnel. The number of lawyers in Russia is estimated at around 55–60 thousand. This legal boom can be explained by a desire to meet the basic international standards required for the country to enter the world market. The current inclusion of Russia in international integration processes hedges the need for recognition by foreign partners of diplomas issued by national universities.

Next discussion was devoted to the intellectual property court and entitled: 'Creating a New Intellectual Property Court. Court to Help?' Here, experts discussed which intellectual property disputes (dispute categories) would be the most popular and which would be the most complicated in the near future, which gaps in the RF Civil Code are most unfavorable to the development of practice, and the legal opinion of the Supreme Arbitration Court on the topical issue of the exercise of exclusive rights.

On the first day of the Congress, the following issues were addressed: 'The Participation of the Legal Market in its Reformation: Recent Projects. Initiative is not to be Punished!' and 'To Enter the Top 50 Doing Business! Is it Real for Russia?' The first session saw experts discuss the establishment of the Russian Arbitration Board, nonprofit partnerships and their participation in the transformation and improvement of existing legislation. The latter session was based on the results of comprehensive studies ranking market leaders. One of the leading law firms has studied, in conjunction with the Moscow government, various advantages to business registration procedures in 'Doing Business' leading countries. On the basis of the results, representatives offered Congress participants their vision of the project.

The second day of the Congress was opened with a panel discussion devoted to the operation of Legal Departments, 'The Legal Department in the Era of National Legal Services Market Reform.'

After years of discussion, the issue of reforming the legal market has now moved into an active stage. It is well known that it is impossible to build a state of law without having a developed national legal services market, composed not only of consultants, but also of corporate lawyers. In these circumstances, it is necessary to improve the perception of legal functions both within and outside the company. Principle topics discussed were: the evolution of legal services; legal support for business taking into account national specificities; the relationship between economic and legal functions in a business; corporate governance as a step towards increasing a company's value; the decentralization of legal departments and the engagement of external consultants or development of in-house departments. Russia's leading corporate lawyers participated in the discussions.

However, participants of the Congress appear to have found the event's most interesting discussion to have been the one to address 'Criteria for Assessing the Quality of Legal Assistance. Ranking, PR-wars and Pseudo-Professionals on the Domestic Legal Services Market.' This discussion was a logical continuation of the session held on Dec. 10, dedicated to the quality standards in legal services.

Since different law firm rankings are becoming more popular, everyone wants to know whether it is possible to consider the ranking of any company as an absolute indicator of its performance.

Practicing lawyers, advocates and consumers (heads of legal departments of large firms, and ranking authors) were invited to discuss the role of rankings upon the selection of legal advisors. According to those who use the services of external legal advisors, foreign rankings show less bias than domestic ones, the main reason for this being different methodologies for determining rankings.

However, when choosing a legal adviser, not only a law firm's quantitative indicators, but also an assessment of its service quality, is rather important. As such, companies entering the Russian market are interested in reputational rankings. According to Olga Voytovich, Legal Department Director of Interros, this is an urgent issue, though rankings have not yet become the popular method for selecting consultants in Russia.

A ranking is deemed credible when it is based primarily on the opinions of independent experts and consumers. This is another reason why foreign rankings are more credible than their Russian equivalents in terms of assessing the quality of legal services provided by law firms.

Techniques used in the preparation of rankings abroad were revealed by Mike Nash using the example of The Legal 500 EMEA. The Legal 500 EMEA ranking has been available for 26 years, and 67% of visitors to this site currently use the data given there as a starting point for selecting a law firm. In terms of process, first, ranking authors

always check the facts of the activities of law firms, and secondly, take into account their customer feedback and comments from market participants. Each year they devote 10 weeks to Russia, with a further 4 weeks to check the information received.

Participants were also interested in the answer to another question: whether law firm brand matters when selecting a consultant. The idea that brand cannot be the sole criterion for selecting a consultant was shared by speakers of the panel. Even in firms with widely recognized brands, their lawyers may have different levels of professional experience.

Three main criteria for evaluating the quality of legal services were identified as being the most important from the point of view of the client:

(1) professionalism – ability to analyze and assess the situation and the law, and to take a competency-based approach to business;

(2) belief in the correctness of one's position and focus on achieving results; and

(3) a principled approach to business, through which confidence is established between the client and legal advisor.

Experts added that although brand does contribute to attracting customers, marketing costs incurred by law firms are not always justified, and their reduction would result in reducing the cost of services – something that is also very attractive to customers. One of the speakers disagreed with this point of view, maintaining that brand is primarily composed of the people working at a law firm, and that marketing is an essential part of strategy and a specific indicator of their performance. Even the best professional can see a decline in work unless he/she focuses on promotion.

The sessions entitled 'Investigation for Business. Antifraud in Business Turnover. Better safe than sorry!' and 'Analysis of Court Awards for Corruption Offences: Challenges and Prospects' were of practical value for businesses.

A session dedicated to the development of arbitration in Russia, where experts discussed the problems of arbitrability of commercial disputes, a code of professional ethics and arbitrator conflicts of interest, was also of great interest.

According to a Judge of the Russian Supreme Arbitration Court, it is impossible to create and legislate a closed list of categories of disputes to be resolved by the arbitration courts and international commercial arbitration tribunals. He emphasized that it is crucial to close puppet arbitration courts, to develop a code of ethics for arbitrators to popularize the idea of arbitration, and to establish arbitrators' liability for willful incompetent and unethical behavior. The Rules on Conflicts of Interest in International Arbitration established by the International Bar Association have long been used worldwide as a code of ethics for arbitrators. They require arbitrators to make a reasonable enquiries as regards conflict of interest, to disclose information where such a conflict of interest exists, and in cases of serious conflict – to refuse the appointment in question.

In connection with the discontinuation of RIA Novosti news agency in late 2013,[1] the fate of the next National Legal Congress is questionable. 'We seldom meet together, and only in a community that brings together people of opposing types of legal activity, can one draw a true conclusion on the direction in which our legal life will evolve,' said Anton Ivanov, Chairman of the Supreme Arbitration Court, in his message to final project participants. Congress organizers will continue the Chairman's thought and hope that the Congress platform will be an important venue for dialogue between lawyers, and that the project will occupy a rightful place in the future national legal market.

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[1] A Decree on the liquidation of RIA Novosti was signed by Vladimir Putin on Dec. 9, 2013. The purpose of the abolition of the agency was the 'improvement of the efficiency of state-owned media.' The liquidated RIA Novosti will be replaced by an international agency, Russia Today. It will be included in the list of the national strategic enterprises.

'The Federal State Unitary Enterprise International News Agency Russia Today focuses on covering abroad Russian state policy and public life,' states the Presidential Decree.

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