Volume IV (2016) Issue 4

Russian Law Journal

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ISSN 2309-8678
e-ISSN 2312-3605

Frequency of Publication: four issues per year

Published by LLC V. Em Publishing House,
92 Lobachevskogo str., Moscow, Russia, 119454

Subscription enquiries should be directed
to V. Em Publishing House

RUSSIAN LAW JOURNAL (RLJ)

An independent, professional peer-reviewed academic legal journal.

Aims and Scope

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

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

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Notes for Contributors

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

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

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CHIEF EDITOR'S NOTE ON THE REVIEW PROCEEDINGS IN RUSSIAN CIVIL PROCEDURE

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DOI: 10.17589/2309-8678-2016-4-4-4-6

Recommended citation: Dmitry Maleshin, *Chief Editor's Note on the Review Proceedings in Russian Civil Procedure*, 4(4) Russian Law Journal 4–6 (2016).

Any court decision may contain errors or simply be unjust or illegal. The right to appeal and review judgements is one of the basic rights that is recognized by most procedural systems. Appellate review is the opportunity for the parties try to correct an injustice that may be contained in a judgment. Two different systems of review are widespread in the world. Which one is used depends on what kind of judicial errors are considered by a court of the review instance: factual or legal errors.

The Russian system of review is influenced by continental European legislation, especially by French and German law. Such legislation provides for appellate and cassational procedures. However, uniquely, the Russian system also provides for supervisory proceedings.

Decisions of a court of the first instance that have not yet entered into force may be appealed through the appeals procedure. The court will assess all evidence presented in the first instance, as well as any new evidence. Cases in a court of an appellate instance are examined by panels of judges, not by a single judge. An appeal has to be filed within one month of the date on which a court of the first instance issued the decision in its final form.

A court of cassation is not entitled to consider matters if they were not established by a court of the first instance. Neither can it rule on the credibility of evidence. Participants cannot ask the court to consider new evidence, they can only present the evidence that was examined by the court of the first instance.

After the cassation process, a supervisory appeal may potentially be filed. A supervisory procedure is an exceptional feature of the Russian civil procedure. Review by way of supervision is a special procedure that allows additional re-examination of judgments which have already entered into legal force. It stems from the Russian Empire's legislation of the XVII–XIX centuries.

During the Soviet period, the right to apply to a supervisory court belonged only to a limited number of officials such as chief judges and their deputies and the Procurator General and his deputies. Participants in a case did not have such right. 8,618 decisions were revoked by way of supervision in 1980. In contrast, 12,500 were revoked by way of supervision in 1989.

In modern Russia, review by way of supervision is regulated in a different manner. It is stipulated in the Constitution and the new 2002 Civil Procedural Code. It exists in addition to the appeal and cassation instances and allows for the re-examination of judgments which have already entered into legal force and which may have already been decided under a cassational appeal. The right to apply to the court of supervision belongs only to the participants of the case and any other persons whose rights were abused by the judgment. Appeals via supervision may only be considered by presidium of the Supreme Court, by military assembly of the Supreme Court, by judicial tribunal of the Supreme Court for civil cases, by presidium of a military court, and by presidium of the Supreme Court of a "subject" (state) within the Federation. It is possible to appeal to a court of supervision within three months of the date on which a judgment enters into legal force.

When reviewing a case by way of supervision, the court only considers questions of law on the basis of materials available in the case. Although the supervisory instance may refuse to accept lower courts findings of fact, it has no power to establish new facts or to consider new evidence. As a general rule, the court verifies "the correctness of the application and interpretation of provisions of material law and norms of procedural law by the courts of the first and cassational instances" only within the limits of the arguments contained in the appeal. However, in the interests of legality, the higher court may also go beyond the limits of the appeal. The court of the supervisory instance may render a new judgment when it is not necessary to consider additional facts or evidence. Some 300,000 appeals a year are considered by the courts of general jurisdiction by way of supervision. 15,215 decisions were cancelled in the supervisory instance in 1996, 20,270 in 2002. That is $^{1}/_{3}$ of all abolished decisions. In contrast, 17,482 decisions were abolished in the supervisory instance in 2004 (after the adoption of the new CCP). That is 20% of all abolished decisions.

The possibility of re-examining a judgment which has already entered into legal force is a moot point. Does it conflict with the principle of *res judicata*? There are two points of view. Some scholars believe that the supervisory instance is an additional opportunity to correct the decision and rectify judicial errors. Others emphasize that

it conflicts with the principle of *res judicata*. The position of the European Court of Human Rights is interesting in this context. In Ryabykh v. Russia, No. 52854/99 dated July 24, 2003, it simultaneously maintains two different positions on the Russian supervisory instance. On the one hand, it believes that review by way of supervision conflicts with the principle of *res judicata* (Art. 52, 55–57 of Ryabykh v. Russia, Art. 25 of Pravednaya v. Russia). On the other hand, it does not infract it because it is used to rectify judicial errors (Art. 25, 28 Pravednaya v. Russia, Art. 52 of Ryabykh v. Russia).

Meanwhile, the Russian supervisory procedure was reformed in 2010 and the right to appeal was limited to a strict number of cases. Nowadays, the supervisory appeal is the exception to the rule.

ARTICLES

PUBLIC PARTICIPATION AND THE RIGHTS OF THE CHILD: REFLECTION ON INTERNATIONAL LAW STANDARDS IN THE LEGAL SYSTEM OF THE RUSSIAN FEDERATION

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DOI: 10.17589/2309-8678-2016-4-4-7-26

This article deals with the much debated issue of children's public participation from the perspective of legal practices in the Russian Federation. Having emerged at the level of national jurisdictions, the practice of engaging minors in decision-making processes on issues of public significance – or the practice of public participation of children – is stipulated by the UN Committee on the Rights of the Child, based on Article 12 of the UN Convention on the Rights of the Child. Public participation of minors implies that children have clearly defined opportunities to take part in decision-making processes concerning those political and public matters affecting their interests.

Albeit limited by the clause "regarding the issues concerning them," the claims for such participation are dictated by emerging standards of international law. The author has examined the process of devising these standards in Russian public law. Moreover, an analysis of the evolution of academic views on public participation of children in Russian legal scholarship is also included in this article.

Relying extensively on the method of legal analysis and the comparative analysis of the conformity of national public law standards with respect to international law, the author proposes several legal amendments to the Federal law "On the Basic Guarantees of the Rights of the Child in the Russian Federation," which would lead to anchoring more solidly the participatory right of minors in the legal system of the Russian Federation.

Keywords: the rights of the child; public participation; UN Convention on the Rights of the Child; children's associations; freedom of expression

Recommended citation: Mariya Riekkinen, *Public Participation and the Rights of the Child: Reflection on International Law Standards in the Legal System of the Russian Federation*, 4(4) Russian Law Journal 7–26 (2016).

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1. Introduction

A classic understanding of public participation – or participation in the conduct of public affairs – the right guaranteed by Article 25 of the International Covenant on Civil and Political Rights (hereinafter: the ICCPR), is associated with elections and referendums. Since General Comment No. 25 to the ICCPR introduces age limitations on the right to take part in the conduct of public affairs, children are not entitled to exercise the rights set forth in said Article 25 of the Covenant. Age limitations on electoral rights are considered a "reasonable" limitation on human rights. The principal avenue of public participation, i.e., elections and referendums, is unavailable to minors. Nevertheless, excluding children from the realm of public participation can no longer be an unconditional principle. According to emerging standards of international human rights law, minors are afforded a set of political rights guaranteeing public participation.

Additional avenues for public participation are provided for children by the UN Convention on the Rights of the Child (hereinafter: the UN CRC Convention).[1] The state parties to this most widely ratified international instrument – Russia included – enforce international legal obligations to respect and ensure the rights set forth in it. Providing the child with a wide range of human rights, the UN CRC Convention does not distinguish between political, civil, and socio-economic rights, while stipulating specific rights with respect to public participation. The opportunities for public participation are embedded in Article 12 of this Convention, guaranteeing for the child "capable of forming his or her own views" the right "to express those views freely in all matters affecting the child" (para. 1). Paragraph 2 of the same Article 12 extends this right to participation in "any judicial and administrative proceedings affecting the child."

[1] Convention on the Rights of the Child, Adopted by General Assembly resolution 44/25 of November 20, 1989, Entered into force September 2, 1990, UN Doc. A/44/49 (1989), 1577 UNTS 3.

Our primary goal is to examine how Russian statutory law dealing with issues of public participation of children conforms to standards of international human rights law. In order to achieve this aim, we discuss the following questions:

1. What are the emerging international law standards regarding the public participation of children?

2. How are these standards conceptualized in Russian legal scholarship?

3. Does Russian statutory law guarantee opportunities for the public participation of children?

4. What amendments to Russian statutory law should be proposed in order to achieve a more comprehensive implementation of the participatory rights of minors?

Concerning working definitions, public participation is understood in this study as the engagement of individuals in the conduct of public affairs, ensuring the opportunity for their direct, active, and continuous inclusion in decision-making processes. Minors are defined in this study as human beings below the age of eighteen years old, unless majority is attained earlier according to the relevant law.

2. Political Entitlements of Children: Conceptual Approaches

European scholars actively take up the issue of the political rights of minors, to which the right to take part in the conduct of public affairs intrinsically belongs. Researchers recognize the existence of limited political rights for children. For instance, arguing in favor of political rights for minors, Ruth Lister maintains that lowering the age threshold of voting rights in separate jurisdictions is a strong counterargument against not granting political rights to minors.[2] Likewise, L.J. LeBlanc claims that the UN Convention on the Rights of the Child guarantees all types of rights, including political rights.[3] Owing to the fact that the right to take part in the conduct of public affairs, as set forth in Article 25 of the ICCPR, is subject to minimum age limitations, children can neither vote, nor stand for public office. Yet public participation, as elucidated by para. 8 of General Comment No. 25 to the ICCPR, is supported by ensuring freedom of expression, assembly and association. The rights to freedom of expression, assembly, and association are subject to more flexible age limitations, enabling minors to engage in public participation. L.J. LeBlanc refers to these rights as "empowering rights" for children.[4] All these

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[2] Ruth Lister, *Why Citizenship: where, when and how Children?*, 8(2) Theoretical Inquiries in Law 705 (2007).

[3] Lawrence J. LeBlanc, *The Convention on the Rights of the Child* XVII (Lincoln: University of Nebraska Press, 1995).

[4] *Id.*

rights and freedoms ensure minors a real opportunity to express their own views on matters of public significance affecting their rights and interests.[5]

As a matter of fact, almost every issue of public policy regards children. If we consider, e.g., the problems of education, healthcare or social security, all these issues concern children, as they are included among the recipients of public services. Mary Donnelly and Ursula Kilkelly, who studied the processes of involvement of minors in decision-making in the field of healthcare in the context of Article 12 of the UN CRC Convention, formulate three reasons for children's participation:

- significant role of participation of minors in decision-making for implementing the rights of the child;
- ability of minors to bring the arguments regarding certain issues of public significance, which often remain unnoticed by adults;
- the urgency of fulfilling international legal obligations with respect to Article 12 of the UN Convention on the Rights of the Child.[6]

Including children in the political sphere is significant not only from the perspective of individual rights, but also from the vantage point of what the Organization for Security and Cooperation in Europe began to call "good governance," i.e., the process ensuring, *inter alia,* accountability in public administration, not to mention public participation in decision-making. The concept of good governance was conceived by the 1991 OSCE Lund Recommendations on the Effective Participation of National Minorities in Public Life.[7] According to the explanatory report appended to these Recommendations, "inclusive and participatory processes" serve "the objective of good governance by responding to the interests of the whole population." The theme of good governance was a decade later taken up by the UN in the framework of a 2000 Commission on Human Rights Resolution "The Role of Good Governance in the Promotion of Human Rights" proclaiming that good governance is based on "transparent, responsible, accountable and participatory government, responsive to the needs and aspirations of the people."[8] Hence, the success of good governance

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5 Paulo David, *A Commentary on the United Nations Convention on the Rights of the Child, Article 31: The Right to Leisure, Play and Culture* 16 (Boston: Martinus Nijhoff, 2006); Thomas Hammarberg & Alfhid Petren, *The Political Influence of Children* in *Children's Rights, Turning Principles into Practices* 62 (A. Petren & J. Himes, eds., Stockholm: Save the Children, Sweden, 2000); Shabnam N. Ahmed, *The Breached Contract: What Society Owes Its Children for Minimizing Their Constitutional Rights*, 50(3) Howard Law Journal 860 (2007).

6 Mary Donnelly & Ursula Kilkelly, *Child-Friendly Healthcare: Delivering on the Right to be Heard*, 19(1) Medical Law Review 33 (2011).

7 The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note (Lund Recommendations) (September 1999), para. 16 (Jul. 22, 2016), available at http://www.osce.org/hcnm/32240.

8 UN Commission on Human Rights, Commission on Human Rights Resolution 2000/64 The Role of Good Governance in the Promotion of Human Rights, April 27, 2000, E/CN.4/RES/2000/64 (Jul. 22, 2016), available at http://www.refworld.org/docid/3b00f28414.html.

substantially depends on well-organized avenues for enhanced citizen participation in decision making, allowing individuals to express their dissatisfaction with the political course of the state in a constructive manner.

Current theories of law and democracy emphasize the significance of the broadest possible representation of civil society in decision-making processes. For instance, Jurgen Habermas, in his Theory of Deliberative Democracy, claims that all subgroups of civil society should participate in deliberating on the most contested political issues.[9] In his book "Legitimation Crisis" Habermas suggested that political decisions should be made after free and open discussion, i.e., deliberation by citizens with the goal of reaching a compromise.[10] Citizens should discuss all issues of common interest according to strict rules of discourse established by law. Representation during such deliberations should be as complete as possible. This ensures that all perspectives on contested political issues are considered, enabling marginalized social groups to express their opinion. As a subgroup of civil society, minors possess distinct rights and interests and, therefore, should be represented in decision-making concerning these rights and interests. Children are capable of contributing to political discussions by virtue of expressing their own attitudes towards the problems discussed.[11] "The idea of political rights for children," – insist F. Earls and M. Carlson – "requires a concept of the child as capable and competent, rather than needy and helpless; it also requires adults to accept children as active and valuable members of society."[12] Yet the realities of decision-making processes do not always reflect such an ideal. For instance, J. Rutherford remarks that even when adolescents find opportunities to express criticism of decisions by public authorities, e.g., in petitions, calls to the call-lines on TV programmes, or by virtue of other similar methods, their opinions are often ignored because of a lack of effective legal mechanisms that would ensure their opinions being heard[13] leading to a situation where political opinions of this segment of the population go unnoticed, during the decision-making processes.

Looking for effective mechanisms allowing public authorities to consider the political opinions of children, separate jurisdictions went further than merely mentioning the political rights of minors in their statutory laws and adopted concrete measures aimed at including minors in the processes of democratic decision-making.

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9 Jurgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (Cambridge: The MIT Press, 1996).

10 Jurgen Habermas, *Legitimation Crisis* (Great Britain: Polity Press, 1989).

11 Sylvie Langlaude, *On How to Build a Positive Understanding of the Child's Right to Freedom of Expression*, 10(1) Human Rights Law Review 36–37 (2010).

12 Felton Earls & Maya Carlson, *Adolescents as Collaborators: In Search of Well-Being* in *The Jacobs Foundation Series on Adolescence. Youth in Cities: A Cross-National Perspective* 69 (M. Tienda & W.J. Wilson, eds., Cambridge: Cambridge University Press, 2002).

13 Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 2 Minnesota Law Review 1472 (1998).

Among such measures are new institutions and forums for considering the views of children on issues of public significance. For example, in 2001 New Zealand adopted a document entitled "New Zealand's Agenda for Children," which included *inter alia* plans for establishing a special forum where children and youth could efficiently express their views regarding the direction of national politics.[14] In 2004 Great Britain launched four mandates appointing Children's Commissioners in England, Scotland, Wales, and Northern Island.[15] These and other initiatives of national governments aim at consulting with minors to avoid situations when children's rights and interests are inadequately represented by adults.

3. International Legal Standards of Public Participation of Children

3.1. Provisions of the UN Convention on the Rights of the Child

As mentioned previously, the UN Convention on the Rights of the Child stipulates a set of political and participatory rights for minors. Although this instrument does not directly mention the right of a child to engage in public participation, the concept of limited participation of children in the conduct of public affairs has evolved from national legal norms. In 2009 the UN Committee on the Rights of the Child commented on the emergence of this widespread phenomenon, broadly conceptualized as the "participation" of children. Limited opportunities for those under 18 years of age to engage in decision-making on matters affecting them are derived from Article 12 of the UN CRC Convention on the right to express one's views. More particularly, this Article 12 reads:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The overriding meaning of this article, as interpreted by the UN Committee on the Rights of the Child, addresses the participatory claims of minors regarding

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[14] Maree Brown & Jaleh McCormack, *Placing Children on the Political Agenda: New Zealand's Agenda for Children* in *The Politics of Childhood: International Perspectives, Contemporary Developments* 185–207 (J. Goddard et al., eds., New York: Palgrave Macmillan, 2005).

[15] Williams Kane & Croke Rhian, *Institutional Support for the UNCRC's "Citizen Child"* in *Children and Citizenship* 184–187 (A. Invernizzi & J. Williams, eds., Los Angeles: Sage, 2008).

decision-making processes. In particular, in General Comment No. 12 to the UN CRC Convention, the UN Committee claims that "[a] widespread practice has emerged in recent years, which has been broadly conceptualized as 'participation,' although this term itself does not appear in the text of Article 12. This concept is now widely used to describe ongoing processes, including information-sharing and dialogue between children and adults based on mutual respect, where children can learn how their views and those of adults are taken into account and shape the outcome of such processes."[16] Although such a broad interpretation of the clause "affecting them" does not entitle children to a general political mandate, the states promised to develop and implement programmes to promote effective participation by children in decision-making processes, including participation in families and schools and at the local and national levels during the 27th special session of the UN General Assembly. This statement is fixed by the final document of this session, entitled "A world fit for children," para. 32(1).[17] Nevertheless, the above-mentioned General Comment No. 12 to the UN CRC Convention emphasizes that the right of the child to express his or her views as set forth in Article 12 represents one of the four main principles of this Convention, consonant with non-discrimination, the right to life and development, and the primary consideration of the child's best interests.[18] In particular, the UN Committee on the Rights of the Child emphasizes that "[t]he right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention."[19] The said document implies that Article 12 of the UN CRC Convention does not merely proclaim that the right should be implemented, but also establishes a legal standard which should be applied when interpreting all other rights.

3.2. The Council of Europe on Public Participation of Children

At the level of the Council of Europe (hereinafter: the CoE), several child-specific treaties were adopted: the 1996 European Convention on the Exercise of Children's Rights;[20] the 2007 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse;[21] and the 2008 European Convention on the

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16 UN Committee on the Rights of the Child, General Comment No. 12 The Right of the Child to be Heard, July 1, 2009, UN Doc. CRC/C/GC/12, para. 3 (Jul. 22, 2016), available at http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf.

17 UN General Assembly, Twenty Seventh Special Session, Resolution [on the report of the Ad Hoc Committee of the Whole (A/S-27/19/Rev.1 and Corr.1 and 2)] S-27/2. A World Fit for Children, October 11, 2002, UN Doc. A/RES/S-27/2 (Jul. 22, 2016), available at http://www.unicef.org/worldfitforchildren/files/A-RES-S27-2E.pdf.

18 General Comment No. 12, *supra* note 16, para. 2.

19 *Id*.

20 CoE, The European Convention on the Exercise of Children's Rights, January 25, 1996, ETS No. 160.

21 The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, October 25, 2007, ETS No. 201.

Adoption of Children (revised).[22] However, focusing on certain procedural issues, these treaties do not include or provide for claims for the public participation of minors. The provisions on public participation can be found in the 1950 CoE Convention for the Protection of Human Rights Fundamental Freedoms (hereinafter: the European Convention)[23] guaranteeing the rights to freedom of expression (Article 10), assembly and association (Article 12), and in its Protocol No. 1,[24] Article 3, which stipulates the right to free and periodic elections. These treaties do not explicitly set minimum age limitations for implementing participatory rights. Yet the principles of establishing such limitations are outlined in the jurisprudence of the European Court of Human Rights (hereinafter: the ECtHR). Concerning the electoral rights stipulated in Protocol No. 1 to the European Convention, the ECtHR establishes that compliance with the requirements of Article 3 of Protocol No. 1 should satisfy the conditions when implementing the rights in question does not "impair their very essence and deprive them of their effectiveness."[25] More particularly, commenting on the restrictions of the right to vote, the Court reaffirmed in the 2004 case of Melnychenko v. Ukraine the provisions of General Comment 25 (1996) to the ICCPR, according to which any restrictions on the right to stand for election, such as minimum age, must be justifiable on the basis of objective and reasonable criteria.[26] Moreover, in the 2005 case of Hirst v. the United Kingdom, the ECtHR has determined that "the imposition of a minimum age may be envisaged with a view to ensuring the maturity of those participating in the electoral process."[27] The Court continued that "[a]ny departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3 of Protocol No. 1."[28]

Noteworthy is also the fact that the issue of the existence of the political rights of children was officially considered by international human rights organs in 1987 when the former European Commission of Human Rights dealt with the case of Irka Cederberg-Lappalainen v. Sweden.[29] The applicant's daughter was attending

[22] CoE, The European Convention on the Adoption of Children (revised), November 27, 2008, ETS No. 202.

[23] CoE, Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, ETS No. 005.

[24] Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, November 1, 1998, ETS No. 155.

[25] ECtHR, Hirst v. the United Kingdom (No. 2), Judgment of October 6, 2005, (2006) 42 EHRR 41, [2005] ECHR 681, para. 62.

[26] ECtHR, Melnychenko v. Ukraine, Appl. No. 17707/02, Judgment of October 19, 2004, ECHR 2004-X, para. 28.

[27] Hirst v. the United Kingdom (No. 2), *supra* note 25.

[28] *Id*.

[29] European Commission of Human Rights, Irka Cederberg-Lappalainen v. Sweden, Appl. No. 11356/85, admissibility decisions of March 4, 1987.

a pre-school in Malmö City of Sweden, the Constitution of which guarantees to every citizen the right to freedom of expression and to arrange and participate in demonstrations (the Instrument of Government, chapter 2, section 1). Pre-school children were arranged to take part in a peace demonstration with the participation of the personnel and the parents. The applicant claimed that she was never asked by the pre-school about the forth-coming demonstration. The applicant's child did not attend the peace demonstration and stayed at home with the mother, who had taken a week's holiday. After having exhausted national court channels, the applicant's complaint reached the European Commission, alleging *inter alia* that permitting pre-school children to participate in a demonstration is a violation of the child's right to have its integrity respected and that the action of the authorities violates the right to freedom of peaceful assembly. Ms. Cederberg-Lappalainen maintained that "freedom" must include the right to abstain from acting. Having found the application manifestly ill-founded, the Commission argued that by making the participation of children in a demonstration dependent on the consent of parents, the authorities observed the child's right to have its integrity respected. Moreover, by deciding to stay at home with her daughter, the applicant exercised the freedom to abstain from participation in public events. Although this application was not examined on its merits in order to establish whether in a democratic state public authorities could arrange demonstrations involving children of an age at which they cannot be assumed to have an opinion of their own, this case opened the official discussions on the existence of political rights of minors.

Promoting child participation was marked as one of the four strategic objectives[30] of the Council of Europe Strategy for the Rights of the Child (2012–2015).[31] Such an objective was established to respond to the criticism of a lack of "respect" for the opinions of children, in particular, when "children have little access to information and their views in public and private life are rarely sought or given due consideration."[32] In accordance with this Strategy:

> All children have the legal right to be heard and taken seriously in all matters affecting them, whether in the family or alternative care environments; day-care; schools; local communities; health care, justice and social services; sport, culture, youth work and other recreational activities aimed at young people under the age of 18; and policy-making at domestic, European and international levels.[33]

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[30] Three other objectives are: promoting child-friendly services and systems; eliminating all forms of violence against children; and guaranteeing the rights of children in vulnerable situations.

[31] Council of Europe Strategy for the Rights of the Child (2012–2015), February 15, 2012, CM(2011)171 (Jul. 22, 2016), available at http://www.coe.int/t/DGHL/STANDARDSETTING/CDcj/StrategyCME.pdf.

[32] *Id*. at 3.

[33] *Id*. at 8.

The value of this Strategy for the promotion of minors' public participation lies in its approach to the role of monitoring the rights of the child. This document recognizes the existing number of CoE treaties, either with implications for the rights of the child or child-specific legal instruments, and proposes to act by implementing the existing standards "through a more proactive mainstreaming of the rights of the child into the Council of Europe monitoring bodies and human rights mechanisms."[34] Such mechanisms include the European Court of Human Rights and other Council of Europe mechanisms and conventional committees.[35] The renewed Strategy for the Rights of the Child 2016–2021[36] again highlights children's participation among the five priority areas of children's rights protection.[37] In order implement this priority, the CoE commits to "taking a participatory approach to the rights of the child in all dimensions of this Strategy and to support its member States in doing so."[38]

In 2012 the Council of Europe adopted the recommendation on the participation of children and young people under the age of 18.[39] Section 1 of this Recommendation defines participation as follows:

> having the right, the means, the space, the opportunity and, where necessary, the support to freely express their views, to be heard and to contribute to decision making on matters affecting them, their views being given due weight in accordance with their age and maturity.

In order to facilitate the public participation of children, this recommendation introduced to the governments of the Member States of the CoE the following

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[34] Council of Europe Strategy for the Rights of the Child (2012–2015), at 11.

[35] The European Committee of Social Rights, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the Group of Experts on Action against Trafficking in Human Beings, the European Commission against Racism and Intolerance, the Enlarged Partial Agreement on Sport, the Advisory Committee on the Framework Convention for the Protection of National Minorities, the Committee of Experts of the European Charter for Regional or Minority Languages, as well as a range of conventional committees, including the Convention Committee on the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children.

[36] Council of Europe Strategy for the Rights of the Child (2016–2021) (Jul. 22, 2016), available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168066cff8.

[37] Four other priority areas are: equal opportunities for all children; a life free from violence for all children; child-friendly justice for all children, and rights of the child in the digital environment. *Id*. at 4.

[38] *Id*. *supra* note 36.

[39] Council of Europe, the Committee of Ministers, Recommendation CM/Rec(2012)2 on the Participation of Children and Young People under the Age of 18, Adopted by the Committee of Ministers on March 28, 2012 at the 1138th meeting of the Ministers' Deputies (Jul. 22, 2016), available at https://www.google.fi/?gfe_rd=cr&ei=-Y6TV6K8H4uA8QfuwJ_4Cg&gws_rd=ssl#q=the+Recommendation+on+the+participation+of+children+and+young+people+under+the+age+of+18.

measures: – to provide legal protection for children and youth in order to participate in drafting constitutions, legislation and regulations; – to undertake periodic reviews to determine the extent to which children and youths' opinions are heard and taken seriously in existing legislation, policies and practices, and to ensure that in these reviews, children and young people's own assessments are given due weight; – to provide children and youth with effective remedies through child-friendly means of submitting complaints as well as optimizing judicial and administrative procedures; – to ensure safeguards for children and youth who are especially vulnerable to rights violations; – to review restrictions in law or in practice, limiting children or youth's right to be heard in all matters affecting them; – to take a co-ordinated approach to strengthening children and youth's participation and to ensure that participation is mainstreamed in decision and policy-making structures; – to establish an appropriate and independent human rights institution, such as an ombudsperson/commissioner for children's rights; and – to allocate adequate financial resources and secure optimal human resources to support children and young people's participation in both formal and informal settings.[40]

As for the practical implementation of strategic objectives to enhance public participation of children at the level of the Council of Europe, children's views have been taken into account by the Committee of Ministers in developing f recommendations on children's rights. In particular, the "Guidelines on Child-friendly Justice," adopted by the Committee of Ministers in 2010, take into consideration the responses from almost 3,800 children in 25 member States. Children's views were also taken into account in the drafting process of the Guidelines on child-friendly health, the recommendation on child-friendly social services, and the Recommendation on the participation of children and young people under the age of 18.[41]

3.3. The Convention and the Legal System of the Russian Federation

The Soviet Union ratified the UN CRC Convention in 1990, in accordance with the Decree of the USSR Supreme Council of June 13, 1990.[42] The Convention entered into force in the Soviet Union on September 15, 1990. As the successor state of the Soviet Union, the Russian Federation is bound by international legal obligations imposed by the UN CRC Convention. In respect of implementing the participatory rights of minors, the provisions of this Convention are to a large extent incorporated into the laws of the Russian Federation. The exception, nevertheless, deals with the right to express views on matters affecting the child in judicial and administrative processes.

40 Recommendation CM/Rec(2012)2, at sec. III.

41 Council of Europe Strategy for the Rights of the Child (2016–2021), *supra* note 36.

42 Указ Верховного Совета СССР от 13 июня 1990 г. № 1559-I «О ратификации Конвенции о правах ребенка», Ведомости СНД СССР и ВС СССР, 1990, № 26, ст. 497 [Decree of the USSR Supreme Council of June 13, 1990. On Ratification of the Convention on the Rights of the Child, Gazette of the Congress of People's Deputies of the USSR and the Supreme Soviet of the USSR, 1990, No. 26, Art. 497].

Such a general right is currently lacking in the statutory law of the Russian Federation. This problem has been highlighted in the 2012 document called "National Strategy of Actions in the Interests of Children in 2012–2017," approved by the Edict of the President of the Russian Federation.[43] This strategy fairly remarks that although there are certain opportunities provided by the 1993 RF Constitution and statutory law ensuring the opportunities of engaging minors in the processes of decision-making regarding the issues of public significance. This document suggests that although there are such specific opportunities, a lack of effective mechanisms of ensuring the participation of children in public life and in deciding on matters regarding their life and interests is one of the major problems facing children.

"National Strategy of Actions in the Interests of Children in 2012–2017" also points out that many children's and youth associations, youth councils, chambers, and parliaments, as well as school self-government bodies are operating in the Russian Federation. Nevertheless, according to this document, the possibilities of minors participating and meaningfully engaging in political life are implemented "rather weakly" due to the "insufficient elaboration of the necessary legal foundation" for such participation. As a matter of fact, there is no federal law regulating the activities of consultative bodies, comprising children and youth. The federal Youth Parliament under the aegis of the State Duma of the Federal Assembly of the Russian Federation, for instance, was established on the basis of the 2011 Decree of the State Duma, not on the basis of any federal law. This lack of federal legal regulation still exists, despite the fact that such bodies promote children's public participation. J. Wall emphasizes the significance of consultative bodies, including those comprising children, pointing out that as of 2014 children's parliaments have been set up in more than 30 states in the world, such as: India (which was the first state having introduced children's parliaments), Sri-Lanka, Norway, Finland, Germany, Slovenia, Bolivia, Ecuador, Brazil, Nigeria, Zimbabwe, Congo, Burkina-Faso, Liberia, New Zealand, and Great Britain.[44] The World Parliament of Children, having convened in Paris in 1999, is worth special mention, conducting several sessions in 1999 upon the initiative of the French National Assembly.[45] This World Parliament convened 350 children and youth representatives from 175 member states of the United Nations in order to discuss matters of public significance. The issues discussed were *inter alia*

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[43] Указ Президента РФ от 1 июня 2012 г. № 761 «О Национальной стратегии действий в интересах детей на 2012–2017 годы», Собрание законодательства РФ, 2012, № 23, ст. 2994 [Edict of the President of the Russian Federation No. 761 of June 1, 2012. On National Strategy of Actions in the Interests of Children in 2012–2017, Legislation Bulletin of the Russian Federation, 2012, No. 23, Art. 2994].

[44] John Wall, *Democratising Democracy: The Road from Women's to Children's Suffrage*, 18(6) The International Journal of Human Rights 646 (2014).

[45] Information regarding the World Parliament of Children is reproduced on the official web-page of the UNESCO organization (22 Jul. 2016), available at http://unesdoc.unesco.org/images/0011/001184/118448Eo.pdf.

the conflicts at the end of the twentieth century, e.g., in Kosovo. Having discussed these tragic events, the children of the different states of the world were united in the belief in the utmost importance of peace. October 24, 1999 the participants of that forum summarized their hopes for peace, solidarity, education, culture, economic development, human rights, and environmental protection in a document entitled "Youth Manifesto for the 21st Century."[46] This manifesto was sent to all the heads of states and to the United Nation. Studies have shown that children are genuinely concerned with the problems of environmental protection and human rights and are willing to pursue such common goals.

Article 32, para. 1 of the 1993 RF Constitution guarantees the citizens of the Russian Federation the right to take part in the management of state affairs either directly or via their representatives. Hence, the Constitution does not explicitly base the right to vote and to hold office on full legal capacity and maturity. Yet reference to full legal capacity is incorporated into para. 2 of the same article, denying the right to vote and to hold office to those citizens who had been found legally incapable by a court of law. Hence, a number of electoral laws in the Russian Federation stipulate that the right to vote and to hold office shall be granted or restricted to those citizens who have reached the age of 18.[47] Yet in 2000 the State Duma of the Federal Assembly of the Russian Federation considered the draft law No. 23045-3 proposing a lower minimum age limit for participation in elections.[48] This draft law was proposed by a group of deputies, including Mr. Semenov, Mr. Koptev-Dvornikov, Mr. Barannikov,

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[46] Information regarding the World Parliament of Children, *supra* note 45.

[47] Федеральный закон от 26 ноября 1996 г. № 138-ФЗ «Об обеспечении конституционных прав граждан Российской Федерации избирать и быть избранными в органы местного самоуправления», Собрание законодательства РФ, 1996, № 49, ст. 5497 [Federal law No. 138-FZ of November 26, 1996. On Ensuring Constitutional Right of Citizens to Elect and to be Elected in Organs of Local Self-Government, Legislation Bulletin of the Russian Federation, 1996, No. 49, Art. 5497]; Федеральный закон от 12 июня 2002 г. № 67-ФЗ «Об основных гарантиях избирательных прав и права на участие в референдуме граждан Российской Федерации», Собрание законодательства РФ, 2002, № 24, ст. 2253 [Federal law No. 67-FZ of June 12, 2002. On Basic Guarantees of Electoral Rights and the Right to Participate in the Referendum in the Russian Federation, Legislation Bulletin of the Russian Federation, 2002, No. 24, Art. 2253].

[48] Проект закона № 23045-3 «О внесении изменений в Федеральный закон «Об основных гарантиях избирательных прав и права на участие в референдуме граждан Российской Федерации», Федеральный закон «О выборах депутатов Государственной Думы Федерального Собрания Российской Федерации» и Федеральный закон «О выборах Президента Российской Федерации», Федеральный закон «Об обеспечении конституционных прав граждан Российской Федерации избирать и быть избранными в органы местного самоуправления» в связи со снижением возраста приобретения гражданами активного избирательного права, права на участие в референдуме» [Draft law No. 23045-3 "On amending Federal law 'On Basic Guarantees of Electoral Rights and the Right to Take Part in the Referendum of the Citizens of the Russian Federation,' Federal law 'On Elections of Deputies to the State Duma of the Federal Assembly of the Russian Federation,' Federal law 'On Elections of the President of the Russian Federation,' and Federal law 'On Ensuring the Constitutional Rights of Citizens of the Russian Federation to Elect and to be Elected in Organs of Local-Self-Government' with the reference to lowering the age of obtaining the right to elect and the right to take part in the referendum"] (Jul. 22, 2016), available at http://www.duma.gov.ru.

and Mr. Dines, all of whom favored granting to minors who turned 16 years old on the day of voting the right to take part in elections. However, this draft law was rejected in the State Duma.[49] In particular, the Duma objected that the right of citizens to take part in state elections and local self-government, as set forth under Article 32 of the 1993 RF Constitution, is an essential political right entitling individuals to take part in the conduct of public affairs. Read in conjunction with Article 60 of the Constitution, granting to citizens of the Russian Federation a full range of rights after reaching the age of 18, the right to participate in elections belongs to all legally competent citizens. Respectively, according to the opinion of the Committee of the State Duma, the right to take part in elections should be exercised by citizens of the Russian Federation who have attained "full legal capacity and civil maturity allowing an individual to keep up with the conscientious approach towards realization of his or her political rights and carrying out responsibility for decisions."

The 1993 RF Constitution does not introduce an age limitation with respect to the freedom of expression (Article 29), freedom of association (Article 30), freedom of assembly (Article 31), nor the right to petition public authorities (Article 33). Such an approach is in accordance with the provisions of the UN CRC Convention and the official interpretations of UN Committee on the Rights of the Child, and UN Committee of Human Rights, guaranteeing the right to take part in the conduct of public affairs, stipulated in the ICCPR General Comment No. 25. Although a child is not entitled to a full political mandate, various provisions of Russian law grant minors opportunities to take part in public law relationships:

To start with, Article 19 of the 1995 Federal law "On Public Associations" stipulates that children who have reached the age of 8 years can take part in children's associations.[50] Article 4 of the same federal law claims that "children's public

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[49] Заключение на проект федерального закона "О внесении изменений в Федеральный закон 'Об основных гарантиях избирательных прав и права на участие в референдуме граждан Российской Федерации', Федеральный закон 'О выборах депутатов Государственной Думы Федерального Собрания Российской Федерации' и Федеральный закон 'О выборах Президента Российской Федерации', Федеральный закон 'Об обеспечении конституционных прав граждан Российской Федерации избирать и быть избранными в органы местного самоуправления' в связи со снижением возраста приобретения гражданами активного избирательного права, права на участие в референдуме», внесенный депутатами Государственной Думы В.О. Семеновым, В.Е. Коптевым-Дворниковым, А.Е. Баранниковым, И.Ю. Динесом [Concluding observation on draft law "On amending Federal law 'On Basic Guarantees of Electoral Rights and the Right to Take Part in the Referendum of the Citizens of the Russian Federation,' Federal law 'On Elections of Deputies to the State Duma of the Federal Assembly of the Russian Federation,' Federal law 'On Elections of the President of the Russian Federation,' and Federal law 'On Ensuring the Constitutional Rights of Citizens of the Russian Federation to Elect and to be Elected in Organs of Local-Self-Government' with the reference to lowering the age of obtaining the right to elect and the right to take part in the referendum,' submitted by the deputies of the State Duma V.O. Semenov, V.E. Koptev-Dvornikov, A.E. Barannikov, and I.Iu. Dines] (Jul. 22, 2016), available at http://www.duma.gov.ru.

[50] Федеральный закон от 19 мая 1995 г. № 82-ФЗ «Об общественных объединениях», Собрание законодательства РФ, 1995, № 21, ст. 1930 [Federal law No. 82-FZ of May 19, 1995. On Public Associations, Legislation Bulletin of the Russian Federation, 1995, No. 21, Art. 1930].

association is an association of citizens under 18 years of age who had united for the pursuits of common activities." The state provides support for activities of public associations with respect to children and youth. The City of Saint-Petersburg, for instance, supports 37 such associations as of May 10, 2016, the minimum age of the participants of which is 8.[51]

2. In respect of exercising the freedom of expression as a mode of public participation, such an opportunity for minors can be realized via the right to petition public authorities. Since neither Article 33 of the 1993 RF Constitution nor Article 2 of the 2006 Federal law "On the Procedure of Consideration of Petitions by the Citizens of the Russian Federation"[52] sets age limitations for petitioning, children's associations can exercise the right to petition in order to inform public authorities of the specific needs of children. The right to submit petitions to public authorities is stipulated in Article 27 of the Federal law "On Public Associations," in accordance with which such associations have the right to put forward initiatives on issues within their own competence and to address petitions to state and municipal authorities.

3. The legislation of the Russian Federation permits minors to exercise freedom of expression in order to take part in the conduct of public affairs via participating in the sessions of public authorities. Federal law "On State Support of Public Associations for Children and Youth" stipulates that members of such associations can take part in the sessions of state organs if such sessions concern the interests of minors.[53]

4. Statutory law introduces higher minimum age limitations for minors in order to facilitate public participation via the freedom of assembly. Minors who had reached the age of 16 have the right to organize public meetings on the basis of Article 5 of the Federal law "On Gatherings, Meetings, Demonstrations, Processions, and Pickets."[54] Concerning citizen participation in meetings and conferences regarding issues of local self-government in certain municipal territories, Article 27 of the Federal law "On the

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[51] Региональный реестр молодежных и детских общественных объединений, пользующихся государственной поддержкой Санкт-Петербурга [Registry of State-Supported Associations for Children and Youth in the City of Saint-Petersburg] (Jul. 22, 2016), available at http://kpmp.gov.spb.ru/media/uploads/userfiles/2016/05/26/%D0%A0%D0%B5%D0%B5%D1%81%D1%82%D1%80_2016_6djfAaK.pdf.

[52] Федеральный закон от 2 мая 2006 г. № 59-ФЗ «О порядке рассмотрения обращений граждан Российской Федерации», Собрание законодательства РФ, 2006, № 19, ст. 2060 [Federal law No. 59-FZ of May 2, 2006. On the Procedure of Consideration of Citizen's Petitions in the Russian Federation, Legislation Bulletin of the Russian Federation, 2006, No. 19, Art. 2060].

[53] Федеральный закон от 28 июня 1995 г. № 98-ФЗ «О государственной поддержке молодежных и детских объединений», Собрание законодательства РФ, 1995, № 27, ст. 2503 [Federal law No. 98-FZ of June 28, 1995. On State Support of Public Associations for Children and Youth, Legislation Bulletin of the Russian Federation, 1995, No. 27, Art. 2503].

[54] Федеральный закон от 9 июня 2004 г. № 54-ФЗ «О собраниях, митингах, демонстрациях, шествиях и пикетировании», Собрание законодательства РФ, 2004, № 25, ст. 2485 [Federal law No. 54-FZ of June 9, 2004. On Gatherings, Meetings, Demonstrations, Processions, and Pickets, Legislation Bulletin of the Russian Federation, 2004, No. 25, Art. 2485].

Basic Principles of Organization of Local Self-Government in the Russian Federation" grants such an opportunity to those who had reached the age of 16.[55]

The process of developing conceptual views on the political rights of the child in Russia has been going on under the auspices of the UN CRC Convention. The academic literature in this field indicates a significant leap in conceptualizing the political rights of minors. Soviet legal scholarship denied the full legal personality of minors. Children were considered as legally "incapable," and their parents and other legal representatives were entitled to participate in legal relationships on behalf of their children.[56] Only a decade ago Russian legal scholars remained cautious about recognizing the notion that minors have political rights. For instance, Professor Chirkin denied the existence of the political rights of minors.[57] Similarly, Professors Zariaev and Malkov argued in favor of limited political rights for children, such as the right to assembly and the right to association.[58] At present Russian legal scholarship has arrived at the point where it can answer the question regarding the existence of the political rights of minors affirmatively.[59]

Although the participatory meaning of Article 12 of the UN CRC Convention regarding the right of the child to express his or her views on matters concerning him or her is stipulated by international human rights institutions, such a right is lacking in the Federal law "On Basic Guarantees of the Rights of the Child in the Russian Federation." In particular Section II of this Federal law ensuring the rights of the child in the Russia concentrates on such issues as the means of protecting the rights of the child in education; ensuring the right of the child to health care; protecting the right of the child to choose his/her profession, professional education, and professional activities; protecting the rights of the child in the field of leisure and recreational activities; protection of children from information intending to harming the child mentally, morally , intellectually, or physically; measures of counteracting child trafficking; and the protection of children in dangerous life situations. This

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55 Федеральный закон от 6 октября 2003 г. № 131-ФЗ «Об общих принципах организации местного самоуправления в Российской Федерации», Собрание законодательства РФ, 2003, № 40, ст. 3822 [Federal law No. 131-FZ of October 6, 2003. On General Principles of Organization of Local Self-Government in the Russian Federation, Legislation Bulletin of the Russian Federation, 2003, No. 40, Art. 3822].

56 Малеин Н.С. Гражданское право и права личности в СССР [Nikolay S. Malein, *Civil Law and the Rights of a Personality in the USSR*] 113–114 (Moscow: Yuridicheskaya literatura, 1981).

57 Чиркин В.Е. Юридическое лицо публичного права [Veniamin E. Chirkin, *Legal Entity in Public Law*] (Moscow: Norma, 2007).

58 Заряев А.В., Малков В.Д. Ювенальное право: Учебник для вузов [Alexander V. Zariaev & Vadim D. Malkov, *Juvenile Law: A Textbook for Higher Educational Establishments*] (Moscow: Yustitsinform, 2005).

59 Морева Р.Б. Конвенция ООН о правах ребенка как источник международного права, 4 Ученые записки Российского государственного социального университета (2010) [Roxana B. Moreva, *UN Convention on the Rights of the Child as a Source of International Law*, 4 Scholarly Notes of the Russian State Social University (2010)].

Federal law, nevertheless, is silent regarding concrete measures ensuring the political rights of minors. Deliberate or not, such an omission remains intact, despite this issue being discussed in the United Nations.

Yet the right of the child to express his or her views on issues of public significance can be seen in several items of legislation in the Russian Federation. For example, Article 13 of the 1995 Law of Sverdlovskaia Oblast "On the protection of the Rights of the Child"[60] stipulates the right of the child to freely express his/her views:

> The child capable of forming own opinion has the right to be heard in decision-making regarding any issue which concerns his interests in any judicial or administrative process. Authorities making such decisions are obligated to consider the views of the child who had reached the age of 10 years unless such consideration goes against of the best interests of the child.

Article 17 of the same law guarantees the right of the child to freedom of association:

> The child has the right to take part in public association on his own will and in accordance with the legislation of the Russian Federation.
>
> In accordance with federal legislation, the educational establishments on the initiative of the students older than 8 years of age can set up public associations of students which are not public associations set up by political parties or children's religious associations.
>
> Executive authorities of Sverdlovskaia Oblast assist the activities of public associations which ensure personal development, creative skills, social activity of children, and entailing the children in cultural and sport life.

4. Bringing National Law in Conformity with International Law Standards

Hence, the author of his article argues for the necessity of amending the Federal law "On the Basic Guarantees of the Rights of the Child in the Russian Federation." In particular, such amendments could be appended to Article 16 of the federal law "Ensuring the Right of the Child to Express His/Her Views Freely":

> of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child

[60] Закон Свердловской Области от 23 октября 1995 г. № 28-ОЗ «О защите прав ребенка», Областная газета, 1995, 31 октября, № 118 [Law of Sverdlovskaia Oblast No. 28-OZ of October 23, 1995. On Protection of the Rights of the Child, Regional Newspaper, October 31, 1995, No. 118].

> For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the laws of the Russian Federation

Moreover, it would be reasonable to define the requirement of state support of the activities of children's associations as a primary goal of state policy in respect of children's rights. Although international law standards dictate that a child is an equal right holder along with others, Article 4, para. 2 of the Federal law "On the Basic Guarantees of the Rights of the Child in the Russian Federation," focusing on the goals of state policy with respect to children's rights, mentions only supporting public associations that "pursue activities regarding the protection of rights and legitimate interests of the child." The urgency of state support of the activities of children's associations is left out of this article. Such an omission suggests that a child is still regarded in Federal law as an object of legal protection, not as a full-scale right-holder. Accordingly, the author is in favor of amending Article 4, para. 2 of the Federal law "On the Basic Guarantees of the Rights of the Child in the Russian Federation" by adding the following provision:

> State policy in the sphere of children's rights is based inter alia on the principle of state support of public associations, children's associations, and other organizations pursuing those activities promoting the protection of rights and legitimate interests of the child.

The amendments proposed would facilitate a deeper respect for the international legal obligations of the Russian Federation regarding the implementation of Article 12 of the UN CRC Convention. In the end, such legal amendments would lead to a more thorough incorporation of the participatory rights of the child into the realm of Russian public law.

5. Conclusion

We have examined the issues of the involvement of minors in the conduct of public affairs. Children, representing a particular subgroup of civil society, are lacking in general political standing. The author of this article suggests that minors can influence public affairs, albeit differently from adults. The limited rights of the child to take part in public affairs was interpreted by the UN Committee on the Rights of the Child as a corollary of the right to express one's views, guaranteed in Article 12 of the UN CRC Convention. Such a right is limited by a range of issues relevant to minors as well as by the level of maturity of the child. Children can express their views only regarding those political issues directly affecting their rights and interests.

These issues are especially relevant to Russia where the Soviet-era denial of children's legal personality still surfaces in the statutory law, challenging the notion of children's effective involvement in public decision-making. As a state party to this Convention, the Russian Federation is subject to international legal obligations to respect and ensure the rights set forth in the above-mentioned Article 12 of the UN CRC Convention. Although Soviet legal scholarship denied the existence of the political rights of minors, modern Russian legal scholarship acknowledges such rights, which is a positive development.

This article examined the prospects of minors to engage in those political issues affecting their interests, e.g., Russian children, starting from the age of eight can be members of children's associations; children, starting from 16 can take part in local assemblies. No age limitations are set for taking part in children's parliaments and children's councils, as well as in addressing public authorities personally and through the mass media. Those minors capable of forming and expressing their opinions on political issues can utilize these modes of public participation. The engagement of children in political decision-making contributes not only to protecting the rights of the child, but also engenders fresh alternatives that go unnoticed by adults.

The right of the child to freely express views on all matters concerning his or her interests, juxtaposed with the obligation of public authorities to take these opinions into consideration, is presently lacking in the Federal law "On the Basic Guarantees of the Rights of the Child in the Russian Federation." Yet such a right can be discovered in separate items of legislation in the Russian Federation. This is why the author of this article proposes an amendment to this Federal law – an amendment that would achieve the goal of a more comprehensive realization of the participatory rights of minors in the legal system of the Russian Federation.

Acknowledgments

This study is a part of a project "Konstruktivnyi protest kak mekhanizm realizatsii prava na uchastie v upravlenii delami gosudarstva" ["Constructive Protest as a Mechanism of Implementing the Right to Take Part in the Conduct of Public Affairs"] No. MK-4880.2016.6 commissioned by the Grant Council under the Aegis of the President of the Russian Federation.

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JURISDICTIONAL COUNTERMEASURES *VERSUS* EXTRATERRITORIALITY IN INTERNATIONAL LAW

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DOI: 10.17589/2309-8678-2016-4-4-27-45

Sovereignty is the reason why States seek to apply their jurisdictions. All States like to extend their jurisdictions as far as they can, so some of them have adopted extraterritorial policies in exercising their jurisdictions. In this manner the United States has approved several extraterritorial Laws in respect of competition law and sanctions, causing some coercion to non-target states. In response to this long-arm jurisdiction by the U.S., some countries, such as the U.K., Canada, Australia, Mexico etc., as well as the E.U., took actions of their own in order to nullify these extraterritorial laws. These measures, which are mostly applied to the jurisdictional field, could be described as jurisdictional countermeasures. They can be divided into prescriptive, adjudicative and executive measures, which include blocking statutes, claw-back statutes, non-recognition, procedural restrictions, non-execution and retaliatory measures. Not all of these measures are prohibited by international law and some can be viewed as a just retorsion against that State. However, where the application of these measures is prohibited by international law – in cases such as the non-recognition of foreign judgments and other jurisdictional regulations in international treaties like mutual judicial assistance agreements – they are countermeasures. If these actions are in response to an illegal extraterritorial law, they should comply with the conditions for countermeasures as cited in the Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 as approved by the International Law Commission.

Keywords: jurisdiction; countermeasures; international law; extraterritoriality; blocking statute; claw-back statute.

Recommended citation: Seyed Yaser Ziaee, *Jurisdictional Countermeasures Versus Extraterritoriality in International Law*, 4(4) Russian Law Journal 27–45 (2016).

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1. Introduction

Although "international law of jurisdiction" is not yet recognized as a field of public international law, it is true that a lot of the principles relating to jurisdiction can be drawn from public international sources. Principles like the comity of nations, reasonableness, the balance of interests, non-interference in the internal affairs of States, legality, principles of due process (consisting of *non bis in idem* and access to Justice) and other principles exist in jurisdictional conventions like the "Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters – Brussels Convention" and the "Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters – Lugano Convention." Any breach of these principles when applying jurisdiction by a State can lead to that State being held responsible.

States act improperly in the field of long-arm jurisdiction when they apply that jurisdiction without respecting the above-mentioned rules. The most commonplace examples of long-arm jurisdictions are extraterritorial legislations, most of which were implemented by the United States of America. States which have been targeted by U.S. extraterritorial sanctions include Iran, Iraq, Libya, North Korea, China, Cuba, Sudan, the Soviet Union and now Russia. The U.S. government enforces embargo regulations through criminal and administrative sanctions. For example, under the Trading with the Enemy Act and other measures, punishment for willful violations of the embargoes of Cuba and North Korea can include fines of $250,000 and imprisonment for 10 years for individuals (including officers, directors, and agents of corporate offenders). Fines against companies can reach $1 million. There are some

administrative sanctions against violators that can be treated as "denial orders."[1] There may be also executive sanctions like Title IV of the Helms-Burton Act that directs the executive branch to deny entrance into the United States for aliens who traffic in confiscated property that is subject to a claim by a U.S. person.

If it appears that the application of a jurisdiction by a State is illegal, other States may be able to implement their own acts against it. Chapter II of Draft Articles on Responsibility of States for Internationally Wrongful Acts describes these acts as "international Countermeasures." Article 49.1 mentions that "an injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations." Countermeasure acts shouldn't breach principles of the non-use of force, human rights provisions, humanitarian law, diplomatic and consular law and other peremptory norms of general international law (Article 50), and they should be an appropriate response to a wrongful act of State (Article 51). In addition, they should call upon the responsible State to fulfill its obligations with the injured State offering to negotiate with the responsible State and suspending all countermeasure acts if the wrongful act has ceased or the dispute is pending before a court or tribunal (Article 52).

In response to the illegal application of jurisdiction by States, injured States usually resort to various acts within a jurisdictional framework. This may include the refusal to extradite individuals, non-recognition of judicial, legislative and executive decisions, and other appropriate domestic acts to combat the illegal application of jurisdiction, such as blocking statutes, claw-back measures, retaliatory legislation and procedural limitations. In other words, States facing an illegal application of jurisdiction principally act in the jurisdictional field. While the object of countermeasures is to induce other States to comply with its obligations, the purpose of jurisdictional countermeasures is to frustrate any illegal exercise of jurisdiction by another State.

The typology of these jurisdictional countermeasures has an important role in assessing their legality. Without seeking to prove any specific breach of international obligations or attribute them to any State, this paper assesses different kinds of jurisdictional countermeasures and State practice in this matter. To date, most jurisdictional countermeasures have been applied against U.S. extraterritorial laws, so the present paper emphasizes measures against U.S. extraterritoriality.

2. Typology of Jurisdictional Countermeasures

2.1. Prescriptive Countermeasures

One aspect of the application of jurisdiction by States relates to the enactment of regulations by legislative powers. These regulations can be based on different types of

[1] Harry L. Clark, *Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures*, 25(1) The University of Pennsylvania Journal of International Law 466 (2004).

jurisdiction, such as territorial jurisdiction, personal jurisdiction, protective jurisdiction and universal jurisdiction. Recent legislative jurisdiction has been based on newer criteria of jurisdiction, such as effect doctrine, and punitive policy, such as secondary sanctions. If a State believes that a foreign law or award is illegal and extraterritorial, it may impede the application of that law in its territory and in relation to its nationals by way of a prescriptive countermeasure. The most frequent of these are as follows.

2.1.1. Blocking Statutes

Since the 1970s, some States have adopted blocking statutes in order to reduce the extraterritorial effects of antitrust regulations in their territories. The purpose of these measures is to make it hard for a foreign State to apply its regulations to nationals of other States. In relation to these measures the legislating State prevents its nationals of recognition and execution of specific foreign laws. For instance, the U.K.'s Protection of Trading Interests Act 1980, Canada's Foreign Extraterritorial Measures Act 1996,[2] Mexico's Law of Protection of Commerce and Investments from Foreign Policies that Contravene International Law 1996[3] and Australia's Foreign Antitrust Judgment (Restriction of Enforcement) Act 1979,[4] prevent their nationals from being obligated under some laws and orders of foreign authorities. [5]

One of the most prominent blocking statutes is E.U. Regulation 2271/96 of 1996 which "provides protection against and counteracts the effects of the extraterritorial application"[6] of specified laws,[7] listed in an annex to the regulation.[8] The aim of this

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[2] In the Canadian Attorney General Order in relation to this Act 1992 "[n]o Canadian corporation and no director, officer, manager or employee in a position of authority of a Canadian corporation shall, in respect of any trade or commerce between Canada and Cuba, comply with an extraterritorial measure of the United States."

[3] Mexican parties and foreign persons are forbidden "to engage in acts that affect trade and investment when such acts are the consequence of the extraterritorial effects of foreign statutes." Ley de Protección al Comercio y la Inversión de Normas Extranjeras que Contravengan el Derecho Internacional, D.O., 22 de Octubre de 1996.

[4] This Act was passed because of US antitrust laws which caused to conviction of four Australian Uranium Firms in US courts.

[5] Jennifer A. Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas*, Corporate Social Responsibility Initiative Working Paper No. 59 (Cambridge, MA: John F. Kennedy School of Government, Harvard University, 2010), at 104.

See Alan V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75(2) The American Journal of International Law 257 (1981).

[6] Council Reg. (EC) 2271/96, Art. 1.

[7] It consists of Helms-Burton Act, sanctions provisions of the Cuban Democracy Act, the prohibitions, licensing provisions and penalty provisions of the Cuban Assets Control Regulations (CACR), and the Iran and Libya Sanctions Act

[8] Alan V. Lowe, *US Extraterritorial Jurisdiction: The Helms-Burton and D'Amato Acts*, 46(2) The International and Comparative Law Quarterly 386 (1997).

regulation is to counteract secondary sanctions of the U.S. such as the 1996 Sanctions against Iran and Cuba (Helms-Burton Act) and Iran and Libya Sanctions Act of 1996 (ILSA).

Blocking Statutes may oblige individuals and legal persons to report to the governmental bodies responsible for applying the Statute. For example, the E.U. Regulation requires European persons to report to the E.U. Commission within 30 days of discovering that their economic and/or financial interests are directly or indirectly affected by the sanctions specified in the E.U. Regulation.[9] Breaching the European blocking statute could lead to "effective, proportional and dissuasive" penalties against European nationals.[10]

Retributive sanctions in extraterritorial laws and their countermeasure regulations always pose a dilemma for merchants. For example, in March 1997, United States authorities demanded that a Canadian subsidiary of Wal-Mart Stores Inc. comply with U.S. sanctions regulations by ceasing to sell Cuban-manufactured clothing in Canada. At the same time, Canadian authorities insisted that Wal-Mart Canada Ltd. should continue to carry the products of Cuban origin or face fines of up to C$1.5 million for noncompliance with countermeasures designed to neutralize the impact of U.S. sanctions.[11]

Blocking statutes can be passed against three types of foreign laws: legitimate and obligatory foreign regulations (like regulations based on universal jurisdiction), legitimate and non-obligatory foreign regulations (like regulations based on personal jurisdiction) and illegitimate foreign regulations (like secondary sanctions). While it is impermissible to approve a blocking statute against "legitimate foreign regulations," approving a blocking statute against "illegitimate foreign regulations" could be justified within a framework of jurisdictional countermeasures and would waive the international responsibilities of the legislating State.

Also we may encounter "blocking decrees" instead of "blocking statutes," in which a court, rather than a legislative body, prohibits the application of a foreign extraterritorial law. For example, in the *Fruehauf* case,[12] a French court appointed an administrator to the French subsidiary of the US-based Corporation in order to prevent that the controllers of the Corporation from damaging the interests of the subsidiary by forcing it to comply with a U.S. embargo on trade with China.[13]

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9 Council Regulation, 2271/96, Art. 2.

10 Lowe 1997, 385.

11 Clark 2004, 456.

12 U.S. Treasury Department directed Fruehauf, a U.S. vehicle manufacturer, to prevent a shipment of buses by its French subsidiary to the Peoples' Republic of China, subject to a comprehensive U.S. embargo. *See* Clark 2004, 466.

13 Alan V. Lowe, *The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search For a Solution*, 34(4) The International and Comparative Law Quarterly 727 (1985).

2.1.2. Claw-Back Measures

Another way of combatting the illegal extraterritorial jurisdiction of States is by resorting to claw-back measures. The objective of claw-back legislation is to allow an entity that is subject to a foreign judgment executed against its foreign assets, to recover the judgment sum against any assets of the plaintiff in the foreign judgment that may be situated in the local jurisdiction.[14] For example, Britain's Protection of Trading Interests Act 1980 authorizes citizens to seek and recover extra-compensatory damages paid to plaintiffs that have prevailed in foreign litigations against U.K. citizens that were prosecuted by the U.S.[15] In cases involving multiple damages,[16] there are two conditions that must be fulfilled before any action of recompense. First, the defendant must bear a sufficient territorial relationship with the U.K., typically not being resident or carrying out business in the foreign state, and second, the defendant must be adequately disconnected from the forum which rendered the multiple damage judgment.[17]

Article 6 of the E.U. Regulation in relation to the U.S. Helms-Burton and D'Amato laws stipulates that any European person is entitled to "recover any damages, including legal costs, caused to that person by the application of the laws specified in the Annex," or by actions based upon them. This provision enables European defendants to recover any damages awarded against them from the plaintiff in the U.S. action, as well as their associated legal costs. Recovery may take the form of the seizure of assets of the U.S. plaintiff, or of persons acting on the plaintiff's behalf (including shares held in a company incorporated in the E.U.), anywhere in the E.U.[18]

The Canadian Act (FEMA) has same measures in relation to trans-boundary laws. Under the terms of this Act, if a non-recognition order cannot be issued because the judgment was satisfied outside Canada or the judgment is under the Helms-Burton Act, the Canadian Attorney General can issue an order declaring that a Canadian person has claw-back rights with respect to the judgment.[19] Before the 1996 FEMA amendments, non-recognition and claw-back provisions related only to antitrust actions,[20] and subsequently it included extraterritorial laws.

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[14] Deborah Senz and Hilary Charlesworth, *Building Blocks: Australia's Response To Foreign Extraterritorial Legislation: Australia's Response to Foreign Extraterritorial Legislation*, 2(1) Melbourne Journal of International Law 112 (2001).

[15] Frederick A. Mann, *The Doctrine of Jurisdiction Revisited after Twenty Years*, 186 Recueil des Cours de l'Academie de Droit International 98 (1984).

[16] Judgment for multiple damages means a judgment for an amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favor the judgment is given (Protection of Trading Interests Act 1980, ch. 11, sec. 5(3)).

[17] Donald J. Curotto, *Extraterritorial Application of the Antitrust Laws and Retaliatory Legislation by Foreign Countries*, 11(2) Golden Gate University Law Review 597 (1981).

[18] Lowe 1997, 387.

[19] FEMA, § 8(1)(b).

[20] *See* Clark 2004, 478.

Although the United States of America has been the main target of claw-back measures, the U.S. itself has resorted to this kind of countermeasure in its international relations. The U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which was approved after the financial crisis in 2008, passed with the aim of significantly changing U.S. financial regulation. One of proposals of the Securities and Exchange Commission (SEC) in this regard was a requirement for all companies listed on a national securities exchange to have a policy to recover compensation erroneously awarded abroad.[21]

In contrast, French courts believe that recovering sums in compensation for foreign judgments is against international law. In fact, the French Tribunal De Commerce argued as long ago as 1885 that it is against the equal sovereignty of States that a court retrieves compensation for a payment ruled by a foreign court.[22]

It should be noted that the most important restriction on claw-back measures is the principle of immunity of State properties. So if a countersuit is launched against a claim in which one claimant is a foreign State, it is not easily possible for a defendant to gain access to the properties of a foreign State in the forum State. But there is no bar to prevent a defendant using claw-back regulations against the property of a private individual. Generally claw-back measures are harsher than blocking statutes because they render to reprisal actions rather than prevent the application of a foreign regulation therein. Some authors believe claw-back measures can cause public relations problems and destabilize international transactions.[23]

2.2. Adjudicative Countermeasures

Sometimes the nullification of extraterritorial foreign Acts remains within the judicial process. In this way judicial authorities can invoke two methods: non-recognition and procedural restrictions. These are kinds of adjudicative countermeasures against extraterritorial regulations which the Forum State believes are illegal.

2.2.1. Non-Recognition

All recognition of legislative, adjudicatory and executive decisions emanates from the "principle of comity of nations." Regarding this principle "in international practice, the laws of each nation exercised within its territory, are effective everywhere, insofar as the interests of another State or its citizens are not prejudiced."[24] In accordance with this principle, all lawful decisions of foreign States should be binding in other

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21 Available at: http://www.sec.gov/rules/proposed/2015/33-9861.pdf.

22 Michael Akehurst, *Jurisdiction in International Law*, 46 British Yearbook of International Law 233 (1974).

23 Steve Coughlan et al., *Law Beyond Borders: Extraterritorial Jurisdiction in an Age of Globalization* 60 (Toronto: Irwin Law, 2014) and Clark 2004, 487.

24 Hessel E. Yntema, *The Comity Doctrine*, 65(1) Michigan Law Review 26 (1966).

States. The international comity principle contrasts with the reciprocity principle, by which recognition of foreign judgments depends on a reciprocal act by the forum country. In any case, recognition merely indicates the 'recognizing of legislative and adjudicative foreign decisions' and will not necessarily result in the execution of foreign decisions.

Decisions that need to be recognized in other States can be divided into two categories: governmental acts of State (jure imperii) and private/commercial acts of State (jure gestionis). Judicial decrees related to public law, such as criminal law, tax law, administrative law, civil procedural law, criminal procedural law and laws governing immovable properties, as well as all executive decisions, are known as governmental acts of State (jure imperii).[25] These acts originate in the sovereign rights of States and are not principally recognized in other sovereign States because it would breach the equity of States.[26] But private/commercial decisions may be recognized in other States and the recognizing State, under the principle of the comity of nations, does not evaluate the substance of the decision and may not absolutely respect these foreign decisions.

Recognition of non-governmental judgments is based on the 'act of State' doctrine, upon which the State is not allowed to inquire into the legality of the acts of a foreign government when the action in question takes place within the territory of the foreign State. But traditionally there are four categories of restrictions on recognizing a non-public foreign judgment: 1) fraud (e.g. forum shopping), 2) unfair justice (including non-competent jurisdiction or unjust procedure), 3) public order and 4) corollary jurisdiction. Insofar as it relates to the present essay, and as a further exception, non-recognition also can be invoked against judgments based on an extraterritorial law. For example, E.U. regulation 2271/96 prohibits the recognition of judgments and administrative determinations that give effect, "directly or indirectly," to the extraterritorial sanction laws annexed to the Regulation, "or to actions based thereon or resulting therefrom." Also, Mexico's Law of Protection of Commerce and Investments from Foreign Policies that Contravene International Law of 1996 provides for the non-recognition and non-enforcement of foreign judgments issued under such laws. Contrary to the E.U. and Mexico, which stipulate illegal sanctions and laws in text of their Acts, Canada's FEMA amendments authorize the Canadian Attorney General to determine foreign trade laws that "adversely affect" Canadian interests and to order the non-recognition and non-enforcement of judgments by foreign tribunals under those laws. A U.S. court may also deny recognition or enforcement

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[25] *See* Frederick A. Mann, *The International Enforcement of Public Rights*, 19(3) New York International Journal Law in Politics 603 (1987); Curotto 1981, 593.

[26] This is the reason why courts in the United States have tried to describe the word "penal" in order to help determine when they should not apply foreign laws or execute foreign judgments which conceivably might be characterized as penal. *See* Mark W. Janis, *The Recognition and Enforcement of Foreign Law: The Antelope's Penal Law Exception*, 20(1) International Lawyer 303–308 (1986).

of a foreign judgment if the rendering court did not have proper subject matter jurisdiction over the dispute. Thus, for example, a U.S. court could deny recognition of a foreign judgment involving real estate located in the United States.[27]

2.2.2. Procedural Restrictions

One of the mechanisms that legislative authorities may approve to combat extraterritoriality is "overriding regulations." These provisions, which are mandatory, assist the claimant to sue before the courts and upon the law of legislating State, even though the claimant and defendant have chosen another forum or governing law in their contract. An example is the Marine Liability Act, by which Canadian shippers/exporters and importers/consignees of goods by sea may be given (i) the choice of a Canadian court or arbitration regardless of the terms of any choice of forum clause, and (ii) the benefit of Canadian law irrespective of any contracted choice of foreign law.[28] This power is rarely exercised, given common law's reluctance to interfere with contractual relations any more than necessary.[29]

Another form of procedural restriction against extraterritorial laws is evidence exchange restriction. Legislative/judicial authorities may prohibit parties from transferring evidence, records and information to a foreign court. For example, Canada's Foreign Extraterritorial Measures Act of 1996 prohibits or restricts the production of records and the giving of information in respect of proceedings related to the enforcement of the Helms-Burton Act. FEMA authorizes courts to issue warrants for the temporary seizure of any records if there is reason to believe that the Canadian Attorney General's blocking order [against extraterritorial laws] will be disobeyed, and the records are likely to be turned over to foreign authorities.[30]

The Mexican Act of 1996 forbids Mexican nationals to issue responses to inquiries from foreign countries under extraterritorial measures. The Mexican government must be notified of any such inquiry or any activity that may be impeded by the foreign laws. In regard to U.K. practice, when an American tribunal ordered some British petroleum companies to produce evidence in 1952, the British government of the time sent a letter to the Anglo-Iranian Oil Company requiring it not to produce documents requested by foreign court, stating "Her Majesty's Government considers it contrary to international comity" because these documents related neither to America nor to business in that country.[31]

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27 Stacie I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 Review of Litigation 116 (2014).

28 Marine Liability Act, S.C. 2001, c. 6, s. 46 (plus Part 5 & schedule 3).

29 Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57(3) Fordham Law Review 309 (1988).

30 Clark 2004, 477.

31 Zerk 2010, 103. *See* Lowe 1980, 259.

There are other forms of procedural restrictions in judicial process. For example, the Arresting State can stop the extradition of a suspect in an international criminal case to an Applicant State that doesn't respect substantial human rights like fair justice.[32] These restrictions do not relate to extraterritorial laws and are thus outside the present assessment.

Blocking statutes differ from procedural restrictions primarily in that the former prohibit parties from complying with extraterritorial laws while the latter do not prohibit the application of the law but restrict its procedural process by imposing limitations on the forum/law choice of contractors or restrictions on document exchanges with foreign judicial or administrative body. It is a useful method for States that do not wish to announce their express conflict with a foreign Act.

2.3. Executive Countermeasures

If State measures against the extraterritorial motivations of other States via regulatory or adjudicatory processes are not sufficient, a State may resort to some enforcement measures against foreign laws in the executive stage. These can be categorized in two forms: non-execution and retaliatory measures.

2.3.1. Non-Execution

Even though there is no doubt that international law obliges States to recognize foreign legislative, adjudicatory and executive decisions, it is accepted that execution of these decisions depends on a unilateral or bilateral obligation. For instance, while the Netherlands and Sweden recognize foreign decrees they do not execute them unless there is a treaty or a special regulation.[33] However approved State practice accepts that there is no tendency for the execution of public law issues like criminal law and tax law unless they can conclude a special treaty. For instance, insolvency decrees have not been executed in Germany, Switzerland, the Netherlands and the United States.[34] Some States, such as Austria, Spain, Japan, Colombia, Poland, Lebanon, Hungary, Lichtenstein, Romania and Turkey, have made the execution of foreign decrees dependent on mutual practice.[35] Other States, such as Iran, have excluded judgments related to domestic real estate and those that jeopardize internal public order.[36]

Non-execution could be regarded as a jurisdictional countermeasure if the execution of a decision was obligatory. But present conventions on the recognition and execution of foreign decisions, such as the Brussels convention or the Lugano

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[32] *See* John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92(2) American Journal of International Law 187–212 (1998).

[33] Akehurst 1974, 234.

[34] *Id.* at 235.

[35] *Id.* at 236.

[36] Enforcement of Civil Judgments Acts, 1978, Iran, Art. 169.

Convention, concentrate solely on private law. In the field of public law, there are some treaties such as universal jurisdiction-based conventions, conventions on double taxation, transnational insolvencies, and mutual legal/judicial assistance or cooperation agreements which require State Parties to recognize and execute foreign decisions and extradite suspects or properties to the Applicant State.

The execution of foreign decisions sometimes becomes the focal point of the contradiction between two principles: the principle of respect for sovereignty and the principle of State immunity. The clearest example of this clash can be seen in extraterritorial confiscation orders,[37] in which a State has to deal with the confiscated assets of a corporation in its territory. If the State accepts an extraterritorial order it breaches its own sovereignty by accepting the transformation of part of its land into the property of a foreign government. If it does not accept the order, it breaches the act of State doctrine and, by extension, the principle of State immunity that could lead to calls on the State's international responsibilities.[38] If the confiscation was illegal, there is no obligation to recognize or execute it and consequently no worry about international responsibility. In this situation non-execution would not be accounted as a countermeasure.

2.3.2. Retaliatory Measures

Some authors regard all kinds of jurisdictional countermeasures – blocking legislation, claw-back statute, non-recognition, procedural restrictions and non-execution – as retaliatory measures,[39] yet it seems that there are some reprisal acts which differ from other forms of jurisdictional countermeasures. While those countermeasures are based on legislative or judicial decisions in the jurisdictional field, retaliatory measures can be based on administrative or executive orders and applied in a non-jurisdictional form.

For example, when the U.S. imposed an energy embargo against the Soviet Union in 1982, the United Kingdom, France and Italy took a retaliatory measure against this extraterritorial sanction which affected some of their nationals' contracts. The U.K. compelled several British-based subsidiaries of U.S. corporations to respect their existing contracts in the Yamal Pipeline Project.[40] Similarly, the French Ministry

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[37] *See* Edwin Borchard, *Extraterritorial Confiscations*, 36(2) The American Journal of International Law 275–282 (1942). It's possible that a State assume right of legality assessment of confiscations abroad before allowing that confiscated assets come in its territory. *See* Ignaz Seidl-Hohenvelden, *Extraterritorial Effects of Confiscations and Expropriations*, 49(6) Michigan Law Review 862 (1951).

[38] Edwin Borchard, *Confiscations: Extraterritorial and Domestic*, 31(4) The American Journal of International Law 676 (1937).

[39] Curotto 1981, 579.

[40] The Yamal Pipeline project was designed to supply West Germany, France and Italy with more than 30 percent of their natural gas needs, and involved lucrative construction contracts with European countries, such as West Germany, Great Britain, France and Italy. Leslie Gelb, *U.S. Hardens Curbs on Soviet Gas Line*, N.Y. Times, June 19, 1982, at A-1.

of Research and Industry ordered a French subsidiary of a U.S. Company to fulfill its contract for the project. The Italian Foreign Ministry issued a statement that all Italian contracts established with respect to the Yamal Pipeline Project "must be honored." It is notable that in response the U.S. barred foreign companies from receiving any exports of U.S. oil and gas-related equipment[41] if they abided by their countries' orders and defied the U.S. embargo. Although these orders may be based on a blocking statute, the purpose of this legislation goes beyond blocking because executive power is used to oblige its nationals to honor their contracts. Therefore these orders can be regarded as retaliatory measures.

Later, as a consequence of the approval of the Helms-Burton sanctions against Iran and Cuba by the U.S., the European Council in 1996 identified a list of options for counter-action, including a WTO dispute panel, visa restrictions, a watch list of U.S. companies, filing law suits against European firms and anti-boycott legislation.[42] Among these, visa restrictions and the watch list of U.S. companies can be accounted as retaliatory measures. As a first step the Commission decided to publish a notice in the Official Journal inviting parties to submit any information which they consider relevant to the compilation of a watch list of U.S. companies or citizens filing actions against Europeans.[43] Ultimately no action was taken to draw up a watch list following successful negotiation between the E.U. and the U.S., but the proposal was preparation for retaliatory measures against the jurisdictional conduct of the U.S.

As Steve Coughlan mentions: "These tit-for-tat ripostes are not helpful. Indeed, they are destructive of international trade and the commercial confidence on which transnational transactions depend, a negation of international order amongst nation States, and denial of the comity between governments that is so essential to the smooth functioning of international relations."[44]

3. Assessment of Jurisdictional Countermeasures

Article 22 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission (ILC) of 2001 set forth: "The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part

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41 Harry L. Clark & Lisa W. Wang, *Foreign Sanctions Countermeasures and Other Responses to U.S. Extraterritorial Sanctions*, Report of National Foreign Trade Council, August 2007, at 15.

42 Francesco Giumelli, *The Success of Sanctions Lessons Learned from the EU Experience* 69 (Farnham: Ashgate, 2013).

43 Available at: http://europa.eu/rapid/press-release_IP-96-732_en.htm?locale=en.

44 Steve Coughlan et al., *Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization*, 6 Canadian Journal of Law and Technology 49 (2007).

Three." The conditions of a legitimate countermeasure are stipulated in Articles 49–54 of Draft, which abstractly consist of: 1 – act against an international obligation; 2 – reversibility of the obligation; 3 – temporality of the measure (in the event of the responsible State complying with its international obligations or the application of a dispute settlement procedure by both States); 4 – respect for the peremptory norms of general international law (*e.g.* human rights and humanitarian law, diplomatic immunities); 5 – proportionality; 6 – notification and offers of negotiation.

If jurisdictional countermeasures are accounted as legitimate countermeasures under international law, this can preclude any wrongfulness in the relations between the injured State and the responsible State. Measures taken against extraterritorial laws are countermeasures when illegality of that extraterritorial law is recognized. As many extraterritorial laws breach the principles of international law regarding the law of jurisdiction, they are assumed to be illegal.[45] But whereas most counteracts are not in themselves illegal, they cannot be accounted as countermeasures in a legal context. As the ILC emphasizes, countermeasures are to be contrasted with retorsion, i.e. "unfriendly" conduct which is not inconsistent with any international obligation of the State engaging in it, even though it may be a response to an internationally wrongful act.[46]

Measures which are inherently unjustified, such as the non-recognition of foreign judgments, can be accounted as countermeasures if imposed they are against an illegal extraterritorial law like U.S. secondary sanctions. However, while international law does not require States to recognize illegal jurisdictions, it does not violate international comity and the act of State doctrine. In any event, recognition will be obligatory if there is a mutual legal or judicial assistance or cooperation agreement between two States or both States are party to international conventions with jurisdictional aspects.[47] For example, in ICSID it is necessary for State parties to recognize and exercise foreign State arbitration awards, even if they run contrary to the internal public order of the State. In this circumstance execution may only be suspended, not halted altogether.

The legitimacy of extraterritorial laws can be challenged because the jurisdictional linkage between the subject-matter and legislating State is weak. The scope of these laws extends to the persons, nationals or companies of other States, and sometimes

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[45] Steve Coughlan et al. 2007, at 11.

[46] Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001, ILC Commentaries, ch. II, no. 3.

[47] There are some multilateral treaties like the Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating To Adoptions 1965, the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971, the Convention of February 1, 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1988, the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation In Respect of Parental Responsibility and Measures For The Protection of Children 1996.

extends to subsidiary companies with a foreign nationality.[48] Some of them oblige parent companies to force their foreign subsidiaries to comply with the Legislating State. In international law, this is an unacceptable way of exercising jurisdiction.

Some believe that under international law of jurisdiction, which often sets forth only vague standards, the legality of a particular jurisdictional assertion is ordinarily not only dependent upon an objective assessment of jurisdictional criteria being fulfilled, but also upon the foreign reactions with which the assertion is met.[49] In the title of its act, Mexico cited "*Foreign Policies that Contravene International Law*"; Canada's Foreign Extraterritorial Measures Act (FEMA) states that the provision will apply to non-Canadian trade laws which are "*contrary to international law or international comity.*"[50] Although the prohibitive ruling in the *Lotus* Case allowed any form of the application of jurisdiction, the persistent opposition of some States and the enactment of Acts against them indicates illegality of this kind of provision.[51] In these situations, the application of countermeasures is allowed and in this context some States, such as Canada, Mexico, the U.K., Australia, Belgium, Denmark, Finland, France, Germany, the Netherlands, Sweden and the E.U. have enacted provisions to prevent the effects of illegal extraterritorial foreign laws.[52]

In any event, jurisdictional countermeasures should fulfill the necessary conditions to be lawful. These conditions consist of reversibility, temporality, proportionality, respect for peremptory norms, notification and an offer of negotiation. Sometimes there are some preliminary negotiations any countermeasure against extraterritorial sanctions; For example, there might be a familiar flurry of diplomatic activity, including "megaphone diplomacy" and a variety of press releases by the European Union condemning extraterritoriality generally and the Helms-Burton and D'Amato Acts in particular.[53]

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48 Cuban Democracy Act of 1992, 22 U.S.C. § 6001–6010 (1996). The CDA strengthened the U.S. economic embargo against Cuba by, among other things, prohibiting foreign subsidiaries of U.S. corporations from conducting business in Cuba. Anthony M. Solis, *The Long Arm of U.S. Law: The Helms-Burton Act*, 19(3) Loyola of Los Angeles International and Comparative Law Journal 714–715 (1997).

49 Cedric Ryngaert, *Jurisdiction in International Law* 467 (Oxford: Oxford University Press, 2008).

50 There are some trends in domestic arguments in the U.S. about the illegality of some sanctions. The U.S. State Department pointed out during the congressional hearings, to no avail, that the exercise of jurisdiction under the Act would violate international law: "The Libertad Bill [the Helms-Burton Act] would represent an unprecedented application of U.S. Law… The principles behind Title III are not consistent with the traditions of the international system… Under international law and established state practice, there are widely-accepted limits on the jurisdictional authority of a state to 'prescribe', i.e., to make its law applicable to the [extraterritorial] conduct of persons." Legal Considerations on Title III of Libertad Act, 141 Cong. Rec., S 15106-8, October 12, 1995, cited in Ryngaert 2008, 467.

51 For the opposite view *see* Lowe 1981, 263.

52 Edward R. Price, *Foreign Blocking Statutes and the GATT: State Sovereignty and the Enforcement of U.S. Economic Laws Abroad*, 28 George Washington Journal of International Law and Economics 315–317 (1995).

53 Alexander Layton and Angharad M. Parry, *Extraterritorial Jurisdiction: European Responses*, 26(2) Houston Journal of International Law 314 (2004).

As Article 50 of the Draft states, "a State taking countermeasures is not relieved from fulfilling its obligations: (a) under any dispute settlement procedure applicable between it and the responsible State." The E.U. invoked the WTO settlement process while simultaneously imposing most available countermeasures against the U.S. for its alleged illegal sanctions. Under the WTO's dispute settlement system, the prior authorization of the Dispute Settlement Body is required before a member can suspend concessions or other obligations under the WTO agreements in response to a failure of another member to comply with the recommendations and rulings of a WTO panel or the Appellate Body. This has been construed both as an "exclusive dispute resolution clause" and as a clause "preventing WTO members from unilaterally resolving their disputes in respect of WTO rights and obligations."[54]

The European Union initiated WTO proceedings against the United States in October 1996, on the basis that the Helms-Burton Act resulted in an infringement of E.U. members' rights under the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS). Negotiations began between the European Union and the United States, leading to the Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act on April 11, 1997. Finally, in May 1998, the United States and the European Union concluded a Transatlantic Partnership on Political Cooperation and an Understanding with Respect to Disciplines for Strengthening of Investment Protection upon which European Union agreed to the suspension of the WTO proceedings. In return for the European Union stepping up its commitment to democracy in Cuba, Title III of the Helms-Burton Act would continue to be suspended.[55]

In this situation, where a dispute process resulted in a *compromise*, any continuation of the E.U.'s blocking and claw-back statutes is doubtful as it is against the provisions for negotiations (Art. 52 – paragraph a (b)) and temporality (Art. 52 – paragraph c (b)). These violations only restrict the non-recognition section of E.U. Regulations where it violates the principles of international law, but other methods of confronting U.S. sanctions do not breach international law and could be accounted as retorsions.

Also in 1998, Japan and the E.U. requested the establishment of a WTO panel to examine a Massachusetts law that disallowed the granting of government procurement contracts to any U.S. or foreign company doing business in or with Burma (Myanmar). Japan and the E.U. challenged U.S. law based on an alleged violation of the WTO Agreement on Government Procurement. The WTO panel was suspended in February 1999 pending the National Foreign Trade Council's challenge against Massachusetts's sanctions in U.S. courts. In June 2000, the U.S. Supreme

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[54] Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001, ILC Commentaries, Art. 50, no. 10.

[55] Layton & Parry 2004, 314.

Court invalidated Massachusetts's embargo on the grounds that it was preempted by federal law. Consequently, the WTO challenge expired on February 11, 2000.[56]

Article 54 of the Draft sets forth "this chapter does not prejudice the right of any State… to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached." So it is not necessary to prove any breach of State interests when imposing blocking or claw-back statutes. Indeed all States could, although typically it does not happen, apply jurisdictional restrictions against an unlawful extraterritorial sanction.[57] It should be noted that while the object of countermeasures is to induce the responsible State to comply with its obligations, as mentioned in Article 49.1 of Draft, the purpose of jurisdictional countermeasures is to nullify the illegal exercise of jurisdiction by another State.

Although these countermeasures, at least in theory, appear to block the extra-territorial assertion of U.S. sanctions in regard to third country trade and investment with U.S.-targeted States, they have had little practical effect in insulating third country businesses from potential liability under U.S. sanctions. Consequently, some major multinational firms with operations in Canada and the European Union have entered agreements with the U.S. government that seek to reduce their liability exposure under U.S. sanctions in return for their compliance with certain requirements of U.S. sanction law.[58]

However, the importance of jurisdictional countermeasures should not be underestimated as sometimes it can result in big fines for transnational corporations. For example, in March 24, 2006, the Mexican government fined the Sheraton Maria Isabel Hotel in Mexico City 1.2 million pesos for expelling Cuban guests. Mexico's Foreign Ministry said the fine was imposed for the hotel's violation of Mexico's sanctions countermeasures law. The controversy led to the hotel's temporary closure for unrelated, alleged violations of the safety code.[59] In April 2007, Austria brought charges against its fifth-largest bank, BAWAG P.S.K. ("BAWAG"), for violating E.U. Regulation 2271/96, after the bank cancelled the accounts of approximately 100 Cuban nationals. BAWAG stated that its pending acquisition by U.S. equity firm Cerberus Capital ("Cerberus") could not be completed without the cancellation of all Cuban accounts because of compliance issues with the Helms-Burton Act. Austrian Foreign Minister Ursula Plassnik immediately denounced BAWAG's actions.[60]

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[56] Clark & Wang 2007, 17.

[57] Elena Katselli Proukaki, *The Problem of Enforcement in International Law: Countermeasures: The Non-Injured State and the Idea of International Community*, 60(1) International & Comparative Law Quarterly 284 (2011).

[58] Alexander 2009, 258.

[59] Clark & Wang 2007, 21.

[60] *Id.* at 23.

Furthermore, the Canadian Act (FEMA) specifies penalties for compliance with objectionable foreign laws and other violations including fines of up to C$1,500,000 for corporations and C$150,000 for individuals along with imprisonment of individuals for up to five years.

4. Conclusion

Notwithstanding the advantages of international transactions, the complexity of these relations causes some problems in the legal relationships between States. Basically, sanctions are imposed against an allegedly intentional wrongful act and so they are themselves categorized as international countermeasures. But countermeasures should meet the conditions stated in the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission. Some of them not only fail to fulfill these prerequisites but also run contrary to the international law of jurisdiction. In addition to them we can add competition laws (e.g. anti-trust provisions) with an extraterritorial reach that are also against the principles of international law. In response to these measures, injured States may impose types of countermeasures that mostly and similarly lie in the jurisdictional field. These could be called "jurisdictional measures."

These measures could be classified in three ways: prescriptive, adjudicative and executive. Blocking statutes as a legislative response seek to prevent nationals from complying with foreign extraterritorial law. Claw-back statutes, as another form of prescriptive countermeasure, authorize defendants of a foreign judgement based on extraterritorial law to recoup the lost sum in the Forum State. Although recognition of foreign judgments is a necessary part of international law or comity, non-recognition can be used as one form of countermeasures in the judicial process against extraterritorial laws. Procedural Restrictions are another form of countermeasures in the judicial process, in which parties are prohibited from choosing a foreign forum/law in their contracts or providing evidence for a foreign authority. In the field of execution it is possible for a State to decline to execute foreign decrees or take retaliatory measures such as visa restrictions or a symmetrical act against nationals of the responsible State. Some States have regulations that contain several types of jurisdictional countermeasures. For example, Canada's Foreign Extraterritorial Measure Act of 1985 includes blocking statutes, restrictive procedures, and non-execution and claw-back measures. E.U. Regulation 2271/96 of 1996 includes blocking statutes and claw-back measures.

It should be noted that most of these acts, with the exception of non-recognition of foreign judgments and to some extent procedural assistance, are not prohibited in international law and therefore cannot be accounted as countermeasures even if they are taken against an unlawful extraterritorial law. As the ILC mentioned they could be called retorsions, rather than countermeasures. But it is possible that some

these acts are prohibited by an obligation laid down in an international treaty. When deploying acts that are normally against international law, these countermeasures should meet the following conditions: 1 – the act comes against a breach of an international obligation, 2 – reversibility, 3 – temporality, 4 – proportionality, 5 – respect for the peremptory norms of general international law, 6 – notification and 7 – offer of negotiation.

Mostly jurisdictional countermeasures are compatible with these conditions but in some cases, such as the E.U. Regulations, the condition of temporality was breached. It seems that a compromise reached between the E.U. and the U.S. nullified the non-recognition part of the Regulations, although the other forms of countermeasures are justified because they are not against international law. The history of international law shows that States incline to jurisdictional countermeasures more often than diplomatic protests.

Extraterritorial laws were first approved by the United States in the field of competition law and then extended to other venues, specifically through sanctions. The fact that most extraterritorial laws were approved in the economic field highlights the importance of economy security in U.S. foreign policy. It seems that responding States, when confronted with U.S. extraterritorial laws, reproduced the same features of U.S. policy: extraterritorial and punitive reaction. As the main purpose of countermeasures has been to fight with the extraterritorial reach of U.S. laws, it appears that some blocking and claw-back statutes extend to foreign subsidiaries of national corporations. Also, like extraterritorial laws, countermeasures involve punitive penalties. However, jurisdictional countermeasures step in the same way of extraterritorial laws but it is a necessary step in order to eliminate earlier extraterritoriality footprints.

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DO LEGAL RIGHTS CORRELATE TO DEVELOPMENT?

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DOI: 10.17589/2309-8678-2016-4-4-46-61

As far as correlation does not mean causation, even it found a high correlation between some legal rights and economical parameters, it doesn't mean that the latter are caused by legal dimensions only. However, if strong correlations exist between some legal rights and some socioeconomic outcomes, this is a good argument for policy makers to improve situation with proper legal rights which highly correlate with their first priority, that of socioeconomic policy aims. It's important to know the real impact of improving legal rights for society to avoid overestimation or underestimation of this impact. Also, regarding the increase in the amount of different international ratings of legal rights, the question which is more reliable should be raised ("competition of ratings"). The correlation analysis shows that "economic oriented" legal rights such as like property and intellectual property are relatively more correlated with GDP per capita. On the other hand, political rights and civil freedoms such as the right not to be tortured unlawfully detained are relatively more correlated with social progress as a more complex and general socio-economic outcome. At the same time there is no high correlation observed between legal rights and life expectancy.

Keywords: law and economics; development; empirical methods; international ranking; human rights; civil liberties; GDP per capita; social progress; life expectancy.

Recommended citation: Kyrylo Molodyko, *Do Legal Rights Correlate to Development?*, 4(4) Russian Law Journal 46–61 (2016).

Table of Contents

1. Introduction

I'd like to give attention to some important arguments which explain why it is so important to know relationships between legal and socioeconomic dimensions:

First, although political rights and civil liberties are important, they can't explain some economic development issues. Free and fair elections and civil liberties are necessary conditions for democracy, but they are unlikely to be sufficient for a full and consolidated democracy if unaccompanied by transparent and at least minimally efficient government, sufficient political participation and a supportive democratic political culture... The slowing of democratisation and rising disenchantment with the results of some political liberalisations appear to have a variety of causes. The pace of democratisation was bound to slow after "the easy cases" – eager-to-liberalise east central Europe after the fall of the Berlin Wall and African regimes susceptible to outside pressure for political change. "Hard cases" such as China and Middle East autocracies were always going to be a more difficult proposition. Autocrats have also learned how better to protect themselves; many of them preside over energy-rich states and have been strengthened by sustained high oil prices… A combination of double standards in foreign policy (autocrats can be good friends as well as foes) and growing infringements of civil liberties has reduced the effectiveness of Western governments' calls for democratisation... However, the direction of causality between democracy and income is also debateable. The standard modernisation hypothesis that economic development leads to, and/or is a necessary pre-condition for democracy, is no longer universally accepted. Instead it has been argued that the primary direction of causation runs from democracy to income (Acemoglu et al., 2005).[1]

Second, it's unclear, how policies matter for economic growth. There is a significant controversy among academics and policy-makers about whether policies matter for economic growth. Recently, Acemoglu et al. and Easterly have presented strong empirical evidence showing that policies do not play a significant role in the process of economic development. Their key conclusion is that macroeconomic policies (monetary, fiscal and trade) have an explanatory power for the cross-country

[1] Roberto Rigobon & Dani Rodrik, *Rule of Law, Democracy, Openness, and Income: Estimating the interrelationships*, 13(3) The Economics of Transition 421 (2005); *The Economist Intelligence Unit's Index of Democracy 2008*, The Economist, at 1–3 (Nov. 10, 2016), available at http://graphics.eiu.com/PDF/Democracy%20Index%202008.pdf.

variation in growth rates and income per capita only because they serve as proxies for institutions... What are the main determinants of economic growth? How can governments create an environment conducive to growth? The answers to these questions have changed fundamentally over the last decades. Traditionally, the emphasis was placed on maintaining good macroeconomic policies such as low inflation, contained budget deficits and exchange rate stability. More recently, the consensus on the determinants of growth has de-emphasized macroeconomic policies in favor of focusing on the role of institutions, in a broader sense, as drivers of economic performance.[2]

Third, it's important to understand whether democracy, some design of political institution, openness affect economic development. What are the fundamental determinants of the large income gaps that separate different regions of the world? Are high incomes the result of good institutions, or is it economic wealth that enables high-quality institutions? How does democracy affect economic development? Is openness to international trade good for development? For democracy? For the quality of institutions? What role do geographical constraints and advantages play in driving all these? What are the relative contributions to patterns of global inequality of exogenous determinants such as geography versus man-made factors such as institutions?[3]

Fourth, GDP is important but people want high quality of life not GDP as such. Money is not happiness, as was shown in the famous Bhutan example where people are poor but happy. Sometimes it's possible to have low GDP per capita but relatively high social progress. So I can't test correlations with GDP per capita only. Moreover, sometimes GDP per capita is high but the majority of the population due to the political regime. For example, Equatorial Guinea has a high GDP per capita but wealth is unevenly distributed.

It has long been accepted that material wellbeing, as measured by GDP per person, cannot alone explain the broader quality of life in a country…But the approach has faced insurmountable difficulties in assigning monetary values to the various factors and intangibles that comprise a wider measure of socio-economic wellbeing. There have been numerous attempts to construct alternative, non-monetary indices of social and economic wellbeing by combining in a single statistic a variety of different factors that are thought to influence quality of life. The main problem in all these measures is selection bias and arbitrariness in the factors that are chosen to assess quality of life and, even more seriously, in assigning weights to different indicators (measured on a comparable and meaningful scale) to come up with a single synthetic measure. GDP, despite its drawbacks, at least has a clear, substantive meaning and

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[2] Antonio Fatas & Ilian Mihov, *Policy Volatility, Institutions and Economic Growth*, 76(4) INSEAD and CEPR 613 (2005).

[3] Rigobon & Rodrik 2005, 534.

prices are the objective weights for the goods and services that make it up (although there are also very big problems in estimating the purchasing-power parities that have to be used instead of market exchange rates in order to express countries' incomes in the same currency). Some researchers have invoked the UN's Universal Declaration of Human Rights to identify the factors that need to be included in a quality-of-life measure. But, even if accepted as a starting point, that still does not point to precise indicators or how they are to be weighted. A technocratic and unsatisfying device that is sometimes used is to resort to "expert opinion."[4]

Harvard professor Michael Porter, who is a leading authority on company strategy and the competitiveness of nations and regions, says it is ridiculous to be measuring success purely on the idea of growth at a time when countries are facing massive social upheavals. He is also critical of previous work that seeks to integrate wellbeing and happiness into the economic agenda. He believes past indices have failed because they have tried to mix economic metrics with social metrics. The SPI only looks at social and environmental considerations and therefore gives them authority in their own right and allows them to be compared and contrasted with traditional economic measures. He says that "The Arab Spring of 2011 and the challenges in Mexico over the last decade, have illustrated the shortcomings of economic growth as a proxy for social progress… In both business and economic development, our understanding of success has been incomplete... Previous efforts to go beyond economic measurement alone have laid important groundwork, but we need a more holistic, comprehensive, and rigorous approach. The Social Progress Index is an attempt to address these gaps and opportunities… Social progress depends on the policy choices, investments, and implementation capabilities of multiple stakeholders – government, civil society, and business. Action needs to be catalysed at country level. By informing and motivating those stakeholders to work together and develop a more holistic approach to development, I am confident that social progress will accelerate."[5]

Fifth, a more precise and integrated theory of human rights is necessary. We hope that someday scholars and policymakers will pay as much attention to government respect to economic, social, and cultural human rights as they have paid to respect for rights of physical integrity. Despite the recognition of other types of human rights, in international human rights law, until recently, most international nongovernmental organizations INGOs, including Amnesty International and Human Rights Watch, have focused their reports and activities almost exclusively on identifying and remedying government violations of the physical integrity of the person. Currently,

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[4] *The Economist Intelligence Unit's Quality-of-Life Index*, The World in 2005, The Economist, at 1 (Nov. 10, 2016), available at https://www.economist.com/media/pdf/QUALITY_OF_LIFE.pdf.

[5] *Michael Porter Unveils New Health and Happiness Index*, The Economist, April 11, 2013 (Nov. 10, 2016), available at http://www.theguardian.com/sustainable-business/michael-porter-health-happiness-index.

there is a movement towards an integrated human rights approach that reflects a belief in the complementarity, universality, and indivisibility of all rights.[6]

In one of the last UN papers related to international rankings methodology the importance of the indicators of governance, rule of law, peacebuilding, violence and conflict and human rights was underlined. Growing interest in their quantitative measures and international levels, has fostered a large number of data initiatives among official and non-official data producers. Work on standardization and harmonization of concepts and methods now underway provides a strong foundation for numerical target-setting and subsequent selection of indicators. Basic standard methodologies have been developed, for example, for victimization surveys, violence against women, homicide, mortality statistics by cause of death, human rights, rule of law, and there is considerable ongoing.[7]

Also I should say some words about the general difference in mentality of lawyers and politicians. Lawyers are more idealists in that for them the rule of law is of intrinsic value. At the same time politicians are more oriented towards socio-economic indicators (GDP per capita, life expectancy, unemployment, social welfare etc.). So, if the lawyers aim is to convince politicians to give more attention to legal rights, lawyers should prove to politicians that legal success indicators highly correlate with economic success if it's really so.

Also it's important that in general, politicians have much more trust in overseas rankings, considering them to be more independent. The difficulty here is that, sometimes, institutions who produce ratings do not have permanent staff worldwide so they authorize domestic experts to create ratings. So finally ratings are created by domestic experts who sometimes overestimate their country (a good example is the enormously high scores of Rwanda in the WEF Global Competitiveness Report).

2. Methodology of Our Research

I used correlation analysis where Y (dependent variables) are socio-economic outcomes. X (independent variables) are legal rights.

Y: dependent variables used. As socio-economic indicators I decided to use two objective socio-economic parameters (Nominal GDP per capita in current prices and Life expectancy) and one complex rating (Social Progress Index).

1. Nominal GDP per capita in current prices in 2012 and 2013. Data available for 204 countries. I used the World Bank data if available and the UN Statistic Division data for a very few countries where the World Bank data was unavailable.

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[6] David Cingranelli & David Richards, *CIRI Human Rights Data Project*, 32 Human Rights Quarterly 395, 416 (2010).

[7] *Statistics and Indicators for the Post-2015 Development Agenda*, UN System Task Team on the Post-2015 UN Development Agenda, The UN, at 7 (Nov. 10, 2016), available at http://www.un.org/en/development/desa/policy/untaskteam_undf/UNTT_MonitoringReport_WEB.pdf.

2. Life expectancy data was taken from the World Health Statistics 2014. Part 3 World Health Indicators.[8] Data available for 193 countries.

3. Also I used a dependent variable: one complex Social Progress Index created in 2013 by professor Michael Porter, Harvard Business School. It measures 132 countries using combination of 52 indicators in the areas of basic human needs, foundations of wellbeing, and opportunity show the relative performance of nations. I make a reservation that Life Expectancy was a one of the indicators used for creation of this Index. However, the weight of this indicator in the common rating is minor. So, I believe that it can't significantly bias our conclusions based on separate research of correlations of the Life expectancy and Social Progress Index with the same legal indicators.

X: independent variables used. I decided to select for our research ranks of legal rights created by well-respected institutions/scholars. I apply the minimum representativeness conditions that data for at least 90 countries from all geographical parts of the world should be available. So I skipped both ratings based on research of less than 90 countries and/or all countries from one region. Also, I try to use ratings which include both developed and developing countries with the one exception of The Bertelsmann Stiftung's Transformation Index which measures 129 developing countries.

Finally I selected and used legal parts of the 8 following international rankings:

1. The Global Competitiveness Report 2013–2014 by the World Economic Forum.[9] Measures 148 countries. Based on survey of local business executives.

2. The Rule of Law Index 2014 by The World Justice Project.[10] Measures 97 countries. Based on a survey of 1000 random individuals in the 3 largest cities of the country (in reality 850–1152 individuals were asked in 2011–2013) plus survey of local experts, on average 24 experts per country. However, the amount of experts in each country is not disclosed.

3. The Bertelsmann Stiftung's Transformation Index (BTI) 2014.[11] Measures 129 developing countries. Based on a survey of 250 local experts from each country.

4. The Cingranelli and Richards (CIRI) Human Rights Dataset 2012.[12] Measures 192 countries. Based on analysis of information about human rights violations from

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[8] *World Health Statistics 2014*, The World Health Organization (Nov. 10, 2016), available at http://www.who.int/gho/publications/world_health_statistics/2014/en/.

[9] *The Global Competitiveness Report 2013–2014*, The World Economic Forum (Nov. 10, 2016), available at https://www.weforum.org/reports/global-competitiveness-report-2013-2014.

[10] *WJP Rule of Law Index 2015*, The World Justice Project (Nov. 10, 2016), available at http://worldjusticeproject.org/rule-of-law-index.

[11] *Transformation Index (BTI) 2014*, The Bertelsmann Stiftung (Nov. 10, 2016), available at http://www.bti-project.org/bti-home/.

[12] *Human Rights Dataset 2012*, The Cingranelli and Richards (CIRI) Human Rights Data Project (Nov. 10, 2016), available at http://www.humanrightsdata.com/.

official and non-official sources such as the number of political prisoners and the number of cases of torture.

5. Democracy Index 2012 by The Economist Intelligence Unit Limited 2013.[13] Measures 167 countries. Based on analytical research of published information plus expert opinions. Clear information about the number and selection of experts is not found.

6. Worldwide Governance Indicators by The World Bank. The 2013 update Rule of Law subsection.[14] Measures 215 countries. Based on centralised analysis of 32 sources, the majority of which are ratings and indexes based on expert surveys but part of them are based on public opinion surveys.[15]

7. Freedom in the World 2013–2014 by Freedom House.[16] Measures 194 countries. Centralised team of 90 international experts was hired for the project who analysed sources related to different countries.

8. The Global Innovation Index 2014.[17] Measures 143 countries. Joint project of Cornell University, INSEAD, and the World Intellectual Property Organization (WIPO) and their Knowledge Partners.

Even though ratings include the majority of countries in the world, some countries are always absent. In our research I compare results of different ratings based on different samples of countries. So N (sample size, countries) differs for different combinations (Y, X) in our summarized statistic (see Table 1). As I mentioned above, to improve validity of our results I excluded from research all rankings with less than 90 countries, considering them not sufficiently representative.

Also it's worth pointing out that a new *The United Nations Rule of Law Indicators Implementation Guide and Project Tools*[18] *appeared in 2011. It offered a new advanced methodology of quantitative estimations in the sphere of comparison of legal systems. However, it hasn't been used in practise yet. This creates a potentially interesting niche for future research and cooperation with UN.*

One can compute correlations by different ways. In our research I found out that sometimes polynomial and linear R^2 were approximately the same. However, in the

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13 *Democracy Index 2012*, The Economist (Nov. 10, 2016), available at http://pages.eiu.com/rs/eiu2/images/Democracy-Index-2012.pdf.

14 *Worldwide Governance Indicators*, The World Bank (Nov. 10, 2016), available at http://info.worldbank.org/governance/wgi/index.aspx#home.

15 Daniel Kaufmann et al., *The Worldwide Governance Indicators Methodology and Analytical Issues*, World Bank Policy Research Working Paper No. 5430 (September 2010).

16 *Freedom in the World 2013–2014*, Freedom House (Nov. 10, 2016), available at https://freedomhouse.org/report/freedom-world/freedom-world-2014#.VMotKMnUdEs.

17 *The Global Innovation Index 2014*, Cornell University, INSEAD, the WIPO (Nov. 10, 2016), available at https://www.globalinnovationindex.org/content.aspx?page=GII-Home.

18 *Rule of Law Indicators Implementation Guide and Project Tools*, The United Nations (Nov. 10, 2016), available at http://www.un.org/en/peacekeeping/publications/un_rule_of_law_indicators.pdf.

majority of our data massive distributions polynomial R^2 was much higher than linear. At the same time, there was no single case where in the linear model correlation was higher to compare with the polynomial model. One could make a mistake if looking at low linear correlation level to make a general conclusion about the low correlation level. In many cases polynomial model could provide a correct response of medium or high level of correlation. So finally I decided to use polynomial correlation as a basis for our research.

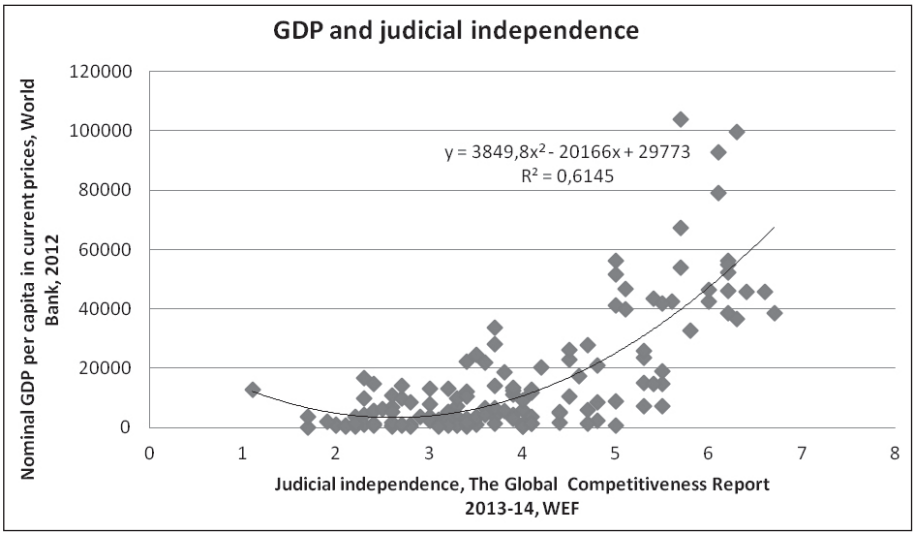
I recognize that some indices I researched are partly based on other indices which are also included in our research. For example, The Rule of Law Index is a one of 32 sources for creation of The Global Competitiveness Report. I are unable to avoid some biases caused by mutual influence of indexes to each other. But I believe that proper distortion is not significant. For example it's clear that the "contribution" of one "ingredient" to the "whole pie" is very unlikely to not be significant compared with the total contribution of the other thirty-one other ingredients and "poison a pie."

To illustrate our methodology I'll demonstrate here in detail one rank from the Global Competitiveness Report 2013–2014: judicial independence.

1.06 Judicial independence

In your country, to what extent is the judiciary independent from influences of members of government, citizens or firms? [1 = heavily influenced; 7 = entirely independent]

| 2012–13 weighted average



For the polynomial function like $Y = ax^2 + bx + c$ I always got positive "a" coefficient and $R > 0$ (positive sign of correlation coefficient).

Each additional increase of X by one point, compared with previous one point X increase, is associated with 2*a higher increase of Y. Also one can say that f"(x) = 2a as far as the second derivative measures how the rate of change of a quantity is itself changing. Unlike a linear function, it's impossible to measure an absolute change of Y associated with 1 unit change of X because it is different at each point of X. But I can measure the acceleration of change. In general, the lower difference in R^2 between polynomial and linear models the lower the module of coefficient "a" in polynomial equation. Only in a very few cases I got similar R^2 for linear and polynomial model. In those cases coefficient "a" is very low.

In our research I consider the following arbitrary correlations:

$R^2 > 0.5625$ high correlation (so if $R>0.75$)

$0.25 < R^2 < 0.5625$ medium correlation (so if $0.5 < R < 0.75$)

$R^2 < 0.25$ low correlation (so if $R < 0.5$)

Table 1

Summary Statistics of Correlations

	Correlation (R^2) with Nominal GDP per capita, 2012	**Correlation (R^2) with Nominal GDP per capita, 2013**	**Correlation (R^2) with Social Progress Index, Porter**	**Correlation (R^2) with Life Expectancy**	**Summarized code of correlations of the row (H = High, M = Medium, L = Low)**
WORLD ECONOMIC FORUM. THE GLOBAL COMPETITIVENESS REPORT					
Sample size (countries)	N = 147	N = 147	N = 122	N = 155	
PILLAR 1 INSTITUTIONS, Aggregated	0.64	0.638	0.456	0.271	HHMM
Ethical behaviour of firms	0.672	0.672	0.471	0.259	HHMM
Intellectual property protection	0.661	0.657	0.484	0.262	HHMM
Irregular payment and bribes	0.659	0.658	0.602	0.4	HHHM
Diversion of public funds	0.653	0.654	0.419	0.279	HHMM
Property rights	0.632	0.631	0.418	0.302	HHMM
Reliability of police services	0.627	0.623	0.469	0.324	HHMM
Judicial independence	0.615	0.612	0.426	0.265	HHMM
Favouritism in decisions of government officials	0.492	0.489	0.282	0.174	MMML
Efficiency of legal framework in challenging regulations	0.487	0.495	0.291	0.158	MMML

Burden of government regulation	0.481	0.481	0.265	0.139	MMML
Strength of auditing and reporting standards	0.471	0.469	0.502	0.289	MMMM
Public trust in politicians	0.468	0.466	0.167	0.122	MMLL
Efficacy of corporate boards	0.462	0.460	0.305	0.136	MMML
Protection of minority shareholders interests	0.396	0.394	0.28	0.146	MMML
Organized crime	0.389	0.390	0.297	0.206	MMML
Business cost of crime and violence	0.386	0.385	0.275	0.183	MMML
Transparency of government policymaking	0.385	0.388	0.311	0.139	MMML
Wastefulness of government spending	0.259	0.257	0.083	0.063	MMLL
Business cost of terrorism	0.141	0.143	0.295	0.104	LLML
Burden of government regulation	0.138	0.139	0.049	0.079	LLLL
Strength of investor protection (max = 10!)	0.074	0.074	0.13	0.091	LLLL
WORLD JUSTICE PROJECT THE RULE OF LAW INDEX					
Sample size (countries)	N = 98	N = 98	N = 90	N = 97	
RULE OF LAW Aggregated	0.83	0.836	0.74	0.43	HHHM
Constraints of government powers subrating	0.747	0.759	0.728	0.314	HHHM
Order and security subrating	0.813	0.818	0.434	0.418	HHMM
Absence of corruprtion subrating	0.755	0.756	0.729	0.496	HHHM
Open Government subrating	0.694	0.705	0.701	0.409	HHHM
Fundamental rights subrating	0.459	0.458	0.71	0.325	MMHM
Regulatory enforcement subrating	0.821	0.822	0.705	0.405	HHHM
Civil justice subrating	0.762	0.768	0.594	0.298	HHHM
Criminal justice subrating	0.777	0.784	0.609	0.322	HHHM
The Bertelsmann Stiftung's Transformation Index (BTI)					
Sample size (countries)	N = 128	N = 128	N = 106	N = 127	
Political transformation Aggregated	0.023	0.025	0.433	0.119	LLML
Stateness. Subrating of Political transformation	0.101	0.087	0.517	0.216	LLML
Political participation. Subrating of Political transformation	0.039	0.04	0.393	0.109	LLML
Rule of law. Subrating of Political transformation	0.036	0.088	0.42	0.119	LLML
Stability of democratic institutions. Subrating of Political transformation	0.063	0.066	0.374	0.123	LLML

Political and social integration. Subrating of Political transformation	0.027	0.029	0.395	0.135	LLML
The Cingranelli and Richards (CIRI) Human Rights Data Project					
Sample size (countries)	N = 190	N = 190	N = 133	N = 189	
Physical Integrity Rights Index (aggregated 4 following rows)	0.281	0.246	0.478	0.188	MLML
Government respect for disappearance	0.028	0.031	0.083	0.083	LLLL
Government respect for extrajudicial killing	0.144	0.157	0.254	0.146	LLML
Government respect for political imprisonment	0.102	0.111	0.351	0.109	LLML
Government respect for torture	0.25	0.264	0.304	0.145	MMML
Empowerment Rights Index Aggregated 7 following rights)	0.107	0.122	0.444	0.182	LLML
Assembly & Association	0.091	0.101	0.314	0.114	LLLL
Foreign Movement	0.047	0.05	0.178	0.143	LLLL
Domestic Movement	0.049	0.053	0.203	0.092	LLLL
Speech	0.013	0.016	0.14	0.067	LLLL
Electoral self-determination	0.101	0.106	0.279	0.166	LLML
Religion	0.019	0.022	0.061	0.003	LLLL
Workers' rights	0.06	0.078	0.15	0.068	LLLL
Women's Economic Rights	0.394	0.413	0.474	0.344	MMMM
Women's Political Rights	0.037	0.044	0.032	0.015	LLLL
Independence of the Judiciary	0.2	0.228	0.417	0.202	LLML
THE ECONOMIST DEMOCRACY INDEX. DEMOCRACY AT A STANDSTILL					
Sample size (countries)	N = 162	N = 162	N = 132	N = 162	
Democracy Index Aggregated	0.452	0.445	0.689	0.384	MMHM
Electoral process and pluralism. Subranking of the Democracy Index	0.235	0.232	0.607	0.338	MMHM
Functioning of Government. Subranking of the Democracy Index	0.405	0.4	0.624	0.406	MMHM
Political participation Subranking of the Democracy Index	0.377	0.378	0.422	0.25	MMMM
Political Culture Subranking of the Democracy Index	0.483	0.476	0.484	0.256	MMMM
Civil liberties. Subranking of the Democracy Index Subranking of the Democracy Index	0.276	0.273	0.655	0.374	MMHM

THE WORLD BANK Worldwide Governance Indicators					
Sample size (countries)	N = 166	N = 166	N = 132	N = 193	
Voice and Accountability participating in selecting their government, as well as freedom of expression, freedom of association, and a free media	0.403	0.373	0.708	0.364	MMHM
Political Stability and Absence of Violence/Terrorism likelihood that the government will be destabilized or overthrown by unconstitutional or violent means, including politically-motivated violence and terrorism	0.356	0.347	0.535	0.25	MMHM
Government effectiveness quality of public services, the quality of the civil service and the degree of its independence from political pressures, the quality of policy formulation and implementation, and the credibility of the government's commitment to such policies	0.645	0.632	0.801	0.488	HHHM
Regulatory Quality ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development	0.634	0.608	0.732	0.43	HHHM
Rule of Law confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence	0.658	0.539	0.708	0.441	HHHM
Control of Corruption Reflects perceptions of the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as "capture of the state by elites and private interests"	0.623	0.603	0.662	0.426	HHHM
FREEDOM HOUSE FREEDOM IN THE WORLD					
Sample size (countries)	N = 182	N = 182	N = 133	N = 188	
Political rights	0.215	0.191	0.42	0.279	LLMM
Civil liberties	0.265	0.274	0.6	0.297	MMHM

THE GLOBAL INNOVATION INDEX 2014					
Sample size (countries)	N = 142	N = 142	N = 133	N = 142	
Regulatory quality	0.633	0.636	0.733	0.475	HHHM
Rule of law	0.716	0.721	0.69	0.434	HHHM

The Global Competitiveness Report 2013–2014 by the World Economic Forum (1 aggregated plus 21 subratings). Correlations of measured legal rights are significantly higher with GDP per capita than with Social Progress Index for 1 aggregated and 19/21 subratings. In two subrating cases the situation is opposite, however R^2 is low in these cases. Correlation with life expectancy as usual is medium in cases where correlation with GDP per capita is high, but low in other cases.

The Rule of Law Index 2014 by The World Justice Project (1 aggregated plus 8 subratings). Correlations of measured legal rights are significantly higher with GDP per capita than with Social Progress Index for 1 aggregated and 6/8 subratings. In the other 2 subratings, the situation is opposite, but the difference between R^2 is minimal and unlikely to be statistically significant. In the majority of cases, correlation with GDP per capita is high, with Social Progress Index and Life expectancy is medium.

The Bertelsmann Stiftung's Transformation Index (BTI) (1 aggregated plus subratings). Correlations of measured legal rights are significantly lower with GDP per capita than with Social Progress Index. All correlations with GDP per capita and life expectancy are low, all correlations with Porter Index are medium.

The Cingranelli and Richards (CIRI) Human Rights Data Project (2 aggregated which combine 11 subratingss and 3 separate ratings). The picture is very similar to the Bertelsmann Stiftung's Transformation Index (BTI). Correlations of measured legal rights are significantly lower with GDP per capita than with Social Progress Index. All correlations with GDP per capita and life expectancy are low, correlations with Porter Index are low or sometimes medium. Exceptions: Government respect for torture where all correlations are medium except with life expectancy where low; Women's Economic Rights where all correlations are medium.

Democracy Index 2012 by The Economist Intelligence Unit Limited 2013 (1 aggregated plus 5 subratings). Correlations of measured legal rights are significantly lower with GDP per capita than with Social Progress Index. All correlations with GDP per capita and life expectancy are medium. Correlations with Social Progress Index are high or medium.

Worldwide Governance Indicators by The World Bank. (The 2013 update. 5 indicators). Correlations of measured legal rights are lower with GDP per capita than with Social Progress Index but not significantly. All correlations with Social Progress Index are high, all correlations with Life expectancy are medium. Correlations with GDP per capita are high or medium.

Freedom in the World 2013–2014 by Freedom House (2 aggregated ratings). Correlations of measured political rights with both GDP per capita and Social Progress Index are significantly lower compared with Civil liberties in the same ratings. All correlations with life expectancy are medium.

The Global Innovation Index 2014 (2 ratings). Correlations of measured legal rights with both GDP per capita and Social Progress Index are high and not significantly different to each other. All correlations with life expectancy are low.

Table 2

Top 10 Correlations Between Legal Rights and Development (R^2 in Brackets)

Nominal GDP per capita in current prices (average of R^2 in 2012 and 2013)	Social Progress Index (Porter)	Life expectancy
The World Justice Project Rule of law aggregated (0.833)	The World Bank. Government Effectiveness (0.801)	The World Justice Project Absence of corruption (0.496)
The World Justice Project Order and security (0.816)	The World Justice Project Rule of law aggregated (0.74)	The World Bank Government effectiveness (0.488)
The World Justice Project The regulatory enforcement (0.822)	The Global Innovation Index. Regulatory Quality (0.733)	Global Innovation Index Regulatory quality (0.475)
The World Justice Project Absence of corruprtion (0.756)	The World Bank. Regulatory quality (0.732)	The World Bank. Rule of law (0.441)
The World Justice Project. Constraints of government powers (0.753)	The World Justice Project. Absence of corruption (0.729)	Global Innovation Index. Rule of law (0.434)
The World Justice Project Criminal justice (0.781)	The World Justice Project. Constraints of government powers (0.728)	The World Bank. Regulatory quality (0.43)
The World Justice Project Civil justice (0.765)	The World Justice Project. Fundamental rights (0.71)	The World Justice Project. Rule of law aggregated (0.43)
Global Innovation Index Rule of law (0.719)	The World Bank. Rule of law (0.708)	The World Bank. Control of corruption (0.426)
The World Justice Project Open Government (0.699)	The World Bank. Voice and accountability (0.708)	The World Justice Project. Order and security (0.418)
The Global Competitiveness Report. Ethical behaviour of firms (0.672)	The World Justice Project. Regulatory enforcement (0.705)	The World Justice Project. Open government (0.409)

3. Conclusion

In general there are no high correlations between score in legal ratings and life expectancy. Probably non-legal factors have the major impact on life expectancy. So I should avoid speaking of legal improvements as the best way to increase life expectancy. "Economic oriented" legal rights such as like property and intellectual property are relatively more correlated with GDP per capita. Political rights, civil freedoms such as the right not to be tortured or unlawfully detained are more correlated with Social Progress. Results of The Cingranelli and Richards (CIRI) Human Rights Data and the Project Transformation Index (BTI) have relatively low correlations with both GDP per capita, Porter Index and life expectancy. As far as these 2 ratings measure a lot of common parameters with other 6 ratings I researched, it's possible to make an assumption the methodological shortcomings of The Cingranelli and Richards (CIRI) Human Rights Data and the Transformation Index (BTI). In CIRI it is likely caused by use of an inappropriate scale (0-1-2 or 0-1-2-3 points are given only which leads to equal score given to significantly distinctive countries). As usual, general questions about legal dimensions, such as an estimate of the rule of law or the whole of fundamental rights, give higher correlations about more narrow legal rights.

Acknowledgments

The author would like to express his sincere gratitude to Mrs. Anne-Marie Brook (Principal Advisor, New Zealand Treasury), Professor Louis Kaplow (Harvard Law School), Professor David Kennedy (Harvard Law School), Professor John Ruggie (Harvard Kennedy School of Government), Professor Deborah Hughes Hallett (Harvard Kennedy School of Government) for giving the author skills, ideas and opportunities necessary for this research. This paper is an extension of the research made while the author's internship in the New Zealand Treasury in summer 2014. It was presented and discussed at the section of the Harvard Law School's Institute for Global Law and Policy workshop in Doha, Qatar, January 3–9, 2015.

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THE RIGHT TO SELF-DEFENCE IN INTERNATIONAL LAW AS A JUSTIFICATION FOR CROSSING BORDERS: THE TURKEY-PKK CASE WITHIN THE BORDERS OF IRAQ

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DOI: 10.17589/2309-8678-2016-4-4-62-80

International law grants states an inherent right to self-defence. States can exercise this right whenever they face armed attack. However, any country wishing to exercise its right to self-defence must fully consider all the restrictions on this right. The right to self-defence can permit the use of force within the borders of the victim state or on the territory of another state from where the attack is carried out. Accordingly, states may respond to any attack by the armed forces of another state or irregular armed groups that use the territory of other states for their attacks. Turkey is a country with a huge population of Kurdish inhabitants. The Kurds possess distinct origins, history, language, culture and a historical link to their land. Thus, they qualify as a people. For much of their history they have peacefully sought to assert their rights; however, Turkey denied those rights to the extent that the formation of the PKK in 1978 became a move of last resort. When the PKK started demanding Kurdish right to self-determination, Turkey launched military operations against it in self-defence. During the 1980s and 1990s, the PKK established camps in Iraq. On several occasions it withdrew its forces there as part of peace negotiations with the Turkish government. Turkey crossed the Iraqi borders and attacked the camps as part of a state policy to fight the PKK outside its borders. The PKK subsequently handed over the camps to other groups, which never posed any military threat to Turkey, but Turkish forces continued to cross the border into Iraq. This article examines the right of Turkey to use force within the borders of Iraq under the justification of self-defence.

Keywords: international law; self-defence; Turkey; Kurdish people; PKK; Iraq.

Recommended citation: Rebaz Khdir, *The Right to Self-Defence in International Law as a Justification for Crossing Borders: The Turkey-PKK Case within the Borders of Iraq*, 4(4) Russian Law Journal 62–80 (2016).

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1. Introduction

The right to self-defence is an exception from the prohibition on the threat or use of force as mentioned among the purposes and principles of the United Nations. The issue is not whether the right to self-defence exists, but when exactly states are entitled to this right. Does it apply before or after an armed attack? What constitutes an armed attack? While it is clear that the right can be exercised on the territory of the victim state, is it possible to use force in self-defence on the territory of another state from where the armed attack is carried out? What if the perpetrator of the armed attack is a non-state actor and uses the territory of another state to launch its attack?

The right to self-defence enables states to use force lawfully to protect their sovereignty, political independence and security without any international responsibility. However, exercising this right is limited to one specific circumstance – an armed attack. Moreover, states must demonstrate that force was used necessarily, proportionally and immediately, as well as informing the UN Security Council.

The Turkish-Kurdish issue can be traced back many centuries. Its roots lie in the invasion of Kurdish land and subsequent ethnic oppression. Following the establishment of the new Turkish republic in 1923, the Kurds became a minority in Turkey. Yet, they have historical connection to the land, their own history, a distinct language and culture, and a national will with the political institutions to express it. Hence, they satisfy the conditions of being a people under international law. When the Kurds tried non-violent means to achieve their right to self-determination, Turkey used military force to deny that right. Therefore, in 1978, the PKK was founded as the sole means to demands their rights. Turkey, though, regards the PKK as

a terrorist organization and fought the group in self-defence. In response, the PKK established some camps in Iraq during the 1980s and 1990s as a strategic base for the rights of the Kurds in other countries and a safe retreat for its forces during peace negotiations with Turkey; it never used them to launch its military attacks against Turkey. Nonetheless, in its fight against the PKK, Turkey crossed Iraq's borders and attacked the camps. The PKK has now handed the camps to the party for a Free Life in Kurdistan (PJAK) and The Kurdistan Democratic Solution Party (PCDK). Although these groups pose no threat of armed attack on Turkey, Ankara still attacks the camps and alleges that they are PKK bases.

Though there are numerous books and articles on the right to self-defence, there is still a lack of literature about the legal dimension of Turkey-PKK case. Examining this case helps to resolve the issue and restore peace and security to the region.

This article examines some important questions regarding the right to self-defence. What is the right to self-defence? When can that right be exercised? What are the necessary conditions to exercise the right? Against whom can the right be exercised? Is the Turkey-PKK case related to the right to self-determination or the right to self-defence? Is Turkey's crossing of Iraq's border justified by the right to self-defence under international law?

The article first discusses the theory of the right to self-defence and second, considering that theory, analyzes the Turkey-PKK case, particularly Turkey's self-defence justification for crossing Iraqi borders.

2. Historical Background

The right to self-defence is believed to refer to the concept of defensive use of force which originated from the law of nations. The defensive use of force was a sovereign right of a state and thus the origin of self-defence was state sovereignty.[1] Based on the view of some other scholars, the right to self-defence has its origin in the concept of "just war" which was present in ancient Greece and Rome. A just war would wage against a state if the state breached its obligations and refused to repair the damage.[2]

But the modern origin of the right dates back to the Caroline incident between the British and United States governments in 1837.[3] In the first half of the 19th century, while Canada was under British rule, a rebellion rose up against British colonialism. Though the U.S. was officially neutral, many people along the Canadian border

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1 Murray Colin Alder, *The Origin in International Law of the Inherent Right of Self-Defence and Anticipatory Self-Defence*, 2 The Western Australian Jurist 115 (2011).

2 Kinga Tibori Szabó, *Anticipatory Action in Self-Defence: Essence and Limits under International Law* 32–33 (Hague: T.M.C. Asser Press, 2011).

3 Anthony Clark Arend, *International Law and the preemptive Use of Military Force*, 26(2) The Washington Quarterly 90 (2003).

sympathized with the insurrection.[4] On the night of December 29, 1837, the Caroline, an American ship that was allegedly bringing assistance to the rebels, moored on the American bank of the Niagara River. British troops crossed the river and attacked the ship. They killed some Americans and burned the ship. The Caroline incident caused tensions in relations between London and Washington. The U.S. claimed that British troops crossed its borders and violated its sovereignty but the British justified the attack as self-defence. Though Britain apologized for the act after several diplomatic exchanges, the case of the Caroline established the modern practice of the right to self-defence in international law.[5]

During negotiations on adopting the United Nations (UN) Charter[6] at the San Francisco Conference in 1945, the right to self-defence was placed in Article 51 and became a part of international conventional law. Moreover, following the adoption of the Charter, the right to self-defence became a subject of scholarly writings and legal literature.[7] In addition to that, the International Court of Justice (ICJ) clarified the right and its scope of its applicability to states in a number of cases, such as Military and Paramilitary Activities in and against Nicaragua (1986),[8] the Legality of the Threat or Use of Nuclear Weapons (1996)[9] and the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004).[10]

3. The Right to Self-Defence in International Law

As we mentioned, the Caroline incident established the modern practice of using force in self-defence in international law. The customary understanding of self-defence is not only exercising a state's right in response to a military attack, but also to counter an imminent threat of armed attack. This type of self-defence is named anticipatory self-defence or pre-emptive self-defence.[11]

The scope of applicability of the right to self-defence in customary international law can be found in a letter which was written on April 24, 1841, by the U.S. Secretary

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4 *British-American Diplomacy: The Caroline Case*, Yale Law School Lillian Goldman Law Library (May 2, 2016), available at: http://avalon.law.yale.edu/19th_century/br-1842d.asp#web1.

5 Arend 2003, 90–91.

6 Charter of the United Nations (adopted June 26, 1945 and entered into force October 24, 1945).

7 Jan Kittrich, *The Right of Individual Self-Defence in Public International Law* 195 (Berlin: Logos Verlag Berlin GmbH, 2008).

8 Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), ICJ Judgment, June 27, 1986.

9 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, July 8, 1996, ICJ reports (1996).

10 The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, July 9, 2004, ICJ reports (2004).

11 Niaz A. Shah, *Self-Defence, Anticipatory Self-Defence and Pre-Emption: International Law's Response to Terrorism*, 12(1) Journal of Conflict & Security Law 111 (2007).

of State Daniel Webster to special British representative Lord Ashburton. Webster stated that "[i]t will be for that Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[12]

That quote illustrates two conditions for exercising the right – necessity and immediacy. However, the paragraph does not mention a third condition that states must meet – proportionality.[13] In other words, in order for a state to be entitled to the right of self-defence under customary international law, it must show the necessity of using force, the use of force must occur as soon as the threat arises and any force must be used in a proportionate manner.

The conventional concept of right to self-defence is linguistically understood to be narrower than the customary concept. The relevant article leaves space for scholarly interpretation. In order to explain the conventional context of the right, we should first mention Article 51 of the UN Charter which states:

> "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

Scholars have been divided into two groups over the interpretation of this article. One group of scholars interprets it restrictively and limits the scope of the applicability of the right to use force against actual military attack. According to their view, a state may exercise the right to self-defence only in response to an armed attack which is actually underway. The attack therefore must be an actual attack and the victim must be an actual victim, otherwise the use of force would be illegitimate.[14] The second group thinks that the article can be interpreted more widely. Their logic holds that states may exercise the right not only to combat an actual military attack but also in response to an imminent armed threat to their sovereignty, political independence and security. The group argues that the right to self-defence was a pre-existing customary right before being placed in the UN

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[12] Leo Van Den Hole, *Anticipatory Self-Defence under International Law*, 19(1) American University International Law Review 96 (2003).

[13] Elizabeth Wilmshurst, *Principles of International Law on the Use of Force by States in Self-Defence* 10 (London: Chatham House, 2005).

[14] Shah 2007, 97.

Charter. The UN Charter merely codified it without seeking to exhaust it.[15] This scholarly view seems more logical because customs are one of the main sources of international law, so the right of pre-emptive self-defence exists even if the UN Charter does not mention it.

4. Limitations on the Right to Self-Defence

One of the UN's purposes is maintaining international peace and security by taking collective measures.

> "[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;"[16]

The UN Charter also requires states to use peaceful means in settling their international disputes.

> "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."[17]

The Charter generally bans the use of force by states through another principle which is the non-use of force principle in article (2/4), which states the following:

> "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

However, the Charter recognizes the right of states to use force in self-defence in Article 51, as an exception to the previous articles. Even so, there are some other limitations on the applicability of Article 51. The limitations are first: the use of force

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15 Shah 2007, at 98–99.

16 UN Charter, *supra* note 6, Art. 1(1).

17 *Id.* Art. 2(3).

must be in response to an armed attack.[18] Second: the state must show the necessity, proportionality and immediacy.[19] Third: the use of force must be reported to the Security Council by states, and as soon as the Security Council takes measures with regard the issue, states must cease using force.[20]

4.1. Armed Attack

As discussed above, international law prohibits the threat or use of force by states. However, it recognizes the right of states to defend themselves against any armed attack on their sovereignty and security. The use of force in self-defence does not constitute an armed attack but amounts to a legitimate use of force under international law.

The main precondition for exercising the right to self-defence is facing an armed attack. However, neither the UN Charter, nor any international document, has defined what is meant by armed attack. Scholars have defined it. Armed attack is generally the 'physical occurrence of the attack' through one state crossing the borders of another. In addition, some scholars believe that the term of armed attack encompasses an imminent threat, which accordingly implies that states may use force in anticipation of occurrence of an armed attack.[21]

An armed attack alone is not enough to justify using force in self-defence. The attack must be of particular scale and effect. In other words, the attack must meet a threshold of intensity of violence.[22]

We should note that non-military actions or threats such as economic and social aggression, do not give states the right to use force in self-defence. The response to such attacks must be of a non-military nature, even if the attacks are very serious and damaging.[23]

4.2. Necessity, Proportionality and Immediacy

Necessity, proportionality and immediacy are also conditions that a state must meet before and during the exercise of its right to self-defence, otherwise, the use of

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18 Christopher Greenwood, *Self-Defence*, Max Planck Encyclopedia of Public International Law (2011) (May 3, 2016), available at: http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e401?prd=EPIL.

19 Angus Martyn, *The Right of Self-Defence under International Law: The Response to the Terrorist Attacks of 11 September*, Parliament of Australia (2002) (May 3, 2016), available at: http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0102/02CIB08.

20 Greenwood, *supra* note 18.

21 Shah 2007, 101.

22 Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), *supra* note 8, para. 195.

23 Greenwood, *supra* note 18.

force would be unlawful. Necessity means that the state must have no other effective response available except resorting to the use of force.[24] Proportionality means that the force must not exceed the amount of the attack and be limited to the elimination of the threat.[25] Immediacy means that any response to an attack must be instant. However, this condition is less rigid because a response to armed attack can be delayed if there is a need to gather evidence or collect intelligence, or any other logical reason.[26]

4.3. The Intervention of the Security Council

While Article 51 recognizes the right of states to self-defence, it imposes two requirements upon states exercising that right. The first requirement is that "[m]easures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." The failure of states to satisfy this requirement makes the claim of self-defence "less plausible" and is considered a violation of the UN Charter. However, it does not make the use of force unlawful.[27] The second requirement is that states can take actions only "[u]ntil the Security Council has taken measures necessary to maintain international peace and security". This requirement is regarded a temporal limitation upon the exercise of the right to self-defence.[28]

We should note that measures taken by the Security Council are neither aimed at limiting the right to self-defence nor fighting on behalf of states acting in self-defence. They are merely intended to impose a ceasefire upon all sides of the conflict by adopting a binding decision under Chapter VII of the UN Charter and settling the dispute by peaceful means.[29]

5. Self-Defence against Non-State Actors

The traditional understanding of the term of armed attack is the use of force by a state against another state.[30] But the contemporary concept also covers the attacks of the non-state actors. The UN Charter, in Article 51, does not make any mention of the source of the armed attack. As it states:

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[24] Van Den Hole 2003, 99.

[25] Shah 2007, 123.

[26] Martyn, *supra* note 19.

[27] Greenwood, *supra* note 18.

[28] Van Den Hole 2003, 98.

[29] Greenwood, *supra* note 18.

[30] Shah 2007, 104.

> "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations."

But the ICJ, in its judgment in the Nicaragua Case explained that an armed attack can be carried out by either regular armed forces or by irregular armed groups. As it held:

> "[a]n armed attack must be understood as including not merely action by regular armed forces across an international border, but also 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to' (inter alia) an actual armed attack conducted by regular forces, 'or its substantial involvement therein.'"[31]

The UN Security Council dealt with the September 11, 2001, attacks on America as armed attacks and confirmed the right to self-defence against terrorist groups in the resolutions 1368 (September 12, 2001) and resolution 1373 (September 28, 2001).

Attacks by non-state actors must fulfill just one requirement: the attacks must be of a particular scale and effect in terms of casualties and damages.[32]

6. Border Crossing in Justification of Self-Defence

The right to self-defence can be exercised within the borders of the victim state as well as on the territory from where the attack is launched.[33] If the attack was directed by a state military force against another state, the victim state can respond as it deems necessary, even if that leads to crossing the borders of another state.[34]

If the attack was carried out by a non-state actor against another state through the territory and military support of another state, the state from where the attack was launched is internationally responsible for a wrongful act under the law of state responsibility[35] and the victim state can use force against both the host state and the

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[31] Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), *supra* note 8, para. 195.

[32] Shah 2007, 105.

[33] Louise Arimatsu, *The Law of State Responsibility in Relation to Border Crossings: An Ignored Legal Paradigm*, 89 International Law Studies (U.S. Naval War College) 35–37 (2013).

[34] Dimitrios Delibasis, *The Right to National Self-Defence: In Information Warfare Operations* 197–198 (Edmunds: Arena Books, 2007).

[35] Responsibility of States for Internationally Wrongful Acts, General Assembly Resolution 56/83 (2001), Art. 8.

non-state actor.[36] If a non-state actor conducted an armed attack against another state through the territory of another state but without military support, the state from which the attack has directed must take all necessary steps to ensure that its territory is not used by a non-state group for military purposes, and the victim state must obtain the consent of the host state before using force against the group.[37]

Besides the general conditions of exercising the right to self-defence, there are some other conditions for using force outside the territory of the attacked state. First; the attack must be large in scale and effect. Second; in case when the attack is carried out by a non-state actor, there must be clear evidence that the state from where the attack is directed is unwilling or unable to curb the group. Third; the use of force must be either to prevent or stop the attack.[38]

7. Turkey and PKK Case

The Turkish-Kurdish issue is historically related to the land and origins of the Kurds. However, the development of international legal norms, principles and rights has brought a legal dimension to the case.

Kurdistan is the historical homeland of the Kurds, on which they have settled since the dawn of history.[39] The traditional territory of Kurdistan comprises 450,000 square kilometers[40] which extends across southern Turkey, northwestern Iran, northern Iraq and northeastern Syria.[41] The name of Kurdistan has origins in a Sumerian word, "*kurti*," which meant "mountain tribe or mountain people."[42] After the Arabs invaded a considerable part of Kurdistan in the middle ages, they referred to the area as *beled ekrad* (the land of the Kurds).[43] In the twelfth century, a *Seljuk* sultan used the word Kurdistan for the first time. This word also means the land of the Kurds.[44] Following the appearance of the Ottoman Empire and Safavid Empire, territories were formally

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36 David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum*, 24(1) The European Journal of International Law 247 (2013).

37 Daniel Bethlehem, *Principles Relevant to the Scope of a State's Right of Self-Defence Against an Imminent or Actual Armed Attack by Non-State Actors*, 106 The American Journal of International Law 7 (2012).

38 Wilmshurst 2005, 11.

39 Jawad Mella, *Kurdistan and the Kurds: A Divided Homeland and a Nation without State* 21 (London: Western Kurdistan Association Publications, 2005).

40 Abdullah Ocalan, *War and Peace in Kurdistan Perspectives for a Political Solution of the Kurdish Question* 10 (2nd ed., Cologne: International Initiative, 2009).

41 Noory Fakhry, *Right to Self-Determination of Kurds and Its Relation with Right to Self-Defence*, Master thesis (Lund University, 2012), at 8.

42 Ocalan 2009, 9.

43 *Id*.

44 Ofra Bengio, *The Kurds of Iraq: Building a State within a State* 2 (Boulder, CO: Lynne Rienner Publishers, 2012).

mapped. After the Battle of *Chaldiran* in 1514 between the Ottomans and Safavids, most of the Kurds found themselves in the Ottoman Empire.[45] The empires later formalized the division in a treaty which was known as the treaty of *Zuhab* in 1639.[46] Following the collapse of the Ottoman Empire in 1923, the Ottoman part of Kurdistan was divided between Turkey, Iraq and Syria.[47]

There are, however, different opinions with regard to the origins of the Kurds;[48] their origins are distinct from the Turks, Arabs and Persians.[49] The Kurds consider themselves to be the decedents of the Meds.[50] The language of the Kurds is Kurdish which belongs to the "Indo-European group of languages"[51] and is distinct from Turkish, Arabic and Persian.[52] Though there is no an accurate data regarding the Kurdish demographic, the Kurds are regarded as the largest ethnic minority in the world.[53] In 2010, the global Kurdish population was estimated to be 37.1 million in the world. The largest Kurdish population lives in Turkey and is estimated to be 17.94 million (about 23% of Turkey's population of 78 million). The rest live in Iran, Iraq, Syria and the diaspora.[54]

During the First World War, the 12th point of Woodrow Wilson's 14 points[55] granted the minorities of the Ottoman Empire the right of "autonomous development." In 1920, the Ottoman Empire signed the treaty of Sevres[56], which included the right of local autonomy for Kurdish areas in Article 62 and even raised the possibility of independence in Article 64. After establishing the new Turkish republic in 1923, Turkey signed another treaty, the treaty of Lausanne.[57] The Lausanne treaty revoked the

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45 Ocalan 2009, 14.

46 Mohammed M.A. Ahmed, *Iraqi Kurds and Nation-Building* 1 (New York: Palgrave Macmillan, 2012).

47 Fakhry 2012, 10.

48 *Id*. at 8.

49 Hardi Cojer, *Denial of Rights and Self-Determination: The Case of the Kurds of Iraq*, Master thesis (National Library of Canada, 1996), at 25.

50 John Limbert, *The Origins and Appearance of the Kurds in Pre-Islamic Iran*, 1(2) Iranian Studies 45 (1968).

51 Mella 2005, 41.

52 Rebaz Khdir, *Self-Determination in International Law: The Case of the Kurds in the Middle East*, Master thesis (National Taras Shevchenko University of Kiev Institute of International relations, 2014), at 64.

53 Fakhry 2012, 8.

54 Siddiq Skender, *A Brief History of Kurds and Kurdistan* 4 (Virginia: Fairfax, 2011).

55 The points were a set of principles submitted by the U.S. president Woodrow Wilson, on January 8, 1918, to end the First World War and restore peace to the World.

56 The Peace Treaty of Sèvres was signed between the Ottoman Empire and the Victorious Allied Powers on August 10, 1920 in Sèvres, France. The treaty obliged Turkey to accept many conditions of the Allied regarding various issues including minority protection.

57 The treaty of Laussanne was signed between the Allied Powers and the New Turkish Republic in 1923 in Lausanne, Switzerland because the new Turkish state rejected the previous treaty of Sèvres. In the Lausanne Treaty, the Allied recognized the borders of the New Turkish Republic and Turkey gave up its territorial claim over the previous lands of the Ottoman Empire.

previous treaty of Sevres and, moreover, denied the existence of the Kurds in Turkey.[58] Therefore, the Kurds started turning to rebellion to achieve their ethnic rights. The first Kurdish rebellion, the Sheikh Said revolt, occurred in 1925, the second rebellion was the Ararat revolt in 1930 and the third Kurdish rebellion was the Dêrsim revolt between 1936–1938. Turkey crushed all these rebellions and insisted on denying the existence of Kurdish ethnicity.[59] From 1925 to 1938, 250,000 Kurds were reportedly killed and about 1.5 million others were displaced by the Turkish army.[60]

After crushing all the Kurdish revolts, Turkey practiced an oppressive assimilation policy. The government punished anyone who claimed ethnic, linguistic and cultural differences as a cause for separatism.[61] The words "Kurd" and "Kurdistan" were banned.[62] The Kurds were considered to be mountain Turks and the Kurdish language was regarded as a dialect of Turkish.[63]

The PKK first began in 1973 with a group of activists known as "*Apoists*." Between 1975 and 1976 the group's idea of was influential in Kurdish society, particularly younger generations. The PKK was officially formed under the leadership of Abdullah Ocalan and adopted the name of *Partiya Karkaren Kurdistan* (Kurdistan Workers Party) on November 27, 1978.[64] The goal of the group was initially to unite all parts of Kurdistan and establish an independent state for the Kurds of the Middle East. However, it later changed its demand to democratic confederalism within the borders of Turkey.[65] The PKK started a violent struggle against Turkey in 1984, which is still ongoing.[66] Turkey's oppressive policies and denial of Kurdish rights encouraged many Kurds to join the PKK and regard the organization as a legitimate force. Turkey, by contrast, started to treat the group as terrorist campaign. It declared a state of emergency in Kurdish populated cities and granted full authority to its military.[67]

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58 Fakhry 2012, 10.

59 Kristiina Koivunen, *The Invisible War in North of Kurdistan*, Doctoral dissertation (University of Helsinki, 2002), at 95–100.

60 *Turkey/Kurds (1922 – present)*, University of Central Arkansas: Political Sciences (May 7, 2016), available at http://uca.edu/politicalscience/dadm-project/middle-eastnorth-africapersian-gulf-region/turkeykurds-1922-present/.

61 Fakhry 2012, 39–40.

62 Amir Hassanpour, *Kurdish Language Policy in Turkey*, Kurdish Academy of Language (May 7, 2016), available at http://www.kurdishacademy.org/?q=node/129.

63 Fakhry 2012, 40.

64 Adem Uzun, "*Living Freedom": The Evolution of the Kurdish Conflict in Turkey and the Efforts to Resolve It* 13 (Berlin: Berghof Foundation, 2014).

65 Abdullah Ocalan, *Democratic Confederalism* 34 (London: Transmedia Publishing Ltd., 2011).

66 Idris U. Eyrice, *Roots and Causes That Created the PKK Terrorist Organization*, Academic thesis (Naval Postgraduate School, 2013), at 15.

67 Uzun 2014, 14.

If the Turkish-Kurdish issue started out as a nationalistic case, it is now a legal issue which related to minority rights. Therefore, the Kurds now demand their rights in light of international instruments that guarantee those rights. Under international law, "all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[68] The only condition that the Kurds need to fulfill under international law is to qualify as a people. Since the Kurds have a historical link to the land where they live now,[69] a distinct origin and a shared language, history and culture, the will to be a people and the institutions to express that will, they fulfill the conditions of being a people.[70] Thus, they are entitled to the right of self-determination. Turkey, by contrast, always claims that there is no Kurdish issue; there is just the issue of terrorism in Turkey.[71] However, beyond very limited rights of broadcasting, private Kurdish language courses and registering Kurdish children with Kurdish names, it does not recognise Kurdish ethnic minority group rights.[72]

8. The Use of Force by Turkey and Crossing Iraqi Borders in Justification of Self-Defence

During the Iran-Iraq war from 1980 to 1988, Iraq lost control over the northern part of its country.[73] In 1991, Iraq launched intensive military operations in the north to regain control of the region, but this resulted in a huge number of people becoming refugees in Turkey and Iran borders.[74] In the same year, and in response

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68 International Covenant on Civil and Political rights (adopted December 16, 1966, entered into force March 23, 1976), 999 UNTS 171, Art. 1(1); International Covenant on Economic, Social and Cultural Rights (adopted December 16, 1966, entered into force January 3, 1976), 993 UNTS 3, Art. 1(1); UN Declaration on the Rights of Indigenous Peoples, General Assembly Resolution, A/RES/61/295, September 15, 2007, Art. 3.

69 The German scholar Kay Heilbronner believes that if the minority lives on a land and there is a historical link between the minority and the land, the minority is regarded people. The human rights expert Cristesco argues that "the presence of a historic relationship with the land is a prerequisite for a people."

70 United Nations Educational Scientific and Cultural Organization, *International Meeting of Experts on Further Study of the Concept of the Rights of Peoples*, *UNISCO Paris November 27–30, 1989: Final Report and Recommendations*, SHS-89/CONF.602/7, February 22, 1990, at 7–8.

71 *There's no Kurdish Issue in Turkey, Just Terrorism: Ardoğan*, Daily News, January 6, 2016 (May 10, 2016), available at: http://www.hurriyetdailynews.com/theres-no-kurdish-issue-in-turkey-just-terrorism-erdogan.aspx?pageID=238&nID=93511&NewsCatID=338.

72 Jaffer Sheyholislami, *Language Varieties of the Kurds* in *The Kurds: History – Religion – Language – Politics* 44 (Alexander Schahbasi, Thomas Schrott, eds., Vienna: Austrian Federal Ministry of the Interior, 2015).

73 Funda Keskin, *Turkey's Trans-Border Operations in Northern Iraq: Before and after the Invasion of Iraq*, 8 Research Journal of Internatıonal Studıes 60 (2008).

74 *Id*. at 61.

to the atrocities committed by Saddam's Regime in the region, the UN Security Council adopted Resolution No. 688 and condemned the civilian oppression by the Iraqi government.[75] The resolution established a no-fly zone and restricted the sovereignty of Iraq over its northern region.[76] After the north Iraqi Kurdish areas achieved the right to autonomy in 1991, Iraqi troops totally retreated from the north and the Iraqi Kurdish *peshmarga* forces replaced them. During those periods the PKK established some military camps along the borders between northeastern of Iraq and southeastern of Turkey.[77] During the 1990s, the PKK declared several unilateral ceasefires in the hope of initiating a peace process and withdrew its forces from Turkey to those camps[78] in a gesture of good faith towards Turkey. But Turkey took political and military advantage of the PKK ceasefires and sought to expel the PKK from its territory and fight it outside its borders. Therefore, Turkey started to find political and legal justifications to cross the borders of Iraq.[79]

Turkey carried out its first military operation in 1983 based on the right of hot pursuit.[80] In 1984, it signed a protocol of security with Iraq that allowed the countries to encroach up to five kilometers into each other's territories. Based on that protocol, Turkey waged intensive operations in 1986 and 1987 in Iraq. The protocol ended in 1989 and was not renewed.[81] Since the 1990s, Turkey has been crossing Iraqi borders on the basis of the right to self-defence as provided in international law.[82]

As discussed above, the Turkey-PKK issue is basically an internal case. The source of the threat to Turkey's territorial integrity, political independence and security is its own undemocratic constitution and laws, not an armed attack of another country or an armed group from the territory of another country. Even if Turkey is entitled to the right of self-defence against the PKK within its borders, what about the rights of Kurdish people? The right to self-defence does not justify Turkey's policy of denying the Kurds, nor does it prevail over the right to self-determination. The reason for that is international law does not support human rights violations under any circumstances.

The PKK might have existed in Iraq and had camps along the Iraq-Iran borders but it was within a specific timeframe or as a precondition of the Turkish governments

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75 *See* the UN Security Council Resolution No. 688 (May 11, 2016), available at: http://www.casi.org.uk/info/undocs/scres/1991/688e.pdf.

76 *Id*.

77 Keskin 2008, 60–62.

78 *Chronology of the Important Events in the World/PKK Chronology (1976–2006)*, Turkish Weekly, May 27, 2007 (May 12, 2016), available at: http://www.turkishweekly.net/2007/05/27/article/chronology-of-the-important-events-in-the-world-pkk-chronology-1976-2006/.

79 Keskin 2008, 62.

80 *Id*. at 64.

81 *Id*. at 63.

82 *Id*. at 67.

to start a resolution process.[83] Moreover, the organizational system of the group is no longer based on its classical understanding of the political campaign and rights of the Kurds. The group has changed its strategy from establishing a united state to local democratic self-governance for the Kurds in the Middle East.[84] There are some other political and military groups that are close to the PKK historically, ideologically and even in military uniform, but Turkey is not the object of their struggle and thus they don't offer any threat or aggression to Turkey. These groups are *Partiya Jiyana Azada Kurdistanê* (PJAK) (the Party for a Free Life in Kurdistan), which is a political and armed group that strives for the rights and freedoms of Kurds in Iran[85] and *Partî Çareserî Dîmukratî Kurdistan*) PÇDK, The Kurdistan Democratic Solution Party) which is a legal and civil party in Iraq.[86] The case is almost the same as the Syrian Kurdish party *Partiya Yekîtiya Demokrat* (PYD) (Democratic Union Party) and its military wing, the People's Protection Units (YPG).[87] Although the party is in the U.S led Coalition in fighting against the Islamic State in Iraq and Syria,[88] Turkey still considers it a terrorist group due to its close affiliation to the PKK.[89] The PYD, contrary to all other sides in the conflict, has established a democratic autonomous structure within the hard times of war and intends to have a strong relationship with Turkey as a neighbour[90] but Turkey always bombards the YPG bases under the justification of state security[91] and insists that it will never allow the creation of a self-ruling Kurdish state on its

83 International Crisis Group, *Turkey and the PKK: Saving the Peace Process*, Europe Report No. 234 (Brussels, 2014), at 5.

84 Ocalan 2011, 26–31.

85 Thomas Renard, *PJAK in Northern Iraq: Tangled Interests and Proxy Wars*, 6(10) Terrorism Monitor (2008), also available at: http://www.thomasrenard.eu/uploads/6/3/5/8/6358199/jamestown7.pdf.

86 Arkan Ali, *Some Political Parties in Iraqi Kurdistan Still Await Licenses*, Rudaw, May 29, 2013 (May 14, 2016), available at: http://rudaw.net/english/kurdistan/290520132.

87 *Different Views on PYD Won't Harm US-Turkey Relations, Says Turkish PM*, Rudaw, March 30, 2016 (May 20, 2016), available at: http://rudaw.net/mobile/english/middleeast/turkey/300320162?ctl00_phMainContainer_phMain_ControlComments1_gvCommentsChangePage=2_50.

88 Cale Salih, *Turkey, the Kurds, and the Fight against Islamic State*, European Council on Foreign Relations (September 2015), at p. 1 (Nov. 10, 2016), available at http://www.ecfr.eu/page/-/Turkey-theKurds-Islamic State.pdf.

89 Oral Calislar, *Why does Turkey Say PYD is More Dangerous than IS*, Al Monitor, July 22, 2015 (May 21, 2016), available at: http://www.al-monitor.com/pulse/security/2015/06/turkey-syria-pyd-more-dangerous-isis.html.

90 Verda Özer, *A Conversation with Salih Muslim*, Daily News, December 13, 2014 (May 21, 2016), available at: http://www.hurriyetdailynews.com/a-conversation-with-salih-muslim.aspx?PageID=238&NID=75570&NewsCatID=466.

91 *Turkish PM Confirms Shelling of Kurdish Forces in Syria*, The Guardian, February 13, 2016 (May 21, 2016), available at: https://www.theguardian.com/world/2016/feb/13/turkey-shells-kurdish-forces-in-syria-in-retaliation-for-attack-on-border-posts; *Turkish Strikes on Syrian Kurdish Areas Leave 40 Civilians Dead: Monitor*, EKurd Daily, August 28, 2016 (September 20, 2016), available at: http://ekurd.net/turkish-strikes-syrian-kurdish-2016-08-28.

borders.[92] While the PKK attacks Turkey inside Turkey, these groups pose no threat of armed attack to the country and thus there is no necessity precondition for Turkey to attack them. Since there is no necessity to prevent or stop any armed attack, there can be no proportionality either.

The PKK is neither a *de facto* Iraqi organ, nor has it been harboured, tolerated or supported by the Iraqi government. Thus, Iraq is not responsible for the PKK attacks.[93] Therefore, Turkey must, at least, ask Iraqi consent before bombarding the PJAK and PCDKs' positions.[94] Moreover, Turkey has targeted Iraqi civilians and civilian objects. It has caused the destruction of many houses and displacement of thousands of people in the north of Iraq. It has attacked the environmental and economic infrastructure of the Kurdistan region of Iraq.[95]

It is no more logical to discuss the Turkey-PKK case within the frame of state sovereignty, territorial integrity, or political unity and security, since the rights of minorities, especially ethnic minority, are now guaranteed under international law.[96] If international law allows states to preserve their territorial integrity, it also requires them to respect and promote minority group rights.[97] If international law condemns the PKK for its violence, it also condemns Turkey for violating minority rights. If self-defence is Turkey's right, self-determination, at least in an internal context, is the right of the Kurds. The solution of the Turkey-PKK issue does not lie in crossing Iraq's borders; it lies in returning to peaceful negotiations to bring the Turkish constitution into compliance with international laws governing minority rights and disarm the PKK. Since Turkey is not faced with any PKK armed attack from Iraq and the attack is directed from the inside, there is no necessity for Turkey to conduct military operations in Iraq. Therefore, Turkey is not entitled to use force within the borders

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92 Wyre Davies, *Crisis in Syria Emboldens Country's Kurds*, BBC News, July 28, 2012 (September 23, 2016), available at: http://www.bbc.com/news/world-middle-east-19021766.

93 Responsibility of States for Internationally Wrongful Acts, *supra* note 35, Art. 8.

94 Mariam Karouny, *Iraq Protests Turkish Incursion into Northern Iraq*, Routers, February 22, 2008 (Sept. 23, 2016), available at: http://www.reuters.com/article/us-iraq-turkey-idUSL2281538020080222; *Iraqi Kurds Condemn Turkey Incursion, Call for Troops Withdrawal*, Xinhua, February 23, 2008 (Sept. 24, 2016), available at: http://news.xinhuanet.com/english/2008-02/23/content_7655337.htm; *Iraq Condemns Turkey for Bombing in an Iraqi Northern Village*, South Front, February 5, 2016 (Sept. 24, 2016), available at https://southfront.org/iraq-condemns-turkey-for-bombing-in-an-iraqi-of-northern-village/.

95 *Iran/Turkey: Recent Attacks on Civilians in Iraqi Kurdistan*, Human Rights Watch, December 20, 2011 (Sept. 24, 2016), available at: https://www.hrw.org/news/2011/12/20/iran/turkey-recent-attacks-civilians-iraqi-kurdistan.

96 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, General Assembly Resolution, A/RES/47/135, December 18, 1992.

97 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly Resolution, A/RES/25/2625, October 24, 1970, para. 7 of the principle of equal rights and self-determination of peoples.

of Iraq under the justification of self-defence under Article 51. Moreover, it has a legal obligation under article (2/4) to refrain from the threat or use of force against Iraq.

9. Conclusion

The right to self-defence has long roots in international law. It can be traced back to the ancient concepts of the defensive use of force and "just wars" of ancient Greece and Rome; the modern basis of the right stems from the Caroline case between the British and U.S. governments in 1837. During negotiations on the adoption of the UN Charter, the right to self-defence was placed in Article 51. The customary understanding of the right includes the use of force both in anticipation of and response to an actual armed attack. The conventional concept of this right leaves space for interpretation. While some scholars confine the exercise of the right only to a response to an actual armed attack, others broaden the scope of the right to entail preemptive self-defence as well. That second view seems to be more logical due to custom, which is another reliable source of international law that the UN Charter has, in this instance, merely codified without exhausting. The right to self-defence is regarded an inherent right to which every state is entitled. The right, however, encompasses the use of force against any armed attack against the sovereignty and security of a state; it is to be exercised within the boundaries of agreed conditions as such necessity, proportionality, immediacy and reporting any measures taken to the Security Council.

The Turkey-Kurdish issue originally stemmed from the invasion of the historical homeland of the Kurds and the denial of their distinct ethnicity. However, it later became a legal issue related to minority rights. The Kurds have a historical link to where they live, a shared history and distinct language and culture within Turkey. Thus, they qualify as a people. Despite making many peaceful attempts to achieve their rights, Turkey left no alternative other than the formation of the PKK in 1978. As soon as the PKK started to demand self-determination, Turkey labelled it a terrorist group and invoked the right to self-defence. During the 1980s and 1990s, the PKK established some camps in Iraq as a strategic step towards resolving the Kurdish issue in the other Middle Eastern countries. It also used the camps as a safe retreat for its forces during peace negotiations with Turkey, as a condition of Turkish governments. But Turkey sought to attack the PKK outside of its borders and attacked the camps under the justification of self-defence even though the PKK attacks Turkey only from within its borders. Some PKK-affiliated groups exist in the northern region of Iraq, but they strive for the Kurds in other countries and they pose no threat of armed attack to Turkey. Thus, there is no necessity for Turkey to cross Iraq's borders and attack them. Since Turkey's circumstances do not meet the precondition of necessity in its military operations, there can be no proportionality either. Therefore, Turkey is not entitled to cross Iraq's borders using Article 51 as a justification. Moreover, it is bound by article (2/4) to refrain from any threat or use of force against Iraq.

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COMMENTS

BUSINESS TRANSACTION INVALIDITY IN THE CONTEXT OF THE PRINCIPLE OF LEGALITY

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DOI: 10.17589/2309-8678-2016-4-4-81-94

This paper explores business transactions in the context of the principle of legality. It will be argued that Article 168 of the Russian Civil Code, as a metarule, contains three types of rule: 1) rules dealing with the priority of special rules and exceptions (exclusive rules); 2) rules dealing with the interpretation of general, special and exclusive rules, as well as with the requirements of statutes or other legal acts violated by a transaction and established outside of Article 168 of the Civil Code; 3) rules dealing with the admissibility of special rules and exceptions, as well as with the conditions of admissibility of these rules.

With regard to the first group of rules, the legislature and commercial courts consider Article 168 of the Civil Code a common base for other grounds in the Civil Code, and in certain other statutes, for declaring transactions invalid. According to the second group of rules, the subject-matter (object) of legal interpretation consists of two elements: a) the text of Article 168 of the Civil Code; and b) the texts of legal acts, described by the generic term "statute or other legal act." Article 168 of the Civil Code provides instructions, not only for rules as objects of application of the article, but also for the methods of interpreting violated requirements. The rules of admissibility for special rules and exceptions, as well as the conditions of admissibility for these standards, are aimed at the numerous cases in which the legislature, in the Civil Code or in other legal acts, expressly establishes nullity (voidness), voidability and other legal consequences for illegal transactions. The paper also answers questions regarding the impact of recent amendments to the Russian Civil Code on the use, by commercial courts, of rules on business transaction invalidity.

Keywords: business transactions; entrepreneurial activities; general, special and exclusive rules; invalidity (nullity or voidness, voidability) and other legal consequences of illegal transactions; the principle of legality; sanctions; statutes or other legal acts.

Recommended citation: Konstantin Totyev, *Business Transaction Invalidity in the Context of the Principle of Legality*, 4(4) Russian Law Journal 81–94 (2016).

1. Introduction

In Russian judicial practice and doctrine, the invalidity of illegal transactions of business entities (entrepreneurs) is usually considered in terms of the application of the grounds of invalidity to particular transactions.

The problems related to the actual grounds for, and the subject and the normative role of the rules governing, the invalidity of transactions in the Russian legal system are not less important, however. These questions take on special significance in connection with recent amendments to Article 168 of the Civil Code adopted in May 2013 (Federal law No. 100-FZ of May 7, 2013 "On Amendments to Subsections 4 and 5 of Section I of Part 1 and Article 1153 of Part 3 of the Civil Code of the Russian Federation")[1] and with the emergence of instructions from the Supreme Court of the Russian Federation approved in June 2015. What impact do these amendments have on the use of the rules on the invalidity of business transactions in commercial courts? The current paper examines recent Russian judicial practice and relevant foreign legal materials in order to suggest answers to these and other closely-related legal questions.

2. Two Approaches to Invalidity of Transactions and Their Respective Features

Traditionally, Russian and foreign debates about the invalidity (nullity, voidability) of illegal transactions of entrepreneurs boil down to one of two possible approaches. Supporters of the first approach view invalidation of an illegal transaction as a way to protect violated rights or as a sanction for violation of the duties to discourage violations.[2] Jurisprudence identifies three types of sanction: 1) punitive (focused on a person held responsible); 2) reparative or corrective (taking into account the interests of those for whose benefit responsibility is assigned); 3) preventive (orders prohibiting future illegal conduct).[3]

Establishing the invalidity (nullity, voidability) of a transaction as a sanction relates to the last two types of legal consequence for violations of legal rules, since these consequences involve the interests of those for whose benefit a transaction

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[1] Собрание законодательства РФ, 2013, № 19, ст. 2327 [Legislation Bulletin of the Russian Federation, 2013, No. 19, Art. 2327].

[2] *See* Herbert L.A. Hart, *The Concept of Law* 33 (Oxford: Clarendon Press, 1994); Peter Bydlinski, *Bürgerliches Recht. Bd. I* 132 (Wien: Springer, 2005); Claus-Wilhelm Canaris, *Gesetzliches Verbot und Rechtsgeschäft* 17 (Heidelberg: C.F. Müller, 1983); Gérard Cornu, *Vocabulaire juridique* 599 (Paris: PUF, 2003); Bertrand Fages, *Droit des obligations* 179 (Paris: LGDJ, 2007); Stéphane Mail-Fouilleul, *Les sanctions de la violation du droit communautaire de la concurrence* 135–158 (Paris: LGDJ, 2002); Hans-Martin Pawlowski, *Zum Umfang der Nichtigkeit bei Verstößen gegen "offentlich-rechtliche" Verbotsgesetze*, 21 Juristenzeitung 696 (1966).

[3] Peter Cane, *Responsibility in Law and Morality* 43 (Oxford: Hart Publishing, 2002).

is declared invalid. For example, the function of Paragraph 134 of the German Civil Code (Bürgerliches Gesetzbuch or BGB)[4] is considered a preventive measure against the performance and mutual execution of an illegal transaction by its parties.[5] The Russian legislature also provides arguments in favor of this approach to invalidating transactions. The term "consequences of violation" used in Article 168 of the Civil Code, for example, shows that the legislature considers invalidation of transactions to be a form of sanction.

Furthermore, on the basis of Paragraph 6 of Article 3 of Federal law "On Amendments to Subsections 4 and 5 of Section I of Part 1 and Article 1153 of Part 3 of the Civil Code of the Russian Federation" more recent provisions of the Civil Code concerning the grounds and the legal consequences of invalidity of transactions (Articles 166–176 and 178–181 of the Civil Code of the Russian Federation) can only be applied to transactions conducted after the date the statute came into effect (Federal law "On Amendments to Subsections 4 and 5 of Section I of Part 1 and Article 1153 of Part 3 of the Civil Code of the Russian Federation" came into effect on September 1, 2013).

Commercial courts have followed this instruction by only applying the new version of Article 168 of the Civil Code to transactions concluded after the date on which it entered into force.[6] The legislature's position and judicial practice have both been determined by observation of the general legal principle of the non-retroactivity of statutes that establish or aggravate responsibility: "a statute introducing or aggravating responsibility shall not have a retrospective effect" (Part 1 of Article 54 of the Constitution of the Russian Federation, Paragraph 5 of Resolution of the Constitutional Court of the Russian Federation No. 20-P of July 20, 2011,[7] Paragraph 1 of Article 4 and Paragraph 1 of Article 422 of the Civil Code). According to this constitutional principle, when enacting new legal rules, the legislature is not allowed "to give retroactive effect to new regulations where doing so would have a negative impact upon the legal status of individuals or restrict their subjective rights that already exist in specific legal relationships" (Paragraph 5 of Resolution of the Constitutional Court of the Russian Federation No. 20-P of July 20, 2011).

Proponents of the second approach argue that invalidating transactions limits the freedom of economic activity (private autonomy, freedom of contract) and

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4 *Bürgerliches Gesetzbuch* 28 (58th ed., München: DTV, 2006).

5 *See* Canaris 1983, at 17; Thomas Zerres, *Bürgerliches Recht* 63 (Berlin: Springer, 2010).

6 *See* Постановление Федерального арбитражного суда Восточно-Сибирского округа от 12 марта 2015 г. № Ф02-495/2015 [Resolution of the Federal Arbitrazh Court of the East-Siberian District No. F02-495/2015 of March 12, 2015]. Hereinafter, the sources of publications of judicial decisions are the Russian legal database "ConsultantPlus" and the website of commercial courts of the Russian Federation: www.arbitr.ru.

7 Собрание законодательства РФ, 2011, № 33, ст. 4948 [Legislation Bulletin of the Russian Federation, 2011, No. 33, Art. 4948].

is a form of control of the terms of transactions.[8] The basis for this argument in Russian legislation is Article 168 in Chapter 9, "Transactions," of the Civil Code, which defines the terms of fulfillment of actions by citizens and legal entities directed at the establishment, change, or termination of civil-law rights and duties (Article 153 of the Civil Code). The legal capacity to engage in entrepreneurial activities which are not prohibited by statute and to perform any transactions that are not contrary to statute, mentioned in Article 18 of the Civil Code (in connection with the legal capacity of citizens), complements this argument.

Despite significant differences, these two approaches possess two important common properties. In both approaches, the rule of invalidity (nullity, voidness) of illegal transactions is considered a legal rule for certain regulated behavior, and the invalidity itself and the restitution related to it are legal consequences of application of the rule in a specific instance.

3. An Alternative Approach and Its Advantages

An alternative approach to Article 168 of the Civil Code has its basis in Paragraph 2.1 of Ruling of the Constitutional Court of the Russian Federation No. 948-O-O of July 15, 2010.[9] In this ruling, Article 168 of the Civil Code was used to develop the rule formulated in Part 2 of Article 15 of the Constitution of the Russian Federation on the duty of citizens and their associations to observe the Constitution and statutes (they "…shall be obliged to observe the Constitution of the Russian Federation and statutes"). Although this conclusion was reached by the Constitutional Court on the basis of the previous version of Article 168 of the Civil Code, it is largely applicable to the article's current formulation, as will be shown later. Therefore, the Constitutional Court places Article 168 of the Civil Code in the context of the constitutional principle of legality (which states that the bodies of state authority, the bodies of local self-government, officials, private citizens and their associations shall be obliged to observe the Constitution and statutes).

This principle is set out in Paragraph 2.2 of Resolution of the Constitutional Court No. 8-P of April 4, 2002[10] and Paragraph 2 of Resolution of the Constitutional Court

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[8] *See* Karl Larenz, Manfred Wolf, *Allgemeiner Teil des Bürgerlichen Rechts* 630, 723 (München: C.H. Beck, 2004); Dieter Medicus, *Allgemeiner Teil des BGB* 192 (Heidelberg: C.F. Müller, 2006); Hart 1994, at 34–35; Jean-Bernard Blaise, *Droit des affaires: commerçants, concurrence, distribution* 548–551 (4th ed., Paris: LGDJ, 2007); Judit Rochfeld, *Les grandes notions du droit privé* 438–447 (Paris: PUF, 2011); Синайский В.И. Русское гражданское право 167 [Vasily I. Sinaiskii, *Russian Civil Law* 167] (Moscow, 2002).

[9] An official publication is on the website of the Constitutional Court of the Russian Federation (Nov. 23, 2016), available at http://doc.ksrf.ru/decision/KSRFDecision41347.pdf.

[10] Собрание законодательства РФ, 2002, № 15, ст. 1497 [Legislation Bulletin of the Russian Federation, 2002, No. 15, Art. 1497].

No. 6-P of March 31, 2015,[11] in which Part 2 of Article 15 of the Constitution is cited in connection with the legal force of rules and the grounds for (and the consequences of) their inclusion in the legal system of the Russian Federation. It is no accident that the Constitutional Court used the abovementioned constitutional provisions (see, for example, Paragraph 6 of Resolution of the Constitutional Court No. 2-P of February 17, 2015)[12] in conjunction with Part 2 of Article 1, Part 1 of Article 11, as well as Articles 2, 10 and 18 of the Constitution, which establish the evaluation criterion, as well as the procedure for promulgation and application of legal norms. A similar approach to the content of Part 2 of Article 15 of the Constitution can be found in decisions of commercial courts. According to one commercial court's decision,[13] Part 2 of Article 15 of the Constitution should be considered a general legal principle, according to which the duty of economic entities to observe the public law requirements of economic legislation is established.

As a result, Article 168 of the Civil Code serves in the context of the constitutional principle of legality not so much as a standard for assessing entrepreneurial behavior as a rule on other legal norms. What rules are established and applied on the basis of a narrow understanding of Article 168 of the Civil Code? The analysis of the current practice of Russian commercial courts justifying their decisions with reference to Article 168 of the Civil Code corroborates the hypothesis that the three most important groups of such rules include: 1) rules governing the priority of special rules and exceptions (exclusive rules); 2) rules governing the interpretation of general, special and exclusive rules, as well as the requirements of statutes or other legal acts violated by a transaction and established outside of Article 168 of the Civil Code; 3) rules governing the admissibility of special rules and exceptions, as well as the conditions of admissibility of these rules. Let us consider each of these groups in more detail.

With regard to the first group of rules, Russian commercial courts universally recognize the existence of a general rule on the voidability of a transaction (in Paragraph 1 of Article 168 of the Civil Code)[14] that violates the requirements of a statute or other legal act, and often treat Paragraph 2 of Article 168 of the Civil Code as an exception to the general rule on the voidability of such transactions (Paragraph 1 of Article 168 of the Civil Code). Moreover, analysis of the place of Article 168 of the Civil Code in the

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[11] Собрание законодательства РФ, 2015, № 15, ст. 2301 [Legislation Bulletin of the Russian Federation, 2015, No. 15, Art. 2301].

[12] Собрание законодательства РФ, 2015, № 9, ст. 1389 [Legislation Bulletin of the Russian Federation, 2015, No. 9, Art. 1389].

[13] Постановление Двенадцатого арбитражного апелляционного суда от 28 мая 2013 г. № А06-27/2013 [Resolution of the Twelfth Arbitrazh Court of Appeal No. A06-27/2013 of May 28, 2013].

[14] *See* Paragraph 73 of Resolution of the Plenum of the Supreme Court of the Russian Federation No. 25 of June 23, 2015 "On Application by the Courts of Certain Provisions of Section I of Part 1 of the Civil Code of the Russian Federation" (Бюллетень Верховного Суда РФ, 2015, № 8 [Bulletin of the Supreme Court of the Russian Federation, 2015, No. 8]).

structure of Chapter 9 of the Civil Code and Paragraph 1 of Article 431-1 of the Civil Code confirms that the legislature and the commercial courts consider Article 168 of the Civil Code to be a general rule in relation to other articles which establish the invalidity of transactions, especially Articles 170, 173, 173-1 and 174 of the Civil Code, as well as certain statutes.[15] Some of these articles of the Civil Code establish an internal structure of relations between general, special and exclusive rules.

The general rule in Paragraph 1 of Article 168 of the Civil Code describes the conditions of voidability of illegal transactions ("a transaction that violates the requirements of a statute or other legal act is voidable..."). The special rule in Paragraph 2 of Article 168 of the Civil Code establishes the nullity of a transaction which not only violates the requirements of a statute or other legal act, but also encroaches on the public interest or rights and legitimate interests of third parties ("…except in the cases provided for by Paragraph 2 of this Article"). In turn, the exclusive rule allows commercial courts not to exercise the special rule of Article 168 of the Civil Code under certain conditions ("…if it does not follow from a statute that such a transaction is voidable...").

According to current judicial practice,[16] the legal difference between general and special (and exclusive) rules, regardless of whether they are established in Article 168 of the Civil Code, is the priority of the latter over the former. However, the current practice of both the commercial courts and the legislature unreasonably confuses the distinct legal concepts of special rules and exceptional (exclusive) rules.

4. Rules of Interpretation

According to the second group of rules which govern legal interpretation, the subject of interpretation consists of two elements – the text of Article 168 of the Civil Code, and the texts of other legal acts, described by the generic term "statute or other legal act" (the term "statute" is also used in the special and exclusive rules of Article 168 of the Civil Code). Similar terminology was present in the previous version of Article 168 of the Civil Code, allowing partial use of judicial precedents. Paragraphs 1, 2 of Article 2 and Paragraphs 2–6 of Article 3 of the Civil Code are aimed at establishing a proper understanding of the composition and the text of external (i.e., with respect to Article 168 of the Civil Code) legal acts in the field of entrepreneurship, as well as at establishing their legal force and normativity. According to these articles of the Civil Code: 1) the concept of statute in the interpretation of judicial practice includes, in addition to the Civil Code, federal statutes adopted in accordance with

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[15] *See* Определение Верховного Суда РФ от 10 апреля 2015 г. № 306-ЕС15-998 [Ruling of the Supreme Court of the Russian Federation No. 306-ES15-998 of April 10, 2015].

[16] *See* Постановление Федерального арбитражного суда Московского округа от 23 июля 2015 г. № Ф05-9286/2015 [Resolution of the Federal Arbitrazh Court of the Moscow District No. F05-9286/2015 of July 23, 2015]

the Civil Code which regulate relations between or involving entrepreneurs; 2) the term "other legal acts" covers decrees of the President of the Russian Federation and regulations of the Government of the Russian Federation.

In view of the above, the role that Paragraph 2 of Article 3 of the Civil Code plays in clarifying the structure of legislative acts can be observed in Paragraph 90 of Resolution of the Plenum of the Supreme Court of the Russian Federation "On Application by the Courts of Certain Provisions of Section I of Part 1 of the Civil Code of the Russian Federation"[17] and in Ruling of the Supreme Court of the Russian Federation No. 33-APG15-13 of July 15, 2015. Therefore, these legislative acts can be identified by direct indications from the legislature that a specific statute is based on the provisions of the Civil Code (for example, according to Part 1 of Article 2 of Federal law No. 44-FZ of April 5, 2013 "On the Contract System in the Procurement of Goods, Works and Services for State and Municipal Needs").[18]

Uncertainty and disagreements over the significance of the term "statute," as it appears in Paragraph 2 of Article 3 of the Civil Code, in relation to Article 168 of the Civil Code have been resolved by the Supreme Court of the Russian Federation in favor of a broader interpretation of the term (Paragraphs 73 and 75 of Resolution of the Plenum of the Supreme Court of the Russian Federation "On Application by the Courts of Certain Provisions of Section I of Part 1 of the Civil Code of the Russian Federation"). This interpretation considers the term "statute" to include the Civil Code of the Russian Federation. On the other hand, in Paragraph 2 of Article 3 of the Civil Code, the legislature does not mention any general legal principles which differ from the principles of civil law explicitly set out in Article 1 of the Civil Code that would contribute to a broader concept of statute. However, the commercial courts still rely on the general principles of law (for example, the principle of legality) not only in connection with Article 169 of the Civil Code (it establishes the grounds for invalidity of a transaction concluded for a purpose contrary to the principles of public order or morality), but also in connection with Article 168 of the Civil Code.

Courts sometimes interpret the term "other legal acts" far more broadly than the literal meaning set out in Paragraph 6 of Article 3 of the Civil Code, e.g., to include the acts of ministries and other federal executive bodies.[19]However, there are examples of judicial practice (developed mainly on the basis of the previous version of Article 168 of the Civil Code) that does not interpret "other legal acts" as also meaning acts of various organs of the subjects of the Russian Federation and local self-governing bodies, as well as acts of ministries and other federal executive bodies, since they are

[17] Бюллетень Верховного Суда РФ, 2015, № 8 [Bulletin of the Supreme Court of the Russian Federation, 2015, No. 8].

[18] Собрание законодательства РФ, 2013, № 14, ст. 1652 [Legislation Bulletin of the Russian Federation, 2013, No. 14, Art. 1652].

[19] *See* Определение Верховного Суда РФ от 13 декабря 2011 г. № 5-В11-116 [Ruling of the Supreme Court of the Russian Federation No. 5-B11-116 of December 13, 2011].

not covered along with charters of business entities by a strict reading of Paragraph 6 of Article 3 of the Civil Code.

Nevertheless, the commercial courts have highlighted a situation in which the provisions of a charter coincide with the requirements of legislation.[20] This can lead to the invalidation of a business transaction due to non-compliance with a statute rather than the charter. The individual legal acts of organs of state authority are, furthermore, not part of other legal acts. In this respect, the Russian legislature and the commercial courts are largely in agreement with foreign practice. For example, in Germany, Paragraph 134 of the German Civil Code does not cover administrative orders directed against procedures for implementing transactions.[21]

The application of Article 168 of the Civil Code of the Russian Federation in interpreting the requirements of statutes or other legal acts, established outside of Article 168 of the Civil Code and violated by an illegal transaction, implies (unlike Article 169 of the Civil Code of the Russian Federation or Paragraph 138 of the German Civil Code) that the content of the violated statute or other legal act should be determined. The requirements of the acts regulated by Article 168 of the Civil Code of the Russian Federation and used by the commercial courts for assessing the legality of transactions depend on the subjects (addressees) of the requirements and the relations regulated by the statutes or other legal acts.

In the field of business transactions assessed by commercial courts in accordance with Articles 1, 2 of the Commercial Procedure Code of the Russian Federation No. 95-FZ of July 24, 2002,[22] categories (composition) of addressees may be identified on the basis of Subparagraph 3 of Paragraph 1 of Article 2, Paragraph 1 of Article 23, Paragraph 1 of Article 50 and Article 153 of the Civil Code, and may include commercial organizations and sole traders. In a number of statutes, the addressees of prohibitions and other requirements are determined with the help of special categories which are different from the standard civil-law concepts of "individual" or "legal entity" (for instance, according to Article 14 of Federal law No. 381-FZ of December 28, 2009 "On the Basic Principles of State Regulation of Trading Activities in the Russian Federation", they include economic entities).[23]

In addition, on the basis of specific instructions from the legislature, the scope of persons to whom certain legal requirements are applied can be further expanded. Relying on Paragraph 3 of Article 23 of the Civil Code, the commercial courts have

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[20] *See* Постановление Федерального арбитражного суда Московского округа от 28 января 2015 г. № Ф05-14162/2014 [Resolution of the Federal Arbitrazh Court of the Moscow District No. F05-14162/2014 of January 28, 2015].

[21] Zerres 2010, at 63.

[22] Собрание законодательства РФ, 2002, № 30, ст. 3012 [Legislation Bulletin of the Russian Federation, 2002, No. 30, Art. 3012].

[23] Собрание законодательства РФ, 2010, № 1, ст. 2 [Legislation Bulletin of the Russian Federation, 2010, No. 1, Art. 2].

also applied the legal requirements for commercial organizations to sole traders (Subparagraph 4 of Paragraph 1 of Article 575 of the Civil Code of the Russian Federation).

In turn, the subject-matter (object) of violated requirements should be related to the transactions. In other words, a transaction should be mentioned in the text of *statutory* requirements as the basis for a legal relationship. For example, a commercial court has refused to apply a statutory prohibition and Article 168 of the Civil Code to a transaction because a certain requirement was related to the charter of a company, not to its transactions. If the issue of invalidity arises from a sham transaction (Paragraph 2 of Article 170 of the Civil Code), the legal requirement, which the parties of a transaction try to bypass, should concern the transaction that the parties actually have in mind, because the actual transaction can be invalidated on the grounds specified in the relevant statute. It should be emphasized that Article 168 of the Civil Code of the Russian Federation allows the possibility of narrowing the scope of legal requirements on the basis of legal exceptions (provided, for example, in Paragraph 11 of Article 21 of Federal law No. 14-FZ of February 8, 1998 "On Limited Liability Companies").[24] Certainly, the legal exceptions must be taken into account in order to recognize a particular transaction as invalid and in order to apply the legal consequences of its invalidity based on Article 167 of the Civil Code of the Russian Federation.

Article 168 of the Civil Code indicates both rules that are the objects of its application, as well as methods of legal interpretation for violated requirements. These methods can be identified by comparing Paragraphs 1, 2 of Article 15 of the Constitution of the Russian Federation and Article 168 of the Civil Code, which expands on the constitutional principle of legality. Therefore, although constitutional provisions require correspondence not only to statutes, but also to the Constitution of the Russian Federation (the constitutional principles), Article 168 of the Civil Code only refers to statutes and other legal acts (Paragraphs 2–6 of Article 3 of the Civil Code). In this way, it gives priority to the legislative intent with respect to the relative normative provision and assumes that it is possible to identify legislative intent on the basis of the literal interpretation of the text of a statute. In turn, jurisprudence argues that the question of legislative intent hinges on "the meaning of words used in a particular context."[25]

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[24] Собрание законодательства РФ, 1998, № 7, ст. 785 [Legislation Bulletin of the Russian Federation, 1998, No. 7, Art. 785].

[25] Rupert Cross, *Statutory Interpretation* 26 (Oxford: Oxford University Press, 2006). *See also* Aharon Barak, *Purposive Interpretation in Law* 97 (Princeton: Princeton University Press, 2005); Ronald Dworkin, *A Matter of Principle* 14, 19 (Harvard: Harvard University Press, 1985); Scott J. Shapiro, *Legality* 304 (Cambridge, MA: Harvard University Press, 2011); Stefan Vogenauer, *Statutory interpretation* in *Elgar Encyclopedia of Comparative Law* 833–835 (J.M. Smits, ed., Cheltenham, UK: Edward Elgar, 2012).

5. The Role of Judicial Practice

For the purposes of interpretation of legal requirements, Russian judicial practice allows use of rules of interpretation contained not only in Article 168 of the Civil Code, but also in decisions of the higher courts (despite the fact that many of these decisions were issued before September 1, 2013, the courts often apply these decisions to the new version of Article 168 of the Civil Code). The rules governing responses to violated requirements are established in two ways. One such way is to indicate the specific paradigmatic cases (examples) related to the relevant concept (composition). Using this method, the scope of the violated requirements may be expanded or reduced. For example, in its Ruling No. 1600-O-O of November 17, 2011, the Constitutional Court of the Russian Federation concluded that it is impossible to apply the prohibition provided in Article 956 of the Civil Code "to cases in which the beneficiary replacement occurs voluntarily by virtue of the norms of Chapter 24 of the Civil Code."[26] Given this restrictive interpretation, the court may reject a petition to recognize a contract as invalid.[27]

Moreover, in Paragraph 9 of Information Letter No. 120 of October 30, 2007 regarding the prohibition on donations from commercial organizations (Subparagraph 4 of Paragraph 1 of Article 575 of the Civil Code), the Presidium of the Higher Commercial Court of the Russian Federation agreed with the court of cassation that the absence of conditions concerning the price of transferred rights (claims) in an agreement regarding assignment of rights "[...] is not itself evidence of the donation of the right."[28] Therefore, the Presidium of the Higher Commercial Court of the Russian Federation defined the external limits of the term "donation" by reference to a situation which is not covered by the legal concept of donation.

An attempt to systematize similar situations, which are important for the interpretation of violated requirements, has been undertaken in Paragraphs 73–76 of Resolution of the Plenum of the Supreme Court of the Russian Federation "On Application by the Courts of Certain Provisions of Section I of Part 1 of the Civil Code of the Russian Federation", as well as in previously adopted decisions of higher courts (for example, in Paragraph 9 of Resolution of the Plenum of the Supreme Court of the Russian Federation No. 10 and Resolution of the Plenum of the Higher Commercial Court of the Russian Federation No. 22 of April 29, 2010 "On Some Issues Arising in Judicial Practice while Litigating the Controversies Relating to the Protection of Property Rights").

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[26] Official publication is on the website of the Constitutional Court of the Russian Federation (Nov. 23, 2016), available at http://doc.ksrf.ru/decision/KSRFDecision82434.pdf.

[27] Постановление Федерального арбитражного суда Московского округа от 25 февраля 2015 г. № Ф05-16038/2015 [Resolution of the Federal Arbitrazh Court of the Moscow District No. F05-16038/2015 of February 25, 2015]

[28] Вестник ВАС РФ, 2008, № 1 [Bulletin of the Higher Commercial Court of the Russian Federation, 2008, No. 1].

Another way to establish the rules of interpretation of the violated requirements used in decisions of higher courts is connected with the elaboration of the common features of the interpreted concept contained in the text of the legal rule. For example, the commercial courts,[29] taking into account Paragraph 75 of Resolution of the Plenum of the Supreme Court of the Russian Federation "On Application by the Courts of Certain Provisions of Section I of Part 1 of the Civil Code of the Russian Federation," ascertained the nullity of a transaction (for example, in connection with infringement of the public interest) which violates a clearly expressed legal prohibition (explicit prohibition).

As indicated in Paragraph 2 of Resolution of the Plenum of the Higher Commercial Court of the Russian Federation No. 16 of March 14, 2014 "On Freedom of Contract and Its Limits"[30] the clearly expressed legal prohibition (explicit prohibition) on parties to an agreement establishing terms which differ from those envisaged by the law has force if the explicit prohibition is unequivocally expressed in the text of the rule (for instance, if there is a direct reference to the nullity, illegality or inadmissibility of an agreement, as in Article 928 of the Civil Code). But this prohibition allows teleologically restrictive interpretations of a statute. Therefore, a discrepancy between a transaction and (i) the requirements of legislation or (ii) the rights of a public entity bound to serve the public interest does not automatically void such transaction (Paragraph 75 of Resolution of the Plenum of Supreme Court of the Russian Federation "On Application by the Courts of Certain Provisions of Section I of Part 1 of the Civil Code of the Russian Federation" and Paragraph 4 of Resolution of the Plenum of the Higher Commercial Court of the Russian Federation "On Freedom of Contract and Its Limits").

Finally, rules governing the admissibility of special rules and exceptions, as well as the conditions of admissibility of these standards, constitute the third group of rules in Article 168 of the Civil Code. This group is aimed not only at the numerous cases in which the legislature, by means of the Civil Code or in other legal acts, expressly establishes nullity (for example, Paragraph 3 of Article 1007, Paragraph 1 of Article 1028, Paragraph 2 of Article 1033 of the Civil Code and Article 122 of the Inland Water Transport Code of the Russian Federation No. 24-FZ of March 7, 2001),[31] voidability (especially the rules established in Paragraphs 1, 2 of Article 449 of the Civil Code and Paragraph 4 of Article 17 of Federal law No. 135-FZ of July 26, 2006 "On Protection of Competition," and considered by the commercial courts as special

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[29] *See* Постановление Федерального арбитражного суда Северо-Западного округа от 9 сентября 2015 г. № Ф05-16038/2015 [Resolution of the Federal Arbitrazh Court of the Northwestern District No. F05-16038/2015 of September 9, 2015].

[30] Вестник ВАС РФ, 2014, № 5 [Bulletin of the Higher Commercial Court of the Russian Federation, 2014, No. 5].

[31] Собрание законодательства РФ, 2001, № 11, ст. 1001 [Legislation Bulletin of the Russian Federation, 2001, No. 11, Art. 1001].

rules with respect to Paragraph 2 of Article 168 of the Civil Code)[32] or other legal consequences (for example, Paragraph 4 of Article 23 or Paragraph 2 of Article 431-1 of the Civil Code) for illegal transactions in general or for particular terms which arise in these transactions. The fact is that Article 168 of the Civil Code and Paragraphs 2–4 of Resolution of the Plenum of the Higher Commercial Court of the Russian Federation "On Freedom of Contract and Its Limits" require that the commercial courts determining the legal consequences of illegal transactions take into account and assess the legislature's position regarding the intent (*purpose)* of the rule that protects certain categories of legal entity.

The purpose of the protection of violated rules is also taken into account in German and Austrian law,[33] in which the absence of direct legislative establishment of nullity leads to a need to determine whether nullification complies with the sense (purpose) of extant statutes. The purpose of extant statutes can be formulated with the help of the clearly expressed legal prohibition (explicit prohibition) that, according to Paragraph 75 of Resolution of the Plenum of Supreme Court of the Russian Federation "On Application by the Courts of Certain Provisions of Section I of Part 1 of the Civil Code of the Russian Federation", allows the courts to apply Paragraph 2 of Article 168 of the Civil Code of the Russian Federation even if there is no direct indication of nullity (as appears in Article 383 of the Civil Code of the Russian Federation). However, the commercial courts often pay attention only to the legislator's silence concerning the consequences of an illegal transaction, and do not sufficiently analyze violated requirements and their purposes (in these cases, applying the general rule of voidability of a transaction).

6. Conclusion

Considered in the context of the constitutional principle of legality, the new version of Article 168 of the Civil Code of the Russian Federation not only regulates the behavior of entrepreneurs and other private legal entities, but also acts as a rule for legal rules (in other words, as a metarule). In this sense, Article 168 of the Civil Code corresponds to its foreign equivalents. The general, special and exclusive rules, as well as the violated requirements of economic legislation, are the object of the Civil Code standards established in Article 168. In turn, the content of the metarule includes rules of priority, interpretation and admissibility, which are formed not only by the legislature, but also, to a large extent, by the courts.

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[32] Собрание законодательства РФ, 2006, № 31 (ч. 1), ст. 3434 [Legislation Bulletin of the Russian Federation, 2006, No. 31 (part 1), Art. 3434].

[33] *See* Werner Flume, *Allgemeiner Teil des Bürgerlichen Rechts* 341 (Berlin; Heidelberg: Springer, 1979); Burkhard Boemke, Bernhard Ulrici, *BGB Allgemeiner Teil* 184 (Heidelberg: Springer, 2009); Bydlinski 2005, at 119, 132.

Judicial practice is only beginning to take the new version of Article 168 of the Civil Code of the Russian Federation into account. However, it is already clear that Article 168 contains contradictions which open up new horizons in the field of modernization of the legal content of Article 168 of the Civil Code and the legal rules related to the article as a means of implementing the constitutional principle of legality.

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Acknowledgments

The article was drafted under the Academic Fund Program at National Research University Higher School of Economics (HSE) in 2015–2016 (Grant No. 15-01-0034) and supported by a subsidy granted to the HSE by the Government of the Russian Federation for the implementation of the Global Competitiveness Program.

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THE EURASIAN MODEL OF INTERNATIONAL LABOUR LEGISLATION IN THE CONTEXT OF GLOBALIZATION

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DOI: 10.17589/2309-8678-2016-4-4-95-111

The current article seeks to provide a comparative legal analysis of the Eurasian model of international labor legislation. It explores the multi-layered nature of contemporary international labor law in the context of globalization and regionalization, emphasizing the growing importance of cross-border legal labor standards in regional structures in the early 21st century and defines how global and regional cross-border legislation is incorporated on the basis of in favorem. The authors propose their own original concept of international labor legislation, based on the four characteristics: 1) The overall aim of legal regulation; 2) The extent of integration within those regulations; 3) Sources of labor law and their characteristics; 4) Systems of international control over labor rights. To define an original model for the legal regulation of labor, the authors investigate case studies of labour legal regulation in inter-state regional organizations including the European Union, the Council of Europe and ASEAN. The authors' theoretical model identifies the defining features of Eurasia's model of labor regulation. The research also follows the establishment and development of Eurasian labor law and attempts to give an informed judgment about its future path. In their conclusions, the authors assert that modern Eurasian labor law is a 'live law', still under development as it incorporates the non-uniform integration between the former Soviet Republics. Two primary trends leading regional co-operation in the labor market are identified: 1) A social model, implementing international labor rights across Eurasia; 2) An economic model, built on the free movement of labor in a common market. In today's environment, the Commonwealth of Independent States goes some way toward representing the first trend through its attempts to serve as an international coordinating organization. The second trend is supported by supranational organizations promoting international

integration, emphasizing the economic priorities of a common labor market (in this case, the EAEC) above social policy. The authors believe that, in the long term, Eurasian labor law at a supranational level should be developed via the EAEC to ensure a good balance between these social and economic models. This would include integration standards adopted in accordance with international labor rights, and the best practices of national labor legislation of its member states.

Keywords: Eurasian model of international labor legislation; international labor rights; Eurasian integration.

Recommended citation: Andrey Lushnikov & Marina Lushnikova, *The Eurasian Model of International Labour Legislation in the Context of Globalization*, 4(4) Russian Law Journal 95–111 (2016).

1. Introduction

At the turn of the 21st century, international labor law became multi-faceted. Europe is now united (the European Union), and the Commonwealth of Independent States (CIS) emerged from the countries of the former Soviet Union. Other inter-regional and regional associations such as the Association of South-East Asian Nations (ASEAN) and the African Union (AU) also appeared. Today's international labor law is shaped by universal international norms as well as regional and inter-regional cross-border labor standards. International law experts have noted that modern conditions promote further cross-border legislation in many regions of the world. Some authors go still further, claiming that further global developments are impossible and that regional legislation will lead the way.[1] The bright prospects for further regional integration stem from the common interests – both social and economic – that inspired the creation of these cross-border regional organizations. It is no coincidence that the very first effective mechanisms to protect human rights were developed by the Council of Europe, a **regional** international organization. On November 4, 1950, the Council of Europe adopted the European Convention on Human Rights, ratifying the creation of the European Commission on Human Rights and the European Court of Human Rights.

However, this kind of socio-legal world view must be balanced and holistic. Clearly, international labor law cannot be defined as a simple "one size fits all" range of international norms adopted by international organizations. The regional model aims to combine universal norms with regional standards in international labor

[1] Manfred Weiss, *The Future of Workers' Participation in the EU* in *The Future of Labour Law. Liber Amicorum Bob Hepple QC* 229 (C. Barnard et al., eds., Oxford: Hart Publishing, 2004).

law, but it cannot escape the interaction and impact of international legislation on a regional level.

Thus, there are many cases where states have ratified the international treaties and conventions of the International Labor Organization while also accepting the rules of regional organizations. It is unreasonable to claim that ILO conventions carry greater legal force than, for example, those of the Council of Europe Convention on the Protection of Human Rights and Freedoms in any state that has ratified both. When there is a divergence between those conventions, the logical resolution is to apply the convention that offers greater protection for social and labor rights. In reality, though, these conflicts are sometimes resolved according to other principles, such as *lex posterior derogat prio* or *lex specialis derogat generali*.

We believe that one feature of the sources of international labor law is a specific protection against any erosion of employees' social and labor rights. For instance, the ILO Constitution endorses this very principle when combing international standards and national legislation. The ILO's international norms are regarded as minimum standards for employment rights and social security and cannot be used to erode conditions for employees and entrepreneurs. The ILO Constitution (Article 19, item 8) states that in countries with higher standards, the adoption or ratification of any convention or recommendation shall in no case "be regarded as affecting any law, court judgment, award, custom or agreement which ensures that the interested workers have more favorable conditions than those prescribed by a convention or recommendation."

This principle of prohibiting the erosion of social and labor rights already has the necessary foundations to be implemented within international legal regulation (universal, inter-regional or regional). However, the implementation of this principle remains open as different international organizations adopted these legal instruments at their own pace. Any one state could potentially be a member of several international associations, each of which has its own models for labor rights and social security.

In our opinion, these different levels of international labor regulation can be harmonized in line with a "collision principle" that explicitly prohibits the erosion of social and labor rights. Unlike national law, which has a unified hierarchy of sources, international law derives from several parallel hierarchies united on a common vertex of mandatory universal norms based on the above-mentioned "collision principle."

2. On the Concept of an International Legal Model or Labor Regulation

As noted above, international labor legislation can be adopted by global international organizations (UN, ILO and others) and international, inter-regional, and regional organizations. However, each has its own established models. We shall

outline the theoretical foundations that define the basic attributes of the legal model for international labor regulation.

We believe that the model should reflect the following:

1) the main purpose of legal regulation;

2) the degree of integration in labor regulation;

3) the nature of labor law sources;

4) international controls and systems to protect labor rights.

Using specific examples, we shall illustrate our proposed approach to defining an idealized legal model of labor regulation, since the actual models of labor regulation in today's international organizations are often mixed and transitional.

In respect of the main purpose of labor regulation, international models can be divided into either economic or social. Social models aim to establish international standards for labor rights and control compliance with those standards. The International Labor Organization's model of international regulation can be seen as the most striking example.

Economic models look to promote economic co-operation by establishing free markets for goods, services and capital. This is underpinned by a free labor market. We believe that the Eurasian Economic Union is an example of this model. In international labor regulation, economic and social purposes may be combined. Thus, while the European Union (EU) initially sought economic integration, subsequent, more coordinated policies prompted more attention to social issues. Western researchers point out that economic integration has made greater progress than social integration, while foreign policy, defense and other areas lag behind.[2] The current model combines economic aims (a free market for common labor) with social goals (a human rights model), and researchers emphasize the varied and comprehensive nature of European integration ideas.[3]

Two models of international labor regulation – coordination and integration – dominate the degree of legal integration (the second criterion above). Under the coordination model, regulatory mechanisms follow a consensus approach to decisions. This can include informal consultation, and respects the sovereignty of member states. ASEAN's members adopted this model, based on the "Asian Path" to regional co-operation[4]. In South America's Mercosur bloc,[5] international labor regulation is related to the activity of two advisory conciliatory agencies: Work Sub

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[2] *The State of the European Union. Making History: European Integration and Institutional Change at Fifty* (S. Meunier & K. McNamara, eds., Oxford: Oxford University Press, 2007).

[3] Марченко М.Н., Дерябина Е.М. Правовая система Европейского союза: Монография [Mikhail N. Marchenko & Elena M. Deryabina, *Legal System of the European Union*] (Moscow: Norma; Infra-M, 2012).

[4] Peter Malanczuk, *Regional Protection of Human Rights in Asia-Pacific Region*, 52 German Yearbook of International Law 112 (2009).

[5] Mercosur includes Argentina, Brazil, Paraguay, Chile and Bolivia as its associate members.

Group 10 and the Social and Advisory Forum, both established on principles of three-way collaboration. Their efforts led to the development and signing of the Social Labor Declaration.[6]

The integration model of international labor law relates to the formation of super-national labor legislation within an international organization, such as EU labor law.[7] Under the Treaty of Lisbon, the EU is granted shared competence with its member states in certain areas while retaining exclusive competence in others. This also covers social policy as defined in the agreement. It implies that both the whole Union and its individual member states have the right to accept legally binding acts. However, individual member states can only implement their competences in areas where the Union has not used, or ceased to use, its own competence.

This qualifying criterion for international labor legislation determines the legal status of international sources of law. Contractual sources, such as ILO Conventions, form part of a coordination model that requires each individual state to ratify the relevant legislation. This forms a significant majority of so-called "soft labor law." In an integration model, the situation is different. The overwhelming majority of EU acts on labor or social provision are accepted in the form of directives. These directives require each member state to reach certain targets, while freeing up individual countries to follow their own paths to those goals. This is distinct from EU regulations, which prescribe both the process and the desired outcome. Directives are applied according to the principle of "harmonious law making."[8] Decisions in the EU Court establish legal precedents that play a significant role in the legal regulation of labor and social matters within the EU.

Logic suggests that each model of international labor regulation should establish international standards for labor rights. The International Labor Code, with all its declarations, conventions and recommendations, is actually created by the efforts of the International Labor Organization. The principles registered in the ILO Charter and in the Declaration on fundamental principles and rights at work (1998) are binding on every member state regardless of whether or not the states have ratified the relevant conventions. Certain researchers also highlight "unforeseen consequences" of the above Declaration in terms of the implementation and promotion of international standards of labor rights that differ from those listed in the Declaration. However,

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6 *See* Lance Compra, *Labour Rights in the FTA* in *Globalization and the Future of Labour Law* 252–254 (J.D.R. Craig & S.M. Lynk, eds., Cambridge: Cambridge University Press, 2006).

7 *See also* Roger Blanpain, *European Labour Law* (12th ed., Alphen Aan Den Rijn: Wolters Kluwer Law and Business, 2010); Philippa Watson, *Social and Employment Law: Policy and Practice in an Enlarged Europe* 537 (Oxford: Oxford University Press, 2009).

8 Постовалова Т.А. Социальное право Европейского Союза: теория и практика 18 [Tatyana A. Postovalova, *Social Law of the European Union: Theory and Practice* 18] (Moscow: Prospekt, 2016).

this act is limited to the main principles and rights.[9] In certain regional organizations pursuing cross-border economic integration, these may be limited to labor standards for migrant workers only.

Any effective mechanism to control and protect international labor rights must ensure that international standards are observed. In respect of our named criterion, we wish to highlight the UN Economic and Social Council's "procedure N1503," which investigates reported violations of human rights and basic freedoms. The ILO has one of the most effective control systems for the observance of international labor legal norms. This system includes the following mechanisms: a) regular, on-going oversight; b) specific responses to claims of abuse; c) dedicated control measures. However, the International Labor Organization lacks any form of judicial protection of labor rights based on individual claims, as offered within the Council of Europe by the European Court of Human Rights. Although the Council's Convention establishes civil and political rights, the ECHR further considers that interpretations of the Convention may also cover social and economic rights – including labor rights. Cases concerning violations of social provision or labor rights come before the European Court, typically when there is a suspected violation of one or more of the following articles of the European Convention:

– Article 4, prohibiting forced labor and slavery;

– Article 8, proclaiming the right to respect for private life in general;

– Article 9, granting the right to freedom of thought, belief and religion;

– Article 11, dedicated to freedom of association;

– Article 14, prohibiting discrimination within the implementation of rights vested in the Convention[10];

– Article 1 of Protocol 1 dedicated to the protection of property.

International regional organizations often follow varying models of labor rights protection. ASEAN has a Commission on human rights where the advisory powers do not extend to the active protection of labor rights. Meanwhile, the Economic Community of West African States (ECOWAS) has a Court of Community which is significantly influenced by the EU's judicial model.[11]

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[9] Philip Alston & James Heenan, *Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Right at Work?*, 36 New York University Journal of International Law and Politics 221–264 (2004).

[10] In particular, this was clearly evident in the "Markin v. Russia" case. For more detail, *see*: Nikita Lyutov, *Russian Law on Discrimination in Employment: Can it Be Compatible with International Labor Standards?*, 4(3) Russian Law Journal 36–41 (2016); Nadezhda Tarusina & Elena Isaeva, *Equalization of Legal Status with Respect to Gender*, 4(3) Russian Law Journal 87–88 (2016); Grigory Vaypan, *Acquiescence Affirmed, Its Limits Left Undefined: The Markin Judgment and the Pragmatism of the Russian Constitutional Court vis-à-vis the European Court of Human Rights*, 2(3) Russian Law Journal 130–140 (2014).

[11] Onsando Osiemo, *Lost in Translation: The Role of African Regional Courts in Regional Integration in Africa*, 41(1) Legal Issues of Economic Integration 118–119 (2014).

3. Eurasian Labor Law: Historical Development and Prospects for Eurasian Integration (a Regional Model of International Labor Regulation)

The Eurasian regional model of international labor regulation (Eurasian labor law) is a comparatively new international legal system and is still a work in progress. At present, it is more of an outline, with details still awaiting definition. Even so, we can discern some general trends for its future development.

The model emerged from the aftermath of the break-up of the USSR as the former Soviet Republics formed new international organizations. The Eurasian model derives from international agreements promoting integration across the post-Soviet space. Because these states share common roots in their shared legal heritage, the model has certain distinctive features. This offers advantages and disadvantages for the process of Eurasian integration. The impetus behind Eurasian integration does not stem solely from the nations' geographical proximity. It draws on existing and historical social, economic, cultural and humanitarian links between peoples who previously lived in a unified nation state and still share similar political and legal traditions. There are relatively few differences in the labor legislation of these states, and those which have arisen should not lead to any serious issues for closer unity within integrated international associations. However, any international integration process, including the labor market, is complex and ambiguous, with many hidden pitfalls.

The history of the Eurasian labor law's development (including the current situation) can be divided into ***three main stages***.

Stage One (1992–1999). The establishment of the Commonwealth of Independent States (CIS) and the first stages of integration agreements between its members. This phase saw the development of a coordination model of Eurasian labor law with a declarative catalogue of international regional standards for labor rights. That model was perceived as the basis for the harmonization of labor laws among CIS members. This regional cross-border cooperation included a focus on human rights, including labor rights. Cooperation on a regional labor market regulated by a framework of international economic law still lacked sufficient impetus to create a common labor market because multilateral agreements within the CIS prioritized the protection of national labor markets.

Stage Two (2000–2014). The formation of international organizations among the states of the former USSR, based on a split-level integration concept, to encourage economic integration across the CIS. These include the Customs Union (CU), the Common Free Market Zone (CFMZ) and the Eurasian Economic Community (EurAsEC).[12]

[12] Agreement on Foundation of Eurasian Economic Community, signed on October 10, 2000 in Astana, Legislation Bulletin of the Russian Federation, 2002, No. 7, Art. 632.

Because each of these is an international economic community, the establishment of a common labor market and the principle of free movement of labor comes to the fore. The Union State of Russia and Belarus holds a unique position within this system of regional cooperation. The developing integration processes in several international organizations generate opportunities to address a wide range of regional problems around international labor regulation, ranging from human rights (regional and international standards of labor rights) to economic integration in a common labor market. As Eurasian integration picks up pace, different types of new international organizations emerge and can be differentiated: coordination and supranational models can be seen, as well as transitional models that combine features of both.

Stage Three (from 2015). The Treaty on the Eurasian Economic Union, which came into force on 1 January 2015 and shows an obvious tendency towards supranational international economic integration. The EAEC presupposes the prospect of new, supranational Eurasian labor legislation.

Eurasian labor legislation is impacted by a wide range of issues, which we will consider below.

The CIS established a coordinated "soft law" mechanism for Eurasian labor with a declarative "catalogue" of international and regional standards for labor rights. The coordinated nature of Eurasian labor law within the CIS is dictated by the legislative structure of this international organization. As the CIS is an inter-state union based on a coordination model, the decisions are reached on a consensus basis among the member states. As noted in research, it was created primarily to replace the USSR, a single unified state that held many peoples together, and there was evidence of an intention to stifle any possible future reconstruction of the Soviet Union or a similar state. This is reflected in the Charter of the Commonwealth of Independent States (established by the decision of the Council of CIS heads of state in Minsk on January 22, 1993). According to Art. 1 of the Charter, "the Commonwealth is not a state and shall not possess supranational powers," whereas CIS member states "shall act as independent and equal subjects of international legislation."[13]

The labor legislation of the CIS countries is characterized by common, similar specifics, largely due to their common legislative framework of the past. The Soviet labor law served as the basis for the subsequent development of national legal systems in the post-Soviet states. This unifying factor (something which the EU, for example, lacks), did not prove sufficient to establish the CIS as an effective regional body capable of unifying social legislation among its members. This may partly explain the decision in 2007 to adopt a new concept that would form a common legal framework and mechanism to implement social legislation across

[13] Информационный вестник Совета глав государств и Совета глав правительств СНГ «Содружество», 1993, № 1. [Information Bulletin of the Council of the CIS State Heads and the Council of CIS Governments' Heads "Sodruzhestvo," 1993, No. 1].

the CIS.[14] This concept incorporates the underlying principles of social policies across the CIS members, including their unanimous recognition of fundamental international acts such as the Universal Declaration of Human Rights (UN, 1948); the International Covenant on Economic, Social and Cultural Rights (1966); the European Social Charter (1961, ed. 1996); the European Community Charter of the Fundamental Social Rights of Workers (1989); the European Code of Social Security (1990); the Charter of the Social Rights and Guarantees for the CIS Citizens (1994); and the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (adopted by the ILO in 1977).

At present, there are two main international sources of law in the CIS:

1) Acts (concepts, conventions, model laws) adopted by plenary meetings of the CIS Interparliamentary Assembly;
2) Agreements adopted by the governments of the CIS member states.

Their legal force is divided into mandatory and recommendatory ("soft law"). The recommendatory laws form the main bulk of the sources of CIS labor legislation which .allows to assert that this legislation is 'soft' and even declarative in nature.

Among the mandatory acts, the CIS Convention on Human Rights and Fundamental Freedoms (concluded in Minsk on May 26, 1995) and the Regulation on the Commission on Human Rights of the CIS, adopted on September 24, 1993) are especially noteworthy. These have come into force in Russia,[15] Tajikistan, Belarus and Kyrgyzstan. In this Convention, the parties also declared their recognition of and respect for the standards defined in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the respective Optional Protocol, as well as the international human rights commitments of the OSCE (CSCE) and the Declaration of the Heads of the CIS member states on international commitments in the field of human rights and fundamental freedoms.

The Convention reinforced the following rights:

– freedom of association with others, including the right to form trade unions and join them to protect personal interests;

– the right to work and be protected against unemployment, as well as equal pay for equal work, including receipt of social benefits;

– the right to equal conditions for work of equal value and equal treatment during workplace assessment;

– the rights of working women;

– the prohibition of forced and compulsory labor.

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[14] Принята на 28-м пленарном заседании Межпарламентской Ассамблеи государств – участников СНГ (постановление от 31 мая 2007 г. № 28-6) [Adopted at the 28th Plenary meeting of the CIS member states' Interparliamentary Assembly, Resolution No. 28-6 of May 31, 2007].

[15] Собрание законодательства РФ, 1999, № 13, ст. 1489 [Legislation Bulletin of the Russian Federation, 1999, No. 13, Art. 1489].

The implementation of this Convention is monitored by the Human Rights Commission of the CIS. It investigates matters and releases conclusions at the request of CIS member states, or in response to human rights cases raised by individuals or NGOs. However, these conclusions are not binding; the Commission is not entitled to apply any measures against a state that has violated the Convention. This makes it an almost entirely ineffective mechanism to protect human rights. The ECHR, responding to a request from the Council of Europe's Committee of Ministers, advised that the CIS Commission could not be regarded as an international judicial body.[16]

The 1994 Charter of Social Rights and Guarantees for the citizens of independent states is the cornerstone of the CIS's international social legislation. Social rights and guarantees established by the Charter are recognized by CIS states as the minimum standard of such rights. It is by all means a legally binding act which does not require ratification and is directly and immediately applied. This follows naturally from its confirmation of generally accepted international social rights.

The CIS also adopted several instruments concerning labor safety, the mutual recognition of rights to compensation for harm caused to workers by injury, occupational disease, and others.[17] These agreements have been approved by the governments of the CIS member states. For instance, the CIS agreement on co-operation in labor safety asserts that the member states, while retaining full autonomy to establish and implement their own national policies on labor safety, consider it advisable to have a coordinated health and safety policy, based on internationally accepted rules and regulations, as well as recognize Occupational Safety Standards (OSS), and common labor protection norms and rules as cross-border standards.[18]

As already noted, recommendatory acts hold a special place within the system of CIS labor law sources – for example, model laws on occupational safety and health (1997); on collective agreements (1997); on State Social Insurance (1997); on the employment of the population (1999); on the basics of social services for the population (2002); social partnership (2006) and others. These could also serve as a basis to bring labor legislation closer together across the CIS countries. 2000 saw a proposal for a model

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[16] Бюллетень Европейского суда по правам человека, российское издание, 2004, № 11 [Bulletin of the European Court of Human Rights, Russian Edition, 2004, No. 11].

[17] *See* Соглашение правительств государств – участников СНГ о сотрудничестве в области миграции и социальной защиты трудящихся-мигрантов (1994 г.); соглашения государств – участников СНГ о сотрудничестве в области охраны труда (1994 г.), о взаимном признании прав на возмещение вреда (1994 г.) и др. [Agreement of CIS member states' governments on collaboration for migration and social protection of migrant workers (1994); agreements of CIS member states on collaboration for labour protection (1994), on mutual recognition of rights to compensation for harm (1994) and other].

[18] Информационный вестник Совета глав государств и совета глав правительств СНГ, 1994, No. 4(17) [Information Bulletin of the Council of CIS Heads of States and Council of Heads of Governments, 1994, No. 4(17)].

Labor Code for the CIS,[19] but this Code was never adopted. Model legislation in the CIS has yet to deliver the anticipated integration effect on Eurasian labor law.

The CIS Economic Court was established as an international control body responsible for the uniform application of agreements among all members.[20] The jurisdiction of the Economic Court includes the resolution of interstate economic disputes, but it lacks any mechanism to force states to comply with its rulings. The Economic Court is also prevented from considering any disputes concerning private international law. This renders it unable to resolve disputes between businesses, or complaints from legal entities and individuals relating to any state's failure to fulfill its responsibilities under CIS agreements. The vast majority of cases that have been considered by the Economic Court of the CIS dealt with interpretations of the CIS's international treaties. Meanwhile, the CIS Economic Court does not make a significant contribution to protecting its citizens' social rights. Obviously, this problem needs to be resolved to ensure that this international organization can carry out its human rights function. Without change, the 'catalogue' of Eurasian labor rights standards will remain declarative, lacking any international control over its implementation.

A system of Eurasian labor rights standards, which was intended to become the basis of a harmonized labor law in CIS member states, formed the core of Eurasian labor law within the CIS. The organization also announced economic integration as one of its goals – something which requires a common labor market. In this context, the CIS Convention on the legal status of migrant workers and their family members (2008) is especially significant. Six states – Belarus, Kazakhstan, Kyrgyzstan, Armenia, Azerbaijan and Ukraine – have ratified this convention. Russia did not ratify it, even though the Convention makes provision for each state to introduce limitations on migrant workers in line with its national laws and interests. These limitations can affect different types of occupation and work, as well as access to paid labor, in order to protect national labor markets and give citizens priority access to employment and freedom of occupation in their own countries. These principles of protecting national labor markets and giving priority to the countries' own citizens are also entrenched in the overwhelming majority of multilateral CIS agreements, as well as bilateral arrangements between members.

During the second phase of its development, Eurasian labor law became fragmented as several different international economic integration organizations

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[19] Концепция модельного Трудового кодекса: принята постановлением Межпарламентской Ассамблеи государств – участников СНГ от 9 декабря 2000 г. № 16-7. Документ официально не опубликован [Concept of a Model Labour Code: adopted by the Resolution of the CIS Member States Interparliamentary Assembly No. 16-7 of December 9, 2000. The document is not officially published].

[20] Соглашение стран СНГ от 6 июля 1992 г. «О статусе Экономического суда СНГ», Бюллетень международных договоров, 1994, № 9 [Agreement of CIS countries "On the Status of the CIS Economic Court"of July 6, 1992, Bulletin of International Agreements, 1994, No. 9].

emerged in the region. These included the Common Free Market Zone (2003, Belarus, Kazakhstan, Russia, Ukraine), the Customs Union (2007, Belarus, Kazakhstan, Russia), the Eurasian Economic Community (1999–2014, Belarus, Kazakhstan, Kyrgyzstan, Russia, Tajikistan). The rise of these organizations established a starting point for a process of transforming coordinating organizations into supranational bodies. The member states of these integration groups accept limits on their sovereignty and delegate selected power to super-national authorities, forming a Uniform Integration Law. This is the point where Eurasian labor legislation acquires the necessary features for an international labor migration law that can lead to a common labor market. The model of labor migration could echo the existing one in the European Union. This is based on freedom of movement for workers within the member states of the association. On November 19, 2010, three states – Belarus, Kazakhstan and Russia – signed an agreement on the legal status of migrant workers and their family members. Article 3 of the agreement stated that within the Eurasian economic community (EAEU),[21] "activities relating to the engagement of migrant workers shall be carried out by the employers of the relevant state regardless of limitations relating to the protection of the national labor market, and migrant workers are not required to obtain work permits in the territories of the signatory states." This agreement has since expired but had a major influence on subsequent international agreements, in particular the Agreement signed in Astana of May 29, 2014 to establish the EAEU and guarantee equal labor rights for migrant workers of EAEU member states.

Despite the shift in emphasis towards economic integration in labor legislation, the EAEU was also given the powers to bring member states' legislation into line with EAEU law and CIS agreements. The key driver of this unifying process was the acceptance of model legislation. Thus, around 80 different model or standard acts of legislation were accepted by the Interparliamentary Assembly of the EAEU from 1997 to 2012. Article 7 of the Agreement on establishing the Eurasian Economic Community was acceptable by the Interparliamentary Assembly of October 10, 2000, bringing about a convergence of these legal frameworks in the EAEU. At the same time the agreement also accepted framework legislation in basic branches of law – the fundamental regulatory legal acts of the Community that established the principles of common legal regulation for member states in relevant areas of public affairs. However, since the EAEU's foundation, development has stalled at the concept stage for framework legislation, including the principles of labor legislation of the EAEU (Decree No. 8 of the Bureau of the Interparliamentary Assembly (IPA) of the Eurasian Economic Community of October 27, 2010)[22] and the Recommendations on the harmonization of the labor laws of EAEU member states (approved by Decree of the IPA EAEU of May 13, 2009).[23]

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[21] The agreement is ratified by the Russian Federation (Federal law No. 186-FZ of July 11, 2011).

[22] Available at: http://www.ipaeurasec.org/docs/?data=docs_6_16.

[23] Available at: http://www.ipaeurasec.org/docs/?data=docs_3.

Within the Eurasian legal framework, the labor law of the Union State established by Russia and the Republic of Belarus takes a very special place. The Agreement[24] that created the Union State includes the pursuit of a coordinated social policy as one of the main purposes of integration, aimed at ensuring decent living standards and freedom for personal growth. The Union State defines itself as a *de jure* international organization of super-national type. The Agreement establishes the Union State's competence in two categories: exclusive and shared. The shared competence of the Union State and its member states contains a coordinated social policy, covering issues of employment, migration, protection of working conditions, social provision and insurance; the provision of citizens with equal rights in employment and payment for labor, education, medical assistance, and other social protections. Looking ahead, we should note that the Agreement establishing the Union State offers citizens a wider range of labor rights than those under EAEU law.

Therefore, while the Eurasian model of legal labor regulation continues through its development phase, economic integration plays a key role, and international labor standards are limited by the Institute of International Labor Migration to ensure freedom for a common labor market.

On January 1, 2015 the Agreement establishing the EAEU came into force, ushering in a new era in the development of Eurasian labor law.[25] Originally, the Customs Union consisted of Belarus, Kazakhstan and the Russian Federation; later Armenia and Kyrgyzstan joined the EAEU.

The EAEU combines four main organizations: the Supreme Council, the Intergovernmental Council, the Eurasian Economic Commission and the EAEU Court.

The Supreme Eurasian Economic Council (the Supreme Council) is the EAEU's supreme body, comprising the Community's member states and authorized to consider key issues of the Community's activity. It determines the strategy, directions and prospects for further integration and makes decisions in line with the aims of the Community.

The Eurasian Intergovernmental Council (the Intergovernmental Council) brings together the heads of EAEU states. It has responsibility for implementing the agreement that established the EAEU and controlling the implementation of international agreements and decisions of the Supreme Council within the Community. It also exercises a range of other powers.

The Eurasian Economic Commission (EEC) is the EAEU's permanent super-national regulating body. The Commission provides the Community with operational and development conditions as well as prepares proposals on economic integration. The Commission consists of the Council – responsible for the general regulation

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[24] Бюллетень международных договоров, 2000, № 3 [Bulletin of International Agreements, 2000, No. 3].

[25] The official website of the Eurasian Economic Commission: http://www.eurasiancommission.org.

of integration processes within the EAEU and for the general management of the Commission's activity – and the Collegium - the Commission's executive body. Labor migration is an area of the Community's activity where powers are delegated to EEC states.

The EAEU Court is the permanent judicial body of the EAEU. The court aims to ensure that the Union's sources of law are uniformly applied by EAEU members and bodies. The court also considers disputes about the implementation of EAEU laws on the request of member states and businesses. The court can pass binding judgments on the commission, or parties to the dispute, but judgments cannot change or cancel the existing legal rules of the EAEU or the laws of member states, nor can they create new ones. The Court's most significant power is to explain the provisions of the Union's law sources. By implication this is an advisory opinion that is not prescriptive in nature and does not deprive member states of the right to joint interpretation or international agreements.

The Agreement that established the EAEU introduced a new judicial category of "the Union's right." The EAEU is invested with a special lawmaking competence to form an independent legal system. EAEU law derives from two sources: 1) primary law (the agreement establishing the EAEU, international agreements within the Union, international agreements between the Union and third parties); 2) secondary law (acts of EAEU bodies, decisions containing legislative provisions, and regulatory and administrative decrees.) EAEU law has the following features:

1) the Union's law is hierarchical and has the special constitutional status of a Constituent Agreement. The labor rights of EAEU states are defined by this act in terms of freedom of movement within a common labor agreement. Meanwhile, the Agreement establishing the EAEU offers a more favorable legal framework to workers who are citizens of Russia and Belarus compared with the workers from Kazakhstan, Armenia, or Kyrgyzstan. A national regime of working conditions (remuneration, working hours and time off work etc.) is first established within the Union State;

2) EAEU law is limited in the areas it can regulate. The nature of economic integration is determined by its main purposes: to create conditions for the stable economic development of each member state to increase living standards for their population; to form a single market for goods, capital and labor resources within the Union; and general modernization, cooperation and competitive growth of national economies compared with the wider world. At the first stage of the EAEU's existence, legal regulation is limited to economic policy: customs policy, foreign trade and protection of national industries. Of these, labor migration is classified as the Union's exclusive competence. Other economic spheres (monetary and credit, currency policy, taxation and other) fall under the shared competence of member states. Culture, social provision, and the "catalogue" of labor rights still come entirely under the competence of member state governments;

3) the Union's law is transient by nature, combining classical international conventional rules accepted by consensus at the Supreme Council and Inter-Governmental Council, and super-national norms and decisions accepted by the Eurasian Economic Commission and the EAEU Court. The Eurasian Economic Community is a super-national community at present. In compliance with Articles 3 and 5 of the Agreement, member states have delegated certain areas of the implementation of single economic policy to the Union. Acts in these areas, once accepted, are binding on the member states themselves, as well as legal entities and individuals based in the territory of the Union. These acts can also be used in the EAEU Court, including cases raised by legal entities and individuals.

As noted in research, prospective development plan for Eurasian integration depends on transformation of the Eurasian Economic Union into Eurasian Union and creation of the new institutions of the Eurasian Parliament and the Eurasian Court of Human Rights.

4. Conclusion

The contemporary Eurasian model of labor law is a living law that is still undergoing development. There is a lot of multi-level, non-uniform integration among post-Soviet countries. Within the labor market, there are two main areas of regional cooperation:

1) A social model, seeking to establish international standards for labor rights among Eurasian countries;
2) An economic model, promoting the free movement of labor within a common market.

Thus far, the CIS, as an international coordination body, has largely been responsible for the social model in the region. Its structure is not visibly supranational and CIS labor law is based on international treaties that seek to align the positions of member states, backed by recommendatory acts pertaining to social policy and labor legislation in the CIS countries. We believe this organization can and should improve its international legal mechanisms to protect labor rights, perhaps by following the examples of the Council of Europe and the European Court of Human Rights.

The economic model is the concern of various international organizations seeking supranational integration through a common labor market. Here the key priorities are economic rather than social. We believe that the EAEC's future should lie in expanding the scope of its cross-border regional labor regulation. As well as legal support for freedom of movement, there is a need for Eurasia-wide standards of labor rights. It is possible to establish a supra-national model for labor legislation across Eurasia that brings together these social and economic approaches to labor regulation. But, like the path followed by the European Union, this demands a distinctive model, integrating international labor rights with the best practices of

existing labor laws in individual member states. However, no model of integration, whether based on EU-style principles of social market economy or some alternative structure, can be borrowed wholesale. It must be adapted in line with the existing legal traditions of the post-Soviet bloc.

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CONFERENCE REVIEW NOTES

RUSSIAN LAW AND GLOBALIZATION

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DOI: 10.17589/2309-8678-2016-4-4-112-119

Recommended citation: David Fishman, *Russian Law and Globalization*, 4(4) Russian Law Journal 112–119 (2016).

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

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

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

1. Russian Constitutional Law and Global Issues

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

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

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

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

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

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

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

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

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

2. Human Rights and Global Challenges

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

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

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

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

3. Sanctions and Business and Eurasian Economic Union

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

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

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

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

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

4. Legal Transplants & Russian Law

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

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

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

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

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

6. Global Context of Russian Labor Law

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

7. Russian Financial Law and Globalization

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

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

8. Conclusion

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

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

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Russian Law Journal

Volume IV (2016) Issue 4

Редактор *Виноградова О.В.*
Оформление и компьютерная верстка: *ИП Резниченко А.С.*

Подписано в печать 5.12.2016. Формат 70x100 $^{1}/_{16}$. Объем 7,5 п.л.
Цена свободная.
Заказ №

Наш адрес: ООО «Издательский дом В. Ема»
119454, г. Москва, ул. Лобачевского, 92, корп. 2.
Тел. (495) 649-18-06

ISSN 2309-8678