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Paper abstracts

Session 1. Russian Constitutional Law and Global Issues

"Discuss your own constitution": Dissident Writings on the 1977 USSR Constitution and Their Impact on the 1993 Russian Constitution

Dr. Kirill Koroteev, Human Rights Centre "Memorial", Moscow, Russia

Since the 1965 demonstration that demanded openness of the Sinyavskiy and Daniel trials the human rights defenders' movement took on legalistic approach, requesting Soviet authorities to respect the constitutional rules the way they were stated in the 1936 USSR Constitution. The constitutional reform of 1977 was an occasion when multiple *samizdat* texts discussing the official draft were produced. Five issues of a bulletin exclusively dedicated to the constitutional debates appeared in *samizdat* that year.

This paper discussed the constitutional ideas of Alexander Yesenin-Volpin, the author not only of the slogan "Respect the Soviet Constitution", but also of insightful constitutional commentaries, Boris Yefimov, who produced a comprehensive draft constitution alternative to the official one and entitled "Draft no. 2", leading defence lawyer Sofia Kallistratova and other dissidents. While their focus on constitutional rights and freedoms and judicial protection thereof, especially in criminal proceedings, was obvious, their suggestions went far beyond the catalogue of rights. The points of discussion included the need for and the procedure of adoption of a new Constitution, the constitutional requirements for the legitimacy of political leadership and public service, church-State relations, relations between international and domestic law, independence of the judiciary and even early proposals for a constitutional court.

The paper puts the dissident ideas in context of the contemporary constitutional debates, both in official Soviet legal publications and abroad (references to dissident proposals are found in English-language legal scholarship, but are entirely absent even from post-Soviet Russian legal texts). The paper also traces the contribution of the dissident debates to the 1993 Russian Constitution through the participation of a number of human rights defenders in the Constitutional Commission of the Congress of People's Deputies and of Sergey Kovalev,

Kronid Lyubarskiy and Boris Zolotukhin in the Constitutional Convention that came up with the constitutional draft approved by the Russian people on 12 December 1993.

The paper not only attempts to fill the gap in the knowledge on Soviet and Russian constitutional history, in particular, how the constitutional rules adopted in 1993 were brought to the level of global modern standards on human rights, judicial review and relations between domestic and international law. It also pays tribute to dissidents who were more likely to face prosecution for the dissemination of their ideas, rather then see them implemented.

Between National Constitutional Identity and Pacta Sunt Servanda: the Russian Constitutional Court, Prisoners' Voting Rights, and Schrödinger's Cat

Grigory Vaypan, Institute for Law and Public Policy/Law Faculty, Moscow State University, Moscow, Russia

This contribution takes the issue of prisoners' voting rights as the most recent example of the Russian Constitutional Court asserting its role as the guarantor of the Russian national constitutional identity *vis-à-vis* the legal order established by the European Convention on Human Rights. In the 2013 judgment in the *Anchugov and Gladkov* case the European Court of Human Rights 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, for the first time using its newly acquired notorious powers to second-guess international judicial decisions, declared this judgment partially unenforceable in Russia. This contribution discusses the ruling of the Russian Constitutional Court and its implications for Russia's future relationship with the Council of Europe and international law more generally. The ambivalence of the Constitutional Court's approach in this case reflects the gap between its general statements on the primacy of national law and the actual absence of any irresolvable legal conflict between the *Anchugov and Gladkov* judgment and the Russian Constitution.

What makes a ruling? Quantitative analysis of the Russian Constitutional Court output (1995-2015)

Ivan Grigoriev, Department of Applied Politics, National Research University Higher School of Economics, St. Petersburg, Russia

Why do constitutional tribunals reject some petitions, and rule on the others? From the legalist standpoint this question may seem trivial: with a non-discretionary docket, the court should accept and review all petitions that meet the legal criteria for judicial review. The question is therefore what these legal criteria are, and the answer probably lies in the province of law. But is this the case in practice? The answer to this question can only be empirical, and so far we do not know much about it. To fill in this void, I construct and quantitatively explore a unique dataset of all decisions produced by the Russian Constitutional Court (RCC) in 1995-2015 (N=22334). I answer a number of important questions concerning the correlates of success in constitutional review in Russia. Why do some cases become rulings (postanovlenie), while others get effectively rejected through determinations/definitions (opredelenie)? Does it depend on the type of litigant? Is the legal subject matter important here? What are the temporal dynamics? I report a whole bunch of unexpected findings, such as the impact of the month the case is reviewed, or the personality of the judge-rapporteur, on the case's trajectory.

Session 2. Human Rights and Global Challenges

Legal Gender Recognition: The Issue Beyond Transgender Rights

Tatiana Glushkova, Human Rights Centre "Memorial", Moscow, Russia

Development of the global human rights agenda brings to the front problems that were not widely discussed even 10 years ago. One of such problems touches upon legal recognition of transgender persons' gender identity. The question of whether or not governments should allow their citizens to change their legal gender has already been replied to by international human rights institutions in the affirmative, however, the question of the requirements which transgender people should satisfy in order to have their preferred gender legally recognized, is still a matter of argument.

Legal gender recognition procedure existing in Russia continues to be completely medicalized as the Federal Law "On Acts of Civil Status" requires that in order to change their legal gender marker one must submit a "certificate on gender change of an established form issued by a medical institution". The Ministry of Health was charged to develop the form of such a certificate in 1998, but no such document has been approved so far. However, one hundred percent of judgments delivered in legal gender recognition cases and known to the author of this paper are based on analyzing whether or not the applicant has proved that their sex had been changed.

At the same time the emerging global trend of demedicalizing legal gender recognition procedure manifests itself, on the one hand, in amendments to national laws omitting requirements of undergoing invasive surgeries, medical treatment and even obtaining a 'transsexualism' diagnosis and, on the other hand, in suggested replacing the 'transsexualism' diagnosis (contained in the 'Mental and behavioral disorders' chapter of ICD-10) with 'gender incongruence' diagnosis which would be included either in 'Factors influencing health status and contact with health services' or in 'Conditions related to sexual health' chapter of ICD-11.

The author argues that demedicalizing legal gender recognition procedure is impossible without achieving legal gender equality as approving a gender marker change procedure based on the person's self-determination will lead to misusing it for purposes other than bringing one's legal gender into compliance with their gender identity (e.g. escaping military conscription, receiving pension at an earlier age, entering into same-sex marriage).

Changing (inter-)faces of Russian human rights ombudsman

Konstantin P. Kokarev, Liberal Arts College, School of Public Policy, Russian Academy of National Economy and Public Administration, Moscow, Russia

National human rights institutions in form of ombudsman offices or national human rights committees are unique forms of integration of international human rights agenda in political systems of nation-states. On the one hand this form of human rights interventions is highly problematic in its operation because depends on overall institutional "willingness" to work within framework of human rights. On the other hand ombudsman have potential to work within state apparatus in organizations closed to nongovernmental actors and to do it in other administrative form. Allocation of duties and relations with community of human rights activists is not set normatively and is a matter of public debate and agreement and could be seen as a part of work for legitimation of this institution.

Contemporary Russian politics shows entangled dynamics in development of human rights institutions. In 1990-th many state actors opposed the idea of their creation: notably on federal level after Kovalyov case. That is why there was not a lot of regional ombudsman. But in 2000s regional human rights institutions were created in almost all regions in the form of human rights ombudsmen and short after in the form of executive ombudsman for rights of children at federal level and his associates of different organizational forms at regional level.
This variance of ombudspersons from Soviet dissidents to retired general of police raises a question about success or failure of institutionalization of human rights institutions in contemporary Russia. Some assume that nowadays human rights ombudsmen has lost its sense and can not be effective in Russian political system. But if we look and ombudsman office as a form of administrative justice we may assume some other chances and models of institutionalization. Professional legal discourse is less politicized and could be constructed even without strong connection to human rights philosophy and for that reason have more chances to be useful for ombudsman institutionalization in Russia because it is better suited to political perceptions and attitudes of general public and bureaucrats and has built-in institutional facilities to operate in fuzzy institutional environment of contemporary Russian politics. We may find some examples of this form of institutionalization in world history of ombudsmen.

Participatory Rights of Minors: International Legal Standards and the Legislation of the Russian Federation

Dr Mariya Riekkinen, Åbo Akademi University, Turku, Finland

I will deal with the much debated in European scholarship issue of public participation of minors and look at it from the perspective of legal experiences of the Russian Federation. Having emerged at the level of separate national jurisdictions, the practice of engaging minors in decision-making processes regarding the issues of public significance – or the practice of public participation of children – is emphasized by the UN Committee on the Rights of the Child, based on Article 12 of the UN CRC Convention. Public participation of minors implies that children have limited opportunities to take part in decision-making processes concerning those political and public matters affecting their interests. For instance, at the level of the Council of Europe, children's views have been taken into account in the development of recommendations of the Committee of Ministers. In particular, the 2010 CoE Guidelines on child-friendly justice adopted by the Committee of Ministers take into consideration the conclusions from almost 3,800 children in 25 member States

Albeit limited with the clause "regarding the issues concerning them," the claims for such participation are dictated by the emerging standards of international law. I will analyze the genesis of perception of these standards in various items of Russian public law. Although the USSR ratified the UN CRC Convention in 1990, there are still lacunae in Russian statutory law which is lacking a spell-out general right of children to express views regarding the matters affecting them in all judicial and administrative processes. This problem has been highlighted in the 2012 document entitled "National Strategy of Actions in the Interests of Children in 2012-2016", approved by the Edict of the President of the Russian Federation. 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, a lack of efficient mechanisms of ensuring participation of children in public life and in deciding on the matters regarding their life and interests is one of the major problems in the sphere of childhood.

Relying extensively on the method of legal doctrinal analysis and comparative analysis of the conformity of national public law standards with international law, I will propose several

options for legal amendments to the Federal law "On the Basic Guarantees of the Rights of the Child in the Russian Federation" which would lead to a fuller entrenchment of participatory rights of minors in the legal system of the Russian Federation.

The Role of Affirmative Action in Implementing the Right to Education: the Case of Russia

Dr Szymon Jankiewicz and Nadezhda Knyaginina, Center for Applied Legal Research of the Institute of Education at the National Research University Higher School of Economics, Moscow, Russia

According to scientific literature there are different definitions of inequality in education. Inequality in education involves the belief that some individuals are defined as disadvantaged, underprivileged, underachieved, non-important, and inferior in respect of their education opportunities. Analysis of Russian and foreign literature allowed us to identify a number of factors that lead to or perpetuate inequalities in education, including but not limited to: opportunities for educational attainment; culture; disabilities; gender; globalization; language; politics; socioeconomic status and others.

One of the measures aimed to overcome discrimination is *affirmative action*. However, the problem of positive discrimination is that support of certain social group leads to infringement of others' interests and violation of the principle of formal equality. Several countries provide for the support measures for overcoming discrimination using affirmative action instruments in the following domains: access to schools and universities (for example, support of orphans and children of deceased soldiers), health disabilities (for example, support measures for disabled people measures), guidance and finance (for example, support for children from low-income families).

Affirmative action is intended to resolve social conflicts, helping to achieve social equality. In XX century positive discrimination has been used as an instrument of equalization of opportunities of race and ethnic groups. Nowadays Russia has to overcome a new challenge – reducing the gap of opportunities for quality education of children from different social groups. The government takes insufficient measures to support children from poor families, children in difficult life situations, and migrant children. At the same time, we cannot ask a logical question about the relationship between affirmative action or reverse discrimination. Where is the balance of these measures? Doesn't that violate the principle of equality in education? These matters will be presented in the proposed paper[1].

Session 3. Sanctions and Business

The use of sanctions by the Russian Federation: the relation between normative and the force

Dr Maria V. Keshner, Department of International and European Law, Kazan Federal University, Tatarstan, Russia

Terminology approaches to the content of the term «sanctions» in Russian and foreign doctrine of international law are different. The majority of studies representatives of the Russian and the Soviet doctrine of international law didn`t distinguish different nature of

[1] The article was prepared within the framework of the Academic Fund Program at the National Research University Higher School of Economics (HSE) in 2016 – 2017 (grant No 16-01-0024) and supported within the framework of a subsidy granted to the HSE by the Government of the Russian Federation for the implementation of the Global Competitiveness Program.

collective coercive measures (international sanctions) and the individual response of coercive measures (countermeasures).

An analysis of the Russian legislation on the use of "sanctions" does not allow him to give an unambiguous assessment. The regularity with which the Russian Federation uses to this tool, is not always indicative of its effectiveness. It is important to note that imposed "sanctions" regimes require certain public expenditure on implementation. It is also one of the principal and not finding an adequate resolution remains the question of compensation for economic losses to business entities to participate in the "sanctions" regimes. Meanwhile, dimensions and price of the question of participation in the "sanctions" regime are significant.

Post-Crimean Twister: Russia, The EU and The Law Of Sanctions

Prof. Paul Kalinichenko, Integration and European Law Department of the Kutafin Moscow State Law University, Moscow, Russia

EU-Russia relations have never been simple. On the one hand, these two international actors have common values and interests. On the other, they have a conflictual relationship, which has become particularly acute after the Ukrainian crisis that started in 2014. After Ukrainian crisis, the EU and Russia have entered a new era. Unfortunately, it is an era of brinkmanship. This brinkmanship is marked, prima facie, by mutual sanctions. After 20 years of partnership and good neighborliness it sounds illogically, but it is a reality. The strategic nature of the EU-Russia partnership has been placed in doubt. The aim of this presentation is to show that the 'war of sanctions', which has frozen official contacts and negotiations have not achieved anything. This crisis can only be overcome through dialogue. However, at the moment, the main critics of the EU sanctions amongst EU Member States (Austria, Greece, Finland, Italy and Spain) are too weak to convince the other members to lift them. The presentation concerns the modern legal aspects and modern legal circumstances surrounding EU-Russia relations in the light of recent events and the deterioration of relations between Russia and the EU in general. In this framework, an account is given of the EU's reaction to the Ukrainian conflict in the context of the EU Common Foreign and Security Policy and of the EU restrictive measures as well as in the context of the Russian countersanctions. A special attention is paid to the EU Court of Justice case-law in the field of the restrictive measures, in particular to the Rosneft case.

Modernity in Contract Law? With Special Reference to Russian Law and Contractual Practice

Prof. Soili Nysten-Haarala, Faculty of Law, University of Lapland and Luleå University of Technology, Finland

Rapid changes in technology have led to changes in business models. Changing circumstances require flexibility and challenge relationships in business. These changes also challenge law, which typically is one of the slowest institutions to develop in society. The slow development can be attached to national legal systems and courts with the specialized profession of lawyers taking care of stability of law. This autonomy of law has both pros and cons. In this paper, I focus on the cons.

Contract law, however, is based on freedom of contract. Therefore, contractual practice can develop in business in spite of other pre-modern principles of contract law. The profession of lawyers, however, still has a strong grasp in contractual practice in business. They focus mostly on control and stability and see flexibility more as a threat than an opportunity. Leaving contracts to lawyers is not a beneficial attitude for business, which urgently needs

agile and relational practices to be developed. Informal institutions such as attitudes, working habits and thinking modes are often stronger obstacles for change than formal institutions such as legislation (North 2015). Russia has its own obstacles for modernizing law, since the soviet period froze law into a tool for control, which still shows both in legislation and even more in attitudes and working habits.

In the proposed paper, I first give examples of new requirements for flexibility and collaborative attitudes in IT- and construction business. After that I present some empirical findings from interviews of foreign businessmen and lawyers working in Russian markets, where these new business models do not have a solid ground. The reasons for "backwardness" of Russian markets are then analyzed with the help of North's institutional economics and Luhmann's system theory. The reasons can be found both in Russian contract law, attitudes to law and the lack of trust in Russian society and business, but also in the pre-modern system of law and the legal profession in the whole western world.

Price Regulation of Electricity Transmission in Russia and Finland: A Comparative Study in International Context

Dr Yury Kuznetsov, Economic Policy Journal, Moscow, Russia

The regulation of prices of electricity transmission services is one of the least internationalized and standardized parts of economic law. Every country has its own regulation model determined by particular historical, geographical, social and political circumstances. Despite these forces of divergence, however, there are some tendencies of convergence related to general ideology of regulation and efficiency requirements. Comparative studies of regulation systems of various countries are helpful for capturing of general tendencies in this sphere as well as development of general international approaches in view in possible integration of energy markets. They may be also useful for mutual understanding of business persons and regulators of various countries.

The paper focuses on the similarities and differences between Russian and Finnish system of price regulation in the sphere of electricity transmission. The primary sources are key laws and regulations enacted in both countries as well as background theoretical and conceptual materials. Among the similarities are such characteristics as use of RAB-regulation and tendency to uniform pricing of transmission services and others. Differences are visible in many aspects such as efficiency stimuli in determining of allowed revenue, power losses covering, connection charges, some legal procedures etc. Some similarities and differences are related to conceptual and institutional factors, others are situational. Nevertheless there exists some tendency of convergence in key aspects based on modern ideological developments in this sphere.

Session 4. Eurasian Economic Union

The Eurasian Economic Union Court and the Russian Law Enforcement Practice: Opportunities and Reality

Dr Ekaterina Dyachenko, Court of the Eurasian Economic Union, Minsk, Belarus.

The EAEU Court settles two categories of disputes: at the request of the Member States and economic entities. Unlike its predecessor – the EurAsEC Court, it has no jurisdiction to examine references for preliminary rulings from national courts, although this mechanism largely remained unutilized by the Russian supreme courts during the three years of the

EurAsEC Court's existence. The EAEU Court, however, has its own mechanisms to influence the judicial and law-enforcement practice of the bodies that operate in the areas that are subject to supranational regulation.

First, it leads the Supreme Court and the Constitutional Court to define their position towards the law of the EAEU. Right now they are willing to recognise the primacy of EAEU law provided that its application won't lead to a violation of constitutionally mandated rights and liberties. Secondly, the EAEU Court's case-law may have a direct or indirect impact on the national courts judgments in individual cases. A direct impact will take place when an act issued by a national body based on the Eurasian Economic Commission's decision is challenged in a national court. A EAEU Court's judgment on the recognition of the Commission's decision as non-conforming to the Union law will predefine the national court's judgment. If at the time of the proceedings, the Commission's decision has not yet been found to be defective, the applicant may apply to the Union Court subject to the suspension of the proceedings in the national court. Unfortunately, within civil proceedings it is impossible to suspend the proceedings pending consideration of the case by the Union Court. Despite the formal possibility to suspend an arbitration case, the courts are reluctant to grant such requests. Thus, a change in the Russian legislation is needed in order to avoid the risk of parallel proceedings and conflicting judgments.

Another major concern is that the Russian procedural legislation provides no opportunity to review a legally effective judicial act due to the decision by the Union Court relevant to the particular case, although such possibility exists in respect of the judgments of the ECtHR. The indirect impact could be described as the Russian courts' adherence to the legal stances adopted by the EAEU Court. The areas of the Court's possible influence are not necessarily limited to those that are subject to the supranational regulation as its case-law could also have an impact on the regulation of foreign exchange control and taxation relations.

Russian constitutional law and the legal order of the Eurasian Economic Union: an uneasy relationship

Maksim Karliuk, HSE-Skolkovo Institute for Law and Development, National Research University Higher School of Economics, Moscow, Russia

Eurasian integration has created a new legal order – the so-called 'Union law' of the Eurasian Economic Union (EAEU). This legal order, which was shaped with the participation of Russia, has its own narrative, principles, hierarchy of rules, and innovations such as direct effect of decisions. These and other features, in their turn, contribute to shaping and development of the Russian legal system. The courts within this integration project were activist from the beginning, somewhat borrowing approaches from the European Union. However, the Russian Constitutional Court has already voiced its differences in such approaches. In addition, it maintains that Russia can set aside international obligations based on national constitution, which indirectly targets the viability of the EAEU legal order. These practices clearly undermine the 'unity' of the EAEU legal order and the interweaving of national and regional legal frameworks. This presentation is called to analyse the uneasy relationship of the two legal orders and assesses the impact that certain practices have on the development of both Russian law and the EAEU law. It points out the flaws in the reasoning in the relevant case-law, but also underlines the commonalities, which could serve as the foundations for seamless coexistence and mutually beneficial common development of the two legal orders. Thus, solutions are proposed to strike a balance between the necessity to protect respective legal orders on the one hand, and ensuring their effectiveness on the other hand.

The Court of the Eurasian Economic Union: challenges and perspectives

Dr. Kirill Entin, Court of the Eurasian Economic Union, Minsk, Belarus.

The Court of the EAEU is a relatively new structure that began functioning in 2015. Despite its crucial role in ensuring the uniform interpretation and application of the law of the EAEU and the fact that it enables undertakings to challenge in court the decisions, actions or inaction of the Eurasian Economic Commission, the Court remains relatively unknown both within the business community and among law professionals.

Indeed, the limited number of applications cannot be attributed solely to the narrow jurisdiction of the EAEU Court or to the lack of Commission decisions in some policy areas, but is also symptomatic to a certain lack of trust. Thus, one of the main challenges the EAEU Court is facing at the moment is building up a reputation. Such a reputation should rest on several elements:

- professionalism (it is important for the judgments to be not only well-grounded1 but also sufficiently clear and easily understandable);
- openness (while the costs to bring an action before the Court are substantial, especially considering the impossibility for the Court to award damages, the Court certainly took an important step in that regard with a liberal interpretation of the locus standi of undertakings and a broad interpretation of the notion of "inaction" of the Commission. The publication of model forms and instructions for the applicants should also render the application process easier);
- impartiality (both from the influence of Member States and the Commission);
- efficiency (the Court admittedly has limited authority in this regard, but it can at least make sure that the cases are dealt with in a timely fashion which is particularly important in the context of parallel proceedings before national courts).

Another important task for the Court is the development of EAEU law through its case-law and its dissemination. This should be done not only via the participation in academic events but also through the organization of specialized trainings for legal professionals and the establishment of cooperation with national courts, particularly since unlike the Court of Justice of the European Union the EAEU Court does not yet have the possibility to examine preliminary references from national courts.

Session 5. Legal transplants and Russian Law

Statutory Damages in the Intellectual Property Law of the Russian Federation: a controversial legal transplant

Dr. Vladislav Starzhenetskiy, Faculty of Law, National Research University Higher School of Economics, Moscow, Russia

"Compensation for violation of exclusive rights" is the dominant remedy used in the Russian legal system against IP infringements. This legal instrument is the Russian equivalent for the US statutory damages. Being introduced in Russia in 1992, it quickly became very popular, and in high demand among IP right holders. At the same time due to its controversial hybrid nature that combines compensatory and punitive functions there is a permanent risk of awarding excessive, many times multiplied damages, which is contrary to the principles of legal certainty, proportionality and individual character of a sanction, reasonableness and justice. Evolution of the compensation in Russian statutes and case law since 1992 reflects

ongoing theoretical debates on its nature. It also demonstrates aggressive tactics used by IP right holders in order to multiply damages subject to the award and reveals practical solutions developed by Russian courts (including Supreme Commercial Court, Supreme Court and the Russian IP Court) to balance competing interests. Although this remedy proved to be very effective in fighting against IP violations, it still needs to be reformed to be fully compatible with the Russian constitutional law provisions and principles of civil liability.

The Ideological Nexus of the Legal Harmonisation Thesis

Dr Antonios E. Platsas, Faculty of Law, National Research University Higher School of Economics, Moscow, Russia

The paper examines in certain detail the ideological basis of the modern legal harmonisation thesis. Against the backdrop of the phenomenon of globalisation, the harmonisation thesis defines to a considerable extent the operations of the majority of the world's legal systems nowadays, i.e. through relevant processes of legal global and regional convergence initiatives. Typical examples here include EU legal initiatives, the European Convention on Human Rights, such international instruments as the UN Convention on Contracts for the International Sale of Goods, the International Covenant on Civil and Political Rights and so forth. In particular, the paper seeks to identify, in the ideology of legal globalisation initiatives, the very philosophical and economics undercurrents, which run through the legal harmonisation thesis. It transpires that the modern harmonisation thesis is the resultant of philosophical and economics analyses. The paper, thus, commences its analysis with the philosophical idea of the one. It subsequently identifies the thesis' practical utility, which has already been observed in economics discourses, by critically analysing and focusing on Kerr's classical thesis as to the convergence of industrial societies around the world. Thereafter, the analysis moves towards the crystallisation of the legal harmonisation thesis for the citizen, the State and corporate actors, i.e. by offering practical examples of such a crystallisation. The paper concludes with a discussion as to the future of the harmonisation thesis for the world's legal systems.

International Interpretation as a Meta-Principle to Interpret Domestic Law

Laura Lassila, Faculty of Law, University of Helsinki, Finland

The globalisation of sales of goods has arise the need to find a way to manage international contract chains without need to refer different national laws for every individual contract. It is necessary to find a way to interpret international and national contract law rules through the nature of the global contract chains.

This paper's aim is to find and define the meta-principle of international interpretation and use that principle to interpret international and national contract law rules. The first step is to find the foundation of a meta-principle of international interpretation by analysing uniform contract law principles. Secondly the uniform principles' content will be defined by analysing case law . The focus will be within the case having connection to the Russian Federation domestic law. Last step is to draw up the content of the meta-principle found from previous analysis.

This paper will take an effort to define the international interpretation as a meta-principle. The meta-principle of international interpretation offers an interpretation umbrella to harmonise international contract law by using existing principles. Under the umbrella takes place general principles of contract law, such a principle of good faith and fair dealing, which will be interpreted under the umbrella's framework no matter on what substantial law or uniform

rules defines such principle. Benefits of the meta-principle is better uniformity and predictability on interpreting commercial contracts. There can be found an interpretation principle which provides the basis of interpreting all international commercial contracts through their character in a global contract chains.

Legal transplants in Russia and dynamics of legitimacy and enforcement

Dr. Ekaterina Mouliarova, Moscow State University, Mosco, Russia/University of Regensburg, Germany

The issue of legal transplantation is of continued importance for comparing legal cultures and understanding the place of law in the process of normative integration. Along with morals, religion, tradition, politics and economy, law formulates normative principles of development and social change. Legal reform by legal transplantation has been an important concept in the theory of normative innovation. The collapse of the Soviet block in the 1990s offered a new opportunity to introduce global constitutional standards into legal systems of the newly independent states and to challenge political reform. Twenty five years later it is clear that the results of legal harmonization and legal reforms and the ability of the Western type law to induce stable political change are far from ideal. There may be various explanations for more or less successful adaptation towards globally accepted ideas and norms in Russia. Pragmatism competing with such traditional values as order, respect for hierarchy, reconciliation, conflict resolution on the one hand and participative values of governance, consensus building, accountability, tolerance on the other hand all reflect the specifics of regional and international legitimacy models and the success and dynamics of global legal transplants in the regional cultural context. The particular way the law drawing limits of global constitutional standards reflects the fundamental place normative traditions and values take in political and legal history.

Session 6. Russian Tax Law in the Context of Globilising Economy

The globalisation of world economy raises new approach to international cooperation in tax matters and domestic views on aggressive tax planning. The world's biggest economies agreed to work on a global plan of actions against base erosion and profit shifting in cross-border tax area ("BEPS"). The BEPS project documents have been developing by OECD. Russia is not an OECD member but it announced a strong political support of BEPS and demonstrates some local anti-offshore measures.

The modern Russian tax rules are relatively new and historically they were developed on a basis of state-controlled economy, without serious national concepts against offshore companies. Since early 90s of the last century when the current tax system was created domestic and multinational taxpayers have been used this as opportunity for aggressive tax planning including typical off-shore tax planning. Few attempts to fight offshore tax planning in Russia were weak and inconsistent and the fiscal system suffered a lot losing underpaid taxes.

Since 2014 Russia started a domestic campaign ("Deoffshorisation") against aggressive cross-border tax planning, seriously amending domestic anti-avoidance rules and cross-border tax rules (including taxation of controlled foreign companies, beneficial ownership concept, corporate tax residency). At the same time the tax authorities started to make more comprehensive tax audits of taxpayers which use double tax treaties to reduce their tax burden and in the majority of court tax disputes the judges upheld the tax authorities. Although the

BEPS project and Deoffshorisation take place almost at the same time, it is more a coincidence rather than a deliberate Russian policy of being in line with the international trends. But at the same time the Russian authorities are not completely isolated from the BEPS. For example, the tax authorities use BEPS wordings as arguments in tax audits, some BEPS actions effect Russian tax policy and legislation.

Both the tax authorities and the customs authorities have the right to valuate prices but they do it for different fiscal purposes. The methods used by the customs authorities in operations between related parties partly match and partly do not match the methods applied by tax authorities. The related party transfer pricing is determined in accordance with the Guidance approved by OECD. Russia has its own detailed domestic regulation on transfer pricing. In 2016 the World Trade Organization's Technical Committee on Customs Valuation confirmed that transfer pricing documentation may be used to support evaluation of prices for the customs purposes.

Anti-Offshore Measures in Russian Taxation: Past and Present

Prof. Alexander Pogorlesky, Faculty of Economics, St. Petersburg State University, St. Petersburg, Russia

The modern Russian tax rules are relatively new and they were developed without serious national concepts against offshore companies. Since early 90s when the current tax system was created domestic and multinational taxpayers have been used this as opportunity for aggressive tax planning including with off-shore tax planning. Few attempts to fight offshore tax planning in Russia were weak and inconsistent and the fiscal system suffered a lot losing underpaid taxes. The world's biggest economies work on a global plan of actions against base erosion and profit shifting in cross-border tax area ("BEPS") significantly changed Russian position on offshores.

BEPS's actual and potential effect on Russian tax treaties and tax law

Dr Victor Matchekhin, Kutafin State Law University (Chair of Financial Law), Moscow, Russia/ Linklaters Russia

Since 2014 Russia started a domestic campaign ("Deoffshorisation") against aggressive cross-border tax planning, seriously amending domestic anti-avoidance rules and cross-border tax rules (including taxation of controlled foreign companies). At the same time the tax authorities started to make more comprehensive tax audits of taxpayers which use double tax treaties to reduce their tax burden and in the majority of court tax disputes the judges upheld the tax authorities. Although the BEPS project and Deoffshorisation take place almost at the same time, it is more a coincidence rather than a deliberate Russian policy of being in line with the international trends.

Application of Transfer Pricing Documentation for Confirming Customs Value in Russia: New Rules and Questions

Dr Wilhelmina Shavshina, DLA Piper, Russia/ Law Faculty, St. Petersburg State University, Russia

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authorities. The related party transfer pricing is determined in accordance with the Guidance approved by OECD. Russia has its own detailed domestic regulation on transfer pricing. In 2016 the World Trade Organization's Technical Committee on Customs Valuation confirmed that transfer pricing documentation may be used to support evaluation of prices for the customs purposes.

Session 7. Roundtable. Global Context of Russian Labour Law

Globalization and its economic and cultural outcomes are the greatest challenges for modern labour and social security law in any country. In Europe it led to the erosion of the standardized terms of employment, and the unprecedented increase of "feminized and non-unionized labour force of part-time, temporary, and self-employed 'flexible' workers mainly engaged in service industries".[2] Its impact upon Russian labour and social security law is less evident. However, understanding globalization as a crucial dependence of national states upon external factors such as international politics, global economic crisis, oil prices, or sanctions, we can trace huge negative impact of globalization upon Russian labour and social security law.

Our session aims to provide the profound analysis of the negative factors influencing the changes in modern Russian labour and social security law and their outcomes. In particular we discuss the poor economic situation, partly associated with the "New Cold War", and the ideology of isolationism. We examine the issues of labour law that are affected by these factors: minimum wages and subsistence level, regulation of temporary agency work and transnational employment relations; Russian migration policy and trade union strategies towards migrant workers. We also assess the impact of economic crisis on the protection of unemployed and consider whether qualitative minimum standards of social protection in case of unemployment can be derived from the Constitution of the RF itself or from the Constitutional Court's case law.

The impact of globalization upon collective labour law is also a matter of concern within our session. We research recent changes into collective labour law, which have led to the serious decrease of the level of employees' working conditions, and question the effectiveness of collective bargaining and collective agreements in Russia in the nearest future. Particular focus is made upon the Russian migration policy and trade union strategies towards migrant workers in light of globalisation.

The session also includes the report about recent developments in Social security law which were influenced by the economic crisis. These changes are analyzed in a comparative and international perspective, basing on the research of foreign "austerity experience" and relevant case law of the International bodies. The session is concluded arguing that the changes brought under the influence of external factors into Russian labour and Social Security law demonstrate that the global raise of inequality, evidenced by leading scholars[3] as one of the results of the globalization, is as well actual for Russia.

The impact of chill in relations with West on modern labour law of Russia

Dr Nikita L. Lyutov, Department of Labor and Social Security Law, Kutafin State Law University, Russia

[2] B. A. Hepple, Labour Laws and Global Trade. Hart Publishing, 2005, p. 6.

[3] Stiglitz, Joseph E. *Globalization and its Discontents*. Vol. 500. Norton: New York, 2002; Piketty, Thomas. "Capital in the 21st Century. *Cambridge: Harvard Uni* (2014).

The recent chill in relations with West has led to the negative consequences for Russian economy. Weaker economy diminished the amount of both budgetary and private employers' resources that could be spent for the social goals. There are two main negative factors influencing the changes in modern Russian labour law. One of them is the poor economic situation, which is partly associated with the "New Cold War". The second factor is the ideology of isolationism, where the legislator argues that any international criticism of Russia from the human rights perspective, including the workers' rights, is inspired by political enemies of Russia. The paper will examine the issues of labour law that are affected by these factors: minimum wages and subsistence level, regulation of temporary agency work and some discussions on further flexibilization of labour law.

Transnational employment relations between economic Scylla and political Charybdis of contemporary Russia

Dr Daria Chernyaeva, Faculty of Law, National Research University Higher School of Economics, Moscow, Russia

The specific geopolitical position of Russia makes it unlikely to become less globalized. However the nature and priorities of 'globalization' may alter under the fluctuations in foreign policy and international relations between the once partnering countries. Political decisions may add to or relax existing economic difficulties thus inducing entrepreneurs and workforce change their choices. This may engender long-lasting rearrangement in capital- and workflows directions which will be hard to reverse.

The paper analyzes these processes as they unfold currently in Russia. It examines amendments recently introduced in the regulation of transnational employment relations against the contemporary economic and political context. The paper assesses the extent to which the legislative response departs from the general international experience in addressing such issues, the nature of the respective corporate initiatives and a potential these field has for being regulated with international instruments. The paper also discusses the relative coherence of various branches of the respective Russian legislation. In conclusion it offers a few ideas on harmonization of the legislative traditions, political aims and national interests of the Russian Federation in transnational employment regulation with the challenges it faces on national and international levels.

Protection in case of unemployment during the crisis in Russia

Dr. Olga Chesalina, Max Planck Institute for Social Law and Social Policy, Germany

Despite the financial and economic crisis, the unemployment rate in Russia has been relatively low. At the same time, however, the unemployment rate according to ILO criteria is more than 4.3 times higher than the number of registered unemployment benefit recipients and stands at 4.6 million persons (6%). While no benefit cuts were effected in connection with the financial and economic crisis, the strong inflationary devaluation of the unemployment allowance was factually tantamount to a benefit cut. The system is characterized by the very low level of unemployment benefits as well as the disproportionate obligations of unemployed persons and the sanctions imposed on them for not fulfilling the latter. In this regard, the difference between active labour market policy and the duty to work must be investigated (in comparison with Belarus and the Nordic countries). The questions arises as to whether qualitative minimum standards regarding the level of social protection in case of unemployment can be derived from the Constitution of the RF itself or from the decisions ruled by the Constitutional Court. Does this practice run counter to the international

obligations of the RF derived from the European Social Charter? Would the ratification of ILO Convention Nr.102 improve this situation?

Collective agreements in Russia: the influence of the economic crises on its legal regulation and effectiveness

Dr Elena Gerasimova, Faculty of Law, National Research University Higher School of Economics, Moscow, Russia

Comparing to many countries Russia has high level of trade union density and collective bargaining coverage, but the quality of collective agreements and their effectiveness where always a subject for criticism due to low level agreements' norms. During last few years the Labour Code of Russia was amended to make changes of collective agreements and employees' working conditions more flexible. In 2014 it was allowed to establish in collective agreements, concluded at the sectoral and local level, longer working hours per one day and per week for employees, working in harmful conditions of 3rd and 4th level, for the financial compensation, defined in the collective agreement. Another law of 2014 provided the employer with the opportunity to apply for termination of collective agreements' provisions in case of financial difficulties, if such opportunity exists in the sectoral collective agreement, and if the employer's application is supported by the local trade union or other representative body. Within last few years majority of sectoral collective agreements were amended with provisions, which allow to realize both options. This brought to serious decrease of the level of employees' working conditions. Together with the decreasing number of employers' association, lowering number of sectoral and local collective agreements and agreements on minimum wage in regions, it raises question on the effectiveness of collective bargaining and collective agreements in Russia in the nearest future. The paper will investigate these issues.

The impact of economic crisis upon social security rights in Russia. Is there any method to resist austerity?

Dr Elena Sychenko, State Institute of Economics, Finance, Law and Technology, Gatchina, Russia

The violent wind of austerity measures, which significantly deteriorated the level of social rights protection in the Southern European States, has reached Russia in 2015. Due to the sanctions and low prices for petrol Russian Government has introduced a number of measures aimed at reducing the budget expenses. These measures had a tight impact upon the most vulnerable groups of the Russian society – pensioners and persons with disabilities. Thus the newly introduced method of disability estimation decreased the number of people with disabilities by 500 000, while the state of the health of these 500 000 persons has not improved. Another recent reform abolished the indexation of pensions in respect to working pensioners, while the official inflation rate in Russia in 2015 was about 13%. In addition, the Russian government has put forward proposals to raise the retirement age and to cancel the payment of pensions to working pensioners. These reforms and these ideas of the Russian Government vividly demonstrate that the right to social security is sacrificed to the economic interests of the state. The questions arise whether there is any method of resistance to such flagrant reforms, whether the state should respect certain human rights while introducing austerity measures? The paper will investigate both questions. Referring to the Greek experience of appealing to European Court of Human Rights and to the European Committee of Social Right, and analysing the recent ECtHR's case law the author will formulate possible ways of challenging current social security reforms dictated by economic crisis in Russia.

Session 8. Russian Financial Law and Globalization

The scope of the arbitral award's binding effect (interests of «third parties» in international commercial arbitration)

Dr. Nataliya Bocharova, Faculty of Law, Moscow State University, Moscow, Russia

Modern business international transactions are multiparty complicated and large-scale projects. Such transactions are usually composed of several bilateral contracts which contain bilateral dispute resolution arrangements. According to the principle of parties autonomy dispute arising between two persons bound by an arbitration agreement in connection with a multiparty project will be resolved by arbitration exclusively between these two parties. Other parties cannot participate in the resolution of the dispute through arbitration, even if they have played an active role in the actual project. Notwithstanding any legitimate interest they might have in the outcome of the dispute, these parties will remain third parties both to the arbitration proceedings and an arbitral award. Their interests are not taken into consideration and left unprotected. Arbitration proceedings unlike litigation do not bear any kind of intervention or joinder, which is s explained by the contractual nature of arbitration.

Thus, binding power of an arbitral award extends only over parties of an arbitration agreement. Meanwhile an arbitral award can affect interests of third parties. How these parties can defend their interests in arbitration proceedings and during recognition and enforcement proceedings in national courts? The paper examines the binding and res judicata effect of the arbitral award through Russian and international experience of defending of interests of third parties in international arbitration.

Legal regulation of payment services in Russia and the EU

Vladimir Ermolin, Moscow State University of International Relations (The Chair of International Civil Law), Russia

I have divided up my presentation into three main parts. Firstly I would like to discuss the modern issues of payment services in the EU and Russia. Secondly I will come to the legal regulation of payment services in Russia and the EU and the comparative analysis of legal acts on payment services in the EU and Russia. Finally I will talk about future law perspective of payment services in the EU and Russia.

There are a lot of difficult aspects of payment services' regulation both in the EU and Russia. In recent years, a significant progress has been achieved in integrating retail payments both in the European Union and in Russia (in Europe - Directive (EU) 2015/2366 of the European Parliament and of the European Council and in Russia - the Federal act of Russia "On the National Payment System"). Nowadays, the security risks relating to electronic payments have increased. This is due to the growing technical complexity of electronic payments, continuously growing volumes of electronic payments worldwide and newly emerging types of payment services.

The review of the European Union legal framework and Federal Acts of Russia on payment services have shown that developments have given rise to significant challenges from the regulatory perspectives. Significant areas of the payments market, in particular, card, internet and mobile payments, remain fragmented beyond the national borders of some EU countries. Many innovative payment products or services do not fall, entirely or in large part, within the scope of the legislation. This has resulted in legal uncertainty, potential security risks in the

payment chain and a lack of consumer protection in certain areas. It has a proven difficulty for payment service providers to launch innovative, safe and easy-to-use digital payment services and to provide consumers and retailers with effective, convenient and secure payment methods not only in the EU, but in Russia as well. That is why it is worth comparing legal methods of payment services' regulation in different countries. There will be a comparison of the legal methods of payment services' regulation set in the Directive (EU) 2015/2366 of the European parliament and of the European Council and the Federal act of Russia "On the National Payment System".

It is also important to pay attention to the law perspectives of payment services and new rules for regulation. They will protect consumers at the time of payments, promote the introduction of innovative online and mobile payments so make European payment services and Russian payment services safer.

Creating of new ideology of credit rating agencies law

Dr Kirill Molodyko, HSE-Skolkovo Institute for Law and Development, National Research University Higher School of Economics, Moscow, Russia

In 2015 the Russian Federal Law 222-FZ it came into force. This is the first regulation of credit rating agencies CRA) in Russia at the legislative level. I report how the Russian central bank has started implementation of some provisions of the new law. The author supports the ideology of establishment of further multinational CRAs by residents of several countries of the BRICS, including Russia. This will require a new regulation because the Western model of supervision of CRAs failed.

In Europe, after the crisis of 2008, the supporters of a legally binding regulation of CRA activities defeated supporters of more liberal "based on the principles" approach. However, both the EU and American CRA markets are highly monopolized. In the US, the financial services markets regulators were "captured" by corporations in the meaning, that the regulators started to believe sincerely themselves that the market is good, what is good for corporations. While creating the CRAs with the founders from all or several of the BRICS countries, it is important to consider the following. Despite the shortcomings of regulation and supervision over CRAs that were highlighted in 2008, some western practices are logical and reasonable. The force of habit is also very important. Investors are used to current regulatory practices even they consider them imperfect and sometimes controversial. Dramatically innovative, extraordinary, very unusual regulation of CRAs is unlikely to cause the confidence. So at the first stage it is advisable to implement to a national Russian market the part of Western practices, which looks reasonable. And then on this basis one should move on, offering the new BRICS regulatory ideology and practices. Of course, a certain amount of formal CRAs reports is unavoidable. But I'm convinced that the focus in the supervision should be shifted from tons of unnecessary papers to: a) de-monopolization of the market through the cooperation of regulators and antitrust agencies of the BRICS countries, b) personal protection of employees of the relevant CRAs, both whistleblowers, or just staff wanting to perform the work faithfully; c) control over certain particular types of CRAs financial flows; d) provision to CRAs and their employees opportunities to quickly get a clear, unambiguous and motivated regulators opinions on emerging market legal issues, especially ethical.

Analysis of opportunities and options for adaptation Islamic banking products and services to the Russian legislative and regulatory framework

Dr Vladimir Malyaev, Department of Banking Law, National Research University Higher School of Economics, Nizhny Novgorod, Russia

Now problems of adaptation of national financial systems to processes of globalization and issues in globalization are one of important areas of modern economic and financial sciences. The negative impact of sanctions by the US and EU countries on the Russian economy:

- worse is the performance of the banking system;
- limited access to external financial markets (the increased cost of funding for banks and corporations);
- blow on the Russian industry, heavily dependent on imports of strategically important resources and technologies (possible deterioration in the financial condition of the corporate enterprises-borrowers);
- the impact on stability of energy exports;
- the fall of the stock market quotations;
- outflow of foreign investments;
- ruble depreciation (risks increased volatility of exchange rate dynamics).

The objective of the banking system to provide the possibility of financing new projects, without resorting to borrowing in Western financial markets. One of the suggestions: switching to other markets in financial borrowing - not in the West but in the East. Islamic finance is a major element of this repositioning. One of the most serious reasons is absence of legislation, regulating the relations, arising while working with Islamic financial instruments.

They are no such concepts as murabahah, mudarabah, istisna in the Russian law; therefore, Islamic financial products can be realized only through analogical schemes. However, the current legal framework allows applying only a small number of Islamic instruments, which is a serious obstacle in the way of development of this financial sector. Legislation change could become a solution; however, this work assumes essential expenses. Changes or amendments can affect about fourteen federal laws, among which Civil and Tax codes, Federal Law "About Banks and Bank Activity", "About the Securities Market", a number of the acts regulating insurance activities, and others. It is equally important to improve the administrative rules and legislation in such areas as the development of waqf institutions, certification of halal products, use of the Muslim practice of insurance.