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EDITOR'S WELCOME NOTE

Dear Reader

We welcome you to another issue of Kutafin Law Review, which with a change in Editorial leadership and team is embarking on new directions in 2019 and beyond. We have updated our "Guidelines for Writers", and we are regularly adding new content to our website.

This issue has a number of articles linked to the topic of Science and the Law. There is much that is similar in the two disciplines, yet there remain contrasts and sometimes difficulties when the two meet. It is our hope that this gives you "food for thought", especially if you are an academic programme decision-maker.

Over the forthcoming months, the Editorial Staff will be making contact with our distinguished readers and contributors, with the purposes of building international cooperation and facilitating scholarly contributions. We most cordially invite you — if this Journal is in your hands — to write and make contact with the Editorial Office, who will be most delighted to hear from you.

Kutafin Law Review is particularly interested in developing English language legal scholarship amongst Russian speaking students and young academics — and presenting it to the world. Working in co-authorship, we encourage students and their teachers to contribute articles. You will find a warm welcome at our Journal, which as in everything we do, we follow our university motto — "not for school but for life". We will give you every encouragement and support to help you to develop your legal scholarship skills into real abilities that you can use outside university. Please get in touch with us to discuss any ideas that you have and find out how we can help. We will also tell you something of our rewards scheme for encouraging academic grade research.

Our next issue, which will appear in late autumn, will include the theme the subject of international legal moot competitions in English.

With our very best wishes from everybody at Kutafin Law Review.

Charles Goddard,
Chief Editor

SCIENCE AND TECHNOLOGY

SOME REMARKS ON THE LEGAL STATUS OF HUMAN EMBRYO

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Abstract

There is no unified position as regards the legal status of the embryo in Europe. Most International laws discard the possibility of recognising an absolute right to life to an embryo or foetus. The European Court of Human Rights had several occasions to consider, and express itself on this question, but has always avoided giving a clear opinion — leaving open the question of whether Art. 2 ECHR also covers life before birth. In the recent Parillo case it has been noted that it raises sensitive moral and ethical issues with a wide margin of appreciation for the States. Although there is no European consensus on the subject, it seems that in the 21st century, the human embryo begins to enjoy a gradual protection and in some situations the law acknowledges some rights associated with it.

Keywords

Foetus, beginning of life, human rights, Parillo case

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1. INTRODUCTION

There is not yet a clear uniform position regarding the status of a human embryo in Europe. The Council of Europe and the European Union experienced some difficulties with the definition of the legal status of human embryo and the issue is unlikely to be resolved in the near future. Researchers consider that the embryo constitutes an exceptional research material, since the cells of the embryo enable the curing of neurological or hereditary diseases. The status of "embryo" is a difficult one to determine, given various factors including cultural, and sociological.[2]

2. EMBRYO AND FOETUS

When a human life begins, at what point is it necessary to protect it? Opinions of the modern scientists in this regard differ significantly.

The first question to be discussed is about the term "embryo" in comparison to the terms "foetus" and "pre-embryo". There is absolutely no consensus about the ethical and juridical value of an embryo. "Embryo" is the stage of development of the human being, starting from the zygote stage before birth up to the point of emerging into the world. Human foetal development lasts about 270 days. It can be divided into two periods: the foetal (embryonic) and foetal (foetal).

There are two basic approaches to the problem of the legal status of the embryo. In the first approach the embryo is defined as a legal entity, with full legal status equal to that of a born person. In the second approach the embryo is legally defined as a part of the mother's body, aligned with the human organs and tissue. It is an object of the mother, with a material nature.[3] According to these approaches nowadays

[2] Ramona Duminică, *Legal status of human embryo*, University of Piteşti, Faculty of legal and administrative sciences. http://www.uab.ro/reviste_recunoscute/reviste_drept/annales_13_2010/18duminica.pdf (accessed 11 December 2018).

[3] Федосеева Н., Фролова Е. *Проблема определения правого статуса эмбрионов в международном и российском право* (Problem of definition of the legal status of embryo in International and Russian Law), Медицинское право, No. 1/2008. See also: Belova G. & A. Hristova *Some Problems Related to the "Human Enbryo" in the EU Law*, KBO, Vol. XXII, 2016, DOI: 10.1515/kbo-2016-0050 and Hristova A. & G. Georgieva New Research and Technology Developmet: Some

we can distinguish *three* positions in respect to the human embryo: absolutist, the liberal point of view and an intermediate or moderate position (gradualism) which believes that a fertilised egg develops into a human being gradually and the embryo has a considerable but not an absolute value.

Some authors emphasise that the level of development of the embryo can be described and defined both in terms of unification of biological cell material in the process of its formation, and from the point of view of the philosophical understanding of the human dignity of the embryo. During the first days, and until the 2nd week, some authors even prefer to use the term "pre-embryo" than embryo, arguing that before nidation (implantation into the lining of the uterus) we have an entity that is not an embryo yet, namely because it lacks two fundamental characteristics: unity and unicity, characteristics that would transform it in an individual.[4]

3. INTERNATIONAL LAW DOCUMENTS ABOUT HUMAN EMBRYO

Firstly, Article 3 of the **Universal Declaration of Human Rights (1948)**[5] clearly states that: "*Everyone has the right to life, to freedom and security of person*". In a similar way, the **International Covenant on Civil and Political Rights (1966)**[6] states in Article 6: "*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life*". In these first documents, it seems indisputable that the protection of certain rights is associated with the term "human being".

Legal and Ethical Issues, Kutafin Law Review, 2017, Issue 2, DOI: 10.17803/2313-5395.2017.2.8.388-397.

[4] Raposo Vera Lúcia, Catarina Prata & Isabel Ortigão de Oliveira *Human Rights in Today's Ethics: Human Rights of the Unborn (Embryos and Foetus)?*, Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol nº 62/63, pp. 95–111. dialnet.unirioja.es/descarga/articulo/3684817.pdf (accessed 12 December 2018).

[5] Adopted on 10 December 1948 by General Assembly Resolution 217 A. http://www.ohchr.org/EN/UDHR/Pages/Introduction.aspx.

[6] Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966. http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

Whilst elaborating the Covenant on Civil and Political Rights, five states, (Belgium, Brazil, El Salvador, Mexico and Morocco), proposed formulating Art. 6 in such a way that human life is protected from the moment of conception. However, this proposal was rejected by the majority of states. They argued that it would be scientifically impossible to exactly determine the moment of conception.

However, the United Nations documents connected with the children's status such as **Declaration of the Rights of the Child (1959)**[7] take a different position in terms that a child is not only an innate human being, but also that is still in the uterus and not born. In this connection the **Convention on the Rights of the Child (1989)**[8] states in its preamble that "*The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth*". This type of statement recognises the acceptance of the idea that by "child" the Convention intends to represent the born as well as the unborn, applying the the rights announced in its text to both categories.

Apart from the United Nations documents, European states in 1950 adopted the **European Convention for the Protection of Human Rights and Fundamental Freedoms** (ECHR). Art. 2.1 states "*Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law*".

Comparing the text of other human rights documents with the text of the ECHR, we can conclude that the ECHR is the most confusing one. Some problems are caused by the statement –"*Everyone's right to life shall be protected by law*", which seems to refer to some kind of subjectivity and personification (included in the term "everyone") that, in the absence of a subsequent explanation about the moment when protection commences, could lead to legitimate uncertainties. It

[7] Adopted by the United Nations General Assembly in Resolution 1386 (XIV) on 20 November 1959. http://www.unicef.org/malaysia/1959-Declaration-of-the-Rights-of-the-Child.pdf.

[8] Adopted by United Nations General Assembly's Resolution 44/25 of 20 November 1989. http://www2.ohchr.org/english/law/crc.htm.

should be noted that in its earlier versions, Art. 2 of the ECHR contained the expressions "*each person*" and "*all individuals*", but at some point the drafting committee choose the term "*everyone*", which is arguably a more evasive concept than the previous ones, though some authors defend exactly the opposite, sustaining that the expression refers unquestionably to the unborn.[9]

Because of the multiplicity of expressions of concept, the drafters finally elected the most neutral version. Nearly all Contracting States already had legislation permitting abortion before ratifying the Convention, and did not make any reservation under Art. 64 of the ECHR with respect to its Art. 2.[10] This single fact can operate as a persuasive argument to support the position that at the very beginning Art. 2 ECHR was understood to not embrace the unborn.

4. EUROPEAN COURT OF HUMAN RIGHTS' VISION TOWARDS THE BEGINNING OF THE RIGHT TO LIFE

The case of *Vo v. France*[11] is related to an important aspect of discussions on the right of life — at which moment life begins at and which moment life is to be protected from. The problem is that this matter has not been addressed in the international legal documents. The only exception is the American Convention on Human Rights from 1969, Article 4.1 of which states that each individual has the right of respect of their life. This right is protected by law, as a rule, from the moment of conception. Unlike the American Convention, Article 2 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) only states that the right to life of each individual shall be protected by law. A similar approach was adopted in the African Charter on Human and Peoples Rights from 1981. In the case of *Vo v. France*,

[9] Raposo Vera Lúcia, Catarina Prata & Isabel Ortigão de Oliveira Human Rights in Today's Ethics: Human Rights of the Unborn (Embryos and Foetus)?, *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol* nº 62/63, p.102, dialnet.unirioja.es/descarga/articulo/3684817.pdf (accessed 12 December 2018).

[10] *Ibidem*, p. 103.

[11] *Vo v. France* (No. 53924/00), Grand Chamber, ECHR, 8 July 2004.

first mention is made of the matter for a human fetus as having the rights granted by ECHR, but the majority of judges disagreed.

In fact, as the European Court of Human Rights has had the opportunity to state in one of their earlier cases of *McCann v. the United Kingdom*: "Article 2 is one of the most important regulations of the Convention which, in times of peace, does not permit derogation in accordance to Article 15. Together with Article 13 (prohibition of torture), it supports some of the basic values of democratic society..."[12]

Since the Convention does not present a definition of human life, in the absence of European legal and scientific consensus regarding the limitations of human life, the Court also refrains from making specific statements."The matter of when life starts is connected to limits of assessment which the Court in principle considers to be exercised by the states; nevertheless, evolutionary interpretation of the Convention must be sought in the light of contemporary conditions..."[13] The Court seems convinced that it is neither desirable, nor possible, for the Court to present an answer to the question of whether an unborn child is an individual in the sense of Article 2 of the Convention (i.e. it is covered by the notion of "everyone"s right to life").[14] Instead of proposing a unified standard, the Court preferred to evaluate matters related to the beginning of human life separately on a case-by-case basis, leaving a significant level of freedom to the Member States under the Convention.

The European Court of Human Rights has had the possibility to pronounce again under the legal relations that arise further to assisted reproduction. The case of *Evans v. United Kingdom*[15] poses a question that had not been raised until then. Until that moment, the matter of the right of life of the embryo/fetus had always been reviewed within a normal pregnancy. In the Evans case, Article 2 of ECHR was reviewed in a situation where the embryo was located out of the appellant's body, which required an assessment of more complex legal relations and interests of the parties involved.

[12] *McCann and Others v. UK* (No. 18984/91), ECHR, 5 September 1989, par. 147.

[13] *Vo v. France*, decision from July 8, 2004, Par. 13.

[14] *Vo v. France*, decision from July 8, 2004, Par. 82 and 85.

[15] *Evans v. The United Kingdom* (No. 6339/05), Grand Chamber ECHR, 7 March 2006.

5. RECENT STRASBOURG CASE-LAW

The European Court and, formerly the European Commission on Human Rights had several occasions to express themselves on the question of whether the protection of Art. 2 ECHR also covers life before birth.[16]

A new stage in the discussion regarding the right to life has most surprisingly been formed in connection to the adoption of the new Hungarian Constitution and its entry into force on January 1, 2012. Article II of the new Constitution of Hungary states the following: "Human dignity is inviolable. Everyone has the right to life and human dignity; embryonic and foetal life shall be subject of protection from the moment of conception". In its opinion, however, the European Commission on Democracy through Law,[17] known as the Venice Commission, stated that the obligation for protection of the embryo/foetus may, under certain circumstances, be in conflict with Article 8 of ECHR.

Legislation concerning termination of pregnancy concerns an aspect of personal life since the pregnant woman is intimately connected to the developing foetus. The European Court of Human Rights (which always searches for the balance between personal and public interest, in case of the lack of standards in a certain area), leaves the answer to the difficult question "When does human life start?" to the judgment of the states with a view to the specific circumstances and needs of the states' own population. At the same time, the Venice Commission refers to the preamble of the UN Convention on the rights of the child, where it is stated that "the child, taking into consideration his/her physical and mental immaturity, needs special protection and care, including legal protection, both before and after his/her birth." However, the cited text can hardly be reviewed as recognition of the absolute right to life of the

[16] *Vo v. France, McCann v. the United Kingdom, Evans v. The United Kingdom*.

[17] Opinion on the New Constitution of Hungary, adopted by the Venice Commission at its 87th plenary session, Venice, 17–18 June 2011.

foetus.[18] It, however, leaves open the question of whether the embryo should enjoy a gradual protection.

The most recent case dealt by the European Court on Human Rights and which received wide response on the Internet is *Parillo v. Italy*.[19] Adelina Parrillo had sought to donate five embryos created for IVF treatment with her partner, who died in a bomb attack while reporting on the war in Iraq before any of the embryos were implanted. She had decided not to pursue a pregnancy and instead chose to donate the embryos to science to promote research into incurable diseases.

Italy prohibits research on human embryos, however, and Ms Parrillo's requests for the embryos to be released were refused by the storage clinic. She sought to challenge this decision on the grounds that it violated her rights under Article 8 of the European Convention on Human Rights.

For the first time, the Court was called upon to rule on the question whether the "right to respect for private life" could encompass the right to make use of embryos obtained from IVF for the purposes of donating them to scientific research. The "family life" aspect of Article 8 was not in issue here, since Ms Parrillo had chosen not to go ahead with a pregnancy with the embryos in question.

The Court, noting that the embryos obtained through IVF contained the genetic material of the person in question and accordingly represented a constituent part of his or her identity, concluded that Ms Parrillo's ability to exercise a choice regarding the fate of her embryos concerned an intimate aspect of her personal life and accordingly related to her right to self-determination. It therefore concluded that Article 8 was applicable in this case.

The Grand Chamber noted that there was no European consensus on the delicate question of the donation of embryos not destined for implantation. Although certain member States had adopted a permissive approach in this area (17 countries out of 41), others had chosen to prohibit it (Andorra, Latvia, Croatia and Malta) or to impose strict

[18] Belova, G. Some Comments on Human Rights and Bioethics, *Balkan Social Science Review*, Vol. 1, 2013, Goce Delchev University — Shtip, Faculty of Law, p. 42.

[19] *Parillo v. Italy* (No. 46470/11), Grand Chamber, ECHR 27 August 2015, available at http://www.echr.coe.int.

conditions on research using embryonic cells (for example, Slovakia, Germany, Austria or Italy).

Lastly, the Court noted that there was no evidence that Ms Parrillo's deceased partner, who had had the same interest in the embryos in question as the applicant at the time of the IVF, would have wished to give the embryos to science. Moreover, there were no regulations governing this situation in Italy.

The Court considered that it was not necessary to examine the sensitive and controversial question of the status of the human embryo in vitro and when human life begins, given that Article 2 (right to life) was not an issue in this case. With regard to Article 1 of Protocol No. 1 (protection of property), the Court considered that it did not apply to the present case, since human embryos could not be reduced to "possessions" within the meaning of that provision.

The Grand Chamber makes an important distinction between embryos in utero and embryos in vitro and that distinction should ultimately be recognised as being crucial. The embryos cannot develop life unless they are in utero.

Dissenting, Judge András Sajó from Hungary said that the applicant's interest in donating her embryos to scientific research, rather than allowing them to remain unused, is a deeply personal and moral decision. This choice is driven by her desire to honour her late partner and to further invaluable medical research with the potential to save lives. The law disregards the interest in preventing actual human suffering through scientific research in the name of the protection of a potential for life which, moreover, cannot ever materialise in the circumstances of the case. According to Judge Sajo, the majority of the Grand Chamber arguably paid insufficient regard to Ms Parrilo's autonomous decision whilst attaching undue weight and emphasis to the putative rights of the cryopreserved embryo. As he correctly pointed out, the embryo would have the potential to develop into a human being, but this remains merely a potential as it cannot happen without the consent of the donor(s), as was clear in the *Evans* case.

6. CONCLUSION

In conclusion, we can summarise that there is no unitary position towards the legal status of the embryo in Europe. In the recent *Parillo* case it has been noted that it raises sensitive moral and ethical issues with a wide margin of appreciation for the States. For the first time the Strasbourg court addressed Art. 1 of Protocol No. 1 to ECHR and held that the human embryos cannot be reduced to "possessions" within the meaning of that provision or simply to tissue or a part of the human's body. Although there is no European consensus on the subject whether the embryos are covered by the right to life, it seems clear that in some situations the law gradually acknowledges some rights corresponding to the human embryo.

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8. *Vo v. France*, (53924/00), Grand Chamber, ECHR 8 July, 2004, available at http://www.echr.coe.int.

9. *Evans v. United Kingdom (*6339/05), Grand Chamber, ECHR 7 March 2006, available at http://www.echr.coe.int.

10. *Parillo v. Italy* (46470/11), Grand Chamber, ECHR 27 August 2015, available at http://www.echr.coe.int.

LORD NEUBERGER'S OBSERVATIONS ON SCIENCE AND THE LAW — OPPORTUNITIES IN THE RUSSIAN EDUCATION SECTOR

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Abstract

Lord Neuberger, past president of the UK Supreme Court and graduate chemist, gives an insight into the similarities and differences between science and the law in terms of thinking. This gives an opportunity to reflect on the challenges faced by a society that is increasingly driven and controlled by data and science, and the implications for training of lawyers.

Keywords

Science, Statistics, Reasoning, Education, Expert

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1. INTRODUCTION

Lord David Neuberger was President of the United Kingdom's Supreme Court from 2012 to 2017. He was appointed to the Court of Appeal in 2004 and the House of Lords in 2007. Since retirement from the Supreme Court, he continues to sit as a Non-Permanent Judge of the Hong Kong Court of Final Appeal. He is well known in legal circles for what might be described as a meteoric rise through the judicial ranks — one of the fastest — and for being one of the youngest ever to be appointed to the House of Lords (which of course became the Supreme Court on its formal establishment on 1 October 2009.

What is less well known about Lord Neuberger is that he is also a scientist. He studied chemistry at Oxford University. However he decided not to pursue chemistry, preferring instead to enter merchant banking in the City of London for three years until 1973, and one year later passed the Bar examinations qualifying as a Barrister. The rest, as they say, is history as he clearly found his calling.

He is also an Honourary Fellow of the immensely prestigious Royal Society[2] of the United Kingdom, elected to this position in 2017. Two years previously, whilst still President of the Supreme Court, he gave a seminal speech at the Royal Society entitled "Science and Law, Contrasts and Cooperation".[3]

2. THE SPEECH WITH RELEVANT OBSERVATIONS

This was a wide ranging and thought-provoking speech, worthy of full consideration. Many such speeches, given by eminent people in semi-social settings at distinguished gatherings contain a modicum of self-deprecation with elements of light entertainment. Even these

[2] Its full title is the Royal Society of London for Improving Natural Knowledge. Founded in 1660, it is the UK's Academy of Sciences, with a current membership of about 1,600 living Fellows. Since foundation, there have been only some 8000 Fellows. Famous Fellows have included Sir Isaac Newton and Stephen Hawking. Lord Neuberger's father, and younger brother — both distinguished biochemists, were also Fellows.

[3] https://www.supremecourt.uk/docs/speech-151124.pdf.

lighter moments can contain great truths. Lord Neuberger refers for example to the great Lord Rutherford[4] who is alleged to have said:

> *"I have the sense that, when it comes to intellectual pursuits, there is mathematics and science and that everything else is stamp collecting".*

Philatelists — and other professionals — will of course disagree with this statement. From personal recollection of school studies, these subjects were immensely satisfying as far as one could be certain of the result. Lord Neuberger refers to this phenomenon as having binary solutions — you are either right or wrong, with a verifiable answer.

2.1. Laws

He makes some wide-ranging observations. For example, he notes that some scientific laws are timeless, yet some are time limited. Laws of motion were tested by astronauts on the moon who dropped a hammer and a feather at the same time,[5] landing at the same time — all as predicted by Galileo some hundreds of years earlier. Galileo's predictions about objects falling equally fast in a vacuum may hold true still, yet the laws of particle physics seem to be rather different in the twenty first century than they were when first enunciated in the late nineteenth and twentieth centuries. The Higgs boson, for example, was unknown to Rutherford.

The law has parallels. There are also timeless principles, and he cites the example of the need for enforceable laws and the need for enforcement of those laws. On the other hand, he cites transitions in the law as rapid as those of particle physics — noting that the fundamental right to human freedom would be unrecognisable to those in a world where slavery was a recognised and reputable trade.

These are not entirely his so called binary solutions where something is either right or wrong. In some cases, there are refinements — where further discoveries or work refine a previous position. A scientific

[4] The distinguished physicist and so called father of nuclear physics. He was also a Nobel Laureate in Chemistry in 1908 at the age of only 37 for his work into radioactive substances.

[5] Apollo 15, Commander David Scott.

example might be the unravelling of the structure of DNA, and a legal example might be the UK Supreme Court's enunciation of when a penalty clause is allowed now to be enforceable — hitherto being entirely unenforceable once a clause is decided to be a penalty.[6]

In the legal sphere, the student might discover a case gives a particular "rule" in the law. Later, they will discover the ideas of ratio decidendi and obiter dicta, and understand how this decision sits within a spectrum of possibilities, and as part of a chain of reasoning that may extend backwards for hundreds of years. Future directions and developments are often signalled by the judgements as well.

The school pupil starting chemistry is given a diluted and simplistic model of the atom and how atoms combine to form molecules. Later studies develop this further into more sophisticated — and nearer the truth — model, with electron shells and electron spins, and energy levels. Even later, the shell model is discarded in favour of electron densities and probabilities. Such is the nature of advancing studies in either science or the law — further and better information.

2.2. Scientific Method

In both science and the law, Neuberger identifies a wish to impose order on chaos, yet highlights differences in approach between a scientist and a lawyer. The scientist he argues follows the scientific method, where facts are observed, hypotheses created, and experiments undertaken — which will confirm, deny, or refine the hypotheses that were being investigated. Eventually, the hypotheses may become scientific laws if results can be verified and replicated. On the other hand, the lawyer's starting position is a law (or set of laws) to which the parties bring their version of the facts. The judge or arbitrator has to test or otherwise establish the facts as he or she sees them — and then assess how the laws apply to them, and find the result. Replicability of scientific experiments — a foundation stone of scientific laws — might be thought of as *stare decisis* for a common law system lawyer — yet

[6] Makdessi v Cavendish Square Holdings BV; ParkingEye Limited v Beavis [2015] UKSC 67. A conjoined case (which is extremely rare) heard by the UK Supreme Court, with Lord Neuberger himself giving the leading (and considerably learned) judgement.

there can be many differentiating factors yielding different outcomes where the laws are the same.

2.3. Morality and Religion

Lord Neuberger notes that the scientist has purely rational thought processes, never having any reasons to use morality or religion in their findings. Both of these can be found in active play in the legal sphere, suggesting the lawyer has to be a master of fields other than their chosen profession. There is however a view amongst the judiciary that a judge no longer brings their own moral or religious views to bear on their decisions.[7] This is unlikely to be true, as we are all the product of our education and upbringing — and unconscious bias can all too easily creep in unseen and undetected. He notes that in a recent Supreme Court case, a decision was required as to whether an absolute ban on assisted suicide contravened human rights.[8] The judges, he says, "did our best to ensure we discounted our own religious, social, or moral views on the topic". With all respect to the Supreme Court, "doing our best" is not necessarily an endorsement of their success.

The tragic case of Mary and Jodie highlighted the confluence of law, science, ethics and religion. It will be recalled that distraught parents, staunch Roman Catholics, brought their conjoined twin daughters to the UK for medical treatment with the hope of separation. Sadly, this proved not possible, and eventually out of necessity the matter came before the courts. The reason was simple — one of the girls was alive only because she was wholly dependent on a shared common artery, which upon separation would guarantee death to one of them. As the parents put it — *"Everyone has the right to life so why should we kill one of our daughters to enable the other to survive?"*

[7] Some 200 years ago, in Best CJ in Bird v Holbrook (1828) 4 Bing 628, 641 said "Christianity is part of the Law of England", whereas now, the view is more that of Sir James Munby who in "Law, Morality and Religion in the Family Courts (29 October 2013) opined "the days are past when the business of the judges was the enforcement of morals or religious belief".

[8] R (Nicklinson) v Secretary of State for Justice [2015] 1 AC 657.

The case went to the Court of Appeal, and the parents accepted their decision, without appealing further. The case[9] was extensively reviewed on medical legal and ethical grounds in a subsequent edition of the British Medical Journal.[10] It attracted much sympathetic attention in the UK at the time, particularly at the time of the first hearing and subsequent appeal. Science — medical science in particular — could not give the answer. Yet the law, and lawyers. had to.

2.4. Common Sense

Common sense is also examined by Lord Neuberger, who observes that in many cases scientific results and laws actually run contrary to common sense. Anyone who has attempted to grapple with quantum mechanics for example will remember many such situations. In contrast, he observes that common sense is frequently referred to and used by judges — and cites two Supreme Court cases that show this.[11] Common sense however is elusive — some might say, being neither common, nor sense. Einstein — possibly one of the architects of some of the most baffling scientific ideas that defy common sense — once said that common sense was the collection of prejudices acquired by the age of eighteen. Prejudices are often unseen and not realised. A wealth of wisdom is contained within the words — somewhat surprisingly given at a United States Department of Defence news briefing of all places.

> *"...because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns-the ones we don't know we don't know."*[12]

[9] Re A (conjoined twins)[2001] 2 WLR 480 EWCA Civ 254.

[10] BMJ Volume 77 Issue 911 — "Do we murder Mary to save Jodie?" An ethical analysis of the separation of the Manchester conjoined twins. Authors: JJ Paris, and AC Filias-Jones.

[11] Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900, paras 15 and 21, and Arnold v Britton [2015] 2 WLR 1593, paras 15,20 and 62.

[12] Donald Rumsfeld, US Secretary of State for Defence, DoD news briefing 12 Feb 2002.

It seems that Donald Rumsfeld is something of a Persian scholar, for these ideas are not new. The 13th century Persian poet, Ibn Yamin described four types of man thus:

> *"One who knows and knows that he knows… His horse of wisdom will reach the skies.*
>
> *One who knows, but doesn't know that he knows… He is fast asleep, so you should wake him up!*
>
> *One who doesn't know, but knows that he doesn't know… His limping mule will eventually get him home.*
>
> *One who doesn't know and doesn't know that he doesn't know… He will be eternally lost in his hopeless oblivion!"*

In the application of common sense — there are perhaps too many unknown unknowns that can give rise to prejudices and unconscious bias. I would thus reject common sense as a basis for either legal decision making or scientific study — yet it is surprising how many times we hear students defend their positions on this basis.

2.5. Logic

If not common sense then, perhaps logic — this abstract, possibly utopian ideal of a quality possessed in equal measure by all persons, — can assist in decision making for the lawyer. Lord Neuberger, with forensic skill, unpicks a line of thinking of judicial and legal scholars on this topic. He finishes with an observation about a Law Lord opining upon the court made law linked to mental distress, describing it as "not entirely logical", yet making nor suggesting any change.[13] This is surely both a lost opportunity, and an admission that logic is not the basis upon which he has made his decision. This show to my mind that logic is not always as important as perhaps the education system portrays it, yet it appears as a standard subject taught to students.

2.6. Reasoning

Reasoning is another thought process shared between scientists and lawyers. The scientific method, as taught in schools is a forward

[13] Alcock v Chief Constable of South Yorkshire [1992] 1 AC 310.

direction of thought, facts, hypotheses, experiments — and possible further iterations to arrive at a conclusion. Neuberger draws our attention to Karl Popper and his theory of "critical rationalism" — which suggested that scientists rather than working forwards from a known position A to an unknown position, Z by careful and logical thought — are rather more likely to do quite the reverse — starting with a bright idea Z, and attempting to rationalise backwards to point A. Neuberger, a judge of considerable experience opines that he instead believes that both forward and backwards thought processes occur simultaneously. He all but admits that once facts are grasped, a judge — possessing an instinct for the right answer, will work their way to construct a reasoned logical answer to suit.

Neuberger does highlight one interesting aspect — where scientists have an advantage over lawyers. This is in the field of the impossible. It may be that a scientist — without more data — cannot give an opinion — and can stand their ground on this lack of data. A judge however has to make a decision, sometimes on incomplete facts. In the absence of a power to be inquisitorial, a judge is hamstrung if the facts are incomplete and they cannot call for more evidence or undertake their own investigations. More attention in the training of a student to be inquisitive and inquisitorial is to be welcomed — especially in systems where education to a large degree is based on requiring students to learn standard answers to standard questions and absorbing without question, the opinions of, and knowledge from, their teachers. As E.M Forster said

"all that spoon feeding does is to teach the shape of the spoon".

Lord Neuberger, a judge of towering intellectual — and scientific — credentials maps out in his speech a number of areas where science and the law have similar, yet often contrasting, themes. His review is scholarly, yet to a degree arguably superficial as it draws no final conclusions other than to highlight that the fields of law and science and their practitioners should listen to and learn from each other's expertise and experience for their mutual benefit and the benefit of this country".

This is a somewhat vague, and utopian ideal — and given the venue of the speech, perhaps nothing more than a courteous and obvious statement to the great and good of the British scientific community.

There is however one aspect of his speech which he does not expand upon in sufficient detail, nor highlight as an obvious conclusion, which deserves closer examination.

3. EXPERT EVIDENCE

The use of science in court cases is surely the sharpest point of interaction between these two fields. A person's liberty, and in some cases their life, can hang in the balance. The various fields of science can be adduced as evidence to support the contention of the party bringing it. Often this will be in the form of so called "expert evidence" — a subject I have previously contributed upon.[14]

My earlier study looked at the concept of the Expert — in particular their duties as currently expressed through the prism of the law of England and Wales. The focus was on the limits to their evidence, with a view as how such evidence might be challenged — and ways to improve the basis upon which such evidence could better serve the legal purpose to which it is directed. This of course is to assist a court — without favour to any party — to decide the case before it. The professor of an arcane field of science has to give evidence in a way which is useful to a judge who needs to understand it, see any limits or defects in it, and make a decision based (in part at least) on its contents.

I have previously mentioned, in the context of civil cases, the UK's Technology and Construction Court, which regularly hears scientific evidence of the highest complexity. The Court of Appeal Criminal Division is no stranger to detailed forensic evidence on matters such as DNA testing, blood spatter patterns, and toxicology to name but three. Some suggestions for further research were also indicated on the topic of educating Experts and their work for a Court. Is it important that a judge such as Lord Neuberger understands, or at least appreciates the intellectual similarities and contrasts to the mode of thinking of such scientists in contrast to his own?

I submit that to a degree it is, for a judge has the right to question an expert witness directly. Taking the above highlights from Lord

[14] Goddard Inna — Experts and Expert Evidence in International Arbitration, Kutafin Law Review Vol 4 Issue 1, April 2017 at 50.

Neuberger's speech, it appears that the issue of the strand or strands of reasoning that has led an expert to a conclusion is the most important for the student lawyer to be concerned with — and those who educate them.

When thinking of science and the law, many people associate the two in combination with various television programmes showing forensic investigations, and brilliant detectives or other investigators solving the problem and discovering the culprit. This is not a new phenomenon, and for many, Sherlock Holmes is the pinnacle of so called deductive reasoning where observed facts lead to a hypothesis, which when you have eliminated the impossible, whatever remains, however improbable, must be the truth. As all law students know, Sherlock Holmes was an alleged master of "deductive reasoning — but in fact was nothing of the sort, reaching almost every one of his "dazzling" conclusions by "inductive reasoning" instead. Some might say that his achievements represent nothing more than educated guesswork in most cases. Further, the cases as published include "reasoning" of a type that could be successfully challenged were any Expert to be foolish enough to try it for themselves.

The judge — with an inquiring mind, and one as broad as Lord Neuberger's, versed in reasoning and the ways of scientific thought process, is well placed to be inquiring as to the calibre and foundations of any expert evidence to which their attention is drawn. Much scientific expert evidence has a mathematical content — usually either arithmetical or more probably in the case of criminal cases, statistical. DNA related evidence is one such field where statistics play a large part.

There are many examples of the misuse — intentional or otherwise — of statistical evidence. I submit that most people are what I would call "number blind". That is, they are unable to grasp the mathematical, probabilistic and statistical truths — some of which are entirely counterintuitive.

The reader who does not agree, is urged to read Dr. John Haigh's excellent and highly readable book — "Taking Chances — Winning with Probability". This book is full of examples of numerical misunderstandings that would allow unscrupulous con artists to deprive you of your money.

Each one is instructive for the lawyer, for they highlight the ways in which numbers can deceive.

There is, for example, a phenomenon ubiquitously miscalled the "Prosecutor's Fallacy". In this fallacy a defendant's criminal liability is argued for on the basis of a fallacious argument, which runs along the lines of:

> "*The odds of finding this evidence on an innocent man are so small that the jury can safely disregard the possibility that this defendant is innocent*".[15]

There is a statistical concept called "prior odds". In Bayesian statistical inference, a "prior" (or to give it its full title, a prior probability distribution) of an uncertain quantity is the probability distribution that would express the observer's belief about this quantity *before* some evidence is accounted for. This is a complex area of mathematics,[16] quite beyond the scope of this paper — as indeed is education to doctorate level in DNA forensic science. Yet the judge has to be aware at least of the concepts, and the strengths and weaknesses of the scientific reasoning process behind them.

This hides the probability of a defendant actually being innocent. The misdirection is that there is an assumption that the prior probability of a random match is equal to the probability of the defendant being innocent. A very simple example is that a blood sample is found with the same blood group as 10 % of the population and which matches the blood group of a defendant. Some might, erroneously it is to be said, assert that on this basis alone the probability of the defendant being guilty is 9 out of 10.

There is a more heartbreaking example, to be found as result of Berkson's paradox. In this situation, conditional probability is confused with unconditional probability. Conditional probability is the measure of probability given that another event has occurred. For example, the probability that any given person has a cough on any given day may be

[15] Fenton, Norman; Neil, Martin; Berger, Daniel (June 2016). "Bayes and the Law". Annual Review of Statistics and Its Application. 3: 51–77.

[16] Mathematics is generally not a subject required for admission to a Russian Law School — where typically the subjects whose scores are assessed are within the humanities.

only 5 %. But if we know or assume that the person has a cold, then they are much more likely to be coughing. The conditional probability of coughing given that you have a cold might be a much higher 75 %. This paradox led to several wrongful convictions of British mothers — who were the victims of Sudden Infant Death Syndrome (SIDS). The principle evidence against them was the statistical improbability of there being a death of two children, one after the other, in the same household. This evidence was enough to (wrongfully) convict them of murder — including the infamous Sally Clarke conviction.[17]

Sally Clarke, a UK solicitor was convicted of murdering her two sons — both of whom died in their cots, the first in 1996 and the second in 1998. Chester Crown Court, which convicted her, did so entirely on the statistical evidence of Professor Sir Roy Meadow, former professor of paediatrics at Leeds University. He equated the probability of two children, dying in this way one after the other, of natural causes as being almost 1 in 73 million — adding that it was the equivalent of backing an 80-1 outsider in a horse race, in four successive years, and winning each time.

He based his expert opinion on the statistical likelihood that a cot death, in the circumstances of an affluent family at the time was 1 in 8,543 based on UK medical data. Professor Meadow then went on to state in court that as two babies were involved, the probability of both dying from cot death was the result of multiplying 1 in 8,543 by 1 in 8,543 — giving an approximate chance of 1 in 73 million. Another example of prosecutor's fallacy — for such evidence could only be valid if each of the deaths is truly independent of the other — with no linkage through, for example, shared genetics. You simply cannot multiply one by the other and declare this as a valid evidential result. Eventually, this mistake was realised, and Sally Clarke was released and her conviction quashed. It was not however until it had taken a grievous toll on her physical and mental welfare after being singled out as a child-killer whilst in prison. She later committed suicide because of alcohol intoxication.

[17] First appeal: *R. v Clark*, [2000] EWCA Crim 54 Second appeal; Clark, R v [2003] EWCA Crim 1020 (11 April 2003).

A further example of mis-reasoning is in DNA testing. An example is that a defendant is found to have a matching DNA profile when looking at a database of 20,000 men (discounting any discussion about the intricacies of the different types of markers, chemicals, proteins, and other arcane areas of forensic science). The probability of a match is stated to be 1 in 10,000 and thus the overwhelming evidence appears to be that the defendant is guilty.

However, the 1 in 10,000 is a misdirection, for this does not equate to the probability of innocence. The closely reasoning reader will clearly understand that the database holds the results of 20,000 persons, giving 20,000 opportunities to find a match by pure chance alone. What might be more surprising is that even if not a single person in the database left DNA at the crime scene, a match with an innocent person *is more likely than not*. In fact, if the mathematics is carried out, there is an 86 % chance[18] of a match. The standard of "beyond reasonable doubt" is clearly not met by this result.

The field of statistics and data analysis is, I would submit, the single most important area where the lawyer can — and should be — educated to a university standard. It is not the most glamorous of subjects — compared to the television programmes that show dazzling laboratories, cutting edge equipment and star-quality detectives and investigators. Nonetheless, these subjects represent the true scalpel of rationality, a tool which can cut through the trees to discern the true likelihood of certain matters affecting life and liberty.

For the reader who remains unconvinced, I will offer another example. Suppose a sports drug test gives a false positive some of the time — in other words some of those who test positive are not in fact drug users. The same test gives a false negative some of the time — that is some of those who test negative are in fact drug users. If a person tests positive, what are the odds of that person being a drug user and a sports cheat?

What is needed is the conditional probability that the person tested is actually guilty given they have failed the test — which can be expressed as Prob (Guilty/Fail). To find this, three numbers are required. The

[18] The sum is 1-[(1-(1/10000) exp20000] = 86 % approximately.

sensitivity of the test is the first — that is the proportion of drug users who fail. In mathematical terms this would be the conditional probability that the tested person fails because they are in fact guilty — expressible as Prob (Fail/Not Guilty). This, naturally should be equal to, or as near as possible, to 100 %.

The second number that is needed is the specificity of the test — how many non-users of drugs pass. Again, we would want this to be 100 % or as near as possible — expressible as Prob (Fail/Not Guilty) being close to or equal to zero. The third number which is needed is the actual proportion of drug users in the population — that is in the group being tested — which has to be estimated. Bayes theorem can then be used, converting probabilities into odds.

The probability of a randomly chosen athlete being a cheat is of course the proportion of cheats in the given population of athletes — a simple odds expression of (number of cheats/number of non cheats). This of course represents the prior odds of guilt.

Someone now fails the test. The posterior odds of guilt — that is the odds they are in fact a cheat, given the evidence of a failed test, needs to be found. The weight of evidence is needed — which is the ratio of the [Prob(Fail/Guilty) / Prob(Fail/NotGuilty]. This needs the sensitivity and specificity noted above. Bayes Theorem states the answer — the posterior odds comes from multiplying the prior odds by the weight of evidence — which if you prefer can be converted into a probability.

Developing this further, in the situation where for example the proportion of cheats is 1 % and both the sensitivity and the specificity is 95 % — the prior odds of guilt are obviously 1/99. The weight of evidence is 95/5 (Prob[Fail/Guilty]/Prob(Fail/Not Guilty]). Thus the posterior odds of the positively testing person are:

(1/99) x (95/5) = 19/99 — approximately 0.19

To convert this into a probability is a matter of dividing the odds by (1 + the odds), which gives the expression:

(19/99) / [1+(19/99)] = 0.16.

The result is therefore that the positively testing person has only a 16 % (*sixteen* percent) chance of being guilty. This should be a surprising result to any reader.

Even though the test gets it wrong only five time in every 100 tests — it does so in *both* cheaters and innocents. In the case of alleged drug cheating in for example the Olympic Games, would this really rather low probability of guilt be sufficient to expel an athlete for testing positive?

Put another way and more strongly, the outcome is plainly unsatisfactory. 95 % sensitivity and specificity seem impressive enough. Suppose in a population of say 10,000 there are 1 % of cheaters. This means there are 9900 "clean" athletes and 100 cheats. The test might therefore be expected to identify 95 % of the cheats — but it will *also* "catch" 5 % of the non-cheaters — some 495 innocent people. Thus in total, we will have 590 people failing — but only 95 of them are actual cheats — which is 16 %.

So called "hot-tubbing" between party appointed experts where there is complex scientific evidence, and potentially conflicting scientific opinions is a relatively new development. The experts appear before the court together, and are questioned and examined together. This concurrency is essential in my view to allowing a Judge to ask questions and understand the strengths and weaknesses — and be informed on areas of science relevant to the decisions which have to be made. In some cases, a "primer" — a kind of mini-introduction to the science involved is also produced to assist the judge understand a field of science they know nothing about. A judge, armed with a mind attuned to statistics and the use and misuse of data, will be well armed to be inquisitive and inquisitorial of data presented to him. In the Sally Clarke case, absolutely no challenge was made to Professor Meadow's excursion into the field of statistics, completely out of his expert field of paediatrics. She was acquitted only with the direct involvement and help from the Royal Statistical Society that identified the complete nonsense adduced by the so-called expert.

4. CONCLUSION

The idea of combining science and the law is one that is seductive — leading to all sorts of flights of fancy about exciting additional courses for the lawyer. These might include firearms, drugs, document forging, nanotechnology, DNA testing, toxicology and, recalling the Ikarian Reefer case[19] (mentioned in my previous article), the arcane vibration mechanisms of marine engines. True, these are indeed interesting and important areas of science, where the law no doubt has many important points of relevance.

For the author however, these are of secondary relevance to the more fundamental thought processes that can cloud even the cleverest scientist, and mislead a court. Lord Neuberger's review only gets to the subject of misuse of statistics at clause 39, well into the overall speech. It is however, arguably the single most important point he makes, although it is treated perfunctorily. The "number blindness" referred to earlier is so significant — and most people are entirely unaware they suffer from this — (the unknown unknown) — that it must be tackled at root to ensure the next generation of lawyers and judges are not disadvantaged in a world which is more technologically advanced than ever before.

If there are still any unconvinced readers — any betting shop, where one can wager on the outcome of a football match, ice hockey event, or horse race is absolute proof positive. The owners of these establishments always make an overall profit — by offering odds on outcomes — whereas the person betting does not always win. They are selling a service that takes advantage of the number ignorance of the punter. A more mystical person might note that the numbers on a casino roulette wheel add up to 666, which is the alleged number of the Devil according to certain religious texts. As far as numbers and statistics are concerned, the Devil is indeed in the detail.

John Haigh's book should, in my view, be a fundamental textbook on a course in Russian law schools as part of a university level course on statistics and data presentation. The Royal Statistical Society in

[19] National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) [1993]2 Lloyds Rep 68 QBD before Cresswell J.

the UK was involved in debunking the misuse of statistics in the Sally Clarke case. I would therefore welcome a joint initiative between our own Russian Academy of Sciences and the Royal Statistical Society in providing a syllabus for law students to study in this critical area of mathematical science. I also hope that academic authorities in our own universities will recognise this important topic and develop programmes to better educate our students for a career in the law where numerical illiteracy and incompetence must be urgently corrected.

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7. British Medical Journal Volume 77 Issue 911.

THE CASE OF GENE-EDITED BABIES, THE ISSUE OF LEGAL REGULATION OF GENOMIC RESEARCH AND THE APPLICATION OF ITS RESULTS IN THE FIELD OF HUMAN REPRODUCTION

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Abstract

The article examines the issues of the legal regulation of genetic research and the use of its results in the field of human reproduction, which have become particularly relevant in connection with the information on the birth of children with edited genes. The law and practice of the Council of Europe member states, China and the United States, as well as international legal acts in this area are analysed. The authors raise the question of the need to develop legal regulation mechanisms.

Keywords

Modification of the human genome, legal regulation of genomic research, Oviedo Convention

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1. INTRODUCTION

At the end of November, 2018, a shocking piece of news circulated in the media worldwide. At a conference in Hong Kong, Chinese geneticist He Jiankui said that the world's first genetically edited twin girls had been born.[3] Professor He claimed the girls' father was infected with HIV, so the scientist decided to edit the part of the genome responsible for the immunity to this virus. According to the Chinese scientist, seven couples participated in the experiment. All the men in the project were HIV-positive, all the women involved were HIV-negative. One of the female participants was still pregnant.

The statement was widely covered by the media and predictably provoked a strong response not only from genetic scientists, but also from the general public.

Both the experiment and He Jiankui`s statement were immediately criticised. Firstly, it was noted that the purpose of the project was not justified, as the risk of infecting the fetus with the virus during IVF is very low, so it is unclear why it was necessary to edit the genome. Secondly, there is no independent confirmation of the claim since the author did not describe the experiment in any scientific articles and revealed the results at the press conference and in a video posted on his blog. Thirdly, according to He, neither the twin girls nor their parents

[3] Johnson, C. Y. Chinese scientist's claim of gene-edited babies creates uproar (2018) The Washington Post. Available at: https://www.washingtonpost.com/science/2018/11/26/scientists-claim-gene-edited-babies-creates-uproar (accessed 6 February 2019).

can be shown to the public. Fourthly, the choice of HIV seems rather strange. Experimenting with congenital genetic diseases seems more reasonable. It is also worth adding that, strangely, Professor He claims to have conducted the experiment on the faculty of Southern University of Science and Technology in Shenzhen China. However, in a statement released in response to He's videos, the university management said that the geneticist had been on unpaid leave for a long time and had not conducted any experiments on the territory of the university. All these facts lead us to question the reliability of the experiment.

The general opinion is that the project has violated scientific ethics, which is why it has drawn outspoken criticism, for example, from the Second International Summit on Human Genome Editing.[4]

Naturally, the question arose about the legal assessment of this experiment. There have been calls for a complete international ban on the genetic modification of human embryos.

2. AN AMBIGUOUS SITUATION WITH THE NATIONAL REGULATION OF GENOMIC RESEARCH

The issue of legal regulation of genomic research is rather vague at the moment. One aspect of the problem is the regulation of the scientific study of human embryos. There is no unanimity on the issue.

Referring to the ECHR Judgment, dated August 27, 2015, in the case of Parrillo v. Italy (complaint No. 46470/11),[5] the ECHR notes:

> "…three countries (Belgium, Sweden and the United Kingdom) allow scientific research on human embryos and the creation of embryos for that purpose.
>
> The creation of embryos for scientific research is however banned in fourteen countries (Bulgaria, Hungary, Greece, Spain, North Macedonia, the Netherlands, Portugal, Serbia, Slovenia, Finland, France, the Czech Republic, Switzerland and Estonia).

[4] Statement by the Organizing Committee of the Second International Summit on Human Genome Editing of November 29, 2018. Available at: http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=11282018b.

[5] See more details on ECHR Judgment, dated August 27, 2015, Parrillo v. Italy. Available at: http://hudoc.echr.coe.int/eng?i=001-157263.

However, research using surplus embryos is generally allowed in those countries, subject to certain conditions.

Three member states (Slovakia, Germany and Austria) as well as Italy largely prohibit scientific research on embryos, and permit it in very restricted cases, such as for the protection of the health of the embryo or where the research is carried out on cell lines imported from abroad. In Slovakia any research on embryos is strictly forbidden, other than research for medical purposes for the benefit of the health of the persons directly participating in the research in question. In Germany the importation and use of embryonic cells for research purposes are largely banned and is authorised only in exceptional circumstances subject to strict conditions. In Austria the law provides that "viable cells" cannot be used for purposes other than in vitro fertilisation. However, the concept of "viable cells" is not defined in the law. According to practice and legal commentary, the statutory ban concerns only "totipotent" embryonic cells.

In four countries (Andorra, Latvia, Croatia and Malta) the law expressly prohibits any research on embryonic stem cells.

In sixteen countries (Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Ireland, Liechtenstein, Lithuania, Luxembourg, the Republic of Moldova, Monaco, Poland, Romania, Russia, San Marino, Turkey and Ukraine) the matter is not regulated. Some of these states take a rather restrictive approach to the practice (for example, Turkey and Ukraine), while others have a rather non-prohibitive practice (for example, Russia)."

This diversity is observed in the member states of the Council of Europe, an international organisation setting high and relatively unified standards for legal regulation. Moreover, there is no unity in approaches in other parts of the world. Another aspect is the legal regulation of the issues of editing the human genome per se, first of all, the alterations that can be inherited by descendants.

Although the Parliamentary Assembly of the Council of Europe stated that "interdiction is currently in effect in all European Union

member states and in many Council of Europe member states aimed at altering the human germ-line", the situation is also quite ambiguous.

Thus, in the United States, as of 2017, medical changes were carried out on the genome for medical purposes: Brian Madux, suffering from Hunter syndrome, received treatment aimed at editing the genome of his liver cells.[6]

In the UK, according to the Guardian, The Human fertilization and Embryology Authority (HFEA) in 2015 approved the application from Kathy Niakan, a stem cell researcher at the Francis Crick Institute in London, for a license to edit human embryos.[7] Niakan was allowed to study embryos for 14 days for research purposes only, without any possibility of implantation.

In July 2018, according to Reuters,[8] experts from the UK's Nuffield Council on Bioethics said that while the law should not currently be changed to allow human genome editing to correct genetic faults in offspring, future legislation permitting it should not be ruled out. In this context, a noteworthy document is Recommendation 2115 (2017) of the Parliamentary Assembly of the Council of Europe,[9] in which it tries to sit on the fence.

On the one hand, the Recommendation notes that "deliberate germ-line editing in human beings would cross a line viewed as ethically inviolable", and also calls upon member states to "put in place a national ban on establishing a pregnancy with germ-line cells or human embryos having undergone intentional genome editing". On the other hand, PACE

[6] Kaiser J. A human has been injected with gene-editing tools to cure his disabling disease. Here's what you need to know (2017) The Science Magazine. Available at: https://www.sciencemag.org/news/2017/11/human-has-been-injected-gene-editing-tools-cure-his-disabling-disease-here-s-what-you (accessed 5 February 2019).

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[9] Recommendation of Parliamentary Assembly for the use of new genetic technologies in human beings (2017). Available at: http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=24228&lang=EN.

notes that "Numerous scientific and ethical bodies are starting to make recommendations to establish an appropriate regulatory framework for genome editing and germ-line interventions in human being. These include most recently the United States National Academy of Sciences and National Academy of Medicine, and the European Academies Science Advisory Council." There is a recommendation that the Committee of Ministers of the Council of Europe" develop a common regulatory and legal framework which is able to balance the potential benefits and risks of these technologies aiming to treat serious diseases, while preventing abuse or adverse effects of genetic technology on human beings".

3. CHINESE CASE

In China, despite statements by the Chinese leadership that He Jiankui " grossly violated the relevant laws and regulations of China" (as Lainie Zhang notes), there is no law enacted by the National People's Assembly that would regulate the editing of the human genome. In this area, secondary legislation acts, namely approved jointly by the Ministry of Science and Technology of China and the then Ministry of Health (now the National Health Commission) in 2003, "Guidelines on ethical principles in human embryonic stem cells". ([200 3], No. 460, December 24, 2003)).[10]

According to Art. 5 Guidelines it is allowed to use in research: unwanted gametes or blastula from in vitro fertilization procedures (IVF); embryo cells from miscarriages or voluntary abortions; blastulas or single split blastocysts using the somatic cell nucleus transfer technology; or donor germ cells.

According to Art. 6 Guidelines investigations on human embryonic stem cells should comply with the following rules:

1. If the blastula is obtained by external fertilization, transplantation of the somatic nucleus, same-sex duplication techniques or genetic modification, the cultivation period in Vitro should not exceed 14 days from the day of fertilization or nuclear transplantation.

[10] Zhang L. On Gene Edited Babies: What Chinese Law Says (2018) The Library of Congress. Available at: https://blogs.loc.gov/law/2018/12/on-gene-edited-babies-what-chinese-law-says.

2. It is prohibited to implant a human blastula obtained and used in research, as provided for in the previous paragraph, into the reproductive systems of humans or any other animals.

3. The combination of human germ cells with cells of other species is prohibited.

Art. 7 of the Guidelines prohibits the purchase or sale of human gametes, cytulas, embryos or fetal tissues.

4. RUSSIAN REGULATION

In the Russian Federation, the current legislation does not contain a direct ban on genome editing research. So, according to Art. 21 of the Constitution of the Russian Federation, "... no one may be subjected to medical, scientific and other experiments without his or her consent" — which does not exclude manipulation of the genetic code with a patient's consent.

In 1996, the Russian Federation adopted the Federal Law "On State Regulation in the Field of Genetic Engineering Activities"[11] It provides a legal definition of gene therapy as a combination of genetically engineered (biotechnological) and medical methods aimed at introducing changes in the genetic apparatus of human somatic cells in order to treat diseases. The same law established the principles (Article 5) of genetic engineering activities, which include the safety of individuals and the environment; the safety of clinical trials of methods of gene diagnostics and gene therapy at the level of somatic cells; the general availability of information on the safety of genetic engineering activities; state registration of genetically modified organisms.

In the Fundamentals of Legislation on the Protection of the Health of individuals, approved by the Federal Law of November 21, 2011 No. 323-FZ, article 36.1 "Features of medical care provided during clinical trials" is of particular importance. In this law, the participation of patients in the study of new, previously unused methods to confirm evidence of their effectiveness is called "medical assistance during clinical trials." For this kind of experiment involving patients, the findings of

[11] Collection of the legislation of the Russian Federation of July 8, 1996 No. 28, art. 3348.

the ethics committee and the expert council of the authorised federal executive body are required. The Ethics Committee determines if the use of methods meets ethical requirements and agrees on a clinical trial protocol. Expert advice gives permission to provide medical assistance in clinical trials.

Voluntary informed consent from a capable adult patient is needed and required to participate in clinical trials. At the same time, both minor patients and legally incompetent or incapacitated patients can participate in clinical trials, provided that they have the voluntary informed consent from one of the parents or another legal representative.

Three categories of patients are banned from participating in clinical trials, but with a number of exceptions. Clause 7 of Article 36.1 prohibits medical treatment in clinical trials if patients are:

1) children, pregnant women, birthing women, breastfeeding women — except for the cases when the methods are intended for the patients, provided that all necessary measures are taken to eliminate the risk of harm to a pregnant woman, birthing woman, breastfeeding woman, to a fetus or child;

2) military personnel — except for serving military contractors, if the relevant methods are specifically designed for use in warfare, emergency situations, prevention and treatment of diseases and injuries resulting from exposure to chemical, biological, or radiation agents;

3) persons suffering from mental disorders — unless the relevant methods are intended for the treatment of mental illness.

Therefore, until recently, legislative regulation of the issues under consideration in Russia was limited to outlining general principles and norms, and did not contain essential prohibitions for any kind of genetic research.

The situation changed to some extent in 2016, when the Russian Federation adopted the Federal Law "On Biomedical Cellular Products", amended 2018,[12] aimed, as stated in Art. 1, at regulating relations arising from the development, preclinical studies, clinical studies, evaluation, state registration, production, quality control, sale, use, storage,

[12] Collection of the legislation of the Russian Federation of June 27, 2016 No. 26 (Part I) Art. 3849.

transportation, import to the Russian Federation, export from the Russian Federation, destruction of biomedical cell products intended for the prevention, diagnosis and treatment of diseases or conditions of the patient, the preservation of pregnancy and the medical rehabilitation of the patient as well as relations arising from the donation of biological material for the production of biomedical cell products.

The principles of the implementation of activities in the field of the treatment of biomedical cell products are:

1) voluntary and free of charge donation of biological material;

2) compliance with medical privacy and other secrets protected by law;

3) the inadmissibility of the sale and purchase of biological material;

4) the inadmissibility of the creation of a human embryo for the production of biomedical cell products;

5) the inadmissibility of the development, production and use of biomedical cellular products of biological material obtained by interrupting or disrupting the process of embryonic or fetal development;

6) compliance with the requirements of biological safety in order to protect the health of donors of biological material, workers engaged in the production of biomedical cell products, medical workers, patients and the environment.

It seems that the prohibitions provided in paragraphs 4 and 5 are ambiguous due to the wording, taking into account the fact that according to Part 2 of Art. 1 of this law, its effect does not apply to the relations that develop when using human germ cells in order to apply assisted reproductive technologies, as well as to relations that arise when human cells and tissues are converted for scientific and educational purposes.

Thus, scientific research, including studies aimed at genomic editing of germ-line cells, is not directly prohibited by this law. However, the specifics of the Russian legislative technique are such that it is often not possible to unequivocally determine which practices are prohibited.

At the same time, in accordance with Art. 8 of the law, the state registration of a biomedical cellular product is carried out according to the results of a proper evaluation, namely:

1) biomedical evaluationof a biomedical cell product, including:
   a) the evaluation of the quality of the biomedical cell product, including the evaluation of the composition of the samples of the biomedical cell product and its quality control methods;
   b) evaluation of documents for obtaining permission to conduct a clinical study of a biomedical cellular product;
   c) evaluation of the effectiveness of the biomedical cell product;
   d) evaluation of the expected benefits compared to the possible risk of using a biomedical cell product;

2) ethical evaluation of the possibility of conducting a clinical study of a biomedical cell product;

3) clinical trials of biomedical cell product.

That is, to enter the stage of clinical studies, it is necessary that a number of experts confirm the potential safety, usefulness and ethical appropriateness of such studies, which is a fairly effective barrier to insufficiently substantiated experiments.

5. INTERNATIONAL ACTS

In a situation where, as it was noted, national rules and standards for genetic research differ significantly from country to country, in the context of global scientific and information exchange, only international legal regulation can lead to some unification of approaches.

As of November 11, 1997, the UNESCO General Conference adopted the Universal Declaration on the Human Genome and Human Rights, approved by the UN General Assembly in 1998, proclaiming a number of important principles in the field of study.[13] In particular, the Declaration stipulates (Article 5) that investigations, treatment or diagnosis related to the genome of a person can be carried out only after a thorough preliminary assessment of the potential hazards and benefits associated with them and taking into account all other prescriptions established by the national legislation. In all cases, one must secure the preliminary, free and explicit expression of the consent of the person concerned; The

[13] Universal Declaration on the Human Genome and Human Rights of November 11, 1997. Available at: http://portal.unesco.org/en/ev.php-URL_ID=13177&URL_DO=DO_TOPIC&URL_SECTION=201.html.

right of every person to decide whether or not to be informed about the results of genetic analysis and its consequences should be respected. The documented results of studies should be submitted for preliminary assessment in accordance with relevant national and international standards or guidelines.

Article 10 of the Declaration states the principle that any research on the human genome, as well as any applied research in this area, especially in the fields of biology, genetics and medicine, should not prevail over respect for human rights, fundamental freedoms and human dignity of individuals, or, where applicable, groups of people.

The Universal Declaration on Bioethics and Human Rights was adopted on October 19, 2005 by the UNESCO General Conference,[14] re-proclaiming a number of principles on which legislation in this area should be built, such as: "human dignity and human rights", "benefits should be maximised, harm should be minimised", "autonomy and individual responsibility", "consent", "respect for human vulnerability and personal integrity". However, despite the undoubted importance of the proclaimed principles, it should be noted that the cited documents are not legally binding.

The only international treaties regulating relations in the area of study are the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, adopted by the Council of Europe in 1997, known as the Oviedo Convention, and its additional protocols.[15] Nontheless, it should be mentioned that the Convention, (despite the fact that it was open for signature more than 20 years ago), has not been signed by all the member states of the Council of Europe. Armenia, Azerbaijan, Andorra, Belgium, Great Britain, Germany, Ireland, Liechtenstein, Malta, Monaco, the Russian Federation are not participating in it. Italy, Luxembourg, Netherlands,

[14] Universal Declaration on Bioethics and Human Rights of October 19, 2005. Available at: http://portal.unesco.org/en/ev.php-URL_ID=31058&URL_DO=DO_TOPIC&URL_SECTION=201.html.

[15] Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine of April 4, 1997. Available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cf98.

Poland, Sweden and Ukraine have not still ratified it.[16] In addition, although the Convention is open for signature by states that are not members of the Council of Europe that participated in its development and the European Community, they do not participate in it.

Even fewer states participate in the additional protocols to the Oviedo Convention, and, despite the appeals of the PACE, the situation has not changed.

One reason for this unsatisfactory state of affairs might be due to the fact that today there is neither global nor pan-European consensus on the rules established by the convention. Some member states have taken a more conservative stance on the study of the genome and the possibilities of gene therapy, while others see the convention as a barrier to research.

Basically, the Oviedo Convention establishes a certain regulatory framework, a system of closely interrelated principles and norms, which can be described as follows. Article 2 of the Convention contains a fundamental principle — the interests and benefit of the individual prevail over the interests of society or science. In essence, all other articles of the convention reveal this humanistic but at the same time in some sense radically individualistic principle, which is an expression of European philosophical anthropology that is still not widely accepted in all societies. In many countries of the world collectivist values either prevail or at least remain.

Article 18 of the Convention expressly prohibits the creation of human embryos for research purposes. At the same time, it has been stated that in case the law permits research on embryos in vitro, and it must also provide adequate protection for the embryos. Thus, the convention, while limiting experiments with a human embryo, does not prohibit them in principle, allowing for in vitro research, but forbidding in vivo research.

Article 13 of the Convention is of the greatest importance for the purpose of our study and it is currently in dispute. According to the

[16] Chart of signatures and ratifications of Treaty 164. Available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/164/signatures?p_auth=F4uxBQvK (accessed 27 February 2019).

article, an intervention seeking to modify the human genome may only be undertaken for preventive, diagnostic or therapeutic purposes and only if its aim is not to introduce any modification in the genome of any descendants.

Therefore, on the one hand, intervention in the human genome, aimed at its modification, can be carried out, which obviously frightens extremely conservative-minded actors, but on the other hand, it is limited to goals — preventive, diagnostic and therapeutic. However, the list of goals is quite wide, so almost any modification of the genome could be performed. In addition, there is a direct ban on such interventions that are aimed at changing the genome of the descendants of a given person. The ban has recently been strongly criticized by a number of researchers who claim that this part of the convention needs to be revised, because in the past 20 or so years the situation has changed a lot with the advent of new technologies, in particular CRISP / Cas9, promising the treatment of many genetic disorders, or inherited diseases. And in this new situation, the ban is contrary to the spirit of the Convention, because it puts abstract social values before the interests and benefits of specific patients.[17]

6. CONCLUSION

In the current situation, when, on the one hand, there are no universal international legal acts regulating the issues of genome editing and interventions into the human germ-line, and on the other hand, technologies and scientific exchange are essentially global, it cannot be ruled out that in certain jurisdictions such sort of experiments will continue. This makes it more urgent to work out such legal mechanisms that would make it possible, as noted in the PACE Recommendations, to develop a common regulatory and legal framework which is able to balance the potential benefits and risks of these technologies aiming

[17] J. Montgomery. Modification of the Human Genome: Challenges from the Human Rights Sphere, Caused by Scientific and Technical Achievements. Precedents of the European Court of Human Rights (2018) 51 Oviedo Convention Anniversary Paper 42–56.

to treat serious diseases, while preventing abuse or adverse effects of genetic technology on human beings. It is obvious that such regulations should exist at a universal level. And it is also obvious that a broad scientific discussion should precede its development.

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THE LEGAL ISSUES OF THE ARTIFICIAL INTELLIGENCE, INTELLECTUAL PROPERTY RIGHTS AND DATA PROTECTION

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Abstract

The explosion in computing and artificial intelligence brings many legal challenges. One of the primary areas for legal interest is the field of copyright when such systems are part of the process of creating works. The status of such works varies according to the legal systems under which they are reviewed, and this article compares two such foundations.

Keywords

Artificial intelligence, copyright, legal protection

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1. INTRODUCTION

The European Commission in its Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the regions "Artificial Intelligence for Europe"[2] (hereinafter — AI Communication) notes that Artificial intelligence (AI) is already part of human lives — from using a virtual personal assistant to organise the working day, to travelling in a self-driving vehicle, to phones suggesting songs or restaurants. It is not science fiction, it is a reality.

AI Communication defines Artificial intelligence as systems that display intelligent behaviour by analysing their environment and taking actions — with some degree of autonomy — to achieve specific goals. AI-based systems can be purely software-based, acting in the virtual world (e.g. voice assistants, image analysis software, search engines, speech and face recognition systems) or AI can be embedded in hardware devices (e.g. advanced robots, autonomous cars, drones or "Internet of Things" applications). AI is used on a daily basis, e.g. to translate languages, generate subtitles in videos or to block email spam. Many AI technologies require data to improve their performance. Once they perform well, they can help improve and automate decision making in the same domain.

Beyond making our lives easier, AI is helping us to solve some of the world's biggest challenges: from treating chronic diseases or reducing fatality rates in traffic accidents, to fighting climate change or anticipating cybersecurity threats. In Denmark, AI is helping save

[2] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the regions Artificial Intelligence for Europe, Brussels, 25.4.2018 COM(2018) 237 final.

lives by allowing emergency services to diagnose cardiac arrests or other conditions based on the sound of a caller's voice. In Austria, it is helping radiologists detect tumours more accurately by instantly comparing x-rays with a large amount of other medical data. Many farms across Europe are already using AI to monitor the movement, temperature and feed consumption of their animals.

The AI system can then automatically adapt the heating and feeding machinery to help farmers monitor their animals' welfare and to free them up for other tasks. And AI is also helping European manufacturers to become more efficient and to help factories return to Europe. Like the steam engine or electricity in the past, AI is transforming our world and our society.

As a system displaying intelligent behavior, AI in certain circumstances may raise certain legal problems. One area is intellectual property (IP) law. National AI strategies have so far paid little attention to the challenges that AI poses to the IP legal framework. However, the increasing importance of AI technologies and the gaps identified by scholars in both the copyright and patent system (e.g. Guadamuz 2017; Michaux 2018, Ramalho 2018; 2017b; Schönberger 2018 or WEF 2018) reveal the need for further investigation.

As regards the issues of patentability of AI, the announcement of the European Patent Office (EPO) of specific guidance on patentability criteria for AI is particularly welcomed. The new section on Artificial Intelligence and Machine Learning provides some clarification on when AI-related subject matter has a technical character.

The protection of AI-generated works or inventions seems to be more problematic. In light of the humanist approach of copyright law, it is questionable whether AI-generated works deserve copyright protection. As regards patent laws, although a priori nothing prevents AI-generated inventions from being patented, the assessment of the noninventive step or the allocation of ownership may also raise issues that are not entirely clear. While some copyright scholars clearly advocate for AI-generated works to be placed in the public domain, others have put forward a series of proposals aimed at ensuring a certain level of protection. With notable exceptions, these proposals are still too vague. They do not always sufficiently detail the possible elements underpinning such

protection. There is no doubt that certain AI-generated creations/ inventions may share the characteristics of information goods — non-excludable and non-rivalrous nature — that justify the creation of quasi monopolistic rights to foster innovation and commercialisation. However, there are concerns whether incentives are needed, especially in cases where the investment cost is low, and what consequences such rights might have on the market, including on creations or inventions made by humans. Would more property rights encourage or rather deter innovation? We clearly need to investigate these issues further from a law and economics approach before favouring one solution or another.[3]

2. COPYRIGHT LAW LEGAL OPTIONS

There are two ways in which copyright law can deal with works where human interaction is minimal or non-existent. It can either deny copyright protection for works that have been generated by a computer or it can attribute authorship of such works to the creator of the program.

THE FIRST OPTION

2.1. The United States

In the United States, for example, the Copyright Office has declared that it will "register an original work of authorship, provided that the work was created by a human being".[4] This stance flows from case law (e.g. Feist Publications v Rural Telephone Service Company, Inc. 499 U.S. 340 (1991)) which specifies that copyright law only protects "the fruits of intellectual labor" that "are founded in the creative powers of the mind."

Rural Telephone Service Company, Inc. (Plaintiff) provides telephone service to several communities. Due to a state regulation, it must issue an annual telephone directory, so it published a directory consisting

[3] Joint Research Centre: Artificial Intelligence. A European Perspective. URL: http://publications.jrc.ec.europa.eu/repository/bitstream/JRC113826/ai-flagship-report_online.pdf.

[4] Copyrightable Authorship: What Can Be Registered revised 09.29.2017. URL: https://copyright.gov/comp3/chap300/ch300-copyrightable-authorship.pdf

of white and yellow pages. The yellow pages have advertisements that generate revenue. Feist Publications, Inc. (Defendant) is a publishing company whose directory covers a larger range than a typical directory. Defendant distributes their telephone books free of charge, and they also generate revenue through the advertising in the yellow pages. Plaintiff refused to give a license to Defendant for the phone numbers in the area, so Defendant used them without Plaintiff's consent. Rural sued for copyright infringement.[5]

The case examined the purpose of copyright and explained the standard of copyrightability as based on originality. The case centred on two well-established principles in United States copyright law: These are that facts are not copyrightable, but that compilations of facts can be. "There is an undeniable tension between these two propositions," Justice O'Connor wrote in her decision. "Many compilations consist of nothing but raw data — i.e. wholly factual information not accompanied by any original expression. On what basis may one claim a copyright upon such work? Common sense tells us that 100 uncopyrightable facts do not magically change their status into being copyrighted when gathered together in one place. The key to resolving the tension lies in understanding why facts are not copyrightable: The sine qua non of copyright is originality".[6]

The court clarified that the intent of copyright law was not to reward the efforts of persons collecting information — the so-called "sweat of the brow" or "industrious collection" doctrine — but rather "to promote the Progress of Science and useful Arts" (U.S. Const. Art. I, § 8, cl. 8). That is, to encourage creative expression.

2.2. Australia

Similarly, in a recent Australian case (Acohs Pty Ltd v Ucorp Pty Ltd), a court declared that a work generated with the intervention of

[5] Feist Publications v Rural Telephone Service Company, Inc. 499 U.S. 340 (1991). URL https://www.casebriefs.com/blog/law/property/property-law-keyed-to-singer/intellectual-property/feist-v-rural-telephone-service-co/.

[6] About Feist Publications v Rural Telephone Service Company, Inc. 499 U.S. 340 (1991). URL https://en.wikipedia.org/wiki/Feist_Publications,_Inc.,_v._Rural_Telephone_Service_Co.

a computer could not be protected by copyright because it was not produced by a human.[7]

The foundation of all computer programs and software is source code. Source code is a humanly readable set of instructions which directs a computer to perform certain functions. The protection afforded to source code and digital products created from source code by the Copyright Act 1968 is far from certain. The uncertainty is predominantly created by difficulties in determining whether the source code is an original artistic work as that phrase is defined in the Copyright Act 1968, and if so who is the author of the source code. For a business that creates digital products the level of protection can have a significant impact for the business if the author of the source code for a digital product is indeterminable or there are multiple authors who work exclusively to create one of the multiple parts of a product.[8]

Acohs is in the business of producing Material Safety Data Sheets (Data Sheets) which are information sheets containing safety information about hazardous chemicals. The Data Sheets are produced by inputting data about a hazardous chemical into a software interface called 'Infosafe Systems', which then generates source code that is interpreted by the computer to produce an individual Data Sheet. In that sense, every Data Sheet holds a unique source code generated by the Infosafe System. In an effort to protect its Data Sheets from being copied by Ucorp, Acohs claimed copyright in the source code for each Data Sheet and the Data Sheets themselves.

In pursuing its claim Acohs encountered two major difficulties: establishing that the source code was an original literary work within the meaning of the Copyright Act 1968; and defining the author of the source code and of the Data Sheets. Justice Jessup found that source code 'consists of words, letters, numbers and symbols which are intelligible to someone skilled in the relevant area, and which convey meaning' and is thus a literary work within the meaning of the Copyright Act 1968.

[7] WIPO // URL: https://www.wipo.int/wipo_magazine/en/2017/05/article_0003.html.

[8] Acohs Pty Ltd v Ucorp Pty Ltd [2010] FCA 577 // URL: https://www.lavan.com.au/advice/intellectual_property_technology/copyright_in_source_code_and_digital_products.

The more difficult question is whether the source code is an original literary work.

Acohs contended that the source code becomes a literary work when it is first reduced to a material form. The point of time this was said to occur was when the transcriber, being the person that inputs the data into the Infosafe System, has completed inputting the data about the hazardous chemical into the Infosafe System and checked the appearance of the resulting Data Sheet on his or her screen. The problem with this interpretation is that the source code is not written by a person, but is generated by the Infosafe System.[9]

Acohs sought to overcome this problem by arguing that the Infosafe System is no more than a tool, such as a pen is no more than a tool to an author who writes a piece of work. Justice Jessup did not accept that argument stating 'it is not as though the transcribers... having in mind the source code they desired to write, used the computer to that end. They were not computer programmers, and there is no suggestion that they understood source code or ever had a perception of the body of source code which was relevant to the Data Sheets on which they worked'. In that sense, the Infosafe System was far more than a mere tool. On that basis the source code was found not to be an original literary work.

Acohs' case was one of joint authorship, of both the source code and the Data Sheets, between the computer programmers who created the Infosafe System and the transcribers. The case for joint authorship of the source code was rejected on the ground that it was an artificial concept that the computer programmers and the transcribers collaborated with each other in the writing of the source code. They made their respective contributions, but were quite separate in what they did. The programmers wrote the program which caused the Infosafe System to generate the source code, and the transcribers input data to affect the layout, appearances and attributes of the Data Sheet. Further, the transcribers had no understanding of the technical task upon which the programmers had been engaged.

[9] Ibid.

Acohs' claim of joint authorship of the Data Sheets was rejected on two grounds. Firstly those programmers could not in any way be considered authors of the Data Sheets. The programmers simply wrote the Infosafe Systems software which in turn created the source code and the Data Sheets. The programmers did not make any contribution to the content of the Data Sheets. The second ground was the same as reasons in respect of the source code — there was no collaboration between the transcribers and the programmers to create the Data Sheets. They each had their individual role.[10]

2.3. The European Union

2.3.1. Copyright conception

In Europe the Court of Justice of the European Union (CJEU) has also declared on various occasions, particularly in its landmark Infopaq decision (Infopaq International A/S v Danske Dagbaldes Forening C-5/08[11]), that copyright only applies to original works, and that originality must reflect the "author's own intellectual creation." This is usually understood as meaning that an original work must reflect the author's personality, which clearly means that a human author is necessary for a copyright work to exist.

From the general scheme of the Berne Convention, in particular Article 2(5) and (8), that the protection of certain subject matters as artistic or literary works presupposes that they are intellectual creations. Similarly, under Articles 1(3) of Directive 91/250,[12] 3(1) of Directive 96/9/EC[13] and 6 of Directive 2006/116/EC,[14] works such as computer

[10] Acohs Pty Ltd v Ucorp Pty Ltd [2010] FCA 577 // URL: https://www.lavan.com.au/advice/intellectual_property_technology/copyright_in_source_code_and_digital_products.

[11] Judgment of the Court (Fourth Chamber) of 16 July 2009.Infopaq International A/S v Danske Dagbaldes Forening C-5/08 // ECLI identifier: ECLI:EU:C:2009:465.

[12] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs // *OJ L 122, 17.5.1991, p. 42–46 (*No longer in force, Date of end of validity: 24/05/2009; Repealed by 32009L0024*)*.

[13] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases. *OJ L 77, 27.3.1996, p. 20–28*.

[14] Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version). *OJ L 372, 27.12.2006, p. 12–18*.

programs, databases or photographs are protected by copyright only if they are original in the sense that they are their author's own intellectual creation.

In establishing a harmonised legal framework for copyright, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society[15] (Directive 2001/29/EC) is based on the same principle, as evidenced by recitals 4, 9 to 11 and 20 in the preamble thereto. In those circumstances, copyright within the meaning of Article 2(a) of Directive 2001/29/EC is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation.

2.3.2. Copyright Issues and Data Protection

The Directive 96/9EC contains two provisions: copyright and a sui generis right. Copyright protects the structure of databases which, if original, constitutes the author's own intellectual creation. By contrast, the more controversial sui generis right protects databases regardless of their originality, as long as there has been "substantial investment in obtaining, verifying or presenting the contents". Both the copyright and the sui generis right in the Directive 96/9EC put the database owner in a position of exclusive access and therefore reduces access to the data. A recent evaluation of the Directive 96/9EC (EC, 2018g) concluded that it has been effective in harmonising the EU legislation on databases and avoiding fragmentation, and that it still provides an appropriate balance between protection of investment and interests of users. On the other hand, it also notes that as a result of a 2004 decision of the Court of Justice clarifying that the sui generis right does not apply to databases that are the by-products of the main activity of a firm, it must be assumed that these rights do not apply broadly to the data economy (machine-generated data, IoT devices, big data, AI, etc.).

[15] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society // *OJ L 167, 22.6.2001, p. 10–19*.

2.3.3. Case Law

In Fixtures Marketing Ltd v. Oy Veikkaus Ab[16], Fixtures Marketing Ltd v. Svenska Spel Ab,[17] British Horseracing Board Ltd v. William Hill[18] and Fixtures Marketing Ltd v. OPAP[19] cases the EU Court established that the term "database" (as defined in Article 1(2) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases) refers to any collection of works, data or other materials, separable from one another without the value of their contents being affected, including a method or system of some sort for the retrieval of each of its constituent materials.

The expression "investment in... the obtaining... of the contents" of a database in Article 7(1) of Directive 96/9 must be understood to refer to the resources used to seek out existing independent materials and collect them in the database. Investment must be understood to refer to the resources used, with a view to ensuring the reliability of the information contained in that database, to monitor the accuracy of the materials collected when the database was created and during its operation. The resources used for verification during the stage of creation of materials which are subsequently collected in a database do not fall within that definition.

The expression "substantial part, evaluated qualitatively... of the contents of [a] database" refers to the scale of the investment in the obtaining, verification or presentation of the contents of the subject of the act of extraction and/or re-utilisation, regardless of whether that subject represents a quantitatively substantial part of the general contents of the protected database.

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[16] Judgment of the Court (Grand Chamber) of 9 November 2004. Fixtures Marketing Ltd v Oy Veikkaus Ab. Case C-46/02 // ECLI identifier: ECLI:EU:C:2004:694.

[17] Judgment of the Court (Grand Chamber) of 9 November 2004. Fixtures Marketing Ltd v Svenska Spel AB. Case C-338/02 // ECLI identifier: ECLI:EU:C:2004:696.

[18] Judgment of the Court (Grand Chamber) of 9 November 2004. The British Horseracing Board Ltd and Others v William Hill Organization Ltd. Case C-203/02 // ECLI identifier: ECLI:EU:C:2004:695.

[19] Judgment of the Court (Grand Chamber) of 9 November 2004. Fixtures Marketing Ltd v Organismos prognostikon agonon podosfairou AE (OPAP). Case C-444/02 // ECLI identifier: ECLI:EU:C:2004:697.

Any part which does not fulfil the definition of a substantial part, evaluated both quantitatively and qualitatively, falls within the definition of an insubstantial part of the contents of a database.

The debate among scholars on the benefits of recognising such rights particularly for machine-generated data is still very open.[20] The text and data mining (TDM) exception to copyright protection could also be considered as a measure that opens access to data. In the EU, the TDM exception is limited to non-commercial use of the data by public sector research institutes and organisations. That is an opening combined with a restriction. In the USA, the "fair use" provisions allow for wider use of data obtained through TDM, provided they do not compete with the services offered by the data holder.

The Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information (Directive 2003/98/EC)[21] is a core element of the European strategy to open up government data for use in the economy and for reaching societal goals. Revised by Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms[22] (Directive 2013/37/EU (PSI Directive)) in July 2013, it encourages Member States (MS) to make as much material held by public sector bodies available for re-use as possible to foster transparency, data-based innovation and fair competition.

The Directive 2003/98/EC seeks to make data held by public sector organisations more accessible to citizens and firms. To the extent that some of these organisations may be involved in the production

[20] Joint Research Centre: Artificial Intelligence. A European Perspective. URL: http://publications.jrc.ec.europa.eu/repository/bitstream/JRC113826/ai-flagship-report_online.pdf.

[21] Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information // *OJ L 345, 31.12.2003, p. 90–96.*

[22] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC // *OJ L 176, 27.6.2013, p. 338–436.*

of commercial services — for instance public utilities in transport and energy — it may also cover some commercial operations. Providing public access to this commercially sensitive data may entail opportunity costs for the data holders. The Directive suggests that pricing of data access should incur marginal costs. Digital datasets are often characterised by the high fixed costs of creating the dataset and virtually zero marginal costs of replicating and transmitting it. As a result, the marginal cost rule may not cover the actual cost of producing public-sector data but, as argued earlier, much of this data is generated to fulfil a legal mandate in the first place, so its reuse becomes a by-product, and can benefit the public administration much more than keeping the data closed. This is the case, for example, if the data generates new products and services that the public administration can use to extract additional information and/or serve the community better.

2.3.4. GDPR and Police Directive

For data which is not rival (ie in the public domain) and which can be transferred at virtually zero cost all over the world, the question of "data sovereignty" has become an issue. This revolves around the idea that data are subject to the laws and governance structures in the nation where it is collected. Within the EU, the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC[23] ((General Data Protection Regulation) GDPR) allows transfer of personal data between Member States. The recent EU Free Flow of Data policy initiative aims to extend this to all types of data in order to avoid national fragmentation of data markets. Personal data transfers outside the EU require that the recipient complies with GDPR rules.

[23] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) // *OJ L 119, 4.5.2016, p. 1–88.*

The datasets are a necessary input into Machine Learning (ML) algorithms. Access to data is important for the development of AI. Access and wide data sharing can occur in markets for direct and indirect data sales, across a wide spectrum of modalities and economic conditions, even when data holders have exclusive control over their data. EU regulatory interventions in data markets are caught between two poles: (a) offering more exclusive rights as an incentive for data producers and holders to invest more in data collection & analysis, and (b) making data more widely available and accessible to facilitate the extraction of new insights from data, including with AI/ML. There is a wide-open unregulated space between personal data rights under the GDPR and general database ownership rights under the DBD where market-based data exchanges, bilateral contracts and technical protection measures rule. There is an ongoing debate in the EU as to whether this open space contains some market failures that need to be filled up with further regulation. That debate ranges from expanding exclusive data ownership rights (European Commission, January 2017) to facilitating access to data (European Commission, April 2018).[24] The rapid rise of AI as a very promising data-processing technology to extract more insights and value from data is fuelling this debate. When data and data analytics technologies become cheaper and more widely available, the need for protection as an incentive to investors may diminish in favour of more access to stimulate innovation. Finding a new balance between these two opposite poles in the debate requires more societal and policy debate.

In one sense, the EU has a head start on developing AI law. New EU rules, particularly the General Data Protection Regulation and the Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision

[24] Joint Research Centre: Artificial Intelligence. A European Perspective. URL: http://publications.jrc.ec.europa.eu/repository/bitstream/JRC113826/ai-flagship-report_online.pdf.

2008/977/JHA[25] (Police Directive), stand to shape AI and mitigate its risks. And because many of these rules stretch beyond Europe's borders-any business who would seek to compete in Europe's vast data market must follow the GDPR.

While the GDPR and Police Directive were not developed specifically for AI, they will set crucial benchmarks for the regulation of AI in Europe. By setting rules and safeguards around the processing of personal data, the GDPR and the Police Directive have the potential to directly impact the development and implementation of AI which is fueled by data. The EU Commission has said little about how it expects these laws to apply to AI. This may be simply because the interpretation of laws is not mainly the Commission's role: it is the responsibility of the European Data Protection authorities and courts.

The General Data Protection Regulation The GDPR contains seven core principles for the collection and processing of personal data, namely:

— Lawfulness, fairness and transparency,
— Purpose limitation,
— Data minimization,
— Accuracy,
— Storage limitation,
— Integrity and confidentiality (security),
— Accountability.

There is a broad European consensus by experts interviewed for this report that the GDPR will be relevant to AI development-but precisely how and to what extent is contested. The central debates include:

— The scope of the restrictions on fully automated processing and on profiling;

[25] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA // *OJ L 119, 4.5.2016, p. 89–131.*

— How to respect the transparency and accountability requirement given current technical limits on explanation of some AI processes, such as deep learning and neural networks;

— How purpose limitation, minimisation and anonymisation can practically be achieved given the scale of many AI applications, the use of AI to find previously unrecognised patterns in data, and the sophistication of mass data analysis techniques;

— How to meet the GDPR's accuracy requirement in data when AI processes are inherently probabilistic; and

— How to support meaningful consent to AI processing.[26]

The 2016 Police Directive will have an impact on the use of AI by law enforcement authorities in the EU. The Directive aims to apply many of the rules governing personal data in the GDPR to the 16 activities of law enforcement and investigative agencies, while still enabling these authorities to collaborate and share data when appropriate. It applies the central data protection tenets of the GDPR to police authorities in the EU, such as the requirement for a data protection officer, data protection impact assessments, and individual rights to seek amendment and correction for instance.

The Police Directive, by its nature, requires states to pass an implementing legislation, as it is not directly applicable as a Regulation would be. This opens the door to a greater degree of local variance. The Directive also has several carve-outs for national security and public order policing that give law enforcement authorities considerably more manoeuvrability in their data processing activities than a regular data controller has. Crucial provisions of the law have yet to be tested in the context of AI in policing. These are applications that are likely to hold serious consequences for the lives of citizens. How will EU states determine if and when the use of AI by law enforcement is "necessary and proportionate in a democratic society"? Many AI applications are likely to raise questions under the Police Directive, including facial recognition, predictive policing, and others.[27]

[26] Mapping Regulatory Proposals for Artificial Intelligence in Europe URL: https://www.accessnow.org/cms/assets/uploads/2018/11/mapping_regulatory_proposals_for_AI_in_EU.pdf.

[27] Ibid.

While discussions on ownership are still inconclusive, the debate has shifted to the issue of data access. In this regard, different options are being considered, including specific regulation, creating a new qualified right to access data, or a system of compulsory licences to grant access to data, either on a horizontal or sectoral basis. So, at the sectoral level, the European Parliament has called on the Commission to publish a legislative proposal on access to in-vehicle data (EP 2018a). With the release of the Third Mobility Package, the Commission has announced a Recommendation that, among other things, will deal with "a data governance framework that enables data sharing, in line with the initiatives of the 2018 Data Package, and with data protection and privacy legislation."

Some scholars have even suggested a specific copyright exception, a fair use or an open norm that cover AI and other related uses without the authorisation of the copyright holders (among others, Geiger et al., 2018, and Schafer et al., 2015). Here we should recall that in 2016 the EC tabled a legislative proposal that, among other things, proposed a mandatory exception for text and data mining (TDM) for research purposes subject to a series of conditions (Article 3 in EC 2016b). The proposal is now being discussed by the Commission, the Council and the Parliament. It must be noted that both the European Parliament and the Council have proposed to enlarge the scope to cultural institutions and to create a new optional exception in addition to that proposed by the EC.

Although generally welcomed by the research community and by copyright scholars, the proposal has not been exempted from criticism in relation to the conditions under which it should operate, being more restrictive than the regime applicable in other countries (Geiger et al., 2018; Samuelson, 2018). All in all, copyright exceptions would only authorise the re-use but would not, strictly speaking, facilitate access to datasets. As indicated at the beginning of this section, some scholars have noted that the distinction between personal and non-personal data is becoming more and more blurred. It is not only that non-personal data or anonymised data can be subject to techniques linking them back to individuals, but also that recent reforms have made clear that the

notion of personal data includes data that allow individualisation, even if they do not reveal the individual's civil or legal identity.[28]

Thus the Council of Europe's, Explanatory report Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108), Ad hoc Committee on Data Protection (CAHDATA), 128th Session of the Committee of Ministers (Elsinore, Denmark, 17–18 May 2018) sets: "The notion of "identifiable" refers not only to the individual's civil or legal identity as such, but also to what may allow to "individualise" or single out (and thus allow to treat differently) one person from others. This "individualisation" could be done, for instance, by referring to him or her specifically, or to a device or a combination of devices (computer, mobile phone, camera, gaming devices, etc.) on the basis of an identification number, a pseudonym, biometric or genetic data, location data, an IP address, or other identifier. The use of a pseudonym or of any digital identifier/ digital identity does not lead to anonymisation of the data as the data subject can still be identifiable or individualised. Pseudonymous data is thus to be considered as personal data and is covered by the provisions of the Convention. The quality of the pseudonymisation techniques applied should be duly taken into account when assessing the appropriateness of safeguards implemented to mitigate the risks to data subjects." This must be taken into account when considering specific regimes for sensor or industrial data that may also include data susceptible to being considered as personal data.

AI is most likely to have significant impacts on our lives, even more than with past waves of digitalisation. As with any major technological change, this will bring significant societal benefits, but will also pose new challenges across many economic segments, including transport, energy, healthcare, defence, education, leisure, farming and finance. The task of policymaking is to manage change and regulate the adoption of new technology in order to ensure that they are acceptable to society and respect our fundamental values. The EU can provide guidance to the European countries on regulatory issues of AI while fostering the

[28] Joint Research Centre: Artificial Intelligence. A European Perspective. URL: http://publications.jrc.ec.europa.eu/repository/bitstream/JRC113826/ai-flagship-report_online.pdf

development of a single market for new technologies. To foster the development and uptake of AI, citizens and industry operators need to be reassured that it complies with ethical and regulatory frameworks. Consumers and users of AI devices should benefit from mechanisms allowing redress in case of damages and from tools that allow them to supervise decisions taken by AI systems. Economic actors also need sufficient legal certainty to invest in AI technology. The initiatives adopted both at the European and national levels provide some hints on how these aspects may be addressed. The future EC guidelines on the ethical development of AI and the findings of ongoing studies on transparency and explainability, along with parallel initiatives undertaken by others stakeholders, may lay the foundations for a fairer AI.

The European policymaker can have a role in the setting of standards for human-centred AI, as has already been done in relation to privacy. Access and use of quality data are fundamental for many AI applications. However, empirical evidence shows that an optimal framework for trading and sharing of data has still to be realised. Within this context, it should put forward a series of proposals to adjust the regulatory framework for non-personal machine-generated data. These go from enacting new ownership rights on data, to establishing access regimes or incentivising data sharing through soft-law instruments. Sectoral approaches and solutions focused on regulating access (rather than on privileging the creation of new rights) are gaining prominence. In a context where the European data landscape is decentralised and fragmented (in comparison with that of other regions), the discussion on data governance becomes even more relevant and opens opportunities for different models to emerge.

In addition, the potential capacity of AI systems to generate inventions or creations has attracted the attention of scholars, some of them sceptical about the capacity of the existing IP framework to accommodate this phenomenon. Further economic and legal research is needed to assess to what extent adjustments to the legal framework or the creation of new rights are needed at all.

THE SECOND OPTION

The second option, that of giving authorship to the programmer, is evident in a few countries such as the Hong Kong (SAR), India, Ireland, New Zealand and the UK.

2.4. The United Kingdom

In 2016, the Government Office for Science (UK Gov., 2016a) released a note on "Robotics, automation and artificial intelligence", which explored the opportunities and recommended three actions concerning challenge areas, facilities and skills. The same entity released a report that same year "Artificial intelligence: opportunities and implications for the future of decision making" (2016b) that included a presentation of what AI is, a review of the use of AI by governments, and a discussion on the effects on labour markets. In 2015, the Alan Turing Institute was created as the national institute for data science, headquartered at the British Library (Hall & Pesenti, 2017).

In 2016, the House of Commons Science and Technology Committee released a report on "Robotics and artificial intelligence" (House of Commons, 2016). The report deals mostly with the broad issues (economic, social, ethical, and regulatory) triggered by this disrupting technology, but the last chapter examines "the research, funding and innovation landscape for robotics and AI'. Its conclusions were rather critical: "Government leadership has been noticeably lacking. There is no Government strategy for developing the skills, and securing the critical investment, that is needed to create future growth in robotics and AI' (UK House of Commons, 2016: 33). In its answer to the report, the government acknowledged that more could be done to take a leading role, and in March 2017 it announced an industry-led review on the conditions necessary for the AI industry to continue to thrive and grow in the UK. In April 2018, the government published its AI Sector Deal (UK Gov. 2018) as part of a large industrial strategy to place the UK at the forefront of AI development and use.[29]

[29] Joint Research Centre: Artificial Intelligence. A European Perspective. URL: http://publications.jrc.ec.europa.eu/repository/bitstream/JRC113826/ai-flagship-report_online.pdf. P. 41–42.

The UK is in a strong position to be among the world leaders in the development of artificial intelligence during the twenty-first century. Britain contains leading AI companies, a dynamic academic research culture, a vigorous start-up ecosystem and a constellation of legal, ethical, financial and linguistic strengths located in close proximity to each other. Artificial intelligence, handled carefully, could be a great opportunity for the British economy. In addition, AI presents a significant opportunity to solve complex problems and potentially improve productivity, which the UK is right to embrace.

The last decade has seen a confluence of factors-in particular, improved techniques such as deep learning, and the growth in available data and computer processing power-enable this technology to be deployed far more extensively. This brings with it a host of opportunities, but also risks and challenges, and how the UK chooses to respond to these, will have widespread implications for many years to come.

In this regard the second option is best encapsulated in UK copyright law, section 9(3) of the Copyright, Designs and Patents Act (CDPA),[30] which states:

"In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken."

Furthermore, section 178 of the CDPA defines a computer-generated work as one that "is generated by computer in circumstances such that there is no human author of the work". The idea behind such a provision is to create an exception to all human authorship requirements by recognizing the work that goes into creating a program capable of generating works, even if the creative spark is undertaken by the machine.

This leaves open the question of who the law would consider to be the person making the arrangements for the work to be generated. Should the law recognise the contribution of the programmer or the user of that program? In the analogue world, this is like asking whether

[30] Copyright, Designs and Patents Act (CDPA) URL: https://www.legislation.gov.uk/ukpga/1988/48/contents.

copyright should be conferred on the maker of a pen or the writer. Why, then, could the existing ambiguity prove problematic in the digital world? Take the case of Microsoft Word. Microsoft developed the Word computer program but clearly does not own every piece of work produced using that software. The copyright lies with the user, i.e. the author who used the program to create his or her work. But when it comes to artificial intelligence algorithms that are capable of generating a work, the user's contribution to the creative process may simply be to press a button so the machine can do its thing. There are already several text-generating machine learning programs already in existence, and while this is an ongoing area of research, the results can be astounding. Stanford PhD student Andrej Karpathy established a neural network which could be taught to read text and compose sentences in the same style. It came up with Wikipedia articles and lines of dialogue that resembled the language of Shakespeare.[31]

Some case law seems to indicate that this question could be solved on a case-by-case basis. In the English case of Nova Productions v Mazooma Games [2007] EWCA Civ 219, the Court of Appeal had to decide on the authorship of a computer game, and declared that a player's input "is not artistic in nature and he has contributed no skill or labour of an artistic kind". So considering user action case by case could be one possible solution to the problem.

Nova designed, made and sold arcade video games. It claimed that the copyright in its game "Pocket Money" had been infringed by Mazooma's game "Jackpot Pool" and another company, B's game "Trick Shot". Novas's claim was not that the software code of "Pocket Money" had been copied, but rather that the game's screen appearance (the "outputs") had been copied. Nova served a schedule of the similarities it relied upon and marked up screenshots to identify the relevant features.

Kitchin J dismissed Novas's claims, finding that the limited number of general ideas that had been copied did not amount to a substantial part of Nova's work. Nova appealed.[32] This decision makes clear that a

[31] WIPO // URL: https://www.wipo.int/wipo_magazine/en/2017/05/article_0003.html.

[32] Nova Productions v Mazooma Games [2007] EWCA Civ 219. URL: https://www.5rb.com/case/nova-productions-ltd-v-mazooma-games-ltd-ors-ca.

computer program may copy all of the "rules" and functions of another without infringing copyright.

Monumental advances in computing and the sheer amount of available computational power may well make the distinction moot; when you give a machine the capacity to learn styles from large datasets of content, it will become ever better at mimicking humans. And given enough computing power, soon we may not be able to distinguish between human-generated and machine-generated content. We are not yet at that stage, but if and when we do get there, we will have to decide what type of protection, if any, we should give to emergent works created by intelligent algorithms with little or no human intervention. Although copyright laws have been moving away from originality standards that reward skill, labour and effort, perhaps we can establish an exception to that trend when it comes to the fruits of sophisticated artificial intelligence. The alternative seems contrary to the justifications for protecting creative works in the first place.

Granting copyright to the person who made the operation of artificial intelligence possible seems to be the most sensible approach, with the UK's model looking the most efficient. Such an approach will ensure that companies keep investing in the technology, safe in the knowledge that they will get a return on their investment.

3. CONCLUSION

Every new technology induces changes with an impact on society. Regulation is often considered necessary to address some of these impacts. The first difficulty when deciding about the most appropriate regulatory framework for AI is to anticipate the impact it may have on society. The second is to cope with the pace of AI advances. Other challenges include the level of complexity of AI, its autonomous and self-learning features and its pervasiveness across sectors. These features require both qualified interdisciplinary capacity (to better understand technologies and predict impact) and flexibility (to envisage frameworks that, while enforceable, can adapt with time) in policymaking.

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OTHER LEGAL ISSUES

GENERAL APPROACH TO THE RELATIONSHIP BETWEEN THE CONCEPTS OF CONTROL AND SUPERVISION (SURVEILLANCE) IN HEALTH CARE

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Abstract

The article presents the analysis of control and supervision in healthcare in the Russian Federation. The author puts forward the idea of understanding distinction between control and supervision in terms of administrative law and different forms and issues, including different types of supervision and control in healthcare system of the Russian Federation.

Keywords

Administrative law, control, supervision, healthcare, prosecutorial supervision agencies, regulation

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1. INTRODUCTION

At present, control and supervision have already become one of the elements of the administrative-legal regulation mechanism. The ultimate goal of the introduction of control and supervisory activities is to optimise the procedural activities of the executive branch. But the action of these bodies, however, also implies activating the law-making work of the executive authorities, increasing the array and improving the quality of the regulatory legal acts they adopt. In this regard, it is important to study the legal nature of control and supervision, their place in the regulatory system in the field of healthcare, to identify and understand their distinctive features.

The undoubted high social significance of health care was another criterion determining the relevance of this study. In the complex system of measures taken by the state to preserve the health of the population, health care is an essential element. It should be noted that an integral regulatory and legal framework has not yet been created for the development of administrative regulations in health care, which would allow to formulate concepts of all types of regulations, establish a procedure for conducting examinations and placing regulations in electronic form, and determine the criteria for their effectiveness.

The current article focuses on the research and analysis of control and supervision in the sphere of health care in the Russian Federation. The first part of the article deals with general legal aspects of control and supervision (surveillance) contained in Administrative law. The second part is devoted to the analysis of the legal regulations in health care. The author primarily aims at identifying various agencies, that carry out control and supervision, their structure and main responsibilities. Further, the author expands on the different features between two

regulation types, points out similarities and differences. The third part examines common features of prosecutorial control and supervision in health care, problems and general types of law violation in the current sphere.

2. GENERAL LEGAL ASPECTS OF CONTROL AND SUPERVISION (SURVEILLANCE)

One of the important problems in the theory and practice of administrative law is the ratio of state control and supervision. The correlation of the concepts of control and supervision is currently the subject of discussion by many scholars of administrative law, since it has an important theoretical and practical significance. It should be noted that in the theory of law there is no clear criteria for the separation of control and supervisory activities. The subject of control and supervision is not an easy topic to discuss, mainly because of different connotation and understanding of the terms control and supervision. Some scholars defined supervision as a conceived process that is being a part of control,[2] others equalise these categories.[3] In order to resolve the ambiguities surrounding the current discussion to the relationship of these categories in the science of administrative law three possible approaches can be distinguished.

It is argued by L. A. Galanina, that in some cases it is complicated to distinguish control from supervisory authorities, therefore, in legislation and literature, the distinction between control and supervisory powers is not always clearly drawn, and control and supervisory bodies are often called "control-supervision".[4] Representatives of the other approach refer to the autonomy of "supervision" and "control" concept,

[2] Konin, N.M. (2004). Administrative law of the Russian Federation. General and Special parts: a course of lectures /Yurist. Moscow. P. 234–236.

[3] Galanina, L.A. (2001) Organisational and legal support for monitoring the implementation of legal acts in the constituent entities of the Russian Federation: dis., Moscow. P. 17.

[4] Galanina, L.A. (2001) Organisational and legal support for monitoring the implementation of legal acts in the constituent entities of the Russian Federation: dis., Moscow. P. 22.

considering them as different types of governmental management.[5] On the other hand, S. G. Nistratov sees supervision as a process with the subject of legality, while the subject of control is not only legality, but also a prudence.[6]

Lawyers have developed two approaches to an understanding of the essence of control: as functions of government and as the activities of governmental bodies. It seems, that both points of view do not contradict each other, since they reflect various aspects of such a complex phenomenon as control. There is also an understanding of supervision as "limited control", which consists of the implementation of public administration bodies with the right to apply administrative coercive measures to their functions in respect of not organisationally subordinated entities in order to establish the implementation of special norms and rules by the latter.

Thus, Y. M. Kozlov pointed out the following criteria for distinguishing between the categories of "control" and "supervision": during the supervision process the subject is not under organisational subordination of the supervisory authority, therefore only administrative-enforcement measures can be applied to the supervised subject; the other situation in the case of control: the subject of control has a direct subordination to the checking authority and during the revision process governmental body may undertake disciplinary measures. Working with the definition supervision cited by Y. A. Andreeva, that sees the supervision as a system of actions and measures established by laws and regulatory legal acts, is carried out by authorised executive authorities and their officials and is aimed at ensuring compliance with the laws, government bodies and institutions, local governments, legal entities and individuals.

Moreover, Professor S. M. Zubarev, identifies the following features of control in administrative regulation as:

1) a function of public administration;

[5] Zubarev, S.M. (2014). Relationship between the concepts of "control" and "supervision" in public administration. State power and local government No. 10. P. 31–36.

[6] Nistratov, S.G. (2012). Control and supervision as a guarantee of legality (theoretical and legal aspect): dis. Volgograd. P. 33.

2) a component of other functions of public administration;

3) the form of feedback between the subject and the object of public administration, ensuring the development and implementation of optimal management decisions;

4) organisational and legal methods of ensuring the rule of law in public administration;

5) a special type of legal process.

So far, at the level of Federal legislation of the Russian Federation there are obvious contradictions in the interpretation of control and supervision. Considering the definitions of control and supervision in the legislation of the Russian Federation, we see the following.

The concepts of "control" and "supervision" are identified in various documents. For example, in the Federal law No. 294-FZ "on protection of the rights of legal entities and individual entrepreneurs in the implementation of state control (supervision) and municipal control". In the Decree of the President of the Russian Federation of March 9, 2004 No. 314 "on the system and structure of Federal Executive bodies", as well as in a number of articles of the administrative Code, the terms "control" and "supervision" are rendered equivalent. For example, article 19.4 of the administrative Code is called "Disobeying the lawful order of an official of the body exercising state supervision (control), an official of the organisation authorised in accordance with Federal laws to exercise state supervision, an official of the body exercising municipal control". Article 19.5 is called "failure to Comply with the legal order (resolution, submission, decision) of the body (official) exercising state supervision (control), the organisation authorised in accordance with Federal laws to exercise state supervision (official), the body (official) exercising municipal control."

However, in article 19.5 of the Administrative Code "supervision" in part 5, and "control" in part 2 apply as "independent" concepts. This approach to the use of the terms "supervision" and "control" can be observed in almost every legal instrument dealing with the implementation of these activities in various spheres of public life. In addition, it should be noted that when considering the draft Federal law "on state and municipal control (supervision) in the Russian Federation" submitted by the Ministry of economic development for consideration

by the Government of the Russian Federation, the normative differentiation of the content of the terms "control" and "supervision" was also not realised. Here, however, it should be noted that the Decree of the Government of the Russian Federation of June 5, 2013 No. 4766 Regulations on Federal state fire supervision in the woods, on Federal state sanitary and epidemiological supervision, and on the state veterinary supervision were adopted. In this regard, similar acts on state control in the relevant areas have lost their force. This Decree of the Government of the Russian Federation also amended numerous government acts, eliminating the terminological confusion of the concepts of control and supervision in favour of the latter. For example, the Decree of the Government of the Russian Federation of December 21, 2000 No. 987 "On state surveillance and control in ensuring quality and safety of food products" called "On the state supervision in the field of quality assurance and food safety" (paragraph 10) and the RF Government Decree of May 12, 2005 No. 293 "On approval of Provisions on state control over geological studying, rational use and protection of mineral resources" was called "On approval of Provisions on state control over geological studying, rational use and protection of subsoil".

Pursuant to the different legal points of view set forth above, which identify differentiation between the terms "control" and "supervision", it is the view of the author that:

1. Supervisory bodies exercise their functions and powers in relation to third parties who are not subordinate to them; Supervisory bodies are mostly related to organisational subordinates, but in some cases in relation to non-subordinated objects, such as self-regulatory organisations.

2. When exercising supervision over the perpetrators, administrative measures (administrative fine, deprivation of a special right, suspension of work, etc.) can be applied, and in the case of control — also disciplinary measures, and sometimes criminal law.

3. The objects subject to supervision are special rules (fire, veterinary, sanitary), and the object subject to control — a wide range of different aspects of the controlled objects (discipline, Finance).

4. Supervision is limited to the verification of compliance with the requirements of the legislation, while in the exercise of control it is

possible to assess the effectiveness and appropriateness of the acts of the audited entity, accompanied by interference in its current economic activity.

However, it is possible to identify common features of state control and supervision, which justifiably lead to the conclusion that they are inextricably linked. The common features of control and surveillance activities in the field of health care can be identified as:

1. Similar subject structure of controlling and Supervisory bodies-the Executive authorities authorised by the law.

2. Unity of control and supervision objectives — legal impact on the development of public relations to ensure their legality.

3. And control and supervision - a process consistent and long consisting of certain stages.

4. Similar forms and methods: licensing, certification, state accreditation.

The activity of external control bodies in health care includes checking the state of affairs of the controlled object not only from the point of view of legality, but also the appropriateness of the decisions taken. Elements of the system of state control in the field of health are: state registration of medicines, medical devices, medical products; licensing, accreditation, certification of specialists; quality control.

Control powers in health care concern concrete bodies and their officials, the enterprises, the organisations, establishments, public associations, thus measures of administrative coercion, unlike supervision, are not applied. Therefore, we can say that the essence and social purpose of control is the system of monitoring the compliance of the controlled object to the requirements that he (the object) received from the management (body, official). The final focus of the control is that it reveals the results of the impact of the subject on the object, the deviations from the requirements of management decisions, from the adopted principles of organisation and regulation, the causes of these deviations, and also identifies ways to overcome existing obstacles to the effective functioning of the entire system.

3. CONTROL AND SUPERVISION (SURVEILLANCE) IN HEALTHCARE

The Government of the Russian Federation plays an important role in healthcare delivery. The Russian Federation has three governmental levels participating in the healthcare system: federal, state and local. The federal government provides a range of regulatory and funding including demographic programs, social plans for families with more than 2 children and other. In accordance with the concepts of the long-term socio-economic development of the Russian Federation for the period up to 2020, (approved by the decree of the Government of the Russian Federation)[7] the main priorities of social and economic policy in the implementation of state programs of the Russian Federation "Healthcare Development"[8] includes cultural traditions, and the introduction of innovative technologies in health care and education.

The functions of the Ministry of Health of the Russian Federation in the field of public administration are enshrined in the Resolution of the Government of the Russian Federation of June 19, 2012 No. 608 "On Approval of the Regulations on the Ministry of Health of the Russian Federation". The level of competitiveness of the modern innovation economy is largely determined by the quality of professional staff. The main goal of the concept of the long-term social and economic development of the Russian Federation for the period up to 2020 (Decree of the Government of the Russian Federation of November 17, 2008 No. 1662-p) is to improve the efficiency of human capital and create comfortable social conditions for everyone.

The fragmentation of the governmental public health infrastructure is in part a direct result of the way in which governmental roles and responsibilities at the federal, state, and local levels have evolved over the history of the country.

General theoretical approaches of control and supervision process in the sphere of public administration should not cause any special

[7] Decree of the Government of the Russian Federation of April 17, 2008 No. 1662-p.

[8] State programs of the Russian Federation "Healthcare Development" approved by the Decree of the Government of the Russian Federation of April 15, 2014 No. 294.

scientific efforts and allow to use it for different interpretations. However, familiarity with scientific sources does not allow to make an unambiguous conclusion. Thus, the most common is the assignment to the objects of control of various bodies and organisations. Scholars have been studying the issue of different approaches of definitions between control or (and) supervision. That is why it is necessary to define various types of control and supervision in health care. Quality and safety control of medical activity is carried out in 3 different forms.

3.1. State control

The state control is performed in accordance with the requirements of Federal law No. 323-FZ of 21.11.2011, the Resolution of the Government of the Russian Federation of 12.11.2012 No. 1152 (amended 14.09.2016) "On approval of Provisions on state control of quality and safety of medical activities", regulatory acts governing the work of the inspectors of the Department.

Healthcare Quality and safety of medical service is carried out by the state control bodies: Ministry of Health of the Russian Federation (Minzdrav), Federal Service for Surveillance in Healthcare (Roszdravnadzor). During the state control of quality and safety of medical activity is obligatory to check the following activities:

— observance by medical organisations of the rights of citizens in the field of health protection;

— licensing of medical activities in accordance with the legislation of the Russian Federation on licensing of certain types of activities;

— medical organisations, orders of providing health care and its standards;

— compliance of medical organisations with the procedures of medical examinations;

— compliance of medical organisations with safe working conditions, requirements for safe use and operation of medical devices and their disposal (destruction);

— observance by medical workers, heads of the medical organisations of the restrictions applied to them at implementation of professional activity;[9]

— internal control of quality and safety of medical activities by medical organisations.

3.2. Institutional control

Institutional control is exercised by the federal executive authorities and the executive authorities of the constituent entities of the Russian Federation. These bodies include Roszdravnadzor, Department of Health. The powers of inspectors are established in paragraphs 3, 5 and 6, part 2 of article 88 of Federal Law No. 323-FZ of 11/21/2011. Institutional control is carried out in accordance with the requirements of Federal Law No. 323-FZ of November 21, 2011, Order of the Ministry of Health of Russia of December 12, 2012 No. 134 on "On approval of the procedure for organising and conducting departmental quality control and safety of medical activities" (Registered in the Ministry of Justice of Russia 03.06.2013 No. 28631).

3.3. Internal control

Internal control is carried out by medical organisations of the state, municipal and private health systems. The procedure for internal control is established by the head of the medical organisation. The document regulating the procedure for conducting internal control of the quality and safety of medical activities within an organisation may be a corresponding Regulation approved by the Order of the head of the medical organisation, with which all the employees participating in the commission on quality control should be familiarised with. This type of control is carried out by the relevant subcommittee of the medical commission. Thus, Internal control in health care is performed by:

— compliance with the requirements for the implementation of medical activities established by the legislation of the Russian Federation;

[9] Federal law No. 323-FZ of 21.11.2011.

— determination of indicators of the quality of medical organisations;

— compliance with the volume, terms and conditions of medical care, quality control of medical care by compulsory medical insurance funds and medical insurance organisations in accordance with the legislation of the Russian Federation on compulsory medical insurance;

— creation of a system for evaluating the activities of medical personnel involved in the provision of medical services;

— creation of information systems in the field of health care, including personalised accounting for medical activities.

Internal control is carried out in accordance with the requirements of Federal Law No. 323, Order of the Ministry of Health and Social Development of the Russian Federation No. 502n "On approval of the procedure for creating and operating a medical commission of a medical organisation"; internal regulations of the organisation.

3.4. State control of medical treatment

This type of control is exercised by the Ministry of Industry and Trade; Roszdravnadzor; Department of Health, including the following legal procedures:

— licensing control in the production of drugs and pharmaceutical activities;

— federal state supervision in the field of drug circulation;

— selective quality control of medicines.

State control (supervision) in the field of drug circulation is carried out in accordance with the requirements of Federal Law No. 323-FZ of 21.11.2011, Federal Law of 12.04.2010 No. 61-FZ (as amended on 03.07.2016) funds (as amended. And add., entered into force on 01.01.2017), regulations governing the work of the inspection agency.

3.5. State control of medical devices

The state control over the circulation of medical devices is carried out by the federal executive body authorised by the Government of the Russian Federation (federal state control) in accordance with the legislation of the Russian Federation in the manner established by the

Government of the Russian Federation, namely the Federal Service for Health Supervision (Roszdravnadzor).

Current state control includes the following activities:

— control of technical tests, toxicological studies, clinical trials;

— control over the efficiency, safety, production, manufacture, sale, storage, transportation, import into the territory of the Russian Federation, export from the territory of the Russian Federation of medical products;

— monitoring the installation, commissioning, use, operation, including maintenance, repair, disposal or destruction of medical devices.

— verification of compliance by the subjects of circulation of medical devices with the approved rules in the field of circulation of medical devices;

— checking the issuance of permits for the importation into the territory of the Russian Federation of medical devices for the purpose of their state registration;

— monitoring the safety of medical devices.

The state control over the circulation of medical products is carried out in accordance with the requirements of Federal Law No. 323-FZ dated November 21, 2011, and the regulatory acts governing the work of the inspection agency.

3.6. Federal State Sanitary and Epidemiological Surveillance

This type of control is carried out by the Chief state sanitary inspectors and their deputies; heads of structural divisions and their deputies, specialists of bodies exercising federal state sanitary and epidemiological supervision. These bodies include Rospotrebnadzor, and the FMBA. The list of inspectors is established by the Decree of the Government of the Russian Federation of 05.06.2013 No. 476 (as amended on 03.30.2017) "On the issues of state control (supervision) and recognition of certain acts of the Government of the Russian Federation". Federal state sanitary and epidemiological surveillance is carried out by:

— analysis of documents and information on ensuring the sanitary and epidemiological well-being of the population. Documents and information are obtained on the basis of written motivated requests;

— sanitary and epidemiological examinations, investigations, surveys, research, testing and other types of assessments;

— unimpeded visits and surveys of territories, buildings, buildings, structures, premises, equipment, etc. in order to verify compliance with sanitary legislation and the implementation of sanitary and anti-epidemic (preventive) measures at specified facilities, etc.

The Federal State Sanitary and Epidemiological Surveillance is carried out in accordance with the requirements of Federal Law No. 323-FZ of 11/21/2011, Federal Law of 03/30/1999 No. 52-FZ (as amended on 03/07/2016) "On the sanitary-epidemiological well-being of the population" (as amended and added, entered into force on 07/04/2016), regulations governing the work of the inspection agency. Unsatisfactory test results can be appealed by a medical organisation to a higher authority or court. The Ministry of Health of the Russian Federation carries out state control in respect of subordinate organisations established by the Order of the Government of the Russian Federation No. 1286-r dated July 19, 2012 "On Federal State Budgetary Institutions Under the Ministry of Health of the Russian Federation", including federal state budget institutions: institutions science, educational institutions, health institutions; federal state-owned institutions: psychiatric hospitals; federal state unitary enterprises.

FMBA has departmental control over the following organisations: scientific organisations, research and production facilities, health facilities, sanatoriums and resorts, centers for hygiene and epidemiology, blood service facilities, institutions of additional professional education, institutions of secondary vocational education, medical and social expertise institutions, pharmacy institutions. The state control of the FMBA in respect of subordinate organisations is carried out on the basis of the following regulatory legal acts: rules for the implementation of departmental control in the field of procurement, order on approval of the number and composition of the inspection, order No. 63z of September 30, 2015, "On Approval of the Number and Personnel of

the Inspectorate for the Implementation of Departmental Procurement Control to Ensure State Needs in Respect to Subordinate Organisations of the FMBA of Russia".

4. SEVERAL ISSUES IN PROSECUTORIAL SUPERVISION IN HEALTHCARE

For many years, the questions of prosecutorial surveillance have been of particular interest to representatives of science and practice, including administrative scientists, in the field of legal regulation. Prosecutor's supervision in the field of health is the activity carried out by authorised bodies over the implementation of existing regulatory acts in order to ensure the rule of law, unity and strengthen the rule of law, protect the rights and freedoms of man and citizen, as well as legally protected interests of society and the state.

Legal regulation of prosecutorial supervision in the field of health care is carried out using the norms of the Constitution of the Russian Federation, Federal Law on the Prosecutor's Office, Federal Law "On the Principles of the Protection of Citizens' Health in the Russian Federation", Federal Law "On Compulsory Medical Insurance", Federal Law "On Circulation of Medicines", Federal Law "On Information, Information Technologies and Protection of Information", decisions of the Constitutional Court and other federal laws of the Russian Federation, secondary normative and local acts.

Public prosecutor's supervision in health care is one of the ways to ensure legality; this consists of constant and systematic monitoring of authorised state bodies, ensuring review over the activities of bodies or persons not subordinate to them in order to detect violations of law in health care. At the same time, an assessment of the activity of a supervised facility is given only from the point of view of legality, and not expediency; thus, interference in the current administrative and business activity of the supervised supervising body is not allowed.[10] The subject of supervision is public relations in the field of public health.

[10] Popov, L.L., Studenikina, M.S. (2016). Administrative law: textbook. 2-e isd. M.: Yur.Norma, Infra-M. P. 287.

The subjects of supervisory activities are authorised by the federal law prosecution authorities. Supervised executive bodies are bodies directly or indirectly involved in the healthcare process; medical organisations, institutions, pharmacies.

The authorised persons in the Prosecutor's office carry out activity on: supervision in the field of observance of the legislation on the rights of citizens to medical care; supervision of execution of the legislation on medicinal ensuring preferential categories of citizens, including about pricing on medicines; carrying out checks of pricing in the sphere of turnover of medical preparations, observance of the rights of citizens; detection of violations in the field of turnover of medicines (exceeding the maximum cost of pharmacy organisations, the lack of a minimum set of drugs, non-compliance with the conditions of storage, licensing requirements); identification of violations of preferential provision of citizens with medicines, the presence of facts of discharge of preferential category of citizens of drugs at their own expense. In all cases of violation in the circulation of medicines, prosecutors should take response measures aimed at restoring the rights of citizens, issue a procurator petition about eliminating violations of health care legislation.

Most often prosecutors encounter violations of the legislation in the field of health care as: imposing paid medical services on a patient, failure to provide (or not providing in time) vulnerable categories of citizens (disabled people, children, cancer patients, elderly people and other categories of citizens) with preferential medicines; failure to comply with the terms and conditions of medical care; violations of law while buying medicines; the problem of illegal attempts of drug manufacturers to gain market entry; illegal refusal to provide medical care (for example, in the absence of registration or registration at a different place of residence).

In the course of the supervisory activities of the prosecutors of Moscow and the Moscow region — materials such as documents or products are checked, analysed, compared and evaluated — materials that are essential for the formation of conclusions about the violation or non-violation of the medical institution (organisation) of the legislation of the Russian Federation.

There are many problems faced by the Prosecutor's office during the supervisory activities. Thus, in practice, one of the widespread issues is *law violation on circulation and drugs storage*. For example, during the inspection of the licensing requirements of pharmaceutical activity it was found that in the pharmacy drugs of different pharmaceutical groups were stored together, with violation of the temperature regime, under the direct influence of artificial lighting, and there were no drugs of primary care included in the minimum range of medicines needed for medical care.[11] Similar cases have been installed in the company "Farmamed" of the city of Moscow, pharmacies, OOO "CHIP", "VELES", OOO "Melodiya Zdorovya", OOO "Prezident SK No. 2" and the chemist's point, JSC "Mosoblpharmacia", Moscow region. The consequence of these actions was the initiation of cases of administrative offences under part 4 of article 14.1 (business activity with gross violation of the conditions provided for by a special permit (license) of the Code of administrative offences of the Russian Federation).

Another problem is the *problem of registration of medical services*. In September 2015, the Moscow city compulsory health insurance fund introduced a system of informing citizens about the medical services provided to them via the Internet with the possibility of electronic filing a complaint about the service not provided. However, within six months, citizens reported more than 39 thousand cases of the provision of services not actually provided to them. In the course of supervisory activities of Moscow city, it is revealed that the distortion of accounting documents is permitted in the majority of the Moscow institutions, and supervision process was made not in an appropriate way.[12]

Perhaps, one of the most common types of offences identified during the Prosecutor's inspections in Moscow and the Moscow region is an *unjustified overstatement of prices* for essential drugs. According to item 2 of Art. 63 of the Federal law "on circulation of drugs" the

[11] Rodionova, V.V. (2013). Prosecutor's office and its role in the supervision of the implementation of legislation on public health. Actual problems of medical law. Russian scientific and practical conference. MSAL, Moscow. P. 145.

[12] http://www.mosproc.ru/news/moscow/prokuratura_goroda_provela_proverku_svedeniy_o_pripiskakh_meditsinskikh_uslug_v_stolichnykh_uchrezhd?sphrase_id=311039.

pharmaceutical organisation has no right to establish margins over the limits established in the subjecsts of the Russian Federation on vital medicines. The Moscow city government sets the maximum retail mark-ups for medicinal products, the size of which shall not exceed five hundred rubles.

The primary importance in the provision of medical care (services) is the principle of *providing free-of-charge drugs in time*, which is often violated in practice. During the inspection at the request of a local Prosecutor's office it was found that the applicant was given a prescription for a drug prescribed by a doctor. At the same time in violation of the Federal law "on bases of protection of health of citizens in the Russian Federation" and the order of Ministry of health and social development of Russia "on the order of issue of medicines" the medicine luckily was issued in time - in the ten-day term, however there was no data made about unsecured prescription to the registering shop.

A similar problem is the presence in law enforcement practice of violations of the law in the provision of cancer patients with drugs. As a result of the inspection carried out in 2016, the Prosecutor's Office of the city of Moscow revealed violations of paragraph 2 of article 16 of the Federal law "on the basics of public health in the Russian Federation"; there was a violation of the rights of people suffering from cancer. Within a two month period, there were no vital medicines for more than 416 cancer patients.[13] A similar case was identified in the Moscow region at the request of a resident of the city of Krasnoznamensk, suffering from cancer and having the right to budget medicines, but forced to buy drugs at his own expense because of their absence. According to the results of the audit, the Prosecutor's office sent to the court an application to the Ministry of Health for money recovery spent on the purchase of drugs. By the decision of the Odintsovo city court, the claims of the Prosecutor's office were satisfied.[14]

[13] http://www.mosproc.ru/news/moscow/prokuratura_goroda_prinyala_mery_reagirovaniya_po_informatsii_smi_o_nenadlezhashchem_obespechenii_on?sphrase_id=311039.

[14] http://mosoblproc.ru/news/prokuratura-cherez-sud-obyazala-ministerstvo-zdravoohraneniya-moskovskoy-oblasti-vyiplatit-invalidu-iz-krasnoznamenska-denezhnyie-sredstva-zatrachennyie-na-priobretenie-lekarstv/.

In law enforcement practice, there are also violations of Federal law in children's medical institutions. The Prosecutor's office of the Northern administrative district of Moscow investigating "Children's clinical hospital No. 9 of. G. N. Speransky", found that the hospital did not have an approved and agreed safety data sheet of the facility, nor an action plan for the prevention and elimination of emergency situations. According to the results of the audit, the Prosecutor started a case on an administrative offense under part 1 of the article. 20.6 (failure to comply with the rules and regulations on prevention and dealing with emergency situations) of administrative offences code of the Russian Federation.[15]

In the course of inspections in the field of recreation and rehabilitation of children, more than seven hundred violations of the law were revealed, illegal actions of organisations that accepted minors, placing them in conditions of less than satisfactory and compliant accomodation, food, health and safety, all without obtaining permits. According to the decisions of prosecutors, one hundred and ten legal entities, heads of organisations and individual entrepreneurs were prosecuted for violations of the legislation on sanitary and epidemiological welfare of the population, fire safety and improvement.

Particular attention should be paid to the problems identified during inspections in perinatal medical centres. In September 2015, the Prosecutor's Office of the city of Moscow found that the number of medical personnel does not meet the requirements of the established Procedure for the provision of medical care in the profile of "obstetrics and gynecology. In addition, not all institutions contain information about the mode of operation, types of medical care, procedure, volume and conditions of its receipt. Violation of the rules of storage of the medicines approved by the order of the Ministry of health and social development of the Russian Federation of 23.08.2010 No. 706n were also identified.

[15] http://www.mosproc.ru/news/sao/prokuratura_severnogo_administrativnogo_okruga_presekla_narusheniya_federalnogo_zakonodatelstva_v_de?sphrase_id=311039.

The Prosecutor's office of the city of Moscow and the Moscow region often meets with violations of the law in correctional institutions. The cases are carried out under article 6.3 of the administrative code. So, it was found that the provision of medical care in the city of Mozhaysk, was carried out in violation of the current legislation. In an uninsulated medical hospital, there were found to be patients with an open form of tuberculosis, and laboratory studies not being carried out due to the lack of reagents.[16]

The problems identified above in control and supervision are only a small part of those that exist in practice. The facts of violation of the legislation in health care, both individually and in its entirety, pose a real threat to the life and health of citizens. Extortion of money from patients, for example the provision of supposedly free medical care, numerous facts of misuse of funds, the quantitative growth of counterfeit products, — all of these cause irreparable harm to the health of the nation and, of course, discredits the entire health care system as a whole.

The UN Human Rights Council, in its resolution, points out that access to medicines is one of the most important conditions for the progressive realisation of the right of everyone to the right of the highest attainable standard of physical and mental health. This principle is intended to protect and ensure that all citizens have equal and non-discriminatory access to essential medicines, as well as their affordability and high quality, as well as the quality of health services.[17] This is important in relation to access to medicines for special categories of the population (persons with disabilities, the elderly, children, people with cancer, citizens in correctional institutions, etc.), as well as in the context of the statement of the United Nations High Commissioner for human rights on, that the problem was not adequately reflected in the

[16] http://mosoblproc.ru/news/prokuratura-potrebovala-ustranit-narusheniya-zakonodatelstva-v-sfere-ohranyi-zdorovya-v-mediko-sanitarnoy-chasti-50-fsin-rossii/.

[17] Access to medicines in the context of the right of everyone to the highest attainable standard of physical and mental health. Human Rights Council. A/HRC/23/L.10/Rev.1. 2013.

relevant national and international plans of action.[18] In order to create effective mechanisms for monitoring and ensuring the safety of public health, strengthening the health system at the national level, a more detailed and comprehensive analysis of the activities of organisations and other participants in the current system of health surveillance is required.

5. CONCLUSION

Summarising the issue of distinction between control and supervision in healthcare in the Russian Federation the author comes to the following conclusions:

1. State supervision in the field of health does not exist in its pure form, i.e. in isolation from control. Depending on the jurisdiction, certain Executive authorities can perform both control and Supervisory functions. In regulatory legal acts, supervision is referred to a control-related activity. Thus, supervision in the sphere of health is a continuous process of inspection of supervised objects in order to ensure the legality of their professional activities.

2. The implementation of oversight activities is consistent with the following principles:

General: democracy; humanism; respect for the rights, freedoms and legitimate interests of the individual; publicity; justice.

Special: objectivity; consistency; authority; timeliness; continuity; comprehensiveness; concreteness; depth; necessity; adequacy.

3. The object of Supervisory activities in the field of health are: state bodies, local governments, legal entities and individuals. The subject of supervision in the field of health care in Russia is primarily the legality in terms of compliance and enforcement of mandatory rules that ensure the functioning and safety of health care. Subjects of supervision in the field of health are specially authorised by Executive bodies, their structural units and officials.

[18] Report of the United Nations High Commissioner for Human Rights. E/2012/51. ECOSOC. 2012. http://www.un.org/ru/documents/ods.asp?m=E/2012/51.

4. The supervision is carried out in the form of verification. When carrying out administrative supervision in the field of health care in respect of supervised objects there is no organisational subordination. Depending on the subject of supervision applicable to the activities of state and municipal bodies, organisations, regardless of the legal forms and forms of ownership, should relate to citizens. As a rule, supervision is narrowly focused and is limited only to checking the activities of legal entities and individuals to comply with certain safety rules in the field of health care.

5. Administrative supervision is carried out only within the framework of procedures established by Federal laws or other regulatory legal acts. For example, the procedure for Supervisory measures in the field of health care is established by the Federal law of, 2008 No. 294-FZ "on protection of the rights of legal entities and individual entrepreneurs in the implementation of state control (supervision) and municipal control" December 26 and adopted in accordance with the regulatory legal acts (usually administrative regulations).When conducting surveillance, it is possible to use means of administrative coercion in cases of security threats to various objects or detection of offenses. It can be as administrative-preventive (personal inspection of citizens at the airport, quarantine) or administrative-preventive measures (administrative detention of the offender, temporary prohibition of activity), and measures of administrative-procedural providing (withdrawal of things and documents, arrest of goods, vehicles and other things) or measures of administrative punishment. Thus, the subjects of administrative supervision are at the same time bodies of administrative jurisdiction.

6. Administrative and Supervisory activities are mainly referred to jurisdictional law enforcement nature than a managerial one. Supervisory powers of the competent authorities and officials are directly connected with administrative enforcement and aimed at a strict and exact execution by state bodies, local authorities, commercial and non-commercial organisations and citizens of mandatory rules, providing the support and security of the citizen, society and state.

Therefore, Supervisory activities include a set of management procedures (for example, planning, organisation of inspections) and,

to a greater extent, administrative and jurisdictional proceedings for the prevention, detection and suppression of offenses, restoration of established law and order and bringing the perpetrators to administrative responsibility.

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ON THE ISSUE OF TAX HARMONISATION PROCESSES WITHIN REGIONAL ECONOMIC INTEGRATION

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Abstract

The tax harmonisation process is presented in the contemporary context of regional economic integration process. The authors suggest that there is a new inevitable economic reason for tax harmonisation within the economic units — namely tax base erosion and profit shifting. The tax harmonisation process in the EU is presented in a systematic way giving reasons and logic of the process. The EEU to certain extent resembles the process. Tax harmonisation within a supranational integration entity covers indirect taxation and only to a certain extent the direct taxation issues. It is consistent with the consequence of introducing the freedoms within the integration process. Another issue of taxation arising within regional economic integration is the allocation of fiscal powers between the member-states at supranational level.

Keywords

Tax, tax harmonisation, regional economic integration, EU, EEU

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CONTENTS

1. INTRODUCTION

The jurisdiction to tax is part of the sovereignty of a State. However, this part of the sovereignty is now affected by the supranational unions and other forms of integrations. The aim of the article is to show certain issues of tax harmonisation as revealed in European Union and in the Eurasian Economic Union.

The methods employed in this research include the method of comparison, analysis and synthesis. The method of comparison is relevant due to the fact that economic integration processes follow certain patterns and share experience in the world of globalisation.

2. TAX INTEGRATION WITHIN THE ECONOMIC UNIONS AND ITS LEGAL HARMONISATION TOOLS

There are a few examples of international regional economic integration in the contemporary world and tax harmonisation is always an inherent part. The contemporary examples include the Andean Community,[3] the South-African Economic Community,[4] and the European Union.[5] The transboundary tax problems with neighbour-states are becoming more important for Russia due to its membership in the Eurasian Economic Union (EAEU). The Eurasian Economic

[3] http://www.comunidadandina.org.

[4] www.sadc.int.

[5] http://europa.eu/.

Union (EAEU) became reality on 1 January 2015 after the 29 May 2014 Agreement on the Eurasian Economic Union was signed.

A regional economic integration usually means that the states set closer economic and political relations due to the common interests, and shared economic problems. In order to stimulate the economic relations the states are trying to create four freedoms: freedom of goods movement, freedom of works and services movement, freedom of labour movement, and freedom of capital movement. Usually, the freedoms appear in the economic integration agenda one after another in the sequence as described. Taxation has an influence on all of the main freedoms and its harmonisation serves and enables the freedoms.

There is a wide academic discussion of the political, geopolitical and economic reasons underlying the European and Eurasian economic integration. It is suggested in certain publications that the Eurasian Economic Union is more politically or geopolitically driven and the economic expectations of the member-states are not met.[6] We would not agree with that. Usually, the will of the member-states politicians is important, but not enough for going through all the controversies and problems of the economic integration process. There should be much in common for the real economic integration: historical, economic or geopolitical factors. There should be some true and objective circumstances driving the economic integration and sometimes making the economic integration inevitable.

Nowadays the tax aspects of the integration trend have their own inevitable and virtual reason pushing the politicians and legislators. These reasons are the tax base erosion and profit shifting.

The phenomena of tax base erosion and profit shifting were quite recently recognised at the global level. The Organization for Economic Co-operation and Development elaborated the document Base Erosion and Profit Shifting Action Plan.[7] This document includes 15 actions, among them such well-known instruments as controlled foreign companies' rules, transfer pricing rules, and multilateral instruments.

[6] A Paralakh, Economic or Geopolitical? Explaining the Motives and Expectations of the Eurasian Economic Union's Member States [March 2018] 11(1) Fudan Journal of the Humanities and Social Sciences 31–48.

[7] http://www.oecd.org/tax/beps/beps-actions.htm.

Multilateral instrument (actions 15 of BEPS Plan) is the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS worked out by OECD which already unites more than 100 jurisdictions. The Convention offers solutions for governments to close the gaps in existing international tax rules. The exact measures to be implemented in bilateral tax treaties between states are based on a Model Tax Convention on Income and on Capital worked out by OECD.

The BEPS Action Plan also proposes the automatic exchange of information between tax jurisdictions. This exchange includes two kinds of information: financial information which is collected by national tax authorities from national financial institutes, and information about the spread of activity of multinational enterprises by tax jurisdictions (country-by-country reporting).

Country-by-country reporting is stipulated by action 13 of the BEPS Plan (transfer pricing). Tax jurisdictions which want to share information with other tax jurisdictions and are ready to implement in the national tax legislation relevant rules may join with the Multilateral Convention on Administrative Assistance in Tax Matters. BEPS Plan also consider possibility of exchange rules stipulating in bilateral tax conventions or in tax information exchange agreements.

Country-by-country reports shall be prepared by multinational enterprises and be provided to national tax authorites in the place of registration of the mother company, or in the place of registration of an enterprise's party who is authorised on the preparation of country-by-country reports.

Country-by-country reporting is included in the package of transfer pricing documentation which is recommended by OECD and includes three parts:

— national documentation (local file) — transfer pricing documentation of each company in a corporate group;

— global documentation (master file) — information about activity of the whole enterprise, main businesses, pricing and policies, etc.;

— country-by-country report — spreadsheets of revenue, profits, accrued and paid profit tax, fixed assets and headcount by tax jurisdictions.

Together, this package of transfer pricing documentation shall provide to all tax jurisdictions fully transparent information about the activity of the whole enterprise — allowing them to analyse links between real activity, earned profit and taxes to trace where the real source of profit is and where taxes shall be actually paid.

Due to the close economic relations between the states within regional economic unions, there are wide range of methods of tax optimisation leading to the erosion of tax base and profit shifting. Differences in tax regimes of different countries opens the opportunities even for non-taxation. Different level of tax burden leads to competition among the states for the tax incomes. General agreements stimulating the trade between the states are entered into regional economic agreements encourages taxpayers to optimize tax payments. Consistent tax harmonisation require transparency of the multinationals' activity[8] and financial statements preventing the profit shifting. In this respect the principles of taxation within an economic union aims to achieve taxation based on place of real activity where income is generated — where the value is created.

In the case of regional economic integration the tax agenda appears at the early stages and develops further. Each stage requires relevant legal instruments and poses specific issues.

The regional economic integration usually go through several stages which are regularly seen in existing economic unions stages.

The first and simplest form of integration is the zone of preferential trade.

The next stage is customs union. The third integration stage is a common economic area (common market). Once the common finance and monetary policy becomes feasible the development of regional economic integration can develop to the stage of economic union and envisage the prospective of a common currency. The economic union is considered to be the base for further political union with unified internal and foreign policy. Further economic integration may lead to foundation of confederation or even federation.

[8] Shashkova A.V. Pro et contra criminalization of corporate liability in the Russian Federation // Kutafin University Law Review. 2017. Vol. 4. No. 2. P. 544–554.

3. THE TAXATION COMPONENT OF THE EUROPEAN INTEGRATION PROCESS

The European Union (EU) includes these steps of integration. The European Community gives us a good example of a tax harmonisation process. The exclusive competence of the European Union, in particular, includes the regulation of the customs union and common trade policy, and the common competence includes the internal market of the Union and the economic cohesion of the Union. These competences allows the European Union to exercise authority in the field of levying customs duties, excise taxes and sales taxes. The European Union in this matter shows that the activity on the harmonisation of taxes on turnover should take place accurately, stage by stage, because the tax system has an influence on the budgets of member states. Powers to regulate turnover taxes, as well as excises and other indirect taxes are granted to the Council of the European Union (only unanimously and after consultation with the European Parliament and the Economic and Social Committee) by section 113 of the Treaty on the Functioning of the European Union, but only as much as necessary for functioning of the common market.

Initially the European Union was based on three communities: The European coal and steel community (ECSC) (the time limit of the founding treaty expired in 2002), the European Economic Community (EEC) and the European Atomic Energy Community (EAEC or Euratom). The communities were incorporated in the European Union and constituted the "first pillar". The other two pillars are: the Common Foreign and Security Policy and Police and Judicial Co-operation in Criminal Matters.

Originally the integration tax legislation was within the European Economic Community. The legal system of contemporary European Union absorbed the integration tax law of EEC. Some of the documents of the EEC are still in force although new documents were adopted on the majority of issues.

The integration tax law of European Union — besides the harmonisation of taxes -was amplified with tax administration issues including the mutual assistance of tax authorities. The sources of

integration law of the EU include: the foundation treaties of the communities and the European Union, regulations, Directives, decisions of the supranational authorities and the rulings of the European Justice Court (ECJ). In fact all the sources are involved to some degree in the integration of tax systems. The integration tax law includes the national tax legislation in a complicated interaction with the supranational documents. From the practical point of view in order to get an idea of VAT taxation of certain supplies first of all one should address the legal system (including legislation, rulings and other sources) of the member-state where the supply takes place (for example, Value Added Tax Act of the UK) and then to the Directives and other sources of EU including the decisions of the ECJ. As we already noted above some of the Directives originally issued within the EEC are in force and still a part of the EU legislation.

As the main goal of the EU is the common market of goods, works, services, labour force and capital, tax integration customs fees and indirect taxes are involved. Direct taxes are involved only in the matter of capital movement freedom, and tax integration in part of the indirect taxes. The lack of tax integration in the sphere of direct taxes compared to indirect can be explained, for at the time of the signing of the Rome Treaty (1957), direct taxes seemed to not be important for the purposes of forming a "common market."

Indirect taxes include turnover taxes, sales taxes, VAT and excises. These taxes were involved in tax integration in EU a long time ago. The unified taxable base, principles etc. were defined very early.

The first documents on the harmonisation of turnover taxation included:

— the Council Directive 67/227/EEC of April 1967 on the harmonisation of legislation of member states concerning turnover taxes (the First Directive),

— the Council Directive 77/388/EEC of May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (Sixth Directive),

— the Council Directive 86/560/EEC of 17 November 1986 on the harmonisation of the laws of the Member States relating to turnover tax

arrangements for the refund of value-added tax to taxable persons not established in Community territory (Thirteenth Directive).

In 2006 a new Directive on VAT was adopted: the Council Directive 2006/112/EC on common system of value added tax. The harmonisation of excises was related to the removal of customs control within the EEC and the EU. Firstly, the integration tax legislation defined the excise goods, taxable base, minimum rates and the calculation methods. Further harmonisation was then structured with reference to particular excise goods categories.

The excises on tobacco, for example, were harmonised with the following documents: the Council Directive 92/79/EEC of 19 October 1992 on the approximation of taxes on cigarettes, Council Directive 92/80/EEC of 19 October 1992 on the approximation of taxes on manufactured tobacco other than cigarettes; and Council Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco.

In respect of taxation of alcohol there were the following documents: Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages, and Council Directive 92/84/EEC of 19 October 1992 on the approximation of the rates of excise duty on alcohol and alcoholic beverages,

The excise taxation of mineral oils was harmonised also in 1992 by the Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils and by the Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duties on mineral oils. In 2003 the Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity was adopted.

In 2008 the harmonisation of excises came into the systematization phase and the new Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC.

The direct taxes are not totally harmonised in the EU in the same way that indirect taxes are. Only selected issues are covered by a limited number of Directives. The main Directives on direct taxation are:

— Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States,

— Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States,

— Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States,

— Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments.

The wording of the Directives' names suggests just how restricted the scope is of this integration legislation. It should be added however that some of the harmonisation problems in the direct taxation are resolved on the basis of the general principle of non-discrimination which arises from the foundation documents of the EU and which are widely applied by the ECJ. But it does not amount to a unified tax base, nor calculation method, nor rates. Attempts to work out projects on the harmonisation of direct taxes were underttaken several times in the years 1975, 1984, 1985, 1988, and 1992, but all of them failed as a result of a lack of consensus between member states and a general unwillingness to concede such a significant part of fiscal sovereignty as taxes on income.

Nowadays there is a fresh initiative on a common consolidated corporate tax base being discussed in the EU. The main points of these discussions are

— A common scope of rules for tax profit calculation;

— tax profit to be calculated based on activity in the European Union in common, not each member state separately;

— tax profit shall be spread by member states based on real activity of company in each member state;

— each member state may set own tax rate by which share of tax profit mentioned above will be obliged.

However, no serious steps are being undertaken at the present time and the main question is if the harmonisation of a tax base is still

feasible. In general the small number of issues already harmonised for direct taxation are closely related to freedoms of capital and labour movement. It might be the case that the full harmonisation of direct taxation is not required for procurement of four fundamental freedoms and therefore will not supported by the member-states.

As we mentioned before the EU developed the new forms of cooperation (second and third pillar) and those included further cooperation of fiscal authorities of the member-states in the field of tax administration.[9] We can mention here the following documents:

— Council Regulation (EU) No. 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax;

— Council Regulation (EC) No. 2073/2004 of 16 November 2004 on administrative cooperation in the field of excise duties and

— Council Directive 2004/106;

— Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation

— Council Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures.

— Arbitration Convention of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (Convention itself and the protocols). This Convention re-entered into force in 2004.

The European Union has its own system of revenues and its own budget. This system is based on Council Directive 70/24 dated 28 April 1970. According to this Directive there are specific sources of the EU's budget, namely mostly the fees received from member states on its funds, which also include tax funds. It is not a brand new approach, for by foundation treaty of The European coal and steel community (ECSC) (1951) the budget of this community was formed partly from sales taxes on coal, steel and their derivatives.

The tax system of the European Union includes agricultural taxes, customs fees on borders of European Union, and a certain share of

[9] AV Shashkova, Russian specifics of combating corruption [2015] 1(3) Kutafin University Law Review 51–68.

VAT which is collected in member states. Also it has the exclusive right of EU to impose tax on income earned by individuals who work in the European Union institutions. Agricultural taxes include the following taxes:

— tax on import and export of agricultural products from/to states who are not members of the EU;

— tax on sugar, paid by companies who are producing sugar in member states;

— tax on isoglucose, paid within the tax on sugar.

Regarding the revenue system of European Union it should be mentioned that the share of VAT paid to the budget of the European Union is collected on the basis of a fixed rate surcharge to the state rate of EU in each member state. The rate of the surcharge is established by Council Direction. VAT is one of the main sources of the EU budget.[10]

The practice of European Justice Court is a factor influencing tax harmonisation. The indirect taxation is closely related with free trade and "common market", therefore it is heavily regulated by supranational legislation acts of the European Union. This is the reason why the ECJ takes cases regarding indirect taxes especially related to interpretation and implementation in national tax legislation.

For direct taxes the situation is different. Competence to levy direct taxes is not provided for in the European Union in the foundation treaties, and member states do not want to surrender their sovereignty in this respect. As the ECJ is not authorised to interpret national tax law and bilateral tax treaties, cases based on tax law are likely to be rejected. Occasional cases which it hears involving direct taxes, consider not tax issues per se, but rather the common principles of European law (freedom for movement, "common market", non-discrimination, freedom of market competence, etc.). The following cases may be mentioned here:

— Case C-279/93 Finanzamt Koln-Altstadt v Roland Schumacker, ECJ, 14 February 1995 about taxation of non-residents;

[10] See G Tolstopyatenko, Evropeyskoye nalogovoye pravo: sravnitelno-pravovoye issledovaniye (The European tax law: comparative legal study) Moscow: Norma, 2001.

— Case C-446/03 Marks & Spencer Pic v David Halsey (HM Inspector of Taxes), ECJ, 13 December 2005 about consideration in tax profit of losses of daughter companies and branches;

— Joined Cases C-436/08 and C-437/08 (Haribo Lakritzen), judgement of 10 February 2011 about dividends taxation;

— C-196/04 Cadbury Schweppes Plc, Cadbury Schweppes Ltd v Commissioners of Inland Revenue, ECR, judgement of 12 September 2006 about legislation on controlled foreign companies

— Case C-324/00 Lankhorst-Hohorst GmbH v Finanzamt Steinfurt, ECJ, judgement of 12 December 2002 about leased financing.

The practice of the ECJ entails not only positive consequences. The main instruments for the protection of national tax jurisdictions such as rules of controlled foreign companies, thin capitalisation and transfer pricing rules are applied restrictedly or very widely by the ECJ. Sometimes member states resist providing tax incentives to resident corporate companies when they may be forced by the ECJ to provide the same incentives to transnational corporate companies.

In the current stage of integration much attention is paid to fair corporate taxation in the European Union. In 2015 the European Commission introduced an Action Plan for the Fair and Efficient Corporate Taxation in the EU,[11] which aims to prevent tax violations and tax evasion through transparency. Council Directive (EU) 2016/1164 of 12 July 2016 is aimed at secure transparent taxation in the EU, setting rules against forms of tax evasion which interfere with the functioning of the "common market".

The logic of the tax harmonisation was developed from the experience of international regional economic integrations and we see the example of the EU. The indirect taxation is the first area to be harmonised as the states are mostly interested in facilitating freedoms of movement of goods and services. The cooperation of fiscal authorities and other tax administration issues are addressed on the first stages in relation to indirect taxation, but the consistent basis for tax administration is considered only once the deep political integration process is in place. The harmonisation of direct taxation

[11] http://europa.eu/rapid/press-release_MEMO-15-5175_en.htm.

is usually an issue of less interest for member-states, postponed for the later stages of integration.

This logic of tax harmonisation is likely to be followed only within the development of international regional economic integration within the Eurasian economic union (which is in force since 1 January 2015).

Still, the Eurasian Economic Union, as example of customs union at the current moment of integration development, does not yet go beyond the scope of customs regulation. EAEU is empowered with its member states with the authority to set customs duty rates when importing goods into the territory of the union. These rates are set in the Common Customs Tariff of the Eurasian Economic Union, which is accepted by the Commission of the Eurasian Economic Union. Tax integration in Eurasian Economic Union is for indirect taxes, but for direct taxes it is very weak and still does not go far enough. As examples of current regulations on some issues of tax integration in EAEU, the following may be mentioned:

— section 72 of the Treaty about Eurasian Economic Union — the principle of a destination country in matter of indirect taxes shall be applied for movement of goods, works and services between member states;

— section 73 of the Treaty about Eurasian Economic Union — sets a rule for direct taxation of individuals of one state who work in another state — to be obliged to pay taxes on income equal to tax residents of this second state.

4. ALLOCATION OF FISCAL POWERS IN ECONOMIC UNIONS

It is inevitable that regional economic integration influences many domestic legal orders in a very complicated and controversial way. Certain constitutional issues are posed by the reality of economic integration.[12] Within the tax harmonisation process the issue of

[12] Roman Petrov and Peter Van Elsuwege, Post-Soviet Constitutions and Challenges of Regional Integration (Routledge 2017) 232.

reallocation of fiscal powers between the national and supranational authorities is very sensitive and problematic.

The following mechanisms to achieve harmonisation in the field of taxation in relation to fiscal powers can be identified in this respect: reservations on the restriction of discretion in the foundation treaties, the transfer (delegation) of powers to supranational institutes, and vesting powers in supranational institutes.

In practice, the direct inclusion of reservations about any limitation of fiscal powers of member-states in foundation treaties is not encountered as the tax system is an inseparable part of sovereignty of state. At the same time, such treaties may contain some general provisions that may serve as principles or guidelines in the exercise of sovereign fiscal powers by member states. For example, section 71 of the Treaty on the Eurasian Economic Union sets that "member states in mutual trade levy taxes, other fees and charges in such a way that taxation in the member state on whose territory the goods of other member states are sold is no less favorable than the taxation applied by this Member State under the same circumstances with respect to similar goods originating from its territory". Further, Article 72 indicates that the "collection of indirect taxes in the mutual trade of goods is based on the principle of the country of destination, providing for the application of a zero rate of value added tax and (or) exemption from excise taxes on the export of goods, as well as their taxation with indirect taxes on import".

The mechanism of the transfer (delegation) of state powers to supranational institutes is suggested by academics and practicioners, and even enshrined in some states at the constitutional level. At the same time, a tax system, as mentioned above, is so inherent to the sovereignty of the state such that it cannot be delegated to supranational institutes, especially considering the constitutional principle of taxation endorsed only by the parliament.

For example, even in the conditions of the functioning of the European Union, and in the presence of a pan-European representative institute (European Parliament), the Constitutional Court of Germany descided that the main source of legitimacy on the sovereign territory

of Germany is the national parliament and the German state according to Constitution may *not* reject any part of its sovereignty.[13]

More often though the union is vested with selected and restricted powers. The union's institutions are authorised to act only within the powers clearly specified in the treaty on the union. There may be exclusive competence of the union and common competence of union and member states.

The international regional tax integration in legal terms is formed by means of substantive law documents. Substantive law documents include unified documents, treaties, recommendations, model laws etc. The regulation of the tax integration usually can be found in the internal legislation of the states,[14] in interstate documents and in the documents of the supranational institutions. The interrelation and hierarchy of these documents is complicated and ambiguous. In the tax law literature the whole system of those regulations is called integration tax law or community tax law.[15]

Integration tax law is quite complicated and some type of unified document encompassing all the taxes is simply not feasible. Such unified documents would not be accepteable nor signable for tax integration due to controversies, differences in the rules about tax base and political reasons. However, there are researchers who look to the draft of a unified tax code of EEU and the expectation by 2016 the EEU could have had a Unified Tax Code.[16] But it did not happen.

5. CONCLUSION

In this article we tried to show the process of tax harmonisation in a consistent and systematic path, using the example of the European Union. The process of tax harmonisation in the Eurasian economic

[13] AI Kovler, Evropeyskaya integatcia: federalistskyi proekt (istoriko-pravovoy ocherk) (European integration: federal project (history and legal essay) (Statut 2016) 154.

[14] Shashkova A.V. Financial & Legal aspects of doing business in Russia. M. 2011.

[15] See G Tolstopyatenko, Evropeyskoye nalogovoye pravo: sravnitelno-pravovoye issledovaniye (The European tax law: comparative legal study) (Moscow: Norma 2001).

[16] K. Boguslavska, The First Steps of the Eurasian Economic Union: Disputes, Initiatives and Results [2015] 170(1) Russian Analytical Digest.

union is still not so advanced, however it moves within the general trend and logic of the European integration. In the XXI century tax harmonisation has its own inevitable economic reason — namely tax erosion and profit shifting. The competition between the neighboring states for the tax revenues and the practices of multinationals push the tax harmonisation and tax integration processes into the regional economic integrations.

The process of tax integration sooner or later poses the question of allocation or reallocation of fiscal powers. The law provides the approaches to this redistribution, however none of them is ideal.

The tax integration as a part of international regional economic integration can achieve a more advanced level. However, harmonisation of taxes will never amount to a supra-national tax system, for example, a tax system of the European Union. Tax is a part of sovereignty which is still vested in a particular state, however the practice keeps on challenging this fundamental truth and it may be possible in an aligned political climate.

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REGIONALISATION AND FEDERALISATION: TRANSFORMING WAYS OF THE SUBNATIONAL GOVERNANCE

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Abstract

The Federalisation, regionalisation and local governance has been an important issue of the jurisprudence and administrative sciences. Although the differences of decentralised and federal systems have remained, several transformations could be observed and in several countries the model of the public administration has changed in the last decades. A convergence or hybridisation of the models can be observed: the competences of the municipal bodies have been strengthened. Although the boundaries between municipalities and member states of the federation have blurred in the governance of these entities, but the legal distinction between them remained solid: the regional municipalities with broad competences do not have statehood.

Keywords

Regionalisation, federalisation, European Union, subnational governance. local government

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CONTENTS

1. INTRODUCTION

The analysis of the legal regulation on the spatial structure and the legal status of the subnational unit can be interpreted as a public law topic. In the literature, the *governance* of the subnational units has been analysed.[2] The majority of the literature on federalism, regionalisation (and regionalism) and local governance follows the political-economical approach. The comparative jurisprudential analyses on the administrative systems focuses on the legal phenomena. Thus the central topic of the jurisprudential approach is based on the examination of the administration of the federal units and the legal status of the autonomous bodies in the administrative systems. In the

[2] J. Loughlin, F. Hendriks, A. Lidström, *Introduction*, [in] *The Oxford Handbook of Local and Regional Democracy in Europe,* red. J. Loughlin, F. Hendriks, A. Lidström, Oxford, 2011, pp. 3–7.

comparative works the issues of *statehood* and *autonomy* are one of the elements of the comparison.[3] The legal approach is an inevitable element of the political analyses and the jurisprudential approach has regards to the actual operation of the systems.

2. METHODS OF THE ANALYSIS AND THEORETICAL BACKGROUND

2.1. Methodological questions

The analysis is based on the jurisprudential method. The constitutional status, the division of the powers between national and subnational unites regulated by the public law, and the tasks of these bodies will be primarily analysed. After World War II and especially from the 1970s the autonomy of the subnational units has been became more significant by the regionalism and the regionalisation. In several countries the regional units have been strengthened and thus the boundaries between regional and federal units are blurred. Therefore the main phenomena in the field of the legal status and the actual operation of the subnational units is the *hybridity*. It is highlighted by John Loughlin that *hybrid* solutions have been evolved by the new models on regionalisation and the centralisation of several federal systems.[4]

Therefore the governance issues should be — at least partly — analysed by jurisprudential method. The jurisprudential approach has a very prominent role in the analysis and in the practice of the questions on federalism and regionalism.

2.2. Theoretical background

The *federalism* and the federalisation has a long tradition in the public law The traditional concept of federalism is connected to

[3] P. M: Huber, *Grundzüge des Verwaltungsrechts in Europa — Problemaufriss und Synthese*, [in] *Handbuch Ius Publicum Europaeum. Band V. Verwaltungsrecht in Europa: Grundzüge*. Heidelberg, red. A. von Bogdandy, S. Cassese, P. M. Huber, Heidelberg, 2014, pp. 24–25.

[4] J. Loughlin, *op. cit.* pp. 14–16.

statehood. The traditional approach of *local governance* is based on the self-governance and autonomy of the *infra-state local and territorial units*. The local governments have autonomy, which is granted by the constitutions or by the legislation, but they are units of the given state.[5]

The interpretation of these concepts has been changed by the transformation of the regional and federal units after the World War II. The greatest challenge of the traditional interpretation was the *regionalisation* and the *regionalism* and changing roles of the federal units. The differences between the Anglo-Saxon and South-American federations, the transformation of the traditional federations (especially Germany, Austria, Switzerland) in Europe and the federal processes resulted several researches in the field of the comparative politics — and partially in the field of the comparative jurisprudence.

The traditional — jurisprudential — classification was based on the relationship between the federal bodies and the bodies of their member states, and it was based on the share of powers and responsibilities between federal and (member) state level. Thus the *centralised* federalism was classified as a type of federalism which was based on the strong competences of the federal level. In the political sciences a similar concept has been evolved, this was the *organic federalism* which was based on the interdependence of the federal and the state and the centralisation of the powers to the federal tier. The "pair" of the organic federalism was the *dual federalism* which was based on the strong competences of the (member) state level and the unequivocal share of the competences.[6] A new element of the federal reforms were the so called *asymmetrical federalism*. The traditional federal states were — primarily — based on the equality of the constituencies of the federations. Although it seems to be a general rule, the asymmetrical federalism has roots in the Middle Age and in the 19th century, as well. There were exceptions to this equality — thus the "symmetry"

[5] See more C. Copus, M. Roberts, R. Wall, *Local Government in England. Centralisation, Autonomy and Control,* London, 2017, pp. 7–10. and G. Melis, A. Meniconi, *Autonomie und Selbstverwaltung als gemeineuropäischen Konzept,* [in] *Handbuch Ius Publicum Europaeum…* pp. 930–933.

[6] W. Swenden, *Federalism and Regionalism in Western Europe,* Basingstoke (UK), New York (NY, USA), 2006, pp. 48–50.

of the federalism. The best example for the asymmetrical federation was Switzerland. The cantons have had different status, several cantons — the so called half-cantons — have had only limited powers. This asymmetrical system remained after the (trans)formation of the Swiss federation in 1847/48.[7] Similarly, the Kingdom of Bavaria, the Kingdom of Württemberg, the Kingdom of Saxony and the Grand Duchy of Baden have certain privileges *(Sonderrechte, Reservatrechte)* within the German Empire *(Deutsches Reich)*.[8] Although the asymmetry of the status of the constituencies had examples, the main model was based on the equality of these units. In the 20th century several federalisation was based on the special status pf the given member states, thus unequal, asymmetrical federations have been evolved.

The *regionalisation* has been transformed in Europe in the last decades. Several countries have been regionalised. The literature focused on those reforms by which regional municipalities with broad competences have been evolved and on those which resulted special units. Firstly, several regional units received new competences. As it will be shown the Italian regions received legislative competences. The legislation belongs to the competences of the state, therefore the Italian regions became an exception. The special rights of several regions were strengthened, thus politically — and partly, legally — *hybrid* models have been evolved which have been between federalism and regionalism.[9]

The concept of "territorial governance" is used as a common interpretation framework of federalism and regionalisation. The traditional boundaries — which have been determined by the legal regulation — have blurred in the last decades, especially after World War II. The *impact of the welfare state on the traditional territorial governance* have been multiple. Firstly, the federalism and the federal reforms have been facilitated by the differences in the field of welfare services. A federal structure could help to evolve different welfare models: thus the economical differences between the territorial units

[7] J. Parker, *Comparative Federalism and Intergovernmental Agreements,* London (UK), New York (NY, USA), 2015, pp. 137–138.

[8] M. Kotulla, *Deutsche Verfassungsgeschichte. Vom Alten Reich bis Weimar (1495–1934),* Berlin, Heidelberg, 2008, p. 516.

[9] J. Loughlin, *op. cit.,* 2013, pp. 14–16.

can be managed.[10] This approach is strongly connected to the *fiscal federalism,* as well.[11] The evolvement of the welfare state has had an opposite effect, as well. In those federations where the welfare issue was very important and the welfare services were guaranteed by the federal constitutions, the federal competences have been widened.[12] The tendencies of the *asymmetrical* territorial reforms have been strengthened, as well. This trend was connected to the *ethnical element* of the federalisation and regionalisation, as well. For example the different legal status of the constituencies of the Russian Federation is based partly on the multinational character of Russia. Traditionally, those Russian constituencies which have a majority of non-Russian population have broader competences than the constituencies ("regions") with Russian majority.[13] The ethnical issue was an important element of the regionalisation procedures, as well. These – ethnically based — regional reforms could be turn into federal reforms: in Belgium the former regional entities became the member states of a federative state after the constitutional reform in 1993.[14]

A new model of the governance has been evolved by these territorial reforms: the multilevel governance which is based on the different competences and the cooperation with the different level units: these units could be member states of the federation and regional and local municipalities, as well.[15] The regional — and partly the federal — reforms were strongly connected to the (regional) development issue. Especially, the European regional reforms have been stimulated by the

[10] R. Simeon, *Federalism and Social Justice: Thinking Through the Tangle,* [in] *Territory, Democracy and Justice. Regionalism and Federalism in Western Democracies,* red. S. L. Greer, Basingstoke (UK), New York (NY, USA), 2006, p. 20.

[11] On fiscal federalism see more: W. E. Oates, *Fiscal Federalism,* New York (NY, USA), 1972.

[12] J. Loughlin, *op. cit.,* 2013, pp. 15–17.

[13] R. Sakwa, *Devolution and Asymmetry in Russia,* [in] *Federalism beyond Federations. Asymmetry and Process in Resymmetrisation in Europe,* red. F. Requejo, K-J. Nagel, Farnham (UK), Burlington (VT, USA), 2011, pp. 155–157.

[14] Balázs I. *Belgium közigazgatása*, [in] *Az Európai Unió tagállamainak közigazgatása,* red. Szamel K., Balázs I., Gajduschek Gy., Koi Gy., Budapest, 2011, p. 276.

[15] J. Loughlin, *op. cit.,* 2013, p. 16.

EU development policies.[16] The regionalisation has been linked to the *decentralisation as a tool of the share of the powers*. *Regionalisation was primarily a top-bottom issue*. This approach was changed in the last decades of the 20th century and the approach of the *regionalism* has evolved, which based on an organic development of the regional units and the regional autonomy.

The territorial governance has been transformed in the last decades. As I have mentioned, the boundaries between the different forms of governance have blurred, hybrid solutions have evolved. In the following I would like to analyse the forms of the regional and federal reforms. I would like to analyse the impact of the hybridisation of the territorial governance on the regulation of the legal (constitutional) status of these territorial units, because this impact could be the key element of a comparative legal analysis.

2.3. Methods of comparison and the main models

Although the hybridisation has been a trend of the territorial reforms, the fundamental legal difference between the federalism and regionalisation remained in the legal regulation. The main element of the comparison is the legal regulation on the constitutional status. This analysis is based on the review of the trends on regionalisation. Therefore the approach of this presentation is based on the comparison of the *organisational questions*. Thus centralised and decentralised and symmetrical and asymmetrical federations will be compared. The regional systems will be shown by the organisational form of the regional entities, thus the special regionalised model, the municipal model, the inter-municipal model and the quasi regionalisation will be compared. Last but not least several "hybrid" models will be analysed: especially the British federal model and Spain's quasi-federalism.

[16] L. Bruszt, S. Palestini, *Regional Development Governance*, [in] *The Oxford Handbook on Comparative Regionalisation,* red. T. A. Börzel, T. Risse, Oxford, 2016, pp. 374–376.

3. THE MAIN MODELS OF THE FEDERATIONS

3.1. Decentralised federations

a) Decentralised, symmetrical federations

The federal models with shared competences between the federal level and the (member) state level is primarily followed in Europe by *Germany*. In the German — decentralised — federal system the states (provinces, *Länder*) have own legislation, executives and justice systems. Unlike the German Empire, the legal status of the provinces are basically equal. These provinces have unicameral (provincial) parliaments *(Landtag)* and a state government which is responsible to the provincial parliament.[17] Germany followed the symmetrical, decentralised federal model of the *United States of America,* which was the pattern for the *dual federations*.

b) Decentralised, asymmetrical federations

Canada could be interpreted as a *decentralised, asymmetrical federation*. The asymmetrical nature of the Canadian federalism is based on the national (ethnical) issue. Province Québec which has a French-speaking majority has special rights and privileges, its competencies are stronger than the powers of the provinces with English-speaking majority. But the Canadian federation has become more centralised in the last decades, because of the welfare state services: the competences of the federal level have been strengthened by the development of the Canadian welfare state.[18]

3.2. Centralised federations

a) Centralised, symmetrical federations

This model is typical in the *smaller* federations, especially in Austria and Belgium. The member states of the Austrian federation,

[17] S. Detterbeck, *Allgemeines Verwaltungsrecht mit Verwaltungsprozessrecht,* München, 2011, p. 58.

[18] I. Peach, *Introduction — On Governing a Dynamic Federation*, *Constructing Tomorrow's Federalism. New Perspectives on Canadian Governance*, red. I. Peach, Winnipeg, 2007, pp. 5–8.

the provinces *(Bundesländer)* are NUTS-2 ("regional") level entities.[19] Therefore the competences of the municipalities is relatively limited, the federal level has strong powers.[20] *Belgium* has a similar system. The unitary Belgium became a regionalised state after the constitutional reform of 1970. The regionalised state developed into a federal state after the reforms of 1993 which was strengthened by the amendment of the Belgian Constitution in 2001.[21]

Although the centralised, symmetrical federation is typical in small federations, a large country could be included this model: *Australia*. However the Northern Territory and the Australian Capital Territory has a special status, Australia could be considered rather a symmetrical than an asymmetrical federation.[22]

b) Centralised asymmetrical federations

In centralised, asymmetrical federation the federal level has broad competences, but the member states have diverse legal status. Typically, the asymmetrical nature of this federation is linked to the multinational nature of the federation. Thus Switzerland and — as I have it mentioned earlier — Russia can be interpreted[23] as such a country.

The legal status of the member states of the federations and the constitutional regulation on them are different. But it is common, that the federative nature of this countries is declared by the federal constitutions. Therefore the statehood of the constituencies is obvious — regardless of the extent of the responsibilities of the member states.

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[19] H. Neuhofer, *Gemeinderecht. Organisation und Aufgaben der Gemeinde in Österreich,* Wien, 1998, pp. 22–23.

[20] L. K. Adamovich, B. C. Funk, G. Holzinger, S. L. Frank, *Österreichisches Staatsrecht. Band 2: Staatliche Organisation,* Wien, 2014., pp. 60–61 and pp. 194–195.

[21] Balázs, *op. cit.,* p. 276.

[22] C. Saunders, *Australia: an 'integrated' federation?*, [in] *Routledge Handbook of Regionalism...* 2013, pp. 390–393.

[23] O. Chernenko, *The Case of "New Moscow": Metropolisation as a Chance for a Local Government System,* [in] *Metropolisation, Regionalisation and Rural Intermunicipal Coopoeration. What Impact on Local, Regional and National Governments in Europe?*, red. L. Malíková, F. Delaneuville, M. Giba, S. Guérard, Lille, 2018, pp. 350–351.

4. DIFFERENT TYPES OF REGIONAL STRUCTURES

The traditional regional model is based on large — typically 3rd tier — municipalities with broad competences. The reasons of the regional reforms were different. One major reason was the reform of the development system. Secondly, several regional reforms were impacted by the multinational issue. Thirdly, the division of the powers between the central and the regional level was a reason for the reforms, as well. Therefore, different regional models can be distinguished.

4.1. Municipal model

The regionalisation tendency was based on the establishment or strengthening of the 3rd tier local governments, the regions. The example of these reforms was the *French regional reform* from the 1960s to present. Although the feudal France was based on the regions, the revolutionary and Napoleonic legislation introduced a centralised state and they were abolished[24] and the new territorial units were the *départements,* the French counties. Although the regions as administrative units were abolished the regional differences remained. Thus the regionalisation became an issue after the World War II. In 1955 22 planning regions *(circonscriptions d'action régionale)* were established, but these regions were part of the top-down planning structure. The next step of the regionalisation was the establishment of the regional prefect *(préfet de region)* in 1964 when the county prefects of the seat of the given regions received regional competences. Thus the territorial agencies of the central government were partly regionalised.[25]

The decentralised model evolved by the reforms of the *Loi Defferre* (1982) when the regional governments as 3rd tier local governments were established. Thus France have a two-tier regional government system: the first, lower tier is the level of the *départements* — which are NUTS-3 units — and the second, higher tier is the level of the regions —

[24] J. Swann, *Parlements and Provincial Estates*, [in] *The Oxford Handbook of the Ancien Régime*, red. W. Doyle, Oxford, 2012, p. 105.

[25] L. Hooghe, G. Marks, A. H. Schakel, S. Niedzwiecki, S. Chapman Osterkatz, S. Shair-Rosenfield, Sara, *Measuring Regional Authority. A Postfunctionalist Theory of Governance, Volume I,* Oxford, 2016, p. 373.

which are NUTS-2 units. These regions have a directly elected council. The majority of the competences of the regional *préfet* were transferred to the president of the regional council.[26] One of the key issues of the French regional reforms was the decentralisation of the planning and development competences.[27] The regional — spatial — structure was significantly reformed in the last years: the former 21 mainland regions were merged into 12 mainland regions (the independent, special region status of Corsica and the five overseas regions were left unchanged). The powers of the regions have been strengthened by this reform.[28] A *decentralised, region-centred model has evolved in France*. This French model was an example for the European regional reforms, especially in those countries which have followed the French model of public administration.

In Germany, *Bavaria* has a special status: the Bavarian system can be interpreted as a *regionalised one,* because the Bavarian districts *(Bezirke)* are regional governments, which are primarily responsible for the regional planning and development.[29]

Although several countries tried to introduce regional reforms in the Eastern Central European countries, the only successful reform was the regionalisation of Poland. The Polish model was based on the French decentralisation pattern, but it was different in some respect. The Polish model is a decentralised one.

Thus the municipal model was based on primarily the development approach, but in the last decades the role of the division of the powers between the national and regional level became more important.

4.2. Regionalised model

This model has evolved firstly in *Italy*. In the 19th century it was a strongly centralised, unitary state which was divided into provinces

[26] N. Dantonel-Cor, *Droit des collectivités territoriales,* Paris, 2007, pp. 35–38.

[27] P. Booth, *Controlling development. Certainty and discretion in Europe, the USA and Hong Kong,* London (UK), New York (NY, USA), 1996, p. 62.

[28] G. Marcou, *Où va le système français d'administration territoriale?,* [in] *Quelle organisation pour les grandes régions en France et en Europe?* red. J-C. Némery, Paris, 2015, pp. 26–30.

[29] T. Weber, V. Köppert, *Kommunalrecht Bayern,* Heidelberg, 2015, p. 27.

(*provincia/province)*. Although the Italian state was centralised the regional differences and inequalities remained. The unitary nature of the Italian state has remained, the Republic of Italy is "one and indivisible" *("una e indivisibile")* but the local and regional government system has been transformed after the World War II. Although the provinces *(province)* have been conserved by the administrative law, the regions *(regione)* were established, which have now very wide autonomy. The speciality of the Italian model is that these regions have legislative powers. In Italy an asymmetrical regional system has evolved, because several regions have special status. *This special status is related to the ethnic diversity* (the German ethnic majority in *Alto-Adige/Südtirol* and the French ethnic majority in *Valle d'Aosta/Vallée d'Aoste)* and the traditional differences in Italy, especially the disparities between Northern and Southern Italy.[30] The significance of the regions have been strengthened after 2014 when the competences of the *province* were weakened by *legge Delrio (legge 7 aprile 2014, n 56)*.[31] Thus Italy is a *regionalised state*, because the regions have more competences than a regional municipality but have less powers than the member states of a federative state.[32]

A similar model has evolved in *Serbia*. The Republic of Serbia is interpreted as a unitary state, but the Northern part of the Republic, the *Autonomous Province of Vojvodina* is a regional entity with broad competences: it has a legislative body and an own government lead by a prime minister. The regional autonomy of Vojvodina was based on the multi-ethnic nature of the province.[33]

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[30] C. Franchini, G. Vesperini, *L'Organizzazione*, [in] *Istituzioni di diritto amministrativo,* red. S. Cassese, Milano, 2012, pp. 108–111.

[31] T. Amorosi, P. Cinque, *Le Province: nuovo Ordinamento ed Organi — Funzioni,* [in] *Guida Normativa 2015,* red. F. Narducci, R. Narducci, Santarcangelo di Romagna, 2015, p. 367.

[32] S. Mangiamelli, *The Regions and the Reforms: Issues Resolved and Problems Pending*, [in] *Italian Regionalism: Between Unitary Traditions and Federal Processes,* red. S. Mangiamelli, Cham, 2014, pp. 3–5.

[33] I. Pálné Kovács, *The development of regional governance in Central and Eastern Europe: trends and perspectives,* [in] *The Routledge Handbook to Regional Development in Central and Eastern Europe,* red. G. Lux, Gy. Horváth, London (UK), New York (NY, USA), 2017, pp. 150–152.

The evolvement of the regionalised model has been strongly impacted by the ethnic diversity of the given countries, but the development issues have been significant elements of the autonomy, as well.

4.3. Inter-municipal model of the regionalisation

In this model the regional units are typically *inter-municipal associations,* which have mainly *development* competences.

One of the most typical examples is the regulation of *Ireland*. The New Public Management paradigm and later the Good Governance paradigm impacted the Irish regional model:[34] the reforms in the 1990s aimed to decentralise the former centralised regional development system. Firstly, the municipalities were obliged to establish Local Development Boards which became the actors of the planning policy. In 2000 the City and County Development Boards were established which are the special committees of the given county and city local government, but they are guided by a member of the central government's Local Development Liaison Team.[35] In the 1990s — taking into account the regionalisation tendencies — two special bodies were established: the two regional assemblies, which are practically the managing authorities of the operative programs based on the European Regional Development Fund and the European Social Fund. These bodies are not considered as an independent regional tier by the Irish administrative law: the members of the assemblies are not elected but delegated by the municipalities and the county and city councils and they do not have general powers — unlike the Irish local governments.[36] Because of these special characteristics, these bodies can be interpreted as special

[34] M. MacCarthaigh, *Public Sector Reform in Ireland. Countering Crisis*. Cham, 2017, pp. 6–7.

[35] M. Adshead, *Policy networks and sub-national government in Ireland*, [in] *Public Administration and Public Policy in Ireland. Theory and Methods,* red. M. Adshead, M. Millar, London (UK), New York (NY, USA), 2003, pp. 119–122.

[36] M. Callanan, *Regional Authorities and Regional Assemblies*, [in] *Local Government in Ireland. Inside Out,* red. M. Callanan, J. F. Keogan, Dublin 2003, pp. 437–438.

inter-municipal associations of the Irish first and second tier local governments.

A similar model has evolved in *Portugal*. The Portugal inter-municipal regionalisation is linked to the development issue as well. Therefore the managing authorities of the regional development are practically inter-municipal associations of the second-tier local governments. Practically, this task was a catalyst of the inter-municipal cooperation in Portugal which has not long tradition in the Southwestern country of the European continent.[37]

4.4. "Quasi-regionalisation": regional units without self-governance and autonomy

In this model the planning is centralised, the major decisions are made by the central government. The *Czech* model is a transition to the inter-municipal one: in 2002 a NUTS-2 level Regional Council was established. The members of the Regional Councils are the delegates of the 14 second tier local government, the NUTS-3 level county governments *(kraje)*. The Regional Councils could be considered as special inter-municipal cooperation and the managing authorities are the bodies of these regional organisations. The hybrid element of the Czech system is the centralised planning procedure and the supervisory competences of the central government.[38]

A similar model has evolved in *Latvia* — which has a one-tier municipal system — where the Regional Development Law of 2002 established special, hybrid bodies in the planning regions.[39]

4.5. Failed regional reforms in Eastern Central Europe

The regionalisation as trend strongly impacted the reform of the post-socialist states. As I have mentioned earlier, in Poland a successful regional reform was executed in the end of the 1990s. Stimulated by

[37] F. Teles, *Local Governance and Inter-municipal Cooperation*, Basingstoke (UK), New York (NY, USA), 2016, pp. 63–64.

[38] S. Kadečka, 2012, pp. 124–127.

[39] M. Tatham, *With, Without or Against the State? How European Regions Play the Brussels Game,* Oxford, 2016, p. 261.

the regional development system of the EU several Eastern Central European countries planned regional reforms. The failure of the majority of these reforms have multiple reasons. The Hungarian reforms failed because the lack of the political consensus and will which was based on the historical traditions. In Hungary the regionalisation has had not real traditions, therefore the top bottom nature of these reform attempt was very strong.[40]

In Romania the failure of the reform has different reasons. Although Romania has strong regional traditions (Romania has three traditional regions: Wallachia, Moldavia and Transylvania) the regional reforms which focused on the development issues failed. The main reason of the failure was based on the principle of the unitary state in Romania. The Constitutional Court of Romania highlighted, that the regionalisation — especially the formation of regions for the autonomy of ethnic minorities — could harm the principle of the unitary state.[41]

5. HYBRID SOLUTIONS: BETWEEN REGIONALISATION AND FEDERALISM

The regional reforms in Europe have different outputs. In several countries the transfer from the central to the regional governments were more significant. In these countries several key competences of the central governments were regionalised, as well. Therefore the competences of the regional units are close to the competences of a member states of the federation. Although these units are very similar to the member states, the classification is not obvious. In several cases the concept of the unitary state prevail in the national constitution, and in other cases the state nature is questionable. Thus this model can be interpreted as a *transitional* one.

[40] I. Pélné Kovács, *op. cit.,* 2014, pp. 100–102.

[41] G. Condurache, *Regionalisation in Romania*, [in] *Local Autonomy in the 21st century. Between Tradition and Modernisation / L'autonomie locale au XXIe siècle. Entre tradition and modernisation,* red. S. Guérard, A. Astrauskas, Lille, 2016, pp. 88–89.

5.1. A "quasi" or "de-facto" federation and the regional development: Spain

The regional development system of *Spain* can be interpreted as this quasi-federative model. After the Fall of the Franco regime, during the Democratic Transition the Spanish Constitution of 1978 introduced a strongly decentralised model. The model of this constitution was based on an asymmetric devolution model. The autonomy of the regional entities — the *comunidad autonoma* — was recognised by the Constitution, but their exact tasks and powers should be defined by the statutes of these autonomies which are organic laws *(ley Orgánica)*. Several *comunidad autonoma* have special status, especially in the field of cultural autonomy and in the field of the official language of the region. Thus Catalonia *(Cataluña / Catalunya)*, the Basque Country *(Pais Vasco / Euskadi)* and Galicia have special rights: their regional language is an official language. Formerly these regions had larger autonomy in the field of taxation, public services, regional planning and development,[42] but the asymmetry of the Spanish regional system has decreased in the last decades. Now the special autonomy of the policing and the regional language as official language has remained as the major element of the special status of these regions. Thus the Spanish regional reforms were interpreted as a top-down federalisation, and the *Estado de las Autonomías* (literally translate: State of the Autonomies) as a federative system.[43] Although the wide competences of the regions the Spanish administrative system could not be interpreted as a federal one. The concept of the unitary state is declared by the Spanish Constitution. Therefore the regions are interpreted as *regional municipalities with wide competences* by the Spanish Constitutional Court — by which the referendum on the independence of Catalonia was declared unconstitutional.[44]

[42] J Rodríguez-Arana, *Derecho Administrativo Español. Tomo I. Introducción al Derecho Administrativo Constitucional,* Olieros, 2008, pp. 207–208.

[43] L. Moreno, *The Federalization of Spain,* London (UK), Portland (OR, USA), 2001, pp. 2–4.

[44] A. Elisenda Casanas, F. Rocher, *(Mis)recognition in Catalunya and Quebec: The Politics of Judicial Containment*, [in] *Consitutionalism and the Politics of Accomodation in Multinational Democracies,* red. J. Lluch, Basingstoke (UK), 2014, pp. 27–28.

Thus the Spanish regions are interpreted legally as municipal entities, but their tasks and powers are similar to the member states of the federations. Therefore Spain has a *quasi-federative model.*

5.2. An asymmetrical quasi federation (?): the United Kingdom

Before the reforms of the 90s the United Kingdom was a relatively centralised state. The 2nd tier local governments, the counties have several regional planning and development competences but these tasks belonged mainly to the powers of the central government. After the EU Accession of United Kingdom regional reforms occurred. These regional reforms were based on deconcentrating the central powers: the regional bodies were practically agencies of the central government. Such regional agencies were the Government Offices for the (English) Regions (GOR) which were organised in England in 1994 and they were primarily responsible for regional planning and development.[45]

The traditional British system has been transformed by the *devolution* process. The devolution is similar to the concept of the *decentralisation*, but it is partly different.[46] Firstly, the devolution had different meanings. In the first phase of the devolution, several competences were transferred to the constituent nations of the United Kingdom. Thus the establishment of the legislative bodies and governments of Scotland, Wales and Northern Ireland was interpreted as the devolution of the United Kingdom. This devolution was an asymmetric one: the powers and duties of these legislative bodies and governments are different. Such regional legislative bodies and governments have not been established in England, the powers and duties of these bodies are fulfilled by the Parliament and the Government of the United Kingdom.

[45] J. Shutt, *Appraising Europe in the Regions 1994–1999: A Case Study of Recent Experiences in Yorkshire and Humberside*,[in] *Regional Development Strategies. A European Perspective,* red. J. Alden, P. Boland, London (UK), Bristol (UK), 1996, p. 92.

[46] See more: A. Cole, *Beyond devolution and decentralisation. Building regional capacity in Wales and Brittany*, Manchester (UK), 2006, pp. 1–3., C. Copus, M. Roberts R. Wall, *op cit.* 2017, pp. 12–13 and Siket J., *A helyi-területi önkormányzatok közigazgatási autonómiája Magyarországon. PhD Dissertation.* Szeged, 2017, pp. 133–135.

The regional planning and development tasks in Scotland, Wales and Northern Ireland are performed by these bodies. The newly organised legislative bodies and governments have very wide powers which are very similar to the member states of the federations. But the United Kingdom was considered as a "quasi-federation" because traditionally the statehood of these units were not recognised.[47] This approach partly changed when Scotland had the opportunity to hold a referendum on the independence. Thus practically the Scottish statehood was recognised by the permissive act of the Parliament of the United Kingdom.[48]

The transfer of powers to the constituent nations of the United Kingdom and thus the "federalisation" of Great Britain is interpreted as a devolution of the British government system. However the (top-bottom) strengthening of the English municipalities (especially the counties and the unitary councils and partly the districts) is a part of the devolution.[49] The different meanings of the devolution the British system can be considered as a *transitive* one. If Scotland, Wales and Northern Ireland are interpreted as regional entities then it is relatively decentralised, because these units have wide development competences. The British jurisprudence is afraid of the "F word", the "Federalisation" in British constitutional law, but if the constituent nations could be considered as member states of a federation than the model of the United Kingdom can be interpreted as a centralised, asymmetrical federal system.

These hybrid systems have evolved on the border of the municipal and federal models. Although the blurring boundaries between self-governance and statehood can be illustrated by these models, but the Spanish regulation shows that the major element of the classification is the constitutional regulation. Although Spain could be interpreted as a quasi-federation, the Spanish regions have broad competences but they are classified by the Constitution as regional municipalities, therefore they do not have statehood. In the United Kingdom, the reforms at

[47] M. Burgess, *Comparative Federalism. Theory and practice,* London (UK), New York (NY, USA), 2006, p. 131.

[48] A. McHarg, *The Constitutional Case of Independence*, [in] *The Scottish Independence Referendum. Constitutional and Political Implications,* red. A. McHarg, T. Mullen, A. Page, N. Walker, Oxford, 2016, pp. 102–104.

[49] C. Copus, M. Roberts R. Wall, *op. cit.* 2017, pp. 12–14.

the end of the 20th century transformed the state significantly: as it is shown by the Scottish referendum, these entities could be interpreted as member states of a federation.

6. CONCLUSION

It can be concluded that the differences of decentralised and federal systems have remained, but several transformations could be observed and in several countries the model of the administration changed in the last decades. A convergence or hybridisation of the models can be observed: the competences of the municipal bodies have been strengthened. Firstly the municipal bodies received new competences, especially in the field of the regional planning. In several countries the former central agencies transformed into inter-municipal bodies. Secondly, in the decentralised countries the coordination competences of the central government have been strengthened. These changes were strongly impacted by the regulation on the EU funds and by the EU cohesion and regional policy. Although the boundaries between municipalities and member states of the federation have blurred in the governance of these entities, but the legal distinction between them remained solid: the regional municipalities with broad competences do not have statehood.

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THE OBLIGATION TO COOPERATE IN EXTRADITION, JUDICIAL ASSISTANCE IN CRIMINAL MATTERS, UNIVERSAL JURISDICTION UNDER UNITED NATIONS CONVENTION AGAINST TORTURE 1984 AND VIETNAM'S IMPLEMENTATION

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Abstract

The article explores the obligations existing under the Vietnamese legal system to cooperate in extradition, and the performance of judicial assistance in criminal matters, and in the exercise of responsibilities of member states under the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT)

Keywords

CAT; torture, extradition; judicial assistance in criminal matters; universal jurisdiction

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1. INTRODUCTION

The 21st century has witnessed many changes, advances and developments in all areas of social life; among them, the basic human rights of the individual is one of the major topics needed to create a society that meets and respects people's needs. It is a basic goal of all progressive and civilised states. However, torture and other cruel, inhuman or degrading treatment and punishment continue to be used in some countries, especially in countries under military dictatorship.[2] Victims of torture are subjected to severe pain (both physical and mental) for the purpose of taking testimonies, confessions, information or threats and discrimination.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, (abbreviated as CAT), was negotiated and ratified by Member States of the United Nations on December 10th 1984 with the aim of establishing an international legal basis to determine the seriousness of the torture, cruel, inhuman or degrading treatment and punish individuals who commit such these acts. CAT officially came into force on June 26th 1987 when the 20th state ratified it.[3] The basic and most important goal of CAT is the removal of cruel, inhuman treatment and punishment from social life, especially by organs of judicial authority as part of criminal proceedings. As of July 10th 2017, 181 countries around the world have ratified this Convention, making it one of the most significant International Conventions.

In Vietnam, respecting and protecting human rights, (and indeed putting people at the centre of all national policies) has become an important objective that the Vietnamese government always pursues. Becoming a member state of international treaties on human rights and diligently implementing them is a key national priority for Vietnam,

[2] According to Prof. Manfred Nowark in the International Conference named Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment" held by the Ministry of Foreign Affairs of Vietnam with the support of the United Nations Development Program (UNDP) on June 6th 2014 in Hanoi. At present, more than 10 % of countries around the world still use torture, especially countries with military dictatorship.

[3] According to Article 27.1 of CAT, this Convention entered into force on the thirtieth day after the date of the deposit with the Secretary General of the United Nations of the twentieth instrument of ratification or accession.

together with ensuring compliance with international human rights standards.[4]

These has led to Vietnam's ratification and accession to nearly all of the important international human rights treaties of United Nations from the latter half of the 20th century to date. This includes the Convention on the Prevention and Punishment of the Crime of Genocide 1948,[5] the International Convention on the Elimination of All Forms of Racial Discrimination 1965,[6] the International Covenant on Civil and Political Rights 1966,[7] the International Covenant on Economic, Social and Cultural Rights 1966,[8] the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity 1968,[9] the International Convention on the Suppression and Punishment of the Crime of Apartheid 1973,[10] the Convention on the Elimination of all Forms of Discrimination against Women 1979,[11] the Convention on the Rights of the Child 1989,[12] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography 2000,[13] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000,[14] to name but a few.

[4] For the first time in the constitutional history, the Constitution of the Socialist Republic of Vietnam 2013 has solemnly recognised that Vietnam conforms to the Charter of the United Nations and international treaties in which the Socialist Republic of Vietnam is a member. It is provided in Article 12 of the Constitution. Moreover, it is the first time that international treaties on human rights are considered as important treaties which must be ratified by the National Assembly. It is provided in Article 70.14 of the Constitution.

[5] Vietnam accessed to this Convention on June 9th 1981.

[6] Vietnam accessed to this Convention on June 9th 1981.

[7] Vietnam accessed to this Convention on September 24th 1982.

[8] Vietnam accessed to this Convention on September 24th 1982.

[9] Vietnam accessed to this Convention on June 4th 1983.

[10] Vietnam accessed to this Convention on June 9th 1981.

[11] Vietnam accessed to this Convention on March 19th 1982.

[12] Vietnam accessed to this Convention on February 20th 1990.

[13] Vietnam accessed to this Convention on September 6th 2001 and reserved Article 5.1, 5.2, 5.3, 5.4 related to extradition.

[14] Vietnam accessed to this Convention on September 6th 2001.

CAT was signed by the Head of the Vietnamese Delegation of the Permanent Representative to the United Nations on November 7th 2013. On November 28th 2014, the National Assembly of Vietnam ratified CAT by the Resolution No. 83/2014/QH13. Vietnam then submitted the ratification instrument to the United Nations General Secretary on February 5th, 2015. The ratification of CAT is clear evidence of the harmonisation and integration of the Vietnam legal system with international law in general and international criminal law in particular.

In order to implement the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, Vietnam needed to include its regulations into domestic law. This included a criminal justice system to improve the legal basis towards an elimination of torture, cruel punishment, inhuman or degrading treatment and protecting individuals from other persons' infringement of life, health as well as human dignity according to CAT regulations. Moreover, Vietnam also has responsible for cooperation in extradition, judicial assistance in criminal matters and implementing universal jurisdiction over the crimes enumerated in CAT. Therefore, this article will clarify the obligations now embedded in Vietnamese national law following this ratification

2. INTERNATIONAL COOPERATION OBLIGATIONS REFERRED TO IN CAT

2.1. Obligation to extradite

In terms of legal science, extradition is cooperation in the form of judicial assistance between states in the field of prevention and combatting of crime further to international and national law. Accordingly, the requested state shall arrest and hand over persons who have committed criminal acts and who have not been subjected to penal liability — or been criminally sentenced by the national court and their sentences have already taken legal effect to the requesting state so that the requesting country conducts the penal liability enforcement against such persons.[15] The international legal bases for cooperation

[15] See further at: Huu Phuoc Ngo (2014), "Extradition in international law and Vietnam legal system", Monograph, National University Publishing House, p. 13.

in extradition between states are multilateral international treaties on the prevention and combating of crime signed in the framework of international organisations such as the United Nations. Others forums include the European Union, the Association of South East Asian Nations and bilateral and multilateral international treaties on judicial assistance containing regulations on obligations to extradite or specific extradition agreements.[16] All states with a duty of cooperation in extradition are obliged to adhere to the fundamental principles of international law and the specific principles of this field including the principle of double criminality,[17] the principle of non-extradition of

[16] In terms of international law, countries can cooperate to extradite offenders based on bilateral and multilateral treaties. The bilateral treaties could be treaties on extradition, legal assistance as well as treaties on prevention and combatting of crime containing regulations on obligations to cooperate in extradition between member states. The multilateral international treaties could be conventions on extradition such as the European Convention on Extradition 1957, Arab League Extradition Agreements 1952 and 1983, Inter-American Convention on Extradition 1981,... or multilateral international treaties on prevention and combatting of crime or multilateral international treaties on legal assistance containing regulations on obligation to cooperate in extradition such as Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity 1968, Convention on offences and certain other acts committed on board aircraft signed at Tokyo on September 14th 1963, Convention for the Suppression of Unlawful Seizure of Aircraft 1970, International Convention against the Taking of Hostages 1979, Convention on Psychotropic Substances 1971, Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, United Nations Convention against Transnational Organized Crime 2000 known as Palermo Convention, United Nations Convention against Corruption 2003,... or 11 treaties on extradition signed between Vietnam and other countries namely the Republic of Korea (2003), Algeria (2010), India (2011), Australia (2012), Cambodia (2013), Indonesia (2013), Hungary (2013), South Africa (2013), Spain (2014), Sri Lanka (2014), China (2015) and France (2016).

[17] According to this principle, cooperation in extradition will happen between states if the requested persons had an act considered as a crime under the criminal laws of both countries. The principle of double criminality is formed in the practice of cooperation in extradition and it is likewise an indispensable principle in domestic law on judicial assistance in criminal matters and extradition as well as international treaties on extradition signed between countries or within the framework of international organizations such as the European Convention on Extradition 1957 (Article 2.1) and other treaties on extradition between France and Uruguay in 2000 (Article 2.1), India in 2003 (Article 2.2), Republic of Korea in 2006 (Article 2), Canada in 1988 (Article 2.2), etc. Moreover, this principle is also an indispensable principle recognized in agreements on legal assistance signed between Vietnam and other countries namely Democratic People's Republic of Korea in 2002 (Article 33.2), Poland

nationals,[18] the principle of non-extradition for political offences[19] and

in 1993 (Article 52.2), the Lao People's Democratic Republic in 1998 (Article 60), the Russia Federation in 1998 (Article 62.2), Ukraine in 2000 (Article 50.2), Mongolia in 2000 (Article 54.2) as well as agreements on extradition signed between Vietnam and other states such as Republic of Korea in 2003 (Article 2.1), Algeria in 2010 (Article 2) and India in 2011 (Article 2)...

[18] According to this principle, the requested states shall refuse extradition if the requested persons are citizens of the requested countries. The principle of non-extradition of nationals provided in the Constitution (Article 17.2) and the Law on Legal assistance (Article 35.1.a) is a constitutional principles under the Vietnamese legal system. However, as specified by the laws of some European countries, the extradition could be granted if it is stipulated in international treaties or national laws in case the requesting states shall give legal guarantees for the requested persons such as commitments to non-discrimination, fair trial for the extradited persons, no death penalty and no execution the death penalty for them. For example, Article 26 of the Constitution of the Italian Republic states that extradition of a citizen is only permitted in the cases expressly provided for in international conventions, likewise it is provided in Article 16.2 of the Constitution of Germany that no German may be extradited to a foreign country and the law can provide otherwise for extraditions to a member state of the European Union or to an international court of justice as long as the rule of law is upheld. Besides, the extradition is also mentioned in constitutions of other countries such as the Constitution of the Republic of Lithuania (Article 13. It shall be prohibited to extradite a citizen of the Republic of Lithuania to another state unless an international treaty of the Republic of Lithuania established otherwise), the Constitution of the Republic of Slovenia (Article 47. No citizen of Slovenia may be extradited or surrendered unless such obligation to extradite or surrender arises from a treaty...), Spanish Constitution (Article 13.3. Extradition shall be granted only in compliance with a treaty or with the law, on a reciprocal basis...), the Constitution of the Kingdom of the Netherlands (Article 2.3. Extradition may take place only pursuant to a treaty) and the Constitution of the Portuguese Republic (Article 33.3. The extradition of Portuguese citizens from Portuguese territory shall only be permissible where an international agreement has established reciprocal extradition arrangements, or in cases of terrorism or international organized crime, and on condition that the applicant state' legal system enshrines guarantees of a just and fair trial. In order not to let criminals slip through net, the principle of Aut dedere aut judicare is mentioned in most of international treaties on extradition as well as United Nations treaties on the prevention and combating of crime. It has also recognized by the International Law Commission as the principle of universal jurisdiction in the field of criminal law.

See further at: http://www.europarl.europa.eu/comparl/libe/elsj/charter/art19/default_fr.htm; and Hugo Grotius, De Iure Belli ac Pacis, livre II, chap. XXI, par. III et IV. Traduction française: Le droit de la guerre et de la paix, par Hugo Grotius, nouvelle traduction par Jean Barbeyrac, Amsterdam, Pierre de Coup, 1724, vol. I, p. 639 à 660; http:// untreaty.un.org/ilc/ documentation/french/a_cn4_599.pdf.

[19] This principle has been prescribed by the law of the Kingdom of Belgium since 1830 and also was first recognized in the treaty between France and Switzerland on

other humanitarian principles.[20]

In order to create an international legal basis for cooperation in extradition between states, CAT stipulated three issues as follows:

Firstly, requesting and requiring member states to consider that torture is an offence and this offence is an extraditable offence.

Specially, according to Article 4 of CAT, states shall ensure that all acts of torture, including acts that were conducted by individuals or their accomplices, are to be offences under its criminal law. Moreover, member states shall consider torture as an extraditable offence under any international treaties on extradition between member states. Further, CAT, requires member states to add such offences into the

Extradition signed on December 30th 1832. It followed by other treaties on extradition such as treaties between Belgium and Spain on June 17th 1870, France on August 15th 1874 and Denmark on March 25th 1876. This principle has been also recognised by the the Hague Academy of International Law as a principle of international law on extradition since 1880. Accordingly, if the act in which the requested person for extradition has performed is regarded as a political offence under the criminal law of the requested country, those acts are considered as acts harming the existence of political regime of a country.

See further at: http://www.ledroitcriminel.free.fr/la_science_criminelle/les_sciences_juridiques/introduction/vitu_meurtre_politique. html.

[20] According to this principle, the requested country will refuse extradition if it has a serious impact on the life, health, honour and dignity of the requested person. Accordingly, if they are minors or the elderly or persons who are not healthy enough to carry the extradition due to illness, the requested countries will refuse the extradition in cases the extradition will be dangerous to that person' s life. It is provided in the Model Treaty on Extradition 1990 (Article 4); the Framework Decision on European arrest warrant and the surrender procedures between member states 2002 (Article 3.3); the Treaty on Extradition between the United States of America and Canada 1971 (Article 5); Law on extradition in China 2000 (Article 9.2), etc. Moreover, the requested state will refuse extradition if the requested person has been sentenced or could be sentenced to death penalty. This provision is mentioned in international treaties on extradition such as the European Convention on Extradition 1957 (Article 11), the Framework Decision on European arrest warrant and the surrender procedures between member states 2002 (Preamble); the Treaty on Extradition between Belgium and the United States of America 1987 (Article 6),); the Treaty on Extradition between the United States of America and Canada 1971 (Article 6), the Treaty on Extradition between Canada and Italia 1981 (Article 3), the Treaty on Extradition between France and Canada 1988 (Article 3), the Treaty on Extradition between France and India 2003 (Article 8), etc.

list of offences which can be extraditable in international extradition treaties signed between them.[21] According to this provision, if the requesting state and requested state already have an international legal basis for extradition, torture offences specified in Article 4 of CAT shall be regarded as extraditable offences. Conversely, if there is no international legal basis for extradition, when states negotiate and sign international treaties on extradition in the future, states shall add torture crimes defined in CAT into the list of extraditable offences in these international treaties.

Secondly, recommending that member states consider that CAT is an international legal basis for cooperation in extradition.

According to CAT, if a member state (whose domestic law stipulates that extradition will be conducted on the existence of international treaties on extradition) receives a request for extradition from another member state with which it has no extradition treaty, it may consider this convention as the legal basis for cooperation in extradition for torture offences. In the event that member states do not refer to international treaties on extradition, those states shall recognise torture crimes as extraditable offences. The law and regulations of the requested state, in this case, will be applied to all conditions, orders, procedures and competences for the provisions of extradition.[22] As mentioned above, the international legal bases for extradition are the bilateral and multilateral international treaties containing regulations on extradition. However, CAT has been very effective in building recommended regulations for other member states. Accordingly, CAT recommends that "it may consider this Convention as the legal basis for extradition in respect of such offences" to create favourable conditions for states to strictly punish for torture offences.

[21] Article 8.1 of CAT.
[22] Article 8.2 of CAT

Thirdly, requesting member states to refuse extradition if the requested person is at risk of torture in the requesting state.

Not only does CAT mention the obligation to cooperate in extradition to punish those who have committed torture, it also states that member states undertake not to extradite those at risk of torture in the requesting state. According to this Convention, no state party shall expel, return (refouler) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.[23] In the view of the author, this provision is intended to protect the human rights in general and the right of the requested person in particular. Even if the requested person is an individual who has committed an offence, they shall be protected in case the requested state where there are substantial grounds for believing that they would be in danger of being subjected to torture. It is a humanitarian provision to contribute to the prevention of torture which is recognised in the Universal Declaration of Human Rights 1948. Under this Declaration it states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[24] Further, the International Covenant on Civil and Political Rights 1966 continued to recognise and expand this provision which states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected with his free consent to medical or scientific experimentation"[25] and "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".[26]

The issue here is the determination of the grounds upon which the requested states think that the requested persons are at risk of torture in the requesting states. In order to clarify this issue, according to Article 3.2 of CAT, "for the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in

[23] Article 3.1 of CAT.

[24] Article 5 of the Universal Declaration of Human Rights 1948.

[25] Article 7 of the International Covenant on Civil and Political Rights 1966.

[26] Article 10 the International Covenant on Civil and Political Rights 1966.

the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights". Thus, it could be understood that the requested state will refuse to extradite anyone to countries that have human rights violations in a regularly occurring and systematic way — as well as to those which have been listed by the international community as a country with systematic human rights violations. The publication of the list of countries that have human rights violations is carried out by the Committees that monitor the compliance and implementation of international human rights treaties[27] and the Human Rights Council[28] based on the results of the examination and evaluation of human rights guaranty and enforcement in countries around the world.

2.2. Obligation to perform judicial assistance[29]

The principle of sovereign equality of states prevents a state from carrying out procedures such as gathering information, evidences, documents and verifying evidences and documents related to the cases; searching and arresting the persons who committed offences, and expelling witnesses who are present in other countries for the purpose of settling criminal cases in its country. Thus, in order to exercise criminal jurisdiction generally and criminal procedures particularly for criminal cases involving foreign elements, states must seek the

[27] For example: the Committee on the Elimination of Racial Discrimination was established on the basis of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) 1965; the Committee on Economic, Social and Cultural Rights was established on the basic of the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, United Nations Commission on Human Rights was established on the basic of the International Covenant on the International Covenant on Civil and Political Rights (ICCPR) 1966, the Committee on the Elimination of All Forms of Discrimination against Women was established on the basis of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979; the Committee against torture was established on the basis of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (CAT), etc.

[28] The United Nations Human Rights Council is a new body established in accordance with the Resolution No. 60/252 dated April 3th 2006 of the United Nations General Assembly in order to replaced United Nations Commission on Human Rights.

[29] See further at: Huu Phuoc Ngo (2015), Judicial Assistance in criminal matters in international law and Vietnam's law, Hong Duc Publishing House.

assistance from other countries through specific acts and proceedings conducted by competent judicial authorities. All support and assistance from the requested states through activities of competent judicial authorities is referred to as judicial assistance in criminal matters.[30] It will create favourable conditions for the competent judicial authorities to effectively carry out the proceedings to sue, investigate, prosecute and bring individuals who committed criminal offences to the trial.

In terms of legal science, judicial assistance in criminal matters is international cooperation between countries on the basis of treaties, with the principle of reciprocity as well as national law. Accordingly, the states assist the competent judicial authorities of the requested states in investigation, prosecution and procedures for going to trial of criminal cases in the most efficient and quickest way. In terms of scope, criminal legal assistance is a cooperation including specific activities in the investigation, prosecution and going on the trial, in which, the competent judicial authorities of the country may require the judicial authorities of other countries to transmit papers, dossiers and documents; summon witnesses and experts; collect and supply evidence, and share information. In special cases, if the request for assistance in investigation, prosecution and going on the trial is denied, the competent authorities of the requesting country may ask the judicial authorities of the requested country about the examination of penal liability of persons who have committed offences if he or she is present in the territory of the requested state.

A study of the provisions of CAT on judicial assistance in criminal matters shows that Article 9 of CAT requires member states to mutually support each other as much as possible in the implementation of criminal procedures including providing necessary evidence for the requested states so that they could conduct the proceedings to adjudicate individuals who committed the crimes of torture. Moreover, members of CAT shall fulfill obligations to cooperate in judicial assistance in criminal matters in accordance with an international treaty on judicial assistance, (if any), between states. In fact, cooperation in judicial assistance in criminal matters could be signed by states through international treaties on judicial assistance that have a wide scope, including judicial assistance

[30] This term is known in French as Entraide Judiciaire en Matierre Penale.

in criminal matters, civil matters, extradition and transfer of persons serving imprisonment sentences[31] or separate agreements on judicial assistance in criminal matters.[32]

2.3. Obligation to exercise the universal jurisdiction

In order not to let criminals slip through the net of law enforcement, the principle of "*Aut dedere aut judicare*",[33] (meaning the obligation to extradite or prosecute), is mentioned in international treaties for the prevention and combating of crime, international treaties on judicial assistance in criminal matters and other international treaties on extradition. For example, Article 16.10 of the United Nations Convention against transnational organized crime in 2000 states that for "a state party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, it shall at the request of the state party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution".

Alternatively, "if extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested state party, the requested party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting party, consider the enforcement of the

[31] For example, 13 large-scale judicial assistance agreements were signed between Vietnam and other countries namely the German Democratic Republic in 1980 (expired), the Union of Soviet Socialist Republics in 1981 (the Russian Federation inherited), Czechoslovakia in 1982 (is currently inherited by Czech Republic and Slovakia), the Republic of Cuba in 1984, Hungary in 1985, Bulgaria in 1986, Poland in 1993, Laos in 1998, the Russian Federation in 1998, Ukraine in 2000, Mongolia in 2000, Belarus in 2000 and the Democratic People's Republic of Korea in 2002.

[32] For example, 5 judicial assistance agreements in criminal matters were signed between Vietnam and other countries namely the Republic of Korea (2003), Algeria (2010), India (2007), United Kingdom of Great Britain and Northern Ireland (2009) and Indonesia (2013 and not yet effective).

[33] This is a Latin phrase recorded in the Roman law. See further at: Hugo Grotius, De Iure Belli ac Pacis, livre II, chap. XXI, par. III et IV. Traduction française: Le droit de la guerre et de la paix, par Hugo Grotius, nouvelle traduction par Jean Barbeyrac, Amsterdam, Pierre de Coup, 1724, vol. I, p. 639 à 660.

sentence that has been imposed under the domestic law of the requesting party or the remainder thereof" (Article 16.12). Moreover, the European Convention on the Suppression of Terrorism on January 27th 1977 also contains a similar provision, whereby, a contracting state in whose territory a person suspected to have committed an offence and which has received a request for extradition, shall, if it does not extradite that person, submit the case, without exception whatsoever and without undue delay, to its competent authorities for the purpose of prosecution (Article 7).

This principle has also been mentioned in the extradition agreements between Vietnam and other countries such as the Republic of Korea (2003), Algeria (2010), India (2011), Australia (2012), Cambodia (2013), Indonesia (2013), Hungary (2013), South Africa (2013), Spain (2014), Sri Lanka (2014), China (2015) and France (2016). Accordingly, if the extradition is refused on the basis of the nationality of the extradited person, as claimed by the requesting state, the requested state shall bring the case to the competent authorities for purpose of prosecution. The principle of Aut dedere aut judicare has also been recognised by the International Law Commission as the principle of universal jurisdiction in the field of criminal law.[34] Putting this principle into practice is one of the measures contributing to the field of prevention and combatting of crime more thoroughly and effectively.

A study of the provisions of CAT shows that the obligation to exercise the universal jurisdiction is mentioned in Article 5, 6 and 7 of CAT. Specifically, according to Article 5 of CAT, member states shall take necessary measures to establish its jurisdiction over the offences of torture in the following cases:

(i) when the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that state;

(ii) when the alleged offender is a national of that state;

(iii) when the victim is a national of that state if that state considers it appropriate (clause 1).

Besides, member states shall similarly take such necessary measures to establish its jurisdiction over such offences in cases where the alleged

[34] See further at: http://untreaty.un.org/ilc/documentation/french/a_cn4_599.pdf.

offender is present in any territory under its jurisdiction and it does not extradite him pursuant to Article 8 of CAT to any of the states mentioned above (clause 2). It should be noted that the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment does not exclude any criminal jurisdiction exercised in accordance with internal law (clause 3). That means CAT only adds the legal basis and principle to determine jurisdiction over individuals who committed the offences of torture and not exclude criminal jurisdiction mentioned in legal system of member states.

Article 6 of CAT, refers to specific provisions so that member states can exercise their jurisdiction over persons who committed the offences of torture. Accordingly, when the circumstances so warrant, any member state in whose territory a person is present who is alleged to have committed an extraditable offence, the competent judicial authorities shall take him into custody or take other legal measures to ensure his presence in order to create the most favourable conditions for their extradition.

However, with the purpose of avoiding an arbitrary decision relating to the handling of suspects, CAT stipulates that the custody and other legal measures shall be as provided in the law of that state but may be continued *only* for such time as is necessary to enable any criminal or extradition proceedings to be instituted (clause 1). Such state shall immediately make a preliminary inquiry into the facts (clause 2) and must promptly report its findings to the said states and indicate whether it intends to exercise jurisdiction (clause 4).

Finally, Article 7 of CAT provides that the state party, where a person alleged to have committed any offence referred to in article 4 is found in their territory, shall submit the case to its competent authorities for the purpose of prosecution. In the cases contemplated under article 5, if the state does not extradite him (clause 1), these authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of the state (clause 2). Moreover, for safeguarding the rights of the suspect, CAT also stipulates that any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

3. VIETNAM'S GUARANTEE IN THE IMPLEMENTATION OF CAT GENERALLY AND COOPERATION IN EXTRADITION, JUDICIAL ASSISTANCE IN CRIMINAL MATTERS, THE EXERCISE OF CAT'S UNIVERSAL JURISDICTION PARTICULARLY

The most fundamental and important aspect of Vietnam's implementation of CAT is the protection of, compliance and respect for human rights which have been recognised and specified in the legal system including in the field of criminal justice law. For the first time in Vietnam's constitutional history, human rights in general (and human rights in the field of criminal justice in particular) have been recognized in the Constitution of Vietnam adopted on November 20th 2013.

Accordingly, Article 20.1 and Article 20.2 of this Constitution stipulate that "everyone shall enjoy the inviolability of the individual and legal protection of his or her life, health, honour and dignity and is protected against torture, violence, coercion, corporal punishment or any form of treatment harming his or her body and health and offence against honour and dignity"; and "no one shall be arrested in the absence of a decision by the People's Court, a decision or sanction of the People's Procuracy except in cases of flagrant offences. Taking a person into, or holding him in custody shall be decreed by statute".

This is followed by Article 31 which states that "a defendant shall be regarded as innocent until the crime is proved in accordance with legal procedure and the sentence of the Court has acquired full legal effect" (clause 1). "Any person who has been arrested, held in custody, prosecuted, investigated, charged or brought to trial in violation of the law has the right to self-defence or to seek the assistance of defence from lawyers or other people" (clause 4). "Any person who has been arrested, held in custody, prosecuted, investigated, charged or brought to trial in violation of the law shall be entitled to compensation for material and psychological damage and restoration of honour. Anybody who contravenes the law in arresting, holding in custody, prosecuting, investigating, charging, bringing to trial or enforcing judgement that causes damages to others shall be dealt with in accordance to the law" (clause 5). The Constitution is the most important legal basis for

Vietnam for defining the legal system generally — and criminal justice law particularly, including the provisions related to anti-torture to implement CAT in the most effective way.

In addition to the Constitution, Vietnam has amended and supplemented other laws and rules to synchronously implement CAT such as the Law on legal assistance in 2007, the Law on Enforcement of Criminal Judgements in 2010, the Criminal Code in 2015, the Criminal Procedure Code 2015, the Law on Enforcement of Custody and Temporary Detention 2015 as well as decrees guiding the implementation of these particularly important laws.

Regarding extradition, the Law on Legal Assistance 2007[35] and the Criminal Procedure Code 2015[36] are the current legal bases upon which Vietnam cooperates with other countries in extradition. In these, refusal of extradition exists for its citizens to foreign countries where there is high risk of torture — as it is considered a consistent principle of Vietnam. This principle has been recognised in the Constitution 2013,[37] Law on legal assistance 2007[38] and the Criminal Procedure Code 2015[39] It is also expressed consistently in foreign policy as well as in cooperation in the field of prevention and combatting of crime between Vietnam and other countries.[40]

However, for the purposes of international cooperation in this field, the method of dealing with cases in which Vietnam refuses extradition if the requested persons are Vietnamese has been specified in the Criminal Procedure Code 2015. Accordingly, Vietnamese competent authorities shall investigate, prosecute, bring to trial and enforce judgement those

[35] Extradition is provided in Chapter 4 from Article 32 to Article 48.

[36] Extradition is mentioned in Chapter XXXVI from Article 498 to Article 506.

[37] Article 17.2 of the Constitution stated that "A Vietnamese citizen shall not be expelled or extradited to other nations".

[38] Article 35.1.a of the Law on legal assistance stipulated that "1. Competent proceedings-conducting bodies of Vietnam may refuse extradition if the extradition requests fall into one of the following cases: a/ The persons requested for extradition are Vietnamese citizens."

[39] Accordingly, refusal of extradition if the requested persons are Vietnamese and how to handle the refusal are specified from Article 498 to Article 501.

[40] This principle is defined in treaties on extradition between Vietnam and 11 other countries which are listed in footnote 16.

persons in accordance with Vietnam legal system.[41] Moreover, the principle of the refusal of extradition of its citizens to foreign countries has become international practice as enshrined in international treaties on extradition and is recognized in national laws such as Germany, Spain, Portugal, Slovenia, Italy,[42] (and others) aiming to protect citizens.

Considering judicial assistance in criminal matters and exercising universal jurisdiction, both the current Criminal Code and Criminal Procedure Code have completely transformed the spirit of the Constitution 2013 as well as the internalised provisions of CAT. Accordingly, the Criminal Procedure Code amended the offence named "use of torture" in Article 373.

Comparing this Article with Article 298 of the Criminal Procedure Code in 1999, it can be seen that this provision has internalised CAT on the basis of Resolution No. 83/2014/QH13 on the ratification of the United Nations Convention against torture to effectively implement this Convention. Article 1 of CAT states that torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The Code also amended some offences such as illegal arrest, detention or imprisonment of a person, use of torture, obtainment of testimony by duress towards aggravation of punishment to meet the requirements of CAT. Specifically, the Code added the circumstance named "torture, cruel, inhuman and degrading treatment or punishment or destruction of victim's dignity" to a list of circumstances as the basis for determination of a sentence category so as to aggravate criminal liability for persons who committed an illegal arrest, detention or

[41] See further at Article 499, 500, 501 of the Criminal Procedure Code 2015.

[42] However, some countries has stipulated that there are some cases in which countries may extradite its citizens to foreign countries under tight conditions. Review footnote 18.

imprisonment of a person. Article 157.3.b of the Code provides a penalty of five to to twelve years' imprisonment. Additionally, the Code added the act named "use of torture or cruel treatment, insult in any shape or form" to an offence called use of torture (Article 373). It also provides that if the offence results in the suicide of the tortured person, the individual committed in this case shall be liable to a penalty of seven to 12 years' imprisonment (clause 3). In the case of the death of a tortured person, the offender shall face a penalty of between 12 to 20 years' imprisonment or life imprisonment (clause 4).

Further, the Code also added circumstances for the basis for determination of a sentence category for the offence of obtaining of testimony by duress (Article 374). If any person uses torture, maltreats or insults the interrogated person, he or she shall carry a penalty of two to seven years' imprisonment (clause 2). Likewise, if any individual commits any of the these resulting in the suicide of the interrogated person, the wrongful conviction of an innocent person, the omission of a very serious crime or extremely serious crime, he or she shall be liable to a penalty of 12 to 20 years' imprisonment or life imprisonment (clause 4).

In order to cement the Constitution 2013 and internalise the Convention against torture, the Criminal Procedure Code 2015 recognised and stipulated the following specific issues for the protection of, compliance and respect for human rights in judicial procedure, namely:

(i) Respect for and protection of human rights, individuals' legitimate rights and interests (Article 8). Accordingly, competent procedural authorities and persons, when instituting legal proceedings within their duties and authority, must respect and protect human rights and individuals' legitimate rights and interests. Measures imposed, whose validity and requisite are regularly inspected, shall be removed or altered if violating laws or deemed unessential.

(ii) Guarantee of bodily integrity (Article 10). Accordingly, every person is entitled to inviolability of the physical body. No person may be arrested without a Court's warrant or Procurator's decision or approval, except for acts "in flagrante". Emergency

custody, arrest, temporary detainment or detention must conform to this Law. Torture, extortion of deposition, corporal punishment or any treatments violating a person's body, life and health are prohibited.

(iii) Protection of an individuals' life, health, honour, dignity and belongings and juridical persons' reputation and property (Article 11). Accordingly, life, health, honour, dignity and belongings of every person are protected by the laws. The laws penalise all unlawful violations of a person's life, health, honour, dignity and belongings and a juridical person's fame, reputation and property.[43]

(iv) Presumption of innocence (Article 13). Accordingly, an accused person is deemed innocent until his guilt is proved according to the procedures and formalities as defined — and a Court passes a valid conviction. If grounds for conviction, as per the procedures and formalities in this Law, do not suffice, the competent procedural authorities and persons shall adjudge the accused person to be not guilty.

(v) Guarantee of the right of defence for accused persons and protection of legal rights and benefits of defendants and litigants (Article 16). Accordingly, an accused person is entitled to defend himself or be defended by a lawyer or another person. Competent procedural authorities and persons are responsible for informing all accused persons, defendants and litigants of all their rights of defence, legitimate rights and benefits according to this Law.

(vi) Regulations relating to persons held in emergency custody and arrestees, temporary detainees, suspects and defendants. These regulations are specified at Article 58.1.d, Article 59.2.c, Article 60.2.d and Article 61.2.h of this Code. Accordingly, persons

[43] Besides, Law on Enforcement of Custody and Temporary Detention in 2015 recognises the principle of management and implementation of custody and temporary detention namely to guarantee humanity; not to torture and use coercion or corporal punishment against or any other forms of treatment that infringe upon lawful rights and interests of, persons held in custody or temporary detention (Article 4.3). Likewise, Article 9.1.i also stipulated that persons held in custody or temporary detention to be compensated for damage in accordance with the Law on State Compensation Liability if being held in detention or custody in contravention of law.

held in emergency custody, arrested following "wanted notices" and temporary detainees, suspects, defendants are entitled to "give statements and opinions, and have no obligation to testify against themselves or admit to guilt". These provisions relating to the right to silence have been praised by law experts and researchers as well as people for its contribution to the fight against extortion of deposition, torture, towards protection of human rights. Moreover, these provisions are consistent with progressive procedural law of many countries in the world and Article 14.3.g of the International Covenant on Civil and Political Rights 1966 accessed by Vietnam on September 24th, 1982.

(vii) Suspect interrogation (Article 183). Article 183.6 states that interrogation of a suspect at a detention facility or the office of investigation authorities or units assigned to investigate, shall be recorded by sound or audio-visual means. Interrogation of suspects at various places shall be recorded by sound or audio-visual means at the requests for the suspect or competent procedural authorities and persons. Thus, all interrogation shall be transparent and protect suspects against torture, extortion, corporal punishment and protect their human rights.[44]

However, for compliance to the provisions of CAT, future direction for Vietnam, is adding a legal basis in order to refuse extradition in cases where the competent judicial authorities of Vietnam have grounds to confirm that the extradited persons, persons in cases of judicial assistance in criminal matters or individual subjected to exercise universal jurisdiction are at risk of torture in the requesting state. This added ground wo uld be listed in Article 35.1 to internalise Article 3 of CAT in the Law on Legal assistance 2007.

[44] Clause 1, Article 2 of the National Assembly's Resolution No. 110/2015/QH13 dated November 27th 2015 on the implementation of the Criminal Procedure Code stated that "to assign the Government to allocate funds to ensure the implementation of the provisions on appointment of defence counsels, audio-recording or audio-visual recording of interrogations of the accused" and "To assign the Minister of Public Security to decide on specific locations with sufficient conditions for audio-recording or audio-visual recording of interrogations of the accused from July 1, 2016. By January 1, 2019 at the latest, the audio-recording or audio-visual recording of interrogations of the accused shall be uniformly conducted nationwide."

Furthermore, Vietnam is also looking to improve detention conditions in detention facilities and centres as well as living and studying conditions in reformatory schools, detoxification and learning facilities. If these facilities are in a bad condition, it will be considered as constituting an act of cruel, inhuman or degrading treatment or even an act of torture. Thus for example, prison officers encouraging or allowing violence to occur between prisoners, temporary detainees, persons held in custody are reprehensible activities could flourish in such circumstances.. On the other hand, competent authorities of Vietnam should also enhance measures to give an education and training to concerned individuals and organisations, especially procedural persons, about the ban on torture and the protection of human rights of persons deprived of their liberty. In the author's opinion, this is one of the most effective methods to prevent torture.

In fact, few countries allow the practice of torture but these acts are still committed by law enforcement officers who lack knowledge or have poor sense of law enforcement. Consequently, these education and training programmes will contribute significantly to the reduction in torture by individuals in the law enforcement bodies. Therefore, it is believed that Vietnam should mention anti-torture and human rights of persons deprived of their liberty in the curriculum of universities, research institutes and training facilities on law and law enforcement officers at all levels. It would be the longest and most sustainable solution to limit and eliminate all acts of torture in practice. Moreover, it is necessary that judicial bodies and procedural authorities develop and implement compulsory training programs, short-term training courses on CAT as well as provisions in the legal system of Vietnam on anti-torture for prison officers, police investigators, security staffs, civil and medical staffs working in detention facilities, educational facilities and concentrated detoxification facilities. These represent the places and circumstances of highest risk of torture. In addition, it is necessary to amend the codes of conduct for those who are mentioned above in which have stressed the prohibition of torture and the protection of and respect for human rights of persons deprived of liberty. Vietnam should improve the mechanism for inspecting and supervising the observance of law by proceedings-conducting bodies and officials, especially in

investigation and detention processes. Accordingly, the monitoring role of the Judiciary Committee and the National Assembly deputies should be promoted and mass media agencies are allowed to routinely monitor the activities of judicial authorities including detention facilities to ensure implementation of CAT in the most comprehensive and effective way.[45]

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STRIKES IN ESSENTIAL SERVICES — THE RUSSIAN FEDERATION

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Abstract

Historically, the right to strike in the essential services was extremely limited, with examples of state based repressive activity. Modern Russian society has a stronger societal — State consensus though this is under pressure from economic factors including reductions in living standards. Most expressions of dissatisfaction take place outside the legal framework. The current regulation of strikes is not balanced and this paper outlines the current situation within its historical context.

Keywords

Essential services, Strikes, Labour relations, Public Sector, Unions

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1. GENERAL BACKGROUND — COUNTRY PROFILE

1.1. Federal/state/province

The Russian Federation is a federal state. Under Art. 72 of the Constitution of the Russian Federation,[2] labour legislation is a joint sphere of competence of the Federation and the RF constituent entities (subjects of federation). Joint competence means that the RF constituent entities have the power to legislate in the field of law exclusively with regard to the issues that have not been regulated at the federal level. The matters of collective labour law are based on the Constitution, the Labour Code of the Russian Federation, the Federal Law "On Trade Unions, their Rights and the Guarantees of their Activities", and other

[2] Konstitutsiya Rossiiskoi Federatsii [the Constitution of the Russian Federation], *Sobraniye Zakonodatelstva Rossiyskoy Federazii [SZ RF] [Russian Federation Collection of Legislation]*. January 26, 2009, No. 4, Item 445.

federal legislation (see para. 1.4). Therefore, although formally labour law, including freedom of association, collective bargaining and strikes, is within the joint competence of the federation and its constituent entities, the whole regulation is established at the federal level.

1.2. Economic, political and historical background

Despite the collapse of the USSR more than a quarter of a century ago, the modern Russian system of collective labour law is heavily influenced by its Soviet past. Employees and trade unions in the Soviet Russia enjoyed labour rights except for the one which is considered to be a cornerstone in the market economies, namely, the right to strike.

According to the official Soviet labour law doctrine, workers in the socialist country did not need the right to strike unlike their colleagues in capitalist countries. This statement was based on the argument that the socialist state formally belonged to the proletariat, i.e. workers, all entities (employers) were state-owned. To this end, the entities were declared belonging to the workers themselves, which made any conflict of interests pointless.[3]

Socialist trade unions were quasi-governmental structures and, therefore, could not act in conformity with market-economy principles of freedom of association. Trade unions were not acting in the same way as real collective bargaining agents of the capitalist state and therefore were strongly criticized by the market economy countries and the ILO.[4]

This, however, doesn't mean that socialist trade unions were useless. They played *a different role*. Instead of being a representative of workers, which is traditional to the Western unions, socialist trade unions were rather an amalgam of an intermediate between the state and the employees, and a kind of social ministry — some explanation of this role will be given further in this section.

Formally, there was collective bargaining in the socialist countries.[5] But as long as the right to bargain collectively was not accompanied with a right to strike, actually, it was an imitation of collective bargaining.

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[3] For more details of this doctrine see: *Aleksandrov*, 1948, 129–163.

[4] See: *Hepple*, 2005, 33, *Gerasimova*, 2014, 259.

[5] In the USSR collective agreements existed at the plant level only.

An idealistic part of the socialist labour law doctrine was that there was no inherent "antagonist" conflict of interests between an employer and an employee, which is essential for privately-owned business in market economies. Despite the now popular "win-win" concepts concerning the market-economy collective bargaining, the main idea of the negotiation remains the same for the centuries: *bargaining*, i.e. the more the employee gets, the less will be left as the employer's profit. A socialist enterprise (employer) was not only remote from its formal "owners" — the people, but in the same manner it wasn't controlled by anyone whose direct interest was to get the immediate profit from its economic activity. Being a part of a socialist economic machine, any entity's goal was twofold: a) to fulfill the economic plan that was assigned to it by the governmental institution, and b) to solve the social tasks — provide employment to the population of the region, to finance the social infrastructure, etc.

The managers of socialist entities were not motivated to economise the entity resources spending less on the employees. On the contrary, they were interested in lowering the production plan to make their own life easier. In monetary terms workers were getting much lower wages than the employees in the richest capitalist countries, but this was in some way compensated by many goods and services in-kind: free or cheap housing, free medicine, free education of all levels, cheap transport services, cheap prices on basic foods etc. From social point of view, this system was in some way more humane than the capitalist one.[6]

In addition to be a "transmission gear" of the communist party to the "masses" (i.e. workers) in Lenin's terms,[7] trade unions were significant social institutions. First major function of trade unions was to control the social security, healthcare, leisure and tourism institutions — social security funds, funds, hospitals, sanatoriums, stadiums, etc. A huge property of this kind was assigned to trade unions by the socialist state. For instance, in the Soviet Union a People's Commissariat (Ministry) on Labour was liquidated in 1933, and all its functions and property

[6] This corresponds more to the late period of socialism when there was no severe totalitarian rule and no economical-military mobilization.

[7] *Lenin*, 1967, 349.

were assigned to the USSR Council of Trade Unions (VCSPS).[8] The members of trade unions could, for instance, travel on "trade union trip ticket" to the annual vacation at a very affordable price. The principles of distribution of these trade union benefits were connected to the employee benefits in professional activities. Thus, trade unions in this field were a type of employer's disciplinary body — a role unthinkable for the market economy system of industrial relations.

The other function of trade unions was negotiation with the employers on collective agreements at the plant level. The word "bargaining" wouldn't be appropriate here — "consultation" describes the situation better. The object of the bargaining was not the wage (as it was established at the centralized level by the state) but certain limited additional benefits. As there was no right to strike, there were no collective labour disputes or disputes of interest envisaged by the law. A totally different role of trade unions can be well illustrated by the fact that for a certain period they formed a pre-court instance for resolution of (individual) labour disputes, i.e. grievances. This means that "workers' representative" was at the same time an arbiter between a worker and employer. In fact, the trade unions were mainly representing the employer's needs, but they were also supposed to be "close to workers". A good example of this situation may be found in the latest Soviet labour law history: the first collective labour dispute in mining sector in Kuzbass region of the USSR was settled by signing an agreement between the miners' *strike committee on the one side*, and the Joint Commission of the local Communist Party authority, the employer and the representative of the *Soviet Trade Union Committee on the other side*.[9]

The transition of former socialist trade unions into democratic organisations and the formation of new trade unions have been a difficult challenge in Russia. The soviet trade unions being former supporters of the socialist regime, the legitimacy and reliability of "old" trade unions as real representatives of workers have been questioned for a long time. New trade unions founded after the transition face similar difficulties

[8] Sovetskoye trudovoye pravo, 1972, 185.

[9] Protocol on agreed measures between the Regional Strike Committee and ZK KPSS Commission, Council of Ministers of the USSR and VCSPS of 19 July 1989 (Quoted by *Lopatin*, 1995, P. 66).

as their counterparts in other market economy countries, namely: the small number of members and, consequently, the problem of democratic representativity fading away. In modern Russia the most active and ready to perform the strike actions are the "new" trade unions, mainly in the manufacturing companies with foreign investments.

1.3. Legal framework (constitution, common v. civil law)

Russia is a civil law country with the legal system which is firmly rooted in the Soviet legal heritage. Long isolation of Russia by the Iron Curtain during the Soviet period made the Russian legal system so specific that some academics say that it is distinct from both common and civil law systems.[10]

The basic law that regulates employment matters is the Labour Code of the Russian Federation[11] (the Labour Code). It includes chapters on an employment relationship and employment contract (including their respective definitions), collective labour law, the norms on wages, working time, labour discipline, mutual liability of the parties of the employment contract, occupational safety and health, resolution of individual and collective labour disputes, norms covering specific categories of employees, etc.

The legal status of trade unions is regulated by the special Federal Law "On Trade Unions, their Rights and the Guarantees of their Activities" adopted in 1996.[12] This law provides for the list of rights of trade unions and the supporting mechanisms of their implementation. The status of employers' associations is regulated by the Federal Law "On employers' associations" adopted in 2002.[13] The mechanisms of

[10] See: *David/Goré/Jauffret-Spinosi*, 2016, 127–220. See also on the matter: *Przhilenskiy/Zakharova*, 2016, 6–25; *Sinyukov*, 1994, 3 et seq.

[11] Trudovoy Kodeks Rossiyskoy Federatsii [The Labour Code of the Russian Federation] adopted by Federal Law of 30 December 2001 No. 197-FZ. *Sobraniye Zakonodatelstva Rossiyskoy Federazii* [SZ RF] [Russian Federation Collection of Legislation] Jan. 7, 2002, No. 1 (part 1), Item 3.

[12] Federalnyi Zakon [Federal Law] Jan. 12, 1996 No. 10-FZ, *Sobraniye Zakonodatelstva Rossiyskoy Federazii* [SZ RF] [Russian Federation Collection of Legislation] Jan. 15, 1996, No. 3, Item 148.

[13] Federalnyi Zakon [Federal Law] Nov. 27, 2002, No. 156-FZ, *Sobraniye Zakonodatelstva Rossiyskoy Federazii* [SZ RF] [Russian Federation Collection of

collective bargaining, resolution of collective labour disputes and performance of strikes are established by the Labour Code.

It is important that theoretically, there must be no "judge made law" in the Russian legal system: formally, the courts only have the power to interpret the existing law and are not authorised to make a new law if they face a gap in regulation. However, the practice of interpretation is such that courts often have to interpret the law in quite an expansive manner in order to fill in the gap. The Supreme Court of the Russian Federation (the Supreme Court), which is the highest court instance,[14] issues statements with explanations to the lower courts on how they should apply and interpret law in different situations. Such statements do not have the formal legal power, but they usually are taken by lower courts as a firm instruction. There are no special labour courts in Russia, but there is a specialisation of certain judges in specific types of cases (including labour disputes). The higher courts have the special labour dispute chambers.

The courts generally try to avoid making statements that may be considered as creating a new legal rule. Therefore, they usually tend to ground their decisions on some written legal rules as much as possible. From the point of view of determining the legality of strikes, this means that courts usually give more trust to formalities than to proportionality of action or some factual circumstances of the case.

1.4. The status and role of collective labour relations

Collective bargaining in Russia is performed at a number of levels as established by Art. 26 of the Labour Code:

— The federal level — the all-Russian level (the General Agreement between the Government of the Russian Federation and the unions of

Legislation] Dec. 2, 2002, No. 48, Item 4741.

[14] Before 2014 there was a separate system of commercial jurisdiction headed by the Higher Arbitration Court of the Russian Federation. In 2014 the system of arbitration courts was subordinated to the Supreme Court of the Russian Federation and the Higher Arbitration Court was dismissed. There is also the Constitutional Court of the Russian Federation which is not subordinated to the Supreme Court. However, the Constitutional Court does not resolve the disputes as such but gives the conclusions on the constitutionality of legal acts and practice.

the most representative trade union confederations and the employers' associations);

— The interregional level — the level of two or more constituent entities of the Russian Federation (Interregional Agreements between respective representatives);

— The regional level — the level of constituent entities of the Russian Federation (Regional Agreements);

— The sectoral level — the level of a certain sector of economy (Sectoral Agreements);

— The territorial level — the level of municipality (Territorial Agreements);

— The local level — the level of the employer or a structural division of the employer (Collective accords between the employees and employer).

As it is stated in Art. 26 of the Labour Code, at each respective level above the plant level "the foundations for the regulation of relations in the field of labour" are established. For those levels that are above the plant level, the Labour Code uses a special term *soglasheniye* (agreement) as opposed to *kollekitvnyi dogovor* (collective accord) which is signed at the plant level. The phrase about "foundations for the regulation" gives a good understanding about the usual contents of the higher-level agreements. They contain quite a few obligations of employers towards the employees. The wages almost never become a subject of regulation in the collective accords at the higher level. In many cases the obligations of employers are limited to empty phrases such as "employers are recommended to undertake…", "employers take measures aimed at…", etc.[15] In rare cases sectoral agreements contain provisions concerning the amount of wages, but they establish just minimum, which is slightly above the statutory federal minimum wage. Taking into account that the statutory minimum wage is currently 11163 rubles per month (about 158.5 euro), this level usually does not reflect the actual situation in payment of wages.

[15] See, for example: Sectoral agreement on the companies that are within the competence of Ministry of Education and Science of the Russian Federation for 2015–2017; Sectoral agreement for the mass media companies for 2015–2017; Sectoral tariff agreement on electric energy for 2013–2015 extended to 2018; Sectoral agreement on atomic energy companies for 2015–2017 et al. // ConsultantPlus Database.

Collective accords at the plant level in many cases just repeat the norms that have already been enshrined in the legislation. Only in the minority of cases they add something substantial to the statutory rights of employees.[16]

Therefore, although bargaining coverage in Russia seems to be quite high,[17] it would not be an exaggeration to state that collective bargaining at higher levels of negotiation acquires quite a modest added value in establishing the labour rights of workers.

1.4.1. Unions and the rate of unionization — private v. public sector (longitudinal)

In the Soviet time, trade union membership was not universal, but it was steadily increasing during the whole socialist period until trade unions united almost all workers in the late decades of the USSR existence.[18]

As it was said in para. 1.2 above, the trade union movement in Russia is divided significantly between the so-called "old" and "new" trade unions. This distinction is more important than division into private and public-sector unions. In Russia, the predecessor of the earlier union having monopoly is recently still the dominating union — the *Federation of Independent Trade Unions of Russia (Federatsiya nezavisimykh profsoyuzov Rossii, FNPR)*. According to the FNPR statement, it unites more than 95 % of total union members in Russia.[19] The FNPR is frequently criticised for being more interested in having close relations with the state authorities rather than in defending the interests of the employees. After the change of the regime, some new

[16] See: *Pryazhennikov*, 2018, 215–230.

[17] Information on collective bargaining coverage is not considered in Russia. According to our calculations based on the information of the FNPR Executive Committee for 2011, 2012, 2013, 2014, 2015 and 2016 and Analytical information on development of social partnership in regions of Russia in 2011 and 2112 prepared for Rostrud and Mintrud, only coverage of FNPR organizations by collective agreements, which they negotiate, is accessible: around 91–92 per cent.

[18] For the USSR see the dynamics of VCSPS membership in Bolshaya Sovetskaya Encyclopedia [Great Soviet Encyclopedia]. Moscow, 1977 (available at: http://bse.sci-lib.com/article093699.html).

[19] The Federation of Independent Trade Unions of Russia (FNPR) official site: http://fnpr.ru/n/252/4890.html.

trade union federations were formed (the main "alternative" trade union federation is the Russian Labour Confederation (*Konfederatsiya Truda Rossii, KTR*).[20] But they are incomparably smaller and are much weaker at political level.

The level of trade union membership in the post-Soviet Russia is about 29 per cent of the total number of employees, but there is no reliable statistics on the issue.[21] While talking about the level of trade union membership, one must take into account that many unions can hardly be considered independent. There is a strict division between the dominant majority „old" trade unions and the "new" or "independent" trade unions in this respect. The former often act not as real collective bargaining agents but rather are affiliated to company management and in many cases are not in fact independent. Due to the system of collective bargaining that is established by the Russian Labour Code, they can effectively block the attempts of minority unions to perform real collective bargaining and organize the strikes. Therefore, the real number of active trade unionists that may seriously consider taking part in strikes, is much lower than the mentioned level of 29 per cent.

There are no statistics concerning the division of membership in private v. public sector unions. However, most state-owned companies have plant unions that have been established in these companies in the Soviet times and are currently affiliated to the FNPR. These unions have many members (often the majority of workers) on the inertial basis — just because workers don't bother themselves with withdrawing from the union.

In private companies, the trade union membership is significantly lower except for the companies which were previously state owned and "inherited" the plant-level unions from the Soviet past.

[20] The Confederation of Labour of Russia (KTR) official site: http://www.ktr.su/.

[21] There is no official statistics on trade union density. Our estimation is that union membership in Russia is about 29 per cent of total workforce, if the official statements of biggest trade-union associations is anything to go by. Officially the economically active population of Russia is 76,1 mln. people for the beginning of 2017 (http://www.gks.ru/bgd/free/b04_03/isswww.exe/stg/d01/36.htm), with around 20 mln. members in the biggest TU Federation (FNPR) according to their latest official information of 2015 (http://www.fnpr.ru/n/252/4890.html), and around 2 mln. members in KTR.

1.4.2. Employers' associations and rate of organization — private v. public sector (longitudinal)

During the socialist period, the Soviet Union always had problems with representation of employers within the ILO structures. In the Soviet planned economy, all significant employers were belonging to the state and were directly controlled by the government. The Russian translations of ILO Conventions and Recommendations of that time called employers *predrinimateli* (lit. — entrepreneurs). Taking into account that the Penal Code of that time contained a crime of "private entrepreneurship or commercial intermediary activity",[22] it is quite clear that there could be no real tripartite social dialogue in the USSR an that time.

Therefore, it is appropriate to talk about the employers' associations in the context of strikes only during the period after the collapse of the Soviet Union in 1991.

The most well-known employers' association in Russia is *Rossiyskiy soyuz promyshlennikov i predprinimateley* (Russian Union of Industrialists and Entrepreneurs, the RSPP)[23] which was founded in 1991 during the process of transition to the market economy. The main goal of the RSPP is to represent employers in *Rossiskaya tryokhstoronnyaa komissiya po regulirovaniyu sotsial'no-trudovykh otnosheniy (*the Russian Tripartite Commission on the Regulation of Social and Labour Relations, the *RTK*),[24] established for the consultation concerning the adoption of labour and social security legislation, other issues of social policy and bargaining concerning conclusion of the General Agreement between the Government and all-Russian federations of trade unions and employers' associations (i.e. the highest level collective agreement). There is no information concerning the dynamics of membership in the RSPP since the moment of its foundation. However, as it is clear from its data about member structures, it unites the majority of sector-

[22] Ugolovno-ispolnitelnyi Kodeks Rossiiskoi Federatsii [The Penal Code of the Russian Federation] Art. 153, *Vedomosti Verkhovnogo Soveta RSFSR [Bulletin of the RSFSR Supreme Council]*, 1960. No. 40, item 591.

[23] See the RSPP official site: http://eng.rspp.ru/.

[24] See the information about the RTK at: http://government.ru/department/141/about/.

level employers' associations and the biggest employers as separate members.[25] Another well-known employers' association is "*Opora Rossii*" (The Pillar of Russia) which unites employers of small and medium-size businesses. Although its main activity is concentrated in lobbying the interests of SMEs in relations with the state, they are also represented in the RTK.

Taking into account that strikes (irrespective of whether they are performed in essential services or not) in practice never happen at the levels above the single employer (see 1.4.3 further), employers' associations don't play a significant role in the situations of specific strikes. Their role regarding strikes seems to be limited to the conservation of current regulatory norms that make implementation of the right to strike close to impossible (see 1.4.3 and 3.1 further).

1.4.3. Data regarding strikes (longitudinal) — full v. partial strikes and private v. public sector

There are no statistics regarding full v. partial strikes or strikes in public v. private sector. However, the official statistics for the recent years show that even the overall strike level is so low that it may be concluded that strikes almost never happen (table 1):[26]

Table 1

Year	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Number of companies affected by strikes	817	291	80	67	5 933	2 575	8	7	4	1	0	2	6	3	2	5

[25] See: http://рспп.рф/about/members.

[26] See: Federalnaya Slujba Gosudarstvennoy Statistiki (Rosstat Rossii) [Federal Service on State Statics (Rosstat of Russia)], Rossiysky Statisticheskiy Ejegodnik [Russian Statistical Annual], 2011. Moscow, 2011. http://www.gks.ru/bgd/regl/b11_13/IssWWW.exe/Stg/d1/05-26.htm; Federalnaya Slujba Gosudarstvennoy Statistiki (Rosstat Rossii) [Federal Service on State Statics (Rosstat of Russia)], Rossiysky Statisticheskiy Ejegodnik [Russian Statistical Annual], 2016. Moscow, 2016. P. 127: http://www.gks.ru/free_doc/doc_2016/year/year16.pdf.

Even a short glance at these data is sufficient to understand that official statistics do not represent any real picture. No dramatic events in 2004 and 2005 could be found to explain the rise of the strike record to four-digit numbers and then its immediate decrease to one-digits. The only explanation of this strange picture can be found in the method of calculation. Since 2006 official statistics includes only legal strikes.

For the country with over 140 million population, the strike statistics for the last ten years may only mean that only in the very exceptional cases the conflicts between workers and employers are settled within a framework of law. Only 10.2 thousand hours are officially reported to be lost due to strikes in 2015.[27] However, it represents a big growth as compared to respective numbers of 0.4, 2.4, 0.2 and 5 thousand that were lost during the period from 2011 to 2014.[28] Although the number of strikes remains symbolic, in 2014 and 2015 they were declared at much bigger enterprises with more than 2 thousand employees on average.

Most conflict situations are resolved outside formal rules. The Russian Non-governmental Organisation "Centre for Social and Labour Rights" has been performing a monitoring of all actions of employees that have led to total or partial stoppage of enterprise activity (strikes, work stoppages provoked by non-payment of wages, hunger-strikes, take-overs of employer's facilities and any other actions either legal or illegal) since 2008.[29] The information was gathered through the Internet, mass media and internal communications with trade unions, non-governmental organizations and other available sources. The data are as follows (table 2):

Table 2

Year	2008	2009	2010	2011	2012	2013	2014	2015	2016
Number of work stoppages	60	106	88	91	95	102	97	168	158

[27] Federalnaya Slujba Gosudarstvennoy Statistiki (Rosstat Rossii) [Federal Service on State Statics (Rosstat of Russia)] Rossiysky Statisticheskiy Ejegodnik [Russian Statistical Annual], 2016.

[28] Ibid.

[29] See: *Bizyukov*, 2017. Available at http://trudprava.ru/expert/analytics/protestanalyt/1807.

The first thing that comes clearly from the data is that illegal protests that fall outside the official statistics happen many times more frequently than the legitimate strikes. It is also obvious that contrary to the official data, the strike level has risen since the beginning of economic problems in Russia in 2008. Such a gap between official statistics and the real situation can be explained by the in-fact restrictive procedure of strikes announcement and performance established by the Russian Labour Code (see further). Gaps in legislation are associated not only with strict procedural rules but also with discriminative procedures of collective bargaining relating to the minority trade unions, weak and further weakening trade unionists' protection measures, and quite restrictive court attitude towards the legality of strikes.

During the last year sociologists note an increase in a number of stop-actions in the public sector (medicine, education, communal services). The share of state sector in stop actions in 2016 reached 24 per cent, which is the largest share in the last years.[30] Also, the year 2016 was notable by the first occurrence of protest actions among the state civil servants since 1990-ies.[31]

2. GENERAL BACKGROUND — COLLECTIVE LABOUR RELATIONS RIGHTS: THE RIGHT TO ORGANISE, THE RIGHT TO BARGAIN COLLECTIVELY AND THE RIGHT TO STRIKE

Art. 37, Para. 4 of the Constitution of the Russian Federation[32] provides for "*the right to individual and collective labour disputes with the use of methods of their resolution provided by the federal law including the right to strike*". This means that:

— The constitutional right to strike is not absolute, but may only be realised in the manner established by the separate federal law. Such

[30] Ibid.

[31] Ibid.

[32] *Sobraniye Zakonodatelstva Rossiyskoy Federazii* [SZ RF] [Russian Federation Collection of Legislation] Jan. 26, 2009, No. 4, Item 445.

federal law regulation is mainly contained in Chapter 61 of the Labour Code.[33]

— Other limitations of the right to strike such as bans on strikes in essential services may be and actually are established by the federal legislation (see further).

Art. 409 of the Labour Code mentions the right to strike as the method of collective labour disputes' resolution with reference to Art. 37 of the Constitution. The definition of strike is set forth in Art. 398 of the Labour Code. "*Strike is a temporary voluntary refusal of employees to perform their labour duties (in whole or in part) with a goal to resolve the collective labour dispute"*. The same Art. 409 of the Labour Code provides for the voluntary character of strikes and prohibition of any coercion in respect of strike performance, i.e. both positive and negative right to strike.

As long as the strike is understood only as means of resolving a "collective labour dispute", its legal definition is also essential for the proper understanding of the meaning of the term "strike". The definition of a *collective labour dispute* is given in the same Article of the Labour Code. It is defined as "*non-resolved disagreements between employees (their representatives) and employers (their representatives) concerning the establishment and alteration of conditions of work (including wages), conclusion, alteration and execution of collective agreements and accords and also concerning the refusal of the employer to take into account the opinion of the employees' elected representative body during the process of adoption of local normative acts [of the employer — N.L.]*'.

Limitation of the strike purpose to the resolution of collective labour disputes makes illegal performance of *solidarity actions* and *political strikes,* because in both cases the parties of the strike are not addressing their demands to *their* employer and, therefore, fall out of the definition of collective labour dispute.

[33] *Sobraniye Zakonodatelstva Rossiyskoy Federazii* [SZ RF] [Russian Federation Collection of Legislation] Jan. 7, 2002, No. 1, Item 3.

The Russian Federation is a party to the *International Covenant on Social, Economic and Cultural Rights* establishing the right to strike.[34] Russia is also bound by Art. 6, Para. 4 of the *European Social Charter* which establishes the right to strike. Nevertheless, Russia has not ratified the Additional Protocol to the Charter setting up a collective complaints procedure and therefore is not subject to this control mechanism.

Russia is also a party to the ILO fundamental Conventions on freedom of association No. 87 and 98. These Conventions have no direct statements concerning the right to strike, but the ILO controlling bodies — the Committee of Experts on Application of Conventions and Recommendation (CEACR) and the Committee on Freedom of Association (CFA) — consider that the right to strike is an integral part of freedom of association established by these Conventions. Decisions of the CEACR and the CFA are not themselves sources of law that may be directly applied by Russian courts. Still, they may be used as a secondary source of interpretation of applicable norms.

Russia has received a significant amount of comments from the ILO monitoring bodies, as well as from the European Committee of Social Rights, responsible for exercising control over the application of the European Social Charter. Some of them relating to the strikes in essential services are commented further.

3. GENERAL BACKGROUND — THE RIGHT TO STRIKE

No official distinction between the *rights*' and *interests*'[35] disputes exists in the Russian labour legislation. Two different procedures on resolution of collective and individual labour disputes exist. Collective labour disputes are resolved in a manner usual for disputes of interest: conciliation, mediation, arbitration and strikes.[36] Individual labour disputes are always the disputes of rights and may be settled by courts

[34] International Covenant on Social, Economic and Cultural Rights. Art. 8, Para. 1 (d).

[35] See more about this division: Chapter 22 by A. Gladstone and Chapter 23 by A. Goldman in *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, 2010, 721–789.

[36] See also: *Lyutov*, 2014, 451.

and commissions on labour disputes (voluntary pre-court procedure).[37] There is one type of disputes of rights that may be settled both as an individual and a collective labour dispute, namely: the disputes about the execution of collective agreements. Consequently, two principally different procedures of resolution may be applied at the same time to practically the same dispute.

The demands on collective labour disputes must be addressed to the employer or its representative. If the demand itself would not be contradictory to the legislation and would be within the employer's control, there is no limitation on strikes arising out of disputes relating to issues that are not fit to be regulated by collective bargaining (management prerogatives).

Strikes arising out of inter-union disputes, political strikes or strikes to announce certain concerns to the public wouldn't be legal because demands of employees wouldn't be addressed to the employer or its representative (see para. 2.1 above). By the same reason, all *political* or *quasi-political* strikes or *sympathy actions* would be considered illegal as long as they are not directly addressed at resolution of the dispute with the employer or the dispute between the trade union organization and employers' association, if collective dispute is resolved at a higher level than the level of single enterprise. The latter situation is purely theoretical: although it is envisaged by the Labour Code, in practice all strikes are performed at a plant level.

There is no direct mentioning regarding the regulation of *full or partial* strikes. However, the Labour Code mentions[38] that a strike committee must issue a strike notice at least five working days before the strike takes place, which, among other issues, should contain the information about the expected number of employees taking part in a strike. This may be interpreted as granting the right to the employees to decide, whether the strike will be full or partial.

Employees or their representatives have the right to call a strike if peaceful procedures have not lead to the resolution of the collective

[37] Trudovoi Kodeks Rossiiskoi Federatsii [Labour Code of the Russian Federation]. Art. 381 and Art. 382.

[38] Trudovoi Kodeks Rossiiskoi Federatsii [Labour Code of the Russian Federation]. Art. 410, para. 10.

labour dispute, or the employer or its representative is evading to take part in peaceful procedures, or he does not execute the decision of labour arbitration which is binding to the parties,[39] except for cases of prohibition of strikes established by the law.[40] Art. 410, Para. 2 of the Labour Code sets up an exception to this rule: if the strike has been announced by the trade union or trade unions' confederation, it may be performed upon the decision of workers of specific employer without exercising peaceful procedures.

The requirements for the approval of the strike by the workers' rank and file are set in Art. 410 of the Labour Code. The decision to call a strike is taken by the meeting or a conference of employees of the employer.[41] The meeting quorum is no less than half of this employer's employees; the conference quorum is no less than two thirds of delegates. An initial quorum was two thirds for both conference and meeting, but after the criticism of the provision of the Labour Code on behalf of the ILO,[42] the quorum for the meeting was lowered in 2006. The decision to call a strike should be taken by no less than a half of the employees or delegates present at the meeting or conference. The period of notice that is required amounts to ten calendar days.[43]

Conciliation is the only mandatory procedure among three peaceful collective labour dispute resolution procedures (conciliation, mediation and arbitration). The Conciliation Commission is to be set up within two calendar days since the day of beginning of the collective labour

[39] Trudovoi Kodeks Rossiiskoi Federatsii [Labour Code of the Russian Federation]. Art. 409, para. 2.

[40] Trudovoi Kodeks Rossiiskoi Federatsii [Labour Code of the Russian Federation]. Art. 413, see further details.

[41] The term *conference* is used when the enterprise is too big to organize a meeting of all employees. In this case employees' delegates for the conference are elected.

[42] In August 2001 the Government of the Russian Federation made a request to the ILO to comment on the draft Labour Code adopted by the State Duma (the lower house of Parliament). In response to this request, the ILO experts prepared a Memorandum (hereinafter: Memorandum), addressed to the Government where certain proposals to amend the text were made. For further details see: *Lyutov*, 2003, 173–189.

[43] Trudovoi Kodeks Rossiiskoi Federatsii [Labour Code of the Russian Federation]. Art. 410, para. 8.

dispute or three days in hypothetic cases of disputes at the level higher than the enterprise level.[44] The day of the beginning of a collective labour dispute is the day when the employer informs about declining of all or part of the employees' or their representatives' demands or the failure of the employer to inform about its decision.[45] The employer is obliged to provide such information within two days after receiving the demands or within three weeks — for disputes at the level higher than the enterprise level.[46] The Conciliation Commission has three calendar days to examine the collective labour disputes (five days — for higher-level disputes). Before the end of 2011 this term could be prolonged upon written consent of both parties of the dispute but now such provision is taken away from the Code.[47] This amendment was made in line with other changes of collective labour disputes regulation mainly associated with shortening of terms of different procedures. In general, such changes were declared as facilitation of the right to strike. But in this particular case such modification is leaving the parties without reasonable flexibility that could help them resolve the dispute by peaceful means.[48]

Conciliation may end in a decision which resolves the collective labour dispute. If the decision was approved by the parties, it is binding upon them. The dispute is considered to be resolved and no right to strike may be legally exercised in such a situation. Nevertheless, there is no prohibition in law for the employees to address to the employer demands similar to the demands that were raised in the course of the previous collective dispute — even the next day after the decision of the Conciliation Committee. However, I am not aware of such a practice.

[44] Ibid. Art. 402.

[45] Ibid. Art. 398.

[46] Ibid. Art. 400.

[47] Federalnyi Zakon "O vnesenii izmenenii v Trudovoi Kodeks Rossiyskoi Federatsii v chasti sovershenstvovaniya v poryadke rassmotreniya i razresheniya kollektivnykh trudovykh sporov [Federal Law on Amendments to the Labour Code of the Russian Federation with Regard to Improvement of the Procedure of Considering and Resolving Labour Disputes] Nov. 22, 2011, No. 334-FZ.

[48] See more on the issue: *Gerasimova*, 2012, 35–38.

According to Art. 403 of the Labour Code, if a collective labour dispute was not resolved by the Conciliation Commission, the parties to the dispute must sign the protocol on disagreement and start negotiations about the resolution of the dispute with the assistance of a *mediator*. Such negotiations must start the next day after signing the protocol. If the parties do not agree on the invitation of the mediator, they are under an obligation to negotiate the issue of resolution of the dispute through the *labour arbitration*. The mediator may only make recommendations to the parties concerning dispute resolution, while the condition for holding of arbitration is the agreement of the parties to abide by its decision.[49] In both cases the parties to the dispute are only obliged to discuss the possibility to use these two procedures (mediation and arbitration) but not to actually implement them. Exception to this rule is the case of compulsory arbitration in cases when the strikes are not permitted (see 6.2 further).[50]

A Collective Accord at the enterprise level[51] may contain an obligation not to strike "*in the event of fulfillment of a corresponding obligation by the employer*", i.e. the relative peace obligation.[52] Art. 46 of the Labour Code concerning the contents of the multi-employer collective agreements[53] does not name such an obligation, although it doesn't prohibit parties to include it into the agreement. Nevertheless, the performance of strike that violates the peace obligation is not included in the exhaustive list of grounds to determine the strike illegal.[54] Arguably such a strike may be considered as being performed "*in breach of terms, procedures and requirements set up in the Code*".[55] Still, the

[49] Trudovoi Kodeks Rossiiskoi Federatsii [TK RF] [Labour Code of the Russian Federation]. Art. 404.

[50] Ibid. Art. 404, para. 2.

[51] *Kollektivniy dogovor* [Collective Accord] in terms of Russian legislation (see para. 1.4 above).

[52] Trudovoi Kodeks Rossiiskoi Federatsii [TK RF] [Labour Code of the Russian Federation] Art. 41, para. 2.

[53] *Soglasheniya* [Agreements] in Russian legislation (see para. 1.4 above).

[54] Trudovoi Kodeks Rossiiskoi Federatsii [TK RF] [Labour Code of the Russian Federation] Art. 413.

[55] Ibid. Art. 413, para. 3.

breach of peace obligation is the violation of a collective agreement and not of the Labour Code directly. No court decisions on the matter are known.

Moreover, it is up to the parties of a collective agreement to decide whether to include the "*peace duty"* into the collective agreement or not. Theoretically, the employer affected by the strike can claim rights which arise from the "*peace duty"*, but no practice is known. Bound to the "*peace duty"* are the parties of collective agreement from the employees' side. These are all employees of the employer (at the enterprise-level) or of the employed being covered by the multi-employer agreement. The union membership is irrelevant to collective bargaining purposes. The "*peace duty"* implies the prohibition of strike relating to the existing collective agreement.

The "*peace duty"* exists during the course of the validity of the collective agreement subject to limitations and the unclear character of the duty itself. In order for the "*peace duty"* to be fulfilled, only direct participation in a strike may be limited.

The strike rules are applied equally in *private and public* sector. The condition of the applicability of the strike rules established by the Labour Code, is the employee status of worker. Civil law contractors, public servants and other non-employee categories of workers don't have the right to strike (see further).

4. THE EXPERIENCE WITH STRIKES IN ESSENTIAL SERVICES

As it was mentioned above,[56] strikes in general are declared only in exceptional cases in Russia. The practice of legal strikes in essential services is even more exotic. However, this doesn't mean that the problem of strikes in essential services is not important for Russia. Illegal strikes or other forms of strike actions happen from time to time and, because of restrictive regulation, they often take quite tough forms, such as hunger-strikes, etc.

[56] See para. 1.4.3 above.

In the recent years the Russian economy has been facing stagnation,[57] the real (cleared from the inflation) incomes are declining starting from 2014 till the moment of writing (December 2018),[58] the incomes gap is quite large,[59] and therefore, there is no surprise that the level of discontent of workers in general is rising.

The essential services employees work mainly in the public sector, and this sector of economy is undergoing serious reforming aimed at enhancing its effectiveness and productivity. These reforms are also associated with increasing wages,[60] which at first glance may be considered as motivation to diminish dissatisfaction of essential service employees in public service. Nevertheless, this increase is performed without big additional state funding. In practice, this means perspectives of massive collective dismissals because of sharing the same amount of work among the smaller number of workers. So, the essential services employees that are to be dismissed may start protesting against dismissals (although this will not constitute a valid subject of collective labour dispute and, therefore, there will be no right to strike in such a situation), and the employees that will retain their workplaces are already protesting against permanent growth of the workload.[61]

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[57] See, for example, the World Bank Data: https://data.worldbank.org/indicator/NY.GDP.MKTP.PP.KD?locations=RU.

[58] Federalnaya Slujba Gosudarstvennoy Statistiki (Rosstat Rossii) [Federal Service on State Statics (Rosstat of Russia)] Real'nye raspologaemye denezhnye dokhody naseleniya [Real incomes of the population], 2017. Available at: http://www.gks.ru/free_doc/new_site/population/urov/urov_12kv.doc.

[59] See the information about equality e.g. using the Gini Index calculated by the US Central Intelligence Agency: The Central Intelligence Agency. World Factbook. Available at: https://www.cia.gov/library/publications/the-world-factbook/rankorder/2172rank.html, or data calculated by the United Nations Development Agency (UNDP) in the Global 2016 Human Development Report. Available at: http://hdr.undp.org/sites/default/files/2016_human_development_report.pdf.

[60] There is a programme of alteration of wages to workers in medical and education sector with indicators compared to the average wages in respective regions established by the Presidential Decrees No. 597, 598 and 599 of May 7, 2012 // *Sobraniye Zakonodatelstva Rossiyskoy Federazii* [SZ RF] [Russian Federation Collection of Legislation] May 7, 2012, No. 19, item 2335.

[61] This is a subject of serious discontent among the public-sector employees already. For example, the Centre for Labour and Social Rights research has marked a significant growth of protests and stop actions of transport workers in the first half

The essential service workers who are protesting against these reforms, are claiming that they are not just objecting to dismissals and intensification of the work process, but rather struggle against the threat to deteriorate the quality of service. These were the reasons of recent cases of protest picketing,[62] hunger-strikes[63] and work to rule actions[64] of the ambulance personnel

Therefore, there are reasons to expect the further growing number of protest and strikes in the essential services, although most of them will be performed illegally.

There is no statutory definition of essential services in Russian labour law. Nevertheless, the Labour Code provides[65] that "*according to Art. 55 of the Constitution of the Russian Federation the strikes shall be declared illegal and shall not be allowed in the following cases:*

a) during the period of military alert or the state of emergency, or specific measures taken in accordance with the legislation on the state of emergency; in structures of the Military Forces of the Russian Federation, other military, paramilitary bodies or organizations (or structural subdivisions) that are directly responsible for the issues of the country defense, security of the state, emergency rescuing, searching-rescuing, firefighting works, prevention or liquidation of natural disasters or emergency situations; in law enforcement bodies; in organizations (or structural divisions) that are directly servicing highly dangerous manufacturing and facilities, at ambulance stations;

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of 2017. See: *Bizyukov*, 2017, Available at: http://trudprava.ru/expert/analytics/protestanalyt/1900.

[62] Sankt-Peterburg. Mediki vyshli k ZAKSu [Saint-Petersburg. Medicals came to the State Assembly] // Kollektivnoye deystvie [Collective Action]. Available at: http://www.ikd.ru/node/19473.

[63] Perviy den' 'italyanki v Moskve: "vbrosy" chinovnikov i vpechatleniya medikov [The first day of "Italian Strike" in Moscow: leaks carried out by officials and impressions of medical workers], Profsoyuzi segodnya [Unions Today]. Available at: http://www.unionstoday.ru/news/ktr/2015/03/25/20373.

[64] Vrachi na iznosye: pochemu v Ufe golodayut doktora "skoroy pomoshchi" [Doctors' burning-out: why ambulance doctors go on hunger-strike in Ufa] // Meduza. Available at: https://meduza.io/feature/2015/04/06/vrachi-na-iznose.

[65] Trudovoi Kodeks Rossiiskoi Federatsii[TK RF] [Labour Code of the Russian Federation] Art. 413, para. 1.

b) in the organisations (or structural subdivisions) that are directly associated with securing life-sustaining of the population (energy provision, heating, water-supply, gas-supply, aviation, railroad and water transport, communications, hospitals) in cases if the performance of strikes endangers the interests of state defense, security of the state, life and security of the people".

First, it is clear from this list that the Labour Code provides for two different types of what may be called "essential services". In the first type of situations and structures (the ones that directly deal with the issues of state security and personal safety listed under letter "a" in this article), the strikes are unconditionally prohibited. In the second list (letter "b") the strikes may be prohibited if they endanger the interests of state and security of human beings.

Second, the prohibition of strikes in all listed situations is justified by the reference to Art. 55 of the Constitution. Paragraph 3 of the Article speaks about the possibility to limit the rights and freedoms of a human and citizen by the federal law to the extent as it necessary to *protect the foundations of constitutional order, morality, health, rights and lawful interests of other persons and the needs of state defense and security*. Thus, in any case, the issues of security of state and people are named by the legislator as the legal ground for the statutory limitation of the right to strike.

Also, the Labour Code[66] contains a norm that provides for the power of the federal governmental body (the Ministry of Labour and Social Protection) to establish the list of minimum services performed during the strike, if the strike is performed against employers that are "*linked to the safety of people, the maintenance of their health, as well as vital interests of the society*". Here more abstract motivation for the limitation of the right to strike (the "vital interests of the society") is added.

Based on the provisions of Art. 413 of the Labour Code, quite a substantial list of occupations and sectors where strikes are prohibited[67] has been set up by the legislation.

[66] Ibid. Art. 412, para. 3. See para. 5.2 further.

[67] See para. 5.1 further.

The *Constitutional Court of the Russian Federation* (the Constitutional Court) seems to widen the Labour Code approach towards the reasons of possible limitation of the right to strike. In the case where the Federation of Aviation Dispatchers of Russia has made a claim concerning non-constitutionality of the prohibition of strikes of the civil aviation personnel responsible for servicing and management of the air traffic,[68] the Constitutional Court dismissed the claim motivating its decision not only by Art. 55 of the Constitution that is mentioned in this respect in the Labour Code, but also by Art. 17, Para. 3 of the Constitution. This Article of the Constitution provides for *inadmissibility to infringe rights and freedoms* of other people in the process of exercising one's own rights.[69] In the case of strikes of the aviation personnel this clearly means the rights of passengers and (probably) the rights of the aviation personnel employers. It seems that this Constitutional Court Ruling may serve a good illustration of the official state position regarding reasoning of limitation of strikes in the essential services.

In another Constitutional Court case[70] that dealt with railroad transport, the Constitutional Court has made a very broad and vague interpretation of justification of limitation of the right to strike. In its Ruling of 2007 the Constitutional Court has mentioned that "... *any circumstances that may interrupt normal functioning of the railroad transport are affecting the interests of each human, as well as the interests of the state, which itself gives the ground for introduction of restrictions concerning the right to strike of certain specific categories of railroad transport employees, whose temporary stoppage of work may create the danger to the interests of state defense and security, life*

[68] Opredelenie Konstitutsionnogo Suda Rossiskoi Federatsii [The RF Constitutional Court Ruling] Oct. 16, 2003 No. 318-O // ConsultantPlus Database. Available at: http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=LAW&n=45141&fld=134&dst=1000000001,0&rnd=0.14454863099112092#0.

[69] Konstitutsiya Rossiiskoi Federatsii [The Constitution of the Russian Federation] Art. 17, para. 3.

[70] Opredelenie Konstitutsionnogo Suda Rossiiskoi Federatsii [The RF Constitutional Court Ruling] Feb. 8, 2007, No. 275-O-P // ConsultantPlus Database. Available at: http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=LAW&n=68822&fld=134&dst=1000000001,0&rnd=0.007377775713777344#0.

and health of people".[71] This quotation is a good example of intentional ambiguity of wording in the court decision. The first half of the sentence seems to state that *any interests of the human and the state that may be affected*, can be considered a sufficient justification for limiting the right to strike. If that would be true, it would give a valid ground to declare *any* strike illegal, because it *always* affects at least the interests of employer. Such an interpretation would contradict at least the approach of the CFA towards the ground for possible limitation of the right to strike being a "a clear and imminent threat to the life, personal safety or health of the whole or part of the population".[72] However, further the Constitutional Court speaks about limitation of the right to strike of only those employees, whose stoppage of work may be dangerous from the point of view of safety and defense. If the Constitutional Court has meant the limitation of strikes for only these category of workers, why is it reasoned earlier by any limitation of any interests, not just by the issues of security? Being a Russian native speaker with legal education and significant experience in reading court decisions doesn't help understand what was meant in this passage of the Constitutional Court.

The *Supreme Court* usually makes decisions concerning the illegality of strikes in essential services interpreting Art. 55 of the Constitution and Art. 413, Para. 1 of the Labour Code very expansively. For example, in one of the cases the Supreme Court ruled, that "...stoppage of technical service of the aircraft may endanger the life and health of people in cases if there will be a potential need to organise sanitary flights or emergency rescue works with the use of aviation, or works to liquidate consequences of natural disasters, accidents, catastrophes, etc.".[73] In this case the legality of one-hour stoppage of work of servicing

[71] Ibid. Para. 4.

[72] The ILO. Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. Geneva, International Labour Office, Fifth (revised) edition, 2006. Para. 591, P. 119. Available at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_090632.pdf.

[73] Opredelenie Verkhovnogo Suda RF [The RF Supreme Court Ruling] Feb. 26, 2009, No. 3-47/08 // SudAct Legal Database. Available at: http://sudact.ru/vsrf/doc/qtleEvUSTSg0/.

departure flights in the airport of Omsk was under discussion. Among the sectors where the stoppage of work was interpreted as dangerous and, therefore, illegal, were the following: railroad service,[74] communal heating,[75] air-traffic control,[76] aviation personnel in general (the strike was declared illegal in general because it involved the stoppage of work of both workers who have no right to strike as well as the ordinary employees that were entitled to strike),[77] river ports.[78] At the same time, the same Supreme Court just few months after the decision concerning the illegality of strikes in river ports of Naberjnye Chelny[79] made directly opposite decision concerning port workers of Saint Petersburg.[80] This contrasting approach looks even more surprising taking into account that two of three judges including the chairman of the hearing were the same in both cases. This difference may be explained by the fact that an argument about essentiality of services was taken in the first case as quite a secondary one, while the main attention of the Court was paid to the procedure. Nevertheless, the arguments about (non)essentiality of port works are clearly stated in both cases.

It seems that among listed cases only the air-traffic control falls within the notion of essential services in the strict sense according to

[74] Opredelenie Verkhovnogo Suda RF [The RF Supreme Court Ruling] July 29, 2002, No. 3-268/02 // SudAct Legal Database. Available at: http://sudact.ru/vsrf/doc/FHorV9FRj4Yt/.

[75] Opredelenie Verkhovnogo Suda RF [The RF Supreme Court Ruling] Feb. 17, 2006, No. 3-25/05// SudAct Legal Database. Available at: http://sudact.ru/vsrf/doc/I3iCBsnF9nLj/.

[76] Opredelenie Verkhovnogo Suda RF [The RF Supreme Court Ruling] Nov. 19, 2002, No. 3-183/02 // SudAct Legal Database. Available at: http://sudact.ru/vsrf/doc/hFLvADA2Q5N5/.

[77] Opredelenie Verkhovnogo Suda RF [The RF Supreme Court Ruling] Feb. 14, 2003, No. 3-200/02// SudAct Legal Database. Available at: http://sudact.ru/vsrf/doc/6wYMoH6tDeZp/.

[78] Opredelenie Verkhovnogo Suda RF [The RF Supreme Court Ruling] Oct. 14, 2005, No. 3П-1-56/05// SudAct Legal Database. Available at: http://sudact.ru/vsrf/doc/MTRzq5MrjwUn/.

[79] Ibid.

[80] Opredelenie Verkhovnogo Suda RF [The RF Supreme Court Ruling] Dec. 16, 2005, No. 3-404/05// SudAct Legal Database. Available at: http://sudact.ru/vsrf/doc/H4GZekKrVS6J/.

the CFA approach,[81] others are specifically mentioned as not being the essential services in the strict sense.[82]

5. STATUTORY RESTRICTIONS ON THE RIGHT TO STRIKE OF EMPLOYEES IN ESSENTIAL SERVICES

5.1. Securing Essential Services by Exclusion from Collective Labour Relations Rights

Russian law uses a "sweeping ban" approach towards the prohibition of strikes in the essential services. As it was already mentioned in para. 4.3. above, Art. 413, para. 1 of the Labour Code contains the list of situations and sectors where the strikes are banned. Besides this, there are a number of laws that specify the prohibition of strikes in a specific sector (see below). In the cases of disputes between the employer and strikers concerning the possibility to perform the strike, the decision is taken by the courts and usually it confirms the employer's claim for declaring the strike illegal (see also para. 4.3).

As for the regime of collective bargaining rights' limitations, there may be four legal situations:

a) employee's work is not considered as an essential service — no limitations of freedom of association and collective bargaining rights, including the right to strike;

b) the work is in the list of work where the strikes are prohibited — the right to form and join trade unions and to take part in collective bargaining is guaranteed except for the right to strike. Such a regime covers both essential services employees, and other categories of workers to whom the Labour Code is applied on the leftover principle, i.e., only for the matters that are not regulated by special norms (the norms regulating state or municipal service, including the police, procurators' office, security services etc.);

c) the worker is not an employee (army service, civil contractors, etc.). The right to organise and join trade unions is still guaranteed by the Federal Law "On Trade Unions, their

[81] The ILO. Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. Para. 585, P. 120.

[82] Ibid. Para. 587, P. 10–121.

Rights and the Guarantees of their Activities", 1996, that states that "a trade union is a voluntary association of *citizens*[83] [*italicised by the author — NL*] that are joined by their production and professional interests which relate to their activity…".[84] Such trade unions exist.[85] However, as such categories of workers are expressly excluded from the scope of the Labour Code,[86] unlike the second category, these workers are not entitled to collective bargaining and social dialogue rights that are established by Part II of the Labour Code.

d) the worker is a convicted prisoner. Besides the direct prohibition on stoppage of work as a measure to resolve a labour conflict established by the Penal Execution Code of the Russian Federation,[87] the prisoners are not entitled to be among founding members of social organisations[88] (that include trade unions). This doesn't mean that a prisoner cannot stay in the trade union where he or she was a member before the conviction, but he or she cannot form the union of prisoners as such. There was an attempt to form such a union in practice, but it was wound up upon the court decision.[89]

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[83] The notion of 'citizens' is interpreted by the courts expansively as related to anyone who has legal residence in the territory of Russia.

[84] Federalnyi Zakon RF "O professionalnykh soyuzah, ikh pravah i garantiyah deyatelnosti" [The RF Federal Law "On Trade Unions, their Rights and the Guarantees of their Activities"] Art. 26, 1996.

[85] See, for example, the site of All-Russian Trade Union of Military Servicemen at: http://www.npsv.ru/index.html.

[86] Trudovoi Kodeks Rossiiskoi Federatsii [TK RF] [Labour Code of the Russian Federation] Art. 11, para. 8.

[87] Ugolovno-ispolnitelnyi Kodeks Rossiiskoi Federatsii [The Penal Code of the Russian Federation] Art. 103, para. 6, Jan. 8, 1997, No. 1-FZ. *Sobraniye Zakonodatelstva Rossiyskoy Federazii [SZ RF] [Russian Federation Collection of Legislation]* Jan. 13, 1997, No. 2, Item 198.

[88] Federalnyi Zakon "Ob obshchestvennyh ob'edineniyah" [Federal Law 'On Social Organizations'] Art. 19, May 19, 1995, No. 82-FZ. *Sobraniye Zakonodatelstva Rossiyskoy Federazii [SZ RF] [Russian Federation Collection of Legislation]* May 22, 1995, No. 21, Item 1930.

[89] Sud likvidiroval profsoyuz, zashchischchavshiy interesy zaklyuchyonnykh [The Court winded-up trade union that was protecting prisoners' interests], Pravo.ru, May 14, 2012. Available at: https://pravo.ru/news/view/72219/.

For the sake of clarity, this variety of regimes may be shown as follows (table 3):

Table 3

	"Non-essential employees"	Essential employees and civil servants	Military Servicemen and others excluded from the LC scope	Convicted workers
Right to strike	Yes	No	No	No
Right to collective bargaining	Yes	Yes	No	No
Right to form and join the union	Yes	Yes	Yes	No

The norms on prohibition of strikes are included in the legislation concerning "*state civil service*"[90] and "*municipal service*".[91] Regulations of law on state civil service and on municipal service cover only government and municipal officials. Any employees performing secondary functions in the government institutions are covered by the provisions of the Labour Code and have the right to strike. These two laws also do not cover employees of state-owned companies and institutions. Policemen, procurator's office servants, military servants and people serving an alternative civil service, state messengers, and state security services officials have no right to strike according to separate legislation establishing their status.

Employees of state-owned companies in general have the right to strike. Chief executive officers of state unitary enterprises have no right to take part in strikes.[92] Such a regulation was established as a

[90] Federalnyi Zakon "O gosudarsvennoi grazhdanskoi sluzhbe" [Federal Law "On State Civil Service"] Art. 17, para. 15, Jul. 27, 2004. *Sobraniye Zakonodatelstva Rossiyskoy Federazii [FZ RF] [Russian Federation Collection of Legislation] Aug.* 2, 2004, No. 31, Item 3215.

[91] Fedearlnyi zakon "O munitsipalnoi sluzhbe" [Federal Law "On Municipal Service"] Art. 14, para. 14, Mar. 2, 2007. *Sobraniye Zakonodatelstva Rossiyskoy Federazii* [SZ RF] [Russian Federation Collection of Legislation] Mar. 5, 2007, No. 10, Item 1152.

[92] Federalnyi Zakon "O gosudarstvennyh I munitsipalnyh unitarnyh predpriyatiyah" [Federal Law "On the State and Municipal Unitary Enterprises"] Art. 21, para. 2, Nov. 14, 2002, No. 161-FZ. *Sobraniye Zakonodatelstva Rossiyskoy Federazii [SZ RF] [Russian Federation Collection of Legislation] Dec.* 2, 2002, No. 48, Item 4746.

response to the practice of state-owned enterprises directors in 1990s to organize strikes as method of putting pressure on the Government to get funding. Nevertheless, there is no prohibition for company directors of other organisational forms (e.g. joint-stock companies) to take part in a strike, even if such companies are totally state-owned.

Apart from general mentioning in Art. 413 of the Labour Code, there is a special legislation concerning the prohibition of strikes during the state of military alert,[93] state of emergency[94] or special measures taken in accordance with the legislation on state of emergency; in the military forces of the Russian Federation, other military, paramilitary and other organizations or their divisions that are directly involved into the issues of state defense, state security, emergency and rescue services, fire-fighting services, services of prevention and liquidation of consequences of natural disasters and emergency situations; the police and other state security services; organizations (or their divisions) directly servicing dangerous production or equipment, at ambulance stations.

The *Federal Law on the "Use of Nuclear Energy"* prohibits strikes, meetings, demonstrations and picketing, transport blocking and other social actions near nuclear industry enterprises and strikes that may endanger the work of such enterprises.[95]

Art. 52 of the *Air Code of Russia*[96] prohibits strikes for the aviation personnel of civil aviation responsible for servicing and directing the air transport. Because of these restrictions flight dispatchers are known to

[93] The state of military alert is being announced according to the Federal Constitutional Law "On the State of Military Alert" of January 30th, 2002, No. 1-FKZ. *Sobraniye Zakonodatelstva Rossiyskoy Federazii* [SZ RF] [Russian Federation Collection of Legislation] Art. 375, Feb. 4, 2002, No. 5.

[94] The state of emergency is announced according to the Federal Constitutional Law "On the State of Emergency" of May 30, 2001, No. 3-FKZ. *Sobraniye Zakonodatelstva Rossiyskoy Federazii* [SZ RF] [Russian Federation Collection of Legislation] Jun. 4, 2001, No. 23, Item 2277.

[95] Federalnyi Zakon "Ob ispolzovanii yadernoi energii" [Federal Law "On the Use of Nuc*lear Energy"]* Nov. 21, 1995, No. 180-FZ, *Sobraniye Zakonodatelstva Rossiyskoy Federazii* [SZ RG] {Russian Federation Collection of Legislation] Jan. 27, 1995, No. 48, Item 4552.

[96] Vozdushnyi Kodeks Rossiiskoy Federatsii [The Air Code of Russian Federation], Federalnyi Zakon [Federal Law] Mar. 19, 1997, No. 60-FZ. *Sobraniye Zakonodatelstva*

perform hunger-strikes.[97] Without the official declaration of the strike in such situations they are taken away from their work by doctors for medical reasons, and have the possibility to put a pressure on their employer at the cost of their own health. Strikes are prohibited[98] for the employees of the *railroad transport* whose work is connected with trains' operations, maneuvering operations, passengers', senders and recipients of cargo shipment service according to the list established by the Federal Law. This list is so wide that almost any railroad employee has no right to participate in strikes.

The norms concerning aviation and railroads were challenged as unconstitutional. In 2007 the Constitutional Court refused to consider that right to strike was excessively limited in respect of railroad workers.[99] Therefore, the law has been left unchanged.

In a slightly more radical situation concerning civil aviation, the Constitutional Court considered[100] the law as unconstitutional in 1995. The then existing law on "Collective Labour Disputes"[101] prohibited strikes in civil aviation enterprises *in whole*. Such prohibition being based only on the fact of an enterprise belonging to a certain

Rossiyskoy Federatsii [SZ RF] [Russian Federation Collection of Legislation] Mar. 24, 1997, No. 12, Item 1383.

[97] See for example: Gubski P. Golodovka aviadispetcherov [Flight dispatchers' hunger-strike]. 161.ru news site, Apr. 2010: http://161.ru/text/news/277784.html (accessed 30 July 2013).

[98] Federalnyi Zakon "O zheleznodorozhnom transporte" [Federal Law "On Railroad Transport"] Jan. 10, 2003, No. 17-FZ. *Sobraniye Zakonodatelstva Rossiyskoy Federazii* [SZ RF] [Russian Federation Collection of Legislation] Jan. 13, 2003, No. 2, Item 169.

[99] Opredelenie Konstitutsionnogo Suda RF [The RF Constitutional Court Ruling] Feb. 8, 2007 No. 275-O-P. *Sobraniye Zakonodatelstva Rossiyskoy Federazii* [SZ RF] [Russian Federation Collection of Legislation] May 22, 1995, No. 21, Art. 1976. For more details see: para. 4.3 above.

[100] Postanovlenie Konstitutsionnogo Suda RF [Resolution of the Constitutional Court of the RF] May 17, 1995, No. 5-P. *Sobraniye Zakonodatelstva Rossiyskoy Federazii* [SZ RF] [Russian Federation Collection of Legislation] May 22, 1995, No. 21, Art. 1976.

[101] Zakon SSSR "O rassmotrenii kollektivnykh trudovykh sporov" [Law of the USSR "On Resolution of Collective Labour Disputes (conflicts)"] May 20, 1991 No. 2179-1. *Vedomosti SND and VS of USSR [Bulletin of the CPD of the RF and SC of the RF]* Jun. 1991, No. 23, Art. 654.

economic sector was found unconstitutional and was abrogated by the Constitutional Court. However, more recent and less restrictive norms of the Air Code were considered not to be in the contradiction with the Constitution in 2003.[102]

There are no *special sanctions* for the illegal participation in the strike in essential services. Such a strike would be considered illegal by the court, and the next day after the receiving the court decision, strikers are obliged to return to work.[103] The very fact of workers' participation in such a strike[104] will not constitute a separate misconduct. The employee may be disciplined for the refusal to stop the strike after receiving the decision of the court. However, there are situations in practice, when courts refuse to consider the stoppage of work aimed at resolving the dispute with an employer, as a strike case because it does not fall within the legal definition of a strike.[105] In such cases the employees may be disciplined for the strike action which took place before the court decision. In the worst case for them, they may be dismissed for "*progul*", i.e. absence at work without a just cause for four consecutive hours or more or during the whole working day.[106] In such cases the workers may be punished for the breach of labour discipline, while in the ordinary cases they may only be disciplined for refusal to get back to work after the court ruling concerning illegality of the strike.

Under the Labour Code, the employees' representative body that is responsible for the organization of an illegal strike, and that did not stop it after receiving the court decision, may be liable for damages incurred by the employer as a result of the strike in the amount that

[102] See para. 4.3 above.

[103] See more details in para. 7 further.

[104] Except for the prisoners. Their strike is considered as major breach of the rules of imprisonment according to Art. 116, para. 1 of the Penal Code. This may lead to the quite severe sanctions depending on the grade of penal regime they are subject to (the list of sanctions is established in Art. 115 of the Penal Code of the RF).

[105] Opredelenie Verkhovnogo Suda RF [The RF Supreme Court Ruling] Feb. 26, 2009, No. 3-47/08. SudAct Legal Database. Available at: http://sudact.ru/vsrf/doc/qtleEvUSTSg0/. See also: Ibid. para. 7.

[106] Trudovoi Kodeks Rossiiskoi Federatsii [TK RF] [Labour Code of the Russian Federation]. Art. 81, part 1, para. 6(a).

shall be determined by the court.[107] The courts tend to interpret this power as the only possibility to oblige the trade union to pay litigation expenses.[108]

Instead of direct and open incompliance with the ban on strikes in essential services, the employees tend to use "alternative" practices which are not established by the labour legislation: work to rule actions, hunger strikes, etc. There was even a discussion in the State Duma concerning the need to prohibit hunger-strikes for the essential service workers, but it did not lead to the adoption of any legislation up to the moment of writing.[109]

5.2. Securing Essential Services by Imposing Limitations on the Right to Strike (A Controlled Strike Model)

The obligation of employees to perform the *minimum works (services)* to be performed during any strike is directly associated with the issue of essential services. The employer, the state bodies of executive power, municipal authorities as well as an employees' body that is in charge of the strike performance are under an obligation to take measures for "*…keeping the social order, ensuring the preservation of employer's and employees' property, as well as functioning of machinery and facilities, if their stoppage may constitute a direct danger to life and health of people*".[110] It is clear that performance of minimum works (services) is based on generally the same grounds as the ban on strikes in essential services (see 4.3).

[107] Trudovoi Kodeks Rossiiskoi Federatsii [TK RF] [Labour Code of the Russian Federation]. Art. 471, para. 2.

[108] See: Leningrad Regional Court Decision of November 22, 2013, on case No. 3-64/2013, Leningrad Regional Court Decision of 25 January 2013, on case No. 3-5/2013, Primorsky Regional Court Decision of 29 April 2011, on case No. 3-36/11, Sverdlovsk Regional Court Decision of 24 February 2011, (case number anonymized). SudAct Legal Database.

[109] See: A. Smirnova. Deputaty khotyat zapretit' golodovki [The deputies wish to prohibit the hunger-strikes]. Utro.ru, 29 April 2015. Available at: https://utro.ru/articles/2015/04/29/1242553.shtml.

[110] Trudovoi Kodeks Rossiiskoi Federatsii [TK RF] [Labour Code of the Russian Federation]. Art. 412, para. 2.

The sector level lists of minimum services have to be adopted by the federal executive power body responsible for the governance in the respective sector of economy according to the methodology approved by the Government.[111] Currently 22 such lists are adopted by the responsible ministries.[112] One of the most problematic sectors from the point of view of essential services strikes sectors, i.e. the railroads, had its list of minimum works successfully challenged in the court. One of two all-Russian railroad unions, being more militant[113] and the only one taking part in strikes in this sector, has appealed the fact of adoption of the list by the Ministry of Transportation without involving this union into the process of coordination of its contents.[114]

The specific list of minimum works (services) to be performed during a particular strike has to be defined by the agreement between the parties to the collective labour dispute together with a local government authority within three days since the announcement of the strike.[115] It is not permitted to include into such a list the works (services) which are not included into the lists of minimum works (services) adopted in respect of the sector of the economy or territory.

In case of disagreement between the parties concerning the list, it has to be approved by the government authority of the constituent entity of the Russian Federation. The latter issue has been a matter of examination of the ILO monitoring bodies. The CFA has noted that any disagreement concerning specific contents of minimum services must be resolved by the independent body that has the credibility of

[111] Postanovlenie Pravitelstva Rossiiskoi Federatsii [The Resolution of the Government of the Russian Federation] Dec. 17, 2002, No. 901. Garant Database. Available at: http://base.garant.ru/185339/.

[112] See the Ministry of Transport of the Russian Federation Order of October 7, 2003 No. 197 (for the transport sector in general); the Ministry of Communications of Russia Order of December 28, 2016 No. 719 (for the communications sector); the Ministry of Agriculture of the Russian Federation Order of January 19, 2006 No. 3 (for agriculture) et al. Consultantplus Database.

[113] See about the relations between majority and minority unions in para. 1.4.1 above.

[114] Opredelenie Verkhovnogo Suda Rossiiskoi Federatsii [The Supreme Court Ruling] Jul. 6, 2006, No. KAC06-221. Consultantplus Database.

[115] Trudovoi Kodeks Rossiiskoi Federatsii [TK RF] [Labour Code of the Russian Federation]. Art. 412, para. 4.

all the parties. The government authority in charge of resolution of such disputes is the *State Service on Labour and Employment* (*Rostrud*) which is subordinated to the Ministry of Labour and Social Protection. It is clear, that in many cases, especially when the dispute relates to the state-owned employer, a governmental agency cannot be considered neutral. The CFA has addressed the Government of Russia in 2003 with the request to amend Art. 412 of the Labour Code in order to meet this requirement.[116] Later (in 2011) the request was repeated by the CEACR,[117] and later (in 2014) the European Committee of Social Rights also asked for clarification of that regulation.[118] Nevertheless, the legislation was not changed.

Another tool that may be used by the employer to minimise the damage caused by the strike, is the court injunction to stop it. In cases of danger that the strike would cause disproportionally big damage to the employer, the courts take decisions on immediate execution of their orders to stop the illegal strikes.[119]

Sanctions for not performing minimum works (services) or not stopping the strikes according to the court order are the same as for the non-compliance with the court decision on illegality of strike and following back to work order (see 5.1 above).

[116] Committee on Freedom of Association cases. Case No. 2199 (Russian Federation) — Complaint date: 18-APR-02.

The Russian Labour Confederation (KTR). Paras. 991, 995. The ILO Normlex Database: http://www.ilo.org/dyn/normlex/en/f?p=1000:50001:0::NO:50001:P50001_COMPLAINT_FILE_ID:2897348.

[117] International Labour Conference, 100th Session, 2011. Report of the Committee of Experts on the Application of Conventions and Recommendations (CEACR). Report III (Part 1A), Geneva, 2011. P. 149. URL: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_151556.pdf.

[118] Council of Europe, 2014, 42.

[119] Reshenie Leningradskogo raionnogo suda [Leningrad Regional Court Decision] Jan. 25, 2013, on case No. 3-5/2013; Opredelenie Verhovnogo Suda Rossiskoi Federatsii [The RF Supreme Court Ruling] Mar. 21, 2008, on case No. 78-G08-5, Opredelenie Verhovnogo Suda Rossiskoi Federatsii [The RF Supreme Court Ruling] Jan. 25, 2008, on case No. 5-G07-113. SudAct Legal Database.

6. THE QUID PRO QUO FOR DENYING OR LIMITING THE RIGHT TO STRIKE

6.1. The alternative means to advance and protect employees' interests for those who are not allowed to unionize and bargain collectively

The amount of benefits that are assigned to the workers in essential services depends greatly on peculiarities of the category of workers. First of all, it should be noted that taking into account negligibly low strike activity in general, which may mainly be explained by quite restrictive legislation on the right to strike (see paras. 1.4.3 and 3 above), the essential services workers don't lose much compared to other categories of workers. That is well understood by the Government, and any measures that are aimed at giving some privileges or benefits to the specific category of workers is not understood by the Government, by employers, or by workers themselves as the compensation for the lack of the right to strike.

Probably, the main incentive for different categories of workers to stay in the profession or to keep industrial peace is the payment of wages. According to the official statistics, the average wage in Russia in September 2017 was 38.083 rubles per month.[120] One of the most militant categories of essential services employees work in the sector of aviation and space. The average wages for this category of workers is 130.933 rubles[121] — almost three times more than average age. However, this may be explained not by the compensation for the lacking right to strike, but rather by the fact that it is a highly qualified work with international competition between employers for the employees. Aeroflot, the biggest air-carrier in Russia, was recently complaining that many pilots are leaving the company despite wages that look astronomic

[120] Federalnaya Slujba Gosudarstvennoy Statistiki (Rosstat Rossii) [Federal Service on State Statics (Rosstat of Russia)] Uroven' zhizni i dokhody naseleniya v oktyabre 2017 [The level of life and incomes of the population in October 2017]. Available at Rosstat site: http://www.gks.ru/bgd/free/B17_00/IssWWW.exe/Stg/dk10/6-0.doc.

[121] Ibid.

to the majority of Russian population: about 650,000 rubles per month for the first pilot and about 350,000 rubles for the second. Still, many pilots are emigrating, especially to China, where they can expect few times larger wages for the same job.[122]

Contrastingly, other highly skilled category of workers, the medical personnel, many of whom are also essential service workers, receive incomparably lower wages. Their amount is even lower than the country average — 30,345 rubles.[123] Despite the attempts to increase their wages in the course of budgetary sector reform (see para. 4.2 above), there seems to be no much success in this issue up to now. Both categories: well-paid aviation personnel and badly paid medical personnel are mainly contesting too intensive workload that leads to the burning out, reduction of quality of work and danger to other people. There seems to be not much attention on their behalf to the issue of non-sufficient collective bargaining rights.

Workers in the area of state governance, security and army forces receive wages that are slightly higher than average — 43,085 rubles.[124] This does not tell much about the real situation for many of these workers whose salaries are highly unequal depending on their rank. While higher officials' wages in these sectors are scandalously high and accompanied with the social security rights that are unheard of by the majority of the population, most of lower-rank civil and military servants receive quite a modest amount of wages. A big income gap in this sector reflects unhealthy social situation and much influence of the highest officials to the amount of their own benefits without enough control on behalf of the civil society. It can't be seriously considered as a compensation for lack of the right to strike which is much more relevant for the lower officials who are underpaid.

[122] See: Aeroflot pytaetsya uderzhat' pilotov den'gami [Aeroflot tries to hold the pilots by money] // Vedomosti, 13 June 2017. Available at: https://www.vedomosti.ru/business/articles/2017/06/13/694163-aeroflot-defitsitom-pilotov.

[123] Rosstat Rossii. Uroven' zhizni i dokhody naseleniya v oktyabre 2017. Op. cit.

[124] Ibid.

6.2. Measures provided by law for assuring basic tenets of free collective bargaining and/or to settle labour disputes for employees who are denied the right to strike

Compulsory arbitration is a substitution mechanism for the ban of the right to strike provided by law.[125] According to Art. 404, Para. 8 of the Labour Code, if the parties of the collective labour dispute, in which employees are not entitled to the right to strike, cannot agree on creation of ad-hoc voluntary labour arbitration or referral of their dispute to the permanent labour arbitration, the governmental body responsible for the settlement of collective labour disputes shall establish compulsory arbitration to resolve such a dispute, being Rostrud.[126] As it was already said, Rostrud is a governmental structure. Therefore, it cannot be considered fully neutral and independent from the state and employer as it is required by the CFA, especially when it comes to the disputes with the state-owned employers that constitute the majority of the cases in essential services.

There is not much open information about the practical outcome of compulsory labour arbitration as it is considered to be a confidential information. However, there is case law[127] concerning illegality of strikes when essential services employees were trying to organize the strike without taking part in compulsory arbitration. This may be considered as a sign of not enough trust to this institution.

7. SECURING ESSENTIAL SERVICES BY OTHER MEANS

Russian legislation that regulates the general procedure of collective labour disputes resolution (see para. 3.4 above) as well as many specific

[125] Trudovoi Kodeks Rossiiskoi Federatsii [Labour Code of the Russian Federation]. Art. 404, para. 8.

[126] The power to settle a collective labour dispute is established in para. 5.5.10 of the Rostrud Statute approved by the Decree of the Government of the Russian Federation of June 30, 2004 No. 324. *Sobraniye Zakonodatelstva Rossiyskoy Federazii* of 17 July 2004, No. 28, Item. 2901.

[127] Opredelenie Verkhovnogo Suda RF [Supreme Court Ruling] Feb. 10, 2006, No. 74-G06-4, Opredelenie Verkhovnogo Suda RF [Supreme Court Ruling] Oct. 14, 2005, No. 11-G05-21 // SudAct Legal Database.

legal limitations of strikes in the essential services (see paras. 5 and 6) do not leave much space for any other limitations: these legal means are already enough to turn the practice of even non-essential services strikes into something quite exceptional (see para. 1.4.3 above).

Nevertheless, the other frequently used method of limitation of the right to strike (both in essential and non-essential services) is the *employers' recourse to courts* with claims on declaring the strikes illegal. According to the Labour Code,[128] the decision on declaring the strike illegal is taken by the high courts of the constituent entity of the Russian Federation. Besides the situations of ensuring the state and human beings security as well as the rights and lawful interests of other people and cases directly established by the federal laws,[129] the strike may be declared illegal by the court if it is called on in breach of terms and procedures established by the Labour Code.[130] If the court has declared the strike illegal, the employees are obliged to get back to work no later than the next day after the strike committee receives the court decision.[131] The court has also the power to suspend the strike which has been declared but has not been started for up to fifteen days when such a strike may cause danger to the health and life of people.[132]

The examination of case law shows that in the vast majority of cases[133] the employers' claims to declare the illegality of strikes were satisfied by the courts. This approach of courts may be explained not by especially cautious attention to the need to provide essential services, but rather by the restrictive attitude to strikes in general. The proportion of cases when the courts approved the claims of illegality of strikes when the essentiality was not under discussion, is approximately the same.[134]

[128] Trudovoi Kodeks Rossiiskoi Federatsii [TK RF] [Labour Code of the Russian Federation]. Art. 413, para. 4.

[129] See para. 4.3 above.

[130] Trudovoi Kodeks Rossiiskoi Federatsii [TK RF] [Labour Code of the Russian Federation]. Art. 413, para. 3.

[131] Ibid. Para. 6.

[132] Ibid. Para. 7.

[133] Thirteen among sixteen under examination which is close to covering all case law on the issue.

[134] Among 23 disputes the claims of employers were satisfied in 17 cases of non-essential services strikes.

In many cases of discussion of illegality of strikes in essential services, the argument of breach of procedure of strike performance was also used by the courts.

It is important that the court practice seems to be changing in a time, and the approach to application of the same norms by the same Supreme Court seems to become more restrictive in the later years.[135]

There are court decisions when provisions of trade unions by-laws were declared contradictory to law on the ground that they provided the right to strike to workers who were considered to be involved in essential services.[136] Nevertheless, the main argument in such cases was not essentiality of service, but again, the procedure: the courts mentioned the right to declare the strike as belonging directly to workers and not to trade unions.

8. PERFORMANCE EVALUATION

The general assessment of legal regulation of the right to strike in essential services in Russia is that it is greatly unbalanced in favour of the state and employers. The aim of the legal limitation of the right to strike in essential services is theoretically grounded mainly with regard to the issues of safety of people and state security (see para. 4.3 above). Nevertheless, the practical interpretation of these limitations is so expansive, that in practice the right to strike as it is regulated now presents no serious obstacle to the proper level of functioning of the employers.

On the other hand, such regulation obviously cannot serve as an example of effective collective bargaining. Even a negligibly low level of strikes in general, not only in essential services (see para. 1.4.3 above) in the great majority of cases is declared illegal when contested in courts by employers (see para. 7 above).

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[135] *Gerasimova*, 2017, 26–30. Available at: http://www.russianlawjournal.org/jour/article/view/271/161.

[136] Reshenie Moskovskogo Gorodskogo Suda [Moscow City Court Ruling] Jan. 14, 2011, No. 33-307. ConsultantPlus Database; Reshenie Tomskogo Raionnogo Suda [Tomsk Regional Court Decision] Jul. 27, 2010, No. 2-821/10. SudAct Legal Database. Available at: (http://sudact.ru/regular/doc/NFu0XLf9Wjx1/.

In quite a significant number of issues (quorum concerning calling the strike in general, the determination of what is understood by essential services, insufficient impartiality of a state institution that has the power to resolve disputes over the minimum services and compulsory arbitration, etc.) Russian legislation that regulates strikes in essential services cannot be considered as complying with the international labour standards imposed by the ILO and the CE.[137]

The experience of discussions of personal preferences in collective bargaining and strikes with active trade unionists that are practically involved in strikes activities, shows that they prefer the actions that fall outside of the legal framework. Usually, it is the choice for them either to follow official procedures established in the Labour Code or to be actually involved in the industrial action. From employers' standpoint, the preference for autonomous and informal or official legal regulation in the situations of disputes is not that clear and depends on personal preferences and policy of the management.

It may be stated that current Russian regulative policy in the area of strikes in essential services is quite consistent in its generally restrictive approach towards the possibility to legally organize the strikes. This consistency, however, cannot be considered optimal and acceptable because the protests of highly discontented workers happen despite formal legal prohibition, and the legislation on strikes does not serve its goal as a safety valve for the society.

9. SUMMARY AND CONCLUSIONS

Historically, the Russian regulation of strikes, including strikes in essential services, has been very restrictive. There were few short periods in the history when the whole country has been almost paralysed by the strike activity. This happened during the first Russian Revolution of 1905–1907, during the revolutionary events of 1917, and in the course of the Soviet system decay in the early 1990-ies. Each time the explosion of a wide protesting movement was preceded by the highly restrictive anti-strike state policy and legal regulation. Since the late XIX century

[137] See also: *Gerasimova*, 2017, 17–20.

up to the fall of the USSR the strike activity was taken by government as a threat to state security and social stability. Current regulation is based on the early 2000s social consensus between the society and the state, when the majority of workers were tolerating the low level of industrial and political democracy in exchange for the constant growth of economy and their living standards.

However, this consensus is not operating smoothly since the interruption of economic and income growth. There is a clear trend of rise of labour protests with the majority of them happening outside the scope of legal framework. Essential services are not the exception in this trend. More than that, taking into account that chances of performing the strike legally for quite a significant group of employees are close to zero, they don't even try to recourse to the official collective labour dispute resolution procedure.

The essential services strikes are the part of a bigger problem for Russia: the restrictive attitude towards the strikes in general. Therefore, the issue of essentiality of strikes is discussed usually within the framework of restriction of strikes as such, as one of many other mechanisms of such restriction.

The current regulation of strikes is very unbalanced and gives quite a good protection for employers' and consumers' interest leaving almost no space for the lawful protection of the workers' rights.

Whether or not this regulation will change in the near future, the answer to this question greatly depends on the political future of the country, which is quite difficult to predict.

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PROMOTING PUBLIC PARTICIPATION IN THE ENVIRONMENTAL IMPACT ASSESSMENT PROCESS IN VIETNAM: FOUNDATIONS FOR EFFECTIVE MANAGEMENT OF FOREIGN INVESTMENT-ENVIRONMENTAL DISPUTES

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Abstract

A major challenge faced by a country which is encouraging high levels of foreign direct investment, is to do it in a way which encourages that investment, without harming the society and culture within which it seeks investment. Environmental protection is a key area — and the role of the public in Environmental Impact Assessments within the context of the legal and societal challenges is the theme of this article.

Keywords

Environmental impact assessment, Vietnam law, environmental disputes

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CONTENTS

1. INTRODUCTION

The last two decades have been an extraordinary period for Vietnam. The country has undergone a dramatic economic development from centrally planned economy to a "socialist-oriented market economy"[4] under the umbrella of the Doi Moi (Renovation) Policy. Attracting foreign direct investment ("FDI") has been a key part of Vietnam's external economic affairs since 1990s. The Government of Vietnam has made tremendous efforts to develop the business and investment climate, and by recognising that the foreign direct investment (FDI) sector is an integral part of the economy — essential to restructuring the economy and raising national competitiveness.[5]

[4] Pursuant to the Political Report of the Vietnamese Communist Party Central Committee at Party Congress XII, Vietnam's "socialist-oriented market economy" is an economy operating fully and synchronously according to the rules of a market economy while ensuring the socialist orientation suitable to each period of national development. It is a modern and internationally integrated market economy which is administered by a law-ruled socialist state and led by the Communist Party of Vietnam toward the goal of a rich people and a developed, democratic, equal and civilized country. The term is first used in the Constitution 1992 to characterize the new model of economic structure in the era of Doi Moi.

[5] World Bank, *Vietnam Development Report 2006 — Business*, http://siteresources.worldbank.org/INTVIETNAM/Resources/vdr_2006_english.pdf (last

The FDI inflows have seen a steady and strong increase after Vietnam's successful accession to the World Trade Organisation ("WTO"). The period between 2010 and 2015 showed the establishment of Vietnam as a major manufacturing hub in the region, with the large majority of FDI flowing into the manufacturing and processing sector.[6] According to Vietnam's Chambers of Industry and Trade, the country attracted USD 300 billion in 2016. The FDI sector accounts for approximately 70 % of the Vietnam export turnover, equivalent to 22 % GDP. The FDI projects have played a very important role, not only in providing investment capital but also in stimulating export activities, as well as introducing new labour and management skills, transferring technologies and generating job opportunities in Vietnam.

However, FDI also contributes to various environmental problems and challenges to Vietnam. According to the survey provided in the "Mitigation of Environmental Impacts Related to FDI in Vietnam" workshop held by the Central Institute for Economic Management ("CIEM") and the EU-MUTRAP Project in June 2016, nearly 67 percent of FDI enterprises operating in Vietnam are export manufacturing companies with low value-added products, backward energy-consuming technologies and high emissions to the environment.[7]

While data concerning the number of environment disputes is not officially collected or widely published in Vietnam, it is evidential that the most serious environmental disputes related to FDI related manufacturing activities during period 2008–2016, such as the Vedan Vietnam Enterprise Corporation Limited which committed pollution acts in Thi Vai River in 2008 and Formosa Steel's toxic waste water allegedly causing massive fish death in Ha Tinh province in April 2016.

Clearly, Vietnam still lacks an efficient environmental regulatory program and/or the enforcement capability to ensure adequate protection of environment. However, postponing the FDI activities until environmental controls are in place is not an option for Vietnam

visited: Oct 15, 2017).

[6] DEDC, *Vietnam Economic Overview & Trade Analysis,* http://www.dedc.gov.ae/StudiesAndResearchDocument/MTR002022016VIETNAM.pdf (last visited Feb. 10, 2017).

[7] Central Institute of Economic Management, Proceedings of the Workshop on the Mitigation of Environmental Impacts Related to FDI in Vietnam (Jun. 15, 2016).

as it is the important element for economic development and industrialisation. While creation and implementation of competent environmental regulatory programmes would take years and delay desperately needed revenue, the need remains. One of the few realistic approaches to strengthen the environmental management of FDI is to promote the participation of the public in the process of environmental risk assessment and make foreign investors undertake to commit environmental protection obligations. Such approaches may simplify the environmental management as well as enforcement process.

This study will focus on the environmental management at FDI projects in Vietnam via public participation mechanisms and investors self-undertakings as regards corporate social responsibility. It starts by examining the concept of public participation in environmental impact assessment and relevant regulations under international environmental law framework. It then gives an overview of Vietnam policy on foreign investment and environmental management. The authors then critically analyse the practice of environmental risk assessment mechanism of Vietnam in Formosa case, one of most recent landmark foreign investment-environmental disputes, to identify the loopholes in the system and thus indicate possible solutions for the problems.

2. PUBLIC PARTICIPATION IN ENVIRONMENTAL IMPACT ASSEMENT: THEORY AND INTERNATIONAL LEGAL FRAMEWORK

2.1. Role of public participation in strengthening national EIA system

Public involvement is considered by many as a significant instrument of environmental management as it helps to improve the quality of environmental decision-making by providing inputs from a wide scope of participants, ranging from experts to individuals who can provide useful information on the environmental matters.[8] Some even consider public participation as a means of countering corruption within

[8] Maria Lee and Carolyn Abbot, "The Usual Suspects? Public Participation Under the Aarhus Convention", 66 The Modern Law Review 1, (2003), at 82.

regulatory agencies, which ultimately would improve the outcomes of the environmental decision-making process.[9]

Public participation has also drawn the attention of environmental experts because of the historically fraught relationship between democracy and "green" politics.[10] Dobson has stated that the linking of green thought with authoritarianism should be treated with caution as there is an obvious inconsistence between the "acceptable ends" which authoritarianism can offer and the value pluralism normally associated with representative democracy.[11] Indeed, some "participative" and "deliberative" alternatives or supplements to representative democracy were proposed which have become significant in balancing the relationship between democracy and green thought.[12]

In the area of environmental protection, Environmental Impact Assessment (EIA), being the process of evaluating the potential environmental impacts of a proposed action, is considered as tool that can be used to safeguard the environment in any development. It would inform community on the likely consequences of a proposed project action in order to avoid or mitigate environmental degradation — prior to the development taking place. Based on the EIA, the competent authorities will make decisions whether to move forward with the investment project and what mitigating measures need to be adopted in relation to the project.[13] EIA processes help the government to prevent, mitigate, and control potential objections to implementing any investment project.

Evidentially, in developing countries like Vietnam, having regulations on EIA in the legal system itself does not guarantee

[9] Ian Ayres and John Braithwaite, *Responsive Regulation,* (Oxford University Press, 1992), chap 3

[10] Maria Lee and Carolyn Abbot, *supra note 5*, at 83.

[11] Andrew Dobson, *Green Political Thought,* (Routledge, 2000), 114–124; *See also* Brian Doherty and Marius de Geus (eds), *Democracy and Green Political Thought — Sustainability, Rights and Citizenship,* (Routledge, 1996), at 56–62.

[12] Brian Doherty and Marius de Geus, *supra note* 8; see also John Dryzek, *The Politics of the Earth*, (Oxford University Press, 1997), at 200–201.

[13] Jennifer Li, "Environmental Impact Assessment in Developing Countries: An Opportunity for Greater Environmental Security?" USAID Working Paper No. 4 (2008), at 1.

an effective implementation of this environmental management instrument. There are, however, various reasons that the competent authorities fail to conduct the assessment appropriately, such as pressure from other government agencies and/or foreign investors, lack of resources, shortage of knowledge and expertise. The above mentioned reasoning have been frequently used by government officials in charge in Vietnam to explain their misconducts in cases of environmental disaster.[14] Hence, if the EIA is conducted half-heartedly its role of prevention of environmental disaster would be diminished and circumscribed. It is therefore, argued that the assessment mechanisms which allow local people (those who are directly affected by the project), academics and representatives of civil society to participate and express their views regarding the proposal and its environmental and social impacts should be fully embraced.[15]

The public has various rights: These include, the right to access to information, the right to contribute to information and the right to challenge decisions. Public participation is an active and constructive exchange of information, meanings, and opinions. Therefore, government authorities are recommended to communicate with the public as early as possible, to communicate with as many people as possible and to communicate through as many means as possible. The public has a wide role to play in any EIA process, for example:

— Provide data and information that is essential for the assessment of impacts on the physical and social environment;

— Reduce conflicts through the early identification of contentious issues;

[14] Nguyen Hoai, "*Environmental Impact Assessment Was Sketchy, What Did The Approver Say?*" (Đánh giá tác động môi trường Formosa sơ sài, người phê duyệt nói gì?), Tien Phong Newspaper, online issue 20/7/2016 [https://www.tienphong.vn/xa-hoi/danh-gia-tac-dong-moi-truong-formosa-so-sai-nguoi-phe-duyet-noi-gi-1029391.tpo] (last visited 02/01/2018); see also Ly Lam, *"Vedan case from the expert's views: Responsibility of the enterprise and society"* [Vụ Vedan dưới góc nhìn của chuyên gia: Trách nhiệm của doanh nghiệp và cả xã hội", Tuoi Tre Online, 30/09/2008 [https:tuoitre.vn/vu-vedan-duoi-goc-nhin-chuyen-gia-trach-nhiem-cua-doanh-nghiep-va-ca-xa-hoi-281000.htm [last visited: 20/11/2017].

[15] Yvonne Rydin and Mark Pennington, "*Public Participation and Local Environmental Planning: The collective action problem and the potential of social capital*", The International Journal of Justice and Sustainability 5(2), (2005).

— Help to identify local citizens and groups with special expertise;
— Identify local and regional issues;
— Provide historical perspective to current environmental conditions;
— Help to generate field data;
— Help to define the scope of work and schedule for the overall assessment process;
— Help to define criteria for evaluating the identified impacts;
— Identify and evaluate potential mitigation measures; and
— Increase public confidence in the development project.

The public nature of the EIA process means that interested groups have an opportunity to raise concerns and see them addressed. It also means that those with special knowledge about the existing environment or the potential impacts can come forward and contribute their information for expert analyses. Public input can bring up environmental issues for review and help prioritise environmental impacts and mitigation measures.[16]

The levels and forms of public involvement may include:

(a) Informing — one way flow of information from the proponent to the public;

(b) Consulting — two way flow of information between the proponent and the public with opportunities for the public to express views on the proposal;

(c) Participating — interactive exchange between the proponent and the public encompassing shared analysis and agenda setting and the development of understood and agreed positions on the proposal and its impacts;

(d) Negotiating — face to face discussion between the proponent and key stakeholders to build consensus and reach a mutually acceptable resolution of issues, for example on a package of impact mitigation and compensation measures.

[16] Mohamed Ismail Ibrahim, "Le rôle de la participation citoyenne dans l'Evaluation d'Impact Environnemental: une étude de cas en Egypte", Conference Paper, the International Conference on Impact of large coastal Mediterranean cities on marine ecosystems, UNEP/MAP MED POL, Alexandria, Egypt, 10-12/2/2009.

In short, public participation in EIA plays a dual role of narrowing the gap between governments and its citizens by the redistribution of powers in decision-making processes, and achieving different perspectives in the decision-making process where people are empowered and have a sense of ownership on the decisions made.[17]

2.2. EIA in the context of international environmental law

The international community started promoting the concept of public participation in EIA from the early 1970s. The Stockholm Declaration in 1972 for the first time recognised the importance of raising public concerns on environmental matters.[18] The World Charter for Nature, in 1982, provided that all individuals, under their national legislation, shall be given the opportunity to participate in environmental decision making.[19] However, it was not until the 1990s that the debate on this concept became significant in the field of international environmental law. One of the most important legal documents providing a notion of public participation is the Rio Declaration 1992 on Environment and Development, which under its Principle 10, has put forward a mandatory language for participatory rights of a comprehensive kind,[20] as more than 150 nations have agreed that:

"Environmental issues are best handled with the ***participation of all concerned citizens***, at the relevant level. ***At the national level***, each individual shall have appropriate access to information concerning

[17] Rick Lawrence and Debbie Deagen, *"*Choosing Public Participation Methods for Natural Resources: A Context – specific Guide*"*, 18 Society and Natural Resources Journal, (2005) 857–872; *see also* Neil Lazarow, "Demystifying Public Participation: A Case for Developing Environmental Indicators for Public Participation*"*, Working Paper, Griffith University Press, 2002); see also Peter McLaverty (ed), *Public Participation in Innovations in Community Governance,* (Ashgate, 2002), at 185–197.

[18] Stockholm Declaration, Principle 19.

[19] World Charter for Nature, Principle 23. See also principle 16: "All planning shall include, among its essential elements, the formulation of strategies for the conservation of nature, the establishment of inventories of ecosystems and assessments of the effects on nature of proposed policies and activities; all of these elements *shall be disclosed to the public by appropriate means in time to permit effective consultation and participation*".

[20] Patricia Birnie and Alan Boyle, and Catherine Redgwell, *International Law and the Environment,* (Oxford University Press, 2009), at 261.

the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. ***States shall facilitate and encourage public awareness and participation by making information widely available.*** Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."[21]

In addition, the Rio Declaration also indicates the need to acknowledge and encourage full participation in environmental issues of politically disadvantaged groups such as women,[22] youth,[23] indigenous people and local communities.[24] Thus, as described by Porras, this principle of public participation is considered as the reflection of the "current consensus of values and priorities in environment and development", and despite the non-binding in nature of the Rio Declaration, Principle 10 is regarded as containing a strongly persuasive normative content.[25] This argument is further supported by the inclusion of Principle 10 in various international treaties.[26] Importantly it is fully reflected in important multinational environmental treaties sponsored by the UN, including the World Charter for Nature (Principle 23), the 1992 Bio Diversity Convention (Article 14), and the 1994 United Nation Framework on Convention on Climate Change (Article 4 and 12).

In 1998, the content of Principle 10 was fully imported into the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (also known as the Aarhus Convention). The Convention is widely recognised as the most significant and comprehensive international legal

[21] Rio Declaration, Principle 10.

[22] Rio Declaration, Principle 20.

[23] Rio Declaration, Principle 21.

[24] Rio Declaration, Principle 22.

[25] Ileana Porras, "The Rio Declaration: A New Basis for International Cooperation" in Philippe Sands (ed.), *Greening International Law* (Earthscan Publications, 1993), at 20, 21.

[26] 1992 UN Convention on Biological Diversity; 1992 UN Framework Convention on Climate Change; 1994 UN Convention on Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification; 1992 Bio Diversity Convention; 1992 United Nation Framework on Convention on Climate Change.

instrument regarding the concept of public participation [in the area of environmental protection].[27] Thus, it may have the "potential to serve as a global framework for strengthening citizens' environmental rights and the application of principle 10 of the Rio Declaration."[28]

The establishment of the Aarhus Convention itself illustrates the concerns of the international community in tackling the issue which was normally considered as a part of a state's *domaine réservé,* public participation and transparency.[29] The Convention, as noted by Ebbesson, provides a definition of the "legal position" of private persons — namely that their rights, duties, and competences are to be provided for in national law.[30] Hence, these international norms are not only formally addressed to states but also ultimately directed at individuals through the documents and proceses of states.[31] The State parties to the Aarhus Convention are required to ensure that the public has access to environmental information held by public authorities.[32] Accordingly, when interested groups requested environmental information relating to human health and safety, and the state of environment, the public authority must make such information available as soon as possible to the public, unless under certain list of grounds (such as if the information may affect the confidentiality of the public authorities).[33]

Furthermore, the Aarhus Convention requires the state to allow the public to participate in decision-making procedures in specific activities, such as environmental impact assessment (EIA), as they may dramatically affect the environment. Accordingly, the state parties are required to inform the public about the decision-making procedure, allow members of the public to comment during the EIA and any

[27] Patricia Birnie and Alan Boyle, *supra note 17*, at 262.

[28] Kofi Annan, "Foreword" in Stephen Stec & Susan Casey-Lefkowitz, "The Aarhus Convention: An Implementation Guide", (United Nations, 2000).

[29] Jonas Ebbeson, "The Notion of Public Participation in International Law", (1997) 8 Yearbook of International Environmental Law 1 (1997), at 51, 62–81.

[30] Ibid. See also Jonas Ebbesson, "Compatibility of International and National Environmental Law" (Kluwer Law International, 1996), 44–76.

[31] Ibid. See also Jonkheer van Panhuys, "Relations and Interactions between International and National Scenes of Law", 112 Recueil De Cours 2 (1964).

[32] Aarhus Convention, Article 4.

[33] Aarhus Convention, Article 4(3) and Article 4(4).

such comments shall be taken into account if in decisions which are made.[34] The public participation in EIA within its national legal system as strengthe-ning the EIA procedure with an increasing role of public participation is seen as significant means for promoting environmental sustainability.

3. VIETNAM'S POLICY TOWARD FOREIGN DIRECT INVESTMENT AND ENVIRONMENTAL PROTECTION

3.1. Overview of the legal framework FDI and environmental protection policy

Since the implementation of the Doi Moi Policy, the Vietnamese Government has emphasised the significance of foreign investments as an important source for modernisation of the economy and sustainable economic growth. To attract FDI, the government introduced the Foreign Investment Law ("FIL") in 1987, which was regarded as the cornerstone of the "opened door" policy for foreign capital in Vietnam.

The Constitution 1992 has recognised, for the first time, the development of a market economy with socialist orientation, the concept of private property and the right of individuals to conduct business activities. It expressly acknowledges foreign-owned capital as a legitimate sector of the economy, encouraging foreign investment and guaranteeing that assets of foreign investors will not be expropriated.

The National Assembly has further modified the FIL in 1996 and 2000 to improve the conditions for FDI, including the acknowledgment of the foreign investor's rights to open branches in Vietnam and assign interests in the foreign-owned enterprise to any parties. In 2005, the Law on Investment ("LOI 2005")[35] and Law on Enterprises[36] were passed by the National Assembly to establish a common regime and unified ground for domestic and foreign investment in Vietnam, which makes it easier for foreign investors to invest and carry out business in the country. This legislative development on investment was influenced by

[34] Aarhus Convention, Article 6, para 2–9.

[35] Law 59/2005/QH11 on Investment, adopted by the National Assembly on 29/11/2005.

[36] Law 60/2005/QH11 on Investment, adopted by the National Assembly on 29/11/2005.

the process of negotiation to access the WTO.[37] The law and regulations on investment shall be harmonised with the TRIMs Agreement and other relevant agreements of WTO. In 2014, the National Assembly adopted a new Law on Investment ("LOI 2014"),[38] which replaced the LOI 2005, which deems to further update and strengthen the investment protection regime in Vietnam.

Environmental protection in Vietnam, like most developing countries, was not the main focus of the policy makers. The government started to pay attention on environmental issues only when faced with the problems caused by some FDI industrial projects in 1990s. The EIA was first formulated by the Law on Environmental Protection ("LOEP") in 1993. Accordingly, LOEP provided that owner(s) of foreign invested projects or joint ventures with foreign investment capital must prepare an environmental impact report that assesses its impact on the environment, and stipulates appropriate preventive measures for examination by the state management agency in charge of environmental protection.[39] The results of appraisal of EIA reports constitutes one of the principal bases for [investment licensing] authorities to approve the project.[40] However, procedures for public participation as well as the requirement for the publicisation and transparency of environmental information has yet to be found in the law. Yet, as highlighted by Doberstein, this very first national legal documents of Vietnam relating to environmental protection has set the yardstick for EIA generally in Vietnam as it provided the requirements for EIA.[41]

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[37] WTO, *WTO Accession Report of the Socialist Republic Vietnam*, Working Party, WT/ACC/VNM/48 (15/11/2006). *The Vietnam's commitments under the WTO influence the legal framework for foreign direct investment, regarding various issues such as the limitation on foreign ownership, Corporate voting rights, Trading rights, Distinction of foreign invested company and domestic companies.*

[38] Law 55/2014/QH13 on Environmental Protection, adopted by the National Assembly on 23/06/2014.

[39] LOEP 1993, Article 18.

[40] LOEP 1993, Article 18.

[41] Doberstein Brent, "Environmental Capacity Building in a Transitional Economy: The Emergence of EIA Capacity in Vietnam", Impact Assessment and Project Appraisal, Vol. 21, issue 1, (2003), 25–42.

The status of public participation in EIA has been improved under the new LOEP adopted in in 2005.[42] The LEOP 2005 expressly regulated the public participation in EIA by providing participatory rights for citizens through various methods such as public meetings, announcements or interviews on environmental matters if required by the public.[43] This legislation has also shown a substantial upgrade of the requirements of EIA procedures as it emphasises that comments from the People's Committees of the Commune and local residents must be included in the EIA report.[44] In addition, the body responsible for reviewing the EIA report must consider any relevant requests or recommendations from organisations or individuals before making its decision.[45] The LOEP 2014 has further strengthened the public participation concept in the EIA system by stating that the representatives of local communities shall have right to participate in accessing the environmental protection information of the producer and conduct measures to safeguard the rights and interests of local community under the laws.[46]

Unfortunately, this provision on public participation is still rather general and vague compared to the Aarhus Convention, which provides much more detailed guidelines regarding the "minimum" standard for the public to participate in environmental matters. It is assumed that this is because provision of LOEP on public participation in EIA was drafted as the result of external pressure by international conventions, international environmental organizations, the international donor community, and the international science community rather by internal driven forces. Under such a top-down process, the laws have been adopted more as a standardised, bureaucratised, procedural formality than as a real solution for intertwined environmental and socio-economic problems.

Looking into practice, the implementation of EIA in Vietnam during the last two decades is generally still limited. Often the actual examination

[42] Law 52/2005/QH11 on Environmental Protection, adopted by the National Assembly on 29/11/2005.

[43] LOEP 2005, Article 105.

[44] 2005 Law, Article 20.

[45] LOEP 2005, Article 21.

[46] LOEP 2014, Article 146.

commences only when the major project decisions (including site, design, and construction preparation) already have been made, thereby rendering the EIA a mere formality. EIAs have been viewed by the government authorities as an exercise in rationalising predetermined outcomes, rather than a means for providing independent and rigorous analysis upon which sound decisions are based. Many observers have attributed these problems to a lack of political will reflected in asymmetries in institutional power.[47] The authority assessing the EIAs frequently is under or politically inferior to and/or subject to financial pressure from other government institutions or private proponents of the project. Furthermore, EIAs are often regarded by key decision makers at various levels of government as a disincentive to potential investors. A general preoccupation with economic performance in the locality frequently leads to trading-off short-term economic benefits for longer-term environmental problems. This underestimation of the role and impact of EIA as a consequence leads to various environmental issues by foreign invested companies.

Overall, it is observed that during the last decades, Vietnam has shown efforts to develop a comprehensive and updated national legal framework on FDI and environmental protection. The relevant laws and regulations are designed to support and facilitate the investment, but also concern about the environmental protection. In the area of environmental protection, the flexibility and low standard of environmental protection of the LOEP seems to help the foreign investors to save the business performance expenses. It should be noted in most cases the investors want to optimise production costs by extending the lifecycle of the technology which has been banned in MNC's home country while it is acceptable in such developing countries thirsting for investment such as Vietnam. Many believe that loosely-designed legal regulations on environment assessment and inefficient environmental enforcement system in Vietnam is one of decisive factors

[47] Bruch Carl et al., "Assessing the assessments: Improving methodologies for impact assessment in transboundary watercourses", International Journal of Water Resources Development, Vol. 23, Issue 3, (2007), 391–410; Tan Alan Khee-Jin, "Environmental laws and institutions in Southeast Asia: A review of recent developments", Singapore Yearbook of International Law, Issue 8, (2004), pp. 177–92.

attracting foreign investment.[48] According to Dinh Duc Truong, nearly 20 % of the FDI corporates reporting that they can save up to 10 % environment protection costs in comparison to that of their home countries, 68 % admit that they can save from 10–50 % and 12 % of them believe that the costs can be reduced to more than 50 %.[49] Moreover, with low required environment protection costs, taxes and fees, 68 % of FDI companies expect to save 10–50 % of the costs while operating in Vietnam, which is an ideal vision the investors want to obtain once their investment projects are launched.[50] With such new regulations, Vietnam tries to define itself as an "apple of the investor's eyes".

However, such FDI-favour-oriented approach in legal framework also produces the side-effect relating to the compliance of foreign investors to their environment protection duties. It is reported that more than 51 % of the investors participating in the research by CIEM in 2015 admited their projects do not fully observe the environment protection requirements and the operation of the factory may cause negative impacts to the environment.[51] The reports of Environmental Inspectorate Department of the Ministry of Natural Resource and Environment ("MONRE") showed that from 2010 to 2015, there were 89 cases involving the charging of monetary fines to foreign investor companies for violating procedural and environment standard rules. It is also observed that administrative fines are relatively quite low and not substantial enough to urge strict compliance by the MNCs.[52]

[48] Dinh Duc Truong, "Quản lý môi trươ`ng tại các doanh nghiệ^p đâ`u tư nươ´c ngoài (FDI) tại Việ^t Nam" *[Managing environment issues at the foreign invested enterprises in Vietnam],* 31 VNU Journal of Science, 46 (2015).

[49] *Ibid.* at 48.

[50] *Ibid.* at 48

[51] Central Institute of Economic Management, *supra* note 9.

[52] Currently the administrative fine would ranged from 5,000,000 VND (approximately 240 USD) to 180,000,000 VND (appromiximately 8,570 USD) only. *See* Decree 179/2013/NĐ-CP of the Government on the Penalties for Administrative Violations Against Regulations on Environmental Protection, dated 14 November 2013 (Decree 179), sec. 2.

Meanwhile in Singapore, according to the Environmental Public Health Act 1987 latest amended by Act 16 of 2016, the offender shall be responsible for a penalty up to 20,000 SGD (approximately 15,300 USD), yet taken into account the additional fine for a continuing offence. In Thailand, pursuant to the 1992 Enhancement and

Such non-compliance and lax regulations are the source of negative environmental impacts and potential environmental disputes. As one of many undesired consequences of such other side of the FDI coin, those who suffer most are the people living in such polluted areas, especially when they are party to environmental disputes when their legal rights and interests are not effectively protected by such poor legal frameworks regarding an environmental dispute resolution mechanism. Therefore, it is extremely crucial that the public, or more particularly the people who are directly suffering from the effect of FDI projects, should be heard by the governments. Hence, their involvement should be promoted in all of the stages of EIA process to balance the scale between FDI and environmental protection.

Another major constraint for public participation in Vietnam to be effective is the access of the civil society groups to environmental governance. While in the Western countries, NGOs have become common critical opponent to major development projects,[53] (which is also reflected in the Aarhus Convention); in Vietnam, the participation of NGOs and civil society groups in the decision-making process in relation to environmental protection is rather limited. The operations of the NGOs, generally, are still restricted due to the fact that the legal framework for formation and operation of NGOs is fragmented and strictly controlled by the state. This limits the efficiency of the NGO in environmental management. Some even consider that the current function of an NGO in the environmental sector is similar to a "state-led civil society" as they often act as the mediator between the government and their citizens but are not fully independent of the state.[54] Hence, it is argued that independent NGOs and other civil society groups may contribute greatly to information collection and dissemination, assessment and the monitoring of environmental impacts of projects

Conservation of National Environmental Quality Act, B.E. 2535, the penalty for failure to meet environmental standards is to one-year imprisonment and a fine of up to 100,000 bahts (around 3,500 USD).

[53] Benedict Kerkvliet, "Authorities and the peoples: an analysis of state-society relations in Vietnam" in H.V. Luong, (eds), *Post-war Vietnam: dynamics of a transforming society* (Rowan and Littlefield, 2003), 27–53.

[54] Lux and Straussman, "Searching for balance: Vietnamese NGOs operating in a state-led civil society" Public Administration and Development 24, (2004), at 173–181.

and the provide advocacy for environmental justice. In fact, the roles of NGOs and civil society groups in official intergovernmental processes on the environment are acknowledged in Agenda 21, the comprehensive sustainable development blueprint adopted at the 1992 Rio Earth Summit.

3.2. A critical analysis on the EIA system from Formosa Case

The drawbacks of EIA in Vietnam can be illustrated by a typical infamous pollution dispute at Formosa Ha Tinh steel plant in 2016 which seriously affected the marine life of four sea coastal provinces of Ha Tinh, Quang Binh, Quang Tri and Thua Thien–Hue in central Vietnam. This case reflects the present issue of practical application of public participation in EIA in big but environmental sensitive FDI project.

Formosa Ha Tinh Steel plant ("Formosa") was developed in Vung Ang Economic Zone of Ha Tinh Province by the Hung Nghiep Formosa Ha Tinh Steel Company under the backing of the Formosa Plastics Group of Taiwan. The steel plant of USD 22 billion is regarded as one of biggest FDI projects in Vietnam to date, recruiting about 10,000 workers in phase 1.[55] The project enjoyed many investment incentives from the Government, including low import tariffs on machines, equipment, materials as well as taxation and land lease.[56]

In 2016, the Formosa discharged toxic industrial waste illegally into the ocean through drainage pipes.[57] Fish carcasses were reported to have washed up on the beaches of Ha Tinh province from at least 6 April 2016.[58] Later, a large number of dead fish were found on the coast of Ha Tinh as well as three other provinces Quang Binh, Quang Tri

[55] *Formosa Steel lifts investment to D22b in cast iron refinery,* http://vietnamnews.vn/Economy/223894/formosa-steel-lifts-investment-to-22b-in-cast-iron-refinery.html#QzwzKqGZkFbFIZ9F.97(last visited Oct 10, 2017).

[56] *Ministry opposes steel region plans,* http://vietnamnews.vn/economy/256780/ministry-opposes-steel-region-plans.html#J7VZCjiXrypDYUtF.99 (last visited Oct 10, 2017).

[57] *Vietnam protest over mystery fish deaths,* http://www.bbc.com/news/world-asia-36181575 (last visited Oct 10, 2017).

[58] *Vietnam, grappling with mass fish deaths, clamps down on seafood sales,* Of the FDI COINS orscoinsof a "le'tion in Ha Tinh province: Need to accelerate]ipal Tasks in the second half of 2015 and the Pr http://www.reuters.com/article/us-vietnam-

and Thua Thien–Hue until 18 April 2016.[59] The Prime Minister stated that the project of Formosa is the biggest FDI project ever in Vietnam but has also caused the most severe pollution incident so far.[60]

The authorities estimated that seafood catches have fallen as a result — 1,600 tons per month including 140 tons of fish, 67 tons of oysters and 16 tons of shrimp dying as a result of the disaster. The toxic pollution caused by Formosa has hit at least 200,000 people by disrupting people's lives and destroying their livelihoods.[61] The massive marine life destruction led to a number of protests by Vietnamese citizens in some cities on 1 May 2016, calling for a cleaner environment and demanding transparency in the investigation process.

On 30 June 2016, after two months facing the ceaseless wave of anger from the locals and pressure from the media, Formosa reached the settlement agreement with the Government in which Formosa undertook to pay VND11.5 trillion (around USD 500 million) in compensation to treat the pollution and mitigate the consequences.[62] Many affected peoples, however, were still unhappy with the result of the settlement agreement, as they wanted Formosa to pay more compensation, do a better environmental cleanup and close the steel plant to avoid potential similar environmental disasters in the future. Many accused the government of ineffective negotiation.

formosa-plastics-environment/vietnam-grappling-with-mass-fish-deaths-clamps-down-on-seafood-sales-idUSKCN0XP0QD (last visited Oct 10, 2017).

[59] Diep Pham and Mai Ngoc Chau, "Beaches of Dead Fish Test New Vietnam Government's Response", Bloomberg [https://www.bloomberg.com/news/articles/2016-05-01/beaches-full-of-dead-fish-test-new-vietnam-government-s-response] (last visited Oct 10, 2017).

[60] Huong Diu, "Prime Minister Nguyen Xuan Phuc: To close the steel plant if Formosa violates again" *[Thủ tướng Nguyễn Xuân Phúc: Nếu Formosa vi phạm trở lại sẽ đóng cửa nhà máy],* [http://www.baomoi.com/thu-tuong-nguyen-xuan-phuc-neu-formosa-vi-pham-tro-lai-se-dong-cua-nha-may/c/22834093.epi] (last visited Oct 10, 2017).

[61] MONRE, Report on the environmental issues at FDI projects period 2015–2017 (Báo các đánh giá vấn đề môi trường tại các dự án có vốn đầu tư nước ngoài), Hanoi, 01/2017.

[62] Ngoc Lan, "Formosa agrees to compensate US $ 500 million for mass fish deaths", Saigon Times online, 1/7/2016 [http://english.thesaigontimes.vn/48314/Formosa-agrees-to-compensate-US$500-million-for-mass-fish-deaths.html] (last visited Oct 10, 2017).

However, it should be noted that the government is faced with a few dilemmas while representing the interests of victims, namely how to mitigate the state responsibilities of investment protection (as the government had approved the EIA for the project and the investors had invested into the project) against the Formosa actions and inactions leading to environmental harm. Improper actions of the government may lead to serious legal consequences as foreign investors are well protected under international investment law.[63] The settlement agreement with Formosa, therefore, could be seen as the most appropriate solutions that could be accepted by investors, not leading to termination of the project.

The Formosa case has shown a typical problem of the current investment regime in Vietnam. The FDI project of Formosa is expected to be a large dynamic project that would motivate other industrial projects and sectors, thus contributing to the rapid economic restructuring, helping Ha Tinh (one of the poorest provinces of Vietnam) become industrialised province in the near future. However, after nearly eight years of operation, Formosa has caused serious environmental pollution, affecting the development of the economy and creating political instability only. One of the main reasons for the Formosa case was that the EIA was not effectively implemented. A numbers of loopholes could be found in the EIA proceeding of Formosa project.

Firstly, there is lack of independent transparency in the appraisal of environmental impact assessment reports of the Formosa project. According to the official record, the EIA report of the Formosa project was prepared by an assessment team comprising of three members of the investor, three members from the Hanoi University of Technology, and the rest three members from the Centre for Consultancy, Training and Transfers Environmental Technology under the Vietnam Environmental Administration Department (VEA). Meanwhile, the appraisal body approving the EIA report was the Department of Environmental Impact Assessment under the VEA. It seems clear that such assessment procedure could hardly be objective and independent.

[63] Tran Viet Dung, "Expropriation of foreign investors assets upon environmental violation" [*Truất hữu tài sản của nhà đầu tư nước ngoài trong trường hợp làm ô nhiễm môi trường*], Journal of Legal Science Vol. 99, Issue 5 (2016) at 12–19.

In fact, the EIA report of the Formosa project is some 285 pages thick, including 9 chapters, designed in accordance with the guidelines of EIA report of Circular 08/2006/TT-BTNMT of the MONRE.[64] However, most of the content of the report focused on describing the socio-economic impact of the project, and the sections relating to analysis on the environmental impacts of the project and forecast on the risk of environmental incidents were less than comprehensive. The assessment of environmental impact of wastewater in the steel plant operation is less than 3 pages of which about 1.5 pages is tables and mainly lists the category of waste water of the plant but provides no information on how such wastewater would affect the environment. The session on prevention, response to environmental incidents is extremely general and vague.[65] Despite the above mentioned, the assessment team still supported the EIA report without raising the question or clarification for the Formosa.

When the Formosa marine pollution disaster happened Mr. Nguyen Khac Kinh, former Head of Department of Environmental Impact Assessment, who had approved the Formosa's EIA report, explained that he did not assess the report upon signing as the examination of the EIA report had already been conducted by assessment team comprising of people who have deep expertise on the subject matter.[66] This arguably irresponsible statement of a high ranking environmental officer reflects the current situation of environmental impact assessment in Vietnam, namely the state environmental authorities can easily approve the EIA report of large scale FDI industrial project as they consider it only as matter of "formality" to legalise the investment registration procedure (the investment project had been provisionally approved by the government). The environmental authorities are "pressured" not to prevent the FDI project that could create jobs, revenue and more

[64] Circular 08/2006/TT-BTNMT of MONRE guiding the strategic environment assessment, environmental impact assessment and environmental protection.

[65] Nguyen Hoai, "Environmental Impact Assessment Was Sketchy, What Did The Approver Say?" (Đánh giá tác động môi trường Formosa sơ sài, người phê duyệt nói gì?), Tien Phong Newspaper, online issue 20/7/2016 [https://www.tienphong.vn/xa-hoi/danh-gia-tac-dong-moi-truong-formosa-so-sai-nguoi-phe-duyet-noi-gi-1029391.tpo] (last visited 02/01/2018).

[66] Ibid.

important the industrialization process in the locality. Thus, to ensure the effective EIA system, it is important to establish truly independent and transparent mechanisms for assessment.

Secondly, the consultation with local community on the EIA report was conducted with little regard for detail or process. Accordingly, the EIA report was sent to the People's Committee and Fatherland Front Committee of Thanh Lac Commune, and then written comments were collected. However, it may be surmised that members of the People's Committee and Fatherland Front Committee of the communes have little or no technical knowledge and adequate understanding about the environmental impact of the subject matter. Therefore, they responded positively toward EIA report, expressing their support for the project of Formosa and only noted that investor must apply necessary measure to reduce the adverse environmental impact.

According to Table 8.1 of the EIA report, a community consultation session was conducted during the EIA for the purpose of conducting a survey with representatives of some 50 households in the locality. However, none of 298 households, who were forced to relocate due to Formosa project, were involved at all in that EIA survey. Furthermore, according to an independent investigation of Thanh Nien News Paper, thousands of households in the locality [of the Formosa steel plant] did not take part in the EIA consultation. Tran Dinh Thanh, Secretary of the Party Committee of Ky Phuoc Commune, confirmed that when Formosa started the project, almost 1,000 hectares of all types of land were acquired, with 1,500 households in the affected area.[67] A proper public consultation with local community was totally neglected in the Formosa's EIA procedure.

Moreover, it should be noted that public participation in the EIA should not just be limited to consultation with the local community. Public consultation in the form of open forums must be conducted to secure opinions from affected organisations, experts and the wide public. Public inputs from different sources must be appended to a project's final EIA report when submitted for examination and approval.

[67] Hue Minh, "Formosa has 'overtaken' peoples" [Formosa "qua mặt" người dân], Thanh Niên Newspaper, 26/04/2016 [https://thanhnien.vn/viet-nam/formosa-qua-mat-nguoi-dan-696022.html] (last visited 18/1/2017).

It is believed that the LOEP and its implementing regulations must further clarify two issues, namely (i) the concept of people being directly affected by the proposed project and (ii) the minimum percentage of affected people participating in EIA consultations. Currently, only people who live in the area affected directly by the project are considered as stakeholders in the environmental impact assessment procedure,[68] while other interested parties, who have interests in the environmental conditions of the area, may not be allowed to take part in the public consultancy of EIA procedure because they do not meet the criteria of "living in the area of the project".

Current laws and regulations exclude the participation of experts, who have knowledge and expertise in the subject matter, from the public consultation on environmental impacts assessment. Meanwhile, people living in the area may not be qualified and able to understand the issue and protect their rights against the development project. Based on the concept of public participation, the scope of people participating in the assessment and consultation shall not be limited by their physical place of residence but rather their interests toward environmental protection in any region of the country.

In May 2016, after the dead fish incident, a group of young people living in Ho Chi Minh City conducted a project named Independent Analysis of Marine Pollution (IAMP) to examine the pollution level in the sea around Ha Tinh province. The project works thanks to a fund made by people who care about the environment. The activists of IAMP collected water samples and sediment samples in the seas in the central of Vietnam, analysed them, and compared them with the National Technical Standards on Marine Environmental Quality. The project has partnered with an independent research group in the country with the aim of analysing a group of benthic organisms (benthic zone, eg foraminifera) to assess the level of pollution.[69] The IAMP demonstrates that people may be interested in environmental issues throughout the

[68] Article 12.4, Decree 18 /2015/ND-CP of the Government on environmental protection planning, strategic environmental assessment, environmental impact assessment and environmental protection plan.

[69] IAMP, Summary of the Assessment Report 2 at Quang Binh Province [http://bit.ly/PTDLKetQuaDot2] (last visited 20/12/2017).

country whilst not being directly affected by environmental pollution in that area. The legal system should provide mechanisms for such citizens of the country to access information and participate in environmental protection, in particular EIA consultations irrespective of whether they are directly affected by the pollution or not. This will create chances for scientists, intellectuals or anyone interested in environment to participate in environmental protection in a more open and effective way. Meaningful participation and consultation in the evaluation of project planning, feasibility study, design and implementation is an important environment safeguards requirement. It can directly reflect the public's perceptions of environmental quality in the project's area of influence.

Thirdly, the time period for the competent authorities to examine the EIA report is rather short to ensure a comprehensive and deep assessment. The commune-level People's Committees of the localities where the projects are implemented and be directly affected by the project have to reply in writing within fifteen (15) working days from the date of receipt of the written project, and does not need a written response in case of approval of the project implementation.[70] This provision accidentally creates psychological hurry and forcing approval for the authorities. It is understandable as Vietnam is calling for foreign investment, and this regulation is aimed at not hindering but rather creating favourable conditions for investors. However, it is believed that the time period of 15 days is not long enough for members of commune-level People's Committee to read, analyse and check the reality of the report of a big and complex project like Formosa. The current regulations put the heavy burden on commune-level People's Committees, while at this level, the necessary conditions are not enough to carry out consultations in terms of time, funding, human and material resources.

Fourthly, there is a serious lack of awareness of environmental protection and the right to access information among the local people. A survey conducted by the VEA in 2010 found that 96 % of the people in the village where the industrial parks are located were blind to

[70] Acticle 12.5.b, Decree No. 18/2015/ND-CP on environmental protection planning, strategic environmental assessment, environmental impact assessment and environmental protection plan.

environmental impact information. The survey also reflects an issue that people have little interest in and understanding of their rights to request and access to environmental information. This leads to a low number of requests to receive environmental information. People are ignoring — or are ignorant of — their own rights to protect the environment. Due to limited legal knowledge, they are not able to know the process of EIA as well as how to approach the state agencies for information. As a result, they do not take an active part in the assessment of environmental impact of projects.

In addition to the above shortcomings, it is assumed that almost everybody would have difficulty reading technical reports, environmental specialties, including many terminologies, units of measurement, and strange and difficult metrics. In the Formosa, case the people in the locality of the Formosa project are generally poor with low education. They barely pay any attention to the environment, thus even if they take part in the survey they would not know the essence of the EIA. It is therefore necessary to further improve people's awareness and knowledge about environmental issues, the impact of environmental pollution on their lives and their rights to environmental protection. To that end, it is assumed that participation of NGOs and other civil society groups (having knowledge and expertise of environment and environmental law) in the EIA is of high importance. They might help to educate local peoples about the impacts of the investment project to the economic and environment in the area, and also consult local peoples with the rights/approaches to protect their legitimate interests.

The Formosa case is an important lesson regarding sustainable development for Vietnam. Attracting foreign investment and creating favourable conditions for foreign businesses to invest in Vietnam is essential to boost the economy of the region in line with the government's development plan. However, the infusion of FDI capital and increased exploration and development have coincided with an increase in environmental consequences. Pollution at Formosa spreading along the coastal areas of Central Vietnam has severely affected the environment, marine life and fisheries. Postponing the FDI project and thus development until environmental controls are in place, however, is not a practical option. Creation and implementation of

competent environmental regulatory programs would take years and delay desperately needed revenue for the province. On top of this, the government must also observe the international commitments in regard to foreign investment protection.[71]

The best solution for Vietnam to avoid a future environmental disaster like Formosa is to strengthen the pre-investment registration process. Beside broadening the scope of stakeholder of the EIA and promote public participation, it is also empirical to tide the foreign investors with liability upon violation of environmental regulation. The responsibility of the foreign investors at the EIA must not only be limited to addressing the concern of public but also undertake to be fully liable for the consequence to environment, including compensating the actual and future damages caused to local community and restoring environment.

It is suggested that for a big scale industrial project, the law should request foreign investors and government to conclude a project agreement to ensure the investment projects serve both economic development and environmental protection objectives. Environmental regulatory and compliance provisions shall be incorporated into such agreement. In this way, if the foreign investors and/or its their project company violate(s) relevant environmental protection regulations, the government has a contract remedy that it can pursue through the local courts, or the international justice system, or arbitration.

The project agreements would hold multi-national companies (MNC) liable for any breach of contract, especially the environmental regulations, and to simplify the enforcement process. The parties can address specific environmental concerns regarding potential liability for existing or future damages and resolve them prior to commencement of the project. Some would argue that requirements for execution of an investment project agreement would prevent foreign investors from investing into Vietnam. However, it should be noted that MNCs may have various motivations when entering such agreement, such as motivation to maintain or secure the market access, or desire to improve production capacity and quality. The serious commitments

[71] Taiwan — Viet Nam BIT (1993), Article 9.

on corporate social responsibility would help the MNC to develop its reputation and attract investors for their business operation. According to some practitioners, environmental contractual partnerships are the solution to environmental consequences of industrialization.[72]

4. CONCLUSION

Attracting foreign investment is of high significance for the industrialisation and economic development of Vietnam. However, the policy makers must also consider the implementation of environmental protection regulation to ensure sustainable development. There is a need to realize that protection of environment and natural resources should equally be taken into account when approving the FDI projects.

Protecting the environment and foreign investment, however, are not mutually exclusive goals. It is of the authors' view that utilising the EIA process efficiently at the investment registration stage could help the government to reduce and mitigate the risks of environmental disaster by FDI projects. Depending how the process is structured, namely who prepares the reports, how the reports are reviewed and approved, and implemented, how information is disseminated and so on — the EIA may create different distributional consequences. The EIA becomes a vital instrument for environmental management only when it is accompanied with transparency and genuine public participation. Without public participation and transparency the EIA may simply become a mere formality with only marginal value for environmental impact control.

In the recent years, the Vietnamese government has started paying more attention to the public participation in EIA. The new Law on Environmental Protection adopted in 2014 shows that public participation is an essential element of the EIA for development projects. Developers are required to do public consultation and summarise local peoples about the impacts of the proposed project. Hence, given the fact that most farmers in Vietnam would have limited understanding

[72] *Madeline Cohen,* "A *New Menu* for the *Hard Rock Cafe: International Mining Ventures* and *Environmental Cooperation* in *Developing Countries", Stanford Environmental Law Journal Vol. 15, Issue130,* (*1996*), 130–147.

of environmental issues as well as ability to evaluate the potential risks of technology used in the industrial project, legal requirements to limit the public consultation to be conducted with people living in the communes only would not be enough efficient. Thus, it is advisable that public consultation to be conducted in the form of open forums to secure opinions, comments from wide group of interested individuals and organisations, e.g. NGOs, environmental experts and local peoples. Furthermore, the LEOP shall regulates that the result of environmental impact studies to be publically available (i.e. published online). It is believed that public inputs from different sources would improve the EIA of the proposed industrial projects. All EIA reports submitted for examination and approval must provide clear explanations for adopting or rejecting public inputs.

It is also advisable that the Vietnamese government considers utilising a combination of public and private legal regimes to improve the environmental management at FDI projects. A practical option here is to promote the compliance of environmental protection regulations by the foreign investors based on contractual obligations. Execution of a project agreement, which specifically assign and detail environmental risks would offer the government the ability to easily enforce the environmental regulations and cement the liability of investors in case of their non-compliance with their own EIA report.

In conclusion, to improve the environmental management structures in Vietnam it is of high importance for policy makers to fully realise the role of the environmental impact assessment process. The benefits can be expected with an approach where the public have the rights to access to information, the right to contribute information and the right to challenge decisions. Successful EIA should then involve the public during the early phase of investment registration in order to avoid local opposition, to gain people confidence and reduce conflicts through the early identification of the related issues. It is also equally important to bind the foreign investors with social responsibilities in relation to environmental protection.

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OVERVIEWED

A REPORT ON THE AMBASSADOR'S CONFERENCE IN ROME FOLLOWING THE 10TH BRICS SUMMIT CONFERENCE

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Abstract

A summary report of the principal speakers at the Ambassador's Conference held in Rome, for the purposes of enhancing European participation in BRICS objectives.

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CONTENTS

1. INTRODUCTION

The 10th BRICS Ambassador's Conference was held in South Africa between the 25th and the 27th July in 2018 under the Chairmanship of South Africa. Its motto was "Collaboration for Inclusive Growth and Shared Prosperity". In October 2018, the Embassy of the Republic of South Africa in Rome — in cooperation with the Italian Society for the International Organization (SIOI) and the Institute EURISPES held a Conference.

The 10th BRICS Summit in Johannesburg saw the conclusion of the first decade of BRICS activity and defined new strategies of cooperation

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and global development. The vision is to have, in the near future, a significant impact on the international scene, specifically on areas and sectors of primary interest for the European Union and Italy.

2. OBJECTIVE

The overall objective of the subsequent Rome Conference in October 2018 was to promote high-level and Ambassadorial meetings with the official representatives of the BRICS countries in Italy with Italian institutions and experts. In particular, participants were selected for their high qualifications and expertise in the analysis of strategies and formulation of solution to enhace this this coordination. A key aspect was to consider and evalate the practical outcomes of the 10th BRICS summit itself. The event was held under the generous patronage of the Italian Network for Euromediterranean Dialogue RIDS-APS and the Italian Network of the Anna Lindt Foundation ALF. BRICS is a major force for global prosperity and wellbeing, and we are pleased to be able to share the results of our Seminar with the BRICS community and beyond. We would like to thank Dr Fabio Tiburzi, a membre of the BRICS Laboratory of Eurispes, for his kind support and valuable contributions to our Report.

3. PROGRAM AND SPEAKERS

The seminar was divided into three phases, namely a) an introduction, b) a session reserved to the official representatives of the five Member States of the BRICS coordination, and c) a session reserved for the comments of Italian experts. The conclusions were given to the official representative of South Africa.

The introduction was carried out by the president of the Italian Society for International Organization-SIOI, Franco Frattini, and by the president of the EURISPES Institute, Gian Maria Fara.

The 1st session received contributions from the following distinguished representatives of the BRICS States:

H.E. the Ambassador of South Africa, Ambassador Shirish M Soni,

H.E. the Ambassador of the People's Republic of China, Ambassador Ruiyu Li,

H.E. the Ambassador of the Federal Republic of Brazil, Ambassador Antonio De Aguiar Patriota,

H.E. the Ambassador of the Russian Federation, Ambassador Sergey Razov, together with Mr. Pavel Knyazev the Deputy Director of the Political Planning Department of the Russian Foreign Ministry and Sous-Sherpa for the Russian Federation in the BRICS coordination,

The Deputy Chief of Mission, Embassy of India, Mrs Gloria Gangte.

The 2nd session was moderated by the General Secretary of EURISPES, Marco Ricceri and recorded the comments of the experts: Diego Fabbri, SIOI lecturer and scientific advisor of the International Policy Magazine LIMES, and Enrico Molinaro, member of the BRICS Laboratory of EURISPES.

The conclusions were made by the Ambassador of South Africa, H.E.Shirish M Soni.

SPEECHES

SIOI President, Franco Frattini

BRICS: a positive reality and an opportunity for Italy, for the European Union

President Frattini recalled, that the first decade of the BRICS coordination saw progressive consolidation, with the last two summits (Xiamen, China, 2017 and Johannesburg, South Africa, 2018) opening a new decade of further consolidation with further enlargement, (based on the new BRICS PLUS strategy) He noted that BRICS coordination does not operate as a structure "against" the prevailing order but "to" collaborate with the main international institutions and the actors of world development with a goal of correcting the most serious distortions of the current globalisation's process. He specifically drew attention to the fact that BRICS recognises the centrality of the UN, (of which they advocate a reform, notably to the Security Council, in order to increase the incisiveness of its actions).

In this light, it was noted that the position of the European Union is not understood, as it continues to favour relations with the individual BRICS member states instead of committing to a cooperation extended to the coordination as a whole. This is a major drawback to current relations with BRICSm and the view was expressed that Italy can make a significant contribution to changing the basis of the European relationships with BRICS.

EURISPES President Gian Maria Fara
Building a collaborative platform with the BRICS

President Fara emphasised, the positive and constructive spirit with which the conference was promoted. Italy considers and values the main points of the BRICS objectives for amendments to world governance, the value of inclusive policies, and the recovery of a primary real economy. The main objective as he expressed is to understand if and how it is possible to organise forms of collaboration between the Italian reality and the BRICS reality. In particular the creation of the conditions for identifying and promoting possible common collaboration platforms between Italy and the BRICS — and use these as a springboard, to enlarge such platforms also at European level. In this context, areas of particular interest for Italy are creating collaborative platforms over the Mediterranean area and Africa. The start of such a collaboration between Italy and BRICS would give an important positive signal at international level, would help to give greater order to the current processes of global development and to multiply the opportunities for common growth.

South Africa Ambassador Prof. Shirish M Soni
The new areas of BRICS cooperation as agreed during the X Summit

South African Ambassador Shirish M Soni shared the main decisions approved in South Africa on July 27, 2018, regarding both the BRICS strategic guidelines and the New Areas of Cooperation.

The strategic guidelines are: a) Special retreat of the BRICS leaders; b) BRICS outreach dialogue (such as dialogue concerning Turkey and therefore the wider context of the Islamic world, and other members of the G20 countries; c) BRICS Business Forum, whose strengthening will allow further enhancement ofa the discussion and the identification of real opportunities for economic development, industrial investments, and commercial exchanges.

The New Cooperation Areas decided by the 10th Summit were noted to be the following: a) the establishment of a BRICS Working Group on the 4th Industrial Revolution, with the aim of evaluating and identifying the opportunities of this new process; b) the establishment of a Vaccine Research Center to be hosted in South Africa; c) the establishment of a BRICS Network of Science and Technology Parks, Business Incubators and Small and Medium Enterprises, d) the establishment of a Women's Forum; e) an agreement to explore the possibilities of establishing a Working Group on Peacekeeping operations; f) the organisation of a Foreign Spokespersons Platform, and finally g) the establishment of a Working Group on Tourism.

In conclusion, and regarding the different areas of cooperation between Italy and the BRICS' reality, Ambassador Soni believes that two of the main areas to be promoted are those related to Education and Scientific Research.

China Ambassador Ruiyu Li
Financial and Economic Governance issues

Ambassador Ruiyu Li stressed, in his introduction, that the title of the Johannesburg summit "BRICS in Africa: collaboration for inclusive growth and shared prosperity in the 4th Industrial Revolution" has a very strong and practical meaning. The great scientific and technological progress has started,, a highly innovative economic development process in emerging markets, which is very stimulating for everyone. Conversely however, they have also brought out new geopolitical conflicts, marked by protectionism, unilateral policies, and trade contrasts. For President Xi Jinping, the BRICS must be able to seize the opportunities of this historic moment by following the three guidelines already set at the

IX Summit of Xiamen. One of these concerns the strengthening of economic cooperation; an area in which the 10th Johannesburg Summit set two precise points.

The first concerns the clear opposition of the BRICS to new forms of protectionism and unilateral international actions that upset the rules, transparency and non-discrimination that characterises the free trade system established by the WTO — a system that must be protected. The second point concerns the importance of the BRICS financial cooperation which must be at the service of the real economy. For this reason the BRICS constituted the BRICS Local Currency Bond Fund, decided to open in 2019 (in São Paulo, Brazil), the New Development Bank Americas Regional Office, and decided to promote a network of their respective financial institutions. The importance of the BRICS in the world economy, (which it was noted does not correspond to an adequate representation in terms of voting in the World Bank as well as in the International Monetary Fund) was highlighted. Ambassador Li confirmed that the BRICS will continue to strengthen their cooperation to address the industrial revolution and that China, in particular, will continue to open more and more doors to international cooperation, as it has done so far, in the interest of the BRICS as well as of the world community.

Brazil Ambassador Antonio De Aguiar Patriota
Multilateralism and the reform of the global governance architecture

The Ambassador of Brazil De Aguiar Patriota underlined the value of the multilateralism that has been established over time in the world geopolitical scene, a process in which the BRICS countries are major advocates and protagonists. The risks of involution constituted by new initiatives inspired by unilateralism were referred to. The need to continue to progress and reform multilateralism was stressed, in particlar the open problems of a new governance, and making it suitable for the needs of the 21st century. The view was expressed that it is multilateralism that allows us to face the greatest challenges of our time, such as the sustainability of development according to the

UN 2030 Agenda, climate change, terrorism, armaments, world trade, epidemic diseases and more. The Ambassador reminded the seminar that the framework of multilateral cooperation makes it possible to reform fundamental international institutions, such as the United Nations itself, to make them more appropriate to — and representative of — the new situations. Strengthening the pillars of multilateralism is a priority commitment of the BRICS. Regarding the BRICS presidency for 2019, the Ambassador shared the main points of Brazil's commitement and concern for the strengthening of cooperation in the following areas: a) Financial cooperation (particularly theNew Development Bank); b) Cooperation in science, technology and innovation (eg small and medium-sized enterprises, vocational training); c) Cooperation in the field of health (treatment of tuberculosis, HIV / AIDS, smoking abuse); d) Cooperation in the field of energy (for example: energy efficiency and reduction of environmental impact).

Russia Ambassador Sergey Razov together with the Deputy Director of the Policy Planning Department of the Russian Ministry of Foreign Affairs, Russian Federation and BRICS Sous-Sherpa for the Russian Federation, Mr Pavel Knyazev

Peace and Security Issues

The Ambasador stressed above all the state of relations between Russia and Italy are considered most satisfactory in light of the current situation. He noted the important role played, in particular, by the intergovernmental commission for trade. As for BRICS the Ambassador underlined the value of their role as actors of peace, engines of economic development and creators of new opportunities for all.

The Deputy Director of the Political Planning Department of the Russian Foreign Ministry and Sous-Sherpa for Russia in the BRICS coordination Mr. Pavel Knyazev, reported on the main security problems related to the wars in Syria and Iraq, the allegations regarding Iran for the matters related to nuclear energy, international terrorism — and the use it makes of information technologies, with possible effects on the situation of entire states. Faced with this danger, he noted Russia supports the need to maximise international cooperation on Cyber

Security. In particular, it suggests continuing the strengthening of the BRICS partnership in the field of peace and security, extending it to other countries based on Nelson Mandela's principles of Honesty, Justice, and Equality, — building greater equity within the system of international relations for peace and security. In this context he noted the United Nations must have a central role, able to protect multipolarity, and impose peaceful methods of intervention. In this context a UN Security Council reform is desirable for a more equitable resolution of international issues. The BRICS, he added, do not allow unilateral interventions, do not allow a double standard of judgment, disapprove of the use of restrictive economic and military measures to punish the States, reiterate their commitment to a peaceful use of Space and wish for closer collaborations in the field of space technologies. In broader terms, he noted it must be clear that the BRICS, with reference also to the new BRICS Plus strategy, are focussed on collaboration, and not competition, with the major international organisations, for example, the G7, the G20, and the World Bank. To this end, the organisation of Dialogue Platforms and economic cooperation in the markets of emerging countries are worthy of further development.

India Deputy Chief of Mission, Embassy of India Mrs Gloria Gangte

People-to-people Cooperation

The Deputy Head of Mission noted that the present Rome conference on the BRICS takes place simultaneously with the visit of the Italian Premier Conte to the Indian Prime Minister Nerenda Modi. The BRICS represent 41 % of the world population, a huge number, and already at its first summit in Fortaleza (2014), Premier Modi expressed his hope that BRICS would put people at the centre of their initiative and follow an approach focusedon the inclusion of people in the growth processes. Since then, numerous initiatives have been promoted for this purpose. Strengthening the knowledge and connections between people is the best way to contribute to Global Security, Economic Stability and Tolerance. The BRICS People-to-People Cooperation policy includes,

among others, the Youth Summit, the Diplomatic Youth Forum, the Young Scientists Forum, and the meetings between women engaged in legislative activity within the Parliamentary Forum. In order to enhance the role of women, at the Johannesburg Summit a decsion was taken to promote a Women's Forum and a Women's Business Forum. Further types of cooperation are in the pipeline, namely the meetings between the Think Tank, the Academic Forum, and the Forum of civil society organisations. The summit decided also to set up a Working Group on Tourism (of considerable importance given the increase in tourist exchanges between the BRICS countries) and to intensify joint initiatives in the sports sectosr. In the cultural field, South Africa has proposed a cooperation treaty in cinematographic co-production and the launch of a comprehensive cultural cooperation plan.

SIOI Lecturer SIOI and Scientific Councellor of LIMES, Diego Fabbri

Mr Fabbri analysed the geopolitical dimension of the BRICS, and expressed the fact that the BRICS are not an alliance but a coordination, within which China has progressively assumed a prevailing role for its great economic expansion. The opinion was expressed that the main open problems of the BRICS are: the relationship between China and the other member states, the relationship between the three states Russia, India, China of the same continent Eurasia, the comparison of the BRICS as coordination with the new policy of the US President, Mr Trump.

EURISPES Member of the BRICS Laboratory and Secretary General of the Italian Network for Euro-Mediterranean Dialogue.RIDE-APS Enrico Molinaro

Mr Molinaro presented the results of the Research Laboratory on the BRICS of EURISPES, notably illustrating a a proposal for the establishment of a permanent Italy-BRICS Forum, an innovative policy-oriented research body in collaboration with the BRICS coordination on Euro-Mediterranean themes.

4. CONCLUSIONS

This was a highly successful seminar, with BRICS representatives of the highest level. The overall message was one of mutual cooperation, not competition — and aspirations for enhancement and prosperity. The urgent need to implement amendments in certain bodies influencing world governance — notably the UN Security Council and the World Bank was an important discussion point. The role that Italy can play in enhancing relationships and cooperation between BRICS and the European Union was clearly demonstrated. We extend our warm appreciation and thanks to the distinguished Ambassadors and Diplomats who were so generous with their time, and for sharing their visions, and opening new avenues for mutually beneficial cooperation.

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