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CHIEF EDITOR'S NOTE ON RUSSIAN LEGAL EDUCATION

DMITRY MALESHIN,

Lomonosov Moscow State University (Moscow, Russia)

I would like to present the second issue of Volume II (2014) of our Journal and to give some additional sketches about the Russian legal landscape.

Legal education in Russia has European roots. First, it is based on undergraduate traditions. Second, it has two graduate levels: bachelor and master. Third, it has two postgraduate levels: Candidate of Law and Doctor of Law.

Students are usually 16–17 years old when they start to study law in Russia. After 4 years of education in a bachelors program students may conclude their studies or continue to study at the same university or at another one in or outside of Russia. There is a list of 200 foreign universities, whose degrees are valid in Russia without any additional approval. Bachelor and master degrees require passing a state examination as well as submission of a qualified dissertation. Bar admission is required for attorneys, notaries, judges.

The first law faculty was established in 1755 at Moscow University, now named Lomonosov Moscow State University. The first law professors were invited from Europe. In the XIXth century there were seven main universities with law faculties in the Russian Empire: in Moscow, Saint-Petersburg, Kazan, Kiev, Warsaw, Vilnius, and Tartu. During Soviet times there were around 50 law schools in the USSR. Nowadays we have around 1200 law schools. These include both state and private universities. During the last several years the following gradation scale has occurred. On the first level there are two primary universities: Lomonosov Moscow State University and Saint-Petersburg State University. According to the Charter approved by the Russian Government Lomonosov Moscow State University is considered as a national heritage (Art. 4). On the second level are ten federal universities: Baltic (Kaliningrad city), Far-Eastern (Vladivostok city), Kazan (Kazan city), Arctic (Arkhangelsk city), North-Eastern (Yakutsk city), North-Caucasian (Stavropol city), Siberian (Krasnoyarsk city), South (Rostov city), Ural (Yekaterinburg city), and Crimean (Simferopol city). In all of them there are law faculties. On the third level are national research universities. Most of them are technological universities and not all of them have law faculties.

On the last level are other universities. Private universities are not widespread, but there are few good small private law schools.

Legal education is regulated by the Federal Law 'On Education' of 29 December 2012. It authorizes licensing and state accreditation by the Ministry of Science and Education. There are also different professional nonprofit accreditation agencies. The most important is accreditation by the Association of Lawyers of Russia, which approved accreditation of only around 120 law schools in 2012–2013.

The law courses are usually based on the national legal system as well as international law, theory and history of law. Foreign law is studied very rarely, but is the subject of many research papers. 95% of the programs are in Russian and just a very few law schools provide legal courses in English. Most professors are Russians, as the use of foreign visiting scholars is not popular. As a rule there are not any academic legal courses joined with foreign universities.

WELCOME

INTERNATIONAL ACADEMY OF COMPARATIVE LAW WELCOME NOTE

GEORGE BERMANN,

Columbia University (New York, USA),
President of the International Academy of Comparative Law

On behalf of the International Academy of Comparative Law (IACL) – its full membership as well as its executive committee – I warmly welcome the *Russian Law Journal* to the world of comparative legal scholarship and inquiry. Comparative law may be more difficult to undertake today than in years past, due to the emergence of so many new nations and regional groupings, but it is for that very reason more important than ever.

Countries vary widely in the extent to which legal developments within their borders come to the attention of comparative lawyers world-wide and thus become part of international legal discourse. A publication like the *Russian Law Journal* will do wonders to combat the ignorance that sometimes results.

I wish to add only that the Academy depends for the accomplishment of its main mission – the quadrennial world congress (such as is coming up in Vienna in July) and the intermediate thematic congresses (such as the Taiwan congress in 2012 and the upcoming Uruguay congress in 2016) – on national committees from as many participating countries as possible. The *Russian Law Journal* cannot help but enrich and inspire the Academy's all-important Russian national committee.

Welcome to the enterprise!

INTELLECTUAL PROPERTY COURT OF THE RUSSIAN FEDERATION WELCOME NOTE

LYUDMILA NOVOSELOVA,
President of the Intellectual Property Court of the Russian Federation (Moscow, Russia)

Legal journals play an important role in dissemination of new information among both researchers and persons engaged in enforcement of law at various levels. Certainly every country has its own specific. Other countries' legal experience usually helps to give a creative meaning to the first-sight obvious facts. In Russia this international experience exchange can be done on a platform of this new legal edition. The Russian Law Journal is able to fulfill such a role even at the global level.

The specific of the Russian law system is expressed not only in the fact that it takes a middle path between anglo-saxon and romanic systems and has a mixed type of civil procedure. The *Russian Law Journal* editors play an essential role of making this information exchange process happen, managing the process of peer review, taking decisions on publication of manuscripts and sourcing review articles.

The law has always been and continues to be a big part of everyone's everyday life. From commerce and government to scientific discovery, healthcare, education and entertainment, the law stays above all those fields named. We already see how it has revolutionized as time goes by. Further changes will continue to affect the way we live. As law practitioners and researchers, we are responsible for making only good changes happen, and to some extent help shape the future. That is why there is a need to cooperate and the *Russian Law Journal* is a great example of cooperation. It provides an ideal forum for exchange of information on a great variety of topics and more, in various formats: full length and letter length research papers, survey papers, work-in-progress reports on promising developments, case studies and best practice articles written by law experts and beginners.

Taking into account the recent increasing of the attention to the issues concerning protection of the intellectual rights we hope that the *Russian Law Journal* will act like the lighthouse for our foreign colleagues. Its pages will notify about the latest developments in the sphere of patent law, trademarks and Internet, *etc.*

The Intellectual Property Court sincerely welcomes the *Russian Law Journal* and expresses wish and hope that the readers shall be able to ascertain among many important scientific researches the solution of the nowadays open problems in all spheres of law as well in this periodical.

FEDERAL CHAMBER OF LAWYERS OF THE RUSSIAN FEDERATION WELCOME NOTE

EVGENY SEMENYAKO,
President of the Federal Chamber of Lawyers of the Russian Federation (Moscow, Russia)

The rules of play in the world of legislation and law have recently undergone significant changes. The opportunity presented itself to overhaul the entire rules and to also bring greater awareness to the society. It has become possible by means of creation of the *Russian Law Journal*.

The *Russian Law Journal* is intended to provide an overview of the processes going on in the different fields of law.

In the attempt, on the one hand, to provide something more than the bare restatement of the legislation, while on the other hand not wishing to repeat established tomes on the subjects, sometimes more is stated and at other times less than what might be considered necessary.

The opinions expressed in the *Russian Law Journal* are those of the respective authors only, clearly reflecting their views. Each of the respective authors bears sole responsibility – authenticity of the material.

Those who have occasion to refer to this Journal are pleased to consult those resources for any purposes of reference and research.

From the point of view of the Federal Chamber of Lawyers of the Russian Federation the publication of the *Russian Law Journal* serves the scientific community and contributes to the effective spread of knowledge, which in its turn leads to the stability and prosperity of the society in general.

The *Russian Law Journal* committed to communicating and fostering mutual trust with colleagues in different branches of law in different continents.

Moreover, from one to another volume it has shown the capability of preserving the high quality of professionalism, dedication, and political neutral orientation.

Undoubtedly every polymathic and interested in law person will find it useful and informative.

ARTICLES

SELECTION OF JURORS AND LAY ASSESSORS IN COMPARATIVE PERSPECTIVE: EURASIAN CONTEXT

NIKOLAI KOVALEV,
Wilfrid Laurier University (Brantford, Canada)

This article compares (1) the qualification of jurors or lay assessors; (2) methods of listing candidates for lay adjudication; and (3) selection and empanelment of jurors and lay assessors for a particular case, in various post-Soviet countries and Western countries. Two key issues are examined. The article examines whether the legislation of post-Soviet countries in relation to the qualification, listing and empanelling of jurors and lay assessors is consistent with the standards applied in developed democracies. Simultaneously, the article explores what standards and rules of selection of lay adjudicators should be incorporated into the legislation of post-Soviet states in order to insure impartiality and independence of lay adjudicators. The article reveals a significant number of defects and gaps that allow executives and court personnel to manipulate the selection process and hamper the formation of impartial, independent and representative lay courts. An examination of the legislation in post-Soviet countries and of the empirical data collected in Russia lead to the conclusion that the mechanisms of the voir dire, peremptory challenges and challenges to entire juries should be reviewed and improved in order to provide reliable safeguards for the selection of impartial and independent lay adjudicators and prevent parties from excluding prospective lay adjudicators for discriminatory reasons.

Key words: trial by jury; mixed courts; jurors; lay assessors; jury challenges; post-Soviet legal reforms; qualifications for jurors; jury service; voir dire; jury selection.

1. Introduction

Since ancient times, societies across the world have been searching for fairness in the adjudication of crimes. Many discovered it in people's participation in the

administration of justice or lay adjudication. As early as in ancient Greece and Rome, ordinary citizens judged their fellow citizens at people's assemblies. Trial by jury as a form of lay adjudication, which emerged in England in the 13th century, became an enduring and influential institution and a symbol of judicial democracy.[1] As other forms and models of lay adjudication evolved across the world, they had different historical roles and destinies.

Lay adjudication in criminal matters can be defined as the involvement of citizens, who may not have formal legal education and training, in deciding the guilt or innocence of the accused and the sentence if the accused is found guilty. This participation may only occur in a system where lay adjudicators share the power of decision-making with a judge or a panel of judges, or where citizens alone may serve as fact finders. The first method of lay adjudication comes in the form of the *mixed court*, in which the participating citizens are called 'lay assessors.' This is a hallmark of the Continental system of criminal adjudication. The second method refers to the *trial by jury,* the predominant model of criminal adjudication in common law countries.

Many contemporary lay adjudication systems descended from the English trial by jury. British colonists transported the English jury system to the 'new lands' of Africa, America, Asia, Australia and New Zealand.[2]

Other countries, like Russia and Spain, initially adopted this institution as a result of reforms carried out by liberal rulers in the second half of the 19th century.[3]

The institution of trial by jury did not develop evenly across the countries that implemented it in their justice systems in the 18th – 21st century. In the Netherlands, for example, the institution of the jury was transplanted onto a new, and 'alien' legal system, and was eventually abolished. In other jurisdictions, the jury system developed into or was replaced by a different model of lay adjudication, a mixed court of professional and lay judges, which sometimes preserved the name *jury*, for example in France, Greece, and Portugal. In some jurisdictions, including the United Kingdom and United States, the institution of the jury became an essential element of the criminal justice system and a part of the legal culture. In Russia, trial by jury was resurrected in criminal proceedings in the early 1990s after almost a century of rejection of everything associated with 'bourgeois' legal systems.

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[1] John Hostettler, The Criminal Jury Old and New: Jury Power from Early Times to the Present Day 21–23 (Waterside Press 2004).

[2] Richard Vogler, *The International Development of the Jury: The Role of the British Empire*, 72 Int. Rev. Pen. L. 525 (2001); John M. Bennet, *The Establishment of Jury Trial in New South Wales*, 3 Sydney L. Rev. 463 (1959); Herbert V. Evatt, *The Jury System in Australia*, 10 Austl. L.J. 49 (1936); Cristopher Granger, The Criminal Jury Trial in Canada (2nd ed., Carswell 1996).

[3] Stephen C. Thaman, *The Resurrection of Trial by Jury in Russia*, 31 Stanf. J. Int. L. 61 (1995) [hereinafter Thaman, *The Resurrection of Trial*]; Samuel Kucherov, Courts, Lawyers an Trials Under the Last Three Tsars (Greenwood Press 1974); Stephen C. Thaman, *Spain Returns to Trial by Jury,* 21 Hastings Int. & Comp. L. Rev. 241 (1998); Carmen Gleadow, *Spain's Return to Trial by Jury: Theoretical Foundations and Practical Results*, 2001–2002 St. Louis-Warsaw Transatlantic L.J. 56 (2002).

The future extent of lay adjudication in the world is not absolutely certain. Some countries with an established criminal justice system are presently reconsidering the role of lay adjudication. For example, in the United Kingdom, the scope of jury trials has been recently reduced.

By contrast, many countries with an authoritarian past and criminal justice systems in transition, in particular countries of the former Soviet Union, are implementing lay adjudication reforms. Russia became the first post-Soviet state to adopt the institution of the jury. In recent years, three other post-Soviet countries, Kazakhstan (2007), Georgia (2011) and Ukraine (2012), introduced or reformed courts with lay adjudicators, and the fourth country, Kyrgyzstan, expressed its intention to introduce trial by jury in January 2015.[4] Although legislation in all four countries uses the term 'lay adjudication' – court with participation of jurors (*sud s uchastiem prisyazhnykh*) or trial by jury (*sud prisyazhnykh*) – not all of these countries introduced a classical jury model of lay participation similar to the one implemented in Russia. Only Georgia and Kyrgyzstan have introduced or are planning to introduce juries. Kazakhstan and Ukraine introduced mixed courts. The Kazakhstani court is based on the French model of *cour d'assises*[5] and consists of one professional judge and ten lay assessors (before the reform of 2010 – two professional judges and nine lay assessors).[6] Ukraine's mixed court system is based on the German model of *Schöffengericht* and consists of two professional judges and three lay assessors.[7] Finally, several other post-Soviet states such as Belarus, Tajikistan, Turkmenistan and Uzbekistan retained the Soviet model of mixed courts, which is very similar to the German model.[8]

This article considers (1) the eligibility of jurors or lay assessors; (2) methods of compiling the list of candidates for lay adjudication; and (3) empanelment of jurors and lay assessors for a particular case. Two key issues are examined. This article examines whether the legislation of post-Soviet countries in relation to the selection of jurors and lay assessors is consistent with the standards of selection of lay adjudicators applied in developed democracies, and simultaneously asks

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[4] Закон Кыргызской Республики «О присяжных заседателях в судах Кыргызской Республики» [*Zakon Kyrgyzskoi Respubliki 'O prisyazhnykh zasedatelyakh v sudakh Kyrgyzskoi Respubliki'* [Law of the Republic of Kyrgyzstan on Jurors in Courts of Kyrgyz Republic]] (adopted on July 15, 2009 No. 215, with amendments as of Aug. 2, 2012) [hereinafter *Zakon Kyrg. o prisyazhnykh zasedatelyakh*], Art. 14 (Kyrg.).

[5] *See* more on different models of lay adjudication in John D. Jackson & Nikolay P. Kovalev, *Lay Adjudication and Human Rights in Europe*, 13 Colum. L. Rev. 83 (2006).

[6] Nikolai Kovalev & Gul'nara Suleymenova, *New Kazakhstani Quasi-Jury System: Challenges, Trends and Reforms*, 38 Int. J. L., Crim. & Just. 261 (2010).

[7] Уголовно-процессуальный кодекс Украины [*Ugolovno-protsessualnyi kodeks Ukrainy* [Criminal Procedure Code of Ukraine]] (adopted on Apr. 13, 2012, No. 4651-VI) [hereinafter *UPK Ukr.*], Art. 31(3) (Ukr.).

[8] Nikolay Kovalev, *Lay Adjudication of Crimes in the Commonwealth of Independent States: An Independent and Impartial Jury or a 'Court of Nodders?,'* 11 J. E. Eur. L. 123 (2004).

what standards and rules for qualifying and selecting lay adjudicators should be incorporated into the legislation of post-Soviet states in order to insure impartiality and independence of lay adjudicators.

In post-Soviet countries, the selection of lay adjudicators is usually regulated by laws on jurors or lay assessors, provisions on jurors and lay assessors in the law on judges and the judicial system, and the code of criminal procedure. In two post-Soviet countries, the governments adopted special laws on jurors or lay assessors. Russia introduced the Federal Law on Jurors in August 2004, which replaced sect. V of the Law on the Judicial System.[9] The Kazakhstani Law on Lay Assessors was adopted in January 2006, and introduced in January 2007, along with the provisions of the Code of Criminal Procedure, which stipulates the mixed court model.[10] The Kyrgyz Law on Jurors was adopted in 2009, and is expected to come into force in different Kyrgyz provinces starting in 2015.[11]

In the majority of post-Soviet countries, procedures for qualifying and selecting lay adjudicators are stipulated in their laws on judges, the judicial system or courts.[12] In some countries, including Georgia, Kazakhstan, Russia and Ukraine, the selection of jurors and lay assessors in court is regulated by codes of criminal procedure.[13] Only

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9 Федеральный закон РФ «О присяжных заседателях» [*Federal'nyi Zakon RF 'O prisyazhnykh zasedatelyakh'* [Federal Law of the Russian Federation on Jurors]] (adopted on Aug. 20, 2004 No. 113-FZ, with amendments as of Feb. 1, 2014) (Russ.) [hereinafter *FZ RF o prisyazhnykh zasedatelyakh*].

10 Закон Республики Казахстан «О присяжных заседателях» [*Zakon Respubliki Kazakhstan 'O prisyazhnykh zasedatelyakh'* [Law of the Republic of Kazakhstan on Jurors]] (adopted on January 16, 2006 No. 121-III ZRK, with amendments as of March 3, 2014) [hereinafter *Zakon RK o prisyazhnykh zasedatelyakh*].

11 *Zakon Kyrg. o prisyazhnykh zasedatelyakh*.

12 Кодекс Республики Беларусь о судостроительстве и статусе судей [*Kodeks Respubliki Belarus o sudoustroistve i statuse sudei* [Code of the Republic of Belarus on the Judicial System and Status of Judges]] (adopted on June 29, 2006 No. 139-Z, with amendments as of July 21, 2012) [hereinafter *KoSISS Belr.*], Ch. 15; Закон Туркменистана «О суде» [*Zakon Turkmenistana 'O sude'* [Law of Turkmenistan on Court]] (adopted on Aug. 15, 2009) [hereinafter *Zakon Turkm. o sude*]; Закон Украины «О судоустройстве и статусе судей» [*Zakon Ukrainy 'O sudoustroistve i statuse sudei'* [Law of Ukraine on Judicial System and Status of Judges]] (adopted on July 7, 2010 No. 2453-VI, with amendments as of Jan. 16, 2014) [hereinafter *Zakon Ukr. o sudoustroistve i statuse sudei*]; Закон Республики Узбекистан «О судах» [*Zakon Respubliki Uzbekistan 'O sudakh'* [Law of the Republic of Uzbekistan on Courts]] (adopted on Sept. 2, 1993 No. 924-XII, with amendments as of Dec. 1, 2013) [hereinafter *Zakon Uzb. o sudakh*].

13 Уголовно-процессуальный кодекс Грузии [*Ugolovno-protsessualnyi kodeks Gruzii* [Criminal Procedure Code of Georgia]] (adopted on Oct. 9, 2009 No. 1772-IIc) [hereinafter *UPK Gruzii*], Arts. 221–224; Уголовно-процессуальный кодекс Республики Казахстан [*Ugolovno-protsessualnyi Kodeks Respubliki Kazakhstan* [Criminal Procedure Code of the Republic of Kakhstan]] (adopted on Dec. 13, 1997 No. 206-I) [hereinafter *UPK Kaz.*], Ch. 59 (Kaz.); Уголовно-процессуальный кодекс Российской Федерации [*Ugolovno-protsessualnyi Kodeks Rossiiskoi Federatsii* [Criminal Procedure Code of the Russian Federation]] (adopted on Dec. 18, 2001 No. 174-FZ) [hereinafter *UPK RF*], Arts. 328–332 (Russ.); *UPK Ukr.*, Arts. 385–388.

in Tajikistan is the selection process of lay assessors stipulated in the by-law passed by the Parliament.[14]

2. Eligibility for Lay Adjudication Service

As a rule, in order to be eligible for jury or lay assessor's service in post-Soviet countries, a person should satisfy some mandatory qualifications such as minimum age, citizenship and registration as a voter. Moreover, a person can be disqualified or excused from jury service by one of the reasons provided by law, such as mental or physical disability, service in the police or other law enforcement agencies, a criminal record or lack of knowledge of the official language.

2.1. Minimum Age

In contemporary English,[15] Scottish,[16] the vast majority of both Canadian[17] and American jury systems, and in some European mixed court systems (including the Bulgarian, Croatian, Danish, Liechtenstein, Macedonian, Norwegian, Portuguese, Serbian, Swedish and Swiss systems) the minimum age for jurors and lay assessors is eighteen years.[18]

In post-Soviet legislation, however, the age requirements for potential jurors and lay assessors are more restrictive. In virtually all post-Soviet countries, lay adjudicators are qualified from among men and women not younger than twenty-five and even thirty.[19] This is opposed to 'universal jury eligibility' obtained by citizens at the age of eighteen in the vast majority of common law jury systems and some mixed court systems.[20] Note, however, that the Georgian Criminal Procedure Code does not contain a minimum age for candidates for jury service. On the basis of the requirement of the Criminal Procedure Code of Georgia, candidates should be

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[14] Положение о народных заседателях (утв. Постановлением Маджлиси намояндагон Маджлиси Оли Республики Таджикистан от 28 июня 2002 г. № 685) [*Polozhenie o narodnykh zasedatelyakh (utv. Postanovleniem Madzhlisi namoiandagon Madzhlisi Oli Respubliki Tajikistan ot 28 Iyunia 2002 g.* [Regulation on Law Assessors (approved by the Resolution of the Assembly of Representatives of the Supreme Assembly of the Republic of Tajikistan on June 28, 2002 No. 685)]] (Taj.) [hereinafter *Polozhenie Taj. o narodnykh zasedatelyakh*].

[15] Juries Act, Ch. 23, § 1 (1974) (Eng.).

[16] Peter Duff, *The Scottish Criminal Jury: A Very Peculiar Institution*, in World Jury Systems 255 (Neil Vidmar, ed.) (Oxford University Press 2000).

[17] David M. Tanovich et al., Jury Selection in Criminal Trials (Irwin Law 1997).

[18] Jackson & Kovalev, *supra* n. 5, at 101.

[19] *Zakon Ukr. o sudoustroistve i statuse sudei,* Art. 59.

[20] Neil Vidmar, *A Historical and Comparative Perspective on the Common Law Jury*, in World Jury Systems, *supra* n. 16, at 28.

registered as voters, thus inferring that the minimum age for a juror in Georgia is the minimum voting age: eighteen.[21]

One of the reasons for the high minimum age requirement for jurors and lay assessors in post-Soviet states is the legacy of Tsarist Russian and Soviet legislation. According to the Statute on Judicial Institutions of 1864, the age of twenty-five was the minimum for a juror in Tsarist Russia.[22] Although, when Bolsheviks replaced jurors by lay assessors they removed any age qualifications apart from the eighteen-year-old voting minimum,[23] in 1948 the age qualification was increased to twenty-three,[24] and in 1958 the minimum age of twenty-five was reinstated.[25] The former Chairman of the Supreme Court of the RSFSR, G.Z. Anashkin, justified the decision of the Soviet legislator to increase the minimum age for lay assessors by stating that a person who adjudicates another person's fate should have sufficient life experience.[26]

This rationale raises several concerns. The first issue is whether a young adult, or a person between the age of eighteen and twenty-five, is unable to deliver a just and true verdict based on the presented evidence. The second is, if the legislator decided that young adults were not able to reach reasonable decisions in adjudication, would it be also appropriate to exclude this category of citizens from voting? The standard age requirement for lay assessors and jurors in post-Soviet countries is higher than the minimum age requirement for a person who wishes to stand for local election,[27]

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21 *UPK Gruzii*, Art. 29.

22 Учреждение судебных установлений Российской империи // Полное собрание законов Российской империи. Собрание второе. № 41475. Ст. 81 [*Uchrezhdenie sudebnykh ustanovlenii Rossiiskoi imperii // Polnoe Sobranie Zakonov Rossiiskoi Imperii. Sobranie vtoroe.* No. 41475. St. 81 [*Law on Judicial Institutions of the Russian Empire*, in 39 Complete Collection of Laws of the Russian Empire. Second Collection, No. 41475, Art. 81]] (Tipografiya II Otdeleniya Sobstvennoi E.I.V. Kantselyarii 1864).

23 Положение о судоустройстве РСФСР 1922 г. (ст. 15) // *Голунский С.А.* История законодательства СССР и РСФСР по уголовному процессу и организации суда [*Polozhenie o sudoustroistve RSFSR 1922 g. (st. 15)* // Golunskii S.A. *Istoriya zakonodatel'stva SSSR i RSFSR po ugolovnomu protsessu i organizatsii suda* [*Regulation on Judicial Organization RSFSR 1922, Art. 15*, in Sergei A. Golunskii, History of Legislation of the USSR and RSFSR on Criminal Procedure and Organization of Courts]] 240 (Gosyurizdat 1955).

24 Положение о выборах народных судов 1948 г. (ст. 2) [*Polozhenie o vyborakh narodnykh sudov RSFSR 1948 g. (st. 2)* [*Regulation on Election of Peoples Courts RSFSR 1948, Art. 2*]], in Golunskii, *supra* n. 23, at 592.

25 Основы законодательства о судоустройстве Союза ССР, союзных и автономных республик 1958 г. // Ведомости Верховного Совета СССР. 1959. № 1(12). Ст. 29 [*Osnovy zakonodatel'stva o sudoustroistve Soyuza SSR, soyuznykh i avtonomnykh respublik 1958 // Vedomosti Verkhovnogo Soveta SSSR*. 1959. No. 1(12). St. 29 [*Fundamentals of Legislation of the USSR and the Union and Autonomous Republics on the Judicial Organization*, 1959(1) Bulletin of the USSR Supreme Council, item 12, Art. 29]].

26 *Анашкин Г.З.* Народные заседатели в советском суде [Anashkin G.Z. *Narodnye zasedateli v sovetskom sude* [Grigorii Z. Anashkin, Peoples' Assessors in Soviet Court]] 7 (3rd ed., Gosyurizdat 1960).

27 The Ukrainian legislation allows a person who has attained the age of eighteen to stand for election as local mayors or members of local legislative assemblies. *See, e.g.*, Закон Украины «О выборах депутатов Верховной Рады Автономной Республики Крым, местных советов и сельских,

or even for Parliamentary election.[28] This inconsistency between qualifications for lay assessors and jurors vis-a-vis MPs and local mayors, in post-Soviet countries also raises the question as to whether it might be considered a form of age discrimination.

Contrarily, some proponents of age restrictions in the post-Soviet countries argue that the involvement of young adults in lay adjudication will be unfair towards professional judges because the minimum age requirement for a professional judge is significantly higher than the universal suffrage age. Thus, former President of the Supreme Court of Ukraine, V.T. Malyarenko, believes that the age of jurors should not be less than the minimum age requirement for the presiding judge in different courts, for instance twenty-five years for jurors in county courts, thirty years in provincial courts and thirty-five years in the Supreme Court.[29] Lower age requirements for jurors, according to Malyarenko, would discriminate against the presiding judge. This reasoning is similar to other claims of opponents to lay adjudication, who deny that adjudicators without any formal knowledge of the law should be allowed to function alongside professional judges, who are required to undertake a professional education and special judicial training.

It could be argued that the government has less trust in younger citizens because a significant number of young adults, in particular young males, are more often confronted with the arbitrariness of law enforcement agencies.[30] In other words, governments in post-Soviet countries may presume that young adults would be more reluctant to vote for conviction because they do not trust law enforcement agencies.

The exclusion of young adults from jury or lay assessors' lists partly deprives a significant group of socially active citizens of the right to participate in public affairs. Since lay adjudication is considered a form of civic education it would be preferable for a society to include more young people in lay adjudication in order to develop a sense of responsibility for their decisions and respect for such constitutional values as human life, rights and freedoms.[31] Some post-Soviet governments, for example

поселковых, городских голов» [*Zakon Ukrainy o vyborakh deputatov Verkhovnoi Rady Avtonomnoi Respubliky Krym, mestnykh sovetov i sel'skikh, poselkovykh, gorodskikh golov* [Law of Ukraine on the Election of Deputies of the Supreme Council of the Autonomous Republic of Crimea, Local Councils and Village, Town and City Mayors]] (adopted on July 10, 2010 No. 2487-VI), Art. 9.

28 According to Art. 76 of the Ukrainian Constitution 'a citizen of Ukraine who has attained the age of twenty-one on the day of elections . . . may be a National Deputy of Ukraine.'

29 *Маляренко В.Т.* Позитиви і негативи суду присяжних // Право Украины. 2000. № 3. С. 3, 9 [Malyarenko V.T. *Pozitivi i negativi sudu prisyazhnykh // Pravo Ukrainy*. 2000. No. 3. S. 3, 9 [Vasilyi T. Malyarenko, *Advantages and Disadvantages of Trial by Jury*, 2000(3) Law of Ukraine 3, 9]].

30 *Степанков И.* Милицейский произвол в зеркале социологов [Stepankov I. *Militseiskyi proizvol v zerkale sotsiologov* [Igor Stepankov, *Police Arbitrariness in the Mirror of Sociologists*]], *Rosiiskaya gazeta* (Oct. 15, 2003), <http://www.rg.ru/2003/10/15/proizvol.html> (accessed June 18, 2014).

31 Alexis de Tocqueville, Democracy in America 262 (University of Chicago Press 2000); Neil Vidmar & Valerie P. Hans, Judging the Jury (Plenum Press 1986); Sanja Kutnjak Ivković, Lay Participation in Criminal Trials: The Case of Croatia 46–49 (Austin & Winfield 1999).

Russia, assign significant importance to military education of young people and aim to enlist as many young conscripts as possible for mandatory military training. The opportunity for young people to participate in the administration of justice is no less important than their knowledge of warfare and their constitutional duty to defend their country. Traditionally, in post-Soviet countries, politicians and ordinary people call the army a 'school of life, patriotism and courage.' By analogy, it would be fair to say that participation of younger citizens in lay adjudication can be a 'school of civic consciousness.'

2.2. Criminal Record as a Ground for Disqualification

Post-Soviet countries have different approaches towards disqualification of prospective jurors or lay assessors based on previous criminal records. Four post-Soviet countries, Kazakhstan, Kyrgyzstan, Russia and Ukraine, disqualify only those ex-convicts whose records of conviction were not expunged (*'pogashennaya sudimost'*). According to Soviet and post-Soviet criminal law, a record of criminal conviction (*'sudimost'*) can be expunged if, within the established period of time after serving the punishment, this person does not commit any other offences. For instance, according to Russian criminal law, if a person is convicted of non-aggravated murder and serves his full sentence, the record of his conviction will be expunged eight years after he is released from prison. In the case of ordinary theft, the record of conviction is expunged three years after the punishment has been served.[32]

In Belarus, the legislature applies a different approach to excluding persons with previous criminal convictions. The absence of a proviso that a record of previous convictions means only a 'non-expunged' record allows the state bodies to interpret the wording of the statute to exclude anyone with any criminal conviction from becoming a potential juror or lay assessor. This approach could be said to violate the right of potential lay adjudicators to participate in the administration of justice. Firstly, according to the criminal legislation of Belarus, a person convicted of any crime is considered 'convicted' until his or her record of conviction is expunged.[33] Secondly, after the ex-USSR countries became independent states, a number of offences were decriminalised, including buggery (*muzhelozhstvo*),[34] parasitism (*tuneyadstvo*) or evasion from work, anti-Soviet agitation and propaganda. Therefore, people convicted for such criminal acts can be erroneously excluded from lay assessor service in Belarus.

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[32] Уголовный кодекс Российской Федерации [*Ugolovnyi kodeks Rossiiskoi Federatsii* [Criminal Code of the Russian Federation]], [hereinafter *UPK RF*] Art. 86.

[33] Уголовный кодекс Республики Беларусь [*Ugolovnyi kodeks Respubliki Belarus* [Criminal Code of the Republic Belarus]], Arts. 45, 97 and 98.

[34] Note that two post-Soviet countries, Turkmenistan and Uzbekistan, still prosecute sodomy between consenting adults. *See* Уголовный кодекс Туркменистана [*Ugolovnyi kodeks Turkmenistana* [Criminal Code of Turkmenistan]], Art. 135, and Уголовный кодекс Республики Узбекистан [*Ugolovnyi kodeks Respubliki Uzbekistan* [Criminal Code of the Republic Uzbekistan]], Art. 120.

2.3. Knowledge of the Official Language

Some post-Soviet countries, including Kazakhstan,[35] Ukraine,[36] and Uzbekistan,[37] allow courts to use the language of the majority of the population living in a particular area, Russian or any other language besides the official language of the titular nation. At the same time, according to the current legislation of some countries, lay assessors or jurors who do not have a command of the official language are excused or disqualified, and excluded from jury or lay assessors' lists at pre-trial stage.

According to Kazakhstani legislation, citizens may apply for exclusion from lay assessors' lists before being summoned to try a criminal case on the ground that they do not know the language of the proceedings.[38] This provision could encourage people who do not have a command of the official (Kazakh) language to apply for excusal from lay assessor service and hence reduce the pool of lay assessors from the Russian-speaking population, which constitutes significant part of the population in some areas.[39]

Ukrainian legislation regulating pre-trial qualification of lay assessors and jurors contains an even more biased provision, according to which citizens may serve as lay assessors or jurors only if they have knowledge of the Ukrainian language.[40] Thus, the Ukrainian Government and legislature disregard the fact that many Ukrainian citizens in the eastern and southern provinces of the country do not speak Ukrainian[41] and hence are automatically excluded from jury and lay assessors' lists. This language policy could cause a number of problems in eastern, southern and some central provinces of the country. Firstly, courts could face a problem of finding a sufficient number of potential jurors and lay assessors who speak Ukrainian, which could lead to delays and additional expenditures for appropriate checks and evaluation. Secondly, and most importantly, in regions with a predominantly Russian speaking population, jury trials conducted in the Ukrainian language with participation of

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35 *UPK Kaz.*, Art. 30.

36 *Zakon Ukr. o sudoustroistve i statuse sudei*, Art. 12(4). Note, however, that the new Criminal Procedure Code of Ukraine explicitly states that the language of the criminal proceedings is the state or Ukrainian language (*UPK Ukr.*, Art. 29(1)).

37 *UPK Uzb.*, Art. 20.

38 *Zakon Kaz. o prisiazhnykh zasedatelyakh*, Art. 10(3)(1).

39 База данных ФОМ. Казахстан. Поле мнений [*Baza dannykh FOM. Kazakhstan. Pole mnenii* [*FOM Database. Kazakhstan. The Field of Opinions*]] (2002), <http://bd.fom.ru/map/kazahstan/506_12746> (accessed Juny 16, 2014).

40 *Zakon Ukr. o sudoustroistve i statuse sudei*, Art. 59(2)(6).

41 *Вахтин Н. и др.* Новые языки новых государств: явление на стыке близкодержавных языков на постсоветском пространстве [Vakhtin N. i dr. *Novye yazyki novykh gosudarstv: yavlenie na styke blizkoderzhavnykh yazykov na postsovetskom prostranstve* [Nikolai Vakhtin et al., *New Languages of New States: Phenomenon at the Junction of neighboring States' Languages in the Post-Soviet Countires*]] (2003), <http://old.eu.spb.ru/ethno/projects/project3/list.htm> (accessed Juny 16, 2014).

only Ukrainian speaking lay adjudicators may lead to dissatisfaction of the parties involved in the trial and arouse disapproval across local communities.

2.4. Disqualification and Exclusion of Judges, Prosecutors and Other Officials Involved in the Administration of Criminal Justice

All post-Soviet countries, except Russia, automatically disqualify officials associated with the criminal justice system, such as judges, prosecutors and law enforcement agents, from jury or people's (lay) assessor service. In Russia, these professionals can be excluded from jury lists only if they apply for excusal. The Russian approach seems less preferable for ensuring independence and impartiality of trial by jury.

A recent reform in England allowing the judiciary, barristers, solicitors, police officers, prison officers, and court staff to serve as jurors[42]) is not without controversy. Interestingly, in England defendants argue that participation of police officers and prosecuting solicitors in adjudication as jurors undermines the independence and impartiality of the jury because 'the tribunal conducting the trial must be free from actual or apparent bias.'[43] The English Court of Appeal and the House of Lords dismissed the appeal of Nurlon Abdroikov, convicted by a jury that included among its members a serving police officer. The House of Lords held that the applicable test is whether, on the particular facts of each case, a fair-minded and informed observer would conclude that there was a real possibility that the jury was biased.[44] In other words, the mere fact that the police officer was a member of the jury is not enough to find a violation of fair trial rights of the accused.

It can be argued, however, that the involvement of criminal justice system professionals in lay adjudication could have adverse effects in transitional legal systems. The House of Lords' approach in relation to the English jury system is not applicable to criminal justice systems across the post-Soviet states because many contemporary post-Soviet judges, prosecutors, police officers and secret service agents, have a strong accusatorial bias against defendants.[45] Thus, participation of

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42 Criminal Justice Act, c. 44, § 321 and sch. 33 (2003) (Eng.).

43 *R v. Abdroikov et al*. [2007] UKHL 37; [2008] 1 All ER 315.

44 *Id.*

45 Accusatorial bias (in Russian *obvinitel'nyi uklon*), which sometimes is also called 'prosecutorial bias,' or bias against defendants, can be defined as a tendency of the judge to presume that the defendants are usually guilty. Judges with accusatorial bias tend to underestimate arguments and evidence of the defence, and, on the contrary, overestimate the significance of the position of the prosecution for justice and mostly rely on indictment. *Алексеева Л.Б., Радутная Н.В.* Предупреждение судебных ошибок, обусловленных обвинительным уклоном в деятельности судов первой и кассационной инстанции: Пособие для судей [Alekseeva L.B., Radutnaya N.V. *Preduprezhdenie sudebnykh oshibok, obuslovlennykh obvinitel'nym uklonom v deyatel'nosti sudov pervoi i kassatsionnoi instantsii* [Lidiya B. Alekseeva & Nona V. Radutnaya, Prevention of Judicial Errors Caused by Accusatory Bias in Trial and Appellate Courts: Manual for Judges]] 4–5 (VYuZI 1989). *See also Панасюк А.Ю.* Презумпция виновности в системе профессиональных установок судей // Государство и право. 1994. № 3. С. 70 [Panasyuk A.Yu. *Prezumptsiya vinovnosti v sisteme professional'nykh ustanovok sudei // Gosudarstvo*

professionals involved in the administration of criminal justice may damage the impartiality of the jury. A police officer or a prosecutor serving as a juror, despite the instructions of the presiding judge, could inform his or her fellow jurors about inadmissible evidence that this juror might obtain from his or her colleagues at the place of work, for instance facts of previous convictions of the defendant. Moreover, jurors selected from among law enforcement agents may be influenced by their superiors or colleagues, who have a direct interest in the outcome of the case. This means that the participation of law enforcement officers and officials from the prosecutor's office may also diminish the independence of a particular juror.

Although theoretically the defence may use peremptory challenges or challenges for cause in order to exclude such jurors during *voir dire* or other empanelment processes in court, this is often difficult in practice for a number of reasons. Firstly, sometimes the defence may not be aware that a prospective juror is a law enforcement agent. Secondly, even if the defence knows that a prospective juror is a police officer or a representative of any other law enforcement agency, successful challenges for cause cannot be based on mere allegations of accusatorial bias on the part of this prospective juror, but should be grounded in particular facts of which the attorney might not be aware. Thirdly, although the defence has the right to peremptory challenges of prospective jurors, the number of challenges is limited to two for each party, or occasionally more if the number of prospective jurors in the jury pool allows so. Some specific issues of challenging jurors, which emerged after ten years of jury trials in Russia, will be discussed later in this paper.

2.5. Educational, Income and Other Qualifications

Although the current legislation of post-Soviet countries contains neither educational nor income (property) qualifications, the Russian judiciary, prosecutors and some conservative legal scholars propose that the government should introduce these and other qualifications for jurors. For example, a survey of Russian practices, conducted by the author, sought views of Russian judges, prosecutors and advocates on the issue of changing the jury law.[46] When asked about desirable changes, several judges and prosecutors stated that educational qualifications should be introduced for potential jurors. However, Russian respondents did not clarify what standards should be used for educational qualification.

Some European countries apply educational qualifications for their lay assessors. For instance, in Greece and Italy, lay assessors must have at least a secondary school

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i pravo. 1994. No. 3. S. 70 [Alexander Yu. Panasyuk, *Presumption of Guilt in the System of Professional Biases of Judges*, 1994(3) State and Law 70]]; Thaman, *The Resurrection of Trial*, *supra* n. 3, at 67; *Мельник В.В.* Искуство защиты в суде присяжных [Mel'nik V.V. *Iskusstvo zashchity v sude prisyazhnikh* [Valerii V. Mel'nik, Art of Defense in Trial by Jury]] 32 (Delo 2003).

[46] Nikolai Kovalev, Criminal Justice Reform in Russia, Ukraine, and the Former Republics of the Soviet Union 539–560 (Edwin Mellen Press 2010).

certificate. In Russia, 90% of citizens have at least a secondary education; therefore it is unclear whether the proponents of educational qualifications meant even a higher requirement, for example, a university degree. If only university graduates were qualified for jury service, prospective jurors would be selected from 28% of the Russian population.[47] Such educational qualifications would, therefore, fail to ensure a fair cross-section of various communities in lay adjudication.

In addition to educational qualifications, several prosecutors from Rostov province who participated in the author's survey, suggested that income or property qualifications (*imushchestvennyi tsenz*)[48] should be applied to prospective jurors. However, the respondents did not specify any standards to be used for such qualification. Some Russian scholars, for instance, Professor Demichev, of the Nizhnii Novgorod Academy of the Interior Ministry, suggests that an income qualification should be based on the 'subsistence minimum' (*prozhitochnyi minimum*).[49] Professor Demichev claims that some Russian citizens who respond to jury summons are more interested in receiving a juror's allowance than in their role in the administration of justice. According to Demichev, income qualifications would exclude 'lumpen' citizens, who deteriorate the quality of trial by jury.[50]

These arguments in favour of income qualification are not convincing. The fact that, for some citizens, jury compensation is one of the motivations to respond to a jury summons does not mean that such jurors cannot be fair and able to deliver a true and just verdict. Using the 'subsistence minimum' as a standard for income qualification would disqualify a significant number of Russian citizens from jury service. According to official statistics, about 12% of the total Russian population in 2013 had an income below the subsistence minimum.[51] Moreover, income qualifications can be in conflict with educational qualifications since many people with university degrees (*Russian intelligentsia*) live below middle class standards, and some *nouveau riche* (*novye russkie*) became affluent without any higher education. Moreover, the proposal to introduce income qualifications sounds particularly

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[47] Об итогах всероссийской переписи населения 2010 г. [*Ob itogakh vserossiiskoi perepisi naseleniya* [*About the Results of the Russian National Census in 2010*]], *Rosiiskaya gazeta* (Dec. 22, 2011), <http://www.rg.ru/2011/12/16/stat.html> (accessed Juny 16, 2014).

[48] The Russian term *imushchestvennyi tsenz* from Russian *imushchestvo* – property can be translated into English either as property or income qualification.

[49] The term *subsistence minimum* is a minimum maintenance rate established by the Government per capita per month.

[50] *Демичев А.А.* Теневое право и суд присяжных // Государство и право. 2004. № 7. С. 104, 105 [Demichev A.A. *Tenevoe pravo i sud prisyazhnykh // Gosudarstvo i pravo*. 2004. No. 7. S. 104, 105 [Alexei A. Demichev, *Shadow Law and Trial by Jury*, 2004(7) State and Law 104, 105]].

[51] Доходы 12 процентов россиян ниже прожиточного минимума [*Dokhody 12 protsentov rossiyan nizhe prozhitochnogo minimuma* [Income of 12 Percent of Russians is Below Subsistence Minimum]], *Pravda* (Nov. 25, 2013), <http://www.pravda.ru/news/economics/25-11-2013/1183272-money-0/> (accessed Juny 16, 2014).

provocative and discriminatory in Russia, a country that declared democracy and equality of all citizens regardless of their social or property status.[52]

Property or income qualifications were abolished in developed democracies in the second half of the 20th century: in Australia in 1947–1957;[53] in England in 1972;[54] in the Republic of Ireland in 1976.[55] For instance, in *de Búrca & Anderson v. Attorney General,* the Irish Supreme Court unanimously held that property qualification was inconsistent with either the equality clause or the criminal jury clause of the national Constitution.[56] Russia and other post-Soviet nations in the process of democratisation and reforming criminal justice systems should follow the example of developed Western democracies that abolished property qualifications, rather than the approach of developing countries mentioned above.

Another qualification proposed by Professor Demichev is the qualification of 'reliability' or 'trustworthiness' (*tsenz blagonadezhnosti*).[57] By referring to the 19th century Russian jury system, Demichev argues that jurors in modern Russia should be selected on the basis of good moral characteristics. According to Demichev, a reliability qualification can serve as an instrument for the exclusion of 'undesirable persons such as the unemployed, "alcohol abusers," and the homeless.'

The introduction of a reliability qualification, however, is presumptively unjustifiable since it could give the government the opportunity to exclude citizens from jury service on subjective grounds. The criteria proposed by Demichev cannot ensure the objective exclusion of 'unreliable' persons. Taking unemployed citizens as an example, one can argue that local authorities may unfairly exclude temporarily unemployed people or those who are officially unemployed but are in fact self-employed. Alcohol abuse has been already recognised as a ground for disqualification in Russian legislation. According to Russian law, however, the government may exclude only those persons who are registered in addiction clinics as alcoholics or drug addicts.[58] Hence, Russian law provides an objective standard for exclusion of alcohol and drug abusers as opposed to the vague definition suggested by Demichev.

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52 Конституция Российской Федерации [*Konstitutsiya Rossiiskoi Federatsii* [Constitution of the Russian Federation]] [hereinafter *Konst. RF*], Art. 19(2) (Russ.).

53 Sonia Walker, *Battle-Axes and Sticky-Beaks: Women and Jury Service in Western Australia 1898–1957*, 11(4) Murdoch U. Electronic J.L. (2004), available at <http://www.murdoch.edu.au/elaw/issues/v11n4/walker114_text.html> (accessed Juny 16, 2014).

54 Sally Lloyd-Bostock & Cheryl Thomas, *The Continuing Decline of the English Jury*, in World Jury Systems, *supra* n. 16, at 68–69.

55 John Jackson et al., *The Jury System in Contemporary Ireland: In the Shadow of a Troubled Past*, in World Jury Systems, *supra* n. 16, 290–91.

56 *Id*.

57 Demichev, *supra* n. 50, at 104–05.

58 *Zakon RF o prisyazhnykh zasedatelyakh,* Art. 3(2)(4) (Russ.).

This proposal would give qualification committees too much discretion in the evaluation of candidates for jury service. Instead of objective criteria, qualification committees could rely on interviews with district police officers and hearsay information about the general reputation of prospective jurors.

As regards Demichev's argument against the involvement of homeless people, it is impossible to expect this group of people to serve as jurors since in order to call a person for jury duty he or she should have a fixed abode. At the same time, it is interesting to note that the negative attitude of Demichev, who then was an assistant professor in the Nizhnii-Novgorod Police Academy, towards Russian jurors is similar to the criticism of the democratisation of qualifications for jury service in the UK expressed by some English legal practitioners. According to Blake, since 1972 'there have been a variety of complaints from judges, policemen, and some lawyers, that jurors are too stupid, or too irresponsible, too easily bribed or intimidated.'[59]

Some post-Soviet jurisdictions, for example Tajikistan, require that candidates for mixed courts have specific personal and moral qualities, which can be very vague criteria opening the possibility for discrimination. The Tajik regulation on lay assessors states that a citizen can become a lay assessor if he is respected, has good character at work and has not committed any disreputable acts.[60] This is because qualifications for lay judges in the classical mixed court are more restrictive than for jurors and are also less democratic.[61] The configuration and organisation of this variant of the collaborative court is based on the idea that the right to participate in adjudication is not the right of every citizen but, rather, of the most 'merited citizens.'[62] Here, however, the question remains open as to whether the determination of a candidate's aptness and merit can be objective and non-discriminatory.

2.6. Repeated Participation in Lay Adjudication

There is no single approach in the legislation of post-Soviet states regarding the issue of repeated participation of citizens in lay adjudication. In countries with a classical mixed court model, lay adjudicators usually serve a definite number of days per annum during a specific term, which may be up to several years. In Belarus,

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[59] Nicholas Blake, *The Case for the Jury*, in The Jury Under Attack 140 (Mark Findlay & Peter Duff, eds.) (Butterworths 1988).

[60] *Polozhenie Taj. o narodnykh zasedatelyakh*, ¶ 8.

[61] For example, in Bulgaria candidates should have a good name and authority with the public; in Slovakia – have full integrity and his/her moral qualities must provide a guarantee that he/she will correctly perform the duties of a lay judge; in Slovenia – be suitable in terms of personal qualities to participate in exercising judicial authority, *etc*. *See* Jackson & Kovalev, *supra* n. 5, at 101.

[62] In fact, the German legislation and literature uses the term *ehrenamtlicher Richter* or *honorary judge* for German lay adjudicators. *See, e.g.*, Eberhard Siegismund, *The Function of Honorary Judges in Criminal Proceedings in Germany*, Presentation to the 120th UNAFEI International Senior Seminar (Japan, Jan. 7 – Febr. 17, 2002), <http://www.unafei.or.jp/english/pdf/PDFpublect/siegismund.pdf> (accessed Juny 16, 2014).

lay assessors may not serve more than twenty-one days per year over a period of five years.[63] According to Uzbekistani law, lay assessors cannot serve more than two weeks per year for two and half years.[64] Similar provisions can be found in Tajikistani and Turkmenistani legislation: no more than two weeks per year for five years.[65] In other words, according to the legislation of these post-Soviet countries, lay assessors should be disqualified if they have completed the established number of days of lay assessors' service. However, practice in some post-Soviet countries demonstrates that judicial authorities violate the statutory requirement that lay assessors may serve only for a certain number of days or weeks; they deliberately extend the period of service for their 'favourite' and trustworthy lay assessors.

The European Court of Human Rights [hereinafter Eur. Ct. H.R.] had examined the issue of 'a flagrant breach of the internal rules for the appointment' of lay assessors in relation to Russian mixed courts shortly before the Russian Government abolished this form of lay adjudication.[66] In *Posokhov v. Russia,*[67] the applicant argued that two lay assessors

> had, contrary to section 9 of the Act [*Federal'nyi zakon 'O narodnykh zasedateliakh federal'nykh sudov obshchei iurisdiktsii v Rossiiskoi Federatsii'*], been acting as lay judges before the applicant's trial for at least *eighty-eight* days, instead of the maximum *fourteen* days per year. Moreover, their names had not been drawn by lot, in breach of section 5 of the Act.

The European Court of Human Rights doubted that the court that heard Posokhov's case could be regarded as a 'tribunal established by law' and held that there had been a violation of Art. 6(1) of the Convention.[68]

A similar practice of alleged illegal use of 'repeaters' in lay adjudication became an issue in constitutional litigation in Uzbekistan. One Uzbek lawyer addressed the Constitutional Court of Uzbekistan with a request to provide an official interpretation of Art. 62 of the Law on Courts (*Zakon Uzb. 'O sudakh'*), since lawyers and judges interpret this provision in various ways. The applicant argued that if a lay assessor had

63 *KoSISS Belr.*, Arts. 134, 136.

64 *Zakon Uzb. o sudakh*, Art. 62.

65 *Zakon Turkm. o sude,* Art. 62(9) and (10), and *Polozhenie Taj. o narodnykh zasedatelyakh*, ¶¶ 3 and 17.

66 A system of mixed courts of one professional judge and two lay assessors existed in Russia until January 2004 when it was abolished in favour of two other modes of trial: a bench trial of three judges or jury trial. *See* Federal Law of the Russian Federation of 29 May 2002 No. 59-FZ.

67 *Posokhov v. Russia*, no. 63486/00 (Eur. Ct. H.R., March 4, 2003).

68 Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms states: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal *established by law*.'

completed his or her two weeks' service he or she could not participate in other trials in the same year and should be challenged. However, the Constitutional Court held that the two week term is not a limitation for repeated participation of lay assessors in the same year and thus could not be grounds for a challenge or a disqualification.[69] The decision of the Constitutional Court of Uzbekistan means that the provision of the Law on Courts is declarative and the court authorities are allowed to summon specific lay assessors for unlimited terms within two and a half years.

Jurors in Russia,[70] Georgia,[71] Kyrgyzstan[72] and lay assessors in Kazakhstan[73] and Ukraine[74] are to be summoned for each trial. Moreover, the Georgian,[75] Kazakhstani,[76] Kyrgyzstani,[77] and Russian laws[78] disqualify or excuse lay assessors or jurors from further service only in the same year. As to the Ukrainian law, it does not disqualify lay assessors from further service even in the same year. Consequently, there is a danger that court authorities could deliberately summon favoured jurors or lay assessors, who delivered guilty verdicts in the past, every year in Georgia, Kazakhstan, Kyrgyzstan and Russia, and even more frequently in Ukraine.[79] In recent years, several cases have been reported where the defence appealed against guilty verdicts on the ground that the jury was composed of members who served as jurors in the past.[80] In one case, 9 of 12 jurors had previously served as jurors in other cases.[81]

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[69] Resolution of the Constitutional Court of Uzbekistan of 10 April 2002 (Uzb.).

[70] *FZ RF o prisyazhnykh zasedatelyakh*, Art. 10(1).

[71] *UPK Gruzii*, Art. 221.

[72] *Zakon Kyr. o prisyazhnykh zasedatelyakh,* Art. 10(1).

[73] *Zakon Kaz. o prisyazhnykh zasedatelyakh*, Art. 15(2).

[74] *UPK Ukr.*, Art. 385(1).

[75] *UPK Gruzii*, Art. 31.

[76] *UPK Kaz.*, Art. 550(3).

[77] *UPK Kyr.*, Art. 331–6(6).

[78] *UPK RF*, Art. 326(3).

[79] According to the Chairman of the Cassational Chamber of the Russian Supreme Court, Alexei Shurygin, the Supreme Court quashed at least one jury verdict on the grounds that the trial court summoned a juror one month after he had served in a previous trial in the same calendar year, in violation of random selection. *See* Научно-практический комментарий к Уголовно-процессуальному кодексу Российской Федерации [*Nauchno-prakticheskii kommentarii k Ugolovno-protsessual'nomu kodeksu Rosiiskoi Federatsii* [Commentary on Criminal Procedure Code of the Russian Federation]] 563 (Viacheslav M. Lebedev, ed.) (Yurait 2003) [hereinafter *Nauchno-prakticheskii kommentarii*].

[80] Appellate Decision of the Supreme Court of the Russian Federation No. 67-O07-53 SP of 18 October 2007 (Re *Filatov*); Appellate Decision of the Supreme Court of the Russian Federation No. 53-O11-61 SP of 24 November 2011 (Re *Ivanov*).

[81] Appellate Decision of the Supreme Court of the Russian Federation No. 67-O12-78 SP of 27 November 2012 (Re *Balashov*).

In another case, the jury foreman previously participated in another trial with the same prosecutor.[82] However, in all these cases the Supreme Court of the Russian Federation dismissed the appeal on the ground that the trial judge did not err by including jurors in the jury, because the required period of one year had passed since their previous jury service. In order to prevent this unfair practice, the legislation of post-Soviet countries should explicitly disqualify those citizens who have served as jurors or lay assessors during several preceding years.

In many common law jurisdictions, citizens are excused from further jury service for longer periods: for two years in the U.S. federal courts,[83] New Zealand,[84] the Canadian provinces of Manitoba[85] and Nunavut;[86] for three years in the Republic of Ireland;[87] and for five years in Québec.[88]

Taking into account that the number of jury trials in Russia and other post-Soviet states is fewer than in the United States and other common law jurisdictions due to the limited number of cases eligible for lay adjudication, the period of excusal for citizens who have already served as jurors or lay assessors in post-Soviet countries could be even longer than in common law jurisdictions, for instance, extending to five or seven years.

Several arguments can be made in favour of extended excusal for previous jurors and lay assessors from lay adjudication service. Firstly, the rotation method would allow other citizens to fulfil their right to participate in the adjudication process. Moreover, since lay adjudication is recognised as a civic duty in Kazakhstan[89] and Russia,[90] it would be unfair, on the one hand, to place the burden of serving as a juror or lay assessor on the same citizens each year or even more often, and, on the other hand, to excuse others from the service. Finally, summoning new 'recruits' for each trial would prevent case-hardening and accusatorial bias on the part of lay adjudicators, which is one of the most serious threats to impartiality of tribunals in post-Soviet states.

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[82] Appellate Decision of the Supreme Court of the Russian Federation No. 4-007-91 SP of 25 October 2007 (Re *Zlotnikov*).

[83] 28 U.S.C. § 1866(e).

[84] Juries Act § 15 (2)(b) (1981) (N.Z.).

[85] The Jury Act C.C.S.M., c. J30, § 25(3) (Can.).

[86] Jury Act R.S.N.W.T., c. J-2, § 7 (1988) (Can.).

[87] Juries Act, Act No. 4/1976, § 9 (1976) (Ir.).

[88] Province of Quebec Jurors Act, c. J-2, § 5(e) (Can.).

[89] *Zakon Kaz. o prisyazhnykh zasedatelyakh*, Art. 11(5).

[90] *FZ RF o prisyazhnykh zasedatelyakh,* Art. 2(2).

3. Pre-trial Composing Lists of Candidates for Lay Adjudication Service

3.1. Methods of Composing Lists of Jury and Lay Assessor Candidates

Legislation in post-Soviet countries stipulates various methods of composing lists of prospective lay adjudicators, which do not always adhere to the methods used in developed democracies. While the Kyrgyzstani[91] and Russian[92] legislation stipulates random collection of prospective jurors' names from electoral registers. Kazakhstani legislation, following the contemporary French model of the collaborative court, also provides for randomly collecting the names of prospective lay assessors from electoral registers.[93]

On the other hand, the Ukrainian law does not require that the listing of prospective lay assessors should be random.[94] In Ukraine, local councils compose and approve lists of prospective lay assessors.[95] Neither does Belarussian law call for random selection. Lay assessors in Belarus are chosen by local executive authorities and approved by local councils and, in case of lay assessors, appointed for the Supreme Court of Belarus – by the President of Belarus.[96]

A final category of selection methods used by some post-Soviet nations is an election model. Uzbekistani legislation, for example, retains a method of listing lay assessors peculiar to the Soviet legal system, election by an open ballot at citizens' meetings at the place of work or residence.[97] A similar method of electing lay assessors is used for district and provincial courts in Tajikistan[98] and for lower district courts (*etrapskie*) in Turkmenistan. At the same time, for higher courts such as provincial (*velaiatskie*) and the Supreme Court of Turkmenistan, potential lay assessors are only nominated by citizens' meetings, and then are appointed by the local governors (in the case of provincial courts) and by the President of the Republic (in the case of the Supreme Court).[99]

Presumably, the method of random selection is the most objective method of composing a list of potential jury or lay assessor candidates, as it ensures a fair cross-section of the community. The alternative method of nomination by the executive

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91 *Zakon Kyr. o prisyazhnykh zasedatelyakh*, Art. 8(3).

92 *Zakon RF o prisyazhnykh zasedatelyakh*, Art. 5(3).

93 *Zakon Kaz. o prisyazhnykh zasedatelyakh*, Art. 6(1)(3).

94 *Zakon Ukr. o sudoustroistve i statuse sudei*, Art. 58-1.

95 *Zakon Ukr. o sudoustroistve i statuse sudei*, Art. 65(3).

96 *KoSISS Bel.*, Art. 134.

97 *Zakon Uzb. o sudakh*, Art. 62(1).

98 *Polozhenie Taj. o narodnykh zasedatelyakh*, ¶ 7.

99 *Zakon Turkm. o sude*, Art. 62.

bodies grants considerable power to local authorities to include loyal or favourable lay adjudicators. The deliberate choice of potential lay assessors by courts could result in obedient lay assessors, who would willingly cooperate with professional judges. The 'democratic' method of electing lay assessors by people in Turkmenistan and Uzbekistan, similarly does not appear to ensure fair representation of citizens in the administration of justice. Firstly, the laws do not stipulate how the special judicial selection commissions or local councils that organise elections in these countries, nominate candidates for inclusion in the list for people's assessor service. This gap leaves a lot of room for manipulation in the pre-selection process, potentially with a view to nominating people favourable to the government. Secondly, if one is to consider this an election, the open ballot voting procedure violates the general requirement of the Universal Declaration of Human Rights for 'genuine elections.'[100]

In the contemporary, political context of the post-Soviet countries, the executive authorities are able to intervene in the process of compiling lists of prospective lay adjudicators no matter what method is used. However, the degree of government intrusion depends on such factors as publicity of the procedure, and accountability of the committee choosing the potential candidates.

3.2. Publicity of the Listing Procedure

None of the post-Soviet countries makes public the random selection of candidates for jury or lay assessor service. Although some countries formally provide public access to preliminary or final jury or lay assessors lists, this alone cannot prevent the authorities from manipulating the lists and thus causing possible selection fraud.

In Kazakhstan, the law stipulates that, first, the individuals on the election registers who are not qualified for lay assessor service are excluded. Then, before 'random' selection of the candidates, the district (*raionnyi*) or city executive body should permit any citizen to examine the preliminary lists of candidates for the lay assessor service over a period of seven days.[101] Examination is done on the premises of the executive body. On the one hand, this rule gives the public an opportunity to observe the selection process. On the other hand, however, this provision is formalistic and does not ensure genuine publicity of the collection process. Firstly, the Kazakhstani law does not require the executive bodies to notify the public of when they can examine the preliminary lists of candidates. Secondly, the period of seven days is not a reasonable time for all citizens who are interested in studying

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100 Article 21(3) of Universal Declaration of Human Rights proclaims: 'The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.'

101 *Zakon Kaz. o prisyazhnykh zasedatelyakh*, Art. 6(1)(2).

preliminary lists to visit the executive body and do so. Thirdly, the examination of preliminary lists by the public does not disclose the actual process of the 'random' listing of candidates, and hence is not an effective safeguard of true randomness. Moreover, the law does not require publication of the final lists; making it impossible for the public to examine the composition of lists on the basis of which a court will actually summon lay assessors for a particular case.

Neither the Russian, nor Georgian, nor Kyrgyzstani laws provide for public random compiling of lists of candidates for jury service from the electoral registers. Sergei Pashin, a former judge and one of the founders of the Russian jury trial system, and Lev Levinson, of the Moscow Human Rights Institute, criticise the Russian legislation for a lack of public control over the compilation of jury lists:

> Closed from the public the procedure [of selection of prospective jurors] allows the consideration of a celebrated 'method of random selection' as unsupported by anything, a pure declaration or fiction . . . The law says nothing about notifying citizens concerning the date of random selection, the open nature of the procedure, the right of representatives of mass media, bar association and prosecution during the process of the compilation of jury lists.[102]

Public random compilation of lists potential jurors and lay assessors is clearly set out in the legislation of some developed democracies. For example, according to French law:

> In each municipality the mayor publicly draws by lot from the electoral list a number of names three times that fixed by the *préfet*'s decision, in order to draw up the preliminary list for the annual list. Persons, who will not reach the age of twenty-three in the coming civil year are not retained for the composition of this preliminary list.[103]

In addition to this public procedure of random drawing up of the lists, French legislation also requires the mayor to draft a preliminary list in two original copies, of which one is deposited at the town hall and the other is sent to the court office of the court where the assize sits. Then a notification is sent to the persons drawn by lot.[104]

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102 *Пашин С., Левинсон Л.* Суд присяжных: проблемы и тенденции [Pashin S., Levinson L. *Sud prisyazhnykh: problemy i tendentsii* [Sergei Pashin & Lev Levinson, Trial by Jury: Issues and Trends]] 52–53 (International Helsinki Federation for Human Rights 2004).

103 Code de procédure pénale, Art. 261 (Fr.).

104 *Id.* Art. 261-1.

3.3. Accountability of the Selection Body

Besides the publicity of the selection procedure, the legislation in post-Soviet states should also contain guarantees of accountability of the bodies that prepare the lists of candidates for jury or lay assessor service. Two mechanisms could help to ensure the accountability of these bodies: appropriate composition of committees, and liability of officials for violations of procedure.

The composition of state bodies that are in charge of random collection of candidate jurors or lay assessors is not sufficiently regulated in the legislation of any post-Soviet countries. In common law countries, legislation explicitly stipulates that preparation of jury lists is the responsibility of nominated officials, such as a *sheriff* in Canada,[105] a *county registrar* in the Republic of Ireland,[106] and a *Chief Electoral Officer* in Northern Ireland.[107]

Contrarily, the laws of post-Soviet states, are unclear about which official or state body should compose jury or lay assessors lists. For example, the Kazakhstani and Kyrgyzstani legislation says that local executive authorities prepare preliminary and general lay assessors lists. According to the Russian law on jurors, in each Subject of the Federation, the highest executive authority determines the procedure and schedule for the compilation of jury lists. Russian law also stipulates that municipal executive bodies compose a random list of candidates for jury service in each municipal district of the subject of the Russian Federation. At the same time, it is unclear which officials conduct the random selection from the list, and whether it is a collective body or a single officer.[108]

In order to prevent corruption and manipulation of jury or lay assessors lists in post-Soviet countries, selection bodies should consist of local officials from executive, legislative and judicial branches of power, as well as representatives of the bar and civil society.

Some European countries use this approach. For example, according to the French law, the annual list of potential lay assessors is drafted at the seat of each assize court by a commission that consists of the court's president or his delegate, three judges appointed each year by the general assembly of the court where the assize court sits; the district prosecutor or his delegate; the president of the bar association attached to the court where the assize court sits or his representative; and five district councillors appointed each year by the district council.[109]

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105 *See* Granger, *supra* n. 2.

106 Juries Act, Act No. 4/1976, § 9–10 (1976) (Ir.).

107 The Juries Order, Act No. 1141, § 4 (1996) (Northern Ireland).

108 Pashin & Levinson, *supra* n. 102, at 53.

109 Code de procédure pénale, Art. 262 (Fr.).

Were such a system to be adopted in post-Soviet states, since the representatives of courts, local legislatures and bar associations are not accountable to executive authorities, the selection committee could presumably 'check and balance' the power of executive authorities by preventing deliberate screening of candidates instead of genuine random collection. In multi-ethnic, multi-religious and multi-language communities, the committee could include, at least as observers, representatives of ethnic minority cultural centres and major religious organizations. This would reduce the risk of ethnic, religious and racial discrimination, as well as prevent arbitrary exclusion of candidates from jury or lay assessors lists. Otherwise, there is a risk that compilation of jury and lay assessors lists in post-Soviet states would be similar to the practice that existed in 19th century Ireland where sheriffs from the protestant community intentionally included only their co-religionists into jury lists and stuck Catholics and other citizens unfavourable to the government off the lists.[110]

Another issue of accountability of the bodies responsible for compilation of jury and lay assessors' lists, is the liability for violations of the compilation procedure. Note that none of the post-Soviet countries recognises manipulation of the jury or lay assessors lists either as a criminal offence (*prestuplenie*) or as an administrative delinquency (*administrativnoe pravonarushenie*), which, according to some scholars and human rights activists in Russia, allows authorities to fabricate jury lists with impunity.[111]

The laws of some post-Soviet countries, for example Kazakhstan, Kyrgyzstan and Russia, allow citizens to complain to executive authorities against the unjustified inclusion or exclusion of names from jury or lay assessors lists. Moreover, Russian and Kazakhstani laws stipulate that if the executive authorities do not answer or reject the complaint, the complainant may appeal to the court according to rules of civil procedure. At the same time, laws in these post-Soviet states do not empower courts to punish executive authorities: for example, to award punitive damages to the plaintiff. According to the current laws in post-Soviet states, courts may only order executive authorities to review jury or lay assessors lists and include or exclude specific citizens' names. Moreover, considering that the procedure of random selection in these countries is not transparent, it is even impossible to establish the facts of unjustified inclusion or exclusion of specific names. Without the ability to obtain proof of irregularities, citizens' rights to appeal to the court against violations in the pre-trial selection procedure are declaratory and formalistic.

In order to prevent officials from manipulating the jury and lay assessors lists, post-Soviet countries need to introduce criminal liability for violating random

[110] *Миттермайер К.* Европейские и американские суды присяжных [Mittermeier C. *Evropeiskie i amerikanskie sudy prisyazhnykh* [Carl Mittermeier, European and American Jury Systems]] 83–84 (V. Molchanov, ed.) (Tipografiya A.I. Mamontova i K° 1869).

[111] Pashin & Levinson, *supra* n. 102, at 70.

selection and for deliberate inclusion or exclusion of names from jury or lay assessors lists on grounds of race, ethnicity, political views, social status, and other illegitimate grounds. Such a new criminal provision would allow prosecution of those officials who illegally exclude names from jury and lay assessors lists, as well as prosecution of those officials who order such exclusion. Such crimes should be included in the class of serious felonies, since jurors and lay assessors in the post-Soviet states may participate in adjudication of serious crimes where the defendants' lives and liberties are at stake.

4. Selection of Jurors and Lay Assessors in Court

While pre-trial selection of veniremen or candidates for lay assessor service is an initial step for selection of the jury or mixed courts for a particular trial, the legislation in post-Soviet states should also guarantee that empanelment of jurors and lay assessors is fair and provides defendants with an impartial and independent tribunal in each individual case.

The procedure for empanelling jurors and selecting lay assessors for a particular case varies in different post-Soviet countries. In countries with classical collaborative courts, like Belarus, Turkmenistan and Uzbekistan, the court assigns two lay assessors for each case in the order they appear on the list of lay assessor candidates.[112] Parties in a criminal trial in Belarus, Turkmenistan and Uzbekistan cannot participate in the selection of lay assessors, except by challenging them for cause on the same grounds as they can challenge the presiding judge. By contrast, legislation in Georgia, Kazakhstan, Kyrgyzstan, Russia and Ukraine, stipulate for the summoning of veniremen or lay assessors on a random basis from jury and lay assessors lists. Moreover, parties in these countries are entitled to participate in jury or lay assessors' selection by means of *voir dire*, challenges for cause and, with the exception of Ukraine, peremptory challenges.

4.1. Summoning for Veniremen and Lay Assessors Service

According to the legislation of Georgia,[113] Kazakhstan,[114] Kyrgyzstan,[115] Russia[116] and Ukraine,[117] candidates for jury or lay assessor service are summoned for each case. Moreover, laws in these countries require the summoning of a minimum number of

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112 *KoSISS Belr.*, Art. 136; *Zakon Turkm. o sude*, Art. 62(10); *Zakon Uzb. o sudakh*, Art. 62.

113 *UPK Gruzii*, Art. 221(1).

114 *UPK Kaz.*, Art. 549(2).

115 *UPK Kyr.*, Art. 331-5.

116 *UPK RF*, Art. 325.

117 *UPK Ukr.*, Art. 385.

candidates: 100 in Georgia, 20 in Russia, 25 in Kazakhstan, 50 in Kyrgyzstan, and only seven in Ukraine. Although Russian legislation requires court personnel to summon veniremen from jury lists using the method of random selection,[118] some Russian scholars, advocates and human rights activists claim that courts sometimes violate this method and select only the candidates most favourable to the government.

In the survey of Russian advocates, judges and prosecutors conducted by the author in 2004, in nine Russian provinces, several advocates and one judge expressed concerns about current practices of selection of veniremen. One of the advocates said:

> Prospective jurors are selected 'in private' without participation of the parties and there is a high risk of selection of a number of 'loyal' jurors, who have numbers from one to fourteen. Even two peremptory challenges cannot correct the situation and prosecution loyalists will get into the jury.

One judge, who was apparently mistaken on the law, pointed out that it was necessary to return to the former method of 'lottery selection,' which would allow selecting jurors at random as opposed to the current practice of selection from the list. This implies that in his court the court personnel in fact deviated from the legally mandated practice of random selection.

A number of reported appellate cases alleged that the court violated random selection procedures, but in most of these cases the appellants failed to prove these allegations.[119]

More evidence of violations in the selection of veniremen in Russia can be found in two high-profile cases where the court personnel deliberately included improper candidates in the jury pool[120] and violated the provision of the Russian Code of Criminal Procedure, which requires that the jury venire should be selected at random from the existing jury lists compiled for a particular court.

In one case a prospective juror, allegedly a former KGB officer, was intentionally included in the jury pool for the trial of the Russian scientist Igor Sutyagin, who was charged with high treason.

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[118] *UPK RF*, Art. 326(1).

[119] Appellate Decision of the Supreme Court of the Russian Federation No. 35-O06-3SP of 13 March 2006 (Re *Sheichenkov*); Appellate Decision of the Supreme Court of the Russian Federation No. 74-O08-18 of 4 June 2008 (Re *Gorin et al.*); Appellate Decision of the Supreme Court of the Russian Federation No. 73-O09-8SP of 4 June 2009 (Re *Shenoev*); Appellate Decision of the Supreme Court of the Russian Federation No. 5-O09-261 SP of 16 November 2009 (Re *Frenkel*); Appellate Decision of the Supreme Court of the Russian Federation No. 67-O12-78 SP of 27 November 2012 (Re *Balashov*).

[120] Anatoly Medetsky, *Juror in Sutyagin's Trial Was a Former Intelligence Officer*, The Moscow Times (Oct. 26, 2004), <http://www.themoscowtimes.com/news/article/juror-in-sutyagins-trial-was-a-former-intelligence-officer/227444.html> (accessed Juny 16, 2014)); *Кригер И.* Суд как разведмероприятие [Kriger I. *Sud kak razvedmeropriyatie* [Igor Kriger, *Trial as Intelligence Measure*]], *Novaya Gazeta* (Nov. 4, 2004), <http://2004.novayagazeta.ru/nomer/2004/82n/n82n-s10.shtml> (accessed Juny 16, 2014).

In another case, according to one of the advocates who participated in the trial, the presiding judge discharged the jury because several jurors and all alternates dropped out of the jury after three months of the trial. Four members from the discharged jury, however, were illegally included in the new jury to try the same case.[121]

Note that the Russian Supreme Court, in its appellate decision, pointed out that the grounds for quashing the acquittal in this case was the fact that all 4 repeaters were not on the jury lists for the new term of service.[122] However, in the Sutyagin trial, in which there was a guilty verdict, the same fact was simply ignored.

In order to increase public confidence in the selection procedure and prevent manipulation of the selection of veniremen or lay assessors, some scholars suggest that parties should be present in court during the random selection of candidates.[123] In Kazakhstan, the authors of the alternative draft law on the Anglo-American type jury system included such a provision:

> Parties have the right to be present during random selection procedure . . . The list of prospective jurors is signed by a court clerk and parties if they participated during random selection procedure.[124]

A similar approach is used in France, where the chairman of the court draws the names of forty lay assessors, who will form the list for the session, by lot from the annual list in open court.[125]

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[121] Appellate Decision of the Supreme Court of the Russian Federation No. 1-011/03 of 26 August 2004 (Re *Ulman et al.*).

[122] *Id*.

[123] *Пашин С.А.* Концепция судебной реформы в России [Pashin S.A. *Kontseptsiya sudebnoi reformy v Rossii* [Sergei A. Pashin, *Concept of the Judicial Reform in Russia*]] (2004), <http://sutyajnik.ru/rus/cases/etc/koncepcia_sud_reformi.htm> (accessed Juny 16, 2014).

[124] Проект Закона Республики Казахстан «О внесении изменений и дополнений в некоторые законодательные акты…» (ст. 550) // Судопроизводство с участием присяжных заседателей и перспективы его введения в Республике Казахстан [*Proekt Zakona Respubliki Kazakhstan 'O vnesenii izmenenii i dopolnenii v nekotorye zakonodatel'nye akty…' (st. 550) // Sudoproizvodstvo s uchastiem prisyazhnykh zasedatelei i perspektivy ego vvedeniya v Respublike Kazakhstan* [Draft Law of the Republic Kazakhstan on Amendments to Some Laws . . . (Art. 550), in Trial by Jury and Prospects of Its Introduction in the Republic of Kazakhstan]] 256 (Dmitry Nurumov, ed.) (Poligrafservis 2005) [hereinafter *Sudoproizvodstvo s uchastiem prisyazhnykh zasedatelei*]. This draft law was written by the National Commission on Democracy and Civil Society (*Natsional'naya komissiya po voprosam demokratii i grazhdanskogo obshchestva*). It has never been officially introduced to the Kazakhstani Parliament despite numerous appeals and requests by NGOs, legal scholars and bar associations to the Government, Members of Parliament and the President. *See, e.g.*, Открытое обращение неправительственных организаций Республики Казахстан к Правительству, Парламенту и Президенту Республики Казахстан [*Otkrytoe obrashchenie nepravitel'stvennykh organizatsii Respubliki Kazakhstan k Pravitel'stvu, Parlamentu i Prezidentu Respubliki Kazakhstan* [*An Open Letter from NGOs to the Kazakhstani Government, Parliament and President*]], Zona.kz (Nov. 11, 2005), <http://zonakz.net/articles/?artid=10127> (accessed Juny 16, 2014).

[125] Code de procédure pénale, Art. 266 (Fr.).

In addition to the selection of prospective jurors or lay assessors by ballot in open court for each particular case or session, the minimum number of summoned jurors or lay assessors should be increased up to thirty-five or forty in order to provide the parties with an opportunity to use their right for peremptory challenges and challenges for cause more extensively and effectively.

4.2. Excusals from Jury or Lay Assessor's Service

In some post-Soviet countries, legislation allows prospective jurors or lay assessors to apply for excusal or to 'challenge themselves' (*zayavit' samootvod*) in court.[126] At the same time, there is not always an exhaustive list in this legislation setting forth the grounds on which the presiding judge can excuse such prospective lay adjudicators. There is a range of grounds for excusal from lay adjudication service stipulated in the laws of some post-Soviet states, such as a jury candidate being sixty-five or older (Kazakhstan and Russia) or seventy (Georgia). In Kazakhstan, as another example, the law allows excusing women with children younger than three years old, candidates with religious views that prohibit participation in the administration of justice,[127] and professionals whose absence from their duties may cause damage to public or state interests (doctors, teachers, pilots, *etc.*). Moreover, according to the laws of Russia[128] and Kazakhstan,[129] the presiding judge can excuse a prospective juror or lay assessor for any other 'good' reason. These grounds easily allow those who wish to avoid jury or lay assessor service to be excused.

In 2004, the author studied the transcripts of fifteen criminal jury cases in the Moscow City Court. In all these cases the presiding judge excused all prospective jurors who applied for exemption. For instance, besides medical reasons, some prospective jurors were excused for one of the following reasons: pressure of work (twenty-two), vacation (two), commemoration of a father's death (one), care of grandchildren (four), relatives in the hospital (two), care for elderly parents (three), reluctance to serve (two), sick leave (two), family conditions (two), religious beliefs or moral reasons (two). The vast majority of refusals to serve as a juror were based on the claim that potential jurors had a permanent job and could not take leave from work. Note, however, that according to the court transcripts none of the prospective jurors was required to provide any evidence to support his or her claim. At the same time, from the point of view of the current law, such claims would not seem to be

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126 *UPK Gruzii*, Art. 31; *UPK RF*, Art. 328(4); *UPK Kaz.*, Arts. 552–553.

127 Russian legislation between 1993 and 2004 used to allow the presiding judge to excuse prospective jurors on these grounds. Закон РСФСР «О судоустройстве РСФСР» [*Zakon RSFSR 'O sudoustroistve RSFSR'* [Law of the RSFSR on Judicial Organization in RSFSR]] of 8 July 1981, Art. 80(6)(3) (provision repealed by the Federal Law of Aug. 20, 2004 No. 113-FZ) (Russ.), however the new law on jurors does not contain such provision.

128 *UPK RF*, Art. 328(4).

129 *UPK Kaz.*, Art. 552(3)(5).

justified, since employers in Russia are prohibited from discharging or transferring an employee to another position during the term of their jury service and from obstructing employees from fulfilling their jury duties.[130]

Theoretically, if a person is fired during jury service, this person can dispute the employer's decision in court. For instance, a woman, who served as a juror in the Moscow Regional Court for seven months, was fired from her place of work shortly before she finished her jury service. She filed a civil action against her employer requesting that she be restored to her position, paid compensatory damages for economic losses during the period of unemployment, and paid non-economic losses for her moral suffering. The court ruled in favour of the ex-juror, and awarded her 2.66 million rubles in damages.[131]

At the same time, the law does not protect those who are employed in the shadow economy. Such employees are not registered, and hence cannot complain if the employer discharges them while they serve as jurors. Even registered employees, who work in the private sector, do not feel secure if they need to leave their job for several weeks or even months. For example, in one of the cases reviewed in the Moscow City Court, a prospective juror, a female merchandiser, was excused because she claimed her employer was not interested in her duties as a juror and she was not able to be in court full-time. The inability to take leave from work in private sector employment in general, and in the 'shadow' sector in particular, should not be recognised as a legitimate ground for exemption from jury service. Otherwise the state would shift the burden of jury or lay assessor duties to citizens who are unemployed or employed in the public sector. Moreover, by excusing those who work in the shadow sector of the economy, courts would indirectly support further tax evasion in companies with unregistered employees.

In some post-Soviet countries, for instance Belarus, Kyrgyzstan and Ukraine, lay assessor service is based on the principle of *voluntarism* (*dobrovol'nost'*), meaning that the government may include citizens in lay assessors list only with their consent. The Criminal Procedure Law of Kyrgyzstan does not allow jurors to excuse themselves, except in the cases of conflict of interest or bias in a particular case, which is a general ground for recusal for professional judges. This is due to a provision of the Law on Jurors, which permits citizens to be removed from the list of prospective candidates before final jury lists are composed and forwarded to the court.[132] Ukraine is another country that does not impose on its citizens the mandatory civic duty to serve as a juror. As opposed to Kyrgyzstan, where citizens must notify the authorities that

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[130] *Zakon RSFSF o sudoustroistve RSFSR*, Arts. 86, 87 (Russ.); *Zakon RF o prisyazhnykh zasedatelyakh*, Arts. 11, 12.

[131] *Снегирева Е.* Присяжный заседатель восстановлен на работе после незаконного увольнения // Российская юстиция. 1997. № 12. С. 7 [Snegireva E. *Prisyazhnyi zasedatel' vosstanovlen na rabote posle nezakonnogo uvol'neniya // Rossiiskaya yustitsiya*. 1997. No. 12. S. 7 [Elena Snegireva, *Juror Reinstated after Wrongful Dismissal*, 1997(12) Russian Justice 7]].

[132] *Zakon Kyr. o prisyazhnykh zasedatelyakh*, Art. 8(1).

they want their names to be removed from the preliminary jury list, Ukrainian law requires prospective candidates to give consent to be included into the jury list. In Kazakhstan, the authors of the alternative draft law on jurors initially proposed a provision that would require participation of citizens in lay adjudication to be based on a similar principle:

> Voluntarism of participation of citizens of Kazakhstan in adjudication as jurors is ensured by the right of the citizen to waive his right to serve as a juror for any reason until he swears in.[133]

The authors of the draft argued that, according to the Kazakh Constitution, participation in public affairs is a right of citizens and not a duty.[134] However, after discussion with OSCE experts the principle of voluntarism of lay adjudication was excluded from the revised draft.[135]

The principle of voluntarism for participation in lay adjudication is a double-sided concept. Arguably, lay adjudicators with the motivation and willingness to serve as lay adjudicators would be more beneficial to the criminal justice system because they would fulfil their duties more responsibly and carefully. Moreover, reluctant lay adjudicators may neglect their duties by trying to be discharged from jury or lay assessors' service. Some lay adjudicators may cause delays in court hearings, or even cause a mistrial, by alleging illness or other 'good' reasons. On the other hand, exclusive inclusion of citizens who are enthusiastic to serve on juries or mixed tribunals would likely make lay adjudication unrepresentative of some age groups and social classes. In other words, lay adjudicators would be represented predominantly by people, such as the unemployed and pensioners, who have spare time and a material interest in the jury or lay assessor allowance. Although participation of these groups of people does not necessarily mean deterioration in the quality of lay adjudication, systematic excusing of citizens with full time jobs would make juries and mixed tribunals less representative, and hence less democratic.

In order to mitigate citizens' reluctance to participate in lay adjudication, the government should ensure several key principles. Firstly, citizens should be required to participate only in a single trial. Secondly, trials with the involvement of lay

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133 *Proekt Zakona Respubliki Kazakhstan o prisyazhnykh zasedatelyakh*, Art. 3, in *Sudoproizvodstvo s uchastiem prisyazhnykh zasedatelei*, *supra* n. 124, at 243.

134 Transcript of the round table on the discussion of the draft laws on jury of 13 January 2005 (unpublished, on file with author).

135 The author criticized the principle of voluntarism of lay adjudication in commentaries on the draft law, which were used by OSCE during round table discussions on 13 January 2005. *Ковалев Н.* Комментарии к законопроекту о присяжных заседателях судов Республики Казахстан от 13 января 2005 г. [Kovalev N. *Kommentarii k zakonoproektu o prisyazhnykh zasedatelyakh sudov Respubliki Kazakhstan ot 13 yanvarya 2005 g.* [Nikolai Kovalev, *Commentaries on Draft Law on Jurors in Courts of the Republic of Kazakhstan*]], in *Sudoproizvodstvo s uchastiem prisyazhnykh zasedatelei*, *supra* n. 124, at 277–78.

adjudicators should be uninterrupted by long recesses, which, in some cases, last for more than a month. Thirdly, those citizens who neglect their duties as jurors or lay assessors by not showing up for court hearings should be removed by the presiding judge and cited for contempt of court. For instance, Mr. Beletskii was selected as juror No. 4 for participation in the first jury trial of *Ulman et al.* in October 2003. After he had been sworn in as a juror, Beletskii did not show up in court on several occasions and did not provide evidence of 'good' reasons for his absence. The presiding judge inquired and discovered that Beletskii was reluctant to serve as juror. The presiding judge discharged Beletskii from the jury and fined him to 2.5 thousand rubles. Moreover, in January 2004, the trial judge, due to lack of alternates to replace Beletskii, had to discharge the whole jury and declare a mistrial. Beletskii appealed the fine to the Supreme Court of the Russian Federation. The Supreme Court dismissed the appeal and upheld the decision of the trial judge.[136]

Given the loopholes in current legislation, and the resulting discretion of judges during jury selection, post-Soviet countries need to pass legislation stipulating an exhaustive list of legitimate reasons for exemption from jury or lay assessor service. Such a list should be limited to some exceptional cases of personal hardship, such as serious illness of a prospective juror or his relatives, death of a relative, *etc.* This would make juries and mixed tribunals in these countries more representative of different strata of society.

4.3. The Voir Dire Procedure

The rules of criminal procedure provide for questioning prospective jurors in Georgia, Kyrgyzstan and Russia, and lay assessors in Kazakhstan, about their knowledge and attitudes towards a particular case and parties, including the defendant and the victim. The purpose of this is to challenge lay adjudicators who possess, or may possess, bias against either of the parties.

The role of the judge in this *voir dire* process varies among states. According to the legislation of some post-Soviet countries, the presiding judge plays an active role in questioning prospective jurors or lay assessors, and parties have limited opportunities to participate in the *voir dire*. For example, in Georgia[137] and Kazakhstan,[138] the parties are unable to ask prospective jurors questions during *voir dire* without having to submit them first to the presiding judge. Contrarily, in Russia, the presiding judge, after questioning prospective jurors, allows the parties to ask their questions, which may elicit facts preventing candidates from serving as jurors in a particular case.[139]

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136 Resolution of the Military Division of the Supreme Court of the Russian Federation No. 1-011/03 of 26 August 2004 (Re *Beletskii*).

137 *UPK Gruzii*, Art. 223(3).

138 *UPK Kaz.*, Art. 551(4).

139 *UPK RF*, Art. 328(8).

Although in some U.S. jurisdictions the participation of parties in questioning prospective jurors can be also restricted,[140] for the most part, direct and active involvement of the presiding judge during *voir dire* is a legacy of the Soviet inquisitorial tradition of criminal procedure.

In order to make criminal procedure more adversarial and less protracted, parties in the criminal trial should have an opportunity to conduct *voir dire* independently. Optimally, the presiding judge might only intervene into questioning in cases when either party abuses its rights by asking indecent, illegal, irrelevant or other improper questions.

Arguably, *voir dire* is not an essential characteristic of the adversary process since several common law jurisdictions, such as England and Wales, Scotland Australia, New Zealand, Northern Ireland, Republic of Ireland, Canada, and some civil law jurisdictions such as France, do not allow, or restrict, the questioning of prospective jurors or lay assessors by parties.[141] According to England's Fraud Trials Committee (hereinafter Roskill Committee), an English governmental committee chaired by Lord Roskill, which was charged with reviewing the methods of prosecuting serious fraud cases in England, judges should not question prospective jurors since it was established by practice that challenges for cause were permitted only if the party referred to *prima facie* evidence for such challenge.[142] Similar grounds for restricting judges from extended questioning of prospective jurors are recognised in Canadian case law. In *R. v. Hubbert*, the Ontario Court of Appeal stated: 'Challenge for cause is not for the purpose of finding out what kind of juror the person called is likely to be – his personality, beliefs, prejudices, likes or dislikes.'[143] Moreover the Canadian Supreme Court in *R. V. Sherratt*, said that challenges for cause 'stray into illegitimacy if used merely . . . as a "fishing expedition" in order to obtain personal information about the juror.'[144] The reason behind abolition of the *voir dire* in some other countries, such as Scotland, is that this procedure undermines the randomness of jury selection.[145] Thus, in *M. v. H.M. Advocate*, the Scottish Appeal Court held:

> [T]here should be no general questioning . . . of persons cited for possible jury service to ascertain whether any of them could or should be excused

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140 J. Alexander Tanford, The Trial Process: Law, Tactics, and Ethics 110 (LexisNexis 2002).

141 *See* Lloyd-Bostock & Thomas, *supra* n. 54, at 72–76; Duff, *supra* n. 16, at 257–60; Vidmar, *supra* n. 20, at 35; Jackson et al., *supra* n. 55, at 292; and Code de procédure pénale, Art. 298 (Fr.).

142 Fraud Trials Committee, Report 128–29 (Hansard 1986); Lloyd-Bostock & Thomas, *supra* n. 54, at 75 (fn. 137).

143 Neil Vidmar, *The Canadian Criminal Jury: Searching for a Middle Ground*, in World Jury Systems, *supra* n. 16, at 234; Granger, *supra* n. 2, at 158.

144 *R. v. Sherratt* [1991] 1 S.C.R. 509 (Can.).

145 Duff, *supra* n. 16, at 257–60.

> from jury service in a particular trial . . . The essence of the system of trial by jury is that it consists of fifteen individuals chosen at random from amongst those who are cited for possible service.[146]

However, as Duff pointed out, the absence of the *voir dire* makes challenging jurors for cause difficult.[147]

Taking into account the fact that Russian advocates obtain the names of prospective jurors on the date of the trial, challenges for cause without preliminary questioning of prospective jurors would be virtually impossible. Moreover, abolition of the *voir dire* procedure would be disadvantageous only for the defence. As opposed to the defence, the prosecution may investigate a panel of jurors by obtaining from the local police information on criminal records and references on prospective jurors and their relatives. In other words, this would turn peremptory challenges by the defence into taking shots in the dark. For instance, one European expert, Joachim Herrmann, in his assessment of the Draft Code of Criminal Procedure of Ukraine pointed out that, in order to make a deliberate decision on peremptory challenges, parties should have an opportunity to question jurors or to request the judge to do so. Otherwise, according to Herrmann, peremptory challenges would end up as a kind of lottery.[148]

This hypothesis is supported by the responses of several Russian advocates to the survey the author conducted in 2004. Several advocates said that the defence needed more information on prospective jurors in order to make rational decisions on peremptory challenges. One of the advocates even pointed out that parties should know the names of prospective jurors, which implies that, in some Russian trials, the court did not provide the names of jurors to the defence. Several respondents among Russian judges also complained about the *voir dire* procedure. Two Russian judges said that besides superficial questioning of prospective jurors other methods needed to be introduced for obtaining information about prospective jurors, such as special questionnaires with an extended numbers of questions, psychological tests and examination by specialists.

The abolition or restriction of the *voir dire* procedure in Russia and other post-Soviet jurisdictions undermines public confidence in the selection of impartial and independent jurors or lay assessors. To ensure that court personnel do not deliberately include candidates favourable to the government and prejudiced against the defendant in the jury or lay assessors pool, the defence should have the right to investigate the pool by questioning prospective lay adjudicators in court.

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146 Duff, *supra* n. 16, at 258.

147 *Id.* at 259.

148 European Commission and Council of Europe, Коментарі до проекту Кримінально-процесуального кодексу України [*Komentari do proektu Kriminal'no-protsessual'nogo kodeksu Ukraini* [Commentary on Draft Criminal Procedure Code of Ukraine]] PCRED/DGI/EXP (2003) 63.

4.4. Peremptory Challenges

Another issue regarding selection of jury or lay assessors is related to the peremptory challenges of prospective lay adjudicators. By using a limited number of peremptory challenges, the parties do not have to support their decisions to strike a lay adjudicator for any reason.

Peremptory challenges are usually employed in jury systems; however, some current mixed court systems, for instance the French *cour d'assises* and *cour d'assises d'appel* and Greek *dikasteria* (*Δικαστήρια*), also allow the parties to challenge a certain number of lay assessors.[149]

Although the tradition of peremptory challenges originates in common law jury systems, the process has come under question in recent years. Some common law countries, including England, Northern Ireland and Scotland, have abolished peremptory challenges.[150] In other common law jurisdictions, such as Australia, New Zealand and the U.S., the practice of peremptory challenges has become a controversial issue.[151] The decisive reason for the abolition of peremptory challenges in England was, like in the case of the *voir dire* procedure, the need to ensure the principle of randomness of jury selection. Thus, for instance, the Roskill Committee shortly before the abolition of peremptory challenges in England in 1988, stated:

> [T]he existence of the peremptory right of challenge must necessarily . . . tend to erode the principle of random selection, and may even enable defendants to ensure that a sufficiently large part of a jury is rigged in their favour.[152]

Note, however, that English prosecutors are still able to ask a juror to stand by, which is 'virtually equivalent to a prosecution right of peremptory challenge.'[153] In other words, arguably, England abolished peremptory challenges not out of concern about the principle of randomness of jury selection, but so that the government could maintain control over the composition of juries. In Scotland, a major rationale for removing peremptory challenges was allegations of abuses of this right by the defence 'in attempt to secure a jury which was less likely to convict.'[154] However, this reasoning was criticized by Professor Peter Duff, of the University of Aberdeen, as 'unsatisfactory.' Duff, on the basis of empirical data, argued: 'there was little evidence it was being "abused" and no evidence whatsoever that this "abuse" had

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[149] Code de procédure pénale, Arts. 297–301 (Fr.); Jackson & Kovalev, *supra* n. 5, at 104.

[150] Vidmar, *supra* n. 20, at 34; Lloyd-Bostock & Thomas, *supra* n. 54, at 72–76; Duff, *supra* n. 16, at 260–63.

[151] Vidmar, *supra* n. 20, at 35.

[152] Fraud Trials Committee, *supra* n. 142, at 126.

[153] Blackstone's Criminal Practice 2006 1504 (Peter Murphy, ed.) (Oxford University Press 2005).

[154] Duff, *supra* n. 16, at 260.

any effect on the outcome of cases.'[155] On the contrary, Duff agreed with the reasons for abolishing peremptory challenges suggested by his English colleagues: juries should be selected at random.[156]

In some other common law countries, such as New Zealand and the United States, experts argue that the prosecution sometimes abuses its power by removing representatives of ethnic and racial minorities. In New Zealand, according to Neil Cameron, and Warren Young of Victoria University of Wellington, and Susan Potter, formerly of the New Zealand Law Commission, the Maori community strongly believes that 'peremptory challenges have a discriminatory effect and exacerbate the unrepresentativeness of juries already produced by the system of disqualifications and excuses.'[157]

This issue has been a subject of litigation during the last fifty years in the United States.[158] For example, in *Batson v. Kentucky* (1986) the U.S. Supreme Court held:

> Equal Protection Clause[159] forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.

The Court in *Batson* also decided that if the defendant established a *prima facie* case of purposeful discrimination concerning the prosecutor's exercise of peremptory challenges at the defendant's trial, the burden to come forward with a neutral explanation for challenging black jurors shifts to the State. The *Batson* principle was later extended to peremptory challenges based on ethnicity (*Hernandez v. New York*) and gender (*J.E.B. v. Alabama ex rel. T.B.*). At the same time the U.S. Supreme Court declined to extend the prohibition of peremptory strikes to religion (*Davis v. Minnesota*).

Laws of Georgia, Kazakhstan, Kyrgyzstan and Russia currently allow peremptory challenges of jurors. Table 1 provides a comparative overview of the number of peremptory challenges provided for in current legislation of the post-Soviet countries, as well as the number of peremptory challenges used in some other civil and common law jurisdictions.

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155 Duff, *supra* n. 16, at 262.

156 *Id.*

157 Neil Cameron et al., *The New Zealand Jury: Towards Reform*, in World Jury Systems, *supra* n. 16, at 192.

158 *Swain v. Alabama*, 380 U.S. 202 (1965); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Powers v. Ohio*, 499 U.S. 400 (1991); *Georgia v. McCollum*, 505 U.S. 42 (1992); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Hernandez v. New York*, 500 U.S. 352 (1991); *Davis v. Minnesota*, 511 U.S. 1115 (1994); *Rivera v. Illinois*, 556 U.S. (2009).

159 Equal Protection Clause is a part of the XIV Amendment to the U.S. Constitution which states: 'no state shall . . . deny to any person within its jurisdiction the equal protection of the laws.' U.S. Const. amend. XIV, § 1.

As Table 1 shows, the number of peremptory challenges in the post-Soviet legislation is usually limited to two, meaning that such challenges have a less significant impact on the composition of the jury or the collaborative court than it does in the common law jurisdictions where each party may challenge between seven and twenty-five prospective jurors. Note also, that in most post-Soviet legislation in joint trials, which are common in cases of serious felonies, the total number of peremptory challenges remains the same for all defendants and they should come to an agreement on how to use their limited number of challenges. Alternatively, the joint parties can choose by lot which defendant may solely use all peremptory challenges.[160] The only exception to this rule is Georgia where, as in common law jurisdiction, in joint trials each defendant is entitled to the number of peremptory challenges, to which the defendant would be entitled if tried alone.[161]

Table 1. Number of peremptory challenges in criminal cases of different jurisdictions

Jurisdiction	Defence	Prosecution	Jurisdiction	Defence	Prosecution
Kazakhstan	3	2	***Belgium***	6–12	6–12
Kyrgyzstan	Min 2	Min 2	***Japan***	4	4
Russia	Min 2 more on judge's discretion	Min 2 more on judge's discretion	***Malta***	2–3	3
Georgia	6 or 12 (life)	6 or 12 (life)	***Norway***	1–2	1–2
Spain	4	4	***Rep. of Ireland***	7	7
France	5–6	4–5	***Greece***	2	2
Australia	3–8 depending on jurisdiction	3–8 and/or 4–6 stand asides in some jurisdictions	***New Zealand***	6 for each defendant	6; 12 if there are several defendants
Canada	4; 12 or 20 depending on type of criminal offence	4; 12 or 20 depending on type of criminal offence	***United States***	2–25 depending on state and type of criminal offence	2–25 depending on state and type of criminal offence

[160] *UPK RF*, Art. 328(15); *UPK Kaz.*, Art. 555(5–6); *UPK Kyr.*, Art. 331-9.

[161] *UPK Gruzii*, Art. 223(11); Canada Criminal Code, R.S.C. 1985, c. C-46, s. 634(4)(a); Juries Act 1981, § 24 (2)(b) (N.Z.); Juries Act, Act No. 4/1976, § 20 (1976) (Ir.).

If two peremptory challenges are insufficient for the parties to exclude all unfavourable prospective candidates, thus evincing merely a formal character, the question arises whether the number of peremptory challenges in post-Soviet countries should be increased or whether peremptory challenges should be abolished altogether. In the 2004 survey of Russian judges, prosecutors and advocates, the author investigated the attitudes of Russian legal practitioners towards peremptory challenges in nine Russian provinces. Table 2 summarises responses to the following question: 'Do you support or deny the idea that parties' rights for peremptory challenges should be preserved?'

Table 2. Support or decline of the right of peremptory challenges

Group of respondents	**Support**	**Neutral**	**Decline**
Prosecutors (n=34)	34	0	0
Judges (n=45)	39	1	5
Advocates (n=56)	55	0	1

Table 2 shows that the vast majority of respondents supported the right for peremptory challenges. Prosecutors and advocates were also asked whether, in their opinions, the minimum number of peremptory challenges should be increased. Table 3, below, summarizes these opinions.

Table 3. Minimum number of peremptory challenges should be increased

Group of respondents	**Positive**	Neutral	**Negative**
Prosecutors (n=34)	27	2	5
Advocates (n=56)	36	6	14

As can be seen, the majority of Russian respondents among both prosecutors and advocates supported an increased number of peremptory challenges. At the same time, some prosecutors (five) and advocates (14) were less enthusiastic about such an increase. Those respondents who answered positively to the question about increasing the minimum number of peremptory challenges were also asked about the number of challenges that should be introduced. The responses varied from three to ten peremptory challenges for each party, with a mean of 5.7 suggested by prosecutors and 5.3 proposed by advocates.

Several Russian scholars also proposed that the number of peremptory challenges for both parties be increased. For example, the late Professor Igor Petrukhin, of the Institute of State & Law of the Russian Federation, argued that the number of

peremptory challenges provided by Russian legislation is lower than 'international standards' and refers to France and the U.S.[162] Pashin has suggested that the number of peremptory challenges should be increased to six for each defendant in Russia.[163] Although Pashin does not explain why the number of peremptory challenges should be increased to six, his proposal seems to be based on the legislation of the Russian Empire of 1864, according to which prosecutors could challenge no more than six prospective jurors and the defence could challenge at least six prospective jurors. This historical law also stipulated that if the prosecution did not use all its peremptory challenges, the defence might have more than six challenges.[164]

Note, however, that the Russian Tsarist government, 20 years later, reduced the number of peremptory challenges from six to three for each party by a law on the 12th of June 1884.[165] This reduction of peremptory challenges was criticized by some 19th century Russian lawyers, for instance, a former senator Foinitskii, who argued that the number of peremptory challenges might be reduced only for less significant criminal cases, but should be preserved for criminal cases of greater importance.[166]

The main argument in favour of preserving peremptory challenges is that they serve as an additional safeguard for selecting impartial lay adjudicators. Arguably, if a prospective juror or lay assessor is prejudiced against either prosecution or defence, any party can challenge this lay adjudicator for cause and, hence, there is no need for peremptory challenges. However, effective application of challenges for cause may be hampered by several factors such as availability of evidence of a lay

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162 *Петрухин И.Л.* Суд присяжных: проблемы и перспективы // Государство и право. 2001. № 3. С. 5–15 [Petrukhin I.L. *Sud prisyaznykh: problemy i perspektivy // Gosudarstvo i pravo*. 2001. No. 3. S. 5–15 [Igor L. Petrukhin, *Trial by Jury: Issues and Prospects*, 2001(3) State and Law 5–15]].

163 Pashin, *supra* n. 123.

164 Устав уголовного судопроизводства // Полное собрание законов Российской империи. Собрание второе. № 41476. Ст. 656 [*Ustav ugolovnogo sudoproizvodstva 1864 // Polnoe Sobranie Zakonov Rossiiskoi Imperii. Sobranie vtoroe.* No. 41476. St. 656 [*Law on Judicial Institutions of the Russian Empire*, in 39 Complete Collection of Laws of the Russian Empire. Second Collection, No. 41476, Art. 656]] (Tipografiya II Otdeleniya Sobstvennoi E.I.V. Kantselyarii 1864). In the famous trial of Vera Zasulich the prosecutor did not challenge any prospective jurors, and this provided the defence with an opportunity to strike eleven jurors off from the panel. The result of the trial was an acquittal. *Радутная Н.В.* Порядок разрешения на предварительном следствии ходатайства о рассмотрении дела судом присяжных. Предварительное слушание. Подготовительная часть судебного заседания. Формирование состава присяжных заседателей // Рассмотрение дел судом присяжных [Radutnaya N.V. *Poryadok razresheniya na predvaritel'nom sledstvii khodataistva o rassmotrenii dela sudom prisyazhnykh. Predvaritel'noe slushanie. Podgotovitel'naya chast' sudebnogo zasedaniya. Formirovanie sostava prisyazhnykh zasedatelei // Rassmotrenie del sudom prisyazhnykh* [Nona V. Radutnaya, *Rules Regarding Resolution of Applications for Trial by Jury During Pre-trial Investigation. Preliminary Hearing. Preparatory Session. Jury Selection*, in Trial by Jury]] 79 (Vyacheslav Lebedev, ed.) (Yurid. lit. 1998).

165 *Фойницкий И.Я.* Курс уголовного судопроизводства. Т. 1 [Foinitskii I.Ya. *Kurs ugolovnogo sudoproizvodstva. T. 1* [1 Ivan Ya. Foinitskii, Criminal Procedure Course]] 425 (Al'fa 1996).

166 *Id.*

adjudicator's bias and the discretion of the judge. In order to challenge a juror or lay assessor for cause, the party should be able to convince the presiding judge that this lay adjudicator is prejudiced against the state, victim or defendant on the basis of information obtained before selection in court and during the *voir dire* procedure.

Sometimes, during *voir dire,* prospective jurors or lay assessors do not disclose their interest in the outcome of the trial, nor admit that they cannot be impartial; but for some reason the party may perceive a high risk that a particular lay adjudicator is prejudiced against the party. In several cases studied by the author in the Moscow City Court in 2004, the defence challenged, without cause, those prospective jurors who claimed that they were impartial despite some controversial facts in their backgrounds. In one case, for instance, the defence attorney challenged a male sculptor who served as a volunteer community police warden (*narodnyi druzhinnik*). In another case the defence used a peremptory challenge to exclude a prospective juror whose son worked in the office of the prosecutor. In both cases the challenged jurors were eager to serve but the defence doubted their impartiality because of their relationships to law enforcement agencies.

It is questionable that the judges would have allowed these candidates to be challenged for cause on the basis of information provided by prospective jurors during the *voir dire*. For instance, in one case, the Russian Supreme Court dismissed the appeal of a defendant who argued that the presiding judge wrongfully did not grant challenges for cause of two jurors who had relatives in law enforcement agencies and another juror who was a victim in another criminal case. The Supreme Court pointed out that the court transcript did not support these allegations and all other challenges for cause from the defence were granted.[167]

According to Professor Nancy S. Marder, Director of the Justice John Paul Stevens Jury Center at Chicago-Kent College of Law, American defence attorneys 'worry that without peremptories, prospective jurors who cannot be impartial will be seated on the petit jury because judges are not always generous about granting for cause challenges.'[168] In post-Soviet criminal justice systems where judges are often infected by accusatorial bias, such a threat could be even worse and more pronounced. In other words, a presiding judge would tend to grant challenges for cause to the prosecution and refuse those made by the defence. Although this statement cannot currently be bolstered by empirical evidence, since Russian lawyers do not use their challenges for cause very often, presumably, if peremptory challenges were abolished, parties would try to challenge for cause more frequently.

However, several arguments weigh against the application of peremptory challenges in post-Soviet countries. One is the threat that in cases involving alleged

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[167] Appellate Decision of the Supreme Court of the Russian Federation No. 88-O05-59SP of 15 May 2006 (Re *Prusskikh et al.*).

[168] Nancy S. Marder, The Jury Process 98 (Foundation Press 2005).

racial, ethnic or religious tensions between defendants and victims, parties would attempt to exclude prospective jurors or lay assessors on the basis of race, ethnicity or religion. For example, in one case the author studied in Moscow City Court, several defendants were charged with the murder of Chechens and the defence attorney asked whether any of prospective jurors belonged to ethnicities from the Caucasus (*litsa kavkazskoi natsional'nosti*) or had relatives from such groups.[169] None of the prospective jurors answered positively, but it was obvious that the defence attorney was trying to identify potential candidates for challenges for cause or peremptory challenges. Remarkably, neither the prosecution objected to this question nor the judge denied it in his discretion. Thus, defence counsel was allowed to examine the jury panel in a discriminatory manner.

Instead of the abolishing peremptory challenges as a remedy against discrimination during jury selection on the basis of race, ethnicity or religion, post-Soviet legislators might consider the *Batson* approach: both parties could be required, in cases of alleged discrimination, to provide a neutral explanation for peremptory challenges. In the context of post-Soviet countries an approach similar to the *Batson* rule should be applied not only to race or ethnicity, but also to religion, as these three demographic characteristics are closely linked (specific ethnic groups belong to certain religious communities, for instance, Russians are predominantly Orthodox Christians, Chechens are predominantly Muslims, Kalmyks are predominantly Buddhists, *etc.*). Moreover, in some cases, religion is a more evident criterion for discrimination than race or ethnicity. For instance, hypothetically, in the trial of a Muslim Chechen defendant in North Osetia, a Russian province with mixed communities of Christians and Muslims, the prosecution could strike Muslim Osetins and keep Christian Osetins in the jury panel.

Application of the *Batson* rule would require the fulfilment of several conditions. Firstly, the parties can only object to a peremptory challenge by establishing a *prima facie* case of racial, ethnicity, gender or religious discrimination by the opposite party. Secondly, the party making the peremptory challenge should explain, in a race, ethnicity, gender or religion-neutral manner, the motives for challenging a particular candidate. Thirdly, the explanation for peremptory challenges should be credible and related to a particular case.[170] Otherwise, the proponent of the peremptory challenge

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[169] The term 'person of the Caucasian ethnic group' (*litso kavkazskoi natsional'nosti*) in the Russian common language refers to the indigenous population of the Southern provinces of Russia, such as Chechnya, Dagestan, Ingushetiia, and North Osetiia, and three other post-Soviet countries: Azerbaijan, Armenia and Georgia. Although this term is used in media and official documents it is discriminatory.

[170] In *Purkett v. Elem*, 514 U.S. 765 (1995) the U.S. Supreme Court, however, held that: 'race-neutral explanation tendered by proponent of peremptory challenge need not be persuasive, or even plausible.' In *Purkett* the prosecution justified its peremptory challenge of one black prospective juror by the following explanation: 'I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to me to

might be able to strike prospective jurors or lay assessors in a discriminatory manner on far-fetched grounds, as in *Purkett v. Elem* (1995) when long hair, a moustache and a goatee-type beard were openly identified as motives for challenging a prospective juror.

Getting away from the issue of abolition and bias in peremptory challenges, and getting back to the optimal number of peremptory challenges, as mentioned above, two are stipulated in the majority of post-Soviet jurisdictions, but should it be more? According to the majority of advocates (36 of 56 respondents) and prosecutors (27 of 34 respondents) who participated in the author's Russian survey, the current two peremptory challenges is not sufficient (*see* Table 3 above). By using peremptory strikes, parties aim to exclude those prospective lay adjudicators whom they do not trust, and who are more likely to reach unfavourable decisions.

Sufficient peremptory strikes for either party can be defined as the minimum number of peremptory challenges needed to exclude those 'untrustworthy' and 'undesirable' jurors or lay assessors who might prejudice either party from winning its case. Sufficiency of the number of peremptory strikes depends on several factors, such as the model of lay adjudication, the number of lay adjudicators in court, the verdict rules, the number of defendants in trial, the number of alternate lay adjudicators in trial and the nature of the trial.

In different models of lay adjudication, the number of peremptory strikes may vary. For instance, in a collaborative court, the model in which three professional judges and nine lay assessors decide questions of fact together, the sufficient number of peremptory strikes for the defence should arguably be higher than in a twelve-member jury court because it is more likely that three professional judges would vote against the defendant, which means that the defence may confront three unfavourable adjudicators in the panel. In a collaborative court the defence should have additional peremptory challenges and this additional number might depend on the number of professional judges on the panel. For instance, in a panel of one professional judge and ten lay assessors the defence might have two additional peremptory strikes. According to French[171] and Kazakhstani[172] rules of criminal procedure, the defence has only one additional peremptory strike, although there are three professional judges in French collaborative courts and two professionals in Kazakhstani courts. In France, the tradition of additional peremptory challenges

not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair. Also, he had a mustache and a goatee type beard . . . I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me.' Justice Stevens, however, dissented: '[T]he Court replaces the *Batson* standard with the surprising announcement that any neutral explanation, no matter how "implausible or fantastic" even if it is "silly or superstitious" is sufficient to rebut a prima facie case of discrimination.'

171 Code de procédure pénale, Art. 298 (Fr.).

172 *UPK Kaz.*, Art. 555.

for the defence has a long history. According to the Napoleonic Code of Criminal Procedure of 1808,[173] both the prosecution and the defence could challenge an equal number of jurors, between eight and twelve, depending on whether there were alternate jurors and depending on the number of prospective jurors who appeared in court (between thirty and thirty-six). However, the defence had the right to challenge an additional juror if the number of prospective jurors in the pool was odd, for instance thirty-one. The French law of 1958[174] allowed the defence to challenge five and the prosecution – four out of nine lay assessors in the *Cour d'assises,* and the Law of the 15th of June 2000, which amended the Code of Criminal Procedure and introduced *Cour d'assises d'appel,* allowed the defence to challenge six and the prosecution to challenge five out of twelve lay assessors in the appellate courts. Thus, in many countries throughout history, the number of peremptory challenges allowed has been higher than in post-Soviet countries. In the post-Soviet context, moreover, it would be justifiable to increase the number of additional peremptory challenges for the defence in collaborative courts as an additional safeguard against improper judicial influence.

The second factor affecting the sufficiency of peremptory challenges, is the size of the jury or mixed court. In small courts consisting of seven jurors, the number of peremptory challenges can be less than in jury courts consisting of twelve members.

Another factor that determines the number of peremptory challenges is verdict rules. In jury systems with simple majority verdicts, the number of peremptory challenges might be less than in the jury systems with unanimous or qualified majority verdicts. For example, if, in a jury of twelve members, which decides the question of guilt by a simple majority, the party fails to challenge five 'untrustworthy' and 'undesirable' jurors, it may still win its case by a simple majority of votes of seven impartial jurors. On the contrary, in a jury system with the unanimous verdict rule, even one or two 'suspicious' jurors with hidden biases may cause defeat to either party.

The fourth factor that determines the number of peremptory challenges, is the number of defendants in the trial. As mentioned above, according to the legislation of post-Soviet countries, in joint trials the total number of peremptory challenges for a group of defendants remains the same as for a single defendant in a separate trial.[175] In post-Soviet countries, defendants tried together need to come to an agreement on who should be challenged by using peremptory strikes. Otherwise peremptory challenges should be made by lot (Russia, Kazakhstan and Kyrgyzstan) or by dividing peremptory challenges between the defendants. Russian legislation also permits the issue of peremptory challenges to be decided by defendants' votes.

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173 Code d'instruction criminelle 1808, Art. 401 (Fr.).

174 Code de procédure pénale, Art. 298 (Fr.).

175 *UPK RF*, Art. 328(15); *UPK Kaz.*, Art. 555(5–6).

The application of these methods, however, raises several concerns. Defendants in joint trials cannot always attain mutual consent. In some trials, for instance, defendants may have opposite views about the criminal case, and if one defendant may see a prospective lay adjudicator as 'untrustworthy' or 'undesirable,' another defendant may see the same person as a favourable candidate. Furthermore, defendants may be of different ethnic origins and backgrounds, and some prospective lay adjudicators suitable for one defendant may be unfavourable for others. Dividing peremptory challenges between defendants is hardly a better solution because, in some cases, the number of defendants can be greater than the maximum number of peremptories, or the number of peremptory challenges is not divisible by the number of defendants, for instance, three peremptory challenges for two defendants. Peremptory challenging by lot, or by defendants' votes, can protect the interests of some defendants but violate the interests of others. Therefore, it would be preferable to grant each defendant the same number of peremptory challenges as he would be entitled to if tried alone.

The fifth factor to be accounted for in establishing the number of peremptory challenges, is the number of alternate jurors or lay assessors allowed in the trial. Legislation in post-Soviet jurisdictions usually stipulates for choosing two alternate lay adjudicators in each trial.[176] In Russia, a presiding judge, depending on the nature and complexity of trial, can increase the number of alternate jurors. In ten of fifteen cases studied by the author in the Moscow City Court, the presiding judge increased the number of alternate jurors to four.

An alternate juror or lay assessor can replace a member of the jury or the mixed tribunal at any time during trial. Enlargement of the court by means of introducing alternates, increases the probability of including biased or other unfavourable candidates in a jury or mixed tribunal. Thus, arguably, if the number of alternate jurors or lay assessors increases, parties should be entitled to additional peremptory challenges. For example, in Canada, the total number of peremptory challenges for each party increases by one for each alternate juror.[177] The U.S. Federal Rules of Criminal Procedure [hereinafter Fed. R. Crim. P.] follows a different approach to the determination of the number of additional peremptory challenges for alternate jurors: one peremptory challenge is permitted when one or two alternates are empanelled; two additional peremptory challenges for three or four alternates; three additional peremptory challenges for five or six alternates.[178] Similar rules for additional peremptory challenges for alternate jurors or lay assessors would constitute safeguards for empanelling impartial lay adjudicators in post-Soviet jurisdictions.

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176 *UPK RF*, Art. 328; *UPK Kaz.*, Art. 556.

177 Canada Criminal Code, s. 634(2.1).

178 Fed. R. Crim. P. 24(4).

Finally, the nature of the trial may create the need for a party to be able to challenge more prospective jurors or lay assessors. For example, in cases of high treason, the government may attempt to include loyal lay adjudicators who would be more likely to convict the defendant. In some common law jurisdictions the number of peremptory challenges varies depending on the type of criminal charge, from a relatively small number of peremptory challenges in misdemeanour cases to a large number of peremptories in cases of serious felonies. For instance, in the U.S. federal courts there are three peremptory challenges for both parties when the defendant is charged with a crime punishable by fine, imprisonment of one year or less, or both. The government has six peremptory challenges and the defendant has ten peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year. However, in capital cases or cases where the government seeks the death penalty each party is entitled to twenty peremptory challenges.[179] Canadian law entitles the prosecution and the defendant to twenty peremptory strikes in cases of high treason and first-degree murder; to twelve peremptory challenges when the accused is charged with an offence, other than high treason or first-degree murder, for which the accused may be sentenced to imprisonment for a term exceeding five years; and to four peremptory challenges for other types of offences.[180]

Lay adjudication in post-Soviet jurisdictions would benefit if the number of peremptory challenges for parties in serious felony cases were increased, in particular in treason cases. Each defendant in a joint trial should be provided with the number of peremptory challenges to which the defendant would be entitled if tried alone. Additionally, parties should be entitled to additional peremptory challenges if alternate lay adjudicators are empanelled.

4.5. Challenge to the Entire Jury

According to Russian law, before jurors are sworn in, either party may request the presiding judge to discharge the entire jury on the grounds of *tendentiousness of composition of jury* (*tendentsioznost' sostava kollegii prisyazhnykh*), which means that a particular jury might be seen as incapable of reaching an impartial verdict due to its characteristics.[181] The presiding judge can sustain or deny such a motion but he needs to provide a rationale for his decision.[182]

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179 F. R. Crim. P. 24(b).

180 Canada Criminal Code, s. 634(2).

181 *UPK RF*, Art. 330(1).

182 *Nauchno-prakticheskii kommentarii*, *supra* n. 79, at 572; *Пашин С.А.* Отбор присяжных заседателей в суде // Состязательное правосудие [Pashin S.A. *Otbor prisyazhnykh v sude // Sostyazatel'noe pravosudie* [Sergei A. Pashin, *Jury Selection in Court*, in Adversarial Justice]] 38 (Sergei A. Pashin & Lyudmila M. Karnozova, eds.) (Izd-vo Mezhdunar. kom. sodeistviya pravovoi reforme 1996).

In theory some Russian scholars and commentators give several examples when the composition of the jury could be considered *tendentious* or partial. According to Pashin,[183] claims of jury partiality are usually made on grounds of the gender or ethnic structure of the jury. Professor Petrukhin[184] argued that a party can move to discharge the jury on grounds of partiality if, for example, jurors who were affected by an ecological disaster are selected to try a case of criminal pollution of the environment, or if, in a trial of an Orthodox Christian, the majority of jurors are Muslims.

In real practice, however, the success of such a motion to challenge the entire jury is very rare. For instance, Pashin[185] and the late Professor Nona Radutnaya, Head of the Criminal Procedure Department at the Russian Academy of Justice,[186] refer to a single case when the defendant was charged with rape and eleven of twelve jurors were women. At the same time, in other trials, defendants also attempted to challenge the entire jury on grounds of it religious composition. They did not succeed. For instance, in the case of *Namazov,* a Muslim defendant of Azeri origin, the defence argued that the composition of the jury was tendentious because there were no Muslim jurors in the jury.[187] The defendant was convicted and appealed. The Russian Supreme Court, however, disagreed with the defence's submission and held that the defence argument unjustifiable because the trial court had examined the jury panel for their ability to participate in fact-finding. Moreover, the Supreme Court referred to the equality clause of the Russian Constitution, which states:

> All people shall be equal before the law and court. The State shall guarantee the equality of rights and freedoms of citizens, regardless of sex, race, nationality, language, origin, property and official status, place of residence, religion, membership of public associations, and other circumstances.[188]

In other words, the Russian Supreme Court claimed that the Constitutional declaration was fully enforced in Russia and all juries would fulfil the equality clause, regardless of their composition.

In the case of *Tarasov, Bal' & Repnikov* the defendants, ethnic Russians, were tried by a jury in the Far-Eastern district military court for murder of an ethnic Ingush victim.[189]

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183 Pashin, *supra* n. 182, at 37.

184 Petrukhin, *supra* n. 162, at 9.

185 Pashin, *supra* n. 182, at 37.

186 Radutnaya, *supra* n. 164, at 73.

187 Appellate Decision of the Supreme Court of the Russian Federation No. 37-005-01SP of 12 April 2005 (Re *Namazov*).

188 *Konst. RF*, Art. 19 (Russ.).

189 Appellate Decision of the Supreme Court of the Russian Federation No. 2-054/02 of 19 October 2004 (Re *Tarasov, Bal' and Repnikov*).

The prosecution attempted to challenge the all-woman jury on the grounds that an ethnically all-Russian, all-woman jury could not reach an impartial verdict in a trial of Russian defendants charged with murder of an ethnic Ingush. The prosecution also argued that an all-woman jury had no understanding of the conditions of military service, which was a central issue in this case since the defendants and the victim were soldiers. In this case, all defendants were acquitted and the prosecution and the victim's relatives appealed to the Russian Supreme Court. The Supreme Court held that the ratio of men and women in juries was not stipulated by law and *jurors were selected without taking into consideration their gender or race*. Moreover, the Supreme Court pointed out, the prosecution's claim regarding women's limited understanding of military service was irrelevant, since the law did not require jurors to have any special knowledge.

On the one hand, in its recent appellate decisions, the Russian Supreme Court clearly excluded gender, ethnicity, race and religion as possible grounds for challenging the entire jury. It seems that a trial court decision that discharged an all-woman jury in a rape trial, was erroneous as well. On the other hand, however, the Supreme Court did not clarify what grounds trial courts can use for discharging the entire jury when a party claims jury partiality. In the mandatory guidelines for trial courts,[190] the Plenum of the Supreme Court of the Russian Federation explained that the term *tendentiousness of composition of the jury* refers to cases where there are reasons to believe that the jury that was selected for a particular case was not able to consider a criminal matter objectively and comprehensively and reach a just verdict due to, for example, the homogeneity of the jury composition in terms of age, professional, social and other factors. It is unclear why the Supreme Court in its appellate decisions did not consider homogeneous juries as tendentious in terms of gender, race or ethnicity, but recognized that homogeneous juries are potentially biased when it comes to age, professional, social and *other* characteristics.

At least three possible explanations exist for this paradox. Firstly, perhaps the decisions in *Namazov* and *Tarasov, Bal' & Repnikov* seem to contradict the later guidelines of the Supreme Court because the appellate decisions in these cases were reached by only three Supreme Court judges, while the Resolution of the Plenum of the Supreme Court was adopted by a larger panel of Supreme Court judges. Secondly, the decisions in the trials of *Namazov* and *Tarasov, Bal' & Repnikov* involved the interests of parties who were members of ethnic minorities, which could indicate that courts of all levels were reluctant to consider issues of racial, religious and ethnic bias of jurors from racial and ethnic majority groups. Such reluctance may be caused by perceived difficulties in summoning prospective jurors from the same community as the defendant in some regions. Thirdly, the decisions in *Namazov* and *Tarasov, Bal' & Repnikov* might not have been in conflict with the guidelines stipulated in the

[190] Regulations of the Plenum of the Russian Supreme Court of 22 November 2005 No. 23, ¶ 16.

Resolution of the Supreme Court because, in *Namazov* and *Tarasov, Bal' & Repnikov*, the homogeneity of jury structure was not a sufficient ground for the trial judge and the appellate court to believe that the juries in both cases were tendentious. In other words, according to the Supreme Court judges the religion of the defendant in *Namazov,* and the gender and ethnicity of the victim in *Tarasov, Bal' & Repnikov*, were not significant factors in those cases, while the gender factor in the case of a male defendant charged with rape, when eleven of twelve jurors were female, was significant enough to infer partiality. In sum, the Plenum of the Russian Supreme Court failed to clarify any concrete standards that could be applied to establish partiality. This gap doubtless causes inconsistencies in trial court decisions. Moreover as Dr. Khasbulat Rustamov, a noted Dagestani lawyer and legal scholar, has pointed out, it is unclear what proportion of jurors in a jury may constitute a partial jury.[191]

Although in theory challenging the entire jury on the ground of tendentiousness of jury composition can be a safeguard for an impartial tribunal, experience in Russia shows that this rule is practically unworkable. If post-Soviet jurisdictions adopt challenges to the entire jury, the legislature needs to account for the following two issues. Firstly, the legislation should be more explicit about the kind of criminal cases where the presiding judge is allowed to discharge the entire jury for partiality: for example, racial, ethnic or religious motivation of the crime, or cases of sexual assault against female victims. Secondly, the legislation should stipulate the proportion of jurors that may create a tendentious jury.

5. Selection of Racially, Ethnically and Linguistically Mixed Lay Adjudicators

Besides restrictions on the use of peremptory challenges on the basis of race or ethnicity and the possibility of challenging the entire jury, for trials involving inter-ethnic crimes post-Soviet jurisdictions should consider selecting racially, ethnically and linguistically mixed courts of lay participation, or courts *de medietate linguae*.[192] These courts could consist of members of the defendant's and victim's communities. This approach was suggested by some American scholars.[193] Professor Deborah Ramirez, an expert on racial profiling and jury selection, for example, argued:

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[191] *Рустамов Х.У.* Проблема отвода в суде присяжных // Государство и право. 1997. № 6. С. 80, 81 [Rustamov Kh.U. *Problema otvoda v sude prisyazhnykh // Gosudarstvo i pravo*. 1997. No. 6. S. 80, 81 [Khasbulat U. Rustamov, *The Issue of Jury Challenges*, in 1997(6) State and Law 80, 81]].

[192] This is a Latin term meaning a court 'of halfness of language' (Black's Law Dictionary 934 (9th ed., West 2009)).

[193] Sheri L. Johnson, *Black Innocence and the White Jury,* 83 Mich. L. Rev. 1611–1708 (1985); Marianne Constable, The Law of the Others. The Mixed Jury and Changing Conceptions of Citizenship, Law and Knowledge (University of Chicago Press 1994); Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury De Medietate Linguae: A History and Proposal for Change,* 74 B.U.L. Rev. 777–818 (1994).

> Currently there is widespread consensus that a racially mixed jury, particularly in cases involving tangible and unmistakable elements of race or racism, offers many benefits. Many judges, scholars, and litigants believe that a racially mixed jury may help to overcome racial bias, improve the fairness of trial proceedings, and enhance public respect and acceptance of criminal and civil verdicts.

However, the court *de medietate linguae* raises other practical issues. The first issue is to decide which party is entitled to such courts: the defendant, the prosecution, (which includes the victim or victim's relatives according to Russian law and the law of other post-Soviet jurisdictions),[194] or both parties. The second challenge is to decide whether there should be any quotas on the number of jurors or lay assessors representing different communities, for example, no more than half of the lay adjudicators from the defendant's community and the same from the victim's community. Thirdly, it is important to determine whether a not-guilty verdict should be unanimous or reached by a qualified majority.

Regarding the first issue, arguably both parties should be entitled to a court *de medietate linguae* and their motion to have representatives of their community should be granted if the presiding judge decides that the case involves racial or ethnic tensions. As opposed to the Anglo-American criminal procedure, in which victims or their relatives are merely regarded as witnesses for the prosecution, in the criminal procedure of civil law jurisdictions, including post-Soviet countries, the aggrieved person receives the full rights of a party. Hence, disregarding the rights of victims, including their relatives, in the legal system of post-Soviet states can be interpreted as violating the principle of equality of parties. This principle impacts the second issue mentioned above – the optimal number of jurors representing each community.

Historically, early mixed juries in 12th – 14th century Britain and Ireland consisted of an equal numbers of natives and foreigners.[195] In some former British colonies, such as Aden, Barbados, Brunei, Federal Malay States, Gold Coast, Johor, Kelantan, North Borneo and Nyasaland, aliens, who were mostly Europeans or American defendants, could require a jury with a majority of jurors of their race.[196]

An interesting approach to the issue of language in the jury system is applied in Québec. According to the Jurors Act, three different types of jury can be called in this Canadian province: a French unilingual jury, which is composed exclusively of French-

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[194] According to the Criminal procedure law of Russia and other post-Soviet countries, the term 'prosecution' (*storona obvineniya*) comprises the public prosecutor (*prokuror*), private prosecutor (*chastnyi obvinitel'*), victim and his or her representative, civil plaintiff and his or her representative. *See UPK RF*, Art. 5(47); *UPK Kaz.*, Art. 7(12); *UPK Kyrg.*, Art. 27.

[195] Constable, *supra* n. 193, at 16–25.

[196] Ramirez, *supra* n. 193, at 788.

speaking persons; an English unilingual jury, composed of English-speaking persons; and a mixed jury, composed of French-speaking and English-speaking persons in equal proportions.[197] In the latter case, all jurors should be bilingual or fluent in both French and English.[198] Based on this example, some multi-lingual post-Soviet countries could probably introduce a similar additional safeguard for ensuring defendants' right to a fair trial. Generally speaking, the language of the trial and adjudication should be determined by the defendant's native language or the language in which he or she is proficient. In case of a bilingual jury, the defendant should also have an opportunity to address the trier of fact directly in one of the languages in which he or she is proficient, without the intermediary of an interpreter.

Some jury researchers, for example Professor Sheri Lynn Johnson, of Cornell Law School, a specialist in racial bias in American juries, has argued that in the twelve-member mixed jury, only three jurors from the defendant's racial group are required in order to prevent a racially motivated conviction.[199] At the same time, Johnson recognizes that such a proposal would result in hung juries rather than acquittals and, in order to acquit the defendant, the number of same race jurors should be ten.[200] Note, though, that a 'hung jury' situation is impossible in the current Russian jury system. According to the current Russian legislation, a not-guilty verdict could be reached by six votes, while a guilty verdict requires at least seven votes. In other words, it is doubtful that in the present Russian context Johnson's proposal could overcome the bias of the majority against the defendant.

It seems, however, that there are several other solutions for establishing effective courts *de medietate linguae* in Russia and other post-Soviet countries. Firstly, verdict rules could be changed to require a unanimous or qualified majority verdict of ten out of twelve votes for convictions and acquittals, as Georgia did in its criminal procedure law.[201] Alternatively, verdict rules could be changed only for acquittals and require a simple majority for all types of verdicts. In this case, both communities should be represented in equal proportions: six from the defendant's community and six from the victim's community. The outcome of the trial therefore would depend on a single 'swing' juror.

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[197] Jurors Act, R.S.Q. 1977, c. J-2, s. 14 (Can.).

[198] E-mail from Professor Louise Viau (the Université de Montréal) to author (June 5, 2005) (on file with author).

[199] Johnson, *supra* n. 193, at 1698–99.

[200] *Id.* at 1699.

[201] According to Art. 261 of the Georgian CPC, the jury should try to arrive at the verdict unanimously. 'If, however, the jury fails to achieve an unanimous decision within three hours, the decision should be made within next six hours with the following majority of votes: if the jury is composed of not less than 11 jurors, the verdict shall be passed if 8 jurors vote for it; if the jury is composed of 10 jurors, the verdict shall be passed if 7 jurors vote for it; if the jury is composed of 9 jurors, the verdict shall be passed if 6 jurors vote for it; if the jury is composed of 8 jurors, the verdict shall be passed if 5 jurors vote for it, if the jury is composed of 7 or 6 jurors, the verdict shall be passed if 4 jurors vote for it.'

The first proposal suggested above for changes in verdict rules is more suitable for the transitional criminal justice systems of the post-Soviet countries for two reasons. Firstly, verdicts reached by unanimous or qualified majority juries would enjoy more public confidence than verdicts reached by a simple majority, which sometimes are criticized as 'questionable.' Secondly, the selection of a court with a mixed racial composition, in which half of the lay adjudicators represent the defendant's race or ethnicity can be very complicated in some areas where the defendant's community represents a small ethnic minority group. By way of example, Chechens constitute less than 1% of the total population in Russia and, while they make up more than 90% of the population in Chechnya, they are not well represented in other regions.

6. Conclusion

This article focused on the analysis of current laws of several post-Soviet states in relation to the selection of prospective lay adjudicators at different stages of the selection process: at the stage of qualification of persons for jury or lay assessors lists, at the stage of summoning prospective lay adjudicators, and at the selection stage in court. This analysis of current legislation reveals a significant number of defects and gaps that allow executives and court personnel to manipulate the selection process and hamper the formation of impartial, independent and representative lay courts. One of the defects is the restrictive list of qualifications for the jury or lay assessors' service, including the minimum age of candidates for lay adjudication service, and knowledge of the official language. Such restrictive eligibility criteria may unfairly exclude many young citizens and those who are incompetent in the official language in some multilingual and multi-ethnic countries such as Kazakhstan and Ukraine.

Lack of a transparent and public selection process and lack of accountability of selective bodies are other challenges. Russian scholars and lawyers have also voiced concerns about the genuine nature of random selection of prospective lay adjudicators. Several Russian cases demonstrate that court personnel sometimes tend to include 'repeaters' into the jury pool and may even 'plant' favourable jurors.

An examination of the legislation in post-Soviet countries and of the empirical data collected in Russia lead to the conclusion that the mechanisms of the *voir dire*, peremptory challenges and challenges to entire juries should be reviewed and improved in order to provide reliable safeguards for the selection of impartial and independent lay adjudicators and prevent parties from excluding prospective lay adjudicators for discriminatory reasons.

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JUSTICE DISPENSATION THROUGH THE ALTERNATIVE DISPUTE RESOLUTION SYSTEM IN INDIA

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The Law Commission of India in its 222nd report emphasized the need for Alternative Disputes Resolution (ADR) for the dispensation of justice, because the courts are inaccessible owing to various factors, e.g., poverty, social and political backwardness, illiteracy, ignorance, procedural formalities and inordinate delay in judgments. During the ancient period the disputes were resolved in an informal manner by neutral third persons or people's court in villages and it continued till the middle of the 20th century. Unfortunately, after the Independence of India in 1947, this system was dissuaded and the government permitted to continue the adversarial system of justice. In 1980, a committee was set up. It recommended Lok Adalats (People's Courts). In 1987, the Legal Services Authorities Act was enacted. This Act obligates the states to provide free legal aid to poor persons. Besides this, the Act provides for the establishment of permanent Lok Adalats. This is one of the important modes of ADR. Lok Adalats have been established in all the districts of the country. They bring conciliatory settlement in complicated cases arising out of matrimonial, landlord-tenants, property, insurance and commercial disputes.

There are four methods of ADR, viz., negotiation, mediation, conciliation and arbitration. Mediation and arbitration are widely preferred. They are alternatives to litigation. The Arbitration Act for the first time was enacted in 1889 and it was subsequently amended many times. On the objections raised by the Supreme Court of India and also on the adoption of UNCITRAL Model Law on International Commercial Arbitration, in 1996 Arbitration and Conciliation Act was enacted. This law is almost the same as is almost in all the countries. Further, the Government of India established International Centre for Alternative Disputes Resolution (CADR) with the objectives of promotion, propagation, and popularizing the settlement of domestic and international disputes by different modes of ADR.

Key words: Indian law; alternative dispute resolution; civil procedure; civil justice; justice dispensation.

1. Introduction

The Law Commission of India in its 222nd Report has emphasized the need for justice dispensation through Alternative Disputes Resolution [hereinafter ADR] mechanisms in India. The traditional concept of access to justice, as is normally understood in India, is access to courts of law. However, courts are inaccessible owing to various barriers, such as poverty, social and political backwardness, illiteracy, ignorance, procedural formalities, inordinate delay in judgment, and the like. Judicial administration has failed to ensure that it is responsive to the reasonable demands of the times and is in particular attuned to secure:

(i) the elimination of delay, speedy clearance of arrears and reduction in costs; and

(ii) the simplification of procedure to reduce and eliminate technicalities and devices causing delay.

2. History and Development of ADR

ADR has been a spoke in the wheel of the larger formal legal system in India since time immemorial. In the ancient and medieval periods disputes were resolved in an informal manner by a neutral third person who was either an elderly person or village chief. Since the *Vedic* (ancient Hindu scriptures) period, India has been heralded as a pioneer in achieving the social goal of speedy and effective justice through informal resolution systems. The adversarial system of justice, adopted later during the 19th and 20th century, proved to be 'costly and time consuming.' Time is consumed in procedural wangles, technicalities of law and the inability of large numbers of litigants to engage lawyers. These ADR methods are not new; they were in existence in some form or other even before the modern justice delivery system was introduced by colonial rulers. There were various types of arbitral body, which led to the emergence of the celebrated *panhayat's raj* (people's rule) system of India, especially in the rural areas. *Panchayat* decisions were accepted by people and treated as binding. Thus, *Lok Adalalat* (people's court) created under the *panchayat raj* was considered very useful. As such, in 1980 the Government of India set up a Committee under the chairmanship of P.N. Bhagwati, a former Chief Justice of the Supreme Court of India. On the recommendations of this Committee, Parliament enacted the Legal Services Authorities Act, 1987 in view of Art. 39A of the Indian Constitution. This Legal Services Authorities Act 1987 implemented in its true spirit the utility of *lok adalats* (people's courts) for the speedy resolution of disputes. The adage here is that justice delayed is justice denied, and speedy justice has now been accepted as a constitutional guarantee.

3. ADR – Access to Justice

Justice in all its facets – social, economic and political – must be rendered to the masses of a country. This Act enshrines dispute resolution through conciliation, mediation and negotiation. The constitutional promise of securing for all citizens social, economic and political justice, as promised in the preamble to the Constitution, cannot be realized unless the three organs of the state – legislature, executive and judiciary – join together to find ways and means for providing the poor with equal access to the justice system. The Constitution through Art. 14 guarantees equality before law and equal protection of laws. Article 39A mandates the state to secure that operation of the legal system promotes justice on a basis of equal opportunity, and ensures that the same is not denied to any citizen by reason of economic or other disabilities. Equal opportunity mandates access to justice. It is not sufficient that law treats all persons equally, irrespective of the prevalent inequalities. Rather, the law must function in such a way that all people have access to justice in spite of economic disparities.

The expression 'access to justice' focuses on the following two basic purposes of a legal system:

1) the system must be equally accessible to all; and
2) it must lead to results that are individually and socially just.

The poor, as already stated, are ignorant of court procedures and terrified and confused when faced with judicial machinery. Thus, most citizens are not in a position to enforce their rights, whether constitutional or other legal rights, which in effect generates inequality.

Article 39A obligates the state to provide free legal aid, through suitable legislation or schemes or any other way, to promote justice on the basis of equal opportunity. It puts stress upon legal justice. The Supreme Court in *Sheela Barse v. State of Maharashtra* (AIR 1983 SC 378), emphasized that the provision of legal assistance for a poor or indigent accused arrested and put in jeopardy of his life or personal liberty was a constitutional imperative mandated not only by Art. 39A but also by Arts. 14 and 21 of the Constitution. In the absence of legal assistance, injustice may result. Every act of injustice corrodes the foundation of democracy and rule of law.

Article 39A makes it clear that the social objective of equal justice and free legal aid have to be implemented by suitable legislation or by formulating schemes for free legal aid. Although Art. 39A was introduced by the 44th Amendment of the Indian Constitution in 1976, its objective of providing access to justice could never have been fulfilled but for the majestic role played by the Supreme Court in the public interest litigation movement. This has enabled a public spirited person to move the court to remedy any wrong affecting public.

4. Other Social Legislation

Besides constitutional provision, there are various other legal rights conferred by different social welfare legislation, *e.g.*, Contract Labour (Regulation and Abolition) Act 1970; Equal Remuneration Act 1976; Minimum Wages Act 1948, *etc*. These rights are of no avail if an individual has no means of getting them enforced. The rule of law envisages that all people are equal before the law. The enforcement of rights must be exacted through the courts and judicial procedure is very complex, expensive and dilatory, putting poor persons at a disadvantage. However, the *lok adalalats* (peoples' court), *nyaya panchayts* (justice through village assembly), and the legal services authority are also part of the campaign to take justice to the people and ensure that all people have equal access to justice in spite of various barriers like social and economic backwardness. The philosophy behind the establishment of Permanent *Lok Adalats* is that they may take upon themselves the role of counselors as well as conciliators. What started as an experiment in using *lok adalat* as an ADR mode has come to be accepted in India as a viable, economic, efficient and informal means of ADR. The provisions relating to *lok adalat* are contained in sects. 19 to 22 of the Legal Services Authorities Act 1987.

5. *Lok Adalats*

Section 22B of the Legal Services Authorities Act 1987, as amended in 2002, enables the establishment of Permanent *Lok Adalats* and its sub-section (1) reads as follows:

> Notwithstanding anything contained in section 19, the Central Authority or, as the case may be, every State Authority shall, by notification, establish Permanent *Lok Adalats* at such places and for exercising such jurisdiction in respect of one or more public utility services and for such areas as may be specified in the notification.

Permanent *Lok Adalats*, established in every district court's complex, provide a statutory forum to litigants to go prior to litigation, and courts may refer pending cases for counseling and conciliation. These permanent *lok adalats* are certainly in a better position to bring conciliatory settlements in more complicated cases arising out of matrimonial, landlord-tenant, property, insurance and commercial disputes, where repeated sittings are required for persuading and motivating parties to settle dispute in an atmosphere of give and take. The disposal of legal disputes at pre-litigation stage by permanent *lok adalats* provides expensive-free justice to citizens. It saves courts from the burden of petty cases enabling them to divert time to more contentious and old matters.

6. Arbitration

There are, as already stated, four methods of ADR: negotiation, mediation, conciliation, and arbitration. Among them, arbitration and mediation are familiar and widely preferred. They are both known alternatives to litigation. Arbitration is the process of resolving a dispute by appointing an arbitrator to collect evidence and decide – a decision that may or may not be binding on the parties. The arbitrator may also be called a private judge. The object of arbitration is the settlement of a dispute in an expeditious, convenient, inexpensive, and private manner so that it does not become the subject of future litigation or tiers of appeal. Mediation means hiring a neutral third party, a mediator, who assists two or more parties to arrive at a decision in the common interest. Both of these forms of ADR are out-of-court settlements.

The first avenue in which conciliation has effectively introduced and recognized by law was in the field of labour law, viz., the Industrial Disputes Act 1947. Conciliation has been statutorily recognized as an effective method of dispute resolution in relation to disputes between workers and management. The provisions in the Industrial Disputes Act makes it attractive for disputing parties to settle disputes by negotiation, failing which, through conciliation by an officer of the government, before resorting to litigation. In *Rajasthan State Road Transport Corporation v. Krishna Kant* ((1995) 5 SCC 75), the Supreme Court observed:

> The policy of law emerging from Industrial Disputes Act and its sister enactments is to provide an alternative dispute resolution mechanism to the workmen, a mechanism which is speedy, inexpensive, informal and unencumbered by the plethora of procedural laws and appeals upon appeals and revisions applicable to civil courts. Indeed, the powers of the courts and tribunals under the Industrial Disputes Act are far more extensive in the sense that they can grant such relief as they think appropriate in the circumstances for putting an end to an industrial dispute.

6.1. History and Development of Arbitration

The courts have extensively recognized ADR in the field of arbitration. Arbitration was originally governed by a number of different enactments, including those in the Code of Civil Procedure. The Arbitration Act, which was first enacted in 1899, was replaced by the Arbitration Act of 1940. The courts were very much concerned about the supervision of the Arbitral Tribunal and keen to ascertain whether arbitrators exceeded their jurisdiction in deciding upon issues. The Arbitration Act 1940 fell short of international and domestic standards. Enormous delay and court intervention frustrated the very purpose of arbitration as a means for expeditious resolution of disputes. The Supreme Court in several cases repeatedly pointed out the need for

a change in the law. The Public Accounts Committee further criticized the Arbitration Act 1940. As such, the Government of India thought it necessary to provide a new forum and procedure for resolving international and domestic disputes quickly.

The Arbitration and Conciliation Act 1996 was thus enacted. This law is virtually the same as that in almost all countries around the world. Conciliation has been given statutory recognition as a means for settlement of disputes under the terms of the Act. In addition, the Act also guarantees the independence and impartiality of arbitrators, irrespective of their nationality. The Act has brought in many important changes to expedite the process of arbitration. This legislation has enhanced the confidence of foreign parties interested in investing in India or engaging in joint ventures, foreign investments, transfer of technology or foreign collaborations, *etc.*

The decision of the Supreme Court in *Konkan Railway Corporation Ltd. & Ors. v. M/s. Mehul Construction Co.* ((2007) 7 SCC 201), summarizes the involvement of the Arbitration and Conciliation Act, 1996, and the main provisions of the Act. The Arbitration Act, 1940, provided for domestic arbitration and did not deal with foreign awards. Foreign awards were dealt with by the Arbitration (Protocol and Convention) Act 1937 and the Foreign Awards (Recognition and Enforcement) Act 1961. The increasing growth of global trade and delay in the disposal of cases before the courts under the normal system in several countries made it imperative to have access to an ADR system, particularly in commercial disputes.

As the entire world was moving towards the speedy resolution of commercial disputes, the United Nations' Commission on International Trade Law, way back in 1985, adopted the UNCITRAL Model Law on International Commercial Arbitration. Since then, a number of countries have given recognition to the model in their respective legislative systems. Indian law relating to the enforcement of foreign arbitration awards provides for greater autonomy in the arbitral process and limits judicial intervention considerably. The grounds on which the award of an arbitrator can be challenged are the invalidity of an agreement, want of jurisdiction on the part of the arbitrator, and want of proper notice to the party of the appointment of an arbitrator and arbitral proceedings.

7. International Centre for ADR (ICADR)

It was against this backdrop that the International Centre for ADR (ICADR) was established and registered as a society under the Societies Registration Act 1860 for promotion and development of ADR facilities and techniques. An autonomous organization under the aegis of the Ministry of Law, Justice and Company Affairs, within the Indian Government, the Centre was inaugurated by the then Prime Minister at New Delhi on 6 October1995. The Chief Justice of India is its patron. More than forty delegates from the SAARC countries attended the inauguration of the Centre.

With its registered office located in New Delhi, the ICADR has plans to establish regional centers in all state capitals to spread the ADR movement. The first regional centre was set up in Hyderabad with financial and logistical support from the Andhra Pradesh Government. Other states are also in the process of establishing such centers in their states.

The main objectives of the ICADR are to propagate, promote and popularize the settlement of domestic and international disputes by different modes of ADR. It also intends to establish facilities and provide administrative and other support services for holding conciliation, mediation and arbitration proceedings in addition to promoting reform in the system of settlement of disputes and its healthy development within the framework of social and economic needs of society.

Conciliators, mediators, arbitrators and other neutral ADR personell are appointed when requested by the parties from among a panel of qualified and experienced neutral ADR practitioners. The institute also envisages undertaking training/teaching in ADR and related matters and awarding diplomas, certificates and other academic or professional distinctions. Moreover, the Institute plans to develop the infrastructure for higher education and research in the field of ADR and to arrange for fellowships, scholarships and stipends for developing professionalism in ADR. Almost all disputes, commercial, civil, labour and family, in respect of which the parties are entitled to conclude a settlement, may be settled by ADR procedures.

The advantages of dispute resolution procedures administered by the ICADR include time and cost savings, autonomy for parties to an international dispute, a choice in the applicable law, procedure and language of the proceedings, the possibility of ensuring that specialized expertise is available from the tribunal in the person of the arbitrator, mediator, conciliator or neutral adviser, and strict confidentiality. Disputes can be referred to the ICADR through a procedure administered by the ICADR in two ways either by a clause in a contract providing for reference of all future disputes under that contract or by a separate agreement providing for reference of an existing dispute. Due to changes in international trade, the court system is not able to meet the requirements of international traders or the corporate sector in dispensing quick justice.

Litigation has not kept pace with our fast moving society and growing changes in business practices. Indeed, compared to modern business, the civil courts have changed very little. It has been realized that ADR is can produce better outcomes than the traditional courts because first, different kinds of dispute may require different kinds of approach, which may not be available through the courts; and secondly, there is direct involvement and intensive participation by the parties to the negotiations under the ADR system to arrive at a settlement. The settlement of commercial disputes under a ADR system will immensely benefit the corporate sector by securing quicker resolutions.

8. Family Courts Act 1984

The Family courts Act 1984 was enacted to provide for the establishment of family courts with a view to promoting conciliation in, and to secure the speedy settlement of, disputes relating to marriage and family affairs. Section 5 of the Family Courts Act provides for the government to require the association of social welfare organizations to help a family court to arrive at a settlement. Section 6 provides for the appointment of permanent counselors to effect settlement in family matters. Further, sect. 9 imposes an obligation on the family court to make efforts to secure a settlement before taking evidence. To this extent ADR has recieved much recognition in the settlement of family disputes. A similar provision is contained in Order XXXIIA of the Code of Civil Procedure, which deals with family matters. According to sect. 4(4)(a) in selecting persons for appointment as judges in family courts, every endeavor shall be made to ensure that persons committed to the need to protect and preserve the institution of marriage and promote the welfare of children, and qualified by reason of their experience and expertise to promote the settlement of disputes by conciliation and counselling, are preferred.

9. Consumer Protection Act 1986

Another right step was taken with the enactment of the Consumer Protection Act 1986 regarding the settlement of consumer disputes. The Act provides for the effective, inexpensive, simple and speedy redress of consumer grievances, which civil courts are not able to provide. The Act is another example of ADR for the effective adjudication of consumer disputes. The Act provides for three-tiers; that is, a district forum, state commission and the National Commission, for the redress of consumer grievances. Large numbers of consumers are approaching these fora to seek quick redress of their grievances. There has also been a spurt in social action litigation on behalf of consumers by consumer activists, voluntary organizations and other social action groups.

10. Scope and Method of ADR

Disputes such as family disputes, contractual disputes, motor accident claims, disputes between neighbours and several other categories of civil and petty criminal cases, which form a substantial percentage of pending litigation, may be more satisfactorily settled by ADR. In India, millions of cases are pending decision before the courts. The Indian legislature has made considerable efforts, through the making and improving ADR laws, to address these problems of delay and the backlog of cases. There is much flexibility in the use of ADR methods. Flexibility is available in relation to both procedures and the way in which solutions to the dispute are

found. Solutions may be problem-specific. The rigidity of precedent, as used in the adversarial method of dispute resolution, will not impede the finding of solutions to disputes in creative ways.

The ADR method brings about a satisfactory solution to disputes, and not only will the parties be satisfied, but the ill-will that would otherwise have existed between them will also end. ADR methods, especially mediation and conciliation, not only address the dispute itself but also the emotions underlying the dispute. Parties do not win or lose. In fact, for ADR to be successful, the emotion and ego existing on the part of the parties must first be addressed. Once emotions and ego have been effectively addressed, resolving the dispute becomes very easy. This requires wisdom and skill of counseling on the part of the mediator conciliator.

As the ADR is participatory there is much scope for parties to participate in the solution-finding process. As a result, they honour the solution with true commitment. Above all, ADR is inexpensive and also affordable for the poor. Until now, there have been some aberrations when it comes to expenses incurred in arbitration. Over course of time, once a good number of quality arbitrators has been developed, the expenses of arbitration will also decrease. The promotion of institutional arbitration will go a long way to improving the quality of ADR services and making them much cheaper. The development of ADR will provide access to many litigants and helps in reducing the enormous workload of the judiciary.

Arbitration is a process of dispute resolution through an arbitration tribunal appointed by the parties or by the Chief Justice or a designate of the Chief Justice under sect. 11 of the Arbitration and Conciliation Act 1996. The parties have option to go for *ad hoc* arbitration or institutional arbitration, depending on their convenience. *Ad hoc* arbitration is arbitration agreed to and arranged by the parties themselves without recourse to an arbitral institution. In *ad hoc* arbitration, if the parties are not able to agree as to the arbitrator or one of the parties is reluctant to cooperate in appointing an arbitrator, the other party may invoke sect. 11 of the Arbitration and Conciliation Act 1996, wherein the Chief Justice of the High Court or the Supreme Court or their designate, will appoint an arbitrator. In cases of domestic arbitration, it will be the Chief Justice or High Court or their designate, and in cases of international commercial arbitration, it will be the Chief Justice of India or his designate that will appoint the relevant arbitrator. In *ad hoc* arbitration fee of the arbitrator is unfortunately quite high.

Institutional arbitration is arbitration administered by an arbitral institution. The parties may stipulate in the agreement to refer a dispute between them for resolution to a particular institution. Indian institutions include the Indian Council of Arbitration and the International Centre for Alternative Dispute Resolution. International institutions include International Court of Arbitration, the London Court of International Arbitration and the American Arbitration Association. Rules are formulated on the basis of experience and address all possible situations that may arise in the course of arbitration.

The large number of sittings and the charging of very high fees per sitting, with several adjournments have often resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of the award. When an arbitrator is appointed by a court without indicating the fees to be paid, either both parties or at least one party will be at a disadvantage. This has caused number of problems: firstly, parties can feel constrained to agree to whatever fees are suggested by an arbitrator even if they are high or beyond their capacity. Secondly, if a high fee is claimed by an arbitrator and one party agrees to pay such a fee, the other party, who is unable to afford or reluctant to pay such a high fee, is put in an embarrassing position. They will not be in a position to express their reservation or objection owing to an apprehension that refusal to agree to the fee suggested by arbitrator, may prejudice their case or create a bias in favour of the other party, who readily agreed to pay the high fee. It is necessary to find an urgent solution to this problem to reduce arbitration costs.

11. Solution regarding High Fees to Arbitrators

The following might present a solution to fixing the issue of arbitrators' fees:

1) institutional arbitration has provided a solution in that, here, an arbitrator's fee is not fixed by the arbitrator on a case by case basis but is governed by a uniform rate prescribed by the institution under whose aegis arbitration is held;

2) another solution could be for the court to fix the fee at the time of appointing the arbitrator, with the consent of parties and if necessary in consultation with the arbitrator concerned;

3) thirdly, retired judges offering to serve as arbitrators might indicate their fee structures to the registry of the respective High Court so that the parties can have the choice to select an arbitrator whose fee is within their 'range,' having regard to the stakes involved.

The objectionable issue here is that parties are forced to agree to a fee that is fixed by such an arbitrator. Unfortunately, delays, high cost, and frequent and sometimes unwarranted judicial interference at different stages, are seriously hampering the growth of arbitration as an effective dispute resolution process. Delay and high costs are two areas where arbitrators may bring about marked improvement through self-regulation.

12. Section 89 of the Code of Civil Procedure 1908

The Government of India has been very serious about the settlement of disputes outside the courts. Therefore, sect. 89 was introduced in 1999, being brought into force with effect from 1 July 2002. This section was introduced for the first time to settle disputes outside the court with the avowed objective of providing speedy justice.

1. It is now mandatory for the court to refer a dispute after the issues have been framed for settlement either by way of:

1) arbitration;
2) conciliation;
3) judicial settlement, including settlement through *lok adalat*; or
4) mediation.

2. If the parties fail to settle their disputes through any of the alternative dispute resolution methods, the suit could proceed further in the court in which it was filed.

3. The procedure to be followed in matters referred for different modes of settlement is spelt out in subsect. (2).

4. Section 89(2) empowers the government and the High Court to make rules to be followed in mediation proceedings to affect a compromise between parties.

One endeavour has been to inspire parties to settle disputes outside the court. Further, in order to have a greater effect in a real sense, a new sect. 16 has been inserted into the Court Fees Act 1870 by the Code of Civil Procedure (Amendment) Act 1999, which reads as follows:

> Where the court refers the parties to the suit to any one of the modes of settlement of dispute referred to in section 89 of the Code of Civil Procedure 1908, the plaintiff shall be entitled to a certificate from the court authorizing him to receive back from the collector, the full amount of the fee paid in respect of such plaint.

Where a matter referred to a *lok adalat* under the terms of sect. 89(2) of the Code of Civil Procedure read with sect. 20(1) of the Legal Services Authorities Act, is settled, the refund of the court fee is governed by sect. 16 of the Court Fees Act read with sect. 21 of the Legal Services Authorities Act, and the plaintiff is entitled to a refund of the whole of the court fee paid on the plaint (*Vasudevan V.A. v. Stat of Kerala* (AIR 2004 Ker 43)).

A *lok adalat* award is on a par with a decree on compromise, final, un-appealable, binding and equivalent to an executable decree, and ends the litigation between the parties (*P.T. Thomas v. Thomas Job* ((2005) 6 SCC 478, 486)).

Public confidence in the judicial system is the need of the hour more than ever before. The judiciary has a special role to pay in achieving the socio-economic goals enshrined in the Constitution. While maintaining their aloofness and independence, judges have to be aware of social changes in the task of achieving socio-economic justice for the people.

13. Conclusion

ADR, thus, is a much easier and faster way of securing justice compared to expensive litigation. Despite the fact that there is a need for justice dispensation

through ADR, there is not much acceptance of this by the people. This includes not only by people in the lower socio-economic strata of society, but even those belonging to highly affluent and educated society. There is, thus, a need in India for the ADR movement to be carried forward with greater speed. Considering the fact that delay in justice is tantamount to justice denied, one should adopt this method. In India, where major economic reforms are under way within the framework of constitutional law, strategies for the swifter resolution of disputes in order to lessen the burden on the courts and provide a means for the expeditious resolution of disputes, will have to be evolved. There is no better option but to strive to develop alternative modes of dispute resolution (ADR). The technique of ADR is an effort to design arbitration, mediation, conciliation, mediation-arbitration, mini-trials, private ajudication, final offer arbitration, court-annexed ADR and summary jury-trials. With the advent of ADR, there is new avenue for people to settle their disputes.

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FREEDOMS COLLIDE: FREEDOM OF EXPRESSION AND FREEDOM OF RELIGION IN RUSSIA IN COMPARATIVE PERSPECTIVE[1]

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In the last decade ethnic and religious contradictions became a matter of growing concern and the issue of preserving the balance between the rights and interests of different groups of people comes to the forefront. There are many examples when freedom of expression is in opposition to freedom of religion. Two recent cases, the cartoons in the Danish newspaper and the recent parody of the Prophet Mohammed, show the importance of this issue. However, the notion of manifestation of religious beliefs, which in the paper is considered primary as a part of freedom of expression, is also very problematic.

The paper considers models of coexistence of both freedoms adopted at the international level, in Europe and in Russia. The first chapter considers general approaches towards balancing of fundamental rights, including approaches of the Human Rights Committee and the European Court. The second chapter concentrates on the regulation of both freedoms in Russia, relevant international and domestic cases.

Key words: freedom of expression; freedom of religions; margin of appreciation; limitation; international standards.

1. Introduction

In the last decade when ethnic and religious contradictions became a matter of growing concern, the problem of preserving balance between rights and interests of different groups of people comes to the forefront. Indeed, how should we determine whether unalienable rights of some prevail over similar rights of others? The issue is particularly problematic when freedom of religion and freedom of expression are involved. Freedom of expression is one of the cornerstones of self-development, of

[1] The article is based on the master's thesis defended at Central European University in 2013.

realization of a person. At the same time freedom of expression is one of the most effective means the individual can use to protect oneself from governmental abuses. Freedom of religion is another fundamental right, the struggle for which has a long and complicated history. The importance of this right is highlighted, for instance, in the International Covenant on Civil and Political Rights, where freedom to hold religious beliefs is granted the status of a non-derogable right, *i.e*. an absolute right to which no limitations are allowed.[2]

There are many cases when freedom of expression collides with freedom of religion. Two striking examples, the cartoons in the Danish newspaper and various recent parodies of the Prophet Mohammed, show the importance of this matter.

The problem gets more complicated when political issues are involved. The most notable example is the situation with the Russian punk-band 'Pussy Riot' which split Russian society into two parts. On the one hand, orthodox believers claimed that the actions of the band in the Cathedral insulted their religious feelings. On the other, a lot of people consider the outrageous sentence rendered to the three girls an oppressive act which violates freedom of expression. This situation is a litmus test that has shown the public sentiment toward close relations between the Government and the Orthodox Church, their interpenetration and fusion.

The issue of mutual relations and mutual limitations which exercise of freedom of expression and freedom of religion impose on each other is crucial, especially in light of the effort to build Russian civil society on Constitutional principles of democracy and law-bound state, in which human rights are proclaimed to be the primary value.

This article is limited to analysis of legislative framework and court practice concerning freedom of religion and freedom of expression. Possible collisions between both freedoms and other fundamental rights are not covered by the paper. Also inner regulation of subjects within the Russian Federation is not considered in the article; division of competence in the Federation is a matter of structure rather than rights.[3]

The first chapter of this paper considers general approaches toward constitutional interpretation of conflicting fundamental rights. It also analyses international standards inspired by the International Bill of Rights and developed by the UN Human Rights Committee [hereinafter HRC]. The third section of the first chapter

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2 Int'l Covenant on Civil and Political Rights, Art. 18, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4 (Sept. 28, 1984), at <http://www.refworld.org/docid/4672bc122.html> (accessed Juny 17, 2014) [hereinafter Siracusa Principles]. *See also* Organization of American States (OAS), *American Convention on Human Rights, 'Pact of San Jose, Costa Rica,'* Art. 9, Nov. 22, 1969, <http://www.refworld.org/docid/3ae6b36510.html> (accessed Juny 17, 2014).

3 Конституция Российской Федерации [*Konstitutsiya Rossiiskoi Federatsii* [Constitution of the Russian Federation]] [hereinafter *Konst. RF*], Art. 71 (Russ.).

addresses the general approach of the European Court of Human Rights [hereinafter Eur. Ct. H.R.], the most progressive body in Europe which develops standards of human rights protection, toward balancing of the fundamental rights. The second chapter studies relations between freedom of expression and freedom of religion in the Russian Federation. It examines reception of the international standards, their development in accordance with national constitutional tradition, and problems arising when cases, where both freedoms are involved, are considered by domestic courts.

2. General Approach and International Standards of Treatment of the Conflict between Freedom of Expression and Freedom of Religion

2.1. Preliminary Remarks

2.1.1. Freedom of Religion and Freedom of Expression in Constitutional Interpretation

In order to establish the meaning and content of fundamental rights and to find balance between them it is necessary to use a particular method of constitutional interpretation. Constitutional interpretation is understood, generally, as a logical operation which helps to define the meaning of a constitutional provision, *i.e.* the meaning and content of the provisions dealing with freedom of expression and freedom of religion.[4]

For the purpose of this paper I will briefly consider the following approaches to constitutional interpretation in relation to the conflict of rights, that of John Rawls, Jurgen Habermas, John Hart Ely, and Ronald Dworkin.

John Rawls claims that when there is a conflict between fundamental liberties, 'they must be mutually adjusted'[5] while a balancing test is not applicable.[6] Moreover, Rawls writes that fundamental liberties may not be denied on such grounds as national security or proportionality between two evils;[7] they can only be restricted 'solely for the sake of one or more other basic liberties.'[8] According to this approach, when there is a clash between interests of, say, religious groups one of which is dominant in the society and another is a minority, the government may not apply the balancing test between the rights of both groups since it will denigrate the

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[4] *See* Georges Burdeau et al., Droit constitutionnel 69 (23th ed., LGDJ 1993); Hanneke Senden, Interpretation of Fundamental Rights in a Multilevel Legal System: An Analysis of the European Court of Human Rights and the Court of Justice of the European Union 7 (Intersentia 2011).

[5] Conflicts between Fundamental Rights 33, 191 (Eva Brems, ed.) (Intersentia 2008).

[6] *Id.*

[7] John Rawls, Political Liberalism 295 (Columbia University Press 1993).

[8] *Id.*

core meaning of liberty.[9] Following this logic, the decision of the Eur. Ct. H.R. in *Otto Preminger Institut v. Austria* is incorrect.[10] Instead Rawls offers the model of regulation of the fundamental liberties. The Government must establish certain frames and rules in accordance to which fundamental rights should be realised. Thus, in Rawls' view a conflict between fundamental rights would be impossible. This approach is not without advantages as it allows eradication of the negative aspect of the balancing test. However, from the perspective of individual, it is good only when the government is not abusing its regulative power.

Jurgen Habermas is also very sceptical towards balancing. According to him, balancing is a deprivation of rights of their 'constitutional power.'[11] The solution he offers is that courts (constitutional courts) should find a right which is most suitable for the case and decide the case solely on the ground of this right.[12]

The next approach is a value judgement offered by John Hart Ely. This doctrine is opposite to the two described above. Ely's main idea is that neither the original meaning of the text of the Constitution, the historical context of incorporation of fundamental rights in the Constitution, nor an interpretation by the legislature can be a sufficient exposition of rights.[13] Thus it is for a constitutional court to interpret constitutional provisions concerning fundamental rights and, most importantly, this interpretation should be given in accordance with the 'democratic will-formation.'[14] Hence according to Ely in the conflict of fundamental rights a right which contributes more to the establishment of the democratic will of the people will prevail.[15]

The last concept is the moral reading of the Constitution argued for by Ronald Dworkin.[16] This implies that the constitutional text 'must be understood in the way that their language most naturally suggests: they refer to abstract moral principles and incorporate these by reference, as limits on [governmental] power.'[17] Consequently, when there is a conflict between fundamental rights of the same value, an interpreter must take into account the real moral value of these rights and somehow balance it from the point of view of their social significance.

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9 Rawls, *supra* n. 7, at 310–11.

10 The case is discussed in more detail in the third section of this chapter.

11 Conflicts between Fundamental Rights, *supra* n. 5, at 84.

12 *Id*. at 85.

13 John H. Ely, Democracy and Distrust: A Theory of Judicial Review (Harvard University Press 1980).

14 Conflicts between Fundamental Rights, *supra* n. 5, at 92.

15 *See also* Aharon Barak, Proportionality: Constitutional Rights and Their limitations (Cambridge University Press 2011).

16 *See* Ronald Dworkin, Law's Empire 45–86 (Harvard University Press 1986).

17 Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 19 (Harvard University Press 1996) (*citing* Conflicts between Fundamental Rights, *supra* n. 5, at 92, 93).

It must be said that theories of constitutional interpretation are not limited to the theories described above. However, these theories illustrate the main approaches to the issue of the conflict of rights. Constitutional courts and international human rights courts when faced with the conflict of rights of the same importance have to choose a particular approach to cope with the problem. Methodologies that constitutional/human rights courts are prone to adopting differ. For example, the Constitutional Court of the Russian Federation uses a methodology which is similar to Dworkin's approach, while the Eur. Ct. H.R. applies the balancing test. The conflict between fundamental rights is difficult to solve on the following grounds: these rights are equal in their nature, they have the same level of protection, nearly the same guarantees; generally it is impossible to apply the test of proportionality when dealing with these rights, so the only applicable test is the *balancing test.*[18] Under the balancing test the Eur. Ct. H.R. understands its role to be 'weighing the rights in conflict against one another and affording a priority to the right which is considered to be of greater value.'[19]

On the one hand, all the theories of constitutional interpretation discussed above have their weak sides. But on the other hand, an interpreter is free to choose certain elements from each of these theories. However as the practice of both national and international judicial institutions shows the main method applicable to the interpretation of the conflict of rights is the balancing test, which is the main focus in the following sections.

2.1.2. Features of the Conflict of Rights

To address the conflict of rights we also have to take into account several notions which influence the treatment of these rights. Firstly, the real conflict between rights exists when these rights have the same level of protection, *i.e.* stated in the same legal documents, upheld by the same authorities, and what is more important, have the same level of judicial protection. When there is a conflict between a conventional right guaranteed by the European Convention of Human Rights and another interest (even legal one) which is not enshrined in the Convention, it is impossible to treat the situation as a conflict of rights.[20] Secondly, the conflict of rights changes when absolute rights are set against rights which can be subjected to limitations.[21] This leads to the conclusion that when there is a conflict, for example, between freedom

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[18] Nevertheless, the test *per se* is not a panacea since in any case its application would be vague.

[19] Conflicts between Fundamental Rights, *supra* n. 5, at 191.

[20] *See generally* Rawls, *supra* n. 7 (claiming that human rights may not be endlessly expanded because such an expansion has a negative effect on protection of 'really fundamental rights'). *See also* Conflicts between Fundamental Rights, *supra* n. 5, at 175–78.

[21] *Chahal v. U. K.*, no. 22414/93 (Eur. Ct. H.R., Nov. 15, 1996) (upholding the idea of hierarchy of norms in the Eur. Ct. H.R. practice).

to hold and to change certain beliefs (or so-called forum internum)[22] and freedom to express certain ideas, the latter will be limited.[23] But it is not the case when there is a clash between two rights which can be subjected to limitations, for example freedom to manifest religious beliefs and freedom of expression.

The conflict between freedom of expression and freedom to manifest religious beliefs usually takes two forms. The first one is when religious speech is offensive itself. For example, when Russian Orthodox believers protest against homosexuality or certain liberal freedoms, they allegedly violate non-discrimination provisions of the Constitution, and thus, abuse their right to free speech. And the second type is when the expression insults religious feelings. For example, in many pieces of contemporary art religious beliefs are interpreted in a possibly offensive way.[24]

When discussing the conflict between freedom of expression and freedom to manifest religious beliefs I have to address an overlap between the terms 'manifestation' and 'expression.' Generally international documents use the term 'manifestation' for the expression of religious beliefs.[25] Consequently, some commentators claim that 'manifestation' should be 'reserved' only for the expression of religious beliefs because it is a specific form of such an expression, a kind of *lex specialis.*[26] They develop this thought claiming that it implies special status and special protection, different from the protection guaranteed to ordinary expression.[27] The Eur. Ct. H.R. stressed in this respect in *Kokkinakis* that 'the exercise of the right to freedom of expression consists in the freedom to manifest one's religion or belief through worship, teaching, practice and observance, it is primary the right guaranteed by Art. 9 of the Convention.'[28]

From my point of view this approach is vague. How should one interpret the fact that, say, a person is a pacifist and he/she expresses some views, teaches or contributes leaflets? Is it a religious manifestation or an act 'purely' of expression? Or another example which will be discussed in the third chapter in more detail: how

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22 *See* Jim Murdoch, Protecting the Right to Freedom of Thought, Conscience and Religion under the European Convention on Human Rights (Council of Europe 2012), available at <http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/documentation/hb09_rightfreedom_en.pdf> (accessed Juny 17, 2014).

23 *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, Arts. 9, 10, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

24 *See* W. Cole Durham, Jr., & Brett G. Schraffs, Law and Religion: National, International, and Comparative Perspective 183–84 (Wolters Kluwer 2010).

25 *See, e.g.,* ICCPR, Art. 18; ECHR, Art. 9.

26 Paul M. Taylor, Freedom of Religion: UN and European Human Rights Law and Practice 207 (Cambridge University Press 2005); Malcolm D. Evans, Religious Liberty and International Law in Europe 285 (Cambridge University Press 1997).

27 *Id.*

28 *Kokkinakis v. Greece*, ¶ 79, no. 14307/88 (Eur. Ct. H.R., May 25, 1993).

should one evaluate the wearing of the headscarf by Muslim women in Europe? Is it only a manifestation of religion? One can call it a political expression or otherwise. Once a political element or certain social significance is involved it is impossible to draw the line between 'manifestation' and 'expression.' Hence my main claim here is that 'manifestation' is covered by the scope of 'expression,' and, hence, the standards of protection applicable to both notions should be the same.[29]

2.2. International Law on the Conflict of Rights

The International Bill of Rights is the most universal means of human rights protection[30] which has its own approach towards balancing and limiting of fundamental rights. In this section I will consider the practice of the HRC concerning freedom of expression and freedom of religion.

Both freedoms are enshrined in the ICCPR. Article 18 states that:

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.[31]

According to the ICCPR, freedom of expression:

> Shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.[32]

Whereas Art. 18 states that freedom of religion *per se* cannot be restricted; it is only freedom to manifest religious beliefs that can be subjected to certain limitations.[33] This is the key covenantal difference between freedom of religion and freedom of

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[29] This approach is not generally recognised, for example Evans claims that any expression which is not connected with religious beliefs is protected under Art. 10 of the ECHR while the expression takes the form of religious manifestation and is protected under Art. 9 as a particular form of expression. However, Evans fails to prove that such type of expression has any specific features which make it so much different from the expression in the meaning of Art. 10. *See* Evans, *supra* n. 26.

[30] The International Bill of Human Rights is a common way of describing three documents: the Universal Declaration of Human Rights [hereinafter UDHR], ICCPR and the International Covenant on Economic, Social and Cultural Rights [hereinafter ECOSOC]. One can argue that different parts of the Bill have different natures. For example, the UDHR – is not a binding document for UN members. Another example is that ECOSOC is not ratified by the United States.

[31] ICCPR, Art. 18(1).

[32] *Id*. Art. 19(1).

[33] *Id*. Art. 18(3).

expression. While the first cannot be limited the latter can be (on the ground of the rights or reputation of others, national security, public order, public health and public morals).[34] It follows from the wording of the Covenant that the right to freedom of religion is logically divided into inner and external aspects,[35] while freedom of expression is always considered as having only external dimension. It is notable to compare this approach with the practice of the Eur. Ct. H.R. which recognises both external and inner aspects of freedom of expression.[36]

The HRC had several occasions to consider cases concerning the conflict between freedom of expression and freedom of religion was involved. In 2000 the HRC decided the case of *Raihon Hudoyberganova v. Uzbekistan*.[37] The author of a communication to the HRC was a student from Uzbekistan. In 1996 she joined the Islamic Affairs Department of the Tashkent State Institute. She claimed to be a practicing Muslim required to follow all the Islamic canons including wearing the Hijab. Within the following two years the university administration took measures limiting student's wearing of the garment and the freedom to manifest her beliefs. For example, access to praying rooms was limited and wearing of religious symbols at the university was prohibited. Ms. Hudoyberganova unsuccessfully challenged those measures in domestic courts. As a result, she applied to the HRC claiming that her rights under Arts. 18 and 19 of the ICCPR were violated.[38]

The HRC decided in favour of the author. It was found that freedom of religion includes freedom to wear religious symbols or religious clothes. Moreover, prohibition from wearing these symbols is illegal interference with the right to adopt and exercise religion. Also the HRC stressed that the Government did not show any compelling reasons for interference with the right.[39] Thus, a violation of Art. 18(2) of the ICCPR was found.

The reasoning of the HRC in the case was not clear. Firstly, and the most crucial from the methodological point of view, the HRC mixed two aspects of Art. 18. It found that freedom to manifest beliefs (external aspect) is an integral part of the

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34 ICCPR. Art. 19(2).

35 Raija Hanski & Martin Schein, Leading Cases of the Human Rights Committee 278 (Institute for Human Rights, Åbo Academi University Turku, 2007). *See also* Manfred Nowak, U.N. Covenant on Civil and Political Rights, CCPR Commentary 412 (2nd ed., N.P. Engel 2005).

36 *Orban v. France*, no. 20985/05 (Eur. Ct. H.R., Jan.15, 2009).

However it does not necessarily mean that the inner aspect of the freedom of expression can preclude the Court from finding limitation proportionate (for example in the hate-speech case of *Norwood* (*Anthony Norwood v. United Kingdom*, no. 23131/03 (Eur. Ct. H.R., Nov. 16, 2004)) the Court found that limitation of the speech reflected beliefs of the applicant was permissible).

37 *Raihon Hudoyberganova v. Uzbekistan*, CCPR/C/82/D/931/2000 (Human Rights Comm., Nov. 5, 2004).

38 ¶¶ 2.1–2.5, 3.

39 *Id*. at ¶ 6.2.

freedom to adopt religion. Thus the treaty body granted these rights the same level of protection, whereas it is clear from the text of the ICCPR it is not so.[40] Secondly, the Committee disregarded the state's margin of appreciation in the case of prohibition of religious symbols in public. According to the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, Uzbekistan had a right to limit certain conventional rights for the sake of public order.[41] In this case the limitation was possible to explain with the secular nature of the state. It illustrates difference of approaches of the Eur. Ct. H.R. and the HRC. While the first one constantly applies the doctrine of margin of appreciation including cases of religious expression, the latter is not inclined to apply this doctrine.

Article 19(3) of the ICCPR permits only two types of limitations on freedom of expression, *i.e.* 'respect of the rights or reputations of others; and for the protection of national security or of public order *(ordre public),* or of public health or morals.'[42] In any case limitations should be necessary and proportionate.[43] In the case of Malcolm Ross, which concerned a Canadian teacher who was fired by the Government on the grounds that he had published certain materials stirring up religious hatred, the HRC found that limitations were necessary to protect the interests of believers.[44]

The HRC in its 102nd session adopted General Comment No. 34, where among other issues it explained its approach towards correlation between Art. 18 and Art. 19 of the ICCPR.[45] The HRC recognised that freedom of expression and freedom of religion have much in common, and expression can be guaranteed *inter alia* by Art. 18.[46] The Committee also addressed the most controversial issue: freedom of expression and blasphemous laws:

> Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, section 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, section 3.

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40 *See* Siracusa Principles, *supra* n. 2.

41 *Id*. at ¶ 22.

42 ICCPR, Art. 19(3).

43 UN Human Rights Comm., General Comment No. 34: Freedoms of Opinions and Expressions (Art. 19), ¶¶ 33–34, 102nd Sess., U.N. Doc. CCPR/C/GC/34 (2011), at <http://www.unhcr.org/refworld/docid/4ed34b562.html> (accessed Juny 17, 2014).

44 *Malcolm Ross v. Canada*, CCPR/C/70/D/736/1997 (Human Rights Committee, Oct. 26, 2000), at <http://www.unhcr.org/refworld/docid/3f588efc0.html> (accessed Juny 17, 2014).

45 General Comment No. 34, CCPR/C/GC/34, *supra* n. 43.

46 *Id*. at ¶ 4. It is a positive development because in its previous cases the Committee was usually silent about intercourse of both freedoms.

The HRC reiterated that restrictions or limitations of free speech in favour of one or another religion are absolutely impermissible. Moreover, it is inconsistent with the ICCPR to prohibit criticism of religious leaders, or to prohibit commentaries interpreting religion and faith.[47] This notion is relevant for the second chapter of this paper.

Hence, the practice of the HRC toward interrelation of freedom of religion and freedom of expression has two main aspects significant for the current research. Firstly, the HRC does not make a deep analysis when it gives an interpretation to obligations of states under Art. 18, in particular provisions concerning freedom to believe and freedom to manifest beliefs (whereas the HRC approach to consider freedom to manifest religious beliefs as a way of realization of freedom of expression should be welcomed). The second important detail is that the HRC formulated a clear test for impermissibility of limitations in favour of a particular religion, religious leader or doctrine.

The last statement is significant from a comparative perspective. The Eur. Ct. H.R. has not developed the same standard. In several of its cases the Strasbourg Court protected religions[48] or beliefs of a particular group,[49] which in those cases could be considered as a disproportional limitation of the artistic expression, or even as a discrimination of one religion (religious group) in favour of the other. This practice would be addressed in more detail in the next section.

The HRC's understanding of the guarantee of freedom of expression through the means of Art. 18 is crucial for defining international standards in this field. However, the HRC did not go so far as to recognise freedom of religion as an integral part of freedom of expression.[50] From my point of view, that recognition would be a great step forward and would help to design universal judicial standards and approaches to both these rights and it would be a universal mechanism of justiciability of possible collisions between these rights. However, once we decide to consider freedom of religion as an aspect of freedom of expression, another problematic issue arises here: what are acceptable limitations toward religious speech. Although there are no clear standards toward these limitations, in principle they could be divided into four groups:[51]

1) prohibition of proselytism;

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[47] General Comment No. 34, CCPR/C/GC/34, *supra* n. 43, ¶ 48; *see also* Evelyn M. Asward, *To Ban or Not to Ban Blasphemous Videos*, 44 Geo. J. Int'l L. 1313 (2013).

[48] *E.g., Wingrove v. the United Kingdom*, no. 17419/90 (Eur. Ct. H.R., Nov. 25, 1996) (holding that the government legitimately restricted demonstration of the movie with the aim to protect the Anglican Church).

[49] *E.g., Otto Preminger Institute v. Austria*, no. 13470/87 (Eur. Ct. H.R., Sep. 20, 1994) (allowing for the protection of religious feeling of the majority of the population of Tyrol).

[50] For further details concerning two theories of understanding of freedom of religion as a right of expression or as a right of identity *see* Anat Scolnicov, The Right to Religious Freedom in International Law: Between Group Rights and Individual Rights 194–218 (Routledge 2011).

[51] *Id.* at 194–95.

2) inner regulation within a religious group, prohibiting certain expression of its members (this issue will not be addressed later in this article, because the object of the research is limited by state regulation);

3) prohibition of blasphemy speech;

4) prohibition of religious hate speech.

This international standard is applicable both on the level of the State-Parties to the ICCPR and it also can be found in the case-law of the Eur. Ct. H.R. that is addressed in the next section.

2.3. General Approach of the Eur. Ct. H.R. towards the Conflict of Rights

Cases concerning freedom of religion and freedom of expression constitute a fair share of the jurisprudence of the Eur. Ct. H.R. In every case the later applies the following test: the interference must be prescribed by law,[52] it must pursue a legitimate aim,[53] the interference must be necessary in a democratic society,[54] *i.e.* there should be a pressing social need and the measures employed by the state must be proportionate to the aim sought.[55]

As to the freedom of expression (including freedom of the press, freedom of artistic expression etc.) the Eur. Ct. H.R. established the following:[56]

– the Court 'must determine whether the reasons adduced by the national authorities to justify the interference were "relevant and sufficient," and whether the measure taken was "proportionate to the legitimate aims pursued";'[57]

– the Court takes into account the role which the press has in a democratic society, the role of 'public watchdog,' contribution of the press into political debates, solving of questions of political importance;[58]

– it is not for the Court to establish methods of the press' work;[59]

– freedom of expression implies that information which shocks, provokes and is disturbing also has the right to be delivered;[60]

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52 *See Foka v. Turkey*, no. 28940/95 (Eur. Ct. H.R., June 24, 2008).

53 *See Gorzelik and others v. Poland,* no. 44158/98 (Eur. Ct. H.R., Dec. 20, 2001).

54 *Handyside v. the United Kingdom*, ¶ 49, no. 5493/72 (Eur. Ct. H.R., Dec. 7, 1976).

55 *See Vajnai v. Hungary*, no. 33629/06 (Eur. Ct. H.R., Oct. 8, 2008).

56 *Mosley v. the United Kingdom*, no. 48009/08 (Eur. Ct. H.R., May 10, 2011) (citing criteria by the Eur. Ct. H.R.).

57 *See UJ v. Hungary*, no. 23954/10 (Eur. Ct. H.R., July 19, 2011); *Chauvy v. France*, ¶ 70, no. 64915/01 (Eur. Ct. H.R., June 29, 2004).

58 *See Financial Times Ltd. and Ors. v. the United Kingdom*, ¶ 59, no. 821/03 (Eur. Ct. H.R., Dec. 15, 2009); *De Haes and Gijsels v. Belgium*, ¶ 37, no.19983/92 (Eur. Ct. H.R., Feb 24, 1997).

59 *See Times Newspapers Ltd. v. the United Kingdom (nos. 1 and 2)*, ¶ 42, nos. 3002/03 and 23676/03 (Eur. Ct. H.R., March 10, 2009); *Jersild v. Denmark*, ¶ 31, no. 15890/89 (Eur. Ct. H.R., Sept. 23, 1994).

60 *See Gündüz v. Turkey*, no. 35071/97 (Eur. Ct. H.R., Dec. 4, 2003); *Handyside v. U.K.*, no. 5493/72 (Eur. Ct. H.R., Dec. 7, 1976).

– the Court makes a distinction 'between reporting facts – even if controversial – capable of contributing to a debate of general public interest in a democratic society, and making tawdry allegations.'[61]

The relevant Eur. Ct. H.R. standards in relation to the freedom of religion can be summarised as follows:[62]

– the Court believes that freedom to exercise religious beliefs is one of the foundations of a democratic society;[63]

– the usual approach toward limitations on freedom to manifest religious beliefs: 'any limitation placed on a person's freedom to manifest religion or belief must be prescribed by law and necessary in a democratic society in pursuit of one or more of the legitimate aims;'[64]

– the Court stresses the necessity for the Contracting Parties to be neutral and impartial as concerns treatment of religions;[65]

– for an act to 'count as a "manifestation" within the meaning of Article 9, the act in question must be intimately linked to the religion or belief;'[66]

– the Court leaves to the States a quite wide margin of appreciation for defining whether interference is necessary in a democratic society.[67]

All the standards described above are applied by the Strasburg Court when it deals with cases where there is a conflict between fundamental rights. When requirements towards these cases are strict enough the Eur. Ct. H.R. has to apply balancing approach[68] towards both freedoms. And this application is not always proper and reasonable which will be illustrated by the case analysis that follows.

The first case addressed is the case concerning prohibition of the movie 'Visions of Ecstasy' in *Wingrove v. The United Kingdom*. Mr. Wingrove, the applicant, was a film director who directed the respective movie. The movie told a story about the life of a nun who experienced powerful ecstatic visions of Jesus. The film was submitted to

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61 *Mosley v. the United Kingdom*, *supra* n. 55, at ¶ 114.

62 *Eweida v. the United Kingdom*, nos. 48420/10, 59842/10, 51671/10 and 36516/10 (Eur. Ct. H.R., Jan. 15, 2013) (citing the criteria by the Eur. Ct. H.R.).

63 *See Kokkinakis v. Greece*, *supra* n. 28, ¶ 31.

64 *Eweida v. the United Kingdom, supra* n. 62, at ¶ 80; *see also Leyla Sahin v. Turkey*, ¶ 105, no. 44774/78 (Eur. Ct. H.R., Nov 10, 2005).

65 *See Bayatyan v. Armenia* [GC], ¶ 110, no. 23459/03 (Eur. Ct. H.R., July 7, 2011); *Jakóbski v. Poland,* ¶ 44, no. 18429/06 (Eur. Ct. H.R., Dec. 7, 2010); *Anoussakis v. Greece*, ¶ 47, no. 18748/91 (Eur. Ct. H.R., Sep. 26, 1996).

66 *Eweida v. the United Kingdom*, *supra* n. 62, at ¶ 82.

67 *See Otto Preminger Institute v. Austria*, *supra* n. 49, at ¶ 47; *Şahin v. Turkey, supra* n. 64, at ¶ 110.

68 It is interesting that even among the judges of the Eur. Ct. H.R. there is no a uniform approach towards tests which should be applied when two fundamental rights are involved: the problem is whether application of the proportionality test is appropriate to such cases or not. It is generally recognized, however, that the balancing test is the best solution.

the British Board of Film Classification for a license to exhibit. The Board rejected the application on the ground that the movie could be offensive to religious feelings.[69]

The case touched upon the issue of blasphemy. The Eur. Ct. H.R. in its decision found no violation of Mr. Wingrove's right of freedom of artistic expression. Firstly, the Eur. Ct. H.R. stressed that there was no universal European understanding of what constituted blasphemy: 'national authorities must therefore be afforded a degree of flexibility in assessing whether the facts of a particular case fall within the accepted definition of the offence.'[70] Then the Eur. Ct. H.R. held that the interference with the applicant's rights was legitimate as it was aimed at protection of interests of Christians.[71] The main argument of the Strasburg Court was that the blasphemy law in principle did not prohibit views or statements which were contrary to religious doctrine but the law prohibited (restricted) the manner in which such an expression was made.[72] The last argument was connected to the possibility that the movie could have been widely distributed once it appeared on a market.

The second case is *Otto Preminger Institut v. Austria*. The applicant association intended to screen the film 'Das Liebeskonzil' ('Council in Heaven'). The public prosecutor initiated suspension of the movie screening on the basis of criminal offence of disparaging religious precepts. The applicant lost the case in national courts on the ground that there could be a 'severe interference with religious feelings caused by the provocative attitude of the film outweighed the freedom of Art.'[73]

Similar to the previous case, here the Eur. Ct. H.R. found no violation. Firstly, the Eur. Ct. H.R. reiterated that states had a certain margin of appreciation when there was a matter of protection of public order and the interest of the society.[74] Secondly, the Eur. Ct. H.R. took into account the fact that the Roman Catholic religion was the dominant religion in the Tyrol region. When the movie was banned from screening, the Austrian authorities were preventing offensive effect of it on religious feelings of the Tyroliennes.[75] And the last argument of the Eur. Ct. H.R. was that Art. 10 could not have been interpreted as prohibiting forfeiture of the movie.[76]

Both cases have attracted a lot of criticism[77] since the Eur. Ct. H.R. had afforded a wide margin of appreciation to the States in balancing two fundamental rights.

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[69] *Wingrove v. the United Kingdom*, *supra* n. 48.

[70] *Id*. at ¶ 41.

[71] *Id*. at ¶ 45.

[72] *Id*. at ¶ 57–58.

[73] *Otto Preminger Institute v. Austria, supra* n. 49.

[74] *Id.* at ¶ 55.

[75] *Id.* at ¶ 56.

[76] *Id.* at ¶ 57.

[77] *See* Sir Patrick Elias & Jason Coppel, *Freedom of Expression and Freedom of Religion: Some Thoughts on the Glenn Hoddle Case*, in Freedom of Expression and Freedom of Information. Essays in Honour of Sir David Williams 51–63 (Jack Beatson & Yvone Crips, eds.) (Oxford University Press 2000).

Article 9 states that '[e]veryone has the right to freedom of thought, conscience and religion . . .'[78] There is nothing in the text of the said Article that grants religions themselves certain rights. But in both cases the Eur. Ct. H.R. took the position of protecting religions.[79] The Strasbourg Court departed from protection of religious freedom and moved out of the conventional frames towards protection of religious feelings. Moreover, in these judgments the Eur. Ct. H.R. belittled the protection of artistic freedom. I argue that potentially they can have negative consequences in the 'Pussy Riot' case that is now pending before the Eur. Ct. H.R.

Now I turn to the discussion of permissible limitations on freedom to manifest religion. The first issue here is the notion of legal certainty.[80] In several of its decisions the Eur. Ct. H.R. upheld prohibition of proselytism,[81] while the formulation of the law prohibiting these actions was vague. Later the Eur. Ct. H.R. changed its approach and applied stricter scrutiny in relation to the nature of a state's act in question.[82] It is also important that the Eur. Ct. H.R. upheld the ban on advertisements of a sect on a private commercial radio station.[83] In the latter case the Strasburg Court upheld a prohibition because of the impact of this way of exercise of freedom of expression towards the public which was found to be very significant since the translation was available for everyone. Thus the case provides an example where both freedom to manifest religion and freedom of expression were limited at the same time.

Concluding this part of the paper, I have to admit that in spite of the fact that there are certain international and regional standards regarding the interaction between freedom of expression and freedom of religion, international regulation is not complete and uniform. Because of practical reasons international treaty bodies and human rights tribunals leave to the states a wide margin of appreciation which, from my point of view, is not necessarily the best solution. One of the problems which will be discussed in the next chapter is the secular nature of the state as a ground of limitation of the right. This ground is not stated in international documents, yet both the HRC and the Eur. Ct. H.R. used it as a justification for states' actions. The additional problem is the silence of human rights bodies towards procedural aspects of the conflict between rights. This lacuna complicates the protection of the fundamental rights in question.

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78 ECHR, Art. 9.

79 *See Wingrove v. the United Kingdom*, *supra* n. 48 (dissent).

80 *See* Paul M. Taylor, Freedom of Religion: UN and European Human Rights law and Practice, 294 (Cambridge University Press 2005).

81 *See Larissis and Others v. Greece*, no. 140/1996/759/958–960 (Eur. Ct. H.R., Feb. 24, 1998).

82 *See Hasan and Chaush v. Bulgaria*, no. 30985/96 (Eur. Ct. H.R., Oct. 26, 2000).

83 *Murphy v. Ireland*, no. 44179/98 (Eur. Ct. H.R., Dec. 3, 2003); *see also* Taylor, *supra* n. 80, at 309.

3. Freedom of Religion and Freedom of Expression in the Russian Federation

3.1. National Regulation in Russia

It is undisputable that freedom of expression (and freedom of the press being its part) and freedom of religion are fundamental constitutional values.[84] These rights are related and may both cooperate or conflict with each other. Nevertheless, in today's Russia an attitude of the authorities and, in particular, the legislature towards these freedoms is not the same. In the light of the recent amendments in legislation[85] one may conclude that the state favours freedom of religion over freedom of expression instead of providing an equal treatment for both.

In the first part of this chapter I study the inner regime of freedom of religion and freedom of expression in Russia. The second part is devoted to the analysis of the Eur. Ct. H.R. decisions rendered in cases brought against Russian authorities.

The Russian Constitution of 1993 establishes that the 'Russian Federation is a secular state.[86] No religion may be established as a state or obligatory one' and 'religious associations shall be separated from the State and shall be equal before the

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[84] *See* Norman Doe, Law and Religion in Europe: A Comparative Introduction 157 (Oxford University Press 2011).

[85] *See* Федеральный закон от 29 июня 2013 г. № 136-ФЗ «О внесении изменений в статью 148 Уголовного кодекса Российской Федерации и отдельные законодательные акты Российской Федерации в целях противодействия оскорблению религиозных убеждений и чувств граждан» // Собрание законодательства Российской Федерации. 2013. 1 июля. № 26. Ст. 3209 [*Federal'nyi zakon ot 29 iyunya 2013 g. No. 136-FZ 'O vnesenii izmenenii v stat'yu 148 Ugolovnogo kodeksa Rossiiskoi Federatsii i otdel'nye zakonodatel'nye acty Rossiyskoi Federatsii v tselyakh protivodeistviya oskorbleniyu religioznykh ubezhdenii i chuvstv grazhdan' // Sobranie zakonodatel'stva Rossiiskoi Federatsii. 2013. 1 iyulya. No. 26. St. 3209* [*Federal Law of 29 June 2013 No. 136-FZ on Amendments to Article 148 of the Russian Federation Criminal Code and Certain Legislative Acts of the Russian Federation in the Aim of Protecting Religious Convictions and Feelings of Citizens against Insults*, 2013(26) Collection of Legislation of the Russian Federation, Art. 3209]].

[86] Secular tradition in the Russian Federation is not that long as, for example, in France (1958 French Constitution, Art. 1; Michel Troper, *Sovereignty and Laïcité*, 30(6) Cardozo L. Rev. 2561, 2561–74 (2009). Russia proclaimed itself a secular state with the adoption of the first Russian Constitution in 1918 (Конституция (Основной Закон) РСФСР [*Konstitutsiya (Osnovnoi Zakon) RSFSR* [Constitution (Fundamental Law) of the RSFSR]] (adopted by the 5th All-Russia Congress of Soviets 10 July 1918), Art. 13; English version is available at <http://www.departments.bucknell.edu/russian/const/18cons01.html#chap05> (accessed Juny 17, 2014)). However, secularism in Russia during the soviet times took different forms than it had in France. The USSR was an atheistic state, where temples were being destroyed, priests were being killed. From this perspective the religious renaissance which occurs now in Russian society is astonishing. *See* Irina Budkina, *Religious Freedom since 1905 – Any Progress in Russia?*, 26(2) Religion in Eastern Europe 24 (2006); Vladimir Fedorov, *Religious Freedom in Russia Today*, 50(4) The Ecumenical Review 449–60 (1998); Dr. Nicolas K. Gvozdev, *Religious Freedoms – Russian Constitutional Principles: Historical and Contemporary*, 2001 BYU L. Rev. 511; Tatyana Titova, *Precarious Future for Half-finished Taganrog Mosque*, 2000 Keston News Service. On the relations between the Orthodox Church and human rights *see*: John A. McGuckin, *The Issue of Human Rights in Byzantium*, in Christianity and Human Rights: An Introduction 173–189 (John Witte, Jr., & Frank S. Alexander, eds.) (Cambridge University Press 2010).

law.'[87] In 1997 the federal statute on 'On Freedom of Truth and Religious Union'[88] was adopted by the State Duma. The statute has been an object of persistent criticism.[89] Firstly, the preamble of the statute proclaims special ties with the state and a special role of the Christian Orthodox Church in the Russian Federation.[90] This provision is a clear deviation from the Constitutional provision about separation and equality of all religious organisations from the state. At the same time the law established very strict conditions for the registration of a new religious organisation.[91] However, comparative researches demonstrate that usually states have a wide margin of appreciation within this sphere.[92]

The current situation in the Russian Federation concerning the relationships between the state and the Orthodox Church is strongly criticised.[93] However, in the Universal Periodic Review of 2013 it was noted that within the last years the emphasis in relations between confessions and the state has shifted. It was noted that the Russian Government patronises 'nation's privileged "traditional religions" while discriminating the others.'[94] Moreover, discriminative practice of the Russian authorities towards different confessions was considered by the Eur. Ct. H.R.[95]

The Russian Constitution states that '[e]veryone shall be guaranteed the freedom of ideas and speech.'[96] The main sources of regulation of the issue are the federal statutes 'On the Media'[97] and 'On Information, Technologies and Protection of

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87 *Konst. RF*, Art. 14 (Russ.).

88 Федеральный закон от 26 сентября 1997 г. № 125-ФЗ «О свободе совести и религиозных объединениях» // Собрание законодательства Российской Федерации. 1997. 29 сент. № 39. Ст. 4465 [*Federal'nyi zakon ot 26 sentyabrya 1997 g. No. 125-FZ 'O svobode sovesti i o religioznykh ob'edineniyakh' // Sobranie zakonodatel'stva Rossiiskoi Federatsii. 1997. 29 sent. No. 39. St. 4465* [*Federal Law of 26 September 1997 No. 125 on the Freedom of Conscious and Religious Associations*, 1997(39) Collection of Legislation of the Russian Federation, Art. 4465]] [hereinafter *Federal'nyi zakon o svobode sovesti*].

89 *E.g.*, Budkina, *supra* n. 86.

90 *Federal'nyi zakon o svobode sovesti*, *supra* n. 88, the preamble.

91 *Id*. Art. 11.

92 Johan D. van der Vyver, *Freedom of Religion and Other Human Rights*, in Tore Lindholm et al., Facilitating Freedom of Religion and Belief: A Deskbook 104–5 (Martinus Nijhoff Publishers 2004).

93 *See* На глазах у россиян государство и церковь сближаются [*Na glazakh u rossiyan gosudarstvo i tserkov' sblizhayutsya* [*The Russians See How the State and the Church Are Getting Closer*]], Inopressa (Nov. 1, 2012), <http://inopressa.ru/article/01Nov2012/nytimes/orthodox.html> (accessed June 17, 2014).

94 Human Rights Council, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, U.N. Doc. No. A/HRC/WG.6/16/RUS/3 (Jan. 28, 2013).

95 *E.g.*, *Jehovah's Witnesses of Moscow and Ors. v. Russia*, no. 302/02 (Eur. Ct. H.R., June 10, 2010).

96 *Konst. RF*, Art. 29 (Russ.).

97 Федеральный закон от 1 декабря 1995 г. № 191-ФЗ «О государственной поддержке средств массовой информации и книгоиздания Российской Федерации» [*Federal'nyi zakon ot 1 dekabrya*

Information.'[98] The legal regulation in this field is in conformity with international standards. Nevertheless, enforcement of these normative provisions by courts and the executive is very controversial.[99]

In recent years the situation with regulation, proposed amendments and court practice dealing with constitutional rights and freedoms became an issue of big public concern.[100] The Criminal Code of the Russian Federation (the only source of criminal law in Russia) does not contain the crime of blasphemy as such. However, after amendments to the Criminal Code from 29th of June of 2013 it *de facto* became possible to bring people to account for a blasphemous speech. Article 148 of the Code before the amendment contained a prohibition of 'illegal obstruction of the activity of religious organizations or of the performance of religious rites.'[101] Now the wording of the article has drastically changed. It is prohibited to 'commit public acts which express disrespect for society and are committed to insult the religious feelings of believers.'[102] Paragraph 2 of this article implies more severe punishment for committing these actions in the places which are designed for religious rites and ceremonies.

From the first sight these amendments have a purely positive goal – to protect feelings of *believers* from intolerance and hooliganism.[103] But there are several concerns in respect of this initiative. Firstly, the amendment protects only religious

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1995 g. 'O gosudarstvennoi podderzhke sredstv massovoi informatsii i knigoizdaniya Rossiiskoi Federatsii' [Federal Law of 1 December 1995 No. 191-FZ on the State Support of the Mass Media and Book-Publishing in the Russian Federation]]. English version available at <http://www.democracy.ru/english/library/laws/eng_1991-1/index.html> (accessed June 17, 2014).

98 Федеральный закон «Об информации, информатизации и защите информации» [*Federal'nyi zakon 'Ob informatsii, informatizatsii i zashchite informatsii'* [Federal Law of 1 February 1995 No. 24-FZ on Information, Informatisation, and the Protection of Information]]. English version available at <http://www.fas.org/irp/world/russia/docs/law_info.htm> (accessed June 17, 2014).

99 The situation with freedom of expression during Russian history was probably even sadder than the situation with the relationships between the state and religion. After a short period of relative freedom of speech, freedom of the press in the period of 1917 – beginning of the twenties in the XXth century was replaced by totalitarian control over the press and freedom of expression. The situation started to change with the policy of *glasnost'* announced by Gorbachev.

100 *See* «Панк-молебен» год спустя: жалоба в ЕСПЧ и просьба о милосердии [*'Pank-moleben' god spustya: zhaloba v ESPCH i pros'ba o miloserdii* [*'Punk-preying' One Year Later: Application to the Eur. Ct. H.R. and Ask for Mercy*]], RBK (Febr. 21, 2013), <http://top.rbc.ru/politics/21/02/2013/846146.shtml> (accessed June 17, 2014).

101 Уголовный кодекс Российской Федерации [*Ugolovnyi kodeks Rossiiskoi Federatsii* [Criminal Code of the Russian Federation]], Art. 148. An old version of the text is available at <http://www.russian-criminal-code.com/PartII/SectionVII/Chapter19.html> (accessed June 17, 2014).

102 Федеральный закон от 29 июня 2013 г. № 136-ФЗ [*Federalnyi zakon ot 29 iyunya 2013 g. No. 136-FZ* [Federal Law of 29 June 2013 No. 136-FZ]] (my translation).

103 Though in the Code there is another article (Art. 213(b) which prohibits hooliganism committed on the religious grounds).

feelings, while feelings of atheists or adepts of other systems of values are not covered by the norm. It was stressed by *Art. 19* that such an amendment does not protect all citizens. Instead it secures well-being of major religions, primarily the Russian Orthodox Church.[104] The criticism here is based on the norms of international law which do not protect religions as such.[105] Moreover, there is a well-established practice of states' abolishing criminal sanctions for defamation of religions.[106] Thus the provision in question is not universal in its application and is not in conformity with international law standards.

The second issue is vague wording of the amendment. The provision protects religious feelings without explaining what constitutes these feelings. Quite often religious feelings are said to be offended by such phenomena as divorce, homosexuality, *etc*. That means that the said provision may guard 'values' that are not shared by the majority of contemporary societies. And the provision may lead to punishment for advocating ideas which are contrary to religious doctrines. The third problem is limitations of free expression. The law criminalizes not real activities, but ideas 'without requiring proof that a prohibited outcome was intended or likely as a consequence of that expression.'[107] The law potentially creates an atmosphere where any critics would be impermissible as violating someone's religious feelings. Under the Eur. Ct. H.R. standards[108] it can lead to a chilling effect on the media and civil society.

The last concern here is para. 2 of Art. 148. The provision is based on a real case which needs to be discussed in more detail. The most striking example of relationships between freedom of expression and freedom of religion of the last years is the 'Pussy Riot' case.

Pussy Riot is a Russian feminist punk band which was created as a response to the current political situation in Russia and which was very critical towards the Government, the Prime-Minister and at the time of events described below a candidate for the presidency Mr. Putin, and the Russian Orthodox Church. In late 2011 – beginning 2012 the band carried out several performances in various public areas in Moscow such as the Red Square, a subway station, roof of a tram, *etc.* For their actions members of the Pussy Riot were arrested and fined under provisions

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104 Legal Analysis. Russia: Draft Amendment to the Criminal Code Aimed at Countering Insult of Religious Beliefs, Article 19 (May 8, 2013) [hereinafter Article 19 Report], <http://www.article19.org/resources.php/resource/3729/en/russia:-draft-amendment-to-the-criminal-code-aimed-at-countering-insult-of-religious-beliefs#sthash.kiR1Ryyi.dpuf> (accessed June 17, 2014).

105 *See* General Comment No. 34, CCPR/C/GC/34, *supra* n. 43.

106 *See* Parliamentary Assembly of the Council of Europe, *Towards Decriminalisation of Defamation*, Resolution 1577 (2007), at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/eres1577.htm> (accessed June 17, 2013).

107 Article 19 Report, *supra* n. 104, at 15.

108 *See* sect. 1.3 above.

of the Code of Administrative Offences. As a reaction to the strengthening of ties between the Government and the Orthodox Church, in particular when Patriarch Kirill supported Mr. Putin, the band recorded a song 'Punk Prayer – Virgin Mary, Drive Putin Away.' The first performance of the song took place in Epiphany Cathedral in Moscow on 18 February 2012. It is important that no complaint to the police was made in relation to that performance.

Three days later, on 21 February 2012 five members of the Pussy Riot attempted to perform the 'Punk Prayer' from the altar of the Christ the Saviour Cathedral in Moscow. The media was invited to make the action public. However the attempt to perform was unsuccessful because the Cathedral security forced the band out and stopped the performance, which lasted only about one minute. According to the facts submitted to the ECtHR 'on 21 February 2012 a deputy director general of the private security company Kolokol-A, Mr. O., complained to the head of the Khamovnikiy district police department in Moscow of "a violation of the public order" by a group of unknown individuals in Christ the Saviour Cathedral.' On 24 February criminal proceedings were instituted. Cathedral stuff members stated that their religious feelings were offended by the performance. On 14 March 2012 the detention orders in respect of three members of the band became final and since then the girls were imprisoned until two were released in the end of 2013 (Ms. Samutsevich was released earlier).

On 17 August 2012 the girls were found guilty and sentenced to two years' imprisonment. It was held that that 'the applicants' choice of venue and their apparent disregard for the Cathedral's behavioural rules had demonstrated their animosity towards the feelings of Orthodox believers, and that the religious feelings of those present in the cathedral had therefore been offended. While also taking into account the video recording of the song 'Punk Prayer – Virgin Mary, Drive Putin Away,' the District Court rejected the applicants' arguments that their performance had been politically, not religiously motivated, stating that the applicants had not made any political statements during their performance on 21 February 2012. Later in 2012 the videos of band's performances posted on their webpage on *YouTube* were found extremist by the court.[109]

[109] The information is given according to the facts from the communicated case by the Eur. Ct. H.R.: *Mariya Vladimirovna Alekhina and Others v. Russia*, no. 38004/12 (Eur. Ct. H.R. lodged on 19 June 2012). *See also* Human Rights' Foundation, *Russia's Violation of the Right to Freedom of Expression: The Case of the Punk Rock Band Pussy Riot*, Legal Report (Aug. 16, 2012), <http://humanrightsfoundation.org/uploads/Pussy-Riot-Case-Report-08-16-2012.pdf> (accessed June 17, 2014); summary of the process in English: Geraldine Fagan, *Russia: Pussy Riot, blasphemy, and freedom of religion or belief*, Forum 18 News Service (Oct. 15, 2012), <http://www.unhcr.org/refworld/docid/5087d9b42.html> (accessed June 17, 2014); Freedom under Threat: Clampdown on Freedoms of Expression, Assembly and Association in Russia 42 (Amnesty International 2013), available at <http://www.amnesty.org/en/library/asset/EUR46/011/2013/en/d9fb0335-c588-4ff9-b719-5ee1e75e8ff5/eur460112013en.pdf> (accessed June 17, 2014).

The process illustrates the approach of the Russian judiciary toward balancing fundamental rights. In the case, the Russian courts found that the action was motivated by religious intolerance, which offended religious feelings of Orthodox believers. The Court analysed only the objective element of the *corpus delicti,* whereas the subjective element was totally ignored. The Court failed to establish the aim of the performance. As NGOs[110] correctly observed, the act of expression was politically motivated. It was totally within the scope of protection under Art. 10 of the ECHR and Art. 19 of the ICCPR. The issue raised by the performance had a great social value and contributed to a political debate – the situation when limitation of such an expression would be disproportional interference by the authorities.[111]

Here we move back to the para. 2 of Art. 148 which was introduced by the legislature as a response to actions of the punk-band. Thus, in addition to concerns which were indicated above, I have to admit the casuistic nature of the provision, its specification toward a particular class of actions, and, consequently, disproportionality.

The 'Pussy riot' case is just one of the examples of the situation with freedom of expression in the Russian Federation. However, in terms of this paper it is more interesting that limitations of freedom of expression were inspired by religious motives. It is a question of time which development this approach will take. But it is quite obvious that a number of applications to the European Court will increase.

3.2. Russian Cases before the Eur. Ct. H.R.

There are few cases in the Eur. Ct. H.R. against Russia concerning mutual limitations of freedom of expression and freedom of religion, though there are a number of cases where both rights were discussed in the context of Russia. Primarily these cases concern issues of national security or proselytism. In the end of 2013 the case of *Mariya Vladimirovna Alekhina and Others v. Russia* was communicated by the Strasburg Court – this case is going to be the first case against the Russian Federation where mutual limitations of freedom of expression and freedom of religion will be considered. However we still can consider certain standards and approaches which the Eur. Ct. H.R. applies toward cases originating from Russia in the field mentioned.

The European Convention does not contain such a limitation as national security as a ground for restrictions of freedom of religion or freedom to manifest religion.[112] Thus, the reliance of Russian authorities on this ground is not valid. This was found

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[110] *See* Fagan, *supra* n. 109; *Russia: Prison sentences for Pussy Riot violate freedom of expression*, Article 19 (Aug. 21, 2012), <http://www.article19.org/resources.php/resource/3418/en/russia:-prison-sentences-for-pussy-riot-violate-freedom-of-expression> (accessed June 17, 2014).

[111] *See* sect. 1.3 above.

[112] ECHR, Art. 9.

by the Eur. Ct. H.R. in its case *Nolan and K. v. Russia*.[113] The applicant was a US citizen who came to Russia as a missionary of the Unification church in 1994. In 2002 after travelling to Cyprus the applicant was refused entry to the territory of Russia. The decision of Russian authorities was motivated by reasons of national security since in the 'Concept of the National Security' there was a provision which stated that 'the national security of the Russian Federation includes also the protection of its spiritual and moral heritage.'[114] Mr. Nolan applied to the Eur. Ct. H.R. claiming *inter alia* that his right to express his religious beliefs was violated by the Russian authorities.

The Court found that the Government failed to provide sufficient grounds that the activities of the applicant constituted a risk to national security.[115] Next, the Court reiterated that applicable limitations 'must be narrowly interpreted' and 'their enumeration is strictly exhaustive.'[116] And Art. 9 does not contain such a ground for limitation as national security. Hence there was a violation of the applicant's right to manifest his religion.[117]

The case is significant in the context of Russia, where national security often serves as a ground for justification of human rights limitations. The Eur. Ct. H.R. approach is based on international norms is another guarantee for individuals.

From the time of *Wingrove* and *Otto-Preminger* more than 15 years have passed, but the Strasburg Court still follows this line of cases. However, one can detect signs of positive changes. For example, in the case *I.A. v. Turkey*[118] which did not overrule previous practice of the Court but showed a discussion among the Eur. Ct. H.R. judges: dissenters claimed that now it is time to overrule *Wingrove*.[119]

I would like to discuss the case of *Jehovah Witnesses v. Russia*.[120] The Association of Jehovah Witnesses has a long history in Russia, but officially registered for the first time only in 1992. Later, beginning from 1995 the organisation started facing difficulties with re-registration in Moscow. The decision of the authorities was based on the grounds that proselytism of the members of the association violates the rights and interests of others: '[it] was necessary to prevent [the association] from breaching the rights of others, inflicting harm on its members, damaging their health and impinging on the well-being of children.'[121]

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113 *Nolan v. Russia*, no. 2512/04 (Eur. Ct. H.R., Feb. 12, 2009).

114 Durham, *supra* n. 24, at 238.

115 *Nolan v. Russia*, *supra* n. 113, at ¶¶ 69–72.

116 *Id*. at ¶ 73.

117 *Id*.

118 *I.A. v. Turkey*, no. 42571/98 (Eur. Ct. H.R., Dec. 13, 2005).

119 *Id*.

120 *Jehovah Witnesses v. Russia*, no. 302/02 (Eur. Ct. H.R., Nov. 21, 2010).

121 *Id*. at ¶ 206.

In 2010 the Eur. Ct. H.R. found that rights of the applicant community were violated by the authorities' actions and ordered compensation. Whereas the Strasburg Court reiterated that in principle the limitation of the freedom to manifest religion on the ground of protection of the rights of others is permissible, in the current case these limitations were disproportionate. The Court was not convinced by the arguments of Russian government that members of the community interfere in the family affaires of its members, that they violate constitutional rights to privacy and free choice of occupation.[122] Next, the Eur. Ct. H.R. paid attention to the proselytism argument. It found that the inference of the Russian court, that the methods of the community were violent, was a 'conjecture.'[123]

The last significant case in the field is the case of *Kasymahunov and Saybatalov v. Russia*.[124] In 2003 the Supreme Court of the Russian Federation banned Hizb ut-Tahrir al-Islami (The Party of Islamic Liberation) as it was recognised to be a terrorist organisation. The organisation's activities were prohibited within the territory of Russia. In 2004 the applicants, who were members of the organisation, were arrested. They were accused of being members of the Hizb ut-Tahrir al-Islami and were charged with aiding and abetting terrorism. The applicants *inter alia* complained that their conviction for the membership of Hizb ut-Tahrir al-Islami had violated their freedom of religion, expression and association.[125]

In this case the Strasburg Court found a violation of Art. 7 which I will not discuss here. However there was no violation either of Art. 9 or of Art. 10 of the ECHR. The Court said that it was not disputed by the applicants that they were engaged in distributing of leaflets and recruiting of new members to their organisation. But the 'organisation cannot benefit from the protection of Arts. 9, 10 and 11 of the Convention because of its anti-Semitic and pro-violence statements, in particular statements calling for the violent destruction of Israel and for the banishment and killing of its inhabitants and repeated statements justifying suicide attacks in which civilians are killed. The Court has held that Hizb ut-Tahrir's aims are clearly contrary to the values of the Convention, notably the commitment to the peaceful settlement of international conflicts and to the sanctity of human life.'[126] The Eur. Ct. H.R. established that the organisation's goals were not peaceful and were not aimed solely at promotion of certain beliefs and expression of certain religious ideas, but 'Hizb ut-Tahrir's literature advocated and glorified warfare in the form of jihad, a term which was mainly used in its meaning of "holy war," to establish the domination of

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122 *Jehovah Witnesses v. Russia*, *supra* n. 120, at ¶¶ 109–27.

123 *Id*. at ¶ 130.

124 *Kasymahunov v. Russia*, no. 26261/05 and 26377/06 (Eur. Ct. H.R., Mar.14, 2013).

125 *Id*.

126 *Id*. at ¶ 106.

Islam. Some of the documents in question also stated that it was permissible to kill any citizen of enemy States, among which [was] named Russia.'[127]

The Strasburg Court noted that the Government had the right to ban the organisation because 'the activities of Hizb ut-Tahrir are not limited to promoting religious worship and observance in private life of the requirements of Islam. They extend outside the sphere of individual conscience and concern the organisation and functioning of society as a whole. Hizb ut-Tahrir clearly seeks to impose on everyone its religious symbols and conception of a society founded on religious precepts.'[128] Thus the applicants were seeking to use freedom of expression and freedom of religion in a way which was contrary to the European Convention and the applicants' complaints were incompatible with the conventional provisions.

The European Court in *Kasymahunov and Saybatalov* clearly established that limitations of both freedom of expression and freedom of religion, are permissible when the aim of the expression and manifestation in question leave the sphere of internal beliefs and pursue goals which are contrary to values of the Convention. Thus the borderline between internal aspect of freedom of expression and freedom of religion, which could not be a subject of restraint, and external aspect, limitations of which in some narrow circumstances is permissible, was established. This can be considered as a standard for the future similar cases in and against Russia and, of course, the case of Pussy Riot which will be decided by the Eur. Ct. H.R. in a couple of years.

4. Conclusion

This paper has considered the problem of mutual relationships and possible limitations between freedom of expression and freedom of religion. While under international law limitations towards freedom of religion *per se* are impermissible, international instruments allow restrictions of the right to manifest religious beliefs. The right to manifest religious beliefs is a right which lies on the border between freedom of religion and freedom of expression, which is why it raises legal problems concerning the treatment of this right. In this paper I attempted to consider the right to manifest one's religion as a part of freedom of expression with all the standards applicable to protection of freedom of expression. The application of the same standards will protect rights of religious groups which express their position, for example, through wearing religious garments.

In Russia freedom to manifest religious beliefs faces certain problems and is not always treated properly. There are many domestic cases and cases of the Eur. Ct. H.R. where priority was given to the secular nature of states instead of protection of the freedom of religious expression. This was done due to the very

[127] *Kasymahunov v. Russia, supra* n. 124, at ¶ 107.

[128] *Id.* at ¶ 112.

wide margin of appreciation which states possess as concerns treatment of these rights. In international law and in the practice of the Strasburg Court limitations are permissible on the ground of protection of the rights and interests of others, public order, health and morals, and public safety. At the same time limitations of the religious manifestation are impermissible on the ground of national security.

The second main problem is the defamation of religions. In Russia such a crime as defamation of religions officially does not exist, however there are domestic cases and even a new trend in legislative policy which introduces such an offence *de facto*. This practice is inspired *inter alia* by the case law of the Eur. Ct. H.R., which in a number of its decisions recognised the right of states to proscribe certain speech, including artistic speech, which is able to offend religious feelings. The problem is getting more serious with the Renaissance of religions occurring all over the world. This makes it more difficult to apply the balancing test towards fundamental rights in question.

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COMMENTS

ARE NON-TRADE VALUES ADEQUATELY PROTECTED UNDER GATT ART. XX?

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The role of WTO in balancing of fair and transparent terms of trade with non-trade values has been widely discussed by politicians, academics, human rights organizations and environmental groups. Indeed, only one of more than twenty lawsuits justifying the application of measures under Art. XX has ended in a victory.

The essay examines to what extent social values can be protected under law of WTO. For these purposes the main characteristics of GATT 1994, such as limitations and conditions for exceptions, a proper balance of provisions of Art. XX and their independence from other exceptions in GATT 1994 are considered as well scope of its application for such non-trade values as public morals; human, animal or plant life or health; exhaustible natural resources and national legislation. The most indicative cases of the WTO dispute settlement system are analysed to extract the practical value of exceptions under Art. XX.

Emphasis on human rights and compliance with the rules of international environmental law is determined by their particular importance for developing states which are not sufficiently influential in the global economy.

The author argues that, despite very limited list of exceptions, provisions of Art. XX GATT 1994 are consistent with the goals of the WTO and allow to provide the effective protection for common human and social values.

Key words: WTO; non-trade values; Art. XX of the GATT 1994; exceptions of Art. XX of the GATT 1994; two-tier test.

1. Introduction

Non-trade values are mentioned in six paragraphs of Art. XX GATT 1994 which relate to public morals; human, animal or plant life or health; compliance with laws

or regulations which are not inconsistent with the provisions of GATT 1994; the products of prison labour; national treasures of artistic, historic or archaeological value and exhaustible natural resources.

Thus, on the one hand Art. XX provides protection for some social values, and on the other hand, the list of values it protects is strictly limited. Moreover, only one (*US – Shrimp* (Art. 21.5 Malaysia)) of twenty attempts by WTO Members have been successful in justifying otherwise GATT-inconsistent measures under Art. XX of the GATT 1994.[1] This is why some international and non-governmental organizations questioned the effectiveness of the protection of social values by this article. Others argue that the WTO 'should expand its jurisdiction to deal with non-trade matters such as the environment in more formal ways.'[2]

This essay justifies the adequacy of Art. XX of the GATT 1994 to its purposes by examination of, firstly, the key features of this Article and its relation with other provisions of the GATT; secondly, their reflection in practice including decisions of WTO bodies, and, finally provides modes of application of Art. XX of the GATT 1994 for the protection of such main values as environment, human rights and public morality. This essay is focused on the exceptions to the WTO regulations that are usually considered as the most indicative cases of the WTO dispute settlement system.

2. Characteristics of Art. XX of the GATT 1994 and Scope of Its Applicatoin

2.1. Characteristics of Art. XX Of The GATT XX

To understand the specificity of Art. XX of GATT 1994 three statements should be taken into consideration.

2.1.1. Exceptions are Limited and Conditional

Article XX of the GATT is applicable only for limited and conditional exceptions from obligations under other GATT provisions.[3] As the panel set in ¶ 5.9 of *US – Section 337 Tariff Act* (1989) Art. XX is

> entitled 'General Exceptions' and that the central phrase in the introductory clause reads: 'nothing in this Agreement shall be construed to prevent the adoption or enforcement . . . of measures . . .' Article XX(d) thus provides for a limited and conditional exception from obligations under other provisions.

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1 Peter van den Bossche & Werner Zdouc, The Law and Policy of the World Trade Organization 553 (3rd ed., Cambridge University Press 2013).

2 Elizabeth Trujillo, *A Dialogical Approach to Trade and Environment*, 16(3) J. Int'l Econ. L. 535, 538 (2013).

3 Bossche & Zdouc, *supra* n. 1, at 546.

> The Panel therefore concluded that Article XX(d) applies only to measures inconsistent with another provision of the General Agreement, and that, consequently, the application of Section 337 has to be examined first in the light of Article III:4. If any inconsistencies with Article III:4 were found, the Panel would then examine whether they could be justified under Article XX (d).[4]

That means, that non-trade values are under protection of this Article only when:

1) exceptions comply the exhaustive list of Art. XX; and

2) measures are not inconsistent with other GATT provisions.

Thus Members of WTO may invoke this Article for justifying policies protecting non-trade values only when both conditions are fulfilled.

2.1.2. Article XX is a Balancing Provision

Despite some experts' doubts[5] Art. XX strikes a balance between the need to protect such universal human values as public morality, human rights, *etc.* and GATT goals to reduce trade barriers. For example, a statement in the Appellate Body report in *US – Gasoline (1996)* states that 'the phrase "relating to the conservation of exhaustible natural resources" may not be read so expansively as seriously to subvert the purpose and object of Article III:4.'[6] This does not require a narrow interpretation of Art. XX because

> [t]he relationship between the affirmative commitments set out in, *e.g.*, Articles I, III and XI, and the policies and interests embodied in the 'General Exceptions' listed in Article XX, can be given meaning within the framework of the General Agreement and its object and purpose by a treaty interpreter only on a case-to-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose.[7]

2.1.3. Independence of Art. XX from Other Similar Provisions

It would be a mistake to apply findings of inconsistency with other articles of the GATT 1994 for justifying measures by exceptions from Art. XX. For example, in *Thailand – Cigarettes (Philippines)* (2011) the Appellate Body noted:

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4 Panel Report, *US – Section 337 Tariff Act* (1989).

5 Donald H. Regan, *The Meaning of 'Necessary,'* in *GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing,* 6(3) World Trade Rev. 347 (2007).

6 Appelate Body Report, *US – Gasoline* 18 (1996).

7 *Id.* at 18.

> We have difficulties understanding why the Panel's disposition of the Philippines' claim under Article III:4 should depend on the Panel's disposition of Thailand's defense under Article XX(d). It is true that, in examining a specific measure, a panel may be called upon to analyze a substantive obligation and an affirmative defense, and to apply both to that measure. It is also true that such an exercise will require a panel to find and apply a 'line of equilibrium' between a substantive obligation and an exception. Yet this does not render that panel's analyses of the obligation and the exception a single and integrated one. On the contrary, an analysis of whether a measure infringes an obligation necessarily precedes, and is distinct from, the 'further and separate' assessment of whether such measure is otherwise justified.[8]

2.2. Scope of Application

2.2.1. Article XX and WTO Agreements Other Than GATT 1994

While there is no doubt that Art. XX justifies any inconsistency with obligations under GATT 1994, it is still not clear whether this Article is available to justify measures inconsistent with other WTO agreements. Initially the panel stated that these measures are not the subject of Art. XX: 'the Panel did not determine whether Article XX(a) is available as a direct defense for breaches of China's trading rights commitments as set out in the Accession Protocol;'[9] but later the Appellate body noted that, as

> the reference to China's power to regulate trade 'in a manner consistent with the WTO Agreement' seems to us to encompass both China's power to take regulatory action provided that its measures satisfy prescribed WTO disciplines and meet specified conditions (for example, an SPS measure that conforms to the SPS Agreement) and China's power to take regulatory action that derogates from WTO obligations that would otherwise constrain China's exercise of such power . . .[10]

<. . .>

> we consider that the provisions that China seeks to justify have a clearly discernable, objective link to China's regulation of trade in the relevant products. In the light of this relationship between provisions of China's measures that are inconsistent with China's trading rights commitments, and

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[8] Appellate Body Report, *Thailand – Cigarettes (Philippines)* ¶ 174 (2011).

[9] Panel Report, *China – Publications and Audiovisual Products* ¶ 8.2(a)(ii) (2010).

[10] Appellate Body Report, *China – Publications and Audiovisual Products* ¶ 228 (2010).

> China's regulation of trade in the relevant products, we find that China may rely upon the introductory clause of paragraph 5.1 of its Accession Protocol and seek to justify these provisions as necessary to protect public morals in China, within the meaning of Article XX(a) of the GATT 1994. Successful justification of these provisions however, requires China to demonstrate that it complies with the requirements of Article XX of the GATT 1994 and, therefore, constitutes the exercise of its right to regulate trade in a manner consistent with the WTO Agreement.[11]

However later in *China – Raw Materials* (2012) the Appellate Body agreed with the panel that in this particular case Art. XX is not applied to justify inconsistency with other agreements.[12]

2.2.2. Measures for Justification under Art. XX

Two requirements of the measures in question are set by GATT and the case law: firstly, it should not 'undermine the WTO multilateral trading system.'[13] Article XX may be employed to justify measures prescribed by the importing country which exporting countries have to comply with or adopt.[14] Secondly, a measure in question must pass two-tier test which the following:

1) the requirements of one of the exceptions from Art. XX of the GATT; and
2) requirements of the chapeau (introductory clause) of Art. XX.[15]

The importance of this test is described in *Brazil – Retreated Tyres* (2007) when the panel set that the manner by which the measure is implemented in practice is not examined but it should be 'relevant to later parts of the Panel's assessment, especially under the chapeau of Article XX, where the focus will be, by contrast, primarily on the manner in which the measure is applied.'[16] The main purpose of the chapeau of Art. XX is 'to avoid that provisionally justified measures are applied in such a way as would constitute a misuse or an abuse of the exceptions of Article XX.'[17]

2.2.3. Territorial Jurisdiction

Although the position of the Appellate Body has not been declared yet, the panel in *EC – Tariff Preferences* (2004) said:

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[11] *China – Publications and Audiovisual Products, supra* n. 10, at ¶ 233.

[12] *Id.* at ¶ 307.

[13] Appellate Body Report, *US – Shrimp* ¶ 121 (1998).

[14] Bossche & Zdouc, *supra* n. 1, at 551.

[15] *Id*. at 552.

[16] Panel Report, *Brazil – Retreated Tyres* ¶ 7.107 (2007).

[17] Bossche & Zdouc, *supra* n. 1, at 573.

> the policy reflected in the Drug Arrangements is not one designed for the purpose of protecting human life or health in the European Communities and, therefore, the Drug Arrangements are not a measure for the purpose of protecting human life or health under Article XX (b) of GATT 1994.[18]

Nevertheless there is no jurisdictional limitation for measures under Art. XX.

Thus, despite the specific nature of Art. XX, due to which this Article should be interpreted carefully in every case, Art. XX provides extensive protection for non-trade values regarding not only GATT but also other WTO agreements, by various internal state measures aimed for national and global use.

3. Specific Exceptions of Art. XX and Their Practical Value

3.1. Protection of Public Morals

This exception was referred to in *US – Tuna (Mexico)* (1991) and *US – Malt Beverages* (1992) but until *China – Publications and Audiovisual Products* (2010) the panel did not 'examine the relevance of this provision.'[19] In *China – Publications and Audiovisual Products* (2010) China invoked Art. XX(a) to justify a content-review mechanism and a system for the selection of companies which were authorised to import publication and audiovisual products. The panel adopted the term 'public morals' from *US – Gambling* (2005) as (1) 'standards of right and wrong conduct maintained by or on behalf of a community or nation;'[20] (2) 'the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values'[21] and (3) Members 'should be given some scope to define and apply for themselves the concepts of "public morals" . . . in their respective territories, according to their own systems and scales of values.'[22] However measures in issue did not pass two-tier tests as necessary, particularly, the panel concluded that 'China has not demonstrated the "necessity" of the approval criteria at issue'[23] because at least one less trade-restrictive measure was available.[24]

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18 Panel Report, *EC – Tariff Preferences* ¶ 7.210 (2004).

19 Bossche & Zdouc, *supra* n. 1, at 569.

20 Panel Report, *US – Gambling* ¶ 6.465 (2005); Appellate Body Report, *US – Gambling* ¶ 299 (2005).

21 Panel Report, *US – Gambling* ¶ 6.461 (2005).

22 *Id.* at ¶ 6.461.

23 Panel Report, *China – Publications and Audiovisual Products* ¶ 7.909 (2010).

24 *Id.* at ¶ 7.909.

It should be noted that members of WTO use Art. XX(a) to justify import bans or other restrictions such as import of horror comics and some types of maps in Bangladesh [25] or alcoholic beverages in Saudi Arabia.[26]

Thus, Art. XX of the GATT protects moral values in the frames described in this paragraph only.

3.2. Protection of Human, Animal or Plant Life or Health

Article XX(b) covers measures 'necessary to protect human, animal or plant life or health.' The first step of the two-tier test does not usually cause difficulties for interpretation: panels and the Appellate Body accepted various measures as appropriate to protect values described in Art. XX(b): measures to reduce the smoking of cigarettes,[27] air pollution,[28] health risks.[29] However these measure must be imposed as a part of comprehensive policy and may not be used as an excuse for discrimination post factum as noted the panel in *China – Raw Materials* (2012): 'invocation of environmental and health concerns is merely a post hoc rationalization developed solely for purposes of this dispute.'[30]

Not all environmental measures can be justified by Art. XX(b): they should be established to protect specific risks, not environment as a whole as the panel highlighted in *Brazil – Retreaded Tyres* (2007).[31]

Also the 'necessity' requirement is more complex in this case. To comply to Art. XX(b) the following must be considered:

1) 'the weighing and balancing'[32] have always to be taken into consideration. The Appellate Body interprets the necessity as in *Brazil – Retreaded Tyres* (2007) with referencing to *US – Gambling* (2005):[33]

> in order to determine whether a measure is 'necessary' within the meaning of Article XX(b) of the GATT 1994, a panel must consider the relevant factors,

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[25] Report by Secretariat, *Trade Policy Review: Bangladesh*, WT/TPR/S/270, 10 September 2012, Appendix, Table AIII.1, at <http://www.wto.org/english/tratop_e/tpr_e/tp370_e.htm> (accessed June 17, 2014).

[26] Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization, 1 November 2005, Annex F, List of Banned Imports, at <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%20@Symbol=%20wt/acc/sau/*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#> (accessed June 17, 2014).

[27] *Thailand – Cigarettes (Philippines)*, *supra* n. 8.

[28] *US – Gasoline*, *supra* n. 6.

[29] Panel Report, *Brasil – Retreaded Tyres* (2007).

[30] Panel Reports, *China – Raw Materials* ¶ 7.499 (2012).

[31] *Brazil – Retreaded Tyres*, *supra* n. 29.

[32] *Id*. at ¶ 182.

[33] Appelate Body Report, *US – Gambling* ¶ 307 (2005).

particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective. This comparison should be carried out in the light of the importance of the interests or values at stake. It is through this process that a panel determines whether a measure is necessary;[34]

2) the more important the protection value and the more the contribution to its protection, the more easily the measure is considered as necessary.[35] The Appellate Body highlighted in *EC – Asbestos* (2001): 'In this case, the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibers. The value pursued is both vital and important in the highest degree'[36] but intensification of restrictions of measures inevitably entails complication of justification of necessity;[37]

3) not only reasonably available measures but also difficulties of their implementation are to be considered. In *EC – Asbestos* the Appellate Body set that

France could not reasonably be expected to employ any alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to 'halt.' Such an alternative measure would, in effect, prevent France from achieving its chosen level of health protection.[38]

This position is also confirmed in *Brasil – Retreaded Tyres* (2007):

[a]n alternative measure may be found not to be 'reasonably available' . . . where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties;[39]

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34 *Brasil – Retreaded Tyres*, *supra* n. 29, at ¶ 178.

35 Bossche & Zdouc, *supra* n. 1, at 557.

36 Appellate Body Report, *EC – Asbestos* ¶ 172 (2001).

37 Bossche & Zdouc, *supra* n. 1, at 557.

38 *EC – Asbestos*, *supra* n. 36, at ¶ 174.

39 *Id.* at ¶ 156.

4) WTO members independently define the level of protection for values under Art. XX(b) as noted in the panel report in *US – Gasoline* (1996):

> it was not the necessity of the policy goal that was to be examined, but whether or not it was necessary that imported gasoline be effectively prevented from benefitting from as favourable sales conditions as were afforded by an individual baseline tied to the producer of a product;[40]

5) policies should not merely follow a majority of scientific opinion.[41] There should be a link between the objective of protecting policy and measures in question.

For example, the panel in *China – Raw Materials* (2012) found that the necessity of export restriction is not demonstrated; examined objectives of the export restrictions and whether these restrictions made a material contribution to the achievement of the policy and the impact of restrictions on trade and the possibility of using less-restrictive measures.[42]

3.3. Protection of Exhaustible Natural Resources

Article XX(g) relates to exhaustible natural resources and suggests a three-tier test. First, the measure must relate to the 'conservation of exhaustible natural resources:' 'exhaustible' natural resources and 'renewable' natural resources are [not] mutually exclusive.

> One lesson that modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense, 'renewable,' are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities. Living resources are just as 'finite' as petroleum, iron ore and other non-living resources.[43]

So the definition of exhaustible resources is sufficient. Second, the measure must be reasonably related to conservation of an exhaustible natural resource and not disproportionally [wide] broad:

> The term 'relat[e] to' is defined as 'hav[ing] some connection with, be[ing] connected to.' The Appellate Body has found that, for a measure to relate to conservation in the sense of Article XX(g), there must be 'a close and genuine

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[40] Panel Report, *US – Gasoline* ¶ 6.22 (1996).

[41] *EC – Asbestos*, *supra* n. 36, at ¶ 178.

[42] Bossche & Zdouc, *supra* n. 1, at 560.

[43] *US – Shrimp*, *supra* n. 13, at ¶ 128.

> relationship of ends and means.' The word 'conservation,' in turn, means 'the preservation of the environment, especially of natural resources.'[44]

The third criterion is even-handedness (but not identity) in the impositions of restrictions on imported and domestic products: the Appellate Body founded that 'there is, of course, no textual basis for requiring identical treatment of domestic and imported products.'[45]

All these steps are illustrated in the panel report in *China – Raw Material* (2012) declared that Chinese measures did not meet any of the elements of three-tier test.[46]

To sum up, Art. XX(b) and (d) protect human, animal or plant life and health as well as exhaustible natural resources if measures complies all requirements.

3.4. Protection of National Legislation

Article XX(d) justifies measures necessary to secure compliance with laws or regulations which are not inconsistent with the GATT, including provisions of customary law, competition law and intellectual property law. The test of a measure is more specific for Art. XX(d). Firstly, a measure must be designed to secure compliance with national law.[47] In *US – Gasoline* the panel noted that measures in question 'were not an enforcement mechanism. They were simply rules for determining the individual baselines. As such, they were not the type of measures with which Article XX(d) was concerned.'[48] However 'the measure cannot be guaranteed to achieve its result with absolute certainty.'[49] Secondly, the legislation must be domestic:

> the terms 'laws or regulations' refer to rules that form part of the domestic legal system of a WTO Member. Thus, the 'laws or regulations' with which the Member invoking Article XX(d) may seek to secure compliance do not include obligations of another WTO Member under an international agreement.[50]

Thirdly, the legislation 'referred to Article XX(d) have to be GATT-consistent.'[51] Thus, actually the test becomes three-tier like in *Canada – Wheat Exports and Grain*

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[44] Appelate Body Report, *China – Raw Materials* ¶ 355 (2012).

[45] *US – Gasoline*, *supra* n. 6, at 21.

[46] *China – Raw Material*, *supra* n. 30, at ¶ 7.467.

[47] Bossche & Zdouc, *supra* n. 1, at 561.

[48] *US – Gasoline*, *supra* n. 40, at ¶ 6.33.

[49] Appelate Body Report, *Mexico – Tax Measures on Soft Drinks and Other* Beverages ¶ 74 (2006).

[50] *Id*. at ¶ 69.

[51] Bossche & Zdouc, *supra* n. 1, at 563.

Imports (2004).[52] Evaluation necessarily follows the general rules of weighing and balancing.[53]

3.5. Other Exceptions

It is not clear at present how efficient exceptions are under Art. XX(e) regarding products of prison labour and (f) regarding 'protection of national treasures of artistic, historic or archaeological value' because there is no case law referring to these paragraphs. Authors suggest two ways to implement Art. XX(e): as a cause for banning the importation of goods produced by prisoners[54] or as a start for developing this concept as a model preventing the use of products as a result of 'slave labour or conditions contrary to the most fundamental labour standards.'[55]

Article XX(f) concerns measures for the protection of national treasures of artistic, historic or archeological value and does not require necessity for the measures.

4. Current Issues regarding Protection of Non-Trade Values

4.1. Human Rights

Recently there were few discussions regarding the role of WTO and particularly GATT in protection of human rights. For example, the United Nations (UN), non-governmental organisations and many scholars argue for the linkage of human rights to international trade within the context of the WTO as an 'inevitable expansion of the WTO trade mandate.'[56] Furthermore, WTO is called 'to shift to a human rights-based approach to international trade'[57] because the human rights are the main priority of Governments and fundamental principle.[58]

However this approach is not acceptable for the following reasons. First, the purpose of WTO's establishment was not promotion of human rights but 'peaceful and predictable interstate economic relations free of political maneuvering.'[59] Thus focus on measures to protect human rights would distract from the main priority of WTO – reduction of barriers in trade between states because '[t]he WTO is not

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[52] Panel Report, *Canada – Wheat Exports and Grain Imports* ¶ 6.218 (2004).

[53] *Id.* at ¶ 6.226; Appelate Body Report, *Korea – Various Measures on Beef* ¶ 164 (2001).

[54] Bossche & Zdouc, s*upra* n. 1, at 571.

[55] *Id.*

[56] Padideh Ala'i, *A Human Rights Critique of the WTO: Some Preliminary, Observations*, 33 Geo. Wash. Int'l L. Rev. 537 (2001) (cited in Tatjana Eres, *The Limits of GATT Article XX: A Back Door for Human Rights?*, 35(3) Geo. J. Int'l L. 597 (2004)).

[57] Eres, *supra* n. 56, at 597.

[58] *Id.*

[59] *Id.*

an appropriate forum for debating, implementing, or interpreting human rights law. It is an efficient and effective international organization mandated to regulate international trade.'[60] Indeed, neither the historical reason GATT nor current case law give legal ground for changes of the list of exceptions under Art. XX of the GATT.

The second objection against strengthening the exiting regulation of exceptions is a flexibility of Art. XX of the GATT: there are enough opportunities for indirect protection of human rights through provisions of Art. XX(a), (b) and (d).

Thus, Art. XX of the GATT is sufficient to protect human rights using Members' measures necessary to protect moral values, compliance with domestic law or human life and health.

4.2. Carbon Border Measures

Another debate concerns carbon border measures because climate change resulting from greenhouse gas emissions and other global ecological issues which cannot be solved locally.[61] Despite some doubts Art. XX of the GATT provides the framework for justification of measures in question as necessary for the protection of human, animal or plant life or health (Art. XX(b)) because in the *Brazil – Retreaded Tyres* the Appellate Body recognized that a trade-restrictive measure, the contribution of which is not immediately observable, could nevertheless be justified under Art. XX(b).[62] As to other situations, the measure must comply with the regular two-tier test. Thus Art. XX of the GATT protects main ecological values without resorting to 'green extremism.'

5. Conclusion

To conclude, Art. XX of the GATT contains exceptions intended for protection of non-trade values such as human life and health, public morals, environment, and respect for the local law. Critics point to the lack of protection of these values by the WTO, primarily because of the very limited list of exceptions.

However, firstly, the design of Art. XX justifies a broad range of exception social values protection:

1) very general definitions of values (for example, a list of measures necessary to protect human, animal or plant life and health is actually unlimited) which can cover all current needs of the world community including human rights or extra measures against climate change;

2) members of WTO have the right to establish their domestic legislation to solve local social issues and this right is under protection of Art. XX GATT 1994.

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60 Eres, *supra* n. 57, at 602.

61 Ludivine Tamiotti, *The Legal Interface between Carbon Border Measures and Trade Rule*, 11(5) Climate Policy 1202–11 (2011), available at <http://dx.doi.org/10.1080/14693062.2011.592672> (accessed June 17, 2014).

62 *Id.*

Secondly, the basic idea of the establishing of the WTO is the development of free trade and the removal of barriers and unjustifiable discrimination in this particular area. The full protection of non-trade values, such as human rights or environment, constitutes the primary duty of state governments and the mandate of various international and non-governmental organisations.

And, finally, protecting measures can be justified as exceptional if they meet the clear requirements of two-tier (sometimes three-tier) test and there are no less restrictive alternatives.

Consequently, Art. XX of the GATT 1994 provides adequate and sufficient protection for the main non-trade values in the framework of the tasks the World Trade Organization and the purpose of signing the GATT.

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BUSINESSMEN V. INVESTIGATORS: WHO IS RESPONSIBLE FOR THE POOR RUSSIAN INVESTMENT CLIMATE?

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This article aims to examine the extent to which Russian investigations into economic and financial crimes are influenced by such factors as systemic problems with Russian gatekeepers, the absence of a formal corporate whistle-blowing mechanism and the continuous abuse of the law by the Russian business community. The traditional critical approach to the quality and effectiveness of Russian economic and financial investigations does not produce positive results and needs to be reformulated by considering the opinions of entrepreneurs. The author considers that forcing Russian entrepreneurs, regardless of the size of their business, to comply with Russian laws and regulations may be a more efficient way to develop the business environment than attempting to gradually improve the Russian judicial system. It is also hardly possible to expect the Russian investigatory bodies to investigate what are effectively complex economic and financial crimes in the almost complete absence of a developed whistle-blowing culture. Such a culture has greatly contributed to the success of widely-publicised corporate and financial investigations in the United States and Europe. The poor development of the culture of Russian gatekeepers and the corresponding regulatory environment is one more significant factor that permanently undermines the effectiveness of economic investigations and damages the investment climate.

Key words: Russia; investigation; economic crime; gatekeepers; whistleblowing.

1. Introduction

The aim of this article is to analyse the ongoing conflict between Russian investigators and the Russian business community, and to make one more attempt at answering the long-standing question regarding how a satisfactory balance between the interests of effective investigation and the protection of the business community can be reached.

This research expressly avoids any attempts to discuss in depth the recent history of different high-level and widely politicised cases, beginning with the famous Most Bank[1] and Yukos affairs,[2] and on to the BTA Bank collapse[3] and the Bank of Moscow fraud investigation.[4] These and similar investigation failures are used conventionally by international researchers to draw public attention to the main problems in the Russian police and judiciary and to show that contemporary Russia is very far from being called a 'state under the rule of law.' However, it is assumed that 'political cases,' 'publicly important cases' and 'large-scale investigations'[5] represent a limited and distinct group of criminal investigations (a tiny fraction of all investigations conducted by the police, FSB, the Investigatory Committee, *etc.*), which may attract significant media attention and look quite shocking to the Western community but do not actually allow a properly grounded judgment to form on problems concerning the failures of the overall quality of Russian investigators.[6]

For the purpose of this article, the terms 'investigators' and 'investigations' denote all Russian investigatory bodies involved in investigating business and financial crimes in accordance with Russian criminal procedural law.[7] Any administrative or legal differences between the responsibilities of the Investigatory Committee of the Russian Federation's Department of Large-scale Investigations, and low-level regional investigators, will be ignored. This article focuses primarily on investigations into economic and financial crimes, which have much in common with the corresponding offences (*e.g.*, different types of fraud) in common law countries.[8] Nevertheless, the

[1] *See Gusinskiy v. Russia*, no. 70276/01 (Eur. Ct. H.R., May 19, 2004).

[2] *See* Dmitry Gololobov, *The Yukos War: The Five Year Anniversary* (Sept. 29, 2008), <http://ssrn.com/abstract=1275444> (accessed June 18, 2014).

[3] *See* Barry Donnelly & Zoë Fuller, *The Chronicles of the JSC BTA Bank Litigation*, In-House Lawyer (Dec. 3, 2012), <http://www.inhouselawyer.co.uk/index.php/litigation-a-dispute-resolution/10037-the-chronicles-of-the-jsc-bta-bank-litigation> (accessed June 18, 2014).

[4] The whole story is available at <http://rapsinews.com/trend/borodin_04052011/> (accessed June 18, 2014).

[5] These are cases without directly declared 'political motivations' for prosecution but which nevertheless attract significant publicity due to publicly important issues raised during the investigation or trial. One such example entails interest in road accidents involving 'monks [from the Russian Orthodox Church] in sports cars' as the public is eager to know whether the monks will be prosecuted like any other wrongdoers or avoid prosecution because of their connection with the Orthodox Church.

[6] *See Резник Г.* Наши суды не ведают сомнения [Reznik H. *Nashi sudy ne vedayut somneniya* [Henry Reznik, *Our Courts Have No Doubts*]], *Novaya Gazeta* (Dec. 14, 2013), <http://www.novayagazeta.ru/society/61467.html> (accessed June 18, 2014).

[7] All investigatory bodies, including the Ministry of Internal Affairs, FSB and Investigatory Committee. The status and rights of these bodies may be significantly different but they can be ignored for the purposes of this article. The bulk of economic and financial cases is conventionally investigated by the Ministry of Internal Affairs (MVD).

[8] See Fraud Act 2006, sects. 1–4.

conclusions of the research, with certain exceptions, are applicable to every other Russian investigation.

For the purpose of this research, it is also assumed that Russian investigations permanently experience problems with effectiveness, quality and fairness as portrayed conventionally by the international media.[9] This research aims neither to challenge this assumption nor to prove that it is significantly incorrect; instead, it focuses primarily on how the Russian business community contributes to the failures and deficiencies of investigations, and then it highlights what should be done by the business community to improve the situation.[10]

2. Russian Investigations: Internal Sins and External Obstacles

As mentioned previously, there are several common presumptions regarding the role of Russian investigators and their position in the contemporary Russian judicial system. It is not difficult to find these references in articles or commentaries concerning recent Russian investigations and sentences brought by the Russian courts[11] and, in fact, these presumptions have become almost de rigueur and widely accepted by the public and the media alike.[12] Moreover, any other investigation of significant public importance is usually viewed and assessed through the 'prism' of these presumptions.[13] In brief, these opinions can be grouped under three headings: problems with the quality of investigations at federal and regional levels; investigations and corruption; and, involvement of investigators in 'political investigations.' Each of these will be considered over the following pages.

In terms of the first group, public and professional complaints about the work of investigators are very common in Russia. Mostly, they concern high-profile cases

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9 See, regarding Russian investigations, Kirill Ershov, *Russian Federation's Law No. 87-FZ: Political Machination or Procedural Reform?*, 1 Pace Int'l L. Rev. 1 (2010); Jonathan D. Greenberg, *The Kremlin Eye: the 21st Century Prokuratura in the Russian Authoritarian Tradition*, 45 Stan. J. Int'l L. 1 (2009); Jason Bush, *No Justice for Business in Russia*, BusinessWeek (June 23, 2009), <http://www.businessweek.com/stories/2009-06-23/no-justice-for-business-in-russiabusinessweek-business-news-stock-market-and-financial-advice> (accessed June 18, 2014); Alexandra Orlova, *Russia's Anti-money Laundering Regime: Law Enforcement Tool or Instrument of Domestic Control?*, 11(3) Journal of Money Laundering Control 210 (2008).

10 *See Волков В.* Как работают суды общей юрисдикции в России (Volkov V. *Kak rabotayut sudy obshchei yurisdiktsii v Rossii* [Vadim Volkov, *How General Jurisdiction Courts Work in Russia*]], Polit.ru (Oct. 13, 2013), <http://www.polit.ru/article/2013/10/13/volkov/> (accessed June 18, 2014).

11 *See* Ethan Burger & Mary Holland, *Law as Politics: The Russian Procuracy and Its Investigative Committee*, 2 Colum. J. E. Eur. L. 143 (2008); Greenberg, *supra* n. 9.

12 *See* European Parliament Resolution of 13 September 2012 on the political use of justice in Russia (2012/2789(RSP)).

13 *See* Petr Antonov, *Russian Political Prisoners in the Russian Federation*, Occidental Observer (Aug. 6, 2013), <http://www.theoccidentalobserver.net/2013/08/russian-political-prisoners-in-the-russian-federation> (accessed June 18, 2014).

which represent just the 'tip of the iceberg.'[14] Complaints usually concern particular procedural omissions, professional negligence, qualifications of the investigators and the general low quality of investigation.[15] These factors render virtually impossible fair and objective trials with all the safeguards provided by Russian criminal procedural legislation and the European Convention of Human Rights [hereinafter ECHR], even if it could be assumed that Russian courts complied strictly with the best international standards and were absolutely independent.[16] Problems with the 'quality' of investigations are interrelated with the issue of the quality of Russian justice and cannot be assessed separately.

One of the most widely known cases from the group of high-profile litigations which significantly undermined public trust in the quality of investigations was the 'Second Yukos case,' where prosecutors had to prove that one of the biggest Russian private companies, with tens of thousands of employees, had been involved in a wholesale fraud and money laundering operation.[17] Ultimately, the investigators and prosecution failed to present to the court a properly argued case which explained how an outstanding feat of fraud had been committed and billions of dollars laundered under the watchful eye of different controlling bodies. Detailed analysis of the serious omissions made by investigators – and subsequently approved by the Russian courts – can be found in different European Court of Human Rights [hereinafter Eur. Ct. H.R.] judgments and reports published by various human rights bodies.[18] Public opinion simply believes that investigators are unable to investigate any complicated case and prefer either to fabricate evidence or to put pressure on judges, thereby forcing them to approve badly drafted and evidenced charges.[19] Ultimately, the entire criminal process appears to be a deeply rooted conspiracy involving investigators and judges and this totally undermines public trust in justice and sends negative messages to the international business community.[20]

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14 *See* Reznik, *supra* n. 6.

15 *See* Human Rights Bureau of Democracy, and Labor, U.S. Dept. of State, *Country Reports on Human Rights Practices in Russia*, <http://www.state.gov/documents/organization/204543.pdf> (accessed June 18, 2014).

16 *See* William Burnham & Jeffrey Kahn, *Russia's Criminal Procedure Code Five Years Out*, 33(1) Rev. Cent. & E. Eur. Law 25 (2008).

17 *See* Dmitry Gololobov, *The Yukos Money Laundering Case: A Never-Ending Story*, 28 Mich. J. Int'l L. 711 (2007).

18 *See* Silvia Borelli, The Impact of the Jurisprudence of the European Court of Human Rights on Domestic Investigations and Prosecutions of Serious Human Rights Violations by State Agents 7, 44–47 (DOMAC 2010), <http://www.domac.is/media/domac-skjol/DOMAC_7-ECHR-SB.pdf> (accessed June 18, 2014).

19 Burger & Holland, *supra* n. 11.

20 *See Куликов В.* Тюремный покой [Kulikov V. *Tyuremnyi pokoi* [Vladislav Kulikov, *Prison Salience*]], *Rossiiskaya Gazeta* (May 17, 2010), <http://www.rg.ru/2010/05/17/proverka.html> (accessed June 18, 2014).

As for the second group, corruption amongst criminal investigators in Russia is often discussed by academics and experts as an important problem for the Russian authorities to deal with.[21] When addressing prosecutors and investigators in the course of an extended meeting of the Collegium of the General Prosecutor's Office, President Vladimir Putin stated that:

> MVD, FSB, FSCD, the Investigatory Committee and the prosecutors are, of course, special, but public organisations, and there are many different people work with them. All the problems of our society are reflected in these organisations like in a drop of water . . . I want you to think about this problem.[22]

Unfortunately, the trust of the population in fair and effective investigation of criminal cases is low.[23] One of the most disastrous recent scandals, which clearly demonstrates the significant involvement of high-level prosecutors and investigators in highly organised illegal activities, was the case of the so-called 'prosecutors' illegal casinos,' in which it was alleged that a group of high-ranking prosecutors from the Moscow region effectively controlled a network of illegal casinos and provided them with immunity from raids and investigations (a well-known Russian term, *krusha*).[24] Moreover, the investigation, initiated by the Investigatory Committee – the dedicated rivals of the General Prosecutor's Office – almost collapsed and all the suspects were ultimately released on bail or even without charge.[25] The corruption investigation against the Russian Minister of Defence, Mr. Serdyukov, which attracted tremendous publicity, was unexpectedly terminated and he was granted amnesty as a person involved in military actions. Such unexpected collapses of large-scale investigations against prosecutors, investigators and other important persons create great confusion for the public and the media and provoke extensive speculation about corruption. All these high-profile scandals have effectively undermined the reputation of Russian investigators.

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21 *See* Ethan Burger & Rosalia Gitau, *The Russian Anti-Corruption Campaign: Public Relations, Politics or Substantive Change*, 1 New J. Eur. Crim. L. 218 (2010).

22 Расширенное заседание коллегии Генпрокуратуры [*Rashirennoe zasedanie kollegii Genprokuratury* [*Extended Meeting of the Collegium of the General Prosecutors Office*]], Kremlin.ru (March 5, 2013), <http://www.kremlin.ru/news/17631> (accessed June 18, 2014).

23 *See Борисов Т.* В тюрьму за 15 миллионов [Borisov T. *V tyurmu za 15 millionov* [Timofei Borisov, *To Jail for 15 Millions*]], *Rossiiskaya Gazeta* (Jan. 14, 2014), <http://www.rg.ru/2014/01/14/vzatka-site.html> (accessed June 18, 2014).

24 For detailed information *see* Скандал с казино [*Skandal s kazino* [*Casino Scandal*]], Gazeta.ru (July 2, 2013), <http://www.gazeta.ru/subjects/skandal_s_kazino.shtml> (accessed June 18, 2014).

25 *See* «Игорное дело» свободно [*'Igornoe delo' svobodno* [*'Casino Case' is Free*]], Gazeta.ru (July 2, 2013), <http://www.gazeta.ru/social/2013/07/02/5404545.shtml> (accessed June 18, 2014).

In relation to the final group of opinions, there is a strong assumption by the public that legal arguments and procedural norms in some Russian large-scale investigations are undermined by political interests.[26] As a result of rich and powerful people 'pulling the strings of jurisprudence,' many cases have lost their credibility during subsequent trials and this, in turn, has attracted the attention of the international community and been scrutinised stringently by human rights organisations, including Human Rights Watch and Amnesty International.[27] The list of allegedly 'politically-motivated' trials organised with the assistance of Russian investigators, according to the media, is sufficiently long.[28] In fact, any investigation or trial in which the media or the general public can detect even the slightest injustice can easily be declared 'political' or at the very least 'unjust.' As a result, Russian investigatory bodies find themselves in a legal and logical trap because, due to a lack of trust and poor credibility, they have no way of building a decent reputation. Even if a case has been investigated properly, nothing prevents defendants and their lawyers from declaring the case political and unjust.[29] Moreover, 'politicisation' of criminal cases is strongly supported by Western lawyers interested in expensive extradition procedures and VIP clients.[30] This approach to high-profile cases has become popular in Russia. The term 'political' is widely used by advocates and political activists involved in Russian criminal investigations but very few experts understand what this term actually means in the Russian context. There is only one recent Russian large-scale case which legally can be called 'political,' mainly because the Eur. Ct. H.R. was able to clearly establish the presence of 'the other motives of prosecution' in accordance with Art. 18 of the ECHR. This case is related to the biggest Russian media empire formerly controlled by Vladimir Gusinskiy. In *Gusinskiy v. Russia* the court accepted that the applicant's liberty was restricted, inter alia, 'for a purpose other than those mentioned in Article 5.'[31] It should be noted that, in spite of the highest possible publicity, Eur. Ct. H.R. has

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26 *See* Greenberg, *supra* n. 9, at 24–28.

27 *See* Kenneth Rapoza, *Political Trials Add to Negative Perception of Russia*, Forbes (Apr. 24, 2014), <http://www.forbes.com/sites/kenrapoza/2013/04/24/political-trials-add-to-negative-perception-of-russia> (accessed June 18, 2014); Jim Heintz, *Politics Colors Russian Criminal Cases*, Yahoo! News (Dec. 25, 2013), <http://news.yahoo.com/politics-colors-russian-criminal-cases-082416022.html> (accessed June 18, 2014).

28 *See* Antonov, *supra* n. 13.

29 For a hypothetical prosecution of Prof Guriev, *see* Gregory L. White & Alexander Kolyandr, *Prominent Russian Economist Flees Country*, Wall Street Journal (May 29, 2013), <http://online.wsj.com/news/articles/SB10001424127887323855804578511452388926008> (accessed June 18, 2014).

30 *See* Jim Armitage, *The Latest Twist in the Case of Mukhtar Ablyazov: French Court Orders Fugitive Millionaire Tycoon to be Extradited to Russia*, The Independent (Jan. 9, 2014), <http://www.independent.co.uk/news/world/europe/the-latest-twist-in-the-case-of-mukhtar-ablyazov-french-court-orders-fugitive-millionaire-tycoon-to-be-extradited-to-russia-9050149.html> (accessed June 18, 2014).

31 *Gusinskiy v. Russia*, *supra* n. 1, at ¶¶ 73–78.

not identified any violations of Art. 18 of the European Convention in a bundle of the Yukos-related cases.[32]

Therefore, from the legal point of view, the nature and extent of 'political prosecutions' is not clear in Russia,[33] that creates an attractive opportunity to declare middle or high-level cases 'political' without proper legal reasoning.[34] There have been several attempts to rationalise and limit this practice by replacing the term 'political prisoner' with the more legally feasible term 'illegally or unfairly sentenced individual.'[35] The new Russian human rights ombudswoman, Ms. Pamfilova, emphasised in her first interview that the term 'political prisoner' should be used with extreme caution.[36] However, many political activists still prefer to use the old terminology, which is often very misleading.

Of course, the impact of negative factors on Russian investigations cannot be overestimated. However, an attempt to answer the question why Russian investigators are unable to investigate Russian economic crimes effectively and then present proper cases to further legitimate court consideration should not be limited to these conventional negative factors only. It is not disputed that a small number of high-profile and publicly important cases in Russia represent just a tiny fraction of the overall number of criminal investigations.[37]

In the economic sphere, the proportion is even more pronounced; however, very often, conclusions which have been made and accepted by experts and the community in respect to high-profile cases with a strong leaning toward political

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32 *See OAO Neftyanaya Kompaniya Yukos v. Russia*, ¶¶ 663–66, no. 14902/04 (Eur. Ct. H.R., Sept. 20, 2011); *Khodorkovskiy v. Russia*, ¶ 16, no. 5829/04 (Eur. Ct. H.R., May 31, 2011).

33 *Russia: Misrule of Law*, The Guardian (July 11, 2013), <http://www.theguardian.com/commentisfree/2013/jul/11/russia-navalny-misrule-law-editorial> (accessed June 18, 2014) ('Russia does not have political prisoners. That was so last century. It does, alas, retain the unedifying spectacle of show trials').

34 *See Former MP's Suit against Human Rights Activist Dismissed by U.S. Court*, RAPSI (Aug. 2, 2012), <http://rapsinews.com/judicial_news/20120802/264061039.html> (accessed June 18, 2014). (The lawsuit concerned an article written by Zalmayev which stated that the US should not grant political sanctuary to a businessman whom Russia had placed on the international wanted list for his involvement in several major illicit transactions. Zalmayev was supported by the head of Moscow Helsinki Group, Lyudmila Alexeyeva, Lev Ponomaryov and other human rights activists.)

35 *Романова О.* Нет политических заключенных, есть несправедливо осужденные [Romanova O. *Net politicheskikh zaklyuchennikh, est' nespravedlivo osuzhdennye* [Olga Romanova, *There Are No Political Prisoners, There Are Only Unfairly Sentenced*]], Echo SPb (Nov. 11, 2013), <http://www.echomsk.spb.ru/blogs/OlgaRomanova/17992.php> (accessed June 18, 2014).

36 *See Брынцева Г.* Эмма Памфилова: Нужно выстраивать целостную систему защиты детства [Bryntseva G. *Emma Pamfilova: Nuzhno vystraivat' tselostnuyu sistemu zashchity detstva* [Galina Bryntseva, *Emma Pamfilova: We Need to Build a Comprehensive System for Protection of Children*]], *Rossiiskaya Gazeta* (March 21, 2014), <http://www.rg.ru/2014/03/21/pamfilova-site-anons.html> (accessed June 18, 2014).

37 *See* Reznik, *supra* n. 6.

motives are applied without proper grounds to the bulk of 'casual' cases.[38] This approach is clearly irrational and misleading, especially in respect to economic and financial investigations which are, mostly, quite complex.

The most obvious solution to the systemic failure of economic and financial investigations is not simply to put all the blame on the shoulders of the investigators as this will not significantly improve the quality of investigations. Understanding 'who is responsible' is just the first part of what is possibly the most famous Russian refrain saying. The second part of the refrain saying, 'what to do?,' should not be forgotten either. In order to improve the results of investigations and make them look convincing to experts and the public, it is necessary to analyse objectively which factors might influence the quality and effectiveness of economic and financial investigations. The business community is the primary beneficiary of this approach as economic and financial crimes are committed not external to but within the business community, and members who prefer fair play should be interested in stringently enforced rules. Russian businessmen should not be mere spectators at the show – they need to be active participants. Conventionally, they praise the quality, independence and effectiveness of investigations in the most developed EU countries and in the US; however, Russian entrepreneurs prefer to ignore the fact that this level of quality can only be reached under the influence of several extremely powerful corporate, administrative and legal factors that are promoted and supported by Western community and business societies. Therefore, in order to improve Russian economic and financial investigations, it is quite important to understand at least the most powerful of these factors and to see how they could be promoted in Russia.

3. Who Should Love Russian Laws?

The most painful greatest area of conflict between investigators and the Russian business community concerns both the certainty authority and the enforcement of Russian laws. It is a double-edged sword in that many businessmen in Russia do not respect the law and, as a consequence, many of them do their best to abuse it when possible. Investigators have to deal with entrepreneurs who not only want to avoid criminal responsibility for their wrongdoings but also want to use criminal law and the investigatory powers of the state to attack their business competitors.

One of the key problems concerning the enforcement of Russian law is that many informal quasi-legal practices and economic crimes are traditionally considered to be publicly permissible for those who conduct their business in the Russian economic environment. Respectively, the attempts of investigators to interfere with such

[38] Kathryn Hendley, *'Telephone Law' and the 'Rule of Law:' The Russian Case*, 1(2) Hague Journal on the Rule of Law 241 (2009) (generalizing from politicised cases with high stakes for everyone involved, including the state, is, however, problematic).

practices very often result in allegations that the investigations are trying to suppress normal business practices.

3.1. Russian Money Laundering

There is a strong public assumption that money laundering charges are widely used by investigators to make other economic charges against entrepreneurs (*e.g.*, embezzlement or misappropriation) look more authoritative to the courts.[39]

However, recently published reports and actions undertaken by the Central Bank of Russia show that a significant number of banks are just criminal enterprises, used by their managers and owners for laundering illicit funds.[40] Of course, the existence of big banking 'laundering machines' contravenes not only Russian laws on money laundering and terrorism financing but also the main international conventions ratified by Russia.

For decades, the Russian 'grey' and 'black' economies were based on the extensive use of legal and illegal cash.[41] Extensive use of cash is the logical and economic result of the widespread corruption in Russia and many businesses would not survive if they were unable to use large sums of cash, not only for illegal deals but also for bribing public officials.[42] Of course, a public dispute has been ongoing for years over who is ultimately responsible for this situation: corrupt public officials or entrepreneurs who willingly bribe public officials. Historically and logically, it appears to be the classic 'chicken and egg' problem and, evidently, it cannot be stopped by the efforts of the business community.

3.2. Ownership and Control

Non-transparency of ownership and control has remained an essential characteristic of Russian business since the rise of the first cooperatives[43] and there are at least several factors which make hidden ownership attractive to the Russian business community.

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[39] *See* Olga Sher, *Breaking the Wash Cycle: New Money Laundering Laws in Russia*, 22 NYL Sch. J. Int'l & Comp. L. 627 (2003); Gololobov, *supra* n. 17; Orlova, *supra* n. 9.

[40] *See* Alexander Kolyandr & Andrei Ostroukh, *Russian Bank Closed Over Alleged Money Laundering*, The Wall Street Journal (Nov. 20, 2013), <http://online.wsj.com/news/articles/SB10001424052702303653004579209643168586818> (accessed June 18, 2014); *Russia's Central Bank Revokes Licences from Two Moscow Banks*, Reuters (Feb. 11, 2014), <http://www.reuters.com/article/2014/02/11/russia-cbank-licences-idUSL5N0LG07S20140211> (accessed June 18, 2014).

[41] *See* Andrei Yakovlev, *'Black Cash' Tax Evasion in Russia: Its Forms, Incentives and Consequences at Firm Level*, 52(1) Europe-Asia Stud. 33 (2001).

[42] *See* Pavel Usanov, *Russian Money Laundering: How Does It Work?*, oDRussia (Apr. 9, 2013), <http://www.opendemocracy.net/od-russia/pavel-usanov/russian-money-laundering-how-does-it-work> (accessed June 18, 2014).

[43] *See* Lucy Chernykh, *Ultimate Ownership and Control in Russia*, 88 J. of Fin. Ec. 169 (2008).

Firstly, it is necessary to examine criminal responsibility. There are numerous, widely known cases where the real owners of companies or their shadow directors have tried to avoid criminal responsibility by concealing their ownership or participation in the management of corporate structures. The *Airport Domodedovo* case[44] in which it was absolutely impossible to establish the ultimate owners of one of the largest Russian airports, compelled the government to introduce new legislation to regulate the owners of airports and their affiliates in Russia.[45]

The second factor is tax optimisation goals. It is still accepted practice to conduct all major business deals abroad. The fairly recent acquisitions of Sibneft by Gazprom, and TNK-BP by Rosneft, demonstrate that even the state sometimes has to play according to these rules.[46] It is highly unlikely that these practices will be eliminated even by a stringently enforced programme of 'de-offshoreritisation' of Russian business recently introduced by the government.[47]

Thirdly, many rich businessmen conceal their real wealth in order to avoid the negative consequences of divorce. Several recent divorce cases have demonstrated that a bad divorce may be more ruinous for a rich businessman than even a conflict with the state.[48] For example, one of the 'old oligarchs,' Vladimir Potanin, openly declared that his former wife, who is currently attempting to chase pursue his assets in the US courts, will never find them.[49]

As a result, although some big Russian companies and corporate groups show their dedication to international principles of transparency and disclosure, many others and their real owners prefer to stay in the shadows.[50] Of course, an unclear ownership structure can be a serious obstacle to investigating complex economic crimes.

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[44] *See* Joe Nocera, *How to Steal a Russian Airport*, NY Times (June 6, 2011), <http://www.nytimes.com/2011/06/07/opinion/07nocera.html?_r=0> (accessed June 18, 2014).

[45] *See Putin Calls on Moscow Airports to Reveal Owners Identities*, *RIA Novosti* (July 3, 2013), <http://en.ria.ru/russia/20130703/182036477.html> (accessed June 18, 2014).

[46] *See* Irina Filatova, *Russian Investors Flock to Virgin Islands after Cypriot Crisis,* Moscow Times (Aug. 18, 2013), <http://www.themoscowtimes.com/business/article/russian-investors-flock-to-virgin-islands-after-cypriot-crisis/484719.html> (accessed June 18, 2014).

[47] Scott Rose & Olga Tanas, *Putin Tells Russian Business Using Offshores to Pay Tax at Home*, Bloomberg View (Dec. 12, 2013), <http://www.bloomberg.com/news/2013-12-12/putin-tells-russian-business-using-offshores-to-pay-tax-at-home.html> (accessed June 18, 2014).

[48] *See* Alexei Barrionueko, *Divorce, Oligarch Style*, NY Times (Apr. 5, 2012), <http://www.nytimes.com/2012/04/08/realestate/big-deal-dmitry-rybolovlevs-divorce-oligarch-style.html?pagewanted=all> (accessed June 18, 2014).

[49] *See Potanin Gives Away Assets Prior to Divorce*, Moscow Times (Feb. 10, 2014), <http://www.themoscowtimes.com/business/article/potanin-gives-away-assets-prior-to-divorce/494156.html> (accessed June 18, 2014).

[50] *See* Roman Shleynov, *Elites Undermine Putin Rail against Tax Havens*, ICIJ (Apr. 4, 2013), <http://www.icij.org/offshore/elites-undermine-putin-rail-against-tax-havens> (accessed June 18, 2014).

3.3. Corruption and Abuse of Criminal Laws

One of the most important issues facing the business community is the use of criminal law against business competitors. The recently appointed head of the Russian business ombudsman, Boris Titov, highlighted some interesting figures when commenting on the statistics on complaints filed by Russian entrepreneurs with his office. In particular, he said that at least half of the complaints had been filed, not to prevent illegal prosecution, but to ask the ombudsman to urge investigators to prosecute other businessmen.[51]

Therefore, it is possible that a significant part of the Russian business community is concerned with potential illegal prosecution but, at the same time, they see criminal investigations as an effective instrument for dealing with their business competitors.[52]

This inevitably raises the question over how many illegal criminal investigations have been launched, not by corrupt investigators, but by unscrupulous entrepreneurs. Unfortunately, this type of statistic is not available now and will most likely not be available in the future as it potentially implicates some respectable Russian entrepreneurs, possibly even some in the Forbes Top 100.[53]

These brief observations of several acceptable business practices does not cover many other informal or criminal practices, such as tax evasion, the smuggling of electronic goods, false invoicing and other undesirable activities. However, it does show that regardless of many political and legal innovations, such as the business ombudsman, the public chamber, presidential council for human rights and different organisations set up to protect small businesses and oligarchs, 'good old-fashioned' methods of conducting business in Russia are still popular, albeit they are better structured and concealed.[54]

In the 1990s and early 2000s, the prosecution of entrepreneurs was very often seen as unfair and illegal because Russian laws were not policed and enforcement was mainly arbitrary and politicised. Disputes over whether this situation has actually changed still continue to this day. However, key signs that the international perception of Russian laws and investigations has changed significantly can be seen in the results of recent extradition proceedings concerning 'new political and economic

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51 *Титов Б.* Даже трогать эти дела нам не надо [Titov B. *Dazhe trogat' eti dela nam ne nado* [Boris Titov, *We Should Not Even Touch These Cases*]], *Delovaya sreda* (Sept. 12, 2013), <http://journal.dasreda.ru/power/3609-boris-titov-dazhe-trogat-takie-dela-nam-ne-nado> (accessed June 18, 2014).

52 *See* Вернутся ли заказные дела против бизнесменов? [*Vernutsya li zakaznye dela protiv biznesmenov?* [*Will Pre-ordered Cases against Businessmen Come Back?*]], *Kommersant* (Oct. 21, 2013), <http://www.kommersant.ru/doc/2309516> (accessed June 18, 2014).

53 *See Opposition-Backed Businessman Kozlov Released from Prison*, *RIA Novosti* (June 3, 2013), <http://en.ria.ru/russia/20130603/181489826.html> (accessed June 18, 2014).

54 *See* Alena Ledeneva & Stanislav Shekshina, Doing Business in Russian Regions: Informal Practices and Anti-Corruption Strategies (NIS Center 2011).

refugees.'[55] Several years ago, the principle that the West did not extradite Russian refugees even if they had allegedly been involved in different, purely economic and financial wrongdoings looked absolutely sound and unchallengeable.[56] Many experts were certain that this trend would continue for decades, until significant political change occurred in Russia.[57] However, for several reasons, among which, of course, should be noted the more palpable and transparent 'playground rules' for businessmen and amendments to Russian criminal laws, the position of Western and international courts has significantly changed.

Several remarks made by the Eur. Ct. H.R. in its judgment in the case of *Khodorkovskiy v. Russia (no. 1)* can be considered as powerful contributing factors to the changing attitude of international judicial instances to new Russian economic refugees.[58] These remarks mostly concern the problem of 'politicised' prosecutions and trials in general but they may find extensive subsequent application in Russia and the Commonwealth of Independent States (CIS). For example, while commenting on the allegations of a violation of Art. 18 of the ECHR,[59] the Eur. Ct. H.R. noted that:

> [A]ny person in the applicant's [Khodorkovsky's] position would be able to make similar allegations. In reality, it would have been impossible to prosecute a suspect with the applicant's profile without far-reaching political consequences. The fact that the suspect's political opponents or business

55 *See* Guy Dinmore, *France Agrees to Extradite Former Kazakh Banker Ablyazov to Russia*, Financial Times (Jan. 9, 2014), <http://www.ft.com/cms/s/0/7285d458-7927-11e3-b381-00144feabdc0.html#axzz2uUrbFKcD> (accessed June 18, 2014); *Austria Turns Over Russian Banker Sought for $60 Mln Embezzlement*, RAPSI (Dec. 12, 2013), <http://rapsinews.com/judicial_news/20131212/270074274.html> (accessed June 18, 2014); Jim Armitage, *French Court Orders Alexey Kuznetsov to be Extradited to Russia Facing Criminal Charges*, The Independent (Jan. 23, 2014), <http://www.independent.co.uk/news/business/news/french-court-orders-alexey-kuznetsov-to-be-extradited-to-russia-facing-criminal-charges-9080710.html> (accessed June 18, 2014).

56 *See Кобякин С.* С Лондона выдачи нет (Kobyakin S. *S Londona vydachi net* [Sergei Kobyakin, *No Extradition from London*]], *Moskovskii Komsomolets* (March 26, 2009), <http://www.mk.ru/social/justice/article/2009/03/26/244894-s-londona-vyidachi-net.html> (accessed June 18, 2014); *UK Harboring Yukos Case Suspects, Tycoon Berezovsky – MP*, *RIA Novosti* (March 24, 2006), <http://en.ria.ru/russia/20060324/44764017.html> (accessed June 18, 2014).

57 *See* Ben Brandon & Edward Grange, *Red Flag to Russia: Extradition Judge Signals Halt to Russian Extraditions unless Prison Conditions Improve*, The World of Extradition (Apr. 8, 2013), <http://worldofextradition.wordpress.com/2013/04/08/red-flag-to-russia-extradition-judge-signals-halt-to-russian-extraditions-unless-prison-conditions-improve/> (accessed June 18, 2014) ('It is likely that the UK court will not extradite to Russia in future cases unless the Russian Federation either demonstrates that there has been a significant improvement in prison conditions or provides specific, positive assurances about the conditions in which the person whose extradition is sought will be held.'); *see also Russian Top Prosecutor Reports 'Breakthrough' in Extradition with UK*, *RIA Novosti* (Jan. 12, 2012), <http://en.ria.ru/ russia/20120112/170722024.html> (accessed June 18, 2014).

58 *See Khodorkovskiy v. Russia*, *supra* n. 32.

59 European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

> competitors might directly or indirectly benefit from him being put in jail should not prevent the authorities from prosecuting such a person if there are serious charges against him. In other words, high political status does not grant immunity.[60]
>
> However, it must recall that political process and adjudicative process are fundamentally different. It is often much easier for a politician to take a stand than for a judge, since the judge must base his decision only on evidence in the legal sense.[61]

Therefore, economic refugees have been deprived of a powerful argument used extensively in the past.[62] Any rich and well-connected person could allege in the extradition proceeding that his prosecution was a political game,[63] and political evidence, which may look quite persuasive to journalists and political activists, may appear insufficient to a judge.[64]

In *Khodorkovskiy and Levedev v. Russia (no. 2)* the Eur. Ct. H.R. had to deal with another important issue, namely, with the question of the authority of certain Russian tax laws of the late 1990s and early 2000s.[65] Ruling on this case, the Eur. Ct. H.R. did not, in substance, create any new jurisprudence but effectively repeated the approach previously highlighted in several cases.[66] When answering the question as to whether the prosecution of the Yukos officials had been based on an unprecedented and novel interpretation of Russian criminal law, the Court stated the following:

> The Court recognises that the applicants' case had no precedents. However, the Court reiterates that Article 7 of the Convention is not incompatible with judicial law-making and does not outlaw the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence

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60 *See Khodorkovskiy v. Russia*, *supra* n. 32, at ¶ 258.

61 *Id.* at ¶ 259.

62 *See* Peter Binning, *Serious Extradition Risks for International Business People*, 8 Bus. L. Int'l 148, 149 (2007).

63 *See France Mulls Extradition of Embezzlement Suspect Kuznetsov*, Moscow Times (Sep. 20, 2013), <http://www.themoscowtimes.com/news/article/france-mulls-extradition-of-embezzlement-suspect-kuznetsov/486400.html> (accessed June 18, 2014).

64 *See Khodorkovskiy v. Russia*, *supra* n. 32, at ¶ 260.

65 *Khodorkovskiy & Lebedev v. Russia*, ¶¶ 869–85, 897–909, nos. 11082/06 and 13772/05 (Eur. Ct. H.R., July 25, 2013).

66 *See Liivik v. Estonia*, ¶¶ 101–04, no. 12157/05, (Eur. Ct. H.R., June 25, 2009); *Radio France and Others v. France*, ¶¶ 18–20, no. 53984/00 (Eur. Ct. H.R., March 30, 2004); *Soros v. France*, ¶¶ 55–62, no. 50425/06 (Eur. Ct. H.R., Oct. 6, 2011).

> and could reasonably be foreseen. The applicants may have fallen victim to a novel interpretation of the concept of 'tax evasion,' but it was based on a reasonable interpretation of Articles 198 and 199 and 'consistent with the essence of the offence.'[67]

In agreeing with the prosecution of the Yukos managers, the Eur. Ct. H.R. has allowed, in general terms, the creative interpretation of Russian criminal law which in turn may have unpredictable consequences especially in respect to economic and financial crime.

A further step in separating criminal law from political issues was made in the famous UK case, *BTA Bank*, which represents a series of lawsuits filed with the UK courts by the Kazakh BTA Bank against its former general manager and alleged shadow-controlling shareholder, Mr. Mukhtar Ablyazov and his allies.[68] In several claims, the claimant successfully proved allegations of large-scale commercial fraud committed by an organised criminal group comprising bank shareholders and managers.[69] At the same time, a series of criminal investigations against former employees and managers of BTA Bank was launched in Kazakhstan, Russia, Ukraine and a number of other countries.[70]

The lawsuits filed in the UK and other courts around the world were supplemented by freezing injunctions and disclosure orders which were the result of allegations made in criminal charges brought against Ablyazov's group.[71] Mr. Ablyazov fought desperately to prove that all the allegations against him were politically motivated and that the financial claims should not be considered by the UK courts.[72] However, the political defence did not work and the UK courts summarily decided to proceed with BTA Bank's claims.[73] The defendant, in his application to the Queen's Bench Division, sought to strike out the case because one of his co-defendants had alleged that the President of Kazakhstan had persuaded BTA Bank's directors to sue Mr.

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67 *Khodorkovskiy & Lebedev v. Russia*, *supra* n. 65, at ¶ 821.

68 *See* Donnelly & Fuller, *supra* n. 3; *see also* Katy Dowell, *BTA v. Ablyazov: The Secret Billionaire*, The Lawyer (Febr. 6, 2012), <http://www.thelawyer.com/bta-v-ablyazov-the-secret-billionaire/1011246.article> (accessed June 18, 2014).

69 Dowell, *supra* n. 68.

70 *See* The General Prosecutor's Office of the Republic of Kazakhstan, *Speech of the Official Representative of Prosecutor General's Office Nurdaulet Suindikov on the Briefing Concerning the Detention of M. Ablyazov in France*, <http://m.prokuror.kz/eng/news/press-releases/speech-official-representative-prosecutor-generals-office-nurdaulet-suindikov> (accessed June 18, 2014).

71 *See* Donnelly & Dowell, *supra* n. 68.

72 *See* Isabel Gorst, *Mukhtar Ablyazov at Centre of Fight over Kazakhstan's BTA Bank*, Financial Times (July 5, 2013), <http://www.ft.com/cms/s/0/23571482-e584-11e2-ad1a-00144feabdc0.html#axzz2ugjJwjyO> (accessed June 18, 2014).

73 *See JSC BTA Bank v. Ablyazov & Ors.* [2011] EWHC 202 (Comm) 58.

Ablayzov and other defendants for the purpose of eliminating him as a political opponent. On that argument the judge ruled that:

> [T]he claimant must be regarded as having two purposes for commencing and pursuing these proceedings against the first defendant [Mr. Ablyazov]. First, it has brought these claims against him to recover the losses for which he is thought to be responsible. It would be *unrealistic to suppose in circumstances where the claimant was insolvent that the proceedings were not brought, at least in part, for the purpose of recovering those losses for the benefit of the claimant and its creditors*. Second, the claimant has, arguably, been persuaded by the President of Kazakhstan to bring these claims for the purpose of eliminating the first defendant as a political opponent of the President of Kazakhstan. The first of those purposes is certainly legitimate and accordingly, for the reasons I have given when considering the law, the proceedings are not an abuse of the process of this court . . .
>
> 53. Collateral purpose: At first sight the elimination of the first defendant as a political opponent would appear to be clearly illegitimate because it is far removed from the remedy which the law gives for misappropriation of assets and appears not to be 'reasonably related the provision of some form of redress' for his alleged wrong. *However, the elimination of the first defendant as a political opponent is said to be the consequence of undermining and damaging his reputation and facilitating the expropriation of his assets worldwide*. If the claimant succeeds in its actions, which are essentially for fraud, the first defendant's reputation is likely to be undermined and damaged and his assets are likely to be seized in order to execute the judgment. *Thus those consequences cannot be an illegitimate purpose of the proceedings*.[74]

Ultimately, the court stated that if one of the two purposes for starting the process against Mr. Ablyazov were legitimate, it seemed right that a claimant should be entitled to proceed with his claim. Even if a secondary, collateral purpose was the elimination of Mr. Ablayzov as a political opponent, this did not prevent BTA Bank (even if its directors had to fulfil the orders of the Kazakh President) from recovering its losses.

Yukos and BTA-type cases have demonstrated that arguments based on either 'quasi-political' prosecution or consequences (the presence of some other motive for prosecution, or some other legal challenge) do not work effectively to restrain contemporary business crime.[75] Moreover, any significant legal action against a powerful and rich person may have significant political implications and political beneficiaries but it should not have any impact on the course of legal action.

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[74] *JSC BTA Bank v. Ablyazov and Ors. (No 6)* [2011] 1 WLR 2996, 3011–12 [emphasis added].

[75] *See* Binning, *supra* n. 62.

4. The Mystery of Russian Gatekeepers

An effective 21st century system of white-collar crime prevention and investigation cannot function without a developed system of gatekeepers[76] but such a move would not be popular in Russia.[77] Sometimes, it seems as if Russia is yet to sign and ratify numerous international conventions on money laundering, fraud, tax crimes, terrorism financing and corruption, many of which aim at imposing certain responsibilities on lawyers, accountants, auditors and other professionals who, by endorsing particular financial transactions or providing legal or other professional opinions, certify that particular funds may enter the financial system.[78] Therefore, the problem of direct or indirect financial transaction certification is a problem that is centred on professional services, including accounting, legal services, auditors and independent appraisers. Many licensed individuals and organisations conventionally comprise a special group of persons named 'gatekeepers' whose key role is to monitor the entry of money into the financial system and certify its legitimacy.[79]

An idea called the Gatekeeper Initiative was proposed by the G7 in 2001 and it was initially related to anti-money laundering initiatives and directed specifically at certain professionals, such as lawyers, accountants and auditors. The aim of this initiative was to fight money laundering and the funding of terrorism following the disastrous attack on New York's World Trade Center on September 11, 2001.[80] This concept has been modified significantly since its inception. From its original genesis it has progressed from mere anti-money laundering and terrorism funding norms to a comprehensive concept of gatekeeping through the professional certification of particular groups of financial transactions in order to tackle fraud, corruption, insider dealing, *etc.* The Gatekeeper Initiative crystallized into a general principle

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76 *See* William Dorton, *Corporate Gatekeepers: An Examination of the Transactional Lawyer's Role*, 99 Ky L.J. 555, 558 (2010–2011); Nancy Reichman, *Moving Backstage: Uncovering the Role of Compliance Practices in Shaping Regulatory Policy*, in White Collar Crime Reconsidered (Kip Schlegel & David Weisburd, eds.) (Northeastern University Press 1992).

77 Used almost ten years ago in Sergei Guriev, *Enron, Yukos and the Gatekeepers*, Moscow Times (Dec. 2, 2004), <http://www.themoscowtimes.com/stories/2004/12/02/005.html> (accessed June 18, 2005).

78 *See* FATF Report. Global Money Laundering and Terrorist Financing Threat Assessment (FATF/OECD 2010), available at <http://www.fatf-gafi.org/media/fatf/documents/reports/Global%20Threat%20assessment.pdf> (accessed June 18, 2014).

79 *Id.*

80 *See* Danielle Kirby, *The European Union's Gatekeeper Initiative: The European Union Enlists Lawyers in the Fight against Money Laundering and Terrorist Financing*, 37 Hofstra L. Rev. 261, 273–92 (2008–2009); Blake Goodsell, *Muted Advocacy: Money Laundering and the Attorney-Client Relationship in a Post 9/11 World*, 34 J. Legal Prof. 211, 212–14 (2009–2010); Kevin Shepherd, *The Gatekeeper Initiative and the Risk-Based Approach to Client Due Diligence: The Imperative for Voluntary Good Practices Guidance for US Lawyers*, 37 ACTEC L.J. 1, 8–11 (2011).

which provides that lawyers and other gatekeepers have to investigate or report suspicious client activity.[81]

Without doubt, lawyers are the key gatekeepers in Russia and in the rest of the world. The importance of their role can be explained by the fact that they 'may be positioned to detect and deter money laundering or facilitate the crime.' Lawyers' duties, in this respect, can be formulated generally as follows:

> At root, it is a good thing for lawyers to screen client misconduct. It keeps lawyers, themselves, honest. It serves societal interests in preventing harm. It enhances judicial administration. And it makes lawyers think about the morality and legality of clients' conduct as well as their own, thus encouraging them to help clients recognize and pursue appropriate behavior. All of these are valid functions for lawyers, and they have always been understood to play a part in the lawyer's everyday dealings with clients.[82]

Therefore, lawyers, and to a certain extent other gatekeepers, are called upon not only to be watchdogs and whistleblowers of their own clients but also moral guardians. However, complying with gatekeeping requirements is extremely complicated and costly. FATF Guidance for Legal Professionals describes three areas of major concern common, to a certain extent, to all gatekeepers: (a) customer/client due diligence; (b) legal firms' internal control systems; and (c) the approach of oversight/monitoring of certain transactions.[83] The system is based on several legal and administrative pillars among which the most important are: the risk-based approach, suspicious transactions identification, suspicious transaction reporting, record keeping, not prejudicing investigations (no tipping-off) and training.[84]

Furthermore, the responsibility of lawyers as gatekeepers is supplemented by their responsibility not to conspire with clients, aid, aid or abet illegal conduct or participate directly in clients' crimes or fraudulent activity.[85] In other words, 'half of the practice of a decent lawyer consists in telling would-be clients that they are damn fools and should stop.'[86]

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81 *See* Bruce Zagaris, *Gatekeepers Initiative: Seeking Middle Ground between Client and Government*, 16(4) Crim. Just. 26, 31 (2001–2002); Shepherd, *supra* n. 80.

82 *See* Fred Zacharias, *Lawyers as Gatekeepers*, 41 San Diego L. Rev. 1387, 1404 (2004).

83 *See* RBA Guidance for Legal Professionals (FATF/OECD 2008), available at <http://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Legal%20professions.pdf> (accessed June 18, 2014).

84 *See* FATF Report, *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals* (FATF/OECD 2013), available at <http://www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20vulnerabilities%20legal%20professionals.pdf> (accessed June 18, 2014).

85 *See* American Bar Association, *Model Rules of Professional Conduct* <http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct.html> (accessed June 18, 2014); *see also* Zacharias, *supra* n. 82.

86 Mary Ann Glendon, A Nation under Lawyers: How the Crisis in the Legal Profession is Transforming American Society 76 (Harvard University Press 1996).

However, in essence, the contemporary system of anti-money laundering, anti-corruption, anti-fraud and many other controls is so complicated and so demanding on financial and human resources that even in the most developed European countries it is still under permanent legal and administrative reconstruction,[87] and sometimes gatekeepers have to spend more time on paperwork than on their main professional duties. In principle, this should not preclude Russia from exerting its best possible effort in creating at least a low-level system of gatekeeping. However, the progress in the creation of gatekeepers in Russia has been minimal.

There are many difficulties involved in promoting a contemporary system of gatekeepers in Russia but the most important is a well-concealed conspiracy between the state and the gatekeepers: gatekeepers do not want to be overregulated and see their duties as completely nominal, while the state does not want to create a powerful system of alternative controls which may highlight the real level of financial and economic crime in Russia. How this conspiracy works can be seen in examples of the way the legal profession in Russia is regulated.

The long-standing regulatory difficulty with lawyers in Russia is that in parallel with a comparatively small group of advocates[88] that are regulated by the special law[89] and controlled by their own professional bodies, there exists an army of unregulated lawyers whose criminal and civil responsibilities are limited only by the general criminal and civil law.[90] Unregulated lawyers are in-house lawyers of different corporations, lawyers who work for the state, lawyers employed by different legal firms and many others. They do not have any codes of professional conduct, any compulsory or recommended ethical norms or any special rules for financial transactions and client accounts.[91] There are also no laws or even recommendations on aspects such as how to regulate the creation, conduct, record-keeping and data preservation of legal firms established by unregulated lawyers or even individuals

87 *See* Kirby, *supra* n. 80, at 292–305.

88 *See* American Bar Association, *Moscow Conference Addresses Challenges for Advocates*, <http://www.americanbar.org/advocacy/rule_of_law/where_we_work/europe_eurasia/russia/news/news_russia_advocates_conference_1209.html> (accessed June 2014, 2014).

89 Федеральный закон от 31 мая 2002 г. № 63-ФЗ «Об адвокатской деятельности и адвокатуре в Российской Федерации» // Собрание законодательства Российской Федерации. 2002. № 23. Ст. 2102 [*Federal'nyi zakon ot 31 maya 2002 g. No. 63-FZ 'Ob advokatskoi deyatel'nosti i advokature v Rosiiskoi Federatsii' // Sobranie zakonodatel'stva Rosiiskoi Federatsii*. 2002. No. 23. St. 2102 [*Federal Law of 31 May 2002 No. 63-FZ on Advocates' Practice and the Advokatura in the Russian Federation*, 2002(23) Collection of Legislation of the Russian Federation, Art. 2102]] (as amended through July 23, 2008).

90 *See* Dmitry Shabelnikov, *The Legal Profession in the Russian Federation*, OSCE (Oct. 1, 2008), <http://www.osce.org/odihr/36312> (accessed June 18, 2014); The Russian Legal Profession (Harvard Law School 2011), available at <http://www.law.harvard.edu/programs/plp/pdf/Russian_Legal_Profession.pdf> (accessed June 18, 2014); Andrey Goltsblat, *A 360 Degree View of the Legal Industry in Russia*, EuropeanCEO (July 16, 2010), <http://www.europeanceo.com/finance/a-360-degree-view-of-the-legal-industry-in-russia> (accessed June 18, 2014).

91 *Id.*

without any legal background.[92] These unregulated legal firms are not even obliged to retain lawyers with valid diplomas to undertake legal work. Of course, this army of unregulated lawyers cannot conduct any gatekeeper functions; moreover, it is an unavoidable fact that this army will permanently produce new lawyers who are not only willing to assist criminals but also see this type of assistance as a good option for earning a living. It should be added that, from a regulatory standpoint, unregulated lawyers are not lawyers at all. The FATF states that:

> Lawyers are members of a regulated profession and are bound by their specific professional rules and regulations . . . Lawyers have their own professional and ethical codes of conduct by which they are regulated. Breaches of the obligations imposed upon them can result in a variety of sanctions, including disciplinary and criminal penalties.[93]

The other difficulty with the actual implementation of the Gatekeeper Initiative in Russia is the weak and inconsistent regulation of advocates. The role played by regulated advocates in the promotion of the rule of law, legal ethics and client compliance with legislation does not reach the gatekeeping standard as it is understood by internationally recognised standards and EU directives.[94] For example, there are special recommendations for advocates[95] which represent an unsuccessful attempt to copy and paste certain aspects of anti-money laundering regulations from different European states. It is evident that regulations which specify advocates' responsibilities to client due diligence in a couple of paragraphs can hardly be regarded as a piece of legislation that may have a significantly adverse impact on the money laundering strategies of the clients. This assumption can be confirmed by the fairly recent FATF Mutual Evaluation report on Russia. Amongst other important issues, the report mentions the following problems in Russia.

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[92] Shabelnikov, *supra* n. 90.

[93] RBA Guidance, *supra* n. 83, at 5–6.

[94] *See Шашкова А.* Участие адвоката в проведении финансово-правовой оценки при противодействии легализации незаконных доходов // Адвокат. 2011. № 7. С. 11, 16–17 [Shashkova A. *Uchastie advokata v provedenii finansovo-pravovoi otsenki pri protivodeistvii legalisatsii nezakonnykh dokhodov // Advokat*. 2011. No. 7. S. 11, 16–17 [Anna Shashkova,*The Lawyer's Participation in the Financial and Legal Assessments in the Anti-money Laundering Process*, 2011(7) Lawyer 11, 16–17]].

[95] Рекомендации по организации исполнения адвокатами требований законодательства о противодействии легализации (отмыванию) доходов, полученных преступным путем, и финансированию терроризма [*Recomendatsii po organisatsii ispolneniya advokatami trebovanii zakonodatel'stva o protivodeistvii legalizatsii (otmyvaniyu) dokhodov, poluchennykh prestupnym putem i finansirovaniyu terrorisma* [Recommendation on Implementation of the Legislation on Fight with Money Laundering and Terrorism Financing]] (Federal Chamber of Advocates of the Russian Federation, Sept. 27, 2007), <http://www.fparf.ru/zazhita_prav/terror_i_prava.htm> (accessed June 18, 2014).

– monitoring of lawyers is remote and not specific to AML/CFT;[96]

– lawyers/notaries/accountants have no requirement to keep records except for those relating to ID;[97]

– lawyers/notaries have filed very few suspicious transaction reports that give rise to concerns over effectiveness of the system;[98]

– doubts exist about effectiveness, given the lack of AML/CFT supervision of lawyers and accountants and lack of information about supervision of notaries;[99]

– there are no provisions relating to politically exposed persons (PEPs), which is an area of special concern in Russia;[100]

– no actual sanctions have been applied in respect of lawyers. Lawyers and notaries can be disbarred for breaches of their respective codes, but no such sanctions have been used for direct breaches of the AML/CFT law.[101]

All of these deficiencies just confirm the fact that anti-money laundering regulations for advocates have been drafted and approved with the sole purpose of demonstrating to the FATF and other international control bodies that Russia is generally a complying country without any serious money laundering problems.[102] The system is definitely not designed to either fight money laundering or create barriers to corruption, tax fraud and other financial crimes. However, the periodic prosecution of advocates and unregulated lawyers, which definitely represent just a tiny fraction of actual wrongdoing, shows that the weakness of the system is effectively abused by both professions.[103]

Russia does not even have a basic functioning system of gatekeepers; it exists formally but it does not help either with crime prevention or with the identification and investigation of actual wrongdoing. This situation is blindly accepted by professional communities and, collaterally, by the state whose efforts to promote

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[96] FATF 6th Follow-up Report, *Mutual Evaluation of the Russian Federation* (FATF/OECD 2013), available at <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/FUR-Russian-2013.pdf> (accessed June 18, 2014).

[97] *Id.* at 17 (R12 (Deficiency 5)).

[98] *Id.* at 8 (R16 (Deficiency 1)).

[99] *Id.* at 19 (R16 (Deficiency 7)).

[100] *Id.* at 14 (R6 (Deficiency 1)).

[101] *Id.* at 16 (R12 (Deficiency 1), R12 (Deficiency 2), 23, R25 (Deficiency 3), 20, R17 (Deficiency 6)); *see also* FATF Second Mutual Evaluation Report on Russian Federation, *Combating Money Laundering and Financing of Terrorism* (FATF/OECD 2008), available at <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20Russia%20ful.pdf> (accessed June 18, 2014).

[102] Money Laundering and Terrorist Financing, *supra* n. 84, at 5.

[103] Бастрыкин: за год на скамье подсудимых оказались 4 судьи, 24 прокурора и 89 адвокатов [*Bastrykin: za god na skam'e podsudimykh okazalis' 4 sud'I, 24 prokurora i 89 advokatov* [*Bastrykin: 4 Judges, 24 Prosecutors and 89 Advocates Were Prosecuted Last Year*]], Pravo. ru (Febr. 27, 2014), <http://pravo.ru/news/view/102261> (accessed June 18, 2014).

this system are not sufficient. As a result, the effectiveness of investigations into economic and financial crime is significantly undermined. It would, therefore, be a miracle if effective investigations were successfully conducted without the dedicated assistance of 21st century gatekeepers.

5. Is There Any Whistleblowing in Russia?

It is difficult to imagine contemporary business without whistleblowing because, in international corporations, it is a recognised method of preventing and investigating corporate crimes. The emergence of whistleblowing as an institution is considered one of the most significant developments in corporate governance in the last fifty years.[104] Over the past several years, many fraud and bribery scandals have come to light because of whistleblower tip-offs.

As business and governmental organisations increase in size and complexity, and work within them becomes more specialised, it becomes increasingly more difficult to discover, prevent and correct mistakes and wrongdoing.[105] Information and technology revolutions have compounded this phenomenon by increasing opportunities for significant fraud and other illegal and harmful acts.[106]

Commonly, whistleblowers are defined as those 'who report illegal or wrongful activities of their employers or fellow employees.'[107] Miceli, Near and Dworkin define whistleblowing as follows: '[W]hen current or former employees disclose illegal, immoral, or illegitimate organizational activity to parties they believe may be able to stop it.'[108] The goal of the legislation on whistleblowers and their protection is, respectively, 'to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws and recover money for victims of financial fraud.'[109]

However, the rise of whistleblowing in the West has had a very limited impact on Russian companies. There are, evidently, several reasons behind this finding. Firstly, informers and whistleblowers have been held in very low regard by Russians for

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[104] Matt Vega, *Beyond Incentives: Making Corporate Whistleblowing Moral in the New Era of Dodd-Frank Act Bounty Hunting*, 45(2) Conn. L. Rev. 483, 485 (2012–2013).

[105] *See* Terance D. Miethe & Joyce Rothschild, *Whistleblowing and the Control of Organizational Misconduct*, 64(3) Soc. Inq. 322, 328 (1994).

[106] *See* Terry Dworkin, *Whistleblowing, MNCs, and Peace*, 35 Vand. J. Transt'l L. 457, 462 (2002).

[107] *See* Jenny Lee, *Corporate Corruption & the New Gold Mine: How the Dodd-Frank Act Overincentivizes Whistleblowing*, 77 Brook. L. Rev. 303, 306 (2011–2012).

[108] Marda Miceli et al., *A Word to the Wise: How Managers and Policy-Makers Can Encourage Employees to Report Wrongdoing*, 86 J. Bus. Ethic. 379, 379 (2009).

[109] US Senate Report (2010) No. 111-176, *The Restoring American Financial Stability Act of 2010* 110.

many centuries[110] and, therefore, Russia has no clear tradition of the practice.[111] In terms of civilian oversight, whistleblowing took on especially negative connotations towards the end of the Soviet era. Not only did the Russian public possess a deep-seated mistrust of the government but it also had a fear of organised crime which meant that, during Yeltsin's presidency, 'informancy' was an 'impossible proposition for the average Russian.'[112] Nothing much has changed since Russian corporations began introducing corporate governance rules. However, not avoiding clear, comprehensive and workable whistleblowing provisions would help to fight internal frauds and corruption.[113]

Secondly, Russian companies conventionally play their own corporate games by formally accepting advanced corporate governance standards to attract investors but, at the same time, limiting their application to real corporate life. Nobody could ever imagine that a Rosneft employee would inform an authorised statutory body about any misconduct inside the company.[114]

Thirdly, the state provides no real protection for whistleblowers, whose protection is essential to encouraging the reporting of misconduct, fraud and corruption.[115] Although the risk of corruption is significantly heightened in environments where the reporting of wrongdoing is not supported or protected,[116] according to the latest report by the Russian branch of the anti-corruption NGO, Transparency International,

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[110] *See Никулина Е.А., Куркин И.В.* Повседневная жизнь тайной канцелярии XVII века [Nikulina E.A., Kurkin I.V. *Povsednevnaya zhizn' tainoi kantselyarii XVII veka* [Elena A. Nikulina & Igor V. Kurkin, Day-to-day Life of the Secret Office in XVIII Century]], ch. 4 (Molodaya Gvardiya 2008).

[111] *See Катасонов В.* Финансовое доносительство в Америке и России [Katasonov V. *Finansovoe donositel'stvo v Amerike i Rossii* [Valentin Katasonov, Financial Whistleblowing in the US and Russia]], *Russkaya Narodnaya Liniya* (Sept. 5, 2012), <http://ruskline.ru/analitika/2012/09/05/ finansovoe_donositelstvo_v_amerike_i_rossiya/> (accessed June 18, 2014).

[112] Jasmine Martirossian, *Russia and Her Ghosts of the Past*, in The Struggle Against Corruption: A Comparative Study 100 (Roberta A. Johnson, ed.) (Palgrave 2004).

[113] *See Черкаев Д.И.* Доносительство и сигнализирование: зло или благо для российских компаний? // Акционерное общество. 2006. № 3(22) [Cherkaev D.I. *Donositel'stvo i signalisirovanie: zlo ili blago dlya rossiiskikh kompanii? // Aktsionernoe obshchestvo*. 2006. No. 3(22) [Dmitry Cherkaev, *Whistleblowing and Informing: Good or Bad for Russian Companies?*, 2006(3) Corporation]], available at <http://www.incorpore.ru/ru/materials/our/korp/material27.html> (accessed June 18, 2014).

[114] *See* Company Policy on Combating Involvement in Corruption Activities No. P3-11.03.01 P-01 (approved by the Rosneft Board of Directors, Minutes No. 24 dated May 30, 2012; Introduced by Order No. 441, dated August 23, 2012) ¶¶ 4, 10, <http://www.rosneft.com/docs/information-en/documents/Company_Policy_on_Combating_Involvement_in_Corruption_Activities.pdf> (accessed June 18, 2014) (the company guarantees confidentiality to all employees and other persons that report any violations in good faith).

[115] Yulia Krylova, *The Nature of Corruption and Multilateral System of Anti-Corruption Regulation in the Transition Economy of Russia*, 65(1) Eur. J. Sci. Res. 79, 88 (2011).

[116] G20 Anti-Corruption Action Plan. Action Point 7: Protection of Whistle-blowers <http://www.coe.int/t/dghl/standardsetting/cdcj/Whistleblowers/G20%20-%20study%20on%20whistleblowers.pdf> (accessed June 18, 2014).

entitled 'Protection of corruption whistleblowers,' there is virtually no legal protection for whistleblowers in Russia in the existing legislation.[117]

The protection of participants in criminal judicial proceedings is regulated by Federal Law No. 119-FZ, dated 20 August 2004, 'on state protection of victims, witnesses and other participants of criminal procedure.'[118] However, Transparency International emphasises that a whistleblower, as understood in international documents, is 'not a witness in the traditional sense, as described in the Criminal Procedure Code.'[119] Therefore, criminal procedure rules which may be suitable for those in witness protection or suspects, and for accused who make a pre-judicial co-operation agreement, are not suitable for the protection of corporate whistleblowers.

Fourthly, it is necessary to consider the possibility that Russian whistleblowers, multinational corporation employee whistleblowers and other persons with evidence of Russian government corruption can work confidentially through US Foreign Corrupt Practices Act and UK Bribery Act violation lawyers to expose government corruption and recover large financial rewards for reporting illegal conduct.[120] However, recent attempts to use these mechanisms have demonstrated their weakness and ineffectiveness. For example, extensive publications about the commercial activities of the First Vice-Prime Minister Mr. Shuvalov (*shuvalogeit*) have not resulted in any investigation in Europe or the US.[121]

In an era of complex economic and financial investigations and in an environment where corporate whistleblowers are gaining more and more public recognition and legislator protection,[122] what kind of responsibility can be placed realistically on Russian investigators? When investigations cannot obtain an early warning about financial wrongdoing or are informed about the offence years after it has been committed, it is difficult to support public demand for high quality and effective investigation.

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117 Russia – Whistleblowing Protection, <https://blueprintforfreespeech.net/document/russia> (accessed June 18, 2014).

118 Vera Shaftan & Alexey Borodak, *Corporate Crime, Fraud and Investigations in Russian Federation: Overview*, <http://uk.practicallaw.com/4-520-5669#a973430> (accessed June 18, 2014).

119 Alternative to Silence: Whistleblower Protection in 10 European Countries, Transparency International (Nov. 15, 2009), <http://www.transparency.org/whatwedo/pub/alternative_to_silence_whistleblower_protection_in_10_european_countries> (accessed June 18, 2014).

120 *See* Jason Coomer, *International Efforts to Help Expose & Prosecute Bribes and Illegal Kickbacks to Russian Government Officials & Other Government Corruption by Foreign Corrupt Practices Act*, <http://www.internationalwhistleblower.com/russiabribewhistleblowers.htm#sthash.hK3QTJUk.BJ7w3DGV.dpuf> (accessed June 18, 2014).

121 *See* Leonid Bershidsky, *Shuvalov Tests Russia's Corruption Laws*, Bloomberg View (Apr. 4, 2012), <http://www.bloomberg.com/news/2012-04-04/shuvalov-tests-russia-s-corruption-laws-leonid-bershidsky.html> (accessed June 18, 2014).

122 For example, the fairly new Dodd-Frank Act which, amongst other things, provides lucrative benefits for whistleblowers. *See* Vega, *supra* n. 104.

6. Conclusion

As mentioned above, this article does not aim to provide a comprehensive and all-encompassing explanation of the actual failure of economic and financial crime investigations in Russia. There is no doubt that the primary responsibility for this failure remains with state institutions; however, merely stating this fact is not enough to modernise the system and sift out the old inquisitional investigatory paradigm and replace it with a new, independent investigatory approach.

Russian businessmen are willing to deal with Russian investigators on a level playing field and they certainly do not want investigators in the 21st century to play according to obscure and unpleasant rules that were established at the time of the GULAG. Moreover, Russian professionals do not want to bear the significant burden resulting from professional and ethical Western-style regulations which are complex and costly to implement. However, this position strongly contradicts the old maxim 'no pain – no gain.' Twenty-first century investigations of economic and financial crime, accompanied by all of the Western-style benefits of fairness, independence and legality, are possible only in Western-style corporate, business and professional environments, including, amongst many other things, a properly developed system of gatekeeping, law-enforcement and whistleblowing.

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MEDIATION AND LEGAL ASSISTANCE

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The development of alternative dispute resolution procedures raises a number of new problems and questions for jurisprudence and legal practice. Many of these are closely related to the implementation of mediation procedures. Significant attention has been paid in the legal literature to the need for mediators' legal education. Nowadays a professional lawyer usually performs the functions of a mediator. Nevertheless, in some countries the competence of mediators can be limited. In fact, such persons may be prohibited from providing any legal assistance to the parties. A direct prohibition of this kind exists in Russian legislation. To what degree is this prohibition realistic and reasonable? Different countries enjoy different approaches to the possibility of providing disputing parties with a mediator's legal assistance in addressing issues requiring legal advice or in the drafting of legal documents. Different approaches to this issue have appeared for various reasons. The absence of consensus is caused by a contradiction between the principle of mediator neutrality in the conflict resolution process and the goals of dispute settlement in which a legally competent intermediary is involved. To ensure the effectiveness of the mediation process, legislators should seek out more flexible ways of regulating procedure.

Mandatory regulation itself contradicts the spirit of 'semi-formal' alternative (extrajudicial) methods for conflict resolution. As such, the presence of direct prohibitions or severe restrictions may not only become challenging in the performance of law but such peremptory norms can also make mediation unattractive and ineffective for some particular types of dispute, such as labor disputes. The principle of preserving a mediator's neutrality is possible if exercised within the framework of a balanced approach to reasonable limits and discretionary rules for the provision of certain types of legal assistance to disputing parties.

The present article aims to consider the possibilities and limitations on a mediator's ability to provide particular types of legal assistance where the guarantee of non-discrimination between disputing parties' interests is presupposed.

Key words: alternative dispute resolution (ADR); mediation; legal assistance.

1. Introduction

The Federal Law 'On Alternative Procedures of Dispute Resolution with the Participation of a Mediator (Mediation Procedure)'[1] [hereinafter Mediation Act] was passed in the Russian Federation in 2010. It formed a new stage of development in alternative methods for dispute resolution in our country. The start of applying mediation procedures has given rise to new questions. The search for answers to these questions provides a new perspective on the place of alternative procedures within the system of protecting citizen's civil rights and freedoms.

In a broad sense mediation can be understood as a sort of negotiation technique when the efforts of contracting parties are organized and coordinated by an independent intermediary. 'Mediation' is a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.[2]

A mediator is often considered to be a person engaged exclusively in creating an environment for negotiation. There is a direct prohibition in Russian legislation on a mediator's provision of legal assistance to disputing parties. In practice, the validity and feasibility of such a strict prohibition is questionable. The impossibility of a mediator applying their legal knowledge in the course of a settlement procedure can render the negotiation process ineffective, and sometimes puts the legitimacy of the parties' final agreement into question. In this respect, the correlation between the service to be provided by a mediator and the provision of legal assistance needs special consideration.

2. Requirements for a Mediator

The Mediation Act presupposes that the activity of a mediator can be carried out both by a professional and nonprofessional. Only a university graduate above twenty

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1 Федеральный закон от 27 июля 2010 г. № 193-ФЗ « Об альтернативной процедуре урегулирования споров с участием посредника (процедуре медиации)» [Federal'nyi zakon ot 27 iyulya 2010 g. No. 193-FZ 'Ob al'ternativnoi protsedure uregulirovaniya sporov s uchastiem posrednika (protsedure mediatsii)' [Federal Law of 27 July No. 193-FZ on the Alternative Procedure of Dispute Adjustment with the Assistance of Mediator (Mediation Procedure)]].

2 Uniform Mediation Act 2001 (USA).

five who has an additional education in the area of mediation procedure can carry out professional meditation activity. Only such professional mediators are entitled to conduct mediation of disputes transferred to a court or arbitral tribunal before the mediation procedure begins. Mediation on a non-professional basis can be carried out by those over the age of eighteen, having full legal capacity and no criminal record. No additional education or special training is required for this purpose in Russia.

There are different approaches to this issue in other countries. For instance, in several states of the USA[3] rules have been established that require mediators to undergo a certified training program. Moreover, the need for mediator licensing has also been discussed.[4]

In Italy too, a mediator is not required to have a degree in law, though they must attend theoretical and practical training courses.[5] Even in Italy, however, not all experts agree with this approach.

Nowadays professional lawyers and psychologists often act as mediators in the Russian Federation. Representatives of these professions were the first to show an interest in the possibilities of mediation techniques for settling legal controversies and interpersonal conflicts. In the USA, as well as in Russia, dispute over the professional affiliation of mediators took place, though in the USA it was solely concerned with the extent to which a mediator needed to be a lawyer.[6]

3. Prohibition for a Mediator to Provide Legal Aid

In carrying out professional mediation activities, a lawyer may find the question of limits upon the use of their legal competencies arising.

According to Art. 15(6) of the Mediation Act, a mediator may not provide the parties with legal assistance. Nevertheless, a mediator does help the parties to settle the conflict between them. Here, an attempt will be made to understand to what degree this latter form of assistance varies from the legal form.

Legal assistance means the provision of professional and organized assistance to a subject of the law in order that they may fulfill their legal possibilities. It is provided in order to find a way out of a problem and to fulfill the individual interests of a client to the maximum.

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[3] *See for details*, Frederick E. Woods, *Legal Issues in the New Methods of Dispute Resolution*, in Attorneys General and New Methods of Dispute Resolution 32 (Michael G. Cochrane, ed.) (ABA 1990).

[4] *See for details*, Newton R. Russell, *Mediation: The Need and a Plan for Voluntary Certification*, 30 USF L. Rev. 613 (1995–1996).

[5] *See for details*, Francesca Cuomo Ulloa, *Chi vuol esser mediatore? Competenze e responsabilità del nuovo mediatore civile e commerciale*, in La mediazione civile alla luce della direttiva 208/52/CE 69–77 (Firenze University Press 2011).

[6] *See for details*, Richard P. Sher, *Mediation*, 41(2) The St. Louis Bar J. 2 (1994); Carrie J. Menkel-Meadov, *Is Mediation the Practice of Law?*, 14(5) Alternatives to the High Cost of Litigation 60 (1996).

In its widest sense, legal assistance maybe understood as any legal help to implement the rights, freedoms and legal interests of a client.

The procedures of mediation and legal assistance provision are brought together by their essence – that is, the provision of organized *assistance* to fulfill the legal possibilities of a subject of law. The purpose of these procedures – to solve a problem and successfully satisfy individual interests – is also a factor of their similarity. According to the Federal Law 'On Free Legal Aid Provision in the Russian Federation,'[7] [hereinafter FL No. 324-FZ] the following activities are considered to be among those constituting free legal aid:

1) legal advice in oral and written forms;

2) drafting of statements, complaints, petitions and other legal documents;

3) representation of a client's interests in courts, or before state and municipal bodies and organizations.

This list is open in nature. Its main principle is that any type of legal assistance is possible if not prohibited by law.

We may presume that every kind of legal assistance including paid legal assistance can be represented by the same types of activity.

As a practicing mediator and a practicing lawyer, therefore, one must ask oneself the question: 'To what degree is the prohibition on mediators providing legal aid reasonable and achievable (at least, as regards the aid mentioned in FL No. 324-FZ)?'

Let's consider the root of the above mentioned hesitations on the examples of particular situations.

4. Is It Provision of Legal Information or Giving Legal Advice?

It can be difficult for a professional lawyer-mediator who has heard the arguments of the disputing parties to keep him or herself from saying: 'I know how to solve this problem.' After all, mediation is the process that helps disputing parties to find a mutually acceptable way of resolving problems *on their own, individually*. As such, mediators should only create acceptable conditions for negotiation and help both parties to realize their inner interests to formulate their proposals. However, are we to understand the position of a mediator simply as that of a 'silent' supernumerary who is merely responsible for the maintenance of civilized dialogue between disputing parties? Should a mediator not influence the decision of the parties appealing to the law? Let us refer to an example.

The mediation process for a labor dispute is coming to an end. The parties have arranged to sign an agreement on the dissolution of the labor contract at issue as

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[7] Федеральный закон от 21 ноября 2011 г. № 324-ФЗ «О бесплатной юридической помощи в Российской Федерации» [*Federal'nyi zakon ot 21 noyabrya 2011 g. No. 324-FZ 'O besplatnoi yuridicheskoi pomoshchi v Rossiiskoi Federatsii'* [Federal Law of 21 November 2011 No. 324-FZ on a Free Legal Aid in the Russian Federation]].

a meditated settlement. Some pay-outs in favor of the employee are prescribed in this agreement. Disability allowance is among them. The employer had not been against this pay-out from the outset of the conflict as it is provided for by the Social Insurance Fund of the Russian Federation from the fourth day of disability. However, during the final phase of the mediated agreement the mediator notices that the amount of the allowance has not been calculated correctly. The parties do not want to 'broaden their horizons' regarding the rules for determining allowances and react to the suggestion that they might do so without enthusiasm. Both the employer and the employee consider themselves to be highly experienced accountants specializing in the pay roll of wages. At the same time, the mediator knows that the calculation is incorrect. Should they say nothing? Indeed, in such a case, incorrectly charged allowance may not be accepted by the Social Insurance Fund if the amount of the pay-out is greater than that determined by law. Alternatively, the right of the employee to receive the allowance determined by law will be violated if the pay-out is smaller than that amount.

The most important thing is that the lawyer-mediator cannot allow the disputing parties to make a partially illegal agreement. It is easy to suppose that the mediator in such a case would in fact feel obliged to break the legal prohibition. Thus, the lawyer-mediator knows the law and follows the principle of legality in their everyday life. They remind the parties that the corresponding legal norm of the Federal Law 'On the Compulsory Social Insurance against Temporal Disability due to Maternity' clarifies the essence of this principle of legality and the rules of its application in a particular case. Here, it turns out that the mediator has practically given a piece of legal advice orally.

Nevertheless, we can appeal to the logic of Recommendation No. R (98)1 of the Council of Europe Ministers Committee on family mediation issues dated the 21 January 1998. In sect. 3 of this Recommendation it is stated that 'the mediator may provide legal information but may not give legal advice.'[8] This, however, raises another question: 'What is the difference between the provision of legal information and giving legal advice?' Or should we simply understand it as an ordinary statement without any interpretation of its possibilities for the implementation of rights?

In Council of Europe Committee of Ministers Recommendation Rec (2002)10 on mediation in civil cases dated 18 September 2002, one finds no prohibition on a mediator giving legal advice. At the same time, according to sect. 6, mediators should 'inform the parties of the effect of the agreements reached and of the steps which have to be taken by one or both parties to enforce the agreement.'[9] Is it therefore possible that such information is not legal in nature? And that recommendations on 'the steps which have to be taken by one or both parties to enforce the agreement' do not constitute legal advice?

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[8] Rec (98) 1E on family mediation (1998).

[9] Rec (2002) 10 on mediation in civil matters (2002).

In s. 10 of the USA's Commercial Mediation Rules it is stated that a mediator has the right to provide the parties with oral and written recommendations on the resolution of their dispute.[10] Whether these recommendations are of a legal nature or not is not specified.

It should be noted that in the USA, alternative dispute resolution methods, are developing in a dynamic way, which presupposes that scientific research in this area is actively carried out. In the United States, instruments of informal justice have been used for a long time in separate areas of law, such as family or labor law.[11] American researchers have identified a so-called 'mediator's weighted settlement of the dispute.' Within the framework of this procedure, a neutral mediator settles the conflict or offers the parties a solution to the conflict. In such cases, the mediator's function turns out to be more significant in comparison with the situation in which he simply facilitates the negotiating process.[12]

5. Mediator's Assessment of Negotiation Perspectives

Another situation in which the actions of a mediator could be characterized as legal advice is in consultations with disputing parties on the termination of a mediation procedure, including the provision of legal justifications for the advisability of the disputing parties turning to, for example, an arbitration court to resolve a dispute. Nevertheless, under pt. 3.2 ('Fairness of the process') of the European Code of Conduct for Mediators, a mediator must inform the parties and may, if they believe it to be reasonable, terminate the mediation process if '. . . a settlement is being reached that for the mediator appears unenforceable or illegal, having regard to the circumstances of the case and the competence of the mediator for making such an assessment.'[13] As such, the mediator first evaluates the mediation in terms of its legal legitimacy and secondly informs the parties of his legal assessment of the proposed settlement. Thirdly, the mediator undertakes a legally significant action on the basis of his own assessment of the legal legitimacy of both parties' actions (*i.e.* terminates the process).

A practicing mediator specializing in labor disputes also invariably faces another delicate situation. Whilst having a private discussion with an employee party to a dispute it may become clear that this party is convinced of the rightness of their cause but is wholly inexperienced in civil procedure law. For example, an employee

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[10] Commercial Mediation Rules 1984 (AAA).

[11] Carrie J. Menkel-Meadow, *The NLRA's Legacy: Collective or Individual Dispute Resolution or Not?*, 26 ABA Journal of Labor & Employment Law 249–66 (2011).

[12] Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 Florida State L. Rev. 937 (1997).

[13] European Code of Conduct for Mediators (Self-Regulation of Mediation: A European Code of Conduct, Brussels, July 2004).

may have no understanding of the fact that he himself must prove the circumstances to which he refers. Here, a mediator acting as 'devil's advocate' may adopt the litigeous perspective envisaged by the employee. But what shall be done in such a case if it is impossible for the employee to agree upon the settlement with the employer due to their unwillingness to compromise reasonably? At the same time, a mediator must recognize that the employee's expectations of the judicial perspective on the matter are, as a rule, unrealistic. Should a mediator explain to the employee the main principles of civil procedure and the peculiarities of presenting evidence in such a matter? Following the formal interpretation of the Mediation Act they should not. However, a mediator will certainly ask questions such as: 'Do you know that you should be able to prove these circumstances to the court? Do you have any documents to confirm you statements?' Unfortunately, these questions cannot substitute a direct explanation of the procedural rules pertaining to the presentation of evidence. An employee's poor legal competence can mean that even a clear hint is unlikely to be properly understood, and the mediator would thus not be able to create an environment for fruitful discussion.

At the same time, a mediator must take into account the fact that they cannot express opinions on the potential perspective of a judge were the dispute to be examined in court. This is firstly because such an opinion would only be the mediator's own individual point of view. Secondly, estimations of this type could violate the principle of impartiality and the need for equal treatment of both parties. Nevertheless, the authors believe that this is not why the Economic Procedure Code of the Republic of Belarus, dated the 15 December 1998 introduced the prohibition on mediators concluding on perspectives of case resolution in the court.[14]

However, a mediator can suggest that the parties calculate legal costs payable and time potentially spent in court if they do not resolve their disagreement.[15]

Notably, legal provisions regarding a mediator's ability to provide legal assistance are different in some countries. For example, the Austrian Mediation Act (Law on Mediation in Civil Law Matters, Art. 16(3)) states that 'in case of necessity a mediator may provide the parties with legal advice especially from a lawyer's point of view when it is essential for the whole mediation process.'[16] Russia might also learn from the People's Mediation Law of the People's Republic of China, dated the 28 August 2010 (Art. 22), which states that 'people's intermediaries' have the right to 'explain corresponding laws.'[17]

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[14] Economic Procedural Code of the Republic of Belarus (1998).

[15] Henry Brown & Arthur Marriott, ADR Principles and Practice 143 (Sweet and Maxwell 1993).

[16] Austrian Mediation Act (Law on Mediation in Civil Law Matters) (2003).

[17] The People's Mediation Law of the People's Republic of China (2010).

6. Mediator Assistance in Drafting Legal Documents

With regard to the provision of legal assistance by way of drafting statements, complaints, petitions and other legal documents, the following is discernible: mediators certainly do not draft statements, complaints or petitions; however, the situation as regards 'other types of legal documents' is quite different and much more complicated. It goes without saying that when a mediator begins their work they offer both parties the ability to sign an agreement on carrying out the mediation process. Does this agreement have a legal status? Should we treat this agreement as a legal document? The authors believe that the answers to these questions is 'yes.' This is because this document both generates legal consequences and lays down the rules of performance for the parties. So who should draft this agreement? Definitely a mediator. Furthermore such a document cannot be a typical agreement because the parties have the right to establish their own procedure under Art. 11 of the Mediation Act.

The next question that arises is who should draft the final mediation agreement? How often can the parties formulate and execute such an agreement with their own powers? This question is likely to be somewhat rhetorical. Perhaps one should advise them to see a lawyer. However, there are two new obstacles to such an 'ideal' solution. First of all, mediation is supposed to be a cheap process for dispute resolution and drafting in another lawyer can make mediation even more expensive than expected litigation costs. Secondly, the introduction of a new person into mediation proceedings can break an agreement already reached but yet to be executed. A practicing mediator knows that the appearance of an advocate who is continually focused on wining at any cost can disturb 'a fragile peace' and destroy the balance of interests created by a mediator. Taking these factors into consideration, mediator-lawyers can provide legal help to both parties in executing the agreement using their legal competence as effectively as possible.

A final mediation settlement in a labor dispute can differ greatly from a classic settlement agreement in a lawsuit. Such settlement can either entail an extra agreement to a labor contract or an order made by the employer in accordance with the employee's application. Predictably, employers running mainly small- to medium-sized businesses use mediation services in these circumstances. As a rule, such employers do not have a lawyer or a highly qualified personnel officer on their staff. Therefore, when a settlement is likely to be reached in labor dispute negotiations, the parties ask a mediator to advise on the form of the future settlement. Under a literal interpretation of law a mediator should refuse such a request! But was is the main purpose their request? The parties had hoped for real help in their dispute resolution. Indeed, the mediator has organized the negotiations, helped to realize the parties inner interests and to reach a mutually beneficial settlement, albeit an oral one. So what is then to be done? It is quite natural that the mediator also draws up a final document.

The above mentioned Austrian Mediation Act (Law on Mediation in Civil Law Matters) states that a mediator shall 'in writing record the result of the mediation as well as the steps necessary for the implementation' on the request of the parties (Art. 17(2)).

Moreover, it must be remembered that the mediator is also involved in the written recording of the results of the mediation from the point of ensuring that it complies with the law. It is evident that the parties are responsible for the decision they have made. However, can a mediator-lawyer keep away from the problem of ensuring the resulting agreement's accordance with the law? We can answer this question referring to legislation in a number of other countries. For example, the Law on Mediation (Law No. 134-XVI) of the Republic of Moldova on mediation, dated the 14 June 2007, contains the following proposition (Art. 8): 'when mediation culminates with conciliation resulting in settlement it is necessary to do everything possible to exclude from it any content that contradicts the law and morals.' If the legal competence of a mediator is inadequate (Art. 29) he has the right to 'ask for the decision of an expert without specifying the parties.'[18]

7. The Possibility Conflict of Interest and Professional Ethics Issues

It is clear that a mediator cannot act for a citizen or represent their interests in the courts, or before state or municipal bodies and organizations. A mediator cannot represent the interests of any party in a listed organization or body in respect of the dispute he is resolving. This matter is in full harmony with the principles of confidentiality, impartiality and the independence of the mediator (Art. 3 of the Mediation Act). However, does it mean that a mediator cannot act as a lawyer and represent the parties' interests in other disputes after the mediation procedure is complete?

The answer to this question is ambiguous. Indeed, it becomes even more interesting where the disputing parties chose a mediator (before any court proceedings) who has already provided legal services to one of the parties to the dispute, including representing their interests before state bodies, and where this fact is well-known to both sides and the mediator himself has not concealed it. Here, the mediator may have authority from both sides, who only this mediator to help them in resolving their conflict, and his previous cooperation with one of the parties may have been unrelated to the present dispute. In such a scenario one is led to ask, what would dominate? The principles of voluntarism and cooperation or the principles of impartiality and objectivity of a mediator? In such a situation the ability

[18] Закон Республики Молдова от 14 июня 2007 г. № 134-XVI «О медиации» [*Zakon Respubliki Moldova ot 14 iyunya 2007 g. No. 134-XVI 'O mediatsii'* [Law of the Republic of Moldova on Mediation (adopted on July 14, 2007 No 134-XVI)]].

of the mediator to adhere to latter principle could be questioned, though nobody would be able to prove the true absence of neutrality and impartiality.

In the USA the norms of conduct for mediators include rules on conflict of interest, which require that they be revealed by the mediator. After disclosure, if all parties agree, the mediator may then proceed with the mediation.[19]

Problems of compliance with professional ethics, the principle of impartiality, and preventing conflicts of interest are discussed in professional literature, but more often concerning situations closely connected with advocacy and notarial functions. Some aspects of this discussion may be helpful in justifying the possibility of mediators providing legal assistance to parties without infringing on principle.

Herve Claire in his work 'Notaries and mediation,' points out that 'the role of a notary is to be the lawyer who is acting for the business but not for his client. Recommendations shall be provided by notary in the common interests of both parties: the seller and the buyer, the creditor and the borrower, all heirs in the case of inheritance, different participants in the economic society.'[20] Nevertheless, one should underline the fact that a notary in foreign countries acts both as a lawyer and a mediator.

In this way, it turns out that a mediator does in practice provide some types of legal aid. Moreover, many lawyers nowadays express the opinion that a mediator should be a professional lawyer who has passed practical training in mediation in order to make the results of mediation procedures more efficient and to prevent them from contradicting the law. However, this view represents another extreme. In the opinion of the authors, everything depends on the circumstances of the dispute in question. Indeed, it appears that the participation of a mediator-psychologist would be more insightful and effective in a family mediation.

The necessity that a practitioner be acknowledged as a specialist who is legally qualified to provide legal assistance (professional or qualified) requires such a person to have a professional legal education confirmed by a corresponding diploma. Why should the right to provide legal assistance not then be granted to mediators who have received a legal education? We believe that the only serious obstacle to this is the principle of impartiality and the independence of the lawyer. Taking into consideration the spirit of the law and the methodology of mediation procedures, mediators may not be allowed to provide unilateral aid (including legal assistance). It is obvious that a mediator is strictly prohibited from providing legal help to one of the parties to a dispute *with a view to giving a more favorable outcome to this side in the dispute*. However, why should a mediator not inform both parties about legal norms

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19 American Bar Association & American Arbitration Association & Association for Conflict Resolution, *Model Standards of Conduct for Mediators* (2005), <http://www.mediate.com/articles/model_standards_of_conflict.cfm> (accessed June 18, 2014).

20 Herve Claire, *Notaries and Mediation*, <http://mosmediator.narod.ru/publikatsii/erve_kler_ notariat_i_mediatsiya> (accessed September 2013).

that are relevant to the issue at hand, for instance, the probable legal consequences of their actions? It is important to note that such a mediator should inform but not give his own interpretation or anticipation of the law. Why should a mediator behave as if their help has nothing to do with legal aid when they help clients to draft a mediation agreement? Here, a mediator-lawyer's legal knowledge as well as their professional experience, is overlooked during the period of mediation.

8. Conclusion

To conclude, when a legislator takes on the responsibility of resolving 'informal' ADR issues, they are recommended to remember that where the mediation process is transformed into a 'semi-formal' one – that is, partially resolved because a significant part of the remaining procedure is beyond state control – they cannot ensure an absolute implementation of any procedural prohibitions imposed. As mediation is characterized by a high degree of privacy, an expectation of the fulfillment of prohibition-like norms seems unrealistic.

It seems that the statutory ban on the provision of legal assistance by a mediator in its present day form is redundant. In this respect, it is probably important to determine quite clearly that:

1) a mediator is not allowed to provide legal aid to any disputing party, which is aimed at resolving the conflict with an outcome that is more favorable for one of the parties to the dispute;

2) if they are in possession of a university education, a mediator is entitled to:

– inform both parties about compliance with legal regulations regarding the dispute at hand and about the application of such regulations, including judicial practice;

– help with drafting an agreement to a conduct mediation process resulting in a mediation settlement.

It should be clearly specified in the law that 'consultative or any other kind of aid' cannot be provided by a mediator (Art. 15(6) of the Mediation Act) because the process of mediation is a type of aid in itself. At the same time, a mediator should inform the participating parties about relevant principles and the order of the procedure, as well as answer questions on this topic.

It should also be noted that the use of mediation to resolve certain disputes may have peculiar features, as in the above mentioned examples relating to labor disputes. In this regard, special rules for mediation to resolve labor disputes should be established in labor legislation as exceptions to the general rules relating to mediation. The adoption of the Law on Mediation in Russia has resulted in changes to the Civil Procedure Code, but has not led to the necessary amendments on this point in the Labor Code.

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BOOK REVIEW NOTES

CIVIL LITIGATION IN CHINA AND EUROPE[1]

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'Unfortunately, thoroughness and quality do not necessarily go hand in hand with efficiency, timeliness and low costs and, therefore, it is the task of the lawmaker, the Judiciary and also the parties and their counsel to balance the various interests involved in the civil action.'[2] In the recently published book *Civil Litigation in China and Europe: Essays on the Role of the Judge and the Parties*, the editors C.H. (Remco) van Rhee and Fu Yulin, both knowledgeable scholars in civil justice and comparative civil procedure, put together a coherent collection of over two dozen essays dealing with (such) 'case management' issues in Chinese and examined European civil justice systems. 'Case management,' intended to balance out efficiency, timeliness and costs with a view to achieving desired quality standards of legal protection, is the basis of nearly all recent reforms of the civil procedure. In the context of the reviewed book, this concept tends to be applied in its broader sense: as the 'umbrella' term pertaining to all the measures and procedures aimed at overcoming the problems of court delays, inefficiency, lack of quality in adjudication in civil justice, and mounting case backlogs. The term includes not only the prescribed procedural rules aimed at rendering adjudication in civil cases before state courts more efficient, but also its application in court practice. In addition, especially in some jurisdictions, the term also tends to pertain to thorough control of the work of judges and a statistical analysis of their productivity. All these aspects are relevant for assessing the efficiency of a particular civil justice system in coping with growing caseloads and quality demands from the perspective of the rule of law.

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[1] Reviewed book: Civil Litigation in China and Europe: Essays on the Role of the Judge and the Parties (= 31 Ius Gentium: Comparative Perspectives on Law and Justice) (C.H. (Remco) van Rhee & Fu Yulin, eds.) (Springer 2014).

[2] C.H. (Remco) van Rhee & Fu Yulin, *The Role of the Judge and the Parties in Civil Litigation in China and Europe: An Introduction*, in Civil Litigation in China and Europe, *supra* n. 1, at 1.

The predominant theme of the collection *Civil Litigation in China and Europe* is the role of the judge and the parties in 'case management' within civil justice. The theme is not only theoretically challenging, but also has a considerable practical significance. A particular value of the book lies in the fact that it considers both components. Theoretical outlooks are interwoven with practical examples, often conveyed in the form of anecdotes told in a journalistic style. These sometimes provide the necessary context by offering information on steps taken by the legislature or rulings made by the courts in particular jurisdictions. Apart from the fact that it deals with a topical issue, the book has a broad geographic reach in its comparative outlook. The content is, however, not clearly divided into the two blocks – China and Europe – as the title might suggest, but rather clearly presents the special traits of particular civil procedure rules in as many as eight European countries (Austria, Germany, Croatia, Italy, The Netherlands, Romania, England & Wales, and France) and one Asian country (China, with a special part dedicated to Hong Kong). Despite certain similarities, the various legal traditions of Europe have produced different rules of civil justice. On the other hand, the Chinese legal system is relatively unknown to European lawyers and jurists, mainly due to the language barrier. It seems, however, that there is a growing necessity to become acquainted with this system for the purpose of economic co-operation. Consequently, it is hardly surprising that the book has been published both in Europe and in China, working towards mutual understanding and providing a critical look at the different systems of civil procedure. The book was first published in 2013 in China in the Chinese language in order to acquaint Chinese lawyers and jurists with the peculiarities of particular European legal systems. The English version was soon published in Europe in early 2014 by *Springer*. It represents volume 31 of the publisher's series *Ius Gentium: Comparative Perspectives on Law and Justice*, which is justified by the relevance of its theme, its structure and its comparative approach to the subject matter. The comparative perspective in the book facilitates not only a better understanding of foreign legal orders, but also points to systemic advantages and drawbacks of the domestic legal order. The comparison is necessary in order to detect solutions that were used as models in other systems, but also for recognising original solutions. Numerous historical, cultural, social and political features of national rules of civil procedural law remain undetected unless placed within the context of space and time. The approach taken in this book, although sometimes neglected, is of great value to lawyers and jurists.

The book is structurally divided into seventeen chapters, organised (apart from the introductory chapter) into eight main parts. Each main part contains between one and three essays (chapters) in which authors outline their respective civil justice systems from their own points of view. The introductory essay in each part represents, in fact, a general analysis of the system under consideration. In spite of the fact that each author takes a different approach to the topic, the topical issues of all essays

are mutually comparable and share the common concept of this collection: a focus on the powers of the court to actively manage the progress of a civil case and the manner and extent to which this is accomplished. Each introductory essay includes an appendix featuring facts and figures relevant to the powers of the judge and the parties in civil litigation. This data, in fact, answers substantially identical questions for each jurisdiction, pertaining to circumstances such as the budget allocated to all courts, the number of judges, non-judge staff and *Rechtspfleger*, but also the number of litigated civil cases and administrative law cases in the courts. Some of the data is analysed in more detail, and some mentioned only incidentally. However, provided that they are correctly interpreted and comparatively analysed in accordance with the laws of statistics, they can provide the basis for pertinent further analyses and conclusions. After the general analysis of the civil justice system, each jurisdiction (with the exception of Italy and Romania) is further presented in more detail in one or two additional essays with a narrower focus. These often pertain to various attempts to settle cases in ways other than litigation, ie to alternative types of dispute resolution (*e.g.*, German 'mediation judges' and the Chinese and Dutch approaches to mediation), or to the role of specialised courts (*e.g.*, the Croatian commercial courts). Some essays also include appendices containing results of empirical studies (data on civil cases in selected courts) or research questionnaires of the author relevant for particular aspects of the national regulation of civil litigation.

The above outlined structure of the book follows an organisation by theme. The first two parts are dedicated to China, with the first part covering the civil justice system of mainland China, and the second the one of Hong Kong. Their legal orders are presented separately as they belong to different cultural and legal traditions. The third part deals with the civil justice systems of Austria and Germany which, although belonging to the same tradition, still slightly differ in certain aspects. The Croatian system, close to the latter two in terms of set up (but, unfortunately, not in terms of efficiency), is dealt with in the fourth part. The Italian, Dutch and Romanian approaches to surmounting the current problems of civil justice are the focus of the fifth, sixth and seventh parts respectively. The eighth part is separated from the rest and found under the heading 'Annex,' as it contains two essays concerning 'case management' in England & Wales, in France, which have a considerably different structure compared to the first fifteen chapters. Although each of the seventeen essays could function on its own, the collection as a whole offers an excellent insight into the various 'case management' techniques in the set of different legal traditions and civil justice systems: from pre-action proceedings and the compulsory order for payment procedure, through strict time-limits and milestone dates, to the provision of different procedural tracks for different types of cases.

The first, introductory chapter was written by the editors C.H. (Remco) van Rhee (Professor of Comparative Civil Procedure and European Legal History at Maastricht University) and Fu Yulin (Professor of Law at Peking University), who are not only

prominent procedural lawyers in their respective jurisdictions, but also active participants and advocates of the development of legal doctrine and practice on the international level. The introductory chapter is a synthetic study of sorts and indicates the focal points and primary actors (the lawmakers, the judiciary, and the litigants and their counsel) of the chapters that follow. Although these actors have different roles in providing efficient and quality legal protection, the ultimate results depend on their mutual coordination. First, the lawmaker must provide procedural rules guaranteeing thorough and quality legal protection, at the same time preventing parties from utilising various delaying tactics thus adversely affecting efficiency and cost-effectiveness of legal protection. The judiciary must, on the other hand, apply these rules with consistency, balancing timeliness and efficiency with thoroughness and quality in adjudication. Finally, the litigants and their counsel should contribute to said features of legal protection by acting within the prescribed framework.

It seems that mainland China and Europe (including Hong Kong, which has a traditional connection to the English common-law type of procedure) took different approaches to the recent amendments to their civil procedure legislation and to overcoming similar problems in balancing growing caseloads and quality of adjudication. This is hardly surprising considering that mainland China uses an inquisitorial procedure, in which the parties play a relatively minor role, while European civil procedural systems tend to have an adversarial character with a more or less active role of the parties. However, in recent times quite the opposite tendencies have been noted. While mainland China's system is gradually adopting some features of an adversarial system, in Europe (and Hong Kong) there is a tendency to increase the powers of the judge in order to establish shared responsibility of the judge and the parties for the proper conduct of civil cases. National solutions, however, tend to vary and are more or less successful at finding an acceptable balance between the powers of the judge and the parties in the conduct of civil litigation. Can more efficient models be successfully transferred into other procedural systems and litigation practices? Not unless the different historical, economic and social conditions in these jurisdictions are taken into account. Understanding these conditions that provides the legislator with an informed choice regarding the adoption or rejection of particular procedural models. Although the final decision is left to the legislator, the book abounds in pertinent information concerning these issues.

1. Civil Litigation in China

Efficiency at the Expense of Quality is the title of the first of the three essays dedicated to the civil justice system of mainland China. The authors Wang Yaxin (Professor of Law at Tsinghua University Law School) and Fu Yulin (book editor) try to explain the paradox of 'high efficiency' but 'low legitimacy' within the Chinese civil justice system. The Chinese model, presented here in detail as an example of an actual

first instance commercial case, seems to prove highly efficient in resolving a large number of cases in a short period of time. Its drawback, on the other hand, is the fact that judgments often suffer from a lack of convincing grounds and insufficient public trust.[3] It is the authors' belief that these characteristics of Chinese civil justice are a result of the relatively recent intensive changes in the Chinese society, and especially of the rapid growth of Chinese economy. The authors conclude that 'the current moment in time might be the turning point for Chinese civil justice to slow down its pace, improve its legitimacy and ultimately gain public confidence.'[4] In this context, 'case management' is of paramount importance, and the other two essays in this part offer their own critical analyses of 'case management.' The authors are Cai Yanmin (Professor of Law at Sun Yat-sen University) and Wang Fuhua (Professor of Law at Law School of Shanghai Jiaotong University).

In her essay Cai Yanmin provides a vivid outlook on the implementation of case quality evaluation index mechanisms and questions whether their use is justified in an attempt to increase efficiency and enhance the quality of adjudication. Opinions on the efficiency of these mechanisms vary. Although they are receiving high praise from the judges (at least publicly) and the mass media, the general public and the legal profession think otherwise. Here are a few examples. In order to increase public participation in judicial adjudication and promote judicial fairness, the novelty of people's assessors' joining the collegial panel to hear cases has been introduced. The high jury trial rate at first instance is considered by some as proof of enhanced judicial fairness. However, things look different beneath the surface. According to the author, it is, in fact, customary that, from the beginning to the end of the proceedings, no assessor and no judge of the panel can be seen in court, except for the presiding judge. Their names are nonetheless printed on the judgment and calculated into the jury trial rate. The calculation of the rate of court-annexed mediation is carried out in a similar way. Mediation, although *de iure* voluntary, is *de facto* compulsory. In fact, inasmuch as the evaluation of the work of judges takes into account, among other things, the number of mediations, this encourages, to put it mildly, the parties to mediate. 'The parties that understand the judge's language are forced to cooperate with him and to accept mediation.'[5] It is interesting to look at the closing rate of cases within the legal time limits. While many civil justice systems suffer from lengthy procedures, the Chinese one is too quick. In 2010 as many as 95% of all first instance cases were closed within the relevant time limits: within 6 months after the case has been accepted by the court in the ordinary procedure and within a period

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[3] Wang Yaxin & Fu Yulin, *Efficiency at the Expense of Quality*, in Civil Litigation in China and Europe, *supra* n. 1, at 34.

[4] *Id.* at 31.

[5] Cai Yanmin, *Case Management in China's Civil Justice System*, in Civil Litigation in China and Europe, *supra* n. 1, at 46.

of 3 months in summary proceedings (70–80% of cases in local courts). This may sound terrific, but there is another side of the coin. There are cases (a negligible number in absolute terms) which are greatly delayed due to internal and external influences on the justice system (such as power dynamics, acquaintanceship, and corruption). For all these reasons the Chinese society perceives the judiciary as 'fast, of poor quality and lacking credibility.'[6] All this sheds different light on the seemingly impressive numbers relating to the efficiency of the Chinese judiciary.

'Case management' in China is peculiar in many ways. It is for this reason that Wang Fuhua chooses to refer to it as 'trial management.' The author in fact advocates a transformation of trial management into 'case management,' as it is known in some European jurisdictions. Trial management is, in fact, organised in a very similar fashion to Weber's model of a bureaucratic system based on a strict hierarchy. This organisation of the judicial power is questionable, particularly if viewed from the perspective of Western European countries. Independence of individual judges is not guaranteed. In trial management, the emphasis is on controlling the judges through administrative bodies. As a record of each case is entered in the court's computer system, senior judges can at any time monitor all decisions made by the judge handling the case and provide him with direction where necessary. However, even the case files that have already been closed are subject to inspection. This is carried out by a permanent institution or other specialised personnel in order to evaluate the quality of the work done by each judge. This is another typical feature of the Chinese civil justice system.

The piling up of cases and systemic judicial inactivity burdened the Hong Kong civil justice system. It is for this reason that Hong Kong undertook the Civil Justice Reform [hereinafter CJR] in 2009, using the English Woolf Reforms as a model. It should be noted that Hong Kong, for historical reasons, has a common-law type of procedure based on English law. The essay written by Peter C.H. Chan (Teaching Fellow of the School of Law, City University of Hong Kong), David Chan (legal practitioner, member of the Hong Kong Bar), and Chen Lei (Assistant Professor, School of Law, City University of Hong Kong) deals with the effects of the implementation of the CJR on particular aspects of civil litigation, especially on the powers of the judge in case management. Prior to CJR, the Hong Kong civil justice system was adversarial and the judge played a passive role. Undue delays which had occurred as a by-product of this kind of system were some of the principal reasons behind the reform. Although the parties are still actively involved in a civil lawsuit, ever since the CJR the court has 'greater discretionary powers to enforce procedural deadlines, limit discovery and administer the litigation timetable.'[7] Use of case management powers depends on the discretionary assessment of the judge himself. The courts still tend to make great use of these powers: unlike

6 Yanmin, *supra* n. 5, at 55.

7 Peter C.H. Chan et al., *China: Hong Kong. Selective Adoption of the English Woolf Reforms*, in Civil Litigation in China and Europe, *supra* n. 1, at 73.

in the former system, the judge now actively participates in the development of the procedure. In addition, the litigant is entitled to appeal against the decision if he believes that the court failed to exercise its discretionary power, to his detriment, or that it abused that power. The essay also includes an overview of the ordinary civil lawsuit in Hong Kong, referring to several concrete cases. Most of the references are substantiated by research results and quotations from relevant literature.

The impact of CJR on alternative dispute resolution techniques (mainly arbitration, adjudication and mediation) from the Hong Kong perspective is the focus of the essay by Christopher To (international arbitrator, adjudicator and mediator from Hong Kong). 'Under the CJR regime, the court does have an overriding duty to encourage the parties to "facilitate settlement of dispute" in appropriate cases.'[8] Although this may lead to the conclusion that mediation under the CJR regime is entirely voluntary, the cost sanction exerts pressure on parties to attempt mediation. In other words, much like in mainland China, mediation has become a *de facto* mandatory procedure. The court is entitled to fine the party which refuses to take part in mediation without good reason if the other party has opted for it. Nevertheless, it would be wrong to deny the effect of the CJR on the successful development of ADR in Hong Kong.

2. Civil Litigation in Europe

A History of Successful Reforms, *Plus Ça Change, Plus C'est La Même Chose* and *Civil Procedure in Crisis* are some of the creative titles of the essays illustrating the diversity of European civil justice systems. The essay entitled *A History of Successful Reforms* presents the Austrian and German models of civil litigation. From the historical perspective, these models had different origins: the Austrian model was inspired by liberalism, and the German one with the inquisitorial Prussian system. However, in recent times an increasing number of similarities have been noticed. The author Andrea Wall (Research Assistant at University of Zurich, Switzerland) concludes that both systems '. . . work quite well, the extent of procedural delay is relatively small and corruption is negligible.'[9] In the context of successful reduction of procedural delay and overcoming problems with backlogs, of particular interest is the Austrian model of automated data collection that monitors the input and output of actions in order to measure the efficiency of individual judges. Dealing with complaints of citizens against the justice system in Austria is in the hands of two mutually independent institutions. On the one hand, the powers of the Ombudsman Board have been extended to include the power to file a request for fixing a time-limit itself

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[8] Christopher To, *Impact of Civil Justice Reform on Alternative Dispute Resolution: A Hong Kong Perspective*, in Civil Litigation in China and Europe, *supra* n. 1, at 133.

[9] Andrea Wall, *Austria & Germany: A History of Successful Reforms*, in Civil Litigation in China and Europe, *supra* n. 1, at 165.

or suggest supervisory measures. On the other hand, nearly identical tasks have been entrusted with the so-called *Justiz-Ombudsstellen*, who are intended to carry out a sort of internal control of the work of courts. *Justiz-Ombudsstellen* are composed of regular judges who have direct access to information about proceedings and it would seem, based on the experience to date, that they are successfully contributing to the efficiency of the Austrian judiciary.

The Austrian model of cooperation between judges and the parties rests on the foundations of the Austrian Code of Civil Procedure drafted by Franz Klein. Irmgard Griss (Former President of the Austrian Supreme Judicial Court) concludes in his essay that, '[t]he cornerstones of this procedural system are the managerial powers of the judge. The judge's strong position is counterbalanced by guarantees of the judge's independence and impartiality, and by safeguards for the parties' right to a fair trial.'[10] However, successful realisation of this system largely depends on individual qualities of the judge. The author proposes several useful guiding principles to be applied by judges.

The phenomenon of 'mediation judges' in Germany is the topic of the essay by Burkhard Hess (Director of the Max Planck Institute Luxembourg). National development of the German judicial mediation from a kind of a grassroots movement of judges to an open conflict of interests of judges and lawyers got its final chapter in the compromise provided by the EU Directive on Mediation.

Klein's model of civil litigation is also found as the basis of the Croatian civil justice system, even though it never completely caught on in practice. It seems that some recent legislative transplants in the Croatian social and political environment did not yield the desired results. The frequency of reforms is inversely proportional to their success rate. Does that mean that there is a lack of coherent and comprehensive vision in resolving problems? The title of the contribution by Alan Uzelac (Professor of Law, University of Zagreb) *Omnipotent Judges as the Cause of Procedural Inefficiency and Impotence* may seem paradoxical at first glance. However, the author makes sure it is substantiated. '. . . [T]he self-understanding of the Judiciary and legal scholars regarding the adversarial nature of civil proceedings may be questioned in the light of the considerable powers exercised by the judges in the course of the proceedings (or, better, in the light of the considerable passivity of the parties and their lawyers).'[11] Compared to other civil justice systems, judicial inquisitorial powers and duties of Croatian judges are considerable; not necessarily as required by legislation as by procedural routines and practices. On the other hand, despite the large number of (omnipotent) judges, the Croatian judiciary lacks efficiency and is nearly impotent. Any attempt at reform made by the legislator is faced with two greatest challenges

[10] Irmgard Griss, *The Austrian Model of Cooperation Between Judges and the Parties*, in Civil Litigation in China and Europe, *supra* n. 1, at 179.

[11] Alan Uzelac, *Croatia*: *Omnipotent Judges as the Cause of Procedural Inefficiency and Impotence*, in Civil Litigation in China and Europe, *supra* n. 1, at 203.

of the Croatian civil justice system: on the one hand, the resolution of the backlog of cases and, on the other, the length of the proceedings. These problems are not only a great burden of the Croatian judiciary; they also presented a serious political problem in the context of accession to the EU. However, partial interventions (abolishing the right to take evidence *ex officio*, the promotion of ADR techniques, and the rule on preclusion) are not producing desired effects.

The same problems afflicting the Croatian judiciary are the topic of the contribution by Mario Vukelić (President of the High Commercial Court of the Republic of Croatia). In his essay, Vukelić looks at the work of the commercial courts in Croatia, which are facing serious problems brought about by the economic crisis (illiquidity and insolvency of companies, forced collection, *etc.*).

Italian civil procedure is a civil procedure in crisis, according to Elisabetta Silvestri (Associate Professor of Law at University of Pavia Law School). Although the Italian Code of Civil Procedure provides for three main types of civil proceedings (the ordinary proceeding, the summary proceeding, the proceeding in labour cases), none of them function really well in practice. Frequent reforms, discrepancies between the law on the books and the law in action, and in particular the excessive length of adjudication are only some of the troubles of the Italian civil justice system. (Interesting parallels can be drawn with the situation in Croatia.) 'Lawmakers had great expectations for the summary proceeding, which was presented as the key to a true Copernican revolution in Italian civil justice, based . . . on the principle of proportionality, with a view to establishing a flexible and deformalised procedure for "simple" cases . . .'[12] A combination of numerous, typically Italian reasons cause reforms to fail in practice. Among the reforms is a failed attempt to reduce the courts' caseload by mediation and ADR. The Italians are generally disinclined to mediation, and the rules making mediation mandatory were subject of review by the Constitutional Court. The Court stated (although only on the Court's website) that mandatory mediation was found to be unconstitutional, but, interestingly enough, due to a violation that occurred in the legislative process. 'Maybe this is too negative an outlook on Italy and her troubled justice system, but if the popular saying "after you hit bottom, you have nowhere to go but up" holds true, this author, feeling that the bottom is not far away, can hope that the ascent will begin soon.'[13]

If some countries can be criticised for rushing into reforms of the civil procedure, often unsuccessful, this most certainly cannot be said for the Netherlands. It firmly advocates a no-nonsense approach to civil procedure reform and, according to the data presented in the contribution by C.H. (Remco) van Rhee (editor) and Remme Verkerk (law practitioner from Rotterdam), is very successful at it. A no-nonsense approach to civil procedure reform pertains to the application of statistical data and

[12] Elisabetta Silvestri, *Italy: Civil Procedure in Crisis*, in Civil Litigation in China and Europe, *supra* n. 1, at 245.

[13] *Id.* at 252.

results of empirical research. On the basis of this data several important structural reforms were carried out, reshaping the Dutch civil justice system. The court system was rationalised, not only in terms of the number of courts (*e.g.*, the number of District Courts was reduced from 19 to 11), but also in the adjustment of the number of court staff. Statistical calculations were made as to how many 'standard minutes' were necessary for each 'product' of the Judiciary (*e.g.*, a contested labour case equals 385 'standard minutes' of judge time). In order to assist individual courts in reducing backlogs, a so-called 'flying brigade' was established. However, truth be told, the principal reason behind the efficiency of the Dutch civil justice system is a disciplined cooperation of everybody involved – the parties, the judges and the lawyers – although the boundaries of their roles are not defined in the law in great detail.

Thorough empirical and comparative research lies at the bottom of the approach to mediation advocated by Rob Jagtenberg (Senior Fellow of Erasmus School of Law, Rotterdam). In his essay, Jagtenberg raises the question whether mediation is a desirable case management tool for the courts, *i.e.*, can mediation be made mandatory. He further asks what criteria should be used to determine whether a case should be allocated to private mediation or to public adjudication? 'Is the standard how parties feel themselves, that is, their private customer satisfaction, and their truth? Or should the Treasury, as the taxpayers' watchdog in a country, be the standard?'[14] It seems that finding the answer to this question is yet another challenge to be faced by legal doctrine.

It is not a good thing if the more something changes the more it stays the same. Especially if the 'something' is civil procedure rules. Unfortunately, this seems to be the case in Romania (although, in other places as well), claim Serban S. Vacarelu and Adela Olga Ognean (both Researchers at Maastricht University, Faculty of Law) in their essay entitled *Plus Ça Change, Plus C'est La Même Chose*. Civil procedure in Romania is in a continuous state of reforms, which always seem to accentuate the active role of the judge with a view to increasing efficiency of the justice system and avoiding undue delays. It seems, though, according to statistical data, that the system is not that inefficient to begin with (80% of first-instance procedure last less than 1 year). Shouldn't the legislator then change his paradigm of thought and focus on building trust in the judicial authorities damaged by political meddling and corruption affairs? 'By allowing greater participation of the parties and providing for restraint on the part of the court, the litigants would be more likely to accept an unfavourable outcome of the adjudication process and their sentiments toward the way the courts operate would be enhanced.'[15] The Romanian experience only proves that the problems of the justice systems in the

[14] Rob Jagtenberg, *Mediation: A Desirable Case Management Tool for the Courts?*, in Civil Litigation in China and Europe, *supra* n. 1, at 292.

[15] Serban S. Vacarelu & Adela O. Ognean, *Romania: Procedural Reforms: Plus Ça Change, Plus C'est La Même Chose*, in Civil Litigation in China and Europe, *supra* n. 1, at 318.

countries of Europe, although similar, each have their own peculiarities. The authors contribute to the thesis that a precise detection of problems to be solved is the key to successful reforms. The Romanian legislator, it seems, has yet to learn this lesson.

The scope of the term 'case management' in England & Wales is analysed by Neil Andrews (Professor of Private Law and Civil Justice, Cambridge University Faculty of Law). English courts have considerable 'case management' powers. It is thought that the primary tasks of the court are to precisely define the focus of the case, prevent procedural indiscipline and unnecessary expenses, and control the speed of the proceedings. All this will make it possible for the parties to be referred to mediation in time, and for judicial resources to be appropriately allocated. It goes without saying that this also requires a certain amount of judicial experience, but also good preparation (pre-hearing reading) not only by judges, but also by lawyers. Trust in the work of courts will be ensured by consistent practice which can be upheld by the Court of Appeal.

The situation is slightly different with 'case management' in France. In his contribution, Emmanuel Jeuland (Professor of Law, Sorbonne Law School, University of Paris I Pantheon Sorbonne) discusses the role of the French case management judge. Although relatively large, case management powers are rarely used. The author distinguishes between 'conventional case management' (whose main function is scheduling) and 'intellectual case management,' which is more focused on the merits of the case. A good judiciary will devise mechanisms for both types of 'case management.' Strictly defined deadlines and communication using modern technologies will, therefore, not suffice. The judge must have powers to examine the case, thoroughly review the case, even *sua sponte*, and, according to the author, 'could acquire new powers to decide on admissibility, the exclusive effect of *res iudicata* and the interest to bring an action.'[16]

The book *Civil Litigation in China and Europe* is not only a study addressing the role of the judge and the parties in civil litigation, aiming to fill the gap in the existing literature (as modestly put by the publisher on the cover), but a multilayered overview of civil justice systems in China and Europe. For this reason it will most certainly find many admirers among both legal theorists and practitioners alike. Viewing matters outside the closed perspective of national law and jurisprudence doctrine is becoming a necessity.

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[16] Emmanuel Jeuland, *Case Management in France*, in Civil Litigation in China and Europe, *supra* n. 1, at 357.

CONFERENCES REVIEW NOTES

THE RESOLUTION OF DISPUTES AT THE LONDON COURT OF INTERNATIONAL ARBITRATION (LCIA): PRACTICAL ASPECTS (Moscow, March 21, 2014)

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This note is an overview of the seminar organized on March 21, 2014 in Moscow. During the discussion participants considered a draft of the new LCIA Rules, the practical aspects of the submission of applications and consideration of cases at the LCIA, the difficulties arising in the enforcement of the arbitration agreements and awards in the Russian Federation, as well as support, which the Russian courts are able to provide to the international arbitration. The summary of the issues discussed is below.

1. Introduction to the LCIA and the Final Draft of the LCIA's New Rules

The LCIA is well-known to Russian practitioners and does not require a special introduction, as the LCIA's internal statistics indicate that 25–30% of all our caseload involve parties based in Russia or other CIS countries. Please note that this figure includes cases involving companies incorporated in the BVI, Cyprus or other popular

off-shore jurisdictions, and it is likely that a large percentage of such companies have either Russian or CIS-based beneficial owners.

We would like to present a brief update on the LCIA's current caseload:

- the LCIA has remained busy: we have seen doubling of referrals between 1997 and 2007, steady increase in referrals from 2010 to 2012, a new all-time high in 2013; and
- the LCIA has become truly international: in 2008 we opened a centre in Dubai in cooperation with the DIFC, in 2010 – in India, in 2011 – in Mauritius, and in May 2013 – a representative office in Seoul.

The LCIA's advantages are as follows:

- reputation and efficient yet 'light touch' approach to the administration of the cases referred to the LCIA;
- cost efficiency as the LCIA's administrative charges and arbitrators' fees are *not* based on the sums in dispute, but on time spent by arbitrators and the LCIA's secretariat, which may be very attractive for the medium- and high-value disputes;
- Russian speaking staff at the LCIA's Secretariat and arbitrators, who speak fluent Russian and/or admitted to practice in Russia on the LCIA's database; and
- the LCIA is located in an arbitration-friendly jurisdiction, therefore, where the parties choose London as the seat of their arbitration, they can rely on the English Arbitration Act 1996 and the English Courts.

The discussion then moved to the recently published final draft of the LCIA's new rules. The review of the current version of the LCIA Rules started in late 2009 and shall be finished this year. The most interesting amendments involve the express provisions on consolidation of cases, appointment of an emergency arbitrator and party representatives' code of ethics. In welcome news for Russian alphabet users, the alphabetical numbering of provisions has been replaced with the numerical system.

Under the current rules, proceedings can be consolidated by parties' agreement and with a tribunal's approval. Under the proposed consolidation provisions, the LCIA Court will be able to decide on consolidation before a tribunal is constituted; alternatively, once a tribunal is in place, another case can be joined in if certain conditions are satisfied.

An emergency arbitrator procedure has been provided in some detail, however, this provision is presented in the LCIA draft in parenthesis, and is still debated by the LCIA Court. If adopted, it would, in addition to the existing provisions for the expedited formation of the tribunal in the cases of 'exceptional urgency,' allow for the appointment of an emergency arbitrator within 3 days of from receipt of an application, who may make an order or render a reasoned award as soon as possible (but no later than 20 days following the appointment).

Finally, the draft of the LCIA's new rules include a remarkable innovation as they provide for a set of general ethical guidelines for parties' legal representatives in the Draft Annex. The parties will have to ensure that their legal representatives have agreed not to engage in activities intended unfairly to obstruct the arbitration or to jeopardise the finality of the award such as knowingly make any false statement to a tribunal, prepare or rely on false evidence or conceal documents or initiate an undisclosed unilateral contact with an arbitrator. The tribunal is expressly empowered to make a finding as to whether there has been any violation of the ethical guidelines, in which case the tribunal may order sanctions against that representative including written reprimands, cautions and references to the legal representatives' regulatory or professional bodies.

There is a number of other changes in the draft LCIA's new rules, which intend to refine and update the existing procedure, such as provisions taking into account changes in the use of technology for the submission of Requests for Arbitration and Responses by email, and rules on the effecting delivery by electronic means. Overall, the final draft of the LCIA's rules indicates that the LCIA envisages arbitration under its auspices as being a more structured approach and also confirms our reputation as a trailblazer with some proposed innovations.

2. Advantages and Issues of Application of the LCIA Rules and English Arbitration Law

Parties when drafting an agreement often pay little attention to the arbitration clause. Poorly drafted arbitration clauses cause difficulties at the stage of bringing the LCIA arbitration and enforcement of the arbitral award. The LCIA website provides for a standard arbitration clause and welcomes its use in contracts.[1]

One of the main elements of the arbitration clause is a seat of arbitration. By choosing a seat of arbitration the parties effectively choose arbitration law that will govern arbitration procedure. Applicable arbitration law, amongst other things, will define procedural rights and limitations of the parties, the level of state court's interference into the arbitral procedure and, interim measures available to the parties in support of arbitration. In effect, by selecting the seat of arbitration parties also choose legal infrastructure that will be available to the parties throughout the arbitration proceedings.

By choosing London as a seat of arbitration one gets all of the below advantages in one shot:

- arbitration friendly jurisdiction;[2]

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1 http://www.lcia.org//Dispute_Resolution_Services/LCIA_Recommended_Clauses.aspx

2 For example, *Fiona Trust* [2007] UKHL 40.

- ability to stay legal proceedings brought in breach of the arbitration clause;[3]
- the Arbitration Act 1996 provides clear limits of court interference into the arbitral procedure;
- flexible arbitration law: the Arbitration Act 1996 contains mandatory and non-mandatory provisions;[4]
- availability of interim measures such as worldwide freezing injunction, disclosure and receivership orders that can be obtained at the English court in support of arbitration seated in London;[5]
- well-developed legal infrastructure: high quality lawyers and top law firms, independent well trained judiciary and arbitrators, reliable and tested arbitral and court procedures; and
- limited grounds of appeal of the arbitral award.[6]

One of the advantages of the English arbitration law is its flexibility. The Arbitration Act 1996 contains 25 mandatory provisions which parties are not allowed to change by agreement. Otherwise, parties are free to agree how their dispute should be resolved, subject only to such safeguards as are necessary in the public interest.[7]

Another main advantage of the English arbitration law is the ability of a party, in case of urgency, to apply to the court for interim measures before the arbitral tribunal is formed.[8] Otherwise, party may only apply for such measures to the court with the permission of the tribunal or the agreement in writing of the other parties.

If the arbitration is administered under the LCIA Rules and parties failed to choose a seat, Art. 16.2 of the LCIA rules provides that in this case the seat of arbitration shall be London, unless and until the arbitral tribunal determines in view of all the circumstances, and after having given the parties a reasonable opportunity to make written comments, that another arbitral seat is more appropriate.

Another mistake common to poorly drafted contracts is confusion relating to the governing law of the contract and the law applicable to arbitration clause. For example, sometimes the contract states that the law applicable to the contract is the substantive law of England & Wales. However, in the subsequent clause the parties agree that implementation of the agreement shall be subject to the laws of the Russian Federation.

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3 Section 9 of the Arbitration Act 1996.

4 Section 4 of the Arbitration Act 1996.

5 For example, *PJSC Vseukrainskyi Aktsionernyi Bank v. Maksimov* [2013] EWHC 3203 (Comm).

6 Sections 67–69 of the Arbitration Act 1996. Article 26.9 of the LCIA Rules opts out of sect. 69 of the Arbitration Act 1996 and provides for finality of the arbitral award on points of law.

7 Section 1(b) of the Arbitration Act 1996.

8 Section 44(4) of the Arbitration Act 1996.

Usually, when talking about 'substantive law' in international arbitration, we mean the law applicable to the substance of the dispute.[9] However, the substantive law governing the contract should be distinguished from the substantive law governing the arbitration agreement.[10] These laws may, depending on the circumstances, coincide or differ. Such distinction is drawn from the principle of autonomy and separability of the arbitration clause.[11] While some authors, noting the distinction between the two, state that the definition of the substantive law include both substantive law of the contract and substantive law of the arbitration agreement,[12] others separate these two concepts and refer to the substantive law of the contract only and the law governing the arbitration agreement.[13] Hence, it is advisable to clearly indicate law applicable to the arbitration agreement to avoid confusion.

Other common mistakes include failure to agree about the language of arbitration or mechanism of nomination of one of the arbitrators. According to Art. 17.1 of the LCIA rules the initial language of the arbitration shall be the language of the arbitration agreement. But what if the agreement is written in more than one language and none of them prevails? What is the right language of communication between the party, the arbitral tribunal and the LCIA if one of the parties does not participate in arbitration?

Usually poorly drafted arbitration clauses cause delay and result in additional legal fees. Therefore, it is important to obtain proper legal advice and pay adequate attention to drafting arbitration clauses.

3. Practice of Russian Court's Assistance to Foreign Arbitrations

Taking into consideration all the advantages of the LCIA rules and English Arbitration Act 1996 practitioners likely would prefer to conclude the arbitration agreement and not to deal with Russian state courts. At first site everything is simple: in case one of the parties files a claim to the court in breach of the arbitration clause the court shall operate 'principle of non-interference' and send the parties to arbitration. However, this not always works. For example, in the well-known case *Russian Telephone Company v. Sony Ericsson*[14] the Supreme Commercial Court of the

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9 UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006), Art. 28(1).

10 New York Convention on the Recognition and Enforcement of Arbitral Awards 1958, Art. V(1)(a).

11 UNCITRAL Model Law, *supra* n. 9, at Art. 16(1).

12 Gary B. Born, International Commercial Arbitration 1311 (Kluwer Law International 2009).

13 Nigel Blackaby & Constantine Partasides, Redfern and Hunter on International Arbitration 165 (Oxford University Press 2009).

14 The Resolution of Presidium of the Supreme Commercial Court of the Russian Federation dated June 19, 2012, case 1831/12.

Russian Federation found invalid the asymmetric arbitration clause which granted only to one party the right to approach a state court for resolution of a dispute.

Nonetheless, the general tendency is that Russian courts enforce arbitration agreements. Two recent cases are rather interesting thereby: the Supreme Commercial Court has consolidated the controversial court practice and found valid arbitration clauses which do not name directly the competent arbitration institution but refer to its rules *(Avtoshped* case[15]) and arbitration clauses with mistakes in a name of arbitration institution (*Sakhalin Energy* case[16]). In other words, Russian courts start to interpret arbitration agreements in accordance with the worldwide accepted principle of effective interpretation. The principle basically means that all doubts in wording of arbitration clause shall be resolved in favor of arbitration until it's clear that the parties intended to arbitrate.[17] But in spite of this we would recommend practitioners doing business in Russia to be more accurate with the wording of arbitration agreements.

Although having an arbitration agreement chance to deal with state judicial system is not so high, Russian courts should not be abandoned completely. The reason is that they can grant interim measures in support of foreign arbitration, which was proven by case law.[18] Certainly interim measures could be granted directly by arbitral tribunal, and we all know how difficult in fact to obtain measures from the state court. But enforceability of tribunal-ordered interim measures in Russia is a very controversial issue. Actually not only in Russia. The New York Convention 1958 on the Recognition and Enforcement of Foreign Arbitral Awards does not contain a definition of arbitral award; it only says that to be quality to an award, an arbitral decision shall be final. Conflicting case law exists on the issue whether or not interim measures decisions satisfy the requirement of finality and are covered by the Convention. According to common approach decisions on interim measures are not final and not enforceable because by themselves they do not resolve any part of the dispute and are temporary by legal nature.[19] On the other hand, there

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[15] The Resolution of Presidium of the Supreme Commercial Court of the Russian Federation dated July 16, 2013, case 2572/13.

[16] The Ruling of the Supreme Commercial Court of the Russian Federation dated May 24, 2013, case 2876/13.

[17] On this principle see, for example, well-known Swiss Arbitration Award of 29 November 1996. In that case arbitration clause was as follows: 'all disputes shall be settled by the Arbitration Court at the Swiss Chamber for Foreign Trade in Geneva' (which does not exist). Nevertheless, holding of the decision was: an arbitration agreement is valid as to its substance; the incorrect designation of an arbitration institution does not affect the validity of an arbitration clause.

[18] *Chigirinskiy* case (The Resolution of Presidium of the Supreme Commercial Court of the Russian Federation dated April 20, 2010, case 17095/09).

[19] *See*, for example, *Resort Condominiums International Inc. v. Ray Bolwell and Resort Condominiums, Pty. Ltd.*, Supreme Court of Queensland, 1993.

is approach offered by US courts[20] and started to be embraced by some civil law countries[21] according to which decision on interim measures is final since it resolves the separate dispute between the parties about a request for interim measures. In *AB Living Design v. Sokos Hotels Saint Petersburg*[22] the Supreme Commercial Court of the Russian Federation supported the first approach and held that interim arbitral awards of any kind, including awards made on provisional measures, are not subject to enforcement in Russia. So far with regard to assets in Russia it would be more effective to ask for interim measures not arbitral tribunals but Russian state courts.

It is well to bear in mind that this situation could sometimes be avoided. Not all interim decisions have to be recognized and enforced in Russia. Shining example is a series of cases *IBRC v. Quinn' family*[23] in which Mareva freezing injunctions and Norwich Pharmacal orders were recognized through personal law of the legal entity without special enforcement procedure.

Finally, let us turn to enforcement of arbitral awards. Generally according to Supreme Commercial Court's statistics there is no special problem with that in Russia, about 80% of arbitral awards are enforced successfully. However, some issues regarding public policy and arbitrability do exist. Since the Informational letter of Presidium of the Supreme Commercial Court dated February 26, 2013 No. 156 was issued, there is no doubt that public policy is an extraordinary ground for refusal in recognition and enforcement of arbitral award. But it applies in practice. In *Rosgazification* case[24] court refused to enforce the award 'competing' with Russian state court judgment (award was based on the agreement which was held void by the court at the suit of company's shareholders). This case is an example how corporate issues could be used to object jurisdiction of the international arbitration. With regard to arbitrability were several recent cases proved that Russian state courts are not ready yet to share with arbitration the disputes involving any public aspects, like disputes from the state contracts[25] or forest rent.[26]

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[20] *See Pacific Reinsurance v. Ohio Reinsurance*, 935 F.2d 1019, 1023 (9th Cir.1991); *Yasuda Fire & Marine Ins. Co. of Europe v. Continental Cas. Co.*, 37 F.3d 345 (7th Cir. 1994); *Arrowhead Global Solutions, Inc. v. Datapath, Inc.*, 166 Fed. Appx. 39, 41 (4th Cir. 2006), *etc.*

[21] *See*, for example, *S.A. Otor Participations v. S.A.R.L. Carlyle (Luxembourg)*, Paris Court of Appeal (October 7, 2004).

[22] The Resolution of Presidium of the Supreme Commercial Court of the Russian Federation dated October 5, 2010, case 6547/10.

[23] *See*, for example, The Resolution of 11th commercial court of appeal dated July 4, 2012, case A65-19446/2011.

[24] The Ruling of the Supreme Commercial Court of the Russian Federation dated December 9, 2013, case 14658/13.

[25] The Ruling of the Supreme Commercial Court of the Russian Federation dated November 29, 2013, case 11535/13.

[26] The Ruling of the Supreme Commercial Court of the Russian Federation dated December 9, 2013, case 11059/13.

At the moment these are one of the most problematic issues regarding arbitration in Russia. Taking into consideration the unification of the Supreme Court practitioners could expect in the future rather significant changes in court practice, including in the area of international arbitration.

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