
ISBN 978-5-8354- (hardcov.)

This book is a result of conjoint work of prominent legal scholars and practitioners. It covers following topical issues of law and law enforcement practice: barriers preventing compliance with the principles of the rule of law, positive and negative aspects of the law enforcement practice, insecurity of independence of the judiciary, artificial criminalization of relations in the economic sphere, unjustified renunciation of prejudicial effect, non-legal formulation and interpretation of law, perfunctory and insufficient protection of property rights, etc.

This book is of interest to legal professionals involved in lawmaking, public administration, law application and enforcement as well as those specializing in legal theory.
## CONTENTS

**Introduction to the English Edition**.................................................................7

**Foreword from the Monograph Project Director** .............................................17

**Introduction (by V. D. Zorkin)**........................................................................20

**First Roundtable Discussions of Russian and Foreign Participants:**

**Uniformity of Judicial Practice and Judicial System**..............................27

- **A. V. Naumov.** On Artificial Criminalization ..........................................73
- **A. G. Fedotov.** On Uniformity of the System of Law and the Judicial System
- **M. A. Subbotin.** Evaluation of Investment Climate: Role of Legal Problems
- **V. M. Zhuikov.** Issues of Administration of Judicial Practice
- **T. G. Morschakova.** The Importance of What we Call the Uniformity of Practice

**Chapter 1. Artificial Criminalization of Economic Activity**
*(by A. V. Naumov)*............................................................................................73

**Chapter 2. Application of Civil-Law Institutions in Other Branches of Law**
*(by A. G. Fedotov and A. V. Rakhmilovich)*..................................................90

**Second Roundtable Discussions of Russian and Foreign Participants: Rule of Law as a Major Factor Ensuring Uniformity of Application of Law and Law Enforcement**.........140

- **V. F. Yakovlev.** Ensuring Enforcement Uniformity within Russia's Judicial System
- **Comments of Roundtable Participants**...........................................................
- **Closing Remarks by T. G. Morschakova**......................................................

**Chapter 3. The Rule of Law and the Constitutional Basis for Uniformity in the Application of the Law by the Courts** *(by T. G. Morschakova)* ... 206

**Chapter 4. Towards Uniformity of Law Enforcement — The Role of Russia’s Judicial System** *(by V. F. Yakovlev)*................................. 248
Chapter 5. Current Issues of Uniformity of Judicial Practice
(by V. M. Zhuikov) ........................................................................................................... 262

THIRD ROUNDTABLE DISCUSSIONS OF RUSSIAN
AND FOREIGN PARTICIPANTS: SECURING PROPERTY RIGHTS .................. 305

V. I. Lafitsky. Courts in the Struggle for Property and Power ................
L. M. Grigoriev. Russian Privatization and Property: Past, Present and Prospects ................................................................. 305
A. G. Fedotov. Right of Ownership and Issues of its Legal Regulation ....
L. V. Golovko. Issues of Participation of the State in Civil Commerce ....
- Comments by T. G. Morschakova .................................................................

Chapter 6. The Court in a Struggle for Property and Power –
Historical and Comparative Law Essay (by V. I. Lafitsky) ................. 362

COMMENTS OF FOREIGN EXPERTS ON ISSUES UNDER DISCUSSION ........ 388
- Comments by M. Karadjova ........................................................................ 388
- Comments by J. Kahn ................................................................................. 393

RUSSIA’S PARTICIPATION IN INTERNATIONAL AGREEMENTS
(POST-ROUNDTABLE DISCUSSION) ................................................................. 400
- Comments by M. Norros and P. Sahlas ...................................................... 400
- Comments by V. V. Klyuvgart ................................................................. 405
- Comments by T. G. Morschakova ............................................................. 408
INTRODUCTION TO THE ENGLISH EDITION

Excerpts from speeches made at the presentation of the monograph at the Chamber of Commerce and Industry of the Russian Federation, in Moscow, on November 16, 2009


The rule of law and an independent judicial system... Russia’s future depends on giving effect to these cornerstone principles. This very interesting book shows the risks of preservation of the current situation and suggests certain measures for its improvement.

As an economist, I would like to say a few words about certain general problems that are quite important from the standpoint of implementation of principles of the rule of law in the economy. The book quite rightly pays close attention to the problem of interference by the State (both as an owner and a regulator) in Russia’s economic life.

Generally, I agree with critical approaches expressed in the book regarding the inadmissibility of illegitimate forms of State interference. At the same time, I would like to emphasize that the State should not be excluded from the system of regulation, since the market cannot deal with all possible issues, particularly during crisis periods (but not only in the situation of a crisis).

The book rightly and sharply criticizes (and this constitutes one of the book’s strengths) artificial criminalization of economic activity in Russia. Such artificial criminalization is extremely damaging not only for its victims but for society as a whole.

I fully agree with the two criteria proposed in the book and pertaining to transformation of one’s liability under the private law into a crime; these are the trespassing of the law on criminally punishable actions and the degree of social danger. Apparently, it would be reasonable to apply the above two criteria also retrospectively, in relation to a number of criminal cases against entrepreneurs whose sentences have already entered into force.

At the same time, artificial decriminalization of the economy should not be allowed either, along with its artificial criminalization. The most danger-
ous forms include corruption-based services provided by government officials to the economy and criminal actions of entrepreneurs such as corporate raids, production of counterfeit products, tax evasion, monopolization of markets, etc. At the current stage of Russia’s development, it is becoming increasingly important to prevent officials of all ranks and levels from forming a close alliance with businesspeople. This phenomenon should be specifically addressed.

One of the monograph’s strengths is that its authors widely rely on international experience and that foreign scholars have participated in its creation.

The book is very useful. Today, apart from overcoming the current economic crisis, we need to create a new model for the economy as well. The economy should not return to its previous patterns. Otherwise we will permanently lag behind developed countries. The unconditional rule of law is one of the most important elements of an innovation-based new economic model, and I hope that the book will help ensure the attainment of this goal in Russia.

Veniamin Fedorovich Yakovlev, Advisor to the President of the Russian Federation, former Chairman of the Higher Arbitrazh Court of the Russian Federation (from 1992 to 2005):

This book reminds me of a Russian proverb, “An egg is dearest at Easter”. Among the current goals of Russia’s development set by the President, the most important one is to create a law-based state and ensure the rule of law and its implementation. The future of our country and our society will depend on how successfully we will ensure the rule of law and address the problem of genuinely independent administration of justice. This is exactly what the book is about.

This book is not just a written text; it is a result of actual discussions. It is important to ensure that there will be as many such forums for discussions as possible and that civil society will influence the State’s policies. Ultimately, everything depends on us; even if the authorities are very good, the fate of Russia will be determined by its citizens, by how they will react to strategic signals from State power and how this will play itself out in everyday life. In our professional activity, we, lawyers, should facilitate the achievement of these goals.

The relations between property, power, and justice determine the character of a society. In this triad and in respect to the distribution of property and power, the judicial system is meant to give effect to the principle of justice and guarantee that the society will indeed be a civil society securing the rights of its citizens. Without fulfilling the task of separating property from power and that of separating various functions of power from each other, there can be no modern civil society which would be free of excessive concentration and abuses of power.
These tasks can only be fulfilled if there is genuine justice in place. If there is no genuine justice, there will be no fairness in distribution of property and power and compliance with the law. Only the rule of law can guarantee that the society will be civilized and prospering, and only independent courts can ensure the rule of law.

There are two aspects of the independence of the judiciary: internal and external. A judge must be independent both externally (that is, he should be independent of other branches of power and any parties owning or controlling great material resources) and internally, (that is, he should be independent within the judicial system, when he issues a judicial decision). The judge should be protected from any influence, both from outside and from within the judicial system. This is needed because the hierarchical structure of the judicial system (meaning that higher courts control lower courts) is fraught with danger for the independence of the judiciary and, therefore, for genuine justice.

The book covers all these problems. I think it will be interesting not only for lawyers but for the public at large, including for the country’s political elite.

Tamara Georgievna Morschakova, Advisor to the Constitutional Court of the Russian Federation, former member of the Constitutional Court of the Russian Federation (from 1991 to 1995), former Deputy Chairwoman of the Constitutional Court of the Russian Federation (from 1995 to 2002):

It might seem to someone that the book sets out too complicated theories, that this has little to do with our practical tasks and goals, that its authors are captured by some Utopian ideas and do not understand the realities of our life. I would like to oppose such points of view: it was the method of creating this work *per se* that required the authors, who started to discuss purely practical problems, to climb up to a certain level of theoretical generalization. They had to do so because it turned out (though this had been known since very long ago) that this was the only way to deal with practical problems. That is why this work is closely related to practice and applies theory for the benefit of practice.

Regardless of the headings of its separate chapters and of the issues addressed in the course of our discussions, the monograph is permeated by one idea which is very important for the area of law, that is, the idea of a systematic nature of law comprising all of its components. When we refer to law we refer not only to the legislation or a collection of rules of law. So far, our law-making programs fail to give effect fully to the idea of the systematic nature of law. This idea is very important for practice because the lack of the systematic nature of law significantly hinders the work of Russian law applica-
tion and enforcement bodies. This idea should be a driving force in research, law-making activity, application of law and law enforcement.

Legal regulation in various branches of law overlaps in many aspects, and often the same terms and concepts are understood differently. This significantly hinders the fine-tuning of the application of law and law enforcement as activity which ensures the rule of law. There is a scope for all courts with various types of jurisdictions to determine their positions. It is such courts with various types of jurisdictions represented by their respective supreme courts that should develop, based on the idea of the systematic nature of law, provisions which can help practitioners in their everyday work.

The book attests to the practical significance of the idea of the rule of law and legal principles. Without such a compass amidst the sea of law-making activities and legislative normative materials, one can neither achieve high-profile goals such as the creation of a law-based state nor fulfill more practical tasks, for example, ensure the fairness and justness of the judicial system. In fact, such more practical tasks demonstrate the significance of these high-profile goals.

The obvious goal of all of the supreme judicial bodies — which nobody tries to disprove — is to ensure uniform application of law and uniformity of judicial practice. From my point of view, as far as the issues of law application and enforcement practice are concerned, possibly the most worthy element of the book is a discussion in it of methods used to ensure such uniformity. Administrative methods of ensuring uniformity within the judicial system may hardly be considered acceptable, at least if one is guided by the eminent idea of the independent system of justice. There will be no independent system of justice if the judicial system uses methods inconsistent with the substance of justice, including when such methods are used for the sake of ensuring uniformity.

The achievements of the authors of this work essentially boil down to three major components which, I believe, should always draw the attention of lawyers. If the law-making, law application and law enforcement practices are not subject to general legal principles, it will be impossible to ensure the rule of law. Unless the courts exercise their law application powers primarily in their capacity of a judicial instance which interprets the law, it will be impossible to ensure the rule of law, because no court may be deprived of its exclusive, even monopolistic, function to determine the contents of applicable law. And finally, the idea of a modern, civilized, and democratic law-based state, which is universal and suitable for all times, is related to the mechanism of ensuring the rule of law through an independent system of justice. It is to these ideas that the book is dedicated.
Vladimir Grigorievich Yaroslavtsev, member of the Constitutional Court of the Russian Federation:

I have been working as a judge for more than 30 years, first as a district court judge, and for the last 15 years I have been a judge of the Constitutional Court. I have considered both civil and criminal cases. That is why I have my own view — including in retrospect — on the situation in the judicial system with which each of us has to deal in one way or another. The positions of the book’s authors do not boil down to abstract academic speculations concerning judicial practice; the book attests to the anguish they feel about our system of justice, the foundation of our law. And this is extremely important because it is impossible to move forward at any level of the judicial power without discussing and analyzing different views.

The central element of any problem relating to courts is a judge, a man or woman in a gown who resolves court cases. Believe me, for a person in a gown (we are talking about a regular situation when the judge really administers justice), this book covering the relations between the legislation and the law is not about some abstract things; it is about the things with which judges constantly deal. All the time, the judge should relate the law and the legal principles in order to issue just and fair judicial decisions.

Russia seems to have everything now, including laws on the status of judges, on the judicial community, and on how the judicial system should operate so that the court would be independent. We have everything in place at the legislative level. But there is a concept which is set out in international principles — for example, the Siracusa Principles [on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights] — defining what subjective independence of judges is. The meaning of the concept is that a judge who does not feel that he or she is independent will never be independent. It seems trivial but it is absolutely true and very relevant for our country.

There is also a classical concept of subjective independence of a judge. The judge submits to no one apart from the law and his own conscience. This is a mandatory moral principle for the judge. Therefore, I would like to say: take care of our judges! The conditions under which they work today remind me of a conveyor belt, since a judge has to rush from one hearing to another in connection with different cases and it is very difficult for him to work in such a way. This is not just a technical issue, it is probably the most important issue because the judge cannot focus on the contents, the basics of a decision he is about to issue. Take care of genuinely professional, thoughtful judges, and then we will have independent, fair, just and impartial courts.

The principles of the rule of law create a platform, a basis for joining together all the branches of law, especially because different branches of Russian law develop separately from each other, so there is no single concept, and many contradictions arise.

The Constitution stipulates that Russia is a law-based state, with rule of law principles determining the domains of all branches of State power and methods of their work. The State should not go beyond the boundaries of the legal terrain; otherwise it would become antipodal to what it is meant to be. The State may not use methods which run contrary to rule of law principles. The rule of law establishes a criterion for evaluation of the performance of the State and all branches of power, be it the legislative, executive, or judicial power. Based on that criterion, the citizens should determine whether or not the State’s actions meet the requirements established in relation to a law-based state.

The principles of the rule of law provide the courts with a tool enabling the judicial power to protect rights and freedoms of citizens and organizations, thus fulfilling the task imposed on courts by the Constitution. To this end, our courts are vested by law with broad powers but one should understand that the provision of the Russian Constitution whereby judges are independent and submit to the law only means that they should submit only to those laws that are not inconsistent with the Constitution and with generally accepted principles and rules of international law, i.e. those that do not run contrary to the principles of the rule of law, rather than just to any law.

So, under the current conditions the court should, based on those principles, not only resolve disputes but also correct errors of the law-maker when the latter (whether by negligence or because of their misinterpretation of the hierarchy of values to be protected by law) adopts a statute which runs contrary to the principles of the rule of law. In such a case, the court should proceed from what is prescribed by law, not by the official statute. Legislation and law are not necessarily identical to each other. So the court should evaluate a statute from the standpoint of its consistency with the Constitution and generally accepted principles of law.

Henri Markovich Reznik, Chairman of the Moscow City Bar Association, member of the Russian Civic Chamber:

The book brought together an exceptional group of authors, including civil and criminal law experts, judges and defense attorneys, lawyers and
economists, prominent scholars and legal practitioners. It is dedicated to current acute problems of Russian law. I highly appreciate their work, and there are many others who share this opinion. This is not just an ordinary legal monograph compiled by a group of prominent authors. This is a very topical and highly professional theoretical and applied work covering most painful and burning problems of our law and our judicial system in their current condition.

Summarizing the contents of the book, one can say that problems that occur at the interface of law and economics are one of its primary topics. These problems arise because relations in the business sphere and the area of private property which are re-emerging in Russia, when they encounter our legal system and law enforcement system, not only turn out to be unprotected but are deemed to be crimes without valid legal grounds. In other words, actions, which are not only lawful but are encouraged by the Constitution, are artificially transformed into criminal actions. Moreover, as a constant phenomenon, artificial criminalization (which is often based not even on a particular rule of law but on non-legal interpretation of such rule by law application and enforcement bodies) has de facto become a standard followed by our criminal justice bodies in their work.

The monograph offers — in part due to the fact that economists contributed to its creation — very interesting coverage of the problems of law and the judicial system arising from the current balance between State power, property, and the court. As a result of their joint economic and legal analysis of the above “triad”, the authors conclude that it plays a decisive role for the entire area of law and demonstrate that the lack in this structure of the independent court (being a mechanism which makes the structure a balanced one) inevitably and gradually results in a redistribution of property in which the court is used solely as a tool for such redistribution and ceases to be a justice body.

The authors of the book very accurately picked up on the development trends of our legal environment which are not readily evident to non-professional observers.


The book reflects the current era — it accurately describes today’s situation in our country. It is in tune with the President’s stated positions but is much more outspoken. It covers real problems of Russia’s institutional system, in particular, its judicial and legal systems which, despite twenty years of reforms, still have to be further developed. The judicial system deals with
formal laws and formal institutes, while economic life is regulated by informal practices rather than by formal laws only.

When formal and informal rules are identical and complied with, this is great luck! Periods of prosperity suddenly occurred in various countries and breakthroughs in their economic development always happened when legal institutions, law and informal institutes in those countries were in harmony with each other. Russia is still unable to put an end to raids aimed at seizing property and to draw a line under the results of privatization of the 1990s.

There are three key problems in our economic life, awareness of which is crucial for enabling economists and lawyers to understand each other. Firstly, though the privatization was carried out poorly, it should be finalized, and for this purpose, it is necessary to put an end to the current endless re-privatization process. Secondly, one should take account of the diversity of Russia, from Tuva Republic to Moscow... The country is almost as diverse as the UN, both in terms of the levels of economic development and in terms of forms of business and public conduct. So far, even the EU has not resolved the problem of uniformity of law, though its member countries are much closer to each other as far as the level of their economic development is concerned than different constituencies in Russia. And thirdly, when the transition period comes to an end, there can be no “[innocent] white sheep”, whether in business or in everyday life. Businesspeople are prevented from leaving their “non-legal playing field”, and attacks of rent-seekers continue. It is an absurd situation when businesspeople are always guilty of something, so there is apparently an attempt to create a market economy based on private property but without respect for private property and with a permanent built-in conflict of property owners with formal laws.

Russia needs gradually to bring its institutions in line with real life and get rid of most notorious informal institutes. In real life business is sometimes captured by the State, and the State is sometimes captured by business. We still cannot make up our minds as to what kind of transformation we want and how it should be carried out, that is, how to modernize the country in a broad sense of this word (meaning not just its technological modernization), i.e. how to modernize the society, the State, and the economy.

The problem of harmonization of formal and informal institutes is very challenging. We need at least to put an end to the era when informal institutes prevail over formal ones. The protection of the interests of entrepreneurs should extend not only to existing entrepreneurs but also to new, future businessmen, including scientists engaged in business to promote innovations. Therefore, from the economic point of view, it is vitally im-
important to create an efficient judicial system and have a reliable method in place to secure property rights. Otherwise, modernization will look impossible even on paper.

David Lametti, Associate Dean (Academic) and Associate Professor, Faculty of Law, McGill University, Canada, Project Director 2002–2007, McGill Russian Civil Law Reform Project:

Law is often likened to a mirror, with formal and informal norms reflecting the values, the history, the identity, and the sense of purpose of a community. If that is true, and I think it is, then law reform is nothing less than the ongoing process of a community understanding itself. And if this latter statement is also true, and again I think it is, then any vibrant and healthy community must be engaged in a more or less continual process of law reform.

Moreover, this continual discourse of law reform must take place in the most of moral contexts. If anything, the process of law reform most explicitly epitomizes what the great American legal scholar Lon L. Fuller called law's «morality of aspiration». True, we aim for the most effective laws and the most efficient laws in pragmatic terms (as the economists in the volume are pointing out), but we also aspire to enacting the most fair laws, the most just laws, the most moral laws.

Law reform is ultimately about being a better society, perhaps even about being the best a society can be. Hence a constitution, a civil code, a penal code, etc. have a more iconic status than the mere agglomeration of the specific provisions contained in each code, and the process of their reform is to be taken as a serious process.

This is particularly true for Russia. The profound changes that have been introduced, to some extent re-introduced, into the Russian normative system over the past two decades reflect Russia's most profound aspirations in the post-Soviet era. The Civil Code of the Russian Federation is but one example of a foundational document that embodies the values — explicit and implicit — in the system of private law. Here law reform, the continual process of assessing and re-assessing its articles, represents the refinement of morality in everyday legal acts, the values to be sought in transactions between and among individuals in society. The same can be said of other basic texts.

And so it is true for the rule of law, a foundational concept that Russia has articulated as an aspirational value for its legal system, but which, despite efforts, has not yet fully taken root. As the guiding principle for legal practice, the Russian legal order continues to struggle with implementing the full implications of the rule of law across areas such as judicial practice and legal interpretation, laden as it is with varieties of instrumental reasoning and
much non-legal influence. This collection of essays represents the attempt to launch the internal reflection and self-critique upon which the morality of aspiration resides. As such, the mere fact of the publication of this collection, published first in Russian and now in English, cannot be overestimated. The writing styles range in directness and daring, but the message is clear: the system is not perfect, sins have been committed, certain mistakes are ongoing, and improvement is necessary. Serious suggestions for reform are proffered. From judicial technique to institutional reform, these essays represent the beginning of a substantive dialogue that is both internal to Russia, and with the publication in English, has been opened to a wider world. All that is a cause for forward-looking cautious optimism.

There is no question that the reform process, value-laden as it is, must be driven by Russian thinkers. This was true of most aspects of the drafting of fundamental normative texts – the drafting of the Civil Code of the Russian Federation led by the late Professors Stanislav A. Khokhlov and Victor A. Dozortsev and by Professor Alexander L. Makovsky, serves as my central example - and has resulted in an enhanced legitimacy for those texts. The same holds for the reform process: the problems must in the main be identified by Russians and the solutions proposed must be equally Russian.

The text herein of Professor Tamara G. Morschakova is a beacon in this regard. However, the invitation of several non-Russian experts to participate in the roundtables that led to this book, coupled with the preparation of an English edition, represent important gestures towards openness and the willingness to endure external critique. As such, the book is an important first step on many levels, and all the various authors and the editor, Dr. Elena V. Novikova, are to be commended.
FOREWORD

From the Monograph Project Director

It would be a great understatement to say that the subject of this monograph is topical. It is no exaggeration to say that at this moment in Russian history the need to secure the real rule of law and independence of the judiciary are the fundamental problems upon which the future of our country depends. Not only lawyers and economists, but also specialists in other areas, businesspeople and certain politicians, are becoming ever more acutely aware of this.

The principle of the rule of law, which is included in this book’s title, is the basis of the constitutional order of any civilized state. Renunciation of this principle, even if it occasionally promises real but transient benefits, very quickly leads to catastrophic consequences.

The book’s authors were united by the long-overdue need for a professional evaluation of the problems which exist first and foremost with judicial and law enforcement practice. The most fundamental and dangerous of these is the systematic deformation of legislation, a factor which continuously undermines the rule of law and the unity of the judicial system.

The position of the authors of this book as professionals and citizens has been formed by their conviction that law enforcement must always be based upon general legal principles and be guided by them. General principles are the guideposts which are necessary for the law enforcement official to enforce specific rules correctly. Without principle, a rule may be transformed into its opposite. The Romans were right in saying “summum jus summa injuria” (extreme law is extreme injustice).

The problem of interpretations of the law which distort its meaning springs from a lack of understanding of the purposes of the law; of what exactly the enforcement of the law is supposed to give to society. Any legislative solution of a problem has its pros and cons. Therefore, the law enforcement official should understand what is fundamental and important for the legislator. And what is being sacrificed for this.

Communist ideology devalued legal principles in the consciousness of those who enforce the law on behalf of the state. This is a sad inheritance, which each of us must overcome day in and day out.
There is nothing more real and specific than the general principles which legislators and law enforcement officials should be guided by. Since the judicial branch is an independent branch of state power, from the beginning the principle of self-regulation has been included in the very idea of its autonomy. In addition, under any circumstances, the judicial system should not reproduce its own mistakes time and time again through an official interpretation which not only is inconsistent with the text of the law but is in its essence unlawful, violating the principles of the law.

A substantive analysis of problems related to current practice in the judicial system is contained in the monograph. The following are examined: positive and negative aspects of the official interpretation of the law; situations where legal practice develops in violation of the law; the absence of uniform judgment rules in the judicial system; instances where courts and court orders are used to achieve unlawful goals; negative trends in the area of the legislative regulation of judges and respect for their status and in many other areas. When compiling the book, we evaluated the problems associated with the correspondence between public and private law, with the lack of a modern conception of public law, with the lag of theory and practice behind current conditions of property rights, and the imperfections of criminal law and its application and enforcement.

Special attention was paid to the trend which has been discovered of the unjustified criminalization of entrepreneurial activity and the expansive application of administrative and tax liability (in addition to criminal liability) in the practice of a prejudiced use and interpretation of not only the rules of civil law but also other regulatory branches of law. Conversations with leading Russian lawyers and economic analysts evidenced a consensus that there was a new and extraordinarily dangerous phenomenon which can be defined as “criminal-legal means of economic management.” The conversations made it possible to analyze this phenomenon.

The co-authors of this monograph chose to use a proactive method for their work, so they not only identified the existing deficiencies but tried to find new solutions. We hope that this will play a positive role in the development of the law and the relations which are regulated by it.

The book offers many unique subjects for readers to examine. Its creators strove to bring together a team of authors consisting of remarkable individuals and extraordinary professionals who are able to conduct a dialogue. Their intense interest in an open and honest discussion of matters of principle combined with long-standing successful experience in scholarly and practical pursuits in various fields of the law made it possible to create an interesting, non-conventional work, not just another standard portrayal of well-worn topics.
The ability and readiness to reach agreement on matters of principle is a quality which is as necessary as it is rare. During the work on the monograph, there was an atmosphere of mutual respect and tolerance which developed both on a professional and on a human level. It was very pleasant to work in this environment. The differences in life experience and professional experience did not lead the discussion into a dead end, but made it possible to make them more profound and multifaceted.

Despite the difficult nature of the problems under discussion and the polemics surrounding them, the monograph participants were able to emerge as a unified team of authors sharing the goal of the common resolution of the challenges posed by the current condition of Russian law and law enforcement practice. Such synergy arose during the course of three roundtable working meetings where the monograph’s chapters were discussed by the authors and scholars from Russia, Canada, Kazakhstan, Finland, the United States, Norway, Bulgaria, and Holland.

As one can see from the text of the monograph’s articles, and in particular from the discussions which were conducted, the authors did not withdraw into their narrowly professional, or, as often happens, formal and dogmatic understandings of the subject matter. They strive to find general legal, inter-industry and even interdisciplinary solutions to problems with the cornerstone idea of serving the law, which every true lawyer must subscribe to.

The unusual format of the book, which combines written and oral genres, is the result of this teamwork. The materials are laid out chronologically, in the sequence in which they were created during the joint work of the authors of the book’s chapters and the dialogue participants. Thus, the transcripts of the roundtables and the book’s chapters alternate, illustrating how and why one or another topic arose and was analyzed. I hope that such a form of exposition makes our book not only convenient for readers to absorb, but also allows them to gain a feeling for the atmosphere of our discussions and to join in the discussion with vigor, albeit at a distance.

Elena V. Novikova
INTRODUCTION

By V. D. Zorkin,
Chairman of the Constitutional Court
of the Russian Federation, doctor of law, professor

The cornerstone problems of the rule of law and the independence of the judiciary are most urgent subjects for a multi-faceted public discussion: the future of the country and its role in the contemporary development of a multi-polar, globalized world depend upon it. Not only representatives of state authorities, political scientists and legal scholars are now constantly focused upon these subjects, but also community leaders, representatives of the mass media, cultural professionals, the business community, human rights activists, and other institutions of civil society. This gives grounds for the discussion of major practical problems of realization of the rule of law principle in the legal framework of the modern State.

The principle of the rule of law in democratic society is an axiom of contemporary constitutionalism. Forgetting this principle, or neglecting it in any area leads to lawlessness, and as a result, to social chaos. The dialectic of the objective necessity of the rule of law in a state governed by law lies exactly in the fact that the state does not strengthen its power when it refuses to follow its obligations to ensure the rule of law, but moves in the direction of disintegration. The constitution subordinates the state to the rule of law and puts it on the path of constitutional statehood; it is the guarantee against voluntarism on the part of either the state or any other public institutions. At the same time, the rule of law is called upon to ensure stability and dynamism in a global world against the new challenges faced by humanity.

The methodological aspect of the realization of the principle of the rule of law in contemporary conditions is connected with the historicity of today’s world and the fact that it is impossible to use clichéd approaches to the realization of the most important ideas of constitutionalism, among other ideas. Moreover, two obstacles to absolute universalism can be neither overcome nor ignored. First is the lack of synchronism in historical movement. Every
country finds itself at a certain stage of history. It may move more quickly in some areas, and more slowly in others, but if it is moving, then the question of what ought to happen and what is correct should be resolved in conformity with this movement, i.e. historically. The second obstacle is fundamental cultural specificity.

The presence of these two obstacles for the formation of an understanding of the possibilities of some sort of extra-temporal and extra-spatial path of development would seem to be obvious. For this reason, there should be no false optimism, no unthinking euphoria; it is possible that it is just such euphoria which is the basis of the world crisis. Refusing to take a historical approach to the present and the future may also engender strategic errors in the approaches to the state governed by the rule of law. History has more than once demonstrated that ruling elites’ failure to grasp historical reality and to take optimal action in such reality has led to historic tragedies, which was confirmed in the 20th century by the experience of Russia and other countries. At the same time, nations have paid too high a price for trampling the principles of law.

For this reason, naturally, the principles of the irregularity of historical movement and cultural diversity must not be used to undermine human rights, or the law as such, or the principles of the contemporary system of constitutionalism. On the contrary, one can use these principles to strengthen democracy, to confirm human rights, and to develop the institution of law and the constitutional system. Let us not throw away these principles merely because at some time somebody distorted them. Let us liberate these principles from distortion and use them for good, all the more so because as the current world crisis has shown us, dismissal of these principles also leads to a dismissal of the principle of the rule of law which is equivalent, in particular, to the demand for formal equality in two of its forms — equality before the law and the principle of legal equality.

I am convinced that every humanist and patriot, whatever their nationality or citizenship, must advocate for freedom and the law, that any form of struggle against freedom and against law is destructive and amoral. However, the struggle for freedom presumes one’s recognition of the historicity of the world.

The principle of the rule of law is not just an abstract theoretical idea which, as is almost always the case in the area of pure theory, can be adhered to or not. We are not talking about freedom of convictions, opinions or scholarly positions. The realities of world order show that one has to pay very dearly for neglecting the principle of the rule of law, for attempts to, so to say, utilize it, to recognize it or not to recognize it based only upon the
momentary interests of the governmental or financial elites. The necessity of unswervingly ensuring the rule of law despite the constant and explicable struggle against terrorism, economic crisis, the difficulties of globalization and similar temptations to limit the action of this principle is one of the most urgent tasks in the practice of contemporary constitutionalism, in the realization of its main postulates, including that of the state governed by the rule of law.

The interpretation of the law should ensure the stability and dynamism of society. After all, a dispute on the meaning of rules of law is also a dispute regarding a concrete reality. The law cannot be torn out of the historical and cultural condition of society, it must not be turned into some sort of decorative costume dummy, however, its historical and cultural conditionality must not serve as the justification for turning the law into non-law, including through an interpretation and application of the law that completely distort the content of the law and deform the legal rule itself. It is even more inadmissible for such a deformation to be used as an instrument for achieving any purposes unrelated to law, whomever they might be assigned by and whatever good intentions they may presume.

Proceeding from the requirements for the legal content of the regulation, the interpretation of rules of law and their application must also be legal. If these processes are carried out in an illegal fashion, i.e. in violation of the principles of the law or its systemic character, with carelessness towards the very meaning of the law, without taking the logic of its judicial interpretation into account, indeed ignoring it, as well as how it arose and developed in the legal system, this will lead to the intentional deformation of the rule of law itself and its constitutional meaning, to a deformation of fundamental legal approaches when interpreting legal institutions which are in essence uniform, which practically leads to an arbitrary dismissal of the rule of law as such.

The danger of such a phenomenon lies not only in the fact that the law stops being effective here, turning into non-law, but also in the fact that the appearance of observing the law is created, although the deformation of a rule of law masquerades as law, and in essence it is not legal. This is the reason why a systematic approach is so important in the interpretation and application of the law, so that the interpretation and application of the law are not carried out according to the principle of a “storage jar,” where the principles of the law contained in rules of constitutional law and the principles and rules of other branches of legislation which are applied pursuant to them are intentionally ignored. Thus, bringing uniformity to the practice of the supreme courts is also a crucial task. From this point of view, the Supreme
Court and the Higher Arbitrazh Court\(^1\) may not interpret rules of law so as to contradict their constitutional sense; when the Constitutional Court reveals such, it is of a generally binding force.

The deformation of a rule of law as the result of illegal interpretation and application leads to the loss of real rights and the impossibility for the subjects of the rights to exercise and defend them; it is destructive for the law as a whole. A citizen is not only a bearer of rights, but also an active defender of these rights, since it is the citizen who raises the question of ensuring the rights in court. Furthermore, this is the individual’s social function. If they are deprived of such a possibility and are illegally removed from real legal relations as one of the defenders of rights which are in effect not only for individual, but in the end also for general interests, then this becomes lethal for the entire system of law.

In order to reduce the possibilities for such a transformation and deformation of the rules of law, the quality of legislative work is, of course, important — so that future conflicts of law are not embedded into the laws which are adopted. Adoption of illegal laws is an absolutely destructive factor. This is often caused by such phenomena as inadequate professional elaboration of the concepts and texts of acts, and their adoption under pressure from interest groups, which contradicts the basic interests of society and the state, legal principles, and the letter and spirit of the Constitution. to the contrary, the criterion used to determine the legal content of a rule of law should be the protection of human rights and freedoms, as well as balancing, in the course of creation of rules of law, such main social foundations as freedom, law and government, provided that the rule of law acts as the general goal.

The principle of the rule of law is fundamental and system-forming in the system of legal principles. The refusal to be subordinate to the law in any sphere of state and governmental activity in essence signifies the authorities' forgetting of society's interests, their striving to stand above society, to view the citizen as an object of their activity and not as a fully equal subject in relations with the state. This does not comply with the rule of law, leads to the danger of arbitrariness, excludes the possibility of legal reforms, including judicial reform, and potentially carries the threat of the destruction of the

---

\(^1\) Translator’s note: Throughout this monograph, the terms “arbitrazh court”, “Higher Arbitrazh Court”, and “Code of Arbitrazh Procedure” refer to the Russian meaning of “arbitrazh”. Historically in Russia, commercial courts and commercial court procedure have been designated as “arbitrazh” courts and “arbitrazh” procedure. These are distinct from private commercial arbitration and the rules that govern it, as conducted under the auspices of the Russian Federation Chamber of Commerce International Commercial Arbitration Court and its Western equivalents. These are also distinct from European commercial courts, for the jurisdiction of Russian arbitrazh courts includes tax and administrative cases.
state itself. One of the main contradictions of contemporary social development consists in the fact that having declared the state to be governed by law \textit{de jure}, but refusing to be subordinate to the law \textit{de facto}, the state will develop along a vector leading to its demise. Such a development contradicts the goals of the current Russian Constitution which, despite all its deficiencies and far from adequate implementation, is ideal in the sense of being normative: it prescribes that power must be divided on the basis of the law, declares human rights as a having inherent worth and presumes the rule of the people on the basis of competitive democracy. Without these three components, constitutional legal principles cannot be realized.

No legal principle lives a life of its own. It is realized and defended with the aid of a multitude of public and state institutions and, first of all, with the assistance of the judicial branch. The practice of applying the law gives rise, on a daily basis, to a multitude of complex problems related to its interpretation and application. It is extremely important that the judicial system acts through a process whereby its errors are corrected by the courts themselves. The judicial system thereby shows itself to be self-regulating. Since the judicial branch is an autonomous power, this principle was instilled into the very idea of its autonomy in relation to other branches of power and other state and public institutions from the very beginning. However, from the beginning this also presumed the inadmissibility of the deviations and errors in judicial practice which would have produced an interpretation which does not comply with the constitutional meaning of a rule of law and which violates the principles of the law. This is provided for by the institutions of constitutional judicial control.

Based upon the professional and moral responsibility of judges, on their feelings as a person and as a citizen, a court cannot become a servile weapon serving the realization of the subjective preferences of the bureaucratic apparatus, even if those find expression in the law. Courts and judges, who remain rather conservative due to the nature of their profession, must at the same time assist in the enrichment and growing of the legal fabric, simultaneously aiding the stability and development of society, fortifying general legal values while remembering that for us the main legal values are the rights and freedoms of the person and the citizen. The court is to protect them as supreme values. But citizens themselves, being the bearers of rights, must not remove themselves from defending their rights and freedoms through the use of any method which does not contradict the law. Not only would justice in cases which are referred to the competency of courts of general jurisdiction grind to a halt, constitutional courts of justice would also cease activity were citizens to stop going to court to defend their constitutional rights. The citi-
zens of Russia defend the rule of law, democracy, private initiative and pluralism of world-views and cultures.

The principle of the state governed by the rule of law is filled with the most significant human and social values which are assumed together with the priority of human rights and the rule of legitimate law, the rule of the people, the division of powers, variety in the forms of democracy, pluralism, etc. However, in many ways the realization of these ideas is hindered by the contemporary condition of civil society in Russia — it is currently characterized by its lack of structure, lack of active institutions, poor development of the system of political parties and other groups in society itself providing the feedback which is necessary for correcting state and government decisions and which make it possible to implement the system of checks and balances provided for by the Constitution. In Russia, all of this is only at the earliest stages of development.

I would like to stress that we have known both successes and defeats in our development. The liberating reforms of Emperor Alexander II in Russia in the middle of the 1860s may serve as an example. He also carried out a judicial reform. When you read the text of the provisions of the law of those years, one gets the impression that their legal content could still be applied today. But at that time the reforms collapsed in Russia. The sprouts of freedom were trampled, and reactionary views triumphed. This occurred for many reasons related to specific cultural and historical realities. First and foremost because in the end, it turned out that the ruling elite was not at the height of its calling; it could not understand the tasks or solve the problems relating to the development of the country. The people remained an object to be acted upon, and not a subject in the process of social transformations because a civil society capable of action had not formed which could advocate and defend this freedom.

The historical experience and practice of civilized nations show that a number of questions cannot be decided through a popular vote. For example, let us take the problem of the death penalty. Thanks to a decision of the Constitutional Court, the application of the death penalty is now blocked in Russia. Will our state now act as a former French president did in his time? In opposition to the results of polling in France, he achieved the ratification of the Protocol to the European Convention prohibiting the death penalty.

Of course, in the 21st century, historical time does not flow like it did in the 18th, 19th or even the 20th centuries. But the increase in historical speed also has its limits, including in the development of the law.

I am certain that if those people who strive to transform Russia into a democratic state governed by the rule of law could have united with the
forces in the world who are striving for the same and if they had accommodated each other, the result would have been reached; therefore, in our time it is not only not necessary, but also very dangerous to object to globalization — this would be a marginal view. This is especially true when one is speaking of advocating constitutional values, as well as the values of law which are generally recognized in international democratic society, with an awareness of the deep commonality and at the same time the special qualities determined by objective reasons and the uneven rates of historical development.
FIRST ROUNDTABLE

Discussions of Russian and foreign participants held in connection with the preparation of the monograph entitled “Rule of Law in Russia: Issues of Implementation, Enforcement and Practice”

“Uninformity of Judicial Practice and Judicial System”
27 November 2008, Moscow

THE PARTICIPANTS:

TAMARA GEORGIevNA MORSchAKOVA, doctor of law, professor, honored jurist of the Russian Federation, honored scientist, former judge of the Russian Constitutional Court.

VICTOR MARTENIANOVICH ZHUuIKOV, doctor of law, professor, honored jurist of the Russian Federation, Deputy Director of the Institute of Legislation and Comparative Law under the Government of the Russian Federation, former Deputy Chairman of the Russian Supreme Court.

ANATOLY VAleNTINOVICH NAUMOV, doctor of law, professor, Head of the Department of Criminal Law Disciplines of the Academy under the Russian Prosecutor General’s Office, member of the Scientific and Advisory Council at the Russian Supreme Court.

ANDREY GENNAIDIEVICH FEToTOV, Ph. D (law), attorney with the Odintsovo City Bar Association.

ANDREY VICTOROVICH RAHMILOVICH, attorney, partner with Margulyan and Rakhmilovich law firm (a chapter for monograph was written by him in cooperation with A. G. Fedotov).

ALEXANDER VLADIMIROVICH ROZENTSVAIG, Ph. D (law), attorney with the Almaty City Bar Association (Kazakhstan).

MIKHAIL ALEXANDROVICH SUBBOTIN, Ph. D (economics), Institute of World Economy and International Relations, Academy of Sciences of the RF, Senior Researcher. Science-consulting company PSA-Expertise, Director. (Moscow).
WILLIAMS SIMONS, professor of Leiden University (The Netherlands) and the University of Trento (Italy).

ELENA VLADIMIROVNA NOVIKOVA, doctor of law, partner of Novikov & Advisers law firm (Moscow), head of the project on preparation of the monograph.

ELENA NOVIKOVA: Dear colleagues, I would like to say a few words about how this idea originated. Generally, the need to discuss the issue of ensuring the uniformity of judicial practice and the judicial system had been long overdue, but no such discussion was held for one reason or another, so this wonderful idea waited until it could be discussed in a new format, in an international monograph.

I assumed that, for this purpose, it was reasonable to invite most authoritative, interested and highly professional Russian and foreign experts who would be capable of working together on the monograph. It also made sense to use the round-table format and hold the discussion in such a way that the participants would work as a team striving to jointly achieve certain results rather than act as each other’s opponents which, unfortunately, is so characteristic of our current academic life. Therefore, there would be an opportunity to create a genuinely joint product, not just a collection of purely descriptive articles written by different authors; such joint product would be an important and notable phenomenon for the Russian legal science and Russia’s practice of application and enforcement of law.

Then, as a result, it would be possible to evaluate a systemic distortion of the legislation in Russia’s practice of the application and enforcement of law, which became a constant factor undermining the uniformity of the system of law and the judicial system alike, and to develop important proposals aimed at improving the legislation and developing the legal theory.

Our esteemed colleagues, Andrey Victorovich Rakhmilovich and Andrey Gennadievich Fedotov will coordinate our discussion.

ANDREY FEDOTOV: A relation may be criminalized only when it goes beyond a civil-law offense. But, most likely, then such relation would violate a certain public interest. Otherwise, in a situation when it violates no public interest and the existing legal relations are purely private ones, contractual or not, and then, as often happens in Russia, representatives of the State start to claim that a party to the relation is a criminal, it will be quite strange for civil lawyers. Then, a civil lawyer would try to find out what public interest
has been violated. It is exactly what one should ask, and maybe, we will be able to find related criteria...

ANDREY RAKHMILOVICH: Is it possible to address the situation from a different standpoint and assume that a public danger emerges and public liability ensues when a person’s conduct prevents the application of civil-law penalties, i.e. when the problem cannot be resolved by means of civil-law penalties? For example, when such person tries to escape or starts to behave willfully, thus trying to evade the civil liability? Probably it is at that time that a public danger emerges which makes it necessary to hold the person criminally liable.

ELENA NOVIKOVA: That is, criminal liability should be imposed essentially on a subsidiary basis.

ANATOLY NAUMOV: [It should be imposed] when the liability provided for by other branches of law (i.e. non-criminal liability) is insufficient.

ALEXANDER ROZENTSYVAIG: In this connection, another issue may be relevant. We are discussing now unjustified criminalization of certain corpus delicti. And what if one reviews well known practices which, in my opinion, are not unique to Russia and common in other countries as well (I generally rely upon what I know about Kazakhstan’s practices)? There are attempts to criminalize any action in the economic area and address it from the standpoint of criminal law. So virtually any action can be criminalized at the discretion of a particular law enforcement body.

TAMARA MORSCHAKOVA: I want to discuss one idea which I would like to support though it is not yet popular in Russia. It deals with the question of what lags behind what. Since the Soviet times, it has been conventional wisdom to state that the theory lags behind the practice. In fact, we have long ago reached the stage when our theory provided us with all possible best options. Still, the practice lags behind the theory. From my point of view, if we manage to prove it, it might be important.

Another idea, which is also absolutely general, is that it is impossible to restrict the existing statutory rights by means of their interpretation. Such interpretation should not limit the scope of protected rights, nor should it result in a narrower perception of their substance. If any interpretation of a text is to be given, it may only be liberal. I believe it is very important for everybody: both for interpretation of individual cases in general court practice and for official interpretation, that is to say, general regulatory and abstract
interpretation which is given by the Constitutional Court. However, in Russia this is not always so. Anatoly Naumov made a very precise statement regarding Article 55(3) of the Constitution — that a restriction may only be imposed by a federal law, and in addition, such restriction should also be tested based on many other parameters to which it should correspond: the restriction should be targeted, commensurate, and related measures should be chosen with due account of their nature, as was mentioned before, as the nature of any measures (even those that are targeted correctly) should be adequate to their target.

In this connection, I would like to draw your attention to the following (this is the third idea which was voiced here before). In Russia, criminal liability is often imposed under the pretext of protection of rights of victims (let us assume that the term “victims” is interpreted broadly), though civil remedies which can be used to protect those rights provide more opportunities, even as far as the area of criminal law is concerned. Charges presented by criminal prosecutors limit the possible amount of compensation, while in a civil proceeding the amount of such compensation may be set on a completely different basis and such proceeding provides much more favorable terms, even in respect of allocation of the burden of proof in the course of protection of the victims’ property and non-property interests where losses resulting from violation of such interests can arise in a tangible form.

ANDREY FEDOTOV: In my opinion, so far as interpretation is concerned, we have two opposite trends: on the one hand, there is a trend in Russia to restrictively interpret rights, in particular, those provided for by the Constitution, and civil rights generally. On the other hand, criminal law rules tend to be interpreted broadly.

TAMARA MORSCHAKOVA: And this is exactly what should not be allowed, since a criminal law rule is always a restriction by virtue of its nature. What are we talking about when we refer to a criminal law rule? We are talking about a prohibition. By virtue of its nature, such rule is meant to prohibit rather than to allow something. When we analyze methods of legal regulation as they are presented in the theory of law, it is clear that these include methods of prohibition and authorization and that there are different proportions between general authorizations and specific prohibitions and between general prohibitions and specific authorizations. A specific prohibition provided by criminal law (it should be noted that such prohibition may only be specific, not general) may not be interpreted broadly which is fully consist-
ent with the requirements of Article 55(3) [of the Constitution]. At the same time, authorizations should be interpreted other than narrowly, if not broadly. Authorizations constitute a very important area of judicial interpretation (all courts are most often deal with interpretation of specific rules of law in the course of their application, and such interpretation is not always given in the Plenum resolutions, though, most probably, it is those resolutions that violate the above rule to the greatest extent. The principle that no criminal law prohibition may be interpreted broadly (which is also true of any other specific prohibition existing in other branches of law) is very important from the standpoint of judicial law enforcement. Contrary to that, an authorization may be interpreted broadly. And as far as the area of restrictions is concerned, court practices and judicial interpretation have nothing to do with it. This is the area where only the legislators may act, and whatever they do should also be checked from the standpoint of consistency of a particular statute with the law in a general sense.

In a resolution issued by the Russian Constitutional Court in 1996, it stated the following general principle (in relation to an erroneous verdict imposing significant restrictions on an individual): since, as provided for by the Constitution, rights of an individual may be restricted only by a federal law and in accordance with the goals and principles set forth by Article 55(3) of the Constitution, no other restrictions (i.e. restrictions imposed by a verdict, i.e. by a judicial act rather than by a law) may be deemed to be possible or may be allowed. This principle can subsequently be used to develop a complete theory. Indeed, no court develops a theory for the sake of developing it. The court would simply examine a particular specific issue relating to a particular case. In fact, when considering the above-mentioned issue, the Court implicitly set out the general fundamental principle.

**VICTOR ZHUIKOV:** As far as interpretation is concerned, there are two positions that manifest themselves in resolutions of the Plenum of the Supreme Court and in disputes. In early 90s, when there were heated debates which explanation, A or B, should be given (where A was less favorable and B was more favorable for persons on trial), someone made the following suggestion: “Dear colleagues, if we have serious doubts, and both parties seem to be right, let us make up our own mind and give such an explanation that would be favorable for the accused, so that any doubt should be interpreted in their favor. I remember that many colleagues objected to this proposal stating that the above principle applies only in the area of law of evidence and may not be applied to substantive law. And, unfortunately, after that, [respective] judgments were issued.
TAMARA MORSHAKOVA: This is a constitutional approach which is confirmed, in particular, by decisions of the Strasbourg Court. There are decisions of the European Court of Human Rights where it is expressly stated that a right may not be restricted in the course of its interpretation by law enforcement bodies.

ANDREY RAKHMILOVICH: I would like to draw your attention to the fact that the civil law provides more opportunities for compensation of harm and protection of a victim than the criminal law. A Resolution on fraud issued by the Plenum of the Russian Supreme Court refers, as an example, to one’s failure to repay a loan: if a person got hold of another’s property by obtaining a loan that he knowingly did not intend to repay, then, from the standpoint of the Supreme Court, such action is a theft. What consequences may arise from a theft? A decision may be issued upon a civil action of the victim in his favor, i.e. the victim will be awarded the sum which has been stolen from him. And in accordance with the rules of the civil law, in such case, payment of interest and compensation of lost profit are also possible. Therefore, there exist completely different relations which do not exist in the criminal law. The criminal law provides for nothing more than compensation of actual damage.

ANDREY FEDOTOV: Inadequate application of criminal law to civil relationships also means (as follows from our discussion) deprivation or artificial restriction of remedies used to protect one’s civil right.

TAMARA MORSHAKOVA: Generally, there is a certain idée fixe that has been prevailing in Russia for a long time, namely, that prosecution of crimes under the criminal law is aimed at protecting the rights of victims. I would say that this idea is absolutely wrong, since when criminal-law methods are applied, victims are deprived of many opportunities in terms of their protection. According to generally accepted ideas which prevail worldwide, criminal-law methods are not at all meant to protect victims since otherwise their protection would only depend on whether or not a respective criminal has been found. Protection of a victim who suffered from a crime should be ensured, inter alia and in the first place, by methods other than those provided for by criminal law. If such other methods are used, protection of a victim will be more comprehensive. It is one of the principles that underlay the international law.

Unfortunately, in Russia this idea is inoperative. We tend to repeat that we need to intensify the fight against crimes since it facilitates the protec-
tion of rights of victims. More simply, the State wants to ensure the protection of such rights at the expense of the criminal which almost never enables a victim to obtain full compensation, and the State does not want to undertake to provide such compensation on its own. However, it is obliged to procure such protection, just because in its capacity of public power it is responsible for ensuring that no or few crimes are committed, that is, for protection of the interests of the population even before any crimes are committed.

**ANATOLY NAUMOV:** It is a paradox that the more severe the criminal’s punishment adjudicated by the State will be, the less the victim will get; if someone is sentenced to 10 years in jail, how much will he be able to pay from what he will earn while in jail?

**TAMARA MORSCHAKOVA:** You know, on the one hand, our public mind is very naïve, and on the other hand, it is perceptive to this idea of revenge which is being inculcated from the top down. I would say that all these things “protect” the State and enable it to continue to disregard its duty to protect the interests of those who suffered as a result of various crimes. The State should perform the above duty, in the first place, by taking preventive measures and eliminating possibilities for crimes. While now everything is blamed on those who caused harm and explained by the fact that their ability [to compensate the same] is limited.

**ANDREY FEDOTOV:** The general topic of our round-table discussion is uniformity of the court system and uniformity of the system of law. If we look at the positive law, the situation does not seem to be bad: the laws are quite good and provide for many right things. On the face of it, we also have a uniform system of law and a uniform court system. However, if the law is viewed as a system of “live” public relations regulated by law, one would realize that there exist problems which, in my opinion, mean that Russia has neither a uniform system of law nor a uniform court system.

What am I talking about? First of all, I am talking about a special role of criminal courts in Russia. In the first place, one should mention the infamous Article 90 of the Russian Code of Criminal Procedure, which was already discussed here behind the scenes and which is well known to all the participants. This Article is entitled “Prejudicial Effect”. I would rather call it “Elimination of Prejudicial Effect”. According to the Article, any circumstances that have been established by a valid verdict shall be acknowledged by a court without any further verification thereof, unless the court has doubts regarding such circumstances. However, we understand that
in fact, the issue of prejudicial effect which is decided by a judge at his absolute discretion has nothing to do with [real] prejudicial effect. This problem became so important that the Russian Constitutional Court already issued a resolution dated 15 January 2008 which addresses it. From my point of view, the most important thing that is stated in the resolution is that if an arbitrazh court delivers a decision based on certain circumstances of a case, then a criminal court dealing with the same circumstances will have no right to disregard such decision. So far, I would go no further. However, when I say that Russia has neither a uniform system of law nor a uniform court system and that both systems are being undermined by a specific position of criminal courts, I do not mean, in the first place or exclusively, that criminal courts are being guided by their own procedural law. The problem is that they are being guided by their own substantive law which has little to do with the criminal law per se.

What do I mean? I am taking about the blanket nature of rules of criminal law, it all boils down to that. The Criminal Code sets out certain rules of criminal law, however, most of these rules are blanket ones. First of all, I am talking now about property crimes, crimes in the area of entrepreneurship. It would seem reasonable that a criminal court, when applying rules of criminal law related to such crimes and, thus, inevitably evaluating actions of commercial turnover participants from the standpoint of civil law, should be guided by the civil law. However, criminal courts are being guided by such “civil law” which has nothing to do with the actual civil law. I would call it “criminal civil law”.

To confirm what I’ve just said, I would like to read aloud certain excerpts from Resolution No. 51 issued by the Plenum of the Supreme Court on 27 December 2007 and entitled “On court practice in relation to fraud cases”. It reads as follows: fraud is deemed to be committed as of the moment of state registration of the ownership title to a real property, the conclusion of a contract, the making of an endorsement on a bill, or the entry into force of a judgment acknowledging that the right to property belongs to a respective person! I would like to understand how on earth our Supreme Court can give such interpretation? How can a crime be completed as of the date when a judgment acknowledging that the right to property belongs to a respective person enters into force? More simply, one can say that the Russian Supreme Court equated a crime with a civil relationship, i.e. a transaction, a bill, perfection of title to immovable property, etc. The Supreme Court made just one reservation: it said that, of course, it is necessary to find out whether or not there was a criminal intent which should have arisen prior to the performance of a transaction. But we all know too well what kind of a
court system we have and what its origins are. If our law enforcement bodies are told that a transaction differs from a crime only in that in the latter case there is a criminal intent and then given the task to identify such criminal intent, there is no doubt that they will be able to establish that everyone, literally everyone, has such intent.

By giving such interpretation, the Plenum of the Supreme Court creates its own “criminal civil law”. One may not equate a civil relationship with a crime since this means complete defiance of everything, this means the absolute local death of the civil law, it has been strangled thereby and no longer exists. This is what professor Naumov spoke about, i.e. artificial criminalization of normal [business] activity.

What situation do we have in relation to property cases, especially those involving entrepreneurial activity? First, they would choose any company. All its transactions would be declared to be criminal, and nobody would bother, based on the rules of civil law, to say: “Yes, there is a civil legal relationship. It either has been performed or still exists. It should terminate on the grounds provided for by law.” Nobody would care – I mean the criminal justice bodies. It is sufficient to declare that a transaction is fictitious, a legal entity is fictitious, an ownership title is fictitious, a transfer of an ownership title is fictitious, and so be it, one can forget about the civil law, create one’s own new criminal civil law and live in accordance with its rules.

The thing is, it is not just an individual outrage committed by an individual law enforcement official in the course of his law enforcement activity. It is a well thought-through and systematic policy which is pursued, in particular, on the basis of explanations provided by the Plenum of the Supreme Court.

What are the consequences of such civil criminal law? I am talking, first of all, about property crimes and crimes relating to business activity. I would like to read aloud the definition of “theft” contained in the Criminal Code and, as a civil lawyer, ask a number of questions. Note 1 to Article 158 of the Criminal Code reads as follows: “When used herein, a “theft” shall mean an unlawful taking without compensation or making use of another’s property in favor of the guilty person or other parties....” So, being a civil lawyer, I want to ask my first question: who are those “other parties”? If this is a person who had a common criminal intent together with the thief, then, most likely, such person is an accomplice, and there is no need to write about such person separately. If, however, this is a different person, an outsider, then what do we have here? Is it a theft in favor of a third party?

TAMARA MORSCHAKOVA: It is the giving of a stolen thing as a gift.
ANDREY FEDOTOV: This is absolutely correct. But if this is the giving of a stolen thing as a gift, then the thing should first be stolen and then transferred as a gift. Why have those “third parties” been included in the legal definition of “theft”? I do not understand why. But it is clear that it can be interpreted in any way.

Let us then talk about gratuitousness of taking. This is a long-debated topic over which many swords have been crossed, so one should say a few words specifically about this problem. Our criminal justice interprets gratuitousness in a very special, unusual way, not in the way it has been interpreted over centuries in civil law theories and even in laws. According to our criminal justice, gratuitousness means either the absence of equivalent [compensation] or its insufficiency. Let’s not discuss the absence of compensation. But what does insufficiency of compensation mean? This means that there is a certain law enforcement officer who decides whether or not such compensation is sufficient. So he can decide it at his own discretion, which in practice results in cases about which I will talk later.

The thing is, criminal justice bodies and officials do not want to know how the concept of gratuitousness, which has been studied in civil theory for centuries, is interpreted by legal scholars (and their interpretation thereof differs completely from the concept of gratuitousness under the criminal law and especially that offered in the course of interpretation of criminal law). When criminal law experts start interpreting this concept, they examine many things, whatever might come to one’s mind, for example, the origin of the word itself, its relation to mercenary motives, etc. The only thing that they can not or do not want to do, I don’t know why, is to read Article 423 of the Civil Code which gives the legal definition of gratuitousness and which provides (in respect of a contract, though, but these rules are applicable to any civil-law relations) that a contract under which one of the parties should receive a payment or other consideration for the performance of its duties is a contract for compensation. It is all quite clearly stated, and one may only talk about gratuitousness if there is no consideration whatsoever, since if consideration is to be “manually” measured to determine its sufficiency or insufficiency, we will get totally different results, and we all know what those results will be.

And here we should return to what professor Naumov said. If there was a certain relation between a victim and a so called “criminal”, then before we classify it under the criminal law, we should do so on a different basis, under some regulatory branch of law, and most likely, the civil law (as often happens). And then we will see that the concept of “theft” as it is described in the Russian criminal law is not operative. Or, rather, it operates in a way that makes it possible to send to jail a person who is not, in fact, a criminal.
There is one example. The problems with gratuitousness are most obvious when one looks at how our criminal justice bodies interpret the concept of price. To prove that there was no compensation or that compensation was insufficient, they would review a certain agreement and say: “No, this price was insufficient, the compensation here is insufficient, so there are indicia of a theft.” Some of the precedents are astounding.

There is a case which has already been discussed at the highest level and which deals with the so-called “transfer prices”. Companies which, under civil law, are dependent, parent or subsidiary companies enter into an agreement among themselves, i.e. within their group of companies, and use prices which were set thereby in the agreement. Such prices are called transfer prices. Such prices were always regularly used, for example, in the oil sector. Let us look at the three companies: Yukos, Russneft, and Rosneft. What do we see? In the opinion of the criminal justice bodies, transfer prices set by Yukos were lower than the market ones, so Khodorkovsky and Lebedev are in jail. In the opinion of the criminal justice bodies, transfer prices set by Russneft were higher than the market ones, so [its President] Gutseriev is on the run. And finally, there is the most interesting thing, because it is most legitimate, from my point of view. There is Resolution No. 6288/02 of 2002 issued by the Presidium of the Higher Arbitrazh Court in respect of the third of the above companies, Rosneft, which states, correctly and in full compliance with the law, that there was no crime and there were no grounds for deeming respective actions to constitute an invalid transaction. For this purpose, the Higher Arbitrazh Court rightfully refers to Article 424 of the Civil Code, whereby the price under a contract shall be set by agreement of the parties thereto.

So, in such a situation, given what is going on, how can we talk about the uniformity of law and the court system? Such uniformity is constantly undermined from within by actions of our criminal justice bodies. I would like to reiterate, it is not just outrageous actions of individual law enforcement bodies or officials. It is a systematic and methodically pursued criminal policy which is based, among other things, on explanations offered by the Supreme Court. The thing is, the term “transaction” is used also in the criminal law, in particular, when describing actions related to money laundering. However, if we equate a crime with a transaction, this way will not lead us anywhere. It means that any participant in a civil turnover can be subjected to criminal prosecution.

Speaking once again about the boundaries of criminalization, I would like to say that, in my opinion, so far there is a civil legal relationship, until it is terminated, any crime will be out of the question, unless we talk about
a civil legal relation under which damage or losses are to be compensated, etc. It is clear that this can exist in the framework of a criminal case too. Unfortunately, our criminal justice bodies operate in the completely unique framework, both in terms of procedural and substantive law, because they almost never apply the civil law other than their own “civil law”. And this is a disaster. Their “civil law” is a fictional, quasi-civil law which violates the essence and content of the civil legislation.

As to Article 90 of the Russian Code of Criminal Procedure, I should say that, upon its careful review, it becomes clear that the Article does not establish prejudicial effect for a criminal court not only with respect to [decisions of] non-criminal courts but also in respect of verdicts issued by other criminal courts. So, this means that in Russia each criminal court acts independently from any other court. It may make any decisions whatsoever, it is not bound by anything, even by the existing judicial acts. The situation that we discussed and that underlay the resolution of Russian Constitutional Court boils down to the fact that a person who was held criminally liable applied to the Constitutional Court stating as follows: “There are acts issued by the arbitrazh court which establish that my actions were lawful, but because of these very actions I am subject to criminal prosecution.” This is the heart of the matter, since in Russia such situation repeats itself all the time.

Sometimes, criminal justice bodies take steps with no inner logics. What are the practical consequences? Let us look at the case of Yukos once again. In the framework of their first case, Lebedev and Khodorkovsky were convicted, among other things, for tax crimes. There are several awards issued by the arbitrazh court whereby companies within the Yukos group of companies were found to have committed tax offences and were obliged to pay underpaid amounts, penalties, and fines, and all such amounts have been recovered and transferred to the state budget. Then, the same factual circumstances were analyzed in the framework of a new criminal case, and the following conclusion was made: “No, this had been a theft.” So at the moment the prosecution is trying to prove that it was a theft. But if these actions are deemed to be theft, then how comes that taxes were imposed thereon? How can one understand this? There is another question. If Khodorkovsky and Lebedev are convicted based on these new charges, what should be done then? Should the previous case be cancelled upon the discovery of new circumstances? Should the awards issued by the arbitrazh courts in respect of this matter be overturned and all taxes be reimbursed?

If the system of law does exist, then it is not something that was just invented, it was developed over centuries by serious people. And it does exist and is being implemented. When it is followed, no such outrageous conflicts
arise. On the contrary, if each criminal court believes that it is acting totally on its one, the law starts and ends with it, and it is bound by neither the civil law nor decisions of any courts, whether criminal or non-criminal, and then we have the results which we discussed earlier.

However, if we realize that this happens all the time and our criminal justice bodies act as described above, then we should acknowledge that our realities cardinaly differ from what is written on paper. If we assume that our criminal courts form part of a unified system, then, in fact, this is the system which embraces the criminal courts and the law enforcement bodies rather than other courts whose decisions the criminal courts are not even obliged to comply with.

How can we talk about the unified system of law when the most extensive regulatory branch of law, namely, the civil law, is totally disregarded by the criminal justice bodies? Unfortunately, this has always been the case at the intersection of public law and private law in Russia. And this is the case now, also at the intersection of the tax law and the civil law, and that of the civil law and the criminal law. However, while at the intersection of the tax law and the civil law we have at least the arbitrazh courts which prevent the situation from becoming absurd, our criminal courts apply their own criminal civil law, which is true also in connection with materials of the Plenum of the Supreme Court.

Once again, what should we do? I think we should try to ensure that there would be no such resolutions of the Plenum of the Supreme Court, which we discussed and which equate crimes and civil legal relations. Such resolutions have to be somehow repealed by someone who can do so. I think, Article 90 of the Russian Code of Criminal Procedure should be changed. In any case, the Russian Constitutional Court has already issued a ruling which enables one to approach the above Article differently. Most probably, Article 3 of the Civil Code should be complemented with a provision whereby institutions, concepts, and rules of the civil law may not be applied in other branches of law and interpreted by courts other than in accordance with the rules of the civil law. Otherwise, every day we will face a situation when the civil law exists “until any militiaman1 decides otherwise”. In other words, a paper form entitled “Order on institution of a criminal proceeding” would mean that one should forget about the civil law as if it were non-existent. So, locally, the civil law has been exterminated. Surprisingly, this is a problem which is discussed by everybody but lawyers. It is described in mass market publications and arouses indignation of journalists. It has been long overdue to seriously evaluate the situation and address it on a professional level.

---

1 Translator’s note: a notion for Russian policeman.
**VICTOR ZHUIKOV:** What is written in the Code of Criminal Procedure? It states that any laws, even federal ones, that run contrary to it shall not be applied.

**ANDREY RAKHMILOVICH:** The State may not determine the interests of private parties. It may not establish whether or not private interests have been violated.

Let us start with the equivalence issue. The issue of gratuitousness is a complicated one since gratuitousness may be different. For example, when I transfer property to you apparently without compensation, I can pursue various economic interests and nobody, besides me, can establish what those interests are because I dispose of my property and rights at my own will and in my own interests. If the State tells me that I acted contrary to my interests, it interferes in an area which is foreign to it. Most often this happens when managers or owners of a company are accused of stealing its property. The thing is, a legal entity’s governing body expresses its will and defends its interests. There are special legal mechanisms of control over the management. A major transaction or an interested party transaction which was entered into other than pursuant to an established procedure may be challenged by shareholders. Shareholders owning in aggregate more than one percent of shares may sue the company’s management seeking to recover damages inflicted on the company through actions of its management. There a special civil-law, corporate law mechanism. No control exists beyond this mechanism, and the State may not say that the president of a company entered into an agreement to sell oil, for example, at undervalue. If the shareholders think that the president did the right thing, the State may not say: “No, he acted incorrectly, contrary to the best interests of the company.” This is because the State does not protect economic interests of particular parties, it protects the public interests instead.

**VICTOR ZHUIKOV:** We talked about theft in favor of third parties. There is such a language now, and it is highly controversial. Unfortunately, when the current Criminal Code was adopted, it was done without taking into account our recent history. The practice in Russia in the respective area was simply outrageous. Do you remember, there was Article 152-1 of the Criminal Code of Russian Soviet Federative Socialist Republic pertaining to false reporting and other distortions of reports? It was announced that there would be the fight against false reporting and that reports should be true and reliable. What did the Plenum of the USSR Supreme Court do? It stated that all the amounts which were paid to an enterprise’s employees for performance over and above
planned targets should be deemed to have been stolen by the enterprise’s CEO in favor of third parties. So a director of a large enterprise which employed tens of thousands employees could be accused of stealing tens of thousands roubles while his bonus amounted to just 200 roubles. He was convicted under Article 93-1 of the abovementioned Code which provided for imprisonment for up to 15 years and capital punishment. When, in the late 80s, the situation in the country changed, the USSR Supreme Court amended, and I remember this clearly as if it had just happened, Resolution No. 10 of the Plenum because we all referred to it. I took part in that revision of such cases. The Presidium of the Supreme Court has revised tens of thousands cases and changed the respective charges and sentences. Can you imagine, people spent in jail 10 or 15 years, some of them were executed! So that is the situation with theft in favor of third parties. The consequences were unimaginable for the entire Soviet Union. The approach to this category of case has cardinally changed, while the language in question remained intact, along with the opportunities for its application.

**TAMARA MORSCHAKOVA:** Even if we consider the examples that we discussed here, the situations where people were persecuted for the same actions, initially for tax crimes and then for crimes of a totally different kind, for theft, [then one should say the following:] it goes without saying that practice may change in the absence of any changes in the law. However, this is left at the discretion of those who organize such changes in the area of practice. Here the role of a particular person or several persons in history is very important. Why is this so? I believe, it is simply because the generally accepted legal principles, the acknowledgement of which is included in the definition of rule of law, are not just taken into account or, alternatively, disregarded independently of anything else. Any case where a person is persecuted at first for one crime and then for another based on the same facts is immediate grounds for applying to the Strasbourg Court, since there is a flagrant violation. This is just one aspect. There are also other violations; for example, when we say that the criminal courts disregard prejudicial effect created by other valid judicial acts issued by other types of justice bodies, we are dealing with a direct violation of the principle of legal stability. Russia has been repeatedly criticized for that in the European Court of Human Rights, if one is to put it mildly. If valid judicial acts, even those issued by Russia’s highest level courts, are contested in a criminal proceeding without having been contested in a court of the proper type, as it happened in the case involving prejudicial effect which the Constitutional Court considered this year, this means that the principle of legal stability is violated. Every time we finally
get to the relation between the two things: discretion of the court in interpretation of rules (which can be very detrimental because of the nature of such rules, if they are drafted in such a way that the court can interpret them differently, on a case by case basis or from time to time rather than consistently interpret them in a definite way) and the fact that general legal principles are totally ignored in the course of interpretation. In fact, they are generally accepted as general rules of law and we confirmed our commitment to comply with them in the Constitution; in addition to the rules of law, we agreed to comply with the generally accepted legal principles, i.e. the principles which are accepted by the international community. However, time and time again such principles are ignored in particular instances of application of law in Russia. Why do such principles exist in the first place? They are meant to help rectify a situation when the law itself is insufficient to reveal its true meaning. The law might be insufficient but in the course of application of law it might be possible and it should be required to rectify the law itself, based on such general principles of law. It is exactly what the principle of the rule of law is about. Nonetheless, it is those principles, such as the principle of legal stability and the principle “not twice for the same thing”, that are not observed. Of course, this should be blamed on practice. However, maybe, one should also recall in this connection that, in accordance with the general legal principles, rules of law that provide for liability should be drafted in such a way that they would not allow one to act at one’s unreasonable discretion every time. The rules of law should be clear, precise, and definitive and should rule out any possibility of their controversial or arbitrary interpretation. The Constitutional Court of the Russian Federation wrote about that many times, reiterating that rules of law should be clear, definitive, and precise, and, first of all, this is true of the rules that establish liability, i.e. the rules that fall within the category of prohibitive rules. I think it is a very telling thing, because we may provide useful guidance to our practitioners even if no corrections are made to the legislation. However, it is always very difficult for us to provide such guidance to the practitioners, given Russia’s huge territory and huge number of law enforcement bodies and officials. It would be better if we could provide guidance to the lawmaker. Nonetheless, the lawmaker is obliged (including by virtue of the Constitution itself) to observe the generally accepted principles and rules of law which have been acknowledged as international rules and which are recognized by the entire international community.

ANDREY FEDOTOV: You said a very important thing, that the law enforcement practice should be guided by the constitutional principles. So,
First Roundtable Discussions

I have a question: let us suppose that a criminal court will look at resolutions of the Russian Constitutional Court and the Resolution of the Plenum of the Supreme Court which we discussed earlier. What would happen and what does it mean from the standpoint of uniformity of the judicial system?

TAMARA MORSCHAKOVA: I can tell you at once what would happen. This is an easy question for everyone. The courts themselves answer this question; if an individual appears in court holding a resolution of the Russian Constitutional Court, they would tell him: “Put it away, we don’t care about it.” And it is clear why they say so. It is because the mechanism ensuring the implementation of a resolution of the Supreme Court is crystal clear. If you deviate from the resolution, your verdict will be overturned, and if this happens, then you will have problems at your work and even be dismissed, apart from other personal consequences. On the contrary, our executive authorities do nothing to ensure implementation of resolutions of the Russian Constitutional Court (though I do not think that a specific mechanism should be created to implement them). No official has ever been held liable for his persistent reluctance to comply with a resolution of the Russian Constitutional Court. There are certain mechanisms, and there are particular types of liability one can bear for one’s failure to do so, but nobody has ever been held so liable.

ANDREY FEDOTOV: When we discuss our criminal justice bodies’ perception of theft, it is very important to distinguish between private and public interests. If one does not understand that a crime does exist where a public interest has been violated and that it does not exist if no private interest has been violated, then we come to a situation where certain crimes have no victims, and such victims are artificially “appointed” afterwards. Speaking of the landmark case of Yukos, it turns out that they have stolen from themselves. They are told that a contract is a form of theft. However, both companies that entered into the contract (i.e. the “thief” and the “victim”) are owned by the same owners. So, who stole from whom? If we abandon mechanisms which are provided for by civil law, namely, by corporate law, we will inevitably end in a legally absurd situation. It is because the law is not a merely invented system. It has been developed over centuries by many wise people, and it has its inner logics. But if in each particular case each particular member of criminal justice bodies starts inventing his own law, we will find ourselves in the situation we discussed.

TAMARA MORSCHAKOVA: I am talking all the time about general things. What is, indeed, going on? In fact, the above examples of how Russian crimi-
nals law sets out its prohibitions constitute a gross violation of the general legal principles, for example, of the principle “sine crimen, sine lege.” Any gap in the criminal law may not be deemed something that has to be interpreted, because in the absence of law there is no crime. From this point of view, in the framework of the Russian system of criminal-law regulations, any gaps in the criminal law are always good. There is no crime which has not been set out in the law. And this should be stated specifically, including in criminal cases in relation to which applications are filed with supranational justice bodies. If there is no express criminal-law prohibition, there can be no criminal liability. This is reflected in the practice of application of law at the supranational level. This is also reflected in our criminal law theory which, so it seems, should be followed by the lawmaker. Analogy is not recognized in the criminal law. This is an embodiment of the general legal approach: a crime may not exist unless it is provided for by law. I think this principle should be reiterated and demonstrated all the time, it is very important, in particular, when we discuss what methods the maker of criminal law should use when setting out corpora delicti.

Regarding criminal-law prohibitions set out in the common law system and the continental law system, I would like to say that within the latter system Russia’s position is a most extreme one in terms of its commitment to setting out provisions of law in general terms. If we look at a German law, how corpus delicti is set out? He who took a certain thing from another person shall be liable. And what do we write instead? When setting out corpus delicti, we would state abstract parameters of the crime’s objective aspect (actus reus), for example, taking or transfer, appropriation, or concealment. The respective provisions are less specific than provisions, say, of the German Criminal Code (Strafgesetzbuch). Within the system of European law, we are still committed to setting out essential elements of offences in most abstract terms, which is inadmissible since abstract language always inevitably leaves room for interpretation and provides for a greater opportunity for discretion. As far as the method of criminal-law regulation is concerned, such abstract language also violates the principle “sine crimen, sine lege” since it is unclear what exactly is meant in the law when it refers to something that has been prohibited.

Mikhail Subbotin: Usually, when people talk about investment climate, they separately discuss social and political, legal, fiscal and institutional aspects. That is, the legal environment forms part of a complex structure of other factors, and each of its elements may turn out to be crucial for an entrepreneur. Legal risks can overweigh those relating to taxation, or vice versa. Our prime ministers often stated that though our system was clearly imperfect, companies had a greater opportunity to earn money. These two
things seemed to be opposite to each other, though not every company is eager to earn more when risks are increasing. As a rule, those who are prepared to risk more tend to be crooks. Companies wish to operate in a normal legal framework. And as far as direct contracts between the State and businesses are concerned, it should be noted that the better legal protection is afforded to investors the greater opportunity the State has to maximize its revenues, because risks are eliminated.

Investment climate of a country is evaluated based on a number of indicators, because no evaluation can be carried out based on a single criterion. Apart from Russia’s credit and investment ratings, if one looks at other parameters, the situation in this country seems to be much more miserable.

In its last year’s report on business climate, the Russian Civic Chamber chose six very important indices and analyzed them over the period of five years.

<table>
<thead>
<tr>
<th>Index of conditions for sustainable economic growth (World Economic Forum)</th>
<th>Economic freedom index (Heritage Foundation)</th>
<th>Index of efficiency of state governing bodies (World Bank)</th>
<th>Corruption Perceptions Index (Transparency International)</th>
<th>Transparency and accountability index (World Bank)</th>
<th>Civil liberties index (Freedom House Foundation)</th>
</tr>
</thead>
<tbody>
<tr>
<td>США</td>
<td>США</td>
<td>США</td>
<td>США</td>
<td>США</td>
<td>США</td>
</tr>
</tbody>
</table>

---

First Roundtable Discussions
It is understandable that Russia performs well as far as the index of economic growth sustainability is concerned because it is directly related to the boom of oil prices, the country’s abundant natural resources, etc. However, Ukraine which exports energy demonstrates approximately the same growth rates. That is, a country can live by exporting [resources] or it can simply develop its economy in a reasonable way, and projections of economic growth in both countries made by international institutions will be virtually identical. Projected rates of growth in China are very high, the USA are more or less at the same level, but they have virtually reached the maximum possible rates, so one should look at comparative positions of various countries, and it is clear from the table where Russia stands so far.

As to the index of efficiency of state governing bodies and, generally, the remaining four indicators (efficiency of public governance, corruption perception, transparency and accountability, and civil liberties), we can see that Russia is close to the bottom and only competes with China so far as the civil liberties are concerned. As to the trends, it is clear that over the period in question the values of all those parameters in Russia decreased, i.e. the situation became worse than it was in early 2000s. These ratings and estimates are often perceived in Russia to be driven by certain political considerations. Nothing of the sort, the methodologies used for that purpose were well thought over and applied many times, and to do some of the calculations involved, one should process about 400 indicators. Each of the organizations has its own methodology, but they do it every year, so their ratings and estimates are well grounded. From my point of view, we should seriously consider them and the situation that Russia faces now.

ELENA NOVIKOVA: Could you please comment on Ukraine’s downward trend in corruption?

MIKHAIL SUBBOTIN: Many observers have already stated that the concept of corruption in Russia is a tricky one in terms of its criteria; it is because corruption in Russia is quite specific, as it constitutes the cornerstone of the entire governance system. The governance system is based on conflicts of interest, as leading government officials often also manage companies.

[For the purpose of the ratings], one estimates, in the first place, the amount of resources that entrepreneurs are required to divest for the purpose of their business transactions, and it turns out that corruption-related costs are increasing steadily. In addition, corruption in Russia changes; it has increased many-fold, but apart from that, it now involves a certain degree
of non-fulfillment of promises: when one paid for something before, at least the obligations were observed, while now an entrepreneur can pay a bribe and then he will be told that it did not work out.

**WILLIAMS SIMONS:** I like Transparency International’s [indicators] very much. As to the other two American institutions, the Freedom House Foundation, for example, you probably know that they are quite rightist. I am not especially fond of them, because I am afraid that their methodologies cannot be used to explain things in relation to Russia and, probably, Ukraine. Though I agree that is quite important to better observe and ensure civil liberties. But I am afraid that the organizations in question see some positive developments in this area in Ukraine simply because they are very much willing to see them. This does not mean that I have any anti-American sentiment, not in the least.

**MIKHAIL SUBBOTIN:** Now, as far as main indicators of business climate in Russia are concerned... It is understandable that the existing “medium” values are more or less acceptable to businesses. As to the indicators “Opportunity to create a new business”, “Protection of private property”, “Development of legal framework for entrepreneurship”, “Corruption-free relations between business and authorities”, “Nature of tax administration of businesses”, “Activities of the systems of licensing, supervision and control”, there is an upward trend but the situation is still worse than necessary for more or less normal business activity. Till recently, businesspeople were satisfied with the political trends. However, the correspondent value is in the middle of the scale, and it is still very far from 7, its maximum value. And the best results were achieved in the category “Relations within the business community”.

In the chart below:

**MAIN INDICATORS OF BUSINESS CLIMATE IN RUSSIA**
(Average estimates vary on a scale from 1 (“very bad”) to 7 (“very good”))
Opportunity to create a new business from scratch
Legal protection afforded to private property
Corruption-free relations between business and authorities
Development of legal framework for entrepreneurship
Nature of tax administration of businesses
Activities of the systems of licensing, supervision and control
Activity of regional authorities aimed at improving business infrastructure
Consistency of federal authorities’ policies with business development
Attitude of public at large to entrepreneurs
Political trends
Relations within the business community
For example, in April 2006, the Foreign Investment Advisory Council held a discussion regarding its second annual survey about Russia as an object of investments. The following five problems were found to prevent the growth of investment flows into Russia: administrative barriers (mentioned by 84% of the respondents), corruption (78%), inadequate and controversial legislation (71%), and selective interpretation and application of laws (67%). At the same time, only 39% of the respondents were concerned about lack of protection against aggressive and non-ethical business methods. So, in Russia, investors are afraid of the State twice as much as of their competitors. In an ideal world, it is the competition that should present the greatest threat, while the State should rank very low on this scale.

In the chart below:

**WHAT KIND OF ACTIVITY ON THE PART OF THE STATE IS NECESSARY, IN YOUR OPINION, FOR THE RUSSIAN ECONOMY IN THE FIRST PLACE?**

(No more than two answers could be given to this question)

Creation of legislative framework for business activity, ensuring that legal provisions are applied on a fair and unconditional basis
Ensuring favorable competitive environment
Legal protection afforded to private property
Creation of business infrastructure (transportation, information, energy systems, and the like) funded by the state budget
Financial support of individual priority enterprises and sectors of the economy
Direct regulation of most important segments of the economy (volume of imports/exports, prices of key commodities, etc.)
Regulation of access to Russian markets provided to foreign manufacturers
Creation of state-owned corporations in various sectors of the economy

“What kind of activity on the part of the state is necessary, in your opinion, for the Russian economy in the first place?” It might be funny for you, lawyers, but it was the “creation of legislative framework” which was noted by an overwhelming majority of the respondents — 64% of them. For example, the number of those who mentioned “financial support of individual sectors” was three times less than that.

There is one more chart that I prepared for you. “What do you think, what is the actual attitude of the authorities to businesses?” They treat business-

<table>
<thead>
<tr>
<th>Деятельность государства</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Формирование законодательных условий деятельности бизнеса, обеспечения их безусловного и справедливого промотирования</td>
<td>64</td>
</tr>
<tr>
<td>Поддержание благоприятной конкурентной среды</td>
<td>27</td>
</tr>
<tr>
<td>Строительство и обновление инфраструктуры для бизнеса — транспортной, информационной, энергетической и т.д.</td>
<td>26</td>
</tr>
<tr>
<td>Финансовая поддержка отдельных приоритетных предприятий и секторов экономики</td>
<td>23</td>
</tr>
<tr>
<td>Прямое регулирование наиболее важных сегментов экономики (объемов экспорта/импорта, цен на ключевые товары и т.д.)</td>
<td>17</td>
</tr>
<tr>
<td>Регулирование доступа иностранных производителей к российским рынкам</td>
<td>6</td>
</tr>
<tr>
<td>Формирование государственных корпораций в различных секторах экономики</td>
<td>4</td>
</tr>
<tr>
<td>Другое</td>
<td>2</td>
</tr>
<tr>
<td>Затрудняюсь ответить</td>
<td>4</td>
</tr>
</tbody>
</table>
es as if businesses were a “money bag”, said 55% of the businessmen polled. Such situation can be tolerated when the toll is paid in the growing economy, since revenues enable one to pay bribes. But what will happen if there is an economic downturn? One can say that this problem is cyclical, and in many respects companies behave differently at the stage of economic upturn and during the crisis.

I will give you an example; probably, it is not entirely correct but it enables one to think about psychological dilemmas that entrepreneurs face in the course of their business activity. Here is the story of Sakhalin 2 project, when a company entered into contracts whereby it was to export 80% of its future gas. In the event of suspension of the project, the company was to buy gas at the world market and sell it to its buyers because that it had undertaken to start supplying gas at a certain moment of time. So, the company faces a dilemma: either it loses money but avoids the conflict and somehow “settles” problems that resulted in the suspension, or, alternatively, it gets into a long story, and its litigiousness can cost it dearly. In a situation where the company has tens of thousands of shareholders it is clear what option it sometimes has to choose. That is, one link broken, the whole chain is broken. Nonetheless, I was impressed by this “money bag” attitude and wanted to tell you about it.

TAMARA MORSCHAKOVA: And what about means that are used to open the “money bag”? They can be different, and this is the most interesting thing. There is a legal aspect but I think it is almost negligible, while other aspects which are not related to law play the major role.

MIKHAIL SUBBOTIN: Many times in books I came across the term “creeping nationalization” which involves certain implicit forms of pressure...

TAMARA MORSCHAKOVA: Forms of taking.

MIKHAIL SUBBOTIN: Yes, and it is unclear how these things can be regulated with the help of legislation. For example, someone is granted the right to build a plant, and when the plant is built and starts to operate, you tell this person that the [only] road to the plant will be reconstructed over the next five years, and workers will be able to commute to the plant only by a helicopter.

From the legal point of view, nothing can be done in such a situation. It is very easy to prevent a business from operating and blackmail it in such way. Recently I published an article which states that there are two different types of investment climate in Russia: on the one hand, for state-owned compa-
nies the climate is extremely favorable, and on the other hand, for all other companies, the climate is quite challenging.

Surveys that we discussed help analyze the problem only in part since we can get some idea of the average situation only. In fact, opinions of businesspeople vary even wider, if we look at private businesses proper (because if we look at Gazprom, for example, it is treated, for the purpose of the survey, as any other private business, though 51% of its shares is owned by the State, and just 49% is owned by the private sector, which means that, from Gazprom’s point of view, the Russian investment climate is quite favorable).

Finally, two quotes. The first quote is taken from an interview which Mr. Burghard Bergmann, the head of E.On Ruhrgas and member of the Gazprom board, gave to Spiegel magazine last year (the interview was then reproduced in several publications in Russia). When he was told that “a very successful company, Yukos, was simply expropriated, and its top manager and major shareholder Khodorkovsky was imprisoned”, Mr. Bergmann said: “I do not know enough facts to be able to make a judgment on the merits but one cannot deem the proceeding to be lawful.”

This was not said by a human rights activist. It shows how well businesses are protected, there are organizations that evaluate the degree of such protection, and there is a report on business climate prepared by the Russian Union of Industrialists and Entrepreneurs (RSPP). After 2004, in the aftermath of the Yukos case, businesses became increasingly less confident about their own protection.

And the second quote. “When enforcing arbitral awards in Russia, one may face difficulties because Russian courts lack expertise in international commercial transactions, and there can be official and unofficial political pressure preventing awards from being enforced against Russian companies (so it will be foreign companies that will face problems because of the inability of Russian courts to enforce awards as well as because of corruption”. This is a quote from a Gazprom’s memorandum which was prepared in connection with a proposed placement of its Eurobonds (see Vedomosti daily dated 18 October 2006). I think it should be discussed by the legal community because it is a kind of a diagnosis.

**TAMARA MORSCHAKOVA:** Very interesting indeed; but I would very much like to see how the “money bag” is used, which particular methods are used to do this. This is the most interesting thing.

**ANATOLY NAUMOV:** Regarding the “money bag”: Yukos and other similar companies represent very high levels of business, and it is clear what
is going on there. Speaking of more “down-to-earth” levels, i.e. of medium and small businesses, the “money bag” approach works as follows: “Pay or otherwise tomorrow I will send you to jail for a violation of Article 171.”

TAMARA MORSCHAKOVA: But this is not a “money bag” for the authorities, it is used by their individual members. They do not put together their personal pocket money, do they?

ALEXANDER ROZENTSVAIG: There is a sharing mechanism, it is a pyramid, and at each level part of the money is appropriated by members of the authorities, and the remaining part goes “up”, but this is a single mechanism.

TAMARA MORSCHAKOVA: Oh yes, the money goes “up” the pyramid, to people at higher levels, but they get the money as protection racket, not in their capacity of officials. That is, they get the money in their particular “private” capacity rather than in their “public” capacity.

ALEXANDER ROZENTSVAIG: I would not say that these two capacities (the private one and that of officials) are entirely different.

TAMARA MORSCHAKOVA: But they would not pass the money to the state budget, even at the highest level, would they? And we are talking about the “money bag” for the authorities. This money is not meant to be transferred to the state budget, so it is meant to be appropriated by individuals within governmental bodies, rather than to be used by the public authorities. This is not a common “money bag” of the State or the society.

MIKHAIL SUBBOTIN: Even if it is individuals they impersonate the state power as such.

TAMARA MORSCHAKOVA: Yes, they work for public authorities, but their wallets are individual, this is not the public authorities’ “money bag”. This is the “money bag” of government officials.

MIKHAIL SUBBOTIN: We have large, medium and small businesses; similarly, there are federal, regional, municipal authorities, and so on. In fact, everyone tries to get bribes wherever possible, from companies one has access to. That is why I don’t think that there are different approaches to getting bribes; on the contrary, someone sets an example, and then everyone else more or less follows the suit.
TAMARA MORSCHAKOVA: Let me refer to an example from Russia’s history, a simple one, so we could fully understand the existing situation. Let us recall “prodrazverstka”\(^1\): representatives of authorities took whatever it was possible to take from peasants, and all things so taken were kept at state-owned granaries and warehouses. Those granaries and warehouses were not meant to be used for personal needs; they are used by other people, not those who took produce from peasants. This is an example of the public authorities’ “money bag”, apart from the fact that it contains food and other products rather than money. And now the situation is different. Officials, using their official position for personal gain, rob other people, but they do not contribute what they get to the common financial base on which the public authorities exist as public institutions.

MIKHAIL SUBBOTIN: Both things exist. There is a simple example. Allocations to the Russian Stabilization Fund were made over many years; it is a pure example of what you’ve just mentioned, of prodrazverstka, because “extra” funds were taken (they were deemed to be “extra” on the basis of a resolution of the Russian Government and the Russian Ministry of Finance) and salted away. This is similar to prodrazverstka, since you take money from many companies based on a certain criterion that was introduced for that purpose and put all the money in a common “money bag”. Then, at the time of an economic crisis, who gets the money? Money is allocated among state-owned companies. That is, those people who prior to that started to manage financial flows in such state-owned companies, now got the money from this common “money bag”. So, what’s the difference?

ALEXANDER ROZENTSAIG: I have an example which answers your question. Regarding Kazakhstan, I have data showing that the public authorities requested and received from large companies many millions of dollars which were spent for election campaigns and creation of their own organizations. So here is the answer.

TAMARA MORSCHAKOVA: This is an understandable method. They in fact took money to organize some public activity; this is better than in a situation where money is taken by legal methods, including through taxation, and then privately appropriated. These are two processes that we need

\(^1\) Translator’s note: a governmental program in communist Russia which obliged peasantry to surrender the surpluses of almost any kind of agricultural produce for a fixed price or without compensation. The absolute limit of a given product for personal or household needs was pre-determined by the state.
to distinguish. The above situation is not a good one, but at least money was taken to perform some public functions, not for one’s private gain.

**ALEXANDER ROZENTSVAIG:** The funds are subsequently shared by allocating them from top to bottom. And what are those “public functions”? This is rather a mechanism of “self-reproduction” of authority.

**MIKHAIL SUBBOTIN:** I know particular ministers and deputy ministers whose wives, as heads of their own companies, provided services to respective or other ministries. They entered into contracts with the ministries, they were paid out of the state budget or funds allocated for R&D, etc.

**ANDREY FEDOTOV:** Unfortunately, there is now a virtually legitimate situation when, if there are legal grounds for it, public funds are transferred to particular persons rather that to the state budget; such persons have nothing to do with the state budget though formally they are public officials. The problem is that this situation is formally legal.

**VICTOR ZHUHKO:** The conflict of interest forms part of the basis on which the State functions.

**ANDREY FEDOTOV:** It is absolutely clear that initially this system is absolutely legitimate: first, taxes are collected, and then funds are transferred from the state budget to state-owned corporations. By the way, I can hardly understand what state-owned corporations are. And then funds are earmarked as “non-budgetary” and may be subsequently used in the manner described by Mikhail Subbotin. That is, Federal Law No. 94 [dated 21 July 2005] on procurement of goods and services for state and municipal needs does not apply, and so everything is legal. There is a certain legal mechanism of redistribution of funds earned by the entire country in favor of purely private parties.

**TAMARA MORSCHAKOVA:** Yes, these are funds that the entire country earns and that are meant to be used for carrying out public functions, but they are allocated among private parties instead.

**ANDREY FEDOTOV:** But there is also another mechanism, at a lower level, which was mentioned by Alexander Rozentsvaig. Strictly speaking, this mechanism, which is used to take away property under the threat of criminal persecution, can hardly be considered to be legal. Unfortunately, there are both mechanisms in place in Russia.
MIKHAIL SUBBOTIN: I would say a few more words about this form of de-privatization which is under way. In the course of privatization in Russia, each company got its owner who started to get rid of so called “side” agreements [used to siphon profit from the company], since it was important for the owner to get profit and distribute dividends. Gradually, the owner eliminated the company’s system of “side” structures through which inputs were purchased by the company at a more expensive price, and its own products were sold cheaper, thus creating profit centers outside of the company. This process of “clearing-up” financial flows was very uneven, however, it was obvious that financial control mechanisms were getting better.

When the reverse process starts, when a company becomes a state-owned one, its top managers find themselves in an ambiguous situation: if they manage to achieve its maximum efficiency, then all the money earned by the company, its profits will go to the state budget. So, in a state-owned company, its top managers willing to earn money [for themselves] would be inclined to create new “side” structures. A review of efficiency indicators of such companies shows that they now spend many times more on charity and other similar events, and it is quite obvious that their revenues are no longer transferred up to the level where the companies would pay taxes thereon. In this sense, we started to go back to the early 90-s.

ANDREY FEDOTOV: Russian laws, in particular, the Russian Code of Arbitrazh Procedure, do not provide that the Higher Arbitrazh Court may overturn an award because of the incompliance of the judicial act with the law, however, it may do so with a view to ensuring uniformity of judicial practice. The question is: is it possible that the supreme judicial body may have no power to repeal a judicial act which is inconsistent with law?

ANDREY RAKHMILOVICH: Do you mean an act that is consistent with law but is inconsistent with judicial practice?

VICTOR ZHUIKOV: I can answer that question; I know its history. There is an influence of the European Court which stated that, generally, all the cases are to be considered by courts of first and second instance, as to the third instance, it will be a cassation court in France, revision — in Germany it is only acceptable in exceptional cases, when it is necessary to do so for the sake of development of law. Maybe, their courts of first and second instance work in such a way that nothing else is required? As to Russia, cases have been always reviewed in a court of supervisory instance because of material violations of rules of substantive or procedural law. When it was decided
to no longer do so, the respective provision was so far left in the Code of Civil Procedure, and the Higher Arbitrazh Court stated that it would “consider cases only when this is necessary for the development of law, as we understand it,” and that it would not pay attention to any other violations. That is all. Anyway, we should say whether it is good or bad. For example, a law can have been violated in courts of all instances, and the Higher Arbitrazh Court would see that it has been so violated but would not overturn [a respective award] because it is not required to do so to ensure uniformity of judicial practice.

**ANDREY FEDOTOV:** And if such an award is made by many courts, then it would overturn legitimate awards which adversely affect the uniformity of judicial practice.

**TAMARA MORSCHAKOVA:** Of course, that is how the uniformity can have negative consequences.

**ANATOLY NAUMOV:** I would like to add a few words regarding the legal nature of resolutions of the Plenum of the Russian Supreme Court and judicial precedents. How do we interpret Article 126 of the Constitution which sets out the jurisdiction of the Supreme Court? It does not contain the word “governing” [explanations], as it was in case of resolutions of the Plenum of the USSR Supreme Court, so based on that, it is concluded that such explanations are non-binding. What does this mean? It means that they are merely recommendations, so if a court does not want to follow them, it may perfectly do so, etc. But will this be so, if we interpret Article 126 of the Constitution correctly? Article 126 is included in the chapter on judicial power, so it deals with one of the Supreme Court’s powers. It is also said there that the Supreme Court shall do so on the basis of its generalization of particular cases, i.e. though the generalization takes place outside the criminal process, all the cases were considered in the framework of the criminal process, within the powers of the Supreme Court. It is one of its powers and authorities, and that is why I believe that one may invoke Article 126 of the Constitution and argue that the resolutions of the Plenum the Supreme Court are binding. Let us refer to the U.S. sociological jurisprudence; it all boils down to the actual function of legal orders/instructions (first of all, judicial ones). We have a more or less similar situation with resolutions of the Plenum of the Supreme Court. Let me ask you the following question: are such resolutions actually regulatory or not? It is clear that they regulate many things. Are there many judges who would, contrary to such resolutions of the Plenum, issue an
inconsistent judgment? Of course, not. So, in fact, resolutions of the Plenum are regulatory. I believe, since Article 126 is included in the Constitution’s chapter on judicial power, such resolutions embody the powers and authorities of the Supreme Court.

Now, speaking of judicial precedents: there are no doubts as far as the Constitutional Court is concerned. Let me give you just one example. In 1995 I acted as an expert in the Constitutional Court in a proceeding on deeming unconstitutional one of the paragraphs of Article 64 of the Russian Criminal Code: the paragraph provided that one’s flight abroad and refusal to return from abroad constitute elements of the crime of treason against the fatherland. Igor Leonidovich Petrukhin acted as a defense lawyer in the proceeding, and we shared the same position. The Constitutional Court found that the provision in question was unconstitutional. So how may one consider this resolution of the Russian Constitutional Court not to be a source of the criminal law? At the same time, no changes were made to the language of Article 64 of the Russian Criminal Code, it changed only in two years, starting from 1 January 1997, upon the coming into force of a new Criminal Code. So what were the courts guided by during these two years, by the then existing Article 64 which was not formally repealed or by the resolution of the Russian Constitutional Court? Of course, by the resolution of the Russian Constitutional Court.

TAMARA MORSCHAKOVA: This is the matter of binding force, not the matter of a precedent.

ANATOLY NAUMOV: Well, it was a peculiar precedent, this is clear. On the other hand, let us suppose that, in any particular proceeding, a court had to issue a judgment of acquittal stating that one’s flight abroad did not constitute corpus delicti, what the court would have to refer to? The court would have to invoke the said resolution of the Russian Constitutional Court. The above resolution was issued by the Russian Constitutional Court in the particular case, and when considering our hypothetical case, the court would have been obliged to so invoke the said resolution. Well, there were no such cases, because the outcome of such cases was clear as the Constitutional court had expressed its opinion on this matter.

That is why I don’t think there is a real difference between a classical judicial precedent and this example. We can find such difference based on formal aspects, but there is no fundamental difference between them.

Finally, I think we somewhat exaggerate the differences between the systems. In 1997, I wrote together with George Fletcher, professor of the Columbia Uni-
versity, a large book entitled “Basic Concepts of Modern Criminal Law” [published in Russian in Moscow, by Jurist Publishing House, in 1998]. The major idea of the book (we reviewed the main institutes of criminal law and focused on 12 of them) is that there are more similarities than differences between our legal systems, the continental legal system and the common law system.

**TAMARA MORSCHAKOVA:** One should distinguish between precedents and assessment of compliance with rules. As far as the latter is concerned, we cannot speak of precedents if we speak from the standpoint of legal consequences. Assessment of compliance with rules should be generally relevant. It is not a precedent; it is a phenomenon of a different nature, a specific prejudicial effect, a process of establishing that a subordinate rule does not comply with the law, as in the example relating to the resolution of the Russian Constitutional Court. Indeed, this is a very interesting issue.

Apparently, lawyers should be more meticulous when they classify a problem from a purely legal point of view. In particular, this is so when we consider the issue of precedents. Is there anything that all of us here agree about? We all agree that any decision made by a court should not be “thrown away”, it should have some universal meaning. But it is important to find out what the legal consequences will be and in respect of which issues a particular court decision should be binding on everybody.

When we speak of precedents and the fact that judicial acts are binding on other courts, it is clear that a judicial act delivered in relation to a particular issue may not be ignored when some other court subsequently considers the same issue. But we should also discuss what role it will play. This issue should be approached differently in various types of judicial bodies. One can refer to the statement whereby a resolution of the Supreme Court should have the force of a precedent. No, we are not talking about this now. The resolution of the above Court is binding; one may say that it is of quasi-legislative force. Once again, it is quasi-legislative because rules of law are created by the lawmaker.

I am not talking now about the dilemma: whether or not [such resolution] constitutes a source of law because then we would have to define what a source of law means, and everything would depend on how this concept is defined. So far as resolutions of the Russian Constitutional Court are concerned, it is expressly stated in the Constitution and in the law that such resolutions are binding and have direct effect. So we are interested in their legal consequences. What fact, in terms of its legal nature, did the Constitutional Court establish? The Constitutional Court established only one fact, namely, that the content of a particular legislative provision (rather than an
article or a law under a particular name) was inconsistent with the Constitution. So it established a particular fact, and a specific fact at that because it relates to legislative regulation. This is not a fact which we establish when we examine circumstances of a murder in a criminal case. This fact is of a different nature; here it was established that a legislative provision was inconsistent with an act of a higher level, namely, the Constitution. If the content of a specific provision is deemed to be inconsistent with the Constitution, it does not matter where we subsequently can come across another fact which has the same legal content. What matters is that this conclusion of the Russian Constitutional Court whereby the content of the provision in question is inconsistent with the Constitution will apply to any other fact having the same legal content, whether such fact is found in a law of a subject of the Russian Federation, other federal law or other procedural code. I believe that this is a special type of prejudicial effect. It is special only because we deal with the established fact pertaining to the content of a rule.

What is a prejudicial effect? One court would establish a certain fact, so other courts would not reestablish it anew. It all boils down to that. Therefore, as far as the resolution of the Russian Constitutional Court is concerned, it creates a prejudicial effect: the fact of unconstitutional content of a particular provision has already been established, so it should be acknowledged as such in all other cases without re-evaluating it anew. Otherwise, the Constitutional Court would have to say 88 times to each of the 88 subjects of the Russian Federation: “No, what you are looking at is unconstitutional”, though it would be the same thing — each of them would like to have its own judicial system. So these are the facts we are talking about. From my point of view, the same applies to the example we discussed when we spoke about checking the content of the rule (as opposed to establishing facts in relation to a particular action). If courts have established that the rule’s content is improper, this fact should be acknowledged whenever such content is found in any other document, regardless of which document this is. Now, as to the binding force of a precedent, one should agree with Anatoly Naumov: it goes without saying that what was decided by a court, which established the relation between established facts and their proper evaluation and classification, constitutes a precedent. We are already talking about how one should evaluate a similar factual circumstance in various cases, not about the establishing of a particular fact. If it has been established that certain legal circumstances should involve the use of certain legal categories and certain rules of law for the purpose of their legal evaluation and classification, then, of course, the respective court decision would be extremely important: if courts review the existing practice, if, for example, supreme judicial bodies cover such practice
in their judicial practice reviews, then [the respective court decision] would constitute direct guidelines on which all other courts should rely. But does it constitute a precedent?

In the Anglo-Saxon system of law, the content of a precedent may be the same as that of Russian rules of law plus judicial practice. But in the Anglo-Saxon system of law, it operates differently. They have a totally different mechanism used to deviate from a precedent. In Russia, no special mechanism of deviation from a precedent is required. Yes, we know that most cases are resolved in a certain way, that certain circumstances entail certain consequences from the standpoint of their legal evaluation and classification, but this does not amount to a fact that has been established by a particular court and that should be binding on all other courts which subsequently examine the same fact; this is something different. To deviate from an accepted approach, one does not need to reject an earlier quasi-precedent or, better to say, the court practice existing in Russia.

Let me go back to the resolutions of the Plenum which are very relevant to what we discussed rather than discuss any more general things. The resolutions of the Plenum used to be binding but they are not binding now. Why is this so? Because decades of courts’ work during the Soviet era showed that it was impossible to “break” (forgive me for this word) incorrect governing instructions of the Plenum of the Supreme Court. I recall how the Chairman of the Ivanovo Oblast Court told me in 1988: “For 10 years, we have been unable to “break” a resolution of the Plenum of the Supreme Court because it was binding”. So, if a court issued a judgment inconsistent with such resolution, its judgment was overturned, and it adversely affected the results of the court’s work. That is why the situation changed. I can even agree that certain acts in the nature of guidance issued by Supreme Courts may become binding, but there should be some balances in the system of law. If such acts are binding then subjects concerned should be given the right to challenge such acts. In Russia everything may be challenged, even a federal constitutional law may be challenged in the Constitutional Court, while acts issued by Supreme Courts, such as acts issued by the Plenum of the Supreme Court or the Plenum of the Higher Arbitrazh Court, may not be challenged. Is this possible in a law-based system? Only in relation to acts in the nature of recommendations, only in relation to something from which one may deviate, but not in relation to what cannot be checked. That is where the shoe pinches. My personal position (I offered the Constitutional Court to do so long ago but it still does not dare to) is as follows: let us agree that such acts are binding, since they are important, but let us acknowledge that we may check them pursuant to our procedure, in a constitutional proceeding (let alone that
they also can possibly be checked as to whether or not they comply with federal law; let them at least be checked in a constitutional proceeding) to determine whether or not they comply with the federal Constitution, as it was done in Hungary. After that, the Plenum of the Hungarian Supreme Court decided that its directives should no longer be binding. Why? Because it was afraid that they would be challenged and it did not want this to happen. So long as those acts are not unchallengeable, whether in Russia or in Hungary, judges of lower courts would be able to deviate from them.

For example, why do I always raise objections in relation to the grounds which were set out in the Code of Arbitrazh Procedure for the sake of ensuring uniformity of the entire arbitrazh courts’ practice (which provides that a violation of uniformity of practice constitutes grounds for overturning [a respective award])? My objections are based on the following: then a violation of a resolution of the Plenum should be grounds for such overturning. And what if such resolution is incorrect? That is why I object to the foregoing.

Let me now make a statement regarding the importance of what we call “uniformity of practice”, whether it is good or bad, and how it is related to the rule of law. In fact, though court systems form a strict vertical structure (today we did not so far discuss this institutional aspect of uniformity of practice), the court system originally includes a certain element of entropy which opposes its manageability. A lower court should make decisions based on its beliefs and juridical conscience. We assume now that the level of such juridical conscience is adequate and proper. Such juridical conscience is determined by very important constitutional aspects. Victor Zhuikov also spoke about that. I strongly support his idea that a judge may not issue a decision which, from his point of view, is inconsistent with law, and may not make a decision if a law which he should apply, from his point of view, is inconsistent with an act of a higher level, is inconsistent with the Constitution. This is the general idea of so called “judicial control”. Such function should be performed not only by the Constitutional Court. You know, a judge should not follow instructions. He should first check whether or not a particular instruction complies with the principles of law. We are talking about the rule of law here, not about a purely positivistic position.

So, there are two categories relating to this topic that are of interest for us: the rule of law and purely positivistic position in relation to ensuring the uniformity of practice from the standpoint of its compliance with the rules of positive law. Rules of positive law are not necessarily very good. We are gradually coming to the idea that a law can also be evaluated. Judicial power is not power at all unless it evaluates laws. All the courts, not only the Consti-
tutional Court, should do it. However, decisions made by such different courts as the Constitutional Court, on the one hand, and other courts, on the other hand, would simply have different legal consequences. When a court analyzes a law and finds that it is inconsistent with the Constitution, it makes a decision in accordance with the requirements of the Constitution, but its decision may not have universal significance. It does not deprive the act, which the court decided not to apply, of its legal force. Such act may not disappear (by virtue of the existing structure of our legal system) until after it has been considered by the Russian Constitutional Court and found to be inconsistent with the Constitution.

Why, for quite a long time, there has been an ongoing dispute between the Supreme Court and the Constitutional Court? It is because they argued whether or not a court should be obliged to apply to the Constitutional Court if the court believes that a particular law is inconsistent with the Constitution. So, to resolve a particular case, a court is not obliged to apply to the Constitutional Court. It may find on its own that a particular law is inconsistent with the Constitution, that it will not apply the same and that it will rely on constitutional rules. In such a way, the court would resolve the case in question. But then there is another issue relating to the topic we are discussing now. All courts are obliged to ensure equality of all before the law and court, and, based on that principle, rather than on some vague idea of uniformity of judicial practice, any court which decided against applying a particular rule because of its incompliance with the Constitution should say to the Constitutional Court: “Please resolve this issue for all.” That is the meaning of all this applications, and that is the difference between judicial control exercised by all courts, on the one hand, and judicial control on the part of the Constitutional Court. Therefore, other courts should apply to the Constitutional Court not because they have doubts whether or not a particular law is inconsistent with the Constitution, but because the judge is confident that the law in question is unconstitutional. As to doubts that the court may have, it should resolve such doubts by interpreting rules.

Now it will be very easy for me to pass on to what I wanted to say. Therefore, we are talking not about uniformity of practice or uniformity of any other color or content but about the uniformity from the standpoint of some generally accepted criteria. Then we need to find out what those criteria are. I believe that such criteria are generally accepted principles of law. Such principles do exist — in the theory, in the legislation (provided that the legislation reflects those principles), and, in Russia, in the first place, they exist in the Constitution. I know that nowadays the importance of stability of our Constitution is not particularly emphasized, but I will speak of the Constitution only to the
extent it is relevant to the activity of the courts. Three parts of the Constitution are relevant to their activity: “The Fundamentals of the Constitutional System”, “Rights and Freedoms of Man and Citizen” (these are chapters 1 and 2), and chapter 7 (“Judicial Power”) which directly addresses the organization of judicial power. As far as those three chapters are concerned, I believe, the Constitution plays an absolutely unobjectionable and stable role in the entire domain of justice and judicial practice. If we review constitutional acts of various countries and look how they deal with the above issues, we will see that in all such countries (since we are talking about democratic law-based states, regardless of whether any such country is a republic or a monarchy as, for example, the Great Britain), all acts in these areas corresponding to the modern level of development of constitutionalism are substantially the same as far as those issues are concerned. All such acts recognize that rights and freedoms are of supreme value, they are based on the same standards of human rights and the same standards of organization of judicial power. The reason for this is as follows: as history has shown, if the judicial power is organized on the basis of some other principles, it cannot play a proper role of judicial power as it should in a democratic law-based society. From my point of view, that is all that needs to be a starting point for ensuring the rule of law by means of justice or by means of courts as judicial power bodies. Of course, this is a most general description but, in fact, in legislative regulation of various countries one can find equivalents to absolutely any and all fundamental legal provisions, whether such provisions pertain to the institutional organization of judicial power, elements of the status of judges as judicial power holders, or regulation of procedural activity, because the judicial power may not be exercised without its procedural form, so it is one of its generally accepted parameters. Justice cannot be administered if a body in charge of it has no parameters that a court must have. The Strasbourg Court sometimes uses the expression “a court or a quasi-judicial body” simply because it assumes that not all the bodies which are based on the same principles as courts are called “courts”. Somewhere they might be called “tribunals” but they are still courts, if one looks at the principles which they adhere to.

So how is all this related to such concept as “ensuring the rule of law”? Sometimes we can address this concept by assuming that it involves the ensuring by courts of the same scope of rights and freedoms for everyone who apply to court seeking judicial protection, including both individuals and legal entities, since in many cases it is legal entities that exercise those rights and freedoms that the Constitution considers to be fundamental.

Then, most probably, we should look at the following: if we strive to achieve the rule of law, will it be always ensured by using terms that we are used to?
I will tell you what those terms are; all of them are related to the concept of “uniformity”, so one may talk about “uniformity of practice”, “uniformity of the judicial system”, or “uniformity of procedures”. But will uniformity of practice, uniformity of the judicial system and “uniformity of procedures always ensure the fairness of justice? In fact, in order to ensure the rule of law (which is the main principle that the judicial power should comply with), one does not necessarily need to have the uniformity of practice, structures, the judicial system and procedures. Probably, this is the most controversial part of my speech. Of course, I am not trying to disprove that, when interpreting a particular law, the courts (regardless of what courts they are, be it constitutional courts, arbitrazh courts, or general jurisdiction courts) may not use any terms inconsistently. For that purpose, unified interpretation of a law plays a great role. Russia, however, does not have an official mechanism for developing universal and unified interpretation of law.

I mentioned already why the resolutions of the Plenums of the Supreme Courts are not suitable for such mechanism. If such mechanism was reconstructed, they could also be of use. But so far, the only mechanism ensuring unified interpretation of law that we currently have is what the Constitutional Court does when it establishes the constitutional meaning of a rule. Sometimes the Constitutional Court has to acknowledge (I think it is good rather than bad) that if a contradiction in interpretation of a rule by different courts results in a conflict of fundamental rights set forth by rules of law (and not only by rules of the Constitution), such situation becomes a constitutional problem. In the opinion of the Russian Constitutional Court, a contradiction in understanding or interpretation of a rule shall be subject to constitutional proceeding if it results in a conflict of rights set forth not only by the Constitution, because the Constitution states that the list of rights contained therein may not result in derogation of other rights including those provided for by law. So the procedure of constitutional judicial control which is based on the above approach is used to eliminate discrepancies in and ensure uniformity of interpretation of law, with such uniformity being based on the establishing of the constitutional meaning of rules; therefore, such procedure constitutes a mechanism ensuring the rule of law, because the Russian Constitutional Court should have no criterion other than the supreme force of the Constitution which contains the rule-of-law requirement. I am not talking now about individual decisions made by the Russian Constitutional Court. I am talking about what there should be, not about what there is. The Russian Constitutional Court should have no other mechanism. It has established the constitutional meaning [of a rule], it is binding on all, so this mechanism is sufficiently reliable, from the technical legal point of view, from the standpoint
of ensuring the rule of law in the judicial system. However, such mechanism in Russia is effective only when decisions in questions are complied with by other courts, which is so far impracticable and might happen very rarely.

Now, the next question: do we need to have uniform procedures in order to be always able to ensure the rule of law? Without any doubt, we do, in some areas, where same rights need to be protected. We know, for example, about a resolution of the Russian Constitutional Court whereby one may not assume that only attorneys-at-law may represent the parties to an arbitrazh proceeding, while in a civil proceeding the interests of the same parties in relation to the same matters of dispute and points at issue may be represented by other persons, not necessarily attorneys-at-law. Currently, there are proposals to change the situation completely, by allowing only professional representation, but, if such proposals are accepted, there will be another problem: how can one ensure equal access to legal aid for those who are unable to retain a lawyer or attorney-at-law (as legal entities, or more or less large or medium businesses do)? The State has not solved the above problem, and, therefore, it fails to ensure the rule of law; though such changes ensure external uniformity, there is essentially no equal access to judicial protection. So, every time when we speak of ensuring the rule of law, it does not boil down to formal similarity of regulation and formally similar court decisions; it is the substantive issue of equal fairness of court decisions.

Now, what does it mean to ensure the rule of law in the framework of court procedures so that they would have the same scale? In fact, such scale does exist, and we should proceed from it when we talk about a uniform procedural manner in which the courts ensure rights and duties. What is this scale? It is very simple, as it is defined by Article 6 of the European Convention [on Human Rights] on fair justice. Whatever procedures might be, they will always ensure the rule of law, and this is the meaning of uniformity of procedures, provided that they will not deviate from the criteria of fair trial set out in Article 6 of the European Convention [on Human Rights]. By the way, it should be noted that this is not, essentially, the requirement that a substantive-law dispute should be resolved fairly; instead, this is the requirement whereby fair procedures for considering disputes should be ensured for everybody.

I would like to address the issue (which is very painful for me and, I think, it can become very painful for all of us) of institutional uniformity or, as written in our law on judicial system, the issue of uniformity of the judicial system. As you see, all the time it sounds as if uniformity had a certain negative connotation for me, as if it were a negative characteristic. It is true that the uniformity of the judicial system is reflected by a number of indicators all of which are quite acceptable. But the idea of the uniformity of the ju-
dicial system starts to be increasingly used in Russia, and I do not want it to be used in a way implying that we do not particularly need courts of different jurisdictions.

We should consider in this connection what would provide more solid grounds for ensuring the rule of law: differentiation between the jurisdictions or the creation of a single court system on the model of the United States (as they tend to call it in Russia, though it is not correct). I myself heard that from our current President at a meeting of the Civil Society Institutions and Human Rights Council under the President of the Russian Federation. According to him, he thought that the development of courts of different jurisdictions would provide certain advantages only when he was very young. And now he thinks that a single court heading a similarly unified system is better. However, I imagine what such system would look like, given our usual stereotypes of structuring everything around a single vertical line. On the contrary, I believe, that it is the differentiation of procedures by type of jurisdiction that provides more solid grounds for ensuring the rule of law. Let me explain why this is so.

First of all, there is some specialization that is taking place. I am not talking now about the fact that arbitrazh courts also consider civil cases, as general jurisdiction courts, as well as administrative cases. I am talking generally about the importance of differentiation between the jurisdictions. Does such differentiation help ensure the uniformity of the judicial system and judicial practice in Russia or does it prevent us from ensuring the same? I believe that differentiation between the procedures generally facilitates the rule of law, because when disputes are monitored in respect of a certain specific category of cases within a specific judicial system this provides a better guarantee of ensuring equal approach to protection of same rights of all individuals or entrepreneurs.

Further, let us look at differentiation processes within the judicial system not only from the standpoint of equality but also from the standpoint of fairness, including from the standpoint of requirements to fair procedures. In an arbitrazh proceeding, one may set the following requirements to the parties: the professional level should be higher; you should be professionals and nothing but professionals; you should not speak in a layman’s language; our discussion should be purely legal; and we should be able to use legal abbreviations and legal jargon and understand each other as members of the legal profession. In this context, the requirement whereby the parties may be represented solely by attorneys-at-law would make sense to me. Can the same requirements be set in respect of a different proceeding, a jury trial? No, they cannot. As far as the procedures are concerned, there are certain limits in re-
spect of ensuring the uniformity. But once again, this should always be done subject to the uniform requirements of Article 6. They cannot be eliminated when differentiating between the procedures.

But I absolutely disagree with the idea of creation of the unified judicial system in the form of a single vertical structure of judicial bodies which will be headed by a single court. In fact, the experience of the European continental countries and the countries of the common law system does not suggest that all the courts should be structured along a single vertical line. Even if we look at the U.S. judicial system, we will see that there are many various courts, including military courts, transport courts, and tax courts. In other words, there are different courts in place in the USA, let alone that there are state courts and federal courts. I can explain why we are structuring the judicial system in Russia solely as the federal courts system. It is because of the common goal of ensuring the single standard of rights and freedoms. Also, one cannot agree in this case that the principle of division of powers necessarily requires each subject of the Russian Federation to have its own judicial system. It is not so because at the federal level, the judicial power, which ensures equilibrium and provides checks and balances in respect of the two other branches of power, provides such checks and balances in respect of legislative federal authorities, executive federal authorities, and their local representative offices, as well as in respect of the legislative and executive authorities of the subjects of the Russian Federation. This is because the value of the single standard of rights and freedoms is undoubtedly higher than that of any claims of the Russian regions for autonomy based on the fact that they are political subdivisions. By the way, the current situation with the funding of magistrate courts (it has already been proposed that they should be funded by the federal state budget) also suggests that when such courts are funded by regional budgets it leads to the establishment of relations which are very dangerous from the standpoint of their independence. Anyway, for us, the single standard of ensuring for everyone a fair and independent trial of one’s case is much more important than any other organizational principles underlyng the structure of the existing power.

Now, a few words about the issue which cannot be omitted: the issue of inadmissible methods and subjects of ensuring the uniformity of judicial practice. I do not know if you totally disagree with the above language. It seems to me that there is a certain set of methods which are still used to ensure the uniformity of judicial practice though they are unsuitable for that purpose. I already mentioned some of them.

Resolutions of the Plenum are unsuitable because they may not be appealed. The prohibition preventing the courts from deviating from resolutions
of the Plenum are unsuitable because it runs contrary to the right and duty of the court to check whether or not a particular act is consistent with the law and the Constitution. This means that every court should check whether or not any resolution of the Plenum is consistent with the law and the Constitution. I think that Article 120 of the Constitution which provides that judges shall be independent and submit only to the Constitution and the law is much more valuable that the idea of ensuring that all courts should follow instructions of a higher courts. Though from the organizational point of view, it is much easier, it is generally easier to give commands to everybody and put everybody in a single line. But from the substantive point of view, the existence of the independent court which checks the consistency with the legal principles set forth by the country’s supreme laws seems to be much more valuable because without it there will be no judicial protection of rights and freedoms. I can name a great many resolutions of the Plenum that run contrary to that, and Victor Zhuikov can do so as well. In any case, we should not substitute uniformity for independence. Exemption procedures in relation to deviation from existing practices (I prefer to use the term “existing practice” rather than “uniformity of judicial practice”, and there can be certain deviations from such existing practices, whether for good or for bad) should be based on the fact that deviations can be both a good thing and a bad thing. If the court system presupposes the total manageability and a lower level court is never able to insist on the correctness of its position, it means that we have no mechanism for correcting incorrect judicial practices. Except only when the Supreme Court realizes that all its decisions issued thereby in respect of particular cases or contained in its resolutions were incorrect. I am afraid, though, that it might take it ages to do so.

Now, regarding one more mechanism. It is absolutely inadmissible to reject the prejudicial effect, including in respect of criminal courts. This is a totally inadmissible mechanism of destruction of the uniform judicial practice. Of course, one can “break” the prejudicial effect but one should do so using very specific procedural forms. I am not saying that prejudicial effect is a sort of a final statement and that nobody should ever challenge any facts established by another court. However, if one needs to “break” the prejudicial effect, abandon the uniform practice, the existing practice and reject the same, one should do so by challenging earlier court decisions rather than just throwing them in a garbage bin. Then one should consider which procedure, which methods and which means can be used to challenge the existing judicial acts. Apparently, one may use only those means of challenging such acts as are consistent with the constitutional principle of a fair trial of every case. So, the cobbler should stick to his last. If the courts are not meant to con-
consider such issues, they may not do so. There is Article 47 of the Constitution for this purpose which provides for the right to have one’s case considered by a proper court; this is a necessary element of fair justice. However, regarding the proper court requirement (based on its interpretation in the Constitution and Article 6), there are many complicated legal issues: which court would be proper? But all these issues can be resolved. The most important thing is to proceed from the following idea: a judicial act may be repealed by a proper, competent court which is specifically designated to do this, in accordance with the structure of the judicial system which is based on the Constitution and the federal constitutional law on the judicial system. No other methods of rejecting prejudicial effect are suitable. Therefore, turning to the topic of the resolution of the Russian Constitutional Court on prejudicial effect, I believe that the most important thing about the resolution is not that one may not just throw an award of the Higher Arbitrazh Court into a garbage bin but is something different.

In my opinion, the most important thing is that a party supporting criminal prosecution in a criminal proceeding may not assume that it has rebutted any doubt about the correctness of its accusation in so far as there are judicial acts in place stating that a person being charged in the criminal proceeding acted lawfully. So, this is the task for the prosecution side in a different proceeding rather than in the criminal proceeding. And who is this prosecution side in Russia? It is the Prosecutor’s Office. As a participant to a proceeding, it performs certain functions in procedures of any type. Now, let us assume that the Prosecutor’s Office has lost an arbitrazh case at all stages [and takes part in a related criminal case]. It has the right, moreover, it is obliged, to defend the interests of the State in its capacity of an owner [in the latter case]. It is the direct duty of the Prosecutor’s Office. Well, it has lost the arbitrazh case. So, the Prosecutor’s Office acts as the prosecution side in one case and it should defend the interests of the State in the other case. Well, this is a unified approach to ensuring the rule of law. And one may not circumvent it. Since the Prosecutor’s Office lost the arbitrazh case it has to put up with the fact that it would not be able to prove, in the criminal proceeding, that all doubts about the accused’s culpability have been eliminated. Since such doubts have not been eliminated, they will be interpreted according to the rules of criminal justice in the criminal proceeding rather than any other rules. So, the most important thing about the resolution in question is that only a proper court may reject any earlier act which has entered into legal force by means of proper procedures which are suitable for a particular branch of substantive law. In fact, I believe that this is exactly the relation which ensures the rule of law as regards to judicial procedures.
I would like to say a few words about the explanation provided by the Higher Arbitrazh Court of which Victor Zhuikov spoke before. The above-mentioned explanation constitutes a prime example of the idea whereby any deviation from the legal position of the Higher Arbitrazh Court, even if such position was taken subsequently, should result in review of judicial acts which were issued earlier by lower arbitrazh courts. To this end, such lower arbitrazh courts should sort of impose punishment on themselves. This is because a case should be reopened upon discovery of new facts by precisely the same court that initially rendered the valid decision therein, which, by the way, should have already been fulfilled by that time. So this is also a complete change in terms of law enforcement, it totally contradicts the principle of legal stability, and it happens other than by virtue of the decision of a higher court or the decision of the Higher Arbitrazh Court which is the only supervisory court authorized to review any cases for the sake of restoring the uniformity of judicial practice. So [as a result of the above-mentioned explanation] the Higher Arbitrazh Court simply vested its own right in multiple courts.

Some people say that the Higher Arbitrazh Court established a judicial precedent in Russia. But this is not a judicial precedent, this is something completely different. Rather, it established a rule according to which each [court] must on its own overturn its own decision. Under no circumstances, this can be consistent with the principle of legal stability though it might seem that it will help ensure the uniformity of judicial practice. However, as far as court cases are concerned, opportunity only knocks once. Judgments have been issued, and they cannot be subsequently changed many times. It is what the Strasbourg Court criticizes us for, regardless of how much we talk about our commitment to the uniformity of judicial practice. That is why this banner of uniformity seems to me to be somewhat controversial.

VICTOR ZHUIKOV: I know some people from the Higher Arbitrazh Court who consider the principle of legal stability to be absolutely sacred.

TAMARA MORSHAKOVA: They just say so.

VICTOR ZHUIKOV: Yes, and they do just the opposite.

TAMARA MORSHAKOVA:— Victor Martenianovich, when exactly do they consider this principle to be absolutely sacred? As our moderators said, those people talk about the principle’s sacred nature when they do not want to overturn a valid judgment and to understand that the mere unlawfulness of the judgment suggests the
lack of uniformity of judicial practice, at least because such judgment deviates from a certain standard.

**VICTOR ZHIUKOV:** I want to remind you about the judgment of the European Court which concerned courts of general jurisdiction and was issued in case *Pravednaya v. Russia*. Ms. Pravednaya alleged that the domestic judicial authorities had re-considered a judgment given in her favor on discovery of new evidence because a pension authority had changed its position and issued a new letter [of instruction]. We are dealing with a similar situation, only within the system of arbitrazh courts. The European Court stated the initial judgment [given in her favor] had been a final one, and regardless of how it had been reconsidered and what forms had been used for that purpose, this still meant that the judgment had been indeed reconsidered. However, the approach we discussed earlier enables one to reconsider cases upon discovery of new facts even 10 or more years on. The European Court considers this to be a violation of the principle of legal certainty.

**TAMARA MORSCHAKOVA:** In fact, there are also other aspects, apart from the fact that this violates the principle of legal certainty. Many people tend to refer to this fact because the European Court of Human Rights has found so, but for some reason it is not so common to consider all the decisions and views of the European Court in their entirety. We routinely say that the principle of legal certainty should be operative in Russia, and the arbitrazh courts love it. However, according to the European Court’s practice and Protocol No. 7 to the European Convention [for the Protection of Human Rights and Fundamental Freedoms], the reopening of a case upon discovery of new or newly established circumstances is not only possible but can be required. But when? When the damage caused by incorrect decisions which had fundamental defects cannot be compensated for by any other means. However, we forgot about this.

I will reiterate my principal idea. Yes, it would be great if the rule of law was ensured on the basis of uniform standards. However, the starting point for such standards should be the general legal principles as they are defined by the international community, recognized thereby as generally accepted principles of international law and set out in the Constitution of the Russian Federation. If the uniformity of judicial practice has any other basis, we do not need it. It can be achieved, for sure. But there exist such inadmissible methods to secure the uniformity which I am even afraid to talk about. It is possible to get rid of all judges who ever issued a decision which a higher instance court found to be unwelcome. If it is done, by the way, it violates the principle which is fundamental from the standpoint of the status of courts.
and which provides that a judge shall not be liable for the content of a decision rendered by him in a proceeding. This does not mean that such a decision, if it is incorrect, should not be rectified. It should be so rectified, and the rights of those who were affected by such incorrect decision should be reinstated. However, such decision should not be used to settle accounts with the judge, because otherwise there will be no independent court which is a prerequisite for ensuring the rule of law in the judicial area. If we are to have uniform practices of courts that are not independent, then we do not need such uniform practice, such justice and such courts.
Chapter 1. Artificial Criminalization of Economic Activity

The problem of efficient legal protection of ownership rights and freedom of economic activity has always been very important in the Russian Federation, and it is becoming even more important now, in view of the current global economic crisis. It is in this connection that we consider as a painful issue the existence of certain rules in the Russian criminal law which operate to artificially criminalize economic activity. Sometimes official interpretation of such criminal law rules by courts and, more generally, judicial practice of their application “contributes” to such criminalization.

Article 171(1) of the Russian Criminal Code provides for liability for illegal entrepreneurship, i.e. for business activity which is carried out without registration or in violation of registration rules, or for submission to a body in charge of state registration of legal entities and individual entrepreneurs of documents containing knowingly false information, or for carrying out business activity which may only be carried out on the basis of a special authorization (license), or for carrying out the same in violation of the terms and conditions of a respective license, if such action caused large-scale damage or involved the obtaining of income on a large scale.

According to official data on registration of crimes, illegal entrepreneurship constitutes one of the most common economic crimes. For example, in 1997, the number of such registered crimes amounted to 3,882; in 1998, to 5,306; in 1999, to 6,415; in 2000, to 8,538; in 2001, to 7,428; in 2002, to 4,972; in 2003, to 1,999; in 2004, to 942; in 2005, to 2,716; in 2006, to 3,200; and in 2007, to 3,340.

In the United States, the criminal law (both at the federal level and that of individual states) does not contain the concept of illegal entrepreneurship as a separate crime as it is regarded in Russia. Under the U.S. law, criminal liability is only provided in respect of certain fraudulent methods of carrying out entrepreneurial activity. For example, §224.7 of the Model Penal Code provides for liability for deceptive business practices. It should be noted that,

---

1 Speaking at a meeting of the Council on Foreign Relations in Washington in November 2008, Russian President Dmitry Medvedev admitted: “... we have not yet created a system that would protect our economy... As a lawyer by education, I have to agree with those who believe that we have still not created an efficient system to protect ownership rights. And we have not created an efficient court system.” (Rossiskaya Gazeta, November 17, 2008).
similarly, the criminal law of Western European market economies (for example, the criminal codes of France, Germany, or Spain) contains no rules on liability for illegal entrepreneurship *per se* (i.e. business activity which is carried out without registration or a special authorization or license). There seem to be reasons for the lack of such rules in developed market economies. It is deceptive business practices or false data provided by entrepreneurs to respective official bodies (which is directly related to various tax offences) that constitutes a problem for any such economy rather than just the lack of registration of a business.

Usually, the need to criminalize illegal entrepreneurship is explained by stating that registration of business activities as provided for by civil legislation is meant to prevent “entrepreneurial activity from actually shifting to the illegal or “grey” economy and, therefore, from leaving the area where it is controlled by the State, which, as a rule, results in the entrepreneur’s failure to perform his legitimate obligations to the State and its citizens.”

Article 51 of the Russian Civil Code provides for mandatory state registration of legal entities, including, in particular, commercial organizations, while Article 48 of the Russian Civil Code provides for the licensing of certain activities. However, it does not follow from the above civil law rules that their violation should be also be prohibited by the criminal law. The meaning of the said civil law rules and legal sanctions for their violation is totally different and it is quite clearly defined in the civil law itself. Article 23(1) of the Russian Civil Code provides that an individual may engage in entrepreneurial activity without establishing a legal entity as of the moment of his state registration as an individual entrepreneur. The Russian Civil Code deems entrepreneurial activity carried out without the state registration to be illegitimate, however, this does not suggest or imply that such specific civil law relations need to be regulated by the criminal law.

The civil law prohibits such activity but this does not mean that there is any reason to declare that such relations (or interests) fall within the domain of the criminal law. Usually, when explaining why the Russian Criminal Code criminalizes illegal entrepreneurship, textbooks on the Special Part of the criminal law and commentaries to the Russian Criminal Code emphasize that the criminal law (namely, Article 171 (1) of the Russian Criminal Code) establishes a nexus between liability for such entrepreneurship and large-scale damage caused thereby to individuals, entities, or the State.

---

or large income derived as a result thereof. However, both compensation for damage and prevention of unjust enrichment fit well within the domain of civil law relations.

As noted above, criminal liability for illegal entrepreneurial activity arises if a respective action caused large-scale damage to individuals, entities, or the State or resulted in deriving large income.

Materiality threshold in respect of income (as well as damage) resulting from illegal entrepreneurship is set forth in the notes to Article 169 of the Russian Criminal Code. Income is deemed to be large if it exceeds 250,000 rubles. However, such specific materiality threshold in relation to income failed to address the issue of income from entrepreneurial activity which is still under dispute in the theory of criminal law and court practice.

Initially (when the Russian Criminal Code entered into force in 1996), in most court cases, income from illegal entrepreneurial activity was interpreted as the entire amount of an entrepreneur’s receipts without taking account of any costs incurred thereby. However, subsequently the Supreme Court of the Russian Federation expressed a different view. For example, the Presidium of the Supreme Court of the Russian Federation stated in its resolution issued in case K. that the identifying element of the corpus delicti of the crime in question provided for in the disposition of Article 171(1) of the Russian Criminal Code (on illegal entrepreneurial activity), i.e. the obtaining of large income, means the profit derived as a result of one’s entrepreneurial activity less any costs incurred in connection with the same. Such approach to this issue was viewed as controversial by many criminal law theorists. Many legal writers (A. E. Zhalinsky, N. A. Lopashenko, T. D. Ustinova, V. I. Tyunin, etc.) interpreted the concept of “income from illegal entrepreneurial activity” based on the same understanding of its nature (some of them did so independently from the position of the Supreme Court). Other legal writers, for example, P. S. Yani and B. V. Volzhenkin, disagreed with such interpretation.

However, I think that their arguments are not entirely convincing. As stated above, in my opinion, a mere violation of the rules of state registration or licensing of certain types of activity provided for by the civil (and administrative) law does not constitute grounds for criminalizing such violations. Criminal law rules with blanket dispositions never provide for any criminal law sanction for a violation of a rule of another branch of law but link instead the criminal unlawfulness of a particular act to a certain additional circumstance (condition, element) as a result of which the violation in question be-

---

comes a social danger which constitutes a necessary element of the crime. And in this case, therefore, the most important thing is not that one evades registration (or licensing) but that there are additional elements (large damage or the obtaining of large income) as a result of which (and exclusively because of which) such evasion becomes criminal and punishable.

Unfortunately, in its Resolution No. 23 dated November 18, 2004, “On the judicial practice of hearing cases of illegal entrepreneurship and legalization of cash (money laundering) or other property obtained by criminal means”, the Plenum of the Russian Supreme Court returned to its previous position whereby income referred to in Article 171 of the Russian Criminal Code means the proceeds from sale of goods (services or work) received during the period of a person’s illegal entrepreneurial activity without deducting any costs incurred by the said person in connection with such activity.

In this connection, I recall a short story written by O. Henry in which he described, in a humorous manner, an attempt by an Indian from North America to start a trading enterprise. With the help of his white “advisor”, the Indian purchased certain goods and started to sell them. However, later the “advisor” found out that the goods (that they had bought together) were being offered at the same price at which they had been bought initially. He tried to explain to his friend that no one traded like that, but the beginner “businessman” said that it would not be fair to sell the goods at a higher price and that he could not act dishonestly.

It should be noted that in relation to other economic crimes, namely, tax crimes, the Plenum of the Russian Supreme Court (in its Resolution No. 8 dated July 4, 1997 “On certain issues of application by Russian courts of criminal laws on liability for tax evasion” which was in effect till the 28th of February 2006, i.e. until the time when an amended version of the same Resolution entered into force) recommended to take account of expenses, i.e. costs which have been incurred by a person and which may be deducted from the person’s tax base in instances provided for by law. However, upon the enactment of and pursuant to Resolution of the Plenum of the Russian Supreme Court No. 64 dated December 28, 2006, “On application by courts of criminal laws on liability for tax crimes”, such interpretation of income was abandoned. It is quite clear that the approach described in Resolution of the Plenum of the Russian Supreme Court No. 8 dated July 4, 1997 is fully consistent with the tax legislation, logical and corresponds to the nature

---

Chapter 1

of a market economy and entrepreneurial activity which is aimed at regularly deriving profit (as per Article 2(1) of the Russian Civil Code) while both Resolution of the Plenum of the Russian Supreme Court No. 64 dated December 28, 2006 and its Resolution No. 23 dated November 18, 2004 run contrary to such nature.

Apparently, such interpretation may be viewed as limitation of rights and freedoms of the individual and citizen. Article 55(3) of the Constitution of the Russian Federation provides as follows: “Human and civil rights and liberties may be restricted by the federal law only to the extent required for the protection of the fundamentals of the constitutional system, morality, health, rights and legitimate interests of other persons, for ensuring the defense of the country and the security of the State.” Pursuant to Article 8 of the Constitution of the Russian Federation, freedom of any economic activity is guaranteed in the Russian Federation. Under Article 34 of the Russian Constitution, the right to freely engage in entrepreneurial activity falls within the category of the rights and duties of the individual and citizen. Further, pursuant to Article 2 of the Russian Constitution, “the individual, his rights and freedoms shall be the supreme value. It shall be a duty of the State to recognize, respect and protect the rights and liberties of the individual and citizen.” Criminal law should be interpreted, in particular by courts and especially by the Plenum of the Russian Supreme Court, in accordance with the constitutional principles.

The review of respective rules of the Russian Constitution, civil and criminal laws, their interpretation by courts and legal writers enables one to conclude that it would be advisable to decriminalize acts provided for by Article 171 of the Russian Criminal Code, and, as a first step in the right direction, that the Russian Constitutional Court should deem Article 171 of the Russian Criminal Code to contradict the Russian Constitution (by virtue of Article 125 of the Russian Constitution). This will not result in any gap in the criminal law which would be an obstacle in terms of preclusion of any socially dangerous effects of illegal entrepreneurial activity. There still will be effective rules of criminal law such as rules on liability for fraud (Article 159 of the Russian Criminal Code), illegal use of a trademark (Article 180 of the Russian Criminal Code), tax crimes (Articles 198 and 199 of the Russian Criminal Code), production, storage, transportation or marketing of goods or products, or performance of work or services which fail to comply with the safety requirements (Article 238 of the Russian Criminal Code), or forgery of documents (Article 327 of the Russian Criminal Code).

It is clear that it will take a lot of time to solve the problem of decriminalization of illegal entrepreneurial activity (or any other act punishable under
A. V. Naumov

criminal law), first of all, because of the existing lengthy lawmaking pro-
dures.

There is also one more aspect of the problem that we discuss herein: the
procedure for carrying out entrepreneurial activity which involves its regis-
tration and licensing is an inexhaustible source of unlawful enrichment of of-
ficials of different levels who are in charge of such registration and licensing.
For example, according to the data of a sociological survey, 78% of respond-
ents, employees of law enforcement bodies, believe that no entrepreneur
would be able to avoid giving bribes to officials in order to obtain a license.
Interestingly, it is the opinion of employees of law enforcement bodies, not
entrepreneurs\(^1\). So here we deal with the basis for corruption which enables
officials (as D. A. Medvedev, President of the Russian Federation, repeatedly
stated, including in his Address to the Russian Federal Assembly\(^2\)) to “night-
marize” entrepreneurs and businesses. In addition, the number of activities
subject to licensing is still much greater than necessary. The scope of such
“nightmares” on entrepreneurs and businesses, including those undertak-
en by law enforcement bodies, may be shown even on the basis of available
statistical data. We referred above to data on registration of crimes provided
for by Article 171 of the Russian Criminal Code (these are data from by the
Main Information and Analytical Center under the Russian Ministry of In-
ternal Affairs). Let us compare the said data with judicial statistical data for
the three most recent years (as presented in Form 10a) and analyze interrela-
tion between respective statistical indicators (statistics is known to be some-
times tricky). In 2005, 2,716 respective crimes were registered, and 408 peo-
ple were convicted; in 2006, the respective numbers were 3,200 and 702; and
in 2007, respectively, 3,340 and 849. If one assumes that most crimes were
registered as those committed by one person only (which is most often the
case), then in 2007 the number of such registered crimes was four times the
number of people convicted for committing them; in 2006 the above ratio was
in excess of 4.5, and in 2005, it was almost 7(!) (it should be noted that this
assumption can result in just minor errors; and if one takes into account that
some of those crimes were registered as committed by two or more people,
the above discrepancy between the number of crimes and the number of con-
victed people becomes even greater). So, what happened to thousands of reg-
istered “crimes” and “criminals”? Of course, there are situations when peo-
ple are legitimately relieved from criminal liability and punishment. For ex-
ample, in 2005, 194 cases (16.9%) in which people were held criminally li-

---


\(^2\) See: Rossiskaya Gazeta, November 6, 2008.
able were dismissed otherwise than on exculpatory grounds; in 2006, there were 223 such cases (12.8%); and in 2007, 258 (13.8%). In 2005, 19 people were relieved from punishment (4.7%), in 2006, 31 people (4.4%) and in 2007, also 31 people (3.7%). Looking at these numbers, one may assume that criminal proceedings were unlawfully initiated against thousands of entrepreneurs, and it is hard to guess how many criminal cases were not initiated at all (instead, entrepreneurs were subjected to pressure in order to make them give a bribe). In view of the foregoing, the decriminalization of illegal entrepreneurial activity or at least (or initially) an amendment of the official interpretation of the criminal law rule on liability for illegal entrepreneurship, would help fight corruption.

The aspects of artificial criminalization of economic activity which we discussed above require one to analyze the reasons of such criminalization at the level of both lawmakers and law enforcement bodies. That is, instead of political or social reasons, one should analyze the reasons relating to specifically legal components (including legal techniques) of lawmaking and law enforcement activity (though, of course, ultimately such specifically legal reasons are determined by social factors). To this end, we need to identify adverse factors, techniques or methods which are relevant to formulation of legislative grounds for respective criminal law rules (or, more generally, rules of law) and which similarly manifest themselves at the law enforcement level, first of all, in connection with judicial interpretation. It should be noted, though, that ultimately drawbacks of interpretation are a natural continuation of those drawbacks (rather than strengths) that are characteristic of the interpreted law itself.

In view of the foregoing, it might be possible to identify certain errors (of purely legal nature) of judgment on the part of the lawmakers which were made when they drafted many penal prohibitions (not necessarily relating to the economic sphere):

(1) When developing respective rules of law, the lawmakers should not have forgotten (ignored or failed to take into account) general legal principles, including those provided for in the Russian Constitution as well as generally accepted principles and rules of international law;

(2) The lawmakers failed to distinguish between different spheres of legal regulation (first of all, the scope of application of the criminal law and that of the civil law); and

(3) The lawmakers excessively used abstract methods of formulation of penal prohibitions failing to more specifically define them on the legislative level.

The specifics of the first factor can be shown by means of comparison of a number of criminal law rules and similar rules of the constitutional law. For example, there is an obvious contradiction between Article 174.1 of the
Russian Criminal Code, which provides for liability for legalization of cash (money laundering) or other property obtained by a person as a result of his crime, and Article 50 of the Russian Constitution (as well as Article 6(2) of the Russian Criminal Code) which prohibits to repeatedly convict anyone for the same offense. One can also argue that such penal prohibition was not formulated on any sham grounds relating to international law; it does not provide for such grounds.

One should admit that it is incorrect, from the legal point of view, to explain (as it usually explained in textbooks on the Special Part of the criminal law and comments to the Russian Criminal Code) that the Russian Federation had to introduce Article 174.1 of the Russian Criminal Code because it was obliged to do so under the Strasbourg Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990 (the “Strasbourg Convention”) and the United Nation Convention against Transnational Organized Crime (Palermo, December 12, 2000) (the “Palermo Convention”). Indeed, in Article 6(1) (Laundering offences) of the Strasbourg Convention, the member countries of the Council of Europe and other countries that signed the Strasbourg Convention were recommended to establish as offences under their domestic law (i.e. to provide for criminal liability for) among others the following actions: the conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his actions; and the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to or ownership of property, knowing that such property is proceeds of crime. A similar rule is contained in Article 6 of the Palermo Convention.

If one proceeds on the basis of these provisions of the Conventions only, then everything is very simple. Under Article 15(4) of the Russian Constitution, the commonly recognized principles and rules of the international law and the international treaties of the Russian Federation shall be a component part of its legal system, and, therefore, the penal prohibition set forth in Article 174.1 of the Russian Criminal Code is consistent with both the Russian Constitution and Article 6(2) of the Russian Criminal Code (which reads as follows: “The present Code is based on the Russian Constitution and the commonly recognized principles and rules of the international law”). This would be so but for a certain material provision which is contained in Article 6(2)(b) of the Strasbourg Convention which expressly provides as follows: “For the purposes of implementing or applying paragraph 1 of this article […] it may be provided that the offences set forth in that paragraph do not
apply to the persons who committed the predicate offence” (the same rule is word by word reproduced in Article 6(2)(e) of the Palermo Convention). Article 1 of the Strasbourg Convention (and, respectively, Article 2 of the Palermo Convention) explains that “predicate offence” means any criminal offence as a result of which proceeds were generated that may become the subject of an offence as defined in Article 6 of this Convention” (i.e. this applies to crimes as a result of which property or proceeds are obtained to be subsequently “laundered”).

The said reservation means that under the above Conventions the states that have signed the same are obliged to ensure that their criminal legislation provides for criminal liability for legalization of cash (money laundering) or other property obtained by criminal means exclusively by other persons. As to the introduction into domestic criminal law of rules on criminal liability for legalization of cash (money laundering) or other property obtained by a person as a result of his own crime, both Conventions contain just a non-mandatory recommendation to do so, leaving this issue to be decided at the absolute discretion of a country concerned. Thus, the existence of Article 174.1 in the Russian Criminal Code does not constitute the performance by the Russian Federation of its obligation which is allegedly provided for by international law (while in fact, as explained above, no such obligation exists).

Such conclusion enables us to analyze the problem based on purely internal (domestic) principles of criminalization of respective acts as well as the principles of criminal law generally. What is legalization of cash (money laundering) or other property obtained by criminal means from the standpoint of its legal or criminal-law nature? As far as other people are concerned (rather than the criminal himself who has obtained such cash or property by criminal means), this is a well-known variety of privity (as it is called in the criminal law theory) to a crime in the form of concealment of the crime which was not promised in advance. If one summarizes numerous publications on privity to crimes, one can state as follows: privity to a crime means deliberate actions of persons who did not take part in the crime aimed at facilitating concealment of the crime, its traces, instruments or targets or selling things obtained as a result of the crime (as defined by M. D. Shargorodsky, V. G. Smirnov, I. A. Bushuev and other legal writers). Privity to a crime differs from criminal complicity in that there is no cause-and-effect and culpable relation with the acts of the perpetrator of the crime, and that is why persons who are privy to a crime are not accomplices to it. Article 316 of the existing Russian Criminal Code provides for liability for the privity to an especially grave crime in the form of concealment of the crime.
Privity to a crime arises exclusively in connection with the crime committed by other persons. This is the normative basis for formulation of the penal prohibition contained in Article 174 of the Russian Criminal Code. At the same time, Article 174.1 of the Russian Criminal Code violates this principle since it provides for criminal liability for privity to one’s own crime. It should be noted that the existence of such rule in the Russian Criminal Code (though, as statistical data show, it is hardly ever applied in practice) creates insuperable difficulties in judicial practice and prevents respective acts from being classified. Thus, in Resolution No. 23 of the Plenum of the Russian Supreme Court dated November 18, 2004, which was discussed above, the issue of distinguishing between legalization of proceeds of crime and disposal of property obtained by criminal means is addressed solely in relation to Article 174 of the Russian Criminal Code: “Disposal of property which was obtained as a result of a crime (for instance, a theft) committed by other persons does not constitute the corpus delicti of legalization of cash (money laundering) or other property (provided for by Article 174), unless such property is made to look as if it were obtained lawfully. Depending on particular circumstances of a case, such actions may contain essential elements of the crime which is punishable as theft (in the form of aiding and abetting) or the crime provided for by Article 175 of the Russian Criminal Code” (i.e. where liability is provided for acquisition or disposal of property which was knowingly obtained by criminal means).

It is clear that the Plenum of the Russian Supreme Court did not extend its conclusion to disposal of property which was obtained by the criminal himself as a result of his “predicate” offence for understandable reasons. It would not make any legal sense to hold him liable for the disposal of the property which he himself obtained by criminal means. Similarly, it would not make any legal sense to hold him liable for legalization (laundering) of such property. Any disposal of, for instance, stolen property by the person who stole it (the thief) is a consequence of his crime (theft) which does not constitute a separate crime. One criminal would steal other people’s money and spend it for his own needs (meals, clothes, and so on), another criminal would sell stolen property, the third one would keep stolen money in a chest, and the fourth one would deposit it in his bank account, etc. From the standpoint of criminal law, there is no difference between all those situations. to convict a criminal for any of the above forms of disposal of stolen property means to convict him for the second time for his predicate offence; this would run contrary to both Article 50 of the Russian Constitution and Article 6(2) of the Russian Criminal Code. But if this is so, how can one prevent legalization of cash (money laundering) or other property obtained by a person as a re-
result of his crime? Nonetheless, it is both possible and necessary; the crimi-
nal law enables us to do so. Paragraph (1)(b) of Article 104.1 of the Russian
Criminal Code provides for mandatory confiscation of property, i.e. for its
involuntary transfer into the ownership of the State without compensation
on the basis of the court judgment, including the transfer of funds, valua-
bles, and other assets for which or in which the property obtained as a result
of the crime and proceeds from such property were exchanged or converted,
whether in full or in part. Thus, if as a result of a crime (bribe taking, drug
dealing, trade in arms, etc.) a person obtained particular property (cash) and
tried to legalize the same, such property or cash, as the case may be, should
be confiscated. In such a case, even tentative recommendations of the Stras-
bourg Convention and the Palermo Convention in relation to prevention
of respective crimes and organized crime will be complied with.

The second mistake of the lawmakers (i.e. that they failed to distinguish
between different spheres of legal regulation, primarily, between the scope
of application of the criminal law and that of the civil law) was analyzed on the
basis of Article 171 of the Russian Criminal Code. As to the ultimate source
of such criminalization, one should point to the following factors. First of all,
\textit{it is necessary to disprove the opinion} (which is generally accepted not only by
judges and employees of law enforcement bodies but by lawmakers as well)
\textit{that the criminal law remedies and methods of protecting the rights of a victim
are probably most reliable}. Where this idea is applied to especially grave and
grave infringements on human life and health or to violent and mercenary
infringements on other’s property (e.g., in case of a robbery or violent rob-
bbery), this is indeed so. In such a case there is no alternative to criminal law
protection of respective objects. The situation is different when we deal with
economic crimes and certain other non-violent crimes against property. In
cases relating to such crimes the victim is interested in compensation of dam-
age caused to him by the crime and, first of all, in \textit{the amount} of such compen-
sation. If his interests are protected by means of criminal law, this might
significantly \textit{decrease} the amount of such compensation. For example, in such
a case, lost profit would not be taken into account (unlike when the situa-
tion is addressed under the civil law). But this is not the most important as-
pect of the compensation of damage under the criminal law; it is the nature
of such compensation that is of utmost importance. Such compensation will
fully depend on whether or not the criminal has been caught and punished.
No such direct relationship exists in the civil law. In view of the foregoing,
firstly, when introducing penal prohibitions, the lawmakers should proceed
from the presumption that \textit{there is no necessary correlation between estab-
lishing criminal punishment for a particular act and the level of actual protec-
tion of the rights of a victim of such offence. Secondly, the lawmakers should bear in mind that artificial criminalization of any relations (which, by virtue of their legal nature, actually fall within the category of civil law relations or administrative law relations rather than within the category of criminal law relations) can limit the opportunities for protection of interests of a victim with the help of civil law remedies.

Finally, as stated above, among other imperfections of the lawmaking which sometimes result in artificial criminalization of economic offences, one should name the excessive use by the lawmakers of abstract methods of formulation of penal prohibitions instead of defining the same more specifically in legislative acts. When formulating criminal law rules, the lawmakers should ensure the interrelation between the abstract and the concrete. Abstract knowledge identifies material (in a certain respect) feature (or aspect) of an object while ignoring its other features (aspects). For example, the disposition of Article 158(1) of the Russian Criminal Code on liability for a theft of property (which is defined as a secret stealing of other’s property) represents a collective image of all possible ways to secretly steal property (their abstract image). Specific ways to secretly steal something may widely vary depending on the place, time, and circumstances of a crime; however, any such theft, while having specific features of a secret act, will be equivalent to any other theft, since it will contain the elements provided for in the disposition of Article 158(1) of the Russian Criminal Code. Therefore, one cannot do without abstract wordings when formulating criminal law rules. But one needs to correctly define the extent of such abstractness and its relative role in comparison with specificity (which is also needed, and also to a proper extent.)

For example, a review of judicial errors of classification of crimes suggests that most often practitioners make mistakes when interpreting evaluative concepts which are not specifically defined by the lawmakers. This drawback clearly manifests itself in the wording of the corpus delicti of a number of economic crimes, for example, in the wording of Article 171 of the Russian Criminal

---

1 In connection with the above, Anita Naschitz, a well-known Romanian lawyer and an expert in the field of law-making techniques, rightfully stated as follows: “The law-maker should correctly determine the extent to which the reflection of public relations by rules of law can be abstract and typifying so that such rules could, on the one hand, to fully cover the entire sphere of relations regulated thereby, without being too general, and to adapt, on the other hand, to various real life situations and their various specific features and aspects, without making such representation too specific or even individualized.” (Naschitz, Anita. Teorie si tehnica in procesul de creare a dreptului. Moscow, 1974, p. 142 (Нашиц А. Правотворчество: теория и законодательная техника. М., 1974. С. 142)).

Chapter 1

Code which provides for liability for illegal entrepreneurship. When developing the Russian Criminal Code of 1996 and amending it, the lawmakers made substantial progress towards making evaluative concepts more specific, for example, the concept of large or especially large income from entrepreneurial activity (by specifying respective monetary amounts). However, the lawmakers did not specifically define the said concept in terms of its contents, i.e. they did not specify what exactly should be deemed to be illegal income (rather than just specify its quantitative parameters) similarly to what was done, for example, in the Russian Tax Code. As a result, the Russian Supreme Court was able to state its position which we criticize and which is expressed, in particular, in the above-mentioned Resolution of the Plenum of the Russian Supreme Court which contradicts the rules of both the Russian Constitution and the civil law.

As stated above, such errors on the part of the lawmakers are further aggravated by interpretation of respective rules of law by law enforcement bodies. The reasons for that, i.e. the factors which adversely affect due process of law and justice and sometimes completely distort the meaning of respective precepts of criminal law (which concern interpretation and application not only of criminal law rules relating to economic activity but also other rules of criminal law), include the following:

1) Elimination of gaps in the law by means of interpretation which is inadmissible, grossly violates the principle nullum crimen sine lege, and contradicts general principles of law (as well as principles of law specific to a particular branch of law). Unfortunately, it is quite common, and sometimes such use of interpretation is “ratified” by means of recommendations contained in resolutions of the Plenum of the Russian Supreme Court. For example, paragraph 9 of Resolution No. 23 of the Plenum of the Russian Supreme Court dated November 18, 2004 reads as follows: “If federal laws permit one to engage into entrepreneurial activity only on the basis of a special authorization (license) obtained thereby, but the procedure for and conditions of [obtaining the same] were not established, and a person started to carry out such activity without such special authorization (license), then the person’s actions which involved the obtaining of large or especially large income or caused material damage to individuals, legal entities, or the State should be classified as illegal entrepreneurial activity which is carried out without such special authorization (license).” It is clear that if such recommendation is complied with and an “offender” is held criminally liable, it will violate fundamental principles of criminal law and general legal principles. Firstly, it appears that certain activity is “a sort of”, “generally” or “potentially” criminal but that it was not precisely defined by the lawmakers. At the same time no account
is taken of the fact that the accused could not comply with the legal requirements on licensing in respect to his activity: no license could have been issued since the law did not establish the terms and conditions of issuing the same. However, in this case, the lawmakers put the blame on the accused entrepreneur rather than themselves (for their delay in setting forth required terms and conditions). In other words, the lawmakers are trying to push their blame on other people. In direct connection with it, no account is taken of such general principle of law as establishing culpability of a person who has committed a crime provided for by criminal law. How can one prove the criminal intent of the entrepreneur in this particular case? It is impossible to do so in accordance with the requirements of the Russian Criminal Code and the Russian Code of Criminal Procedure (but, as practice shows, sometimes such intent is successfully “proved”).

(2) A trend to interpret criminal law widely. As stated above, Article 50(1) of the Russian Constitution and Article 6(2) of the Russian Criminal Code spell out the principle whereby no one may be repeatedly held criminally liable for the same offense. Apparently, the situation is clear. However, in practice, the above constitutional and penal prohibitions can be and have been circumvented, for example, by means of wide interpretation of the concept of cumulative offences (so the courts effectively allowed what the lawmakers excluded). Pursuant to the Russian Criminal Code of 1996 (Article 17 of the version in which it was originally enacted), cumulative offences mean two or more offences which are provided for by different articles or paragraphs of the Criminal Code and for none of which the person has been convicted. But what does it mean that respective offences should be provided for by different articles of the Criminal Code? The most common example is the following: a person commits a murder involving a violent robbery, extortion, or racketeering (Article 105(2)(h) of the Russian Criminal Code). If, say, the murder involves racketeering, do we deal with one crime or two crimes? Apparently, the answer is obvious. The structure of Article 105(2)(h) of the Russian Criminal Code implies that the objective aspect of crime (actus reus) in case of a murder under aggravating circumstances includes the racketeering (or violent robbery or extortion, as the case may be). In such case, cumulative offences would result in the culprit’s being convicted twice which is prohibited both by the Criminal Code and the Constitution. First, the culprit will be convicted for murder involving a violent robbery, extortion, or racketeering, and then he will be convicted for the second time directly for the racketeering (under Article 209 of the Russian Criminal Code), violent robbery (under Article 162 of the Russian Criminal Code) or extortion (under Article 163 of the Russian Criminal Code). The Plenum of the Russian Supreme Court took a different
view of the issue. In its Resolution No. 1 dated January 27, 1999, “On judicial practice in relation to murder cases (Article 105 of the Russian Criminal Code)” (as amended by its Resolution No. 7 dated February 6, 2007), the Plenum explained as follows: “A murder committed when committing a violent robbery, extortion, or racketeering should be classified as a murder involving the violent robbery, extortion, or racketeering. In such cases, respective actions are classified as offences provided for by Article 105(2)(h) of the Russian Criminal Code together with the articles thereof which provide for liability for a violent robbery, extortion, or racketeering.” to eliminate uncertainty, the lawmakers amended the wording of the definition of “cumulative offenses”. The lawmakers added the following words to the first sentence of Article 17(1) of the Russian Criminal Code: “except for instances when, as provided for by articles of the Special Part of this Code, the committing of two or more crimes is deemed to be a circumstance which entails a more severe punishment” (as amended by the Federal Law dated July 21, 2004). The logic of the lawmakers is flawless. In our example, the person would be convicted for a murder under aggravating circumstances exclusively because when committing the murder he also committed a violent robbery, extortion, or racketeering (or vice versa). Recognition of cumulative offenses in this particular case means that the person will be convicted twice for the violent robbery, extortion, or racketeering. For the first time, he will be so convicted since he will get a more severe punishment for the murder under aggravating circumstances, and then he will be convicted for the second time directly for the violent robbery, extortion, or racketeering. Apparently, everything is clear. However, the wording of the said Resolution of the Plenum of the Russian Supreme Court on application in this case of the concept of cumulative offences still remains unchanged. It should be noted that we considered just one particular example of how the concept of cumulative offences is understood in judicial practice.

Willingness to interpret the criminal law widely (which represents, in effect, an accusatory bias) is also related to failure to take into account that blanket dispositions of many rules of criminal law include the contents of regulations belonging to other branches of law and that in such a case the corpus delicti of a respective crime is determined with the help of prohibitions provided for by other branches of law; in relation to the disposition of a rule of criminal law, such prohibitions become a mandatory condition of criminal liability. Such blanket nature may be explicit (as in the wording of Article 143 or 264 of the Russian Criminal Code) or implicit. As a good example of such implicit blanket nature of a disposition, one may mention the definition of a threshold in relation to a theft punishable under criminal law committed by way
of stealing, fraud, misappropriation or embezzlement, and, accordingly, the way in which the corpus delicti of crimes provided for by Articles 158, 159, and 160 of the Russian Criminal Code is distinguished from petty theft (committed by any of the above means) which is punishable under administrative law and provided for by Article 7.27 of the Russian Code of Administrative Offences. It is well known that over the last few years, pecuniary criteria set forth in the administrative law and applied in relation to the constituent elements of petty theft punishable thereunder changed several times. The RSFSR Code of Administrative Offences provided for the threshold of one minimum monthly statutory wage (“MROT”); the Russian Code of Administrative Offences of 2001 – for the threshold of 5 MROTs; the same Code in its version of September 27, 2002 – for the threshold of one MROT; its version of June 22, 2007 – for the threshold of 100 rubles; and its version of May 16, 2008 – for the threshold of 1,000 roubles. Therefore, in effect, upon every such change, the threshold in respect of petty thefts punishable under criminal law changed accordingly (without formally making amendments to the Russian Criminal Code). Anyway, it is worth noting that for about a year [i.e. from the 22nd of June 2007 till the 16th of May 2008] a person guilty of a petty theft of another’s property for an amount in excess of 100 rubles [about 4 US dollars] was to be held criminally liable and, accordingly, subject to criminal penalty. Unfortunately, some investigators initiated criminal proceedings in such cases, though they were obliged to take account of the still effective Article 14(2) of the Russian Criminal Code which provides as follows: “The commission of an act, or a failure to act, although formally containing the indicia of any act provided for by this Code, but which, by reason of its insignificance, does not represent a social danger, shall not be deemed a crime.” The fact that the above rule was neglected attests to the accusatory bias which is still characteristic of the Russian law enforcement practice and, unfortunately, has not yet become history.

(3) A trend to restrictively interpret rights of individuals which manifests itself in judicial practice. It might make sense to compare the wording of constitutional provisions relating to protection of the right to privacy and similar provisions of the Russian Criminal Code. Article 137(1) of the Russian Criminal Code provides for criminal liability for illegal collection or dissemination of information about the private life of a person which constitutes his personal or family secrets, without his consent, or the distribution of this information in a public speech, in a publicly performed work, or in the mass media. However, the Russian Constitution contains a slightly different wording describing respective rights of the individual and citizen. Article 23(1) of the Russian Constitution provides that “everyone shall have the right
to privacy, to personal and family secrets, and to protection of one’s honor and good name”, and its Article 24(1) reads as follows: “It shall be forbidden to collect, store, use and disseminate information about the private life of any person without his/her consent.” At the same time, the lawmakers provided in the Criminal Code that the object of crime is not any and all information about the private life of a person (and this is how this issue is described in the Russian Constitution in connection with protection of rights of the individual and citizen); the object of crime is limited to information which constitutes the person’s personal or family secrets. I agree with those legal writers who consider such limitation as a significant drawback of the criminal law rule in question.

Firstly, it creates significant procedural obstacles (in terms of proof). A secret is, first of all, information or data of certain nature. But how can one decide which information about the private life of a person falls within the category of the person’s secret and which does not? At least on the legislative level, this can be determined only in respect of professional secrets protected by law, such as medical, judicial, attorney’s secrets, secrets relating to preliminary investigation, notary’s acts, cash deposits, and confession. And what about all other information?

But yet it is not the most important thing. The most important thing is that the Constitution, as stated above, refers twice to the right to privacy (in Articles 23(1) and Article 24(1)) beyond the context of personal or family secrets (under Article 23, a family secret is viewed just as one of the types of information about the privacy of one’s life). Given that these issues are highly sensitive and that one’s private life has many various aspects, if the limitation provided for by the criminal law is lifted and the scope of information about the private life of a person is no longer limited to information which constitutes a “secret”, then this will be more consistent with the above-mentioned rules of the constitutional law.

These are the main reasons of artificial criminalization of economic activity both by the lawmakers and law enforcement bodies. Eventually, such artificial criminalization substantially hinders the rule of law.

---

Chapter 2. Application of Civil-Law Institutions in Other Branches of Law

I. Civil Law in the Legal System

Application and interpretation of legal institutions or statutes of a particular branch of law outside its traditional boundaries are an old problem. With respect to civil law, it has in some instances been resolved by inserting into effective legislation provisions on the scope and procedure of application of civil-law rules to regulate relations governed by other branches of law.

Most current codes define their scope by laying down the rules of application of civil law (legislation) and civil-law institutions to relations regulated by specific branches of legislation. Differentiation from civil-law institutions can be found in the following codified regulations of the Russian Federation: the Water Code (Article 4), the Town-Planning Code (Article 4), the Housing Code (Articles 7–8), the Land Code (Article 3), the Forest Code (Article 3), the Tax Code (Article 11), the Family Code (Article 4), and the Customs Code (Article 11).

The above codes differentiate their scope of regulation from civil legislation in various ways. For instance, the Family Code of the Russian Federation permits especially extensive application of civil legislation to property and non-property relations among family members: civil law applies here in all instances where rules regulating such relations are absent from family law.

Contrary to a common belief, references to the terms, rules and institutions of the civil legislation are characteristic of public law (and not just of private law). Among codified instruments (with the exception of so called “functional” codes1), only the Code of Administrative Offences and the Criminal Code fail to regulate the application of the terms and institutions of civil law. It would be simplistic and inaccurate to attribute this fact to a simple omission on the part of the law-maker. In view of the substance of those branches of law, it might be reasonable to suggest the following explanation why the Code of Administrative Offences and the Criminal Code are silent on the rules of conflict with other branches of law.

---

1 For example, the Merchant Shipping Code, the Internal Water Transport Code, and the Air Code, which, from the legal perspective, serve as a form of incorporation rather than codes.
The Code of Administrative Offences and the Criminal Code are instruments containing protective legal rules only, and the Russian Criminal Code is a codified instrument of a branch of law that is exclusively protective (rather than regulatory). Protective branches of law do not regulate the protected social relations: they are subject to regulation by other areas of law. To put it simply, criminal law does not regulate the relations it protects.

M. D. Shargorodskiy and O. S. Ioffe observed, “The holder of a benefit protected by criminal law performs certain positive acts but he does so as a party to relations other than criminal because criminal law just protects the benefit without regulating the holder’s authority.” This view is shared by criminal lawyers. For instance, V. G. Smirnov wrote, “The rules of criminal law never work autonomously; they just formulate a threat of punishment in case of violation of social relations organized by rules of other branches of Soviet law.”

This is precisely why the Russian Criminal Code does not and cannot contain any conflict-of-laws rules regulating the relationship between criminal law and regulatory branches of law.

Article 2 of the Russian Criminal Code defines the purpose of the code as protection (rather than regulation) of the rights and freedoms of the individual and citizen, property, public order and public security, the natural environment, and the constitutional regime. For that purpose, the code establishes the grounds for and principles of criminal liability, specifies which deeds constitute criminal offences and defines the types of punishment for crimes and other criminal-law measures.

That exhausts the subject matter of criminal law. Criminal law does not state or address any other objectives, especially the objective to regulate the protected relations; it cannot and may not do so. Theoreticians of criminal law emphasize that the law-maker seeks to comply with the following rule in determining which branch of law should enjoy primacy in regulating various forms of liability: in borderline cases, primacy is given not to criminal law but to other branches of law: civil law, administrative law, disciplinary law, taxation law, etc.

---

1 This fundamental idea was put forward in the classical literature on Russian (Soviet) civil law and theory of law in the 1950s. See: M. D. Shargorodskiy, O. S. Ioffe. On the System of Soviet Law, Sovetskoe gosudarstvo i pravo. 1957, Issue No. 6, p. 108. (Шаргородский М. Д., Иоффе О. С. О системе советского права // Советское государство и право. 1957. № 6. С. 108).


The view of criminal law as an exclusively protective branch of law that
does not regulate protected social relations and the opinion that “the role
of criminal-law sanctions is often exaggerated”\(^1\) are traditional and firmly es-
tablished in the general theory of law and the theory of criminal law\(^2\).

Even authors who do ascribe a “regulatory” function to the mechanism
of criminal law have to concede that it is limited to deterrence\(^3\) (prevention)\(^4\)
or release from criminal liability in the circumstances that rule out the crim-
inal nature of a deed\(^5\), and that it has nothing to do with the substantive regu-
lation of protected social relations. The theory of criminal law acknowledges
that criminal law does not regulate protected social relations; on the contrary,
other branches of law and the prohibitions they contain are applied to clas-
sify acts as criminal or non-criminal\(^6\).

p. 22 (Лейст О. Э. Санкции и ответственность по советскому праву (Теоретические про-

кции в советском праве. М., 1962. С. 105–106); Theory of State and Law. Eds. A. I. Korolyov,
L. S. Yavich. Leningrad, 1987, p. 407 (Теория государства и права / Отв. ред. А. И. Коро-
лев, Л. С. Явич. Л., 1987. С. 407); Course of Soviet Criminal Law. Ed. by A. A. Piontkovskiy,
права / Под ред. А. А. Пионтковского, П. С. Ромашкина, В. М. Чхиквадзе. М., 1970. Т. 1,
C. 12); V. G. Smirnov. Legal Relations in Criminal Law, Pravovedenie, 1961, No 3, p. 89 (Смир-
нов В. Г. Правоотношение в уголовном праве // Правоведение. 1961. № 3. С. 89).

\(^3\) See, e.g.: Criminal Law. General Part: Manual for University Students. Eds. I. Ya. Kozachenko,
Z. A. Neznamova. Moscow, 1997, pp. 12–13 (Уголовное право. Общая часть: Учебник для ву-

1997, p. 45 (Начкебия Г. И. Предмет науки уголовного права: Автореф. дисс. ... докт.

\(^5\) Z. A. Astemirov. Theoretical Issues of Criminal Liability and Punishment. Makhachkala,
1987, p. 51 (Астемиров З. А. Проблемы теории уголовной ответственности и наказа-
ния. Махачкала, 1987. С. 51); A. V. Naumov. Russian Criminal Law. General Part: Course
of Lectures. Moscow, 2000, pp. 5–15 (Наумов А. В. Российское уголовное право. Об-
Liability. Krasnoyarsk, 1990, p. 70 (Похмелкин В. В. Социальная справедливость и уго-
ловная ответственность. Красноярск, 1990. С. 70).

\(^6\) A. V. Naumov. Sources of Criminal Law in Other Law Branches, Zakonnost’. 2002,
No 7, pp. 38–43 (Наумов А. В. Нормы других отраслей права как источник уголовно-
го права // Законность. 2002. № 7. С. 38–43); М. А. Ibragimov. Normative Acts of Other
seq. (Ибрагимов М. А. Нормативные акты иных отраслей права как источники уголов-
Some authors note here that “where criminal law uses the terms borrowed from other branches of law, their understanding and, therefore, their application to classify crimes must be based on their branch-specific definition,”¹ and “if criminal law uses legal categories whose definitions are provided in other branches of law, they must be understood in accordance with such definitions.”²

To sum up, criminal law protects but does not regulate protected relations, in particular civil-law relations. That is why the Russian Criminal Code does not and cannot contain any rules of the conflict of criminal and civil law or rules on the procedure for the use of the terms, concepts and institutions of civil law in the Criminal Code. The terms, concepts and institutions of civil law can be used and understood in the Russian Criminal Code solely and exclusively in the same manner as they are used and understood in civil law.

No conflict exists or may exist between criminal and civil law. Otherwise we would be faced with the inadmissible situation where criminal law not only protects but also, by going far beyond its scope, regulates relations constituting the subject matter of civil law. Figuratively speaking, that would mean in practice that a watchman, instead of guarding a house by patrolling the grounds, would set about re-building the house at his own discretion “so that it is easier to protect”. After such “improvements”, however, the structure would cease to be a house and become unfit for habitation. Such “protection” would stop criminal law from protecting normal civil-law relations. Instead, it would protect some sort of hybrid civil-criminal relations that do not exist in reality but are artificially created by regulating normal civil-law relations by means of criminal law.

Most codes and many other legislative acts contain special provisions dealing with the application of civil law to the relations they regulate. However, the practice of applying the rules and institutions of civil law within the framework of other branches of law (sometimes on the basis of official interpretation and even rules of law) is such that it does not at all reflect the true substance and nature of civil-law rules and institutions. That often creates a situation where legal practitioners who apply civil law to other branches of law are guided by their own notions that have very little to do with the

true meaning of civil law. The application of such interpretations of civil law results in the fragmentation of the consolidated legal system and emergence of a multitude of isolated legal “havens” where “criminal civil law” or “tax civil law”1 are applied in a manner that would puzzle a civil lawyer. This is an especially serious problem in the practice of public law, particularly the practice of the law-enforcement agencies and criminal courts.

II. Civil-Law View of Crime

To talk of the civil-law approach to crime might seem an error or even legal nonsense: it is the prerogative of criminal law to define which acts constitute a criminal offence. However, it would be really strange if an act regarded as a criminal offence in terms of criminal law (or, more accurately, criminal justice) would constitute a lawful civil relationship in terms of civil law. If we assume that, by stipulating criminal liability for crimes against property, criminal law primarily protects civil rights (above all the right to own property), a situation where criminal justice classifies as a crime what, from the perspective of civil law, is recognized as a lawful civil relation is nothing but a legal absurdity. Yet such situations are not uncommon in the practice of criminal justice.

In order to understand the attributes of acts constituting criminal offences in terms of both criminal and civil law (in particular larceny as a “classical crime model”), it might be useful to take a look at those acts in the context of a legal system that yet made no distinction between civil law and criminal law. Such was the state of law in Ancient Rome where legal relations that were subsequently viewed as a criminal offence (public delict) or a civil delict existed within the framework of a single institution, i.e., furtum (larceny).

I. B. Novitskiy observed that “furtum did not quite match the modern notion of larceny”: furtum was not limited to the theft of a thing; furtum usus (theft of use) and furtum possessionis (theft of possession, which could be committed, for instance, by the owner taking away from the lender a thing offered to the latter as security) were also possible so that “furtum meant any illegal acquisitive infringement of other people’s things.”2 D.V. Dozhdev notes that “as new delicts were identified, the meaning of furtum was narrowed down but it still remained a lot broader than the modern understanding.”

---

1 It is common in the law enforcement practice of the taxation authorities and even courts to refer to “tax obligations”, “contracts as a form of tax avoidance”, the “price” of a contract determined by the taxation authorities rather than the parties, etc.

The essential element of larceny is that the useful properties of a thing are taken away against the will of the owner, for gain and deliberately.

The study of furtum has a long tradition in civil law because it is an institution that not so much defines an “exterior boundary” of civil law as establishes legal regulation of property relations that exist here in the crime mode (larceny) because larceny does not terminate the victim’s property rights, nor does it grant property rights to the thief.

In particular, there is extensive literature on the issue of furtum in German civil law. German scholars describe in detail the characteristic features of relations classified as furtum. For instance, Schlossmann points out that the presence or absence of furtum depends on whether unilateral action involves “legality of the transfer of possession”\(^4\). J. Baron wrote, “Furtum is committed by the person who trespasses against a movable thing, deliberately causes damage to another and enriches himself” (sich einen Gewinn verschafft)\(^5\).

A. Brinz notes that furtum involves appropriation of other people’s things without legal basis (rechtslos), without the knowledge and against the will of the owner of such things\(^6\). E. Böcking defines furtum as “appropriation of possession”\(^7\).

To sum up, from the prospective of civil law, larceny is a unilateral act committed without any legal (civil-law) basis and against the will of the owner.

---


\(^3\) Civil action in a criminal court serves as a formal expression of the fact that civil law does not “cease to exist” after a crime has been committed (contrary to a common interpretation provided by criminal justice in order to simplify criminal classification) but continues to regulate property relations between the perpetrator and the victim.


\(^7\) E. Böcking Römisches Privatrecht. Institutionen des römischen Civilrechts. Bonn, 1862, S. 149.
A. G. Fedotov and A. V. Rakhmilovich

(lawful possessor) as a result of which the perpetrator *de facto* takes possession of other people’s things, achieves self-enrichment and inflicts losses on the owner (lawful possessor) of a thing, who is deprived of possession. It is a bit embarrassing to repeat such truisms but the feeling of embarrassment vanishes after a look at the legal definition of larceny (Note 1 to Article 158 of the Russian Criminal Code) which reads: “This Code defines theft as unlawful gratuitous taking and (or) use of another person’s property with a mercenary motive for the benefit of the perpetrator or other persons, inflicting losses on the owner or another possessor of such property”.

As we can see, by comparison with the civil-law understanding of larceny, the legal definition lacks references to such attributes as unilateral action against the owner’s will (which in some cases virtually results in recognition by criminal justice of the fact that the “victim” may be “a participant in a crime”). Moreover, another attribute of larceny, i.e., lack of civil-law basis for appropriation of a thing, remains implicit in the more general feature of unlawfulness. In practice that often means that ascertaining the unlawfulness of theft boils down to its formal statement on the basis of a specific provision in the Russian Criminal Code, and as a rule, the question whether or not the accused really obtained possession of a thing without any civil-law basis is either completely disregarded by criminal justice or is dealt with by classifying any civil-law act (issue of a power of attorney, a transaction, a contract, transfer of property, etc.) as “fictitious” or “forged”. to all intents and purposes, that means case-by-case “demise” of civil law, which is simply ignored by criminal justice.

What is still more remarkable (or even mystifying) about the legal definition of theft is the phrase about use of another person’s property for the benefit of “other persons” (and not the thief). In other words, the law-maker presumes that stolen property may be *de facto* possessed not by the thief but by other persons. It remains unclear who those mysterious “other persons” might be. If factual possession of stolen property is taken not by the perpetrator but by other persons who acted jointly with the perpetrator for the purpose of theft, such cases are addressed in criminal law by applying the institution of complicity without any need to refer to “other persons”. If, however, it implies that those other persons are not accomplices but strangers to whom the thief hands over stolen property (i.e., after *de facto* taking possession of that property), we are dealing with a different corpus delicti (i.e., acquisition and sale of property obtained by criminal means). Or does it mean that the perpetrator is a self-

---

1 Unfortunately, it is praesumptio juris et de jure among the criminal-justice officials that, once criminal proceedings have been initiated in a case, only criminal law may apply to the facts and circumstances of the case. Yet the effective legislation gives no reason to presume that civil law should not apply to the property relations between the perpetrator and the victim.
less altruist? If so, then the mercenary motive (enrichment) is absent from the elements of crime. In fact, the legal definition of theft is such that we have no choice but to recognize the existence in the Russian criminal law of theft for third-party benefit and theft without the mercenary motive.

The intrinsic inconsistencies of the legal definition of theft are aggravated by the approach of criminal justice to the interpretation of gratuitousness as a characteristic of theft. Such are the scale and gravity of this issue that it deserves a more detailed discussion.

The importance of interpretation of gratuitousness in criminal and civil law relates primarily to the fact that, in its law enforcement practice, when dealing with theft, criminal justice differs significantly from civil law in the treatment of gratuitousness. It is common for the investigative and judicial authorities to define gratuitousness as taking (appropriation for one’s own or third-party benefit) of another person’s property without providing any equivalent (consideration) or sufficient equivalent (of equal value).

This understanding of the gratuitousness of theft has no basis in law (the legal definition of theft provides no reason for such interpretation of gratuitousness); it is based exclusively on the interpretation offered in Soviet times by the Supreme Court of the Russian Soviet Federative Socialist Republic (RSFSR). Commentary to the RSFSR Criminal Code (effectively, the source of official interpretation at that time) explained, “Gratuitousness is understood to mean unlawful appropriation of socialist property, either completely free of charge or at artificially low prices, e.g., at wholesale prices, by means of illegal and artificial reduction of goods’ price or culling of industrial goods or cattle, etc.” This interpretation is so firmly rooted in the realities of state-owned property in the socialist economy that it could hardly be applied in practice to the theft of personal property. It is indicative that, in identifying the elements of theft of personal property, Soviet commentators confined themselves to the comment that the elements of crime under Article 144 (theft of personal property) “coincide with” those under Article 89 (theft of state or public property): a reference to attributes like “gratuitousness” or purchase at wholesale prices (!!!) or reduction of goods’ price would expose the utter absurdity of such interpretation of gratuitousness with respect to theft of personal property.

---

3 Ibid., p. 275.
Modern commentators of the Criminal Code turned out to be more socialist than the socialists themselves: though in the socialist system the interpretation under review was essentially inapplicable to theft of personal (i.e., de facto private) property, criminal justice sees nothing wrong about applying it to such offences today.

To sum up, the currently prevailing understanding of gratuitousness of theft as “insufficient equivalent” in investigative and judicial practice has taken shape as a result of the following evolution. It emerged as an element of theft applicable solely to theft of state-owned or public socialist property (because “theft” of other forms of property by means of purchase at wholesale prices or price reduction was simply impossible), as a purely descriptive and causal element (use of wholesale prices, culling, price reduction, etc.) and as an element applicable exclusively to those “thieves” who already held the property in question in their capacity as employees of legal entities that, to use the terminology of the period, exercised the legal authority of owners. Later, in the absence of state-owned and public socialist property, this interpretation, for no good reason whatsoever, gained universal currency, and its application was extended to any case of theft by any person, including (primarily) persons who acquired “stolen” property from the owner for consideration and on legal grounds1.

That would suggest that the interpretation of gratuitousness of theft as insufficiency of equivalent was mechanically transferred to modern Russian criminal law; it then acquired a life of its own and completely lost touch with its original legal, economic and social background. While social relations that gave life to that interpretation are defunct, the interpretation itself continues to exist though it has no basis in law; moreover, it has gained universality and plays a defining role in the law enforcement practice of criminal justice.

The approach of criminal justice to gratuitousness is completely different from its understanding in civil law2. Historically, gratuitous acquisition has been regarded by law as “a borderline case” at the junction between justified and unjustified acquisition of property. In Roman law, gratuitousness was treated as a special feature that was not characteristic of property relations and constituted an obvious exception. Jhering pointed out that, though a later form of property transfer (traditio) permitted transfer by gift as an economic (but not legal) basis, the earlier form of law (mantipatio) did not accept any other causa but purchase and sale, i.e., “antique law did not envisage transfer

---

1 But, in the opinion of the investigative authorities, “for insufficient value”.
2 This inevitably results in conviction for “selfless theft”.

98
of property by gift ... the idea of gift was completely strange to antique law, ancient Romans did not make gifts!\(^1\)

As a consequence of that, Ancient Rome did not recognize the deed of gift (\textit{donatio}) as a separate type of contract but saw it as a \textit{causa} of another contract where a person granted property for non-pecuniary reasons (out of generosity, out of gratitude, etc.). Moreover, numerous rules existed to regulate reversion of a gift: for a variety of reasons, the donor or the donor’s heirs could claim the donation back\(^2\). As law evolved, gifts as an institution of civil law generally ceased to be exotic, but to this day lawyers continue to debate various aspects of donations, particularly the issue whether the gift may be at all acknowledged as a form of contract\(^3\) or should be instead regarded as an element or \textit{causa} inherent in various civil-law relations\(^4\).

Contrary to the assertions of some authors, the cases of gratuitousness in civil law are not limited to the deed of gift or transfer into gratuitous use. The element of gratuitousness in civil law exerts much broader and more important impact than is commonly believed. The effective legislation contains the following legal definition of gratuitousness: “A gratuitous contract is a contract under which one party agrees to grant something to the other party without receiving a payment or valuable consideration from the latter” (Article 423(2) of the Russian Civil Code). According to the law, the key characteristic of gratuitousness is granting without valuable consideration. Though the above definition relates to contracts, arguably it is fundamentally applicable to civil-law relations in general.

Since civil-law relations are complex in nature and, even with respect to contracts (obligations), involve a lot more than just granting and consideration, the legal definition of gratuitousness has to be specified by pointing out that gratuitousness does not mean that the person who acquires something gratuitously is not required to perform any action, especially in relation to money or property.

Professor A. A. Simolin wrote in his fundamental work on gratuitousness, “We are faced with a number of instances where a transaction does not become commutative due to the assumption of obligations by both

counterparties.” Among such cases, he mentions, in particular, *modus*\(^2\) (for instance, the obligation to feed a gift horse and not to work it too hard, the obligation to grant the donor’s family the right to use a garden which is part of the donated estate, donation of a collection of paintings on the condition that it may not be split, etc.)\(^3\), and things like the borrower’s obligation to keep safe the thing that was transferred into his gratuitous use and return it to the lender\(^4\).

A. A. Simolin demonstrates in a convincing manner that gratuitousness occurs even when the beneficiary performs certain actions (including even when he incurs material costs) provided that those actions meet the following conditions: they must not constitute accretion of the donor’s material assets, and the counterparties must focus their efforts on the same object, i.e., the object of the counterparties’ actions must be identical (for instance, the gift horse that should be well fed and not worked too hard, not the horse and the money as would be the case in a sale and purchase transaction). That does not mean, however, that the beneficiary must perform such actions only at the expense or within the limits of such benefits\(^5\) (e.g., the beneficiary may spend his own money to feed the gift horse, and that does not amount to a commutative transaction because the actions of both the donor and the beneficiary are directed at the same object. i.e., the horse). And here A.A. Simolin points out quite correctly that, even though in some cases *modus*-related costs may turn out to be greater than the value of property acquired free of charge, the relations in question do not forfeit their gratuitousness\(^6\).

It should be added that the characteristics of gratuitousness identified by A. A. Simolin are accurate and valid if only because all acts by the benefici-

---

2. G. F. Dormanotov wrote that modus “is an accessory definition subsidiary to a gratuitous transaction, the deed of gift, the testament or bequest by which the donor binds the beneficiary of a donation or bequest to an obligation to use the donated or bequeathed property, in whole or in part, for certain purposes, which the donor specifies, or the obligation to perform other acts limiting or diminishing the value of donation or bequest.” See: G. F. Dormanotov. System of Roman Law. General Part. Kazan, 1910, p. 233 (Дормидонтов Г. Ф. Система римского права. Общая часть. Казань, 1910. С. 233).
5. Ibid., pp. 41–43.
ary of gratuitously acquired property in respect of such property are acts by the actual owner (or the lawful possessor) who is required by law (e.g., Article 210 of the Russian Civil Code) to bear the burden of maintaining property and perform all requisite acts with regard to such property in its actual condition \textit{de facto} and \textit{de jure}.

In addition to donations, transfers into gratuitous use, deposits and powers of attorney, according to A. A. Simolin, gratuitous transactions include other contracts “without diminishment of the donor’s property and accretion of the beneficiary’s property”, for instance, the promise to make an apartment available for accommodation free of charge or to perform work without pay\(^1\).

In Jhering’s opinion, gratuitous (non-profit) transactions include not only use of a thing and custody free of charge but also gratuitous management of another person’s affairs. He called the deed of gift “a form of waiver of property and rights” and illustrated the common nature and practical importance of gratuitous transactions by presenting a table with a list of the most common commutative contracts (purchase, exchange, lease, etc.) showing that each of them has a matching gratuitous transaction (donation, transfer into gratuitous use, etc.)\(^2\).

On the whole, it should be noted that the opinions on gratuitous civil-law relations cover a wide range of issues and are not confined solely to contracts (transactions). For example, according to Professor Yu. S. Gambarov, gratuitousness (altruism) also includes unpaid partnerships, associations, and alliances\(^3\).

The above analysis suggests that there may be an element of gratuitousness in a variety of civil-law relations and that the common understanding of gratuitousness in civil law is applicable not only to transactions but to all property relations; unlike the treatment of gratuitousness in criminal justice, the legal definition of gratuitousness in civil law makes no reference to the category of equivalent.

Since the treatment of theft as a relation where the victim fails to receive sufficient equivalent is different from the understanding of equivalent in civil law, it might be necessary to review the notion of equivalent in civil law in more detail.


“Purpose in Law”, Jhering’s work quoted above, is a classical source containing probably the most profound and detailed study of equivalent in property relations. In that work, Jhering writes, “The idea of payment (Lohn) and equivalent are not identical: the equivalent may consist not of payment but of something else (for instance, in cases of specific performance (Realleistung))”, “the equivalent is the expression of the idea of equity in transactions”.\(^1\) He then asks, “How does society address this issue? By means of law?” And he provides the following answer: “That is not so; in actual fact, even when the interest of all requires establishment of a certain order, it is necessary to figure out whether that interest is capable of establishing the requisite order by itself ...”\(^2\)

Jhering notes earlier that “the definition of contract performance by the counterparty (Gegenleistung)\(^3\) as equivalent, however equitable such a definition might be from the perspective of transactions, would be completely wrong from the perspective of the parties. Contract performance by the counterparty, which solely and exclusively constitutes the equivalent of our performance, is psychologically unable to change the relative positions of the parties; that would require overbalance (Plusvalent), certainly not in the objective but in the subjective sense: it is necessary for both parties to be convinced of their personal benefits resulting from the exchange.”\(^4\)

Thus, the matter in question is that the equivalency of property relations, which exists in public thinking as the idea of equity of transactions, may be achieved (implemented) only through the interests of parties to a specific transaction, each of which has its own understanding of interests and equivalent. That constitutes an objective contradiction, and it can only be removed by consideration of the will of the parties: they perform a transaction on certain terms at a certain price (or free of charge) and in certain circumstances without the imposition of external will and external interest (i.e., other than the interests of the parties to the transaction) of the state or the public based on an abstract notion of non-equivalency of relations that does not pertain to the specific transaction. Economically, socially and legally, that would be no different from state regulation of prices and other substantive terms and conditions of transactions in the socialist economy.

Jhering’s fundamental position was that no transaction could be regarded as “an exchange of equivalents”: if that were the case, no transaction would

---

\(^2\) Ibid., p. 180. Usurious contracts, in Jhering’s opinion, are an exception where the state may interfere in the substance of the transactions. Ibid., pp. 181–182.
\(^3\) This is an inaccurate translation; what is meant here is consideration (Gegenleistung).
ever be performed because parties enter into a transaction only if each party believes to gain advantage from the transaction in comparison with the *status quo* (including advantage in value terms). If a transaction has been concluded, there must at least be a presumption that each party believed it to be beneficial so “insufficiency of equivalent” is out of the question. Even in gratuitous transactions, more is at stake than just some “altruistic equivalent” (such as gratification of parental affection, love, generosity, etc.), or what Yu. S. Gambarov (referring to Spencer) calls “ego-altruism” (*e.g.*, the sense of comradeship).¹ Purely material interests may also be involved, *e.g.*, the desire to ease the burden of keeping property in case of provision of empty premises for use free of charge.

Jhering’s concept of the equivalent as the idea of equity of transactions implemented solely and exclusively through the will of the parties to transactions gained broad acceptance.² It was not until socialist civil law began taking shape that it first attracted criticism (and such criticism often failed to mention the author of the concept). In particular, P. I. Stuchka, the People’s Commissar for Justice and subsequently Chairman of the RSFSR Supreme Court, wrote, with a reference to V. I. Lenin, “Something for something of equal value is a general principle of bourgeois law. But what does the equivalent mean? Law provides no explanation; it no longer remembers what it is. The equivalent of goods is extended to the will of the owners of goods and leaves it to the free will of the contracting parties to establish such an equivalent. We have already shown that we cannot accept this view as a whole and that we keep returning to the objective equivalent of products in civil law, though we do allow contracts to deviate from this objective equivalent (whether simple or detailed labor equivalent).”³

There seems to be no need to criticize this view: “allowing contracts to deviate” (!!!) from “simple or detailed labor equivalent” is an argument that speaks for itself.

---

² It would certainly be wrong to assume that Jhering’s idea was his own invention of purely theoretical nature without any basis in legal practice. In the English court system, for instance, the precedent was set by the court judgment in Bolton v. Madden in 1873: “Consideration may be to the benefit of the debtor or a third party or may be to no one’s obvious benefit and to the detriment of the creditor. In any case, the adequacy of the consideration is for the parties to consider at the time of making the agreement, not the Court when it is sought to be enforced”. See: W. Anson. Law of Contract. Moscow, 1984, p. 74 (Ансон В. Договорное право. М., 1984. С. 74).
No authoritative civil law experts — unless their objective was merely to demonstrate a commitment to the “struggle against bourgeois law” — have been able to challenge Jhering’s theory of the equivalent in a convincing and substantive manner. In criminal law, there are no profound studies (or at least no studies are commonly known) that would refute Jhering’s theory or propose a different well-substantiated theory of the equivalent. The equivalent is used in interpretations of criminal law as a bare category and axiom to be accepted on trust; criminal law studies do not offer any explanations as to why the definition of gratuitousness is based on the equivalent, and criminal lawyers are either unaware or dismissive of the theory of the equivalent in civil law.

Thereby, it has to be concluded that the criminal-law treatment of theft on the basis of the idea of “insufficient equivalent” has no serious academic foundation; it relies on the understanding of the equivalent in the spirit of vulgar political economy of socialism and artificial substitution of the categories of gratuitousness and equivalency. This approach is extensively reflected in the interpretation and the law enforcement practice of the followers of P. I. Stuchka.

It is unfortunate that the view of gratuitousness of theft as the taking of property without providing an equivalent or by providing “an insufficient equivalent” has become part of the canon of Russian criminal law. All definitions of gratuitousness in connection with theft are identical, i.e., “appropriation is regarded as gratuitous if it is performed without consideration, i.e., without pay or for token or inadequate pay”.

It should be stressed again that such understanding of gratuitousness derives exclusively from interpretation and has no legal basis. In order to find out what gratuitousness really means, criminal lawyers are prepared to go to such lengths as study the etymology of the word “gratuitous” and the relation of gratuitousness to the mercenary motive and actual damage. The only

---

1 For example, Yu. S. Gambarov’s criticism of Jhering’s theory is limited to “exaggerated importance of selfishness” without touching upon the essence of Jhering’s treatment of the equivalent. He also praises the extraordinary strength and depth of Jhering’s analysis of purely legal issues. See: Yu. S. Gambarov. Op. cit., pp. 46–48.

2 Unless we can accept as a foundation the idea of “simple or detailed labor equivalent of goods” that exists apart from, and regardless of, the parties to transactions and their relations. (That is why a “good” TV set has to be expensive even on a desert island where there is neither electricity nor television broadcasting.)


thing criminal lawyers are not prepared to do in considering gratuitousness as an element of theft is to read Article 423(2) of the Russian Civil Code which contains a legal definition of gratuitousness as a relation where one person receives property from another person without the payment or any other consideration (i.e., without transferring money or any other property or another object of civil law in exchange for the acquired property).

That makes you wonder why the commentators of criminal law are unhappy about the legal definition of gratuitousness in civil law. To put it bluntly, the reason is that the criminal-law interpretation of gratuitousness draws inspiration from the ideas of Stuchka, the People’s Commissar of Justice, while Article 423 of the Russian Civil Code relies on the scientific concepts of Rudolf von Jhering, professor of the Vienna and Göttingen Universities, and other bourgeois professors. Unfortunately, we are dealing here with a situation where the excesses of socialist legal thinking of official commentators and legal practitioners, though they have no legal basis whatsoever, continue to dominate criminal justice and even criminal policies.

Such interpretation of gratuitousness from the perspective of criminal law results in a possibility of supplanting (and actual supplanting in the practice of criminal justice) of genuinely gratuitous relations with commutative relations in cases where an official legal practitioner may deem consideration to be insufficient. That view takes no heed of the fact that gratuitous and commutative relations do not overlap.

1 In order to go beyond mere assertions, let us look at a statement by V. I. Lenin that was repeatedly quoted, partially or wholly, and consistently implemented in practice in Soviet times: “Preparation of new civil laws is under way. The People’s Commissariat for Justice is swimming with the tide, I can see that. But it must swim against the tide. It should not borrow (or, more accurately, it should not let itself be fooled by old thick-headed bourgeois lawyers who borrow) old bourgeois notions of civil law; it must create new ones. It should not yield to the People’s Commissariat’s of Foreign Affairs, whose job is such that it has to adapt to Europe; it must struggle against this line of behavior and develop new civil law, a new attitude to ‘private’ contracts, etc. We do not recognize any things ‘private’, for us everything in the economy is subject to public, not private, law. We only accept capitalism if it is state capitalism, and the state means us, as I wrote above. Therefore it is necessary to extend the scope of state interference in ‘private-law’ relations; to broaden the authority of the state to repeal ‘private’ contracts; to apply our revolutionary thinking rather than corpus juris romani to ‘civil-law relations’; to demonstrate systematically, persistently and aggressively by means of a number of model trials how this can be achieved in an intelligent and vigorous manner; to expose and expel those members of revolutionary tribunals and those people’s judges who refuse to learn and understand this”. See: V. I. Lenin. On the Objective of the People’s Commissariat’s of Justice in Conditions of a New Economic Policy. In: V. I. Lenin. Complete Works. Vol. 44, p. 398 (Ленин В. И. О задачах Наркомюста в условиях новой экономической политики // Полн. собр. соч. Т. 44. С. 398).

2 It is just like being “slightly pregnant”. Nevertheless, “insufficient consideration” in each instance inarguably characterizes the relation in question as commutative and not gratuitous.
Leaving aside the fallacy of defining gratuitousness by reference to “insufficient equivalent”, attention should be drawn to the following. Even if, for the sake of convenience, we do accept such understanding of gratuitousness, one has to admit that the argument of insufficient equivalent, provided it is valid at all, cannot be made until the following four questions get answered.

First, does it make sense to speak of insufficient equivalent in case of the taking of property? Obviously it does not: if property is taken, no equivalent (whether sufficient or insufficient) is possible. That suggests that there is no reason whatsoever to regard “insufficient equivalent” as some sort of generic concept: it is impossible to apply this concept to establish gratuitousness of theft in the form of taking. Otherwise we would have to imagine legal nonsense like a pickpocket placing a small coin in the victim’s pocket as “an insufficient equivalent” of a stolen wallet. To sum up, the theory of insufficient equivalent is thinkable only in cases of theft by means of converting to the thief’s benefit of property which was already in his possession.

Second, if insufficient equivalent means that theft is thinkable only as converting property to the thief’s benefit, the question arises how the thief obtained that stolen property in the first place. The answer is clear: property was obtained from the victim, and, therefore, relations existed between the thief and the victim on the basis of which stolen property was transferred to the thief not against the will of the victim but by the latter willingly.

That leads us to the third question: if a relation existed between the thief and the victim that consisted in the victim willingly transferring “stolen property” to the thief, is it possible to provide any legal classification of that relation before it is classified in terms of criminal law? The answer is obviously yes. Otherwise the victim’s behavior would be mentally abnormal: if the victim did transfer property to the future thief, there must have been reasons for that, namely legal reasons (like a civil-law contract, and, in case of “insufficient equivalent”, it had to be a commutative contract).

This inevitably raises the fourth question: how can this view be reconciled with Article 223(1) of the Russian Civil Code, according to which the purchaser acquires title to property under a contract as of the moment of its transfer (receipt)? In other words, if property was transferred by the “victim” to the “perpetrator” in exchange for payment that is “insufficient” in the opinion of criminal justice, according to the theory of insufficient equivalent –

---

1 If the thief obtains property not from the victim but from another person, it is that other person that should be considered the thief.
cy of the equivalent, the property owner emerges as the thief. Such is the “logic” of the insufficient-equivalent theory as an element of gratuitousness in the context of theft.

It would seem that the above questions vividly demonstrate that the insufficient-equivalent concept lacks both legal and doctrinal foundation; it completely distorts the substance of gratuitousness as a legal category and eventually leads to unjustified criminal reprisals, in particular against the property owner.

However, all those questions fade into insignificance from the perspective of anti-logic if we consider the following issue as a follow-up to the first question. The above discussion focused on the thief’s conversion of property to his own benefit. According to Note 1 to Article 158 of the Russian Criminal Code, however, theft also includes appropriation and (or) conversion of property belonging to another for the benefit of other persons. to put it differently, conversion of property to the benefit of other persons (third-party benefit) constitutes theft by law.

At least two questions arise in this connection. First, what is the mercenary motive here if the thief does not turn property to his own benefit? Second, how should gratuitousness be treated in cases where stolen property is turned to the benefit of other persons for the thief not to be presented as a criminally liable altruist who is held criminally responsible without using property for his own benefit?

That is to say, it is unclear whether the law-maker believes that, in cases of theft where property is used for other persons’ benefit, there is a relation of donation by the thief of stolen property to the person for whose benefit it is used or whether it is a case of “inevitable complicity” that occurs whenever stolen property is used for another persons’ benefit. With regard to the former, it is unclear why use of stolen property for the benefit of another person constitutes a crime: property gets stolen before it is donated, and it makes no sense to designate the beneficiary as “another person”. With regard to the latter, it is unclear why, in view of the provisions on complicity, those “other persons” are designated as a separate subject benefiting from stolen property. In any case, reference to the insufficient equivalent provided by the thief sounds confusing here: it would suggest that the thief is responsible for failure to pay or for insufficient payment for property which was used for another person’s benefit, i.e., the thief is held liable under criminal law for acts performed not by himself but by another person; this looks like criminal liability of “a crazy altruist”.

1 This takes us back to the actual attribute of theft dating back to the institution of furtum in Ancient Rome where theft had to involve appropriation of property without legal grounds (and not without an equivalent or “sufficient equivalent”).
Arguably all these remarkable cases of criminal liability are the consequence of a tacit principle guiding Russian criminal justice. It is the principle of broadening interpretation to the greatest extent possible. If it is appropriation of property, then it must be for the benefit of both the thief and “other persons” (meaning anybody). If it is gratuitousness, then it must include not only truly gratuitous actions but also the “insufficient equivalent”.

Broad interpretations in Russian criminal law sometimes stretch so far that they cross the boundaries of internal consistency and systemic integrity of criminal law, law as a whole and even logic. The result is emergence of such legal and logical oxymora as theft in the form of appropriation accompanied by the provision of insufficient equivalent or gratuitousness of theft in the form of provision of insufficient equivalent in case of use of property for another person’s benefit.

This is a fundamental and long-standing problem, and it would seem that it can only be resolved (at least partially) if the Constitutional Court intervenes and the Russian Criminal Code is supplemented with a provision directly prohibiting broad interpretation of the rules of criminal law.

III. “Criminal Civil Law”

The phrase “criminal civil law” as used above is by no means an exaggeration or a metaphor. Unfortunately, it is a common occurrence in the practice of Russian criminal justice. It derives, in particular, from the official interpretation of law. Evidence of that is provided, for instance, by Resolution No. 51 of the Plenum of the Supreme Court of the Russian Federation dated December 27, 2007, “On the judicial practice of hearing cases of fraud, misappropriation and embezzlement”. The document is so revealing that we have to resort to extensive quotations:

“Fraud is committed by means of deceit or abuse of confidence under whose impact the property owner or another person or a competent government authority transfer property or title thereto (!!) to other persons or fail to hinder appropriation of such property or acquisition of title thereto (!!!) by other persons” (see paragraph 1 of the above Resolution);

“Deceit as a method of theft … may consist … for example, in the provision of counterfeit goods or another subject of a transaction (!!!), use of deceptive techniques in the course of settlement for goods or services (!!)…, aiming to mislead the property owner or another person”;

“Abuse of confidence also occurs in cases where a person assumes obligations (!!!) without the intention to fulfil them, for the purpose of gratuitous

1 Italics and exclamation marks added.
appropriation of other people’s property for his own or third-party benefit (!) or acquisition of title to such property (!) (e.g., an individual obtaining a loan or advance payment for work or services or prepayment for delivery of goods if that individual did not intend to repay the debt or otherwise fulfil his obligation); “If fraud is committed in the form of acquisition of title (!) to other people’s property, the criminal offence is deemed completed at the moment of the guilty party obtaining a legally formalized ability to take possession (!) or dispose of the property of another as if it were its own property (in particular, at the moment of registration of ownership rights to real property or other rights thereto (!!!) subject to such registration in accordance with the law; at the moment of conclusion of a contract (!!!); at the moment of endorsement of a bill (!!!); on the effective date of a court decision recognizing the person’s title to the property (!!!) or on the date of another decision to grant title by the competent government authority or a person whom the guilty party misled as to the existence of legal grounds for the guilty party’s or other persons’ possession, use or disposal of property” (see paragraph 4 of the above Resolution).

These “depths of wisdom” to say the least are sure to besot scholars of civil law and make them think that the body of law examined by civil lawyers must be completely different from the version of civil law examined (and applied!!) by criminal lawyers. It is hard to believe that the source of such interpretation is the Supreme Court: fraud in the form of acquisition of title, assumption of obligations, receipt of advance payment and making advance payment for delivery of goods (!), fraud completed upon emergence of a legally formalized ability to take possession, on the date of conclusion of a contract, at the moment of endorsement of a bill, on the date of state registration of ownership right (!!!!), on the effective date of a court decision (!!!!!), on the date of a decision of a government authority (!!!).

According to the Supreme Court, the only distinction between civil-law relations and crime is criminal intent¹. Of course, it is much easier to locate that distinction in other people’s minds than try to figure out what happens to the civil-law relation that (let us reveal this “secret”) arises even in those

¹ Paragraph 5 of Resolution No. 51 of the Supreme Court of the Russian Federation dated December 27, 2007, “On the judicial practice of hearing cases of fraud, embezzlement and misappropriation”, reads as follows: “In cases where a person obtains property of another or acquires title to such property without the intent to fulfil obligations relating to the terms and conditions of transfer thereto of such property or title, as a result of which the victim suffers material damage, the act has to be classified as fraud if the intent to appropriate property of another or acquire title to such property arose before appropriation of property of another or title to such property”.
instances where one party misleads the other (Article 179(1) of the Russian Civil Code) and whose existence indicates that possession by the “thief” does have basis in civil law. That merely means absence of the element of illegality in the presumed crime, and, as we all know, criminal intent cannot serve as a substitute.

One gets the impression that, according to the official position of the Russian Supreme Court, even if the “victim” hands over property willingly, and possession of that property by the “fraudster” has civil-law basis, that is totally irrelevant to the definition of crime and it still might be a crime; all that it takes is to detect “criminal intent” in the acquirer’s mind. This interpretation is unacceptable: before (and not instead of) determining criminal intent, the following question has to be answered: if, as the Supreme Court acknowledges, it is a matter of contracts, transactions, bills and title of ownership, what happens to those civil-law relations and on what grounds are they terminated? Once a civil-law relation has arisen, it can be terminated on certain legal grounds (performance of an obligation, invalidation of a transaction by court, etc.) but not by virtue of determining criminal intent, which may not serve as a reason for the termination of civil relations by law.

Moreover, the position of the Supreme Court — the assumption that, if the “intent not to perform the obligation” existed before the appropriation of property, there was also “criminal intent” to appropriate property by means of deceit (so it is not a civil-law relation) — is legally untenable. From the civil-law perspective, what is termed “intent” to appropriate property by means of misrepresentation is failure of the alienator’s intention (misperception) and the deliberate misrepresentation by the beneficiary (deceit). Do those circumstances imply that the transaction (as a legal fact giving rise to civil-law relations and obligations (Article 8(1)(1) of the Russian Civil Code)) is void? No, it does not: under Article 179(1) of the Russian Civil Code, a transaction concluded under the impact of deceit may be deemed null and void by court upon the victim’s claim. to put it differently, relations classified as a criminal offence in the interpretation of the Supreme Court are not even regarded as a void transaction by law since such transactions can merely be contested.

In a more general sense, too, Article 179 of the Russian Civil Code is a stumbling block because many legal practitioners instinctively balk at the idea that actions committed under the influence of deceit or coercion may be regarded not as a crime but as a transaction, and such a transaction is not void but voidable. In view of the interest and controversy aroused by the issue of distinguishing between criminal offences and transactions made under
the influence of deceit or coercion as provided for in Article 179 of the Russian Civil Code, it might be useful to review it in more detail.

Opinions on how to differentiate transactions influenced by deceit from criminal offences (particularly fraud) vary over a wide range. Many criminal lawyers firmly believe that these relations can, and do, overlap. In our opinion, that is an erroneous view but it is reinforced by poorly formulated definitions in criminal law that are at variance with the rules of the general part of the Criminal Code as well as the rules of civil law.

According to Article 159 of the Russian Criminal Code, fraud means “theft of another person’s property or acquisition of title to another person’s property by means of deceit or abuse of confidence”. That article talks, on the one hand, of theft, i.e., unlawful acquisition of property, and, on the other hand, of acquisition of title to another person’s property. It creates the impression that, with regard to the acquisition of title, the law-maker recognizes that fraud may occur even if civil law has not been violated. This phrasing — acquisition of title to another person’s property — is clearly in conflict with the definition of theft contained in the note to Article 158 of the Russian Criminal Code: the act it calls crime cannot be illegal by definition.

Experts in criminal law themselves have drawn attention to the flaws of Article 159 of the Russian Criminal Code. However, the problem they see is not that acts lawful in terms of civil law may be regarded as a criminal offence but, the other way around, that “legal title can be acquired by unlawful means”. Interestingly, criminal lawyers who embrace this critical view never seem to ask themselves which of the fraudster’s acts are illegal and which of them ought to be seen as socially dangerous.

In line with Article 159 of the Russian Criminal Code, the Plenum of the Russian Supreme Court passed Resolution No. 51, dated December 27, 2007, describing the objective aspect of fraud as “a transaction”, with a proviso that such a transaction is made by the victim under the influence of deceit or abuse of confidence. Let us recall that, according to Article 179(1) of the Russian Civil Code, a transaction made under the influence of deceit, coercion or threat is voidable, i.e., it can become invalid as a result of its invalidation by court at the victim’s suit (as provided for by Article 166(1) of the Russian Civil Code).

---

1 In particular, one of the authors heard his colleagues say that, if we refuse to equal transactions influenced by willful misrepresentation with crimes and if we insist that such transactions should be contested in court, we will be “swept away by a wave of street fraud”. As we will show later, that is not true.

Otherwise such a transaction remains valid. That is to say, the Civil Code leaves it to the victim to decide whether he has suffered an infringement of rights and needs legal protection. The public authorities (the law enforcement authorities) may not claim the victim’s rights have been violated and need protection if the “victim” does not deem it necessary to contest the transaction in court.

Are voidable transactions unlawful before they are invalidated by court? Obviously they are not: unless a voidable transaction is actually invalidated, it is in no way different from a regular valid transaction. Assuming a voidable (but uncontested) transaction is unlawful, its unlawfulness obviously does not entail either infringement of someone’s rights or any liability, in which case the term “unlawfulness” becomes absolutely meaningless. To sum up, our view is that a transaction made under the influence of deceit may not constitute the objective aspect of crime unless it has been invalidated by court. Only such transactions can be deemed unlawful because they violate the rights of a party, and the negative impact of such a transaction on the victim has to be rectified at the other party’s expense.

Yet, as K. I. Sklovskiy rightly points out, the problem is that a voidable transaction can be invalidated only as a result of a civil, not criminal, trial. The public authorities may not initiate scrutiny of a transaction to find out whether the rights of a party have been violated; the criminal court does not have the appropriate authority. Therefore, in a case of fraud, i.e., acquisition of property by the culprit in violation of civil law, a criminal trial on charges of fraud has to be preceded by a civil trial in order to invalidate the transaction constituting the objective aspect of fraud. This is an especially objectionable conclusion to those who dislike the idea that transactions influenced by deceit are not criminal offences.

Scholars have suggested a variety of ways to resolve this “internal inconsistency”. For example, O. V. Gutnikov suggests that “a distinction should be made between acts influencing the transaction (deceit, coercion, threats) and the transaction made under the influence of such acts”. Use of deceit, coercion and threats by a party in the process of entering into a transaction has to be analyzed sepa-
rately, regardless of the transaction made under the influence of such acts. That approach restricts the objective aspect of fraud directly to deceit or abuse of confidence, leaving outside its scope the voidable transaction itself.

K. I. Sklovskiy notes that “the transaction in a criminal case which is usually voidable can be treated merely as a flawed transaction (because the indictment establishes the fact of deceit) but not as an invalid one.” The court proceedings establish the fact of fraud while disregarding an essential feature of theft, i.e., the unlawfulness of appropriation of a thing by the offender in terms of civil law. In other words, the court states that there has been infringement of public interest in a situation where the victim’s subjective rights did not suffer any violation. Yet the victim is the only person who could have charged the “perpetrator” with committing an unlawful act by contesting the transaction in court but chose not to do so.

Arguably, the diversity of views on the relation between fraud and transactions influenced by deceit owes a lot to the neglect of the traditional theory of contracts, according to which entering into a contract (a bilateral transaction) is the process of coordinating the intent and declarations of intent, which are to be reciprocal, non-identical and mutually agreed.

Let us look at what normally happens in the case of fraud. The offender deliberately causes failure of the victim’s intention and willfully makes a false declaration of intent that does not reflect the offender’s genuine intent. There is neither reciprocity nor coordination of intent and declarations of intent here. The key point is that in such circumstances the subject of the transaction cannot be coordinated, so no contract can be made between the fraudster and the victim. The fraudster and the victim of fraud cannot coordinate the subject of the contract (are unable to do so by virtue of the nature of their relationship) in the absence of an agreed reciprocal intent and the respective declaration of intent. Therefore, in connection with fraud, there is no point in talking of a transaction influenced by deceit: there is no transaction here at all because there is no contract.

Fraud consists precisely in the victim believing to enter into a transaction while the fraudster just affects to commit to that transaction. That is also

---

1 The transaction is understood here to mean acts of parties aiming at the creation, modification or termination of rights and obligations of the parties regardless of whether or not such acts by the parties have reached the desired effect. Such an approach extends the term “transaction” to embrace both valid and invalid transactions. See a review of various views on this topic in: O. V. Gutnikov. Op. cit., pp. 67–68.


3 That in itself serves as additional proof that no transaction may be part of the objective aspect of crime unless it is a void transaction or a transaction deemed to be invalid by court.
why, by definition, fraud cannot be committed in the form of a transaction because there is neither reciprocity nor coordination of intent. At the same time, fraud means discrepancy between the intent and the declaration of intent. The victim’s discrepancy has to do with the expectation to actually acquire what is offered or promised by the fraudster (that expectation is false because the victim is being misled by the fraudster). The fraudster also experiences a discrepancy between the intent and the declaration of intent: the declaration of intent does not reflect the genuine intent, it is a misrepresentation which, as a rule, is designed to mislead the victim as to consideration to be received from the fraudster.

That is what constitutes the essence of fraud and differentiates it from a contract made under the influence of deceit. A transaction influenced by deceit may be made while in case of fraud there can be no question of making a transaction because the victim does not seek to acquire what the perpetrator actually offers or intends to offer while the fraudster does not offer what the victim seeks to acquire. No transaction is made here, no transaction exists. Therefore, instead of focusing on transactions influenced by deceit and trying to differentiate such transactions from fraud, discussion of fraud should emphasize that it involves no contract (no contract is made) because the parties have not agreed upon its subject, i.e., what the victim seeks to acquire is not what the fraudster offers, and the fraudster, in designating the subject of the contract, deliberately makes a false declaration of intent in order to mislead the victim.

There is clearly a misunderstanding of the scope of Article 179 of the Russian Civil Code. The article deals with transactions made under the influence of deceit or coercion (i.e., actually existing transactions). It does not apply to acts that, because of deceit or coercion, stopped short of making a transaction: in that case, there is simply no transaction at all, and voidability has no meaning. That provision must be clearly understood in the sense that, if the deceit results in the discrepancy between the intent and declaration of intent with regard to the subject of the transaction, that case is outside the scope of Article 179 of the Russian Civil Code: for a contract to be made (according to Article 432(1)(2) of the Russian Civil Code), the subject matter of the contract must be agreed; if it has not been agreed, there is no contract, it has not been made, and it is both unnecessary and impossible to designate it as voidable.

Article 179 of the Russian Civil Code may only apply in those cases where deceit does not concern the subject of the transaction. The same is true of transactions made under duress. If the party under duress promises to transfer or transfers property against its wish and will, that is a textbook case of discrep-
ancy between the intent and declaration of intent in respect of the subject of the transaction, which indicates non-existence of a contract (i.e. attests to the fact that no contract has been entered into). All the more, there can be no question of a contract if one party is aware that, because of deceit or coercion, the other party experiences a discrepancy between the intent and declaration of intent so that it expects to receive something different from what is actually being offered by the first party (in case of deceit) or grants something to the first party against its will (in case of coercion).

The above arguments also challenge the view that, if we accept that the transaction and the objective aspect of crime cannot, and do not, overlap and that a transaction made under the influence of deceit cannot give grounds to criminal charges until it has been invalidated by court, we will be ”swept away by a wave of street fraud”. That view would be valid only if we assumed that a back-street purchase from a stranger for a couple of dollars of an imitation jewel touted as ”a five-carat diamond” amounts to a transaction. There is no transaction here! If only because the parties have not agreed to the subject of the transaction (one party seeks to purchase a diamond for a couple of dollars while the other seeks to sell a cheap bauble for that amount of money). This is not how they are supposed to agree the subject of the transaction. There is no reciprocal, mutually agreed intent. There is no contract here and there is no transaction, no transaction has been made. And there is absolutely no reason why such street crimes should be cited to underpin concepts of differentiating fraud from transactions influenced by deceit, simply because there is no transaction here, it does not take place.

It is another matter that, for no good reason, the label of fraud is sometimes attached to transactions that were made, but never performed or performed unilaterally or in part only. Here the problem of distinguishing between crimes and transactions does arise (or, more correctly, it is artificially created). Again, the first step towards its resolution should be to find out whether the parties have agreed upon the subject of the transaction. If yes, and if neither party was mislead as to the consideration due under the transaction, i.e., neither party was mislead as to the subject of the transaction, the transaction does occur, and fraud is out of the question because there was no deceit. Fraud only happens when the perpetrator receives what he seeks from the victim while the victim receives from the perpetrator something different from what the victim sought to receive (or what the victim agreed upon as the subject of the transaction). Thus, since fraud amounts to appropriation of a thing in exchange for something the victim sought to acquire but the perpetrator never intended to grant, fraud always involves inherent failure of intent and declaration of intent, ruling out a contract, i.e., incidence of a transaction.
Correlation between private and public law is often examined in a very general, even abstract, manner. Yet where a transaction has been concluded as a result of deceit, the borderline between private and public law is quite clear: there can be no question of crime until the victim has contested the transaction in court and the court has deemed the transaction null and void, which implies the absence of the civil-law relation. However, neither the preliminary investigation bodies nor the courts show any concern that the facts of cases of fraud and other business-related cases may include transactions that were concluded (and even performed) without being contested and invalidated in court.

Though Russian criminal justice does occasionally recognize the need to address the tricky issue of contracts and other transactions constituting “the objective aspect of crime”, it resolves that issue by reference to Article 169 of the Russian Civil Code as grounds for declaring all such transactions null and void.

Unjustified use of Article 169 of the Russian Civil Code by the taxation authorities has been the topic of a lively academic debate, but criminal justice has a still more deplorable record. It is presumed de facto that all transactions “containing essential elements of offence” are anti-social and invalid by default; therefore, they do not require any legal classification in terms of civil law. Simply speaking, civil law only remains effective until a policeman decides that a transaction contains “essential elements” of a crime.

In view of the above, it must be pointed out that to stick the anti-social label on all transactions containing “essential elements of offence” is a debatable approach for the following reasons.

Article 169 of the Russian Civil Code says that any transaction entered into with a purpose clearly contradicting the fundamental principles of public order and morality is null and void; as a consequence, it envisages confiscation of consideration received or to be received under the transaction. It is obvi-

---


2 As any lawyer would doubtlessly agree, one or several “essential elements” of offence can be detected in most civil-law relations, e.g., infliction of loss in case of civil injury or enrichment as an indispensable element of all commutative transactions.

3 This civil-law provision has a long history. In Ancient Rome the most serious offenders could be declared sacer esto (consecrated to gods), which meant death and confiscation of property in favor of the temple (For more details, see: L. N. Kofanov. Emergence and Evolution of Roman Law in the VIII-Vth Centuries B.C. Synopsis of doctoral thesis, Moscow, 2001,
ous that this provision is based on the opposition and differentiation of private and public interest (and, consequently, private and public law). Though civil law is part of private law, confiscation of property under anti-social transactions is a provision regulated both imperatively and in terms of public law: it deprives the guilty party to the transaction of property not in favor of the other party (as compensation of damages or another sort of compensation) but in favor of the state.

Opinions concerning the civil-law provision on confiscation of property under anti-social transactions vary over a wide range. Some views are strongly negative. The key reason for that is the ambiguity of the provision on confiscation of property under such transactions (regardless of whether such transactions are deemed to be contradicting good morals, the fundamental principles of the legal system, etc.). As I. A. Pokrovskiy wrote, “We are facing not something precise and definite but some sort of riddle that lawyers have so far been unable to resolve.”

The implication is that the understanding of the provision in question across the world relies almost exclusively on interpretations so that in practice it is applied at the discretion of the court. In particular, A. P. Belov reviewed various national interpretations of public-order provisions to make the correct conclusion that “the existing interpretations are too general in character to allow any definitive conclusions as to which imperative rules reflecting the appropriate system of public order exist in individual countries.”

Article 169 of the Russian Civil Code is similar in terms of its wording (reference to the fundamental principles of the legal system) to a provision of the French Civil Code stipulating that contracts detrimental to public order and good morals are invalid. Yet, though French lawyers conducted probably the world’s most extensive analysis of the concept of public order\(^1\), a plain and unambiguous definition of that term has yet to be developed. Moreover,
L. J. de la Morandiere, for instance, explicitly notes “the changeability of the notion of public order”\(^1\), that is to say, admits that it is impossible to define its clear and specific meaning.

With regard to Article 169 of the Russian Civil Code, the most obvious question concerning the interpretation of that provision relates to the difference between Article 169 and Article 168 of the Russian Civil Code, the latter providing that transactions which breach the requirements of law shall be null and void. In formal terms, that boils down to the issue whether there can be non-statutory “fundamental principles of public order”\(^2\). In our opinion, that is impossible (otherwise we would have to conclude that the fundamental principles of public order have no basis in law and lie outside the scope of positive law). Yet if that is so, we must presume that Article 169 of the Russian Civil Code means not just statutory requirements but some sort of special rules enshrined by statute and “constituting the fundamental principles of public order”.

Unfortunately the definition of those fundamental principles and identification of statutes where they are formulated can only be a matter of interpretation. Arguably the Constitution of the Russian Federation may be the only statute where the fundamental principles of public order may be defined and whose application in civil law would not at the same time violate the provisions of Article 3(2) of the Russian Civil Code on the primacy of the Civil Code over other instruments of civil law. The weakness of this interpretation is that the Constitution is a directly applicable statute, and its application in cases where transactions are in conflict with the constitutional provisions requires no justification other than Article 168 of the Civil Code.

Thus, it might be concluded that Article 169 of the Russian Civil Code has been incorporated in civil law for the purpose not so much of complying with “the fundamental principles of public order” (that purpose is achieved by Article 168 of the Russian Civil Code) as of creating a civil-law loophole that would make it possible not only to deem a transaction to be null and void regardless of the will of the parties (again, Article 168 of the Russian Civil Code would be sufficient for that) but also to confiscate consideration.

---


\(^2\) As regards the reference to moral principles in Article 169 of the Russian Civil Code, in our opinion, it makes the provision too elastic and blurs its legal meaning. (On this issue, we share the opinion of R. O. Khavina who completely rejected the moral component of the provision under review. See: R. O. Khavina. Importance and Essence of Contracts in Soviet Socialist Civil Law. Moscow, 1952, p. 181 et seq. (Халфина Р. О. Значение и сущность договора в советском социалистическом гражданском праве. М., 1952. С. 181 и далее).
received or to be received under the transaction in favor of the state without the need to prove the fact and the scale of damage caused to the state.

In terms of interpretation, Article 169 of the Russian Civil Code poses the same problem as the corresponding provisions in other countries’ statutes: interpretations are very diverse and vague. That is what brought to life Resolution No. 22 of the Plenum of the Russian Higher Arbitrazh Court dated April 10, 2008, “On some issues of the practice of settling disputes relating to the application of Article 169 of the Civil Code of the Russian Federation”. Though the interpretation is not quite free from faults\(^1\), coming from the supreme national court, it was a crucial step helping to define the limits beyond which Article 169 of the Russian Civil Code may not be applied.

The Higher Arbitrazh Court of the Russian Federation explained (in paragraph 1 of Resolution No. 22 of April 10, 2008) that “in defining the scope of application of Article 169 of the Russian Civil Code, judges should be guided by the rule that transactions that may be classified as transactions pursuing the said objective must not only be in conflict with legal requirements and legal instruments (Article 168 of the Code) but also undermine the foundations of Russian public order, the principles of public, political and economic organization and moral statutes of society”.

It cannot escape notice that, in defining the fundamental principles of public order as the foundations of public order and the principles of public, political and economic organization of society, the Russian Higher Arbitrazh Court basically described the scope of regulation of the Constitution. According to such interpretation, transactions subject to Article 169 of the Russian Civil Code are transactions infringing upon the rights and institutions enshrined and protected by the Constitution. This is a view that is hardly open to debate.

The Russian Higher Arbitrazh Court further explains (paragraph 1 of Resolution No. 22 of April 10, 2008) as follows: “The said transactions may include, in particular, transactions directed at the production or alienation of certain things whose civil turnover is either prohibited or limited (certain types of weapons, ammunition, narcotic drugs, other goods whose properties may pose a danger to the life and health of citizens, etc.); transactions directed at the production or distribution of literature or other goods advocating war or instigating ethnic, racial or religious hatred; transactions aiming to produce or sell counterfeit documents and securities”.

---

\(^1\) They do not include, however, failure to provide a clear definition of the fundamental principles of public order: in our view, that is mission impossible.
What is striking about this part of the clarification is that the Russian Higher Arbitrazh Court extended the scope of Article 169 of the Russian Civil Code to include acts subject to respective provisions of the Russian Criminal Code. In other words, the Higher Arbitrazh Court equated transactions violating the fundamental principles of public order with crimes. At first glance, it might look like a correct approach corroborated by Article 243(1) of the Russian Civil Code, which reads as follows: “In cases envisaged by law, property can be taken away from the owner without compensation by a court decision as a sanction for committing a crime or another offence (confiscation)”. That is to say, it would seem that the judgment of the Higher Arbitrazh Court supports the argument that a transaction may be an element of the objective aspect of crime (at least with respect to certain crimes).

That, however, gives rise to at least two objections. First, the interpretation of the Higher Arbitrazh Court supplants “a purpose clearly contradicting the fundamental principles of public order and morality” with “direction” at the production or alienation of certain things whose civil turnover is either prohibited or limited, i.e., replaces Article 169 of the Russian Civil Code with Article 129(2) of the Russian Civil Code, which provides for the legal regulation of things whose civil turnover is limited or banned and, being a special rule in respect to specific cases (which, consequently, should apply to such cases) and which makes no mention of confiscation.

The second objection has to do with the systemic integrity of law. Redundancy of remedies, an integral characteristic feature of civil law, is absolutely unacceptable in criminal law. Therefore, from the perspective of the principles of criminal law, it is debatable whether the confiscation can be applied based on Article 169 of the Russian Civil Code to criminal offences that do not entail confiscation under criminal law. The Russian Higher Arbitrazh Court basically confirms this view in the following clarification: “In the context of disputes resulting from public-law relations, it is required to apply sanctions envisaged by law as liability for the specific offence and not the consequences stipulated in Article 169 of the Russian Civil Code (paragraph 5 of Resolution No. 22 dated April 10, 2008).

It is noteworthy that the resolution of the Russian Higher Arbitrazh Court speaks not of confiscation as punishment for a specific offence but of a sanction, i.e., any sanction envisaged by public law. It is critical that the supreme national judiciary authority spoke against application of Article 169 of the Russian Civil Code to public relations if liability for such relations is stipulated by public law, and, consequently, inter alia, to acts constituting the ob-
jective aspect of crime. This looks like a sound position ruling out instances where an offence may entail dual legal liability, i.e. under public law and Article 169 of the Russian Civil Code.

To sum up, the Russian Higher Arbitrazh Court believes that acts constituting elements of a criminal or a tax-related offence, even if criminal justice or the taxation authorities classify them as a transaction, may not entail the consequences specified in Article 169 of the Russian Civil Code; in such cases, sanctions must be applied as stipulated by public law with respect to the crime in question, i.e., liability must be in accordance with criminal laws or tax laws respectively.

We leave outside the scope of this paper numerous studies dealing with the definitions of the fundamental principles of public order, definitions of the purpose of transactions under review, the issue whether the purpose has to be achieved or irrefutable presumption of prejudice to the fundamental principles of public order is sufficient, and other related matters. We do so for several reasons. The multiplicity and diversity of opinions suggest that it might be impossible to read any concrete meaning into Article 169 of the Russian Civil Code and, moreover, that its provisions might be alien to civ-

---

1 Though the reference of the Russian Higher Arbitrazh Court to public law probably was made primarily in relation to tax law, there hardly can be any reason why this interpretation should not be extended to any public law, in particular criminal law.

2 That cannot possibly mean compensation of damage (loss) like in a legal suit in a criminal case: Article 169 of the Russian Civil Code provides for a sanction (confiscation) in its pure form.

3 Let us just note that only a mind operating in the framework of legal logic (more precisely, public-law logic) and ignoring everyday logic may come up with the idea that a transaction may pursue the purpose of undermining the fundamental principles of public order and morality. The parties to transactions do not care whether their actions might undermine public order and morality — that is not their objective — they pursue totally different goals of business (consumption). All they can be charged with is disregard of the fundamental principles of public order and morality. In that sense, paragraph 1 in Resolution No. 22 of the Russian Higher Arbitrazh Court dated April 10, 2008, which says that “the purpose of the transaction may be deemed to run counter to the fundamental principles of public order and morality only if the court proceedings have demonstrated that at least one party had such intent”, is an argument in the spirit of legal logic and has nothing to do with reality (unless, of course, it is an attempt to implant the alien concept of indirect intent in civil law). In order to demonstrate the shakiness and ambiguity of this legal structure, especially if vaguely interpreted in the Russian judicial system, one might, for instance, ask the following question: does Article 169 of the Russian Civil Code apply to a transaction of purchase by a potential (future) murderer of a knife from a bona fide seller, if the purchaser intended from the very start to use it as a murder weapon and then actually committed murder with that knife? The search for an answer to that question exposes complete inapplicability of Article 169 of the Russian Civil Code (or, rather, the artificial nature of its applicability): the most vivid (and moral, in terms of Article 169 of the Russian Civil Code) result of its application would be the return of the knife to the seller and payment of a fine equal to the price of that murder weapon in favor of the state.
Article 169 of the Russian Civil Code is an extremely elastic rule that can be construed to mean almost anything depending on judicial discretion or official interpretation. In terms of the purposes of use, this provision serves as the state’s *ultima ratio* in civil (private) law: it enables the state to invalidate a transaction against the will of the parties solely by virtue of judicial discretion, which can be supported by official interpretation. In view of that, official interpretations serve no useful purpose other than listing instances that *cannot* be classified in accordance with Article 169 of the Russian Civil Code.

Probably the only substantive solution of the problem would be to repeal Article 169 of the Russian Civil Code. Yet as long as it remains effective, it is crucial that the Russian judicial system should not use it at its discretion as some sort of blunt weapon. And here it is necessary to understand in what kind of context the concept of antisocial transactions can make sense.

A substantive and insightful analysis of that issue was provided by K. I. Sklovskiy who wrote, “As was noted above, it is the subject matter of the contract (rights and responsibilities) that has to be in conflict with the fundamental principles of public order and morality. There is no need for any mediation or discussion of further results in order to classify a transaction in accordance with Article 169 of the Civil Code; that would be superfluous and mistaken.”

That is to say, K. I. Sklovskiy points out quite correctly that the antisocial component must be inherent to the subject matter of the transaction (and the text of the contract, if available); it may not be deduced from its consequences, the more so, from the consequences of its non-performance. A transaction can be regarded as antisocial only if its execution *directly* (and not by indirect extrapolation) undermines *public* interests protected by law.

---

1. That is also evidenced by the history of that provision, which started life as a rule of public law.
2. The Russian Higher Arbitrazh Court did so by excluding tax offences from the jurisdiction of Article 169 of the Russian Civil Code, ruling out simultaneous application of sanctions under public law and Article 169 of the Russian Civil Code and emphasizing the primacy of public law relative to Article 169 of the Russian Civil Code.
3. Lawyers have repeatedly suggested deleting this article. See, e.g., S. G. Pepeliaev. Law Enforcement Bolshevik Style, Vedomosti. June 21, 2007, No. 112 (1886) (Пепеляев С. Г. Правоприменение по-большевистски // Ведомости. 21.06.2007. № 112 (1886)).
5. Though, as we noted earlier, it would be sufficient to classify such cases in accordance with Article 168 of the Russian Civil Code (which would ensure that such transactions are deemed null and void and the confiscation purpose is achieved according to criminal law), as long as Article 169 of the Russian Civil Code remains formally effective, such interpretation
Chapter 2

(e.g., bribery, human trafficking, drug trafficking, sale of radioactive materials, payment of a fee for a contract killing, etc.).

In practice, many transactions termed antisocial and equated with crime in the Russian system of criminal justice are actually regular transactions which were not performed or were partially performed by one of the parties. The classification of such transactions as antisocial inevitably results from the flawed logical and legal stance of Russian criminal justice: criminal prosecution is initiated for non-performance of transactions presumed to be antisocial! Criminal judges probably want such transactions to be performed by all means!

One has to agree with K. I. Sklovskiy who writes, “A contract for the sale of shares of stock or crude oil in no way violates the fundamental principles of public order, even if the parties further intend to obtain unjustified tax benefits or even if they plan to use the proceeds to commit serious crimes.”

The practice of the law enforcement agencies and judicial authorities, however, abounds in cases where the criminal offence (theft) consists of a transaction, though it has been performed by the parties and has not been challenged in court. It is commonplace in the criminal justice system to regard transactions as “a method of theft” and a component of the objective aspect of crime. That is to say, ordinary civil-law relations are labeled as a criminal offence.

IV. Transaction as a “Crime”

Criminal law makes extensive and frequent use (especially in the context of the classification of crimes) of the term “transaction” without clarifying by statute such unconventional usage and interpretation of this civil-law term (and the respective legal institution) in criminal law. In some cases, the Russian Criminal Code uses the formal terminology of civil law (transactions, acquisition of rights, performance of work, provision of services, custody, conveyance, lending, establishment of a commercial entity, transfer of property into one’s possession, alienation, sale, etc.); in other cases, it uses more general, descriptive terms like fabrication, marketing, turnover, development, production, ac-

is indispensable. Otherwise the absolute vagueness of Article 169 of the Russian Civil Code might serve as the basis for totally arbitrary court decisions.


2 The Russian Criminal Code contains direct or descriptive references to transactions, specific types of contracts (i.e., bilateral or multilateral transactions), terms and conditions of transactions and actions aimed at performance of transactions in Articles 127.1, 159, 170, 171.1, 172, 173, 174, 174.1, 175, 176, 177, 179, 181, 184, 185.1, 186, 187, 189, 191, 192, 193, 195, 196, 204, 218, 220, 222, 223, 228, 228.1, 228.2, 234, 235, 238, 242, 242.1, 246, 247, 255, 257, 273, 290, 291, 312, 324, and 327.1.
cumulation, allotment, implementation, distribution, shipment, purchase, application, import, export, cultivation, dissemination, advertising, cross-border movement, design, placement, construction, operation, alloy production, transportation, training, financing, procurement, etc.

The question arises why the law-maker uses the formal term “transactions” (or specific types of contract) in some cases but in other cases prefers different terms though they have no legal definition in civil law and denote actions that, as it would seem, simply cannot constitute a transaction (e.g., marketing or turnover). It is unlikely that such inconsistency of terminology is a result of mere carelessness on the part of the law-maker. The simplest (but not exhaustive) answer is that the law-maker avoids using the term “transaction” in instances where such acts are unlawful by definition (illicit marketing, drug-trafficking, weapons-trafficking, etc.).

The term “transaction” is used explicitly in Articles 170, 174, 174.1, 179, 185.1, and 191 of the Russian Criminal Code where the law-maker deemed it necessary to emphasize that the objective aspect of crime includes actions performed “in the form of” or in respect of transactions. Here the original unlawfulness of “acts in the form of transactions” is either non-obvious (except for Articles 170 and 191 of the Russian Criminal Code, which directly mention illegal transactions) or non-existent (as in the case of Article 185.1 of the Russian Criminal Code, which envisages liability for failure to provide information about transactions).

Such broad use of civil-law terminology in the Russian Criminal Code prompted A. E. Zhalinskiy to argue that “civil-law constructs and concepts to some extent predetermine the prescriptive rules of criminal law.” Interestingly, it is civil law that predetermines criminal-law rules, not the other way around.

Use of the term “transaction” in the description of punishable offences in the Russian Criminal Code necessitates the following question: can a transaction be part of the objective aspect of crime? In order to answer that question, let us take a closer look at the definitions of the transaction and the objective aspect of crime.

Article 153 of the Russian Civil Code reads as follows: “Transactions are actions by individuals and legal entities directed at the creation, modification or termination of civil-law rights and obligations.” According to the doctrine of criminal law, the objective aspect of crime always includes an act, or fail-

2 Meaning both formal and actual elements of crimes.
ure to act, classified as socially dangerous by criminal statutes (the criminal offence \textit{per se} as defined in Article 14(1) of the Russian Criminal Code, \textit{i.e.}, “a culpably committed socially dangerous act prohibited by this Code on pain of punishment”). Merger of the definitions of the transaction and the objective aspect of crime produces an evidently absurd result, \textit{i.e.}, “actions of individuals and legal entities directed at the creation, modification or termination of civil-law rights and obligations are culpably committed socially dangerous acts prohibited by the criminal code on pain of punishment.”

This bizarre phrase serves as convincing and indisputable proof that no transaction can be part of the objective aspect of crime. At first glance, however, criminal statutes seem to provide evidence to the contrary: the term “transaction” is mentioned directly in the dispositions of Articles 170, 174, 174.1, 179, 185.1, and 191 of the Russian Criminal Code. This seeming contradiction vanishes if we recall that the term “transaction” in statutory provisions means both valid and invalid transactions. The invalid transaction has no legal consequences, except for those relating to its invalidity, and it is deemed invalid from the moment when it is entered into (Article 167(1) of the Russian Civil Code). In addition, Article 166(1) of the Russian Civil Code stipulates that “a transaction shall be invalid on grounds stipulated herein by virtue of its invalidation in court (voidable transaction) or regardless thereof (void transaction).”

That is taken to mean that if the transaction is invalid (\textit{i.e.}, entails no civil-law consequences from the moment when it is entered into), it can be part of the objective aspect of crime. Yet only void transactions are legally invalid from the moment of their conclusion without invalidation in court upon the claim of an authorized person (Article 166(2) of the Russian Civil Code). It is void transactions alone that entail no civil-law consequences (rights and obligations) directly by law, irrespective of the will of the parties and from the moment of their conclusion.\footnote{That is especially relevant in criminal law in establishing the presence or absence of criminal intent.}

A void transaction means an act that has the outward appearances of a transaction but does not make a transaction. According to the traditional opinion of civil lawyers, a void transaction is a non-transaction. As L. Ennektsers observed, “In terms of its appearances, a void transaction does exist; however, it does not exist as a legal transaction”, “a void transaction does not exist in the legal sense ... it does not generate legal consequences for anybody or against anybody.”\footnote{L. Ennektsers. A Course of German Civil Law. Vol. I, Part 2. Moscow, 1950, p. 307 (Эннекцерус Л. Курс германского гражданского права. Т. I. Полутом 2. М., 1950. С. 307).}
The same act by the same person may not at the same time constitute a legal, valid (not void) transaction entailing civil-law rights and obligations and a wrongful act violating criminal law and entailing criminal prosecution. So there can be no doubt that the objective aspect of crime may only include void transactions (non-transactions), and whether a transaction is void can be established exclusively on the basis of civil law and not criminal law.

The last point deserves special emphasis because the investigative authorities almost always face the temptation to take advantage of Article 168 of the Russian Civil Code to declare a transaction void only because the term “transaction” is used in various provisions of the Russian Criminal Code. It must be remembered that all provisions of the Russian Criminal Code that mention transactions in a direct or descriptive manner may only be applied as blanket rules (reference rules) only, i.e., they require reference to civil law because criminal law protects but it does not regulate civil-law relations.

Only if it has been established on the basis of provisions of civil law that a transaction is void, acts constituting the subject matter of such transaction may be regarded as potential components of the objective aspect of crime. In view of that, Article 168 of the Russian Civil Code, which stipulates that a transaction that does not comply with statutory or other legal requirements is void if (1) law does not establish that such a transaction can be contested or does not provide for other consequences of violation, may only be applied in conjunction with the provisions of Article 3(2) of the Russian Civil Code, which stipulates that civil law consists of the Civil Code and other federal laws adopted in pursuance of the Civil Code (hereinafter referred to as “statutes”) regulating civil-law relations. Thus, civil law alone may provide grounds to declare a transaction void, which means that application of the provisions of criminal law to declare a transaction void is impossible and unacceptable because the Russian Criminal Code may not and does not contain the rules of civil law.

Criminal law may not be applied to an act possessing the appearance of a transaction until civil law ceases to apply to the relations in question because it has been determined on the basis of civil law that the transaction is void and entails no civil rights or obligations; that would withdraw such a transaction from the scope of civil law (apart from the establishment of the void-

---

1 Recognition of that view leads some researchers of the correlation between criminal law and civil law to conclude that criminal law is accessory relative to civil law. See: V. V. Khiliuta. Deceit in Property Relations: Distinction Between Criminal and Civil Liability, Forum prava. 2007, No. 2., p. 230 (Хилюта В. В. Обман в имущественных отношениях: разграничение уголовно-правовой и гражданской ответственности // Форум права. 2007. № 2. С. 230). As a matter of fact, the idea of criminal law being accessory to civil law dates back several cen-
ness of the transaction and its implications) unless the criminal case involves compensation of damages (loss) on the basis of a civil law claim presented in a criminal proceeding.

The voidness of transactions referred to in the Russian Criminal Code is established on the basis of civil law and not simply because transactions are mentioned in the disposition of a particular article in the Russian Criminal Code. Reference to a transaction in the Russian Criminal Code does not automatically make such a transaction void because the criminal code does not contain any rules of civil law, and its application to determine whether or not a transaction is void is out of the question.

First, it must be pointed out that not all of the transactions mentioned in the Russian Criminal Code are necessarily void and identical to the perpetrator’s acts that constitute the elements of crime. The Russian Criminal Code contains provisions that mention transactions as something in respect of which criminal acts are committed. Those are Article 170 of the Russian Criminal Code (registration of knowingly unlawful land transactions), Article 179 of the Russian Criminal Code (coercion to conclude a transaction or forfeit a transaction under the threat of violence or destruction or damage of property or dissemination of data injurious to the rights and legitimate interests of the victim and the victim’s family), and Article 185.1 of the Russian Criminal Code (malicious evasion of providing information containing transaction data and deliberate provision of incomplete or incorrect data).

It is interesting to look at the range of transactions covered by the above-mentioned Articles of the Russian Criminal Code: void transactions, like in Article 170 (that article refers directly to knowingly unlawful transactions, i.e., void transactions under Article 168 of the Russian Civil Code), voidable transactions, like in Article 179 (according to Article 179(1) of the Russian Civil Code, a transaction concluded under the threat of violence is voidable and may be invalidated by court at the victim’s suit) and valid transactions, like in Article 185.1 of the Russian Criminal Code (since that Article refers to failure to provide data on any transaction, it should probably be assumed that it primarily implies ordinary and valid transactions). That serves as additional proof that, among transactions mentioned in the Russian Criminal Code, the only transactions that are not necessarily void are those transactions that lie outside the objective aspect of crime as criminal acts.

Of special interest in considering the use of the institution of transactions in the Russian Criminal Code are provisions on money-laundering,
which basically equate transactions with crime (for no reason whatsoever as it would seem). Article 174 of the Russian Criminal Code stipulates as follows: “Financial operations and other transactions involving cash or other property that is known to have been obtained by other persons by criminal means (except for crimes described in Articles 193, 194, 198, 199, 199.1, and 199.2 of this Code), for the purpose of legalizing possession, use and disposal of such cash or other property, shall be punished [...].” Article 174.1 of the Russian Criminal Code reads as follows: “Financial operations and other transactions involving cash or other property obtained by a person as a result of his committing a crime (except for crimes described in Articles 193, 194, 198, 199, 199.1, and 199.2 of this Code) or use of such cash and other property for the carrying out of entrepreneurial or other economic activity shall be punished [...].”

As we review the use of the concept of transactions with regard to money-laundering, it cannot escape our notice that Resolution No. 23 of the Ple-num of the Russian Supreme Court dated November 18, 2004, “On the judicial practice of hearing cases of illegal entrepreneurship and legalization of cash (money-laundering) or other property obtained by criminal means” contains an incorrect or incomplete interpretation of the reference to transactions in Articles 174 and 174.1 of the Russian Criminal Code. Paragraph 19 of the Resolution clarifies that “financial operations and other transactions specified in Articles 174 and 174.1 of the Russian Criminal Code should be understood as acts … directed at the creation, modification or termination of the related civil-law rights or obligations”. That is to say, in its interpretation, the Russian Supreme Court simply reproduced the legal definition of the transaction contained in Article 153 of the Russian Civil Code1.

Since the resolution makes no mention of the fact that the objective aspect of crimes described in Articles 174 and 174.1 of the Russian Criminal Code may only include void transactions, it necessarily follows that, according to the interpretation of the Russian Supreme Court, the same act by the same person may at the same time be both a lawful transaction (acts directed at the creation, modification or termination of civil-law rights or obligations) and a criminal offence, i.e., a crime. Obviously such interpretation is incorrect and unacceptable.

Apart from the reasons outlined above, additional evidence in favor of the argument that transactions that are not void may not be part of the objective aspect of crimes described in Articles 174 and 174.1 of the Russian Crimi-

---

1 That resulted in the absurd definition that, as we showed above, was produced by merging the definitions of transaction and crime.
nal Code is the fact that the said Articles provide for criminal liability only where there is direct criminal intent. That is only possible if a void transaction is entered into, i.e. a party (or the parties) is (are) aware that the transaction is not a valid and lawful contract but a crime committed under the guise of a void transaction. Where valid or voidable\(^1\) transactions are concluded, there can be no criminal intent.

The key element of crimes described in Article 174 and 174.1 of the Russian Criminal Code is conclusion of transactions with property that is known to have been obtained by criminal means (Article 174 of the Russian Criminal Code) or as a result of committing a crime (Article 174.1 of the Russian Criminal Code). to use the terms of civil law, the subject matter of transactions mentioned in Articles 174 and 174.1 of the Russian Criminal Code is property obtained by criminal means or as a result of committing a crime.

At first sight, trying to figure out whether Articles 174 and 174.1 of the Russian Criminal Code mean any property obtained by criminal means or as a result of committing a crime (except for property obtained as a result of committing crimes described in Articles 193, 194, 198, 199, 199.1, and 199.2 of the Russian Criminal Code) might seem a superfluous exercise but in fact it is not. In order to understand what kind of property obtained by criminal means can be the subject matter of transactions mentioned in Articles 174 and 174.1 of the Russian Criminal Code, it is important, first of all, to remember that all property acquired as a result of a criminal activity can be divided into two categories: property that has a legitimate owner (the victim) and property that has no legitimate owner. The need to distinguish between those two categories of property in criminal law is determined, in particular, by Articles 104.1—104.3 of the Russian Criminal Code. By postulating the primacy of compensation of damage inflicted upon the legitimate owner (Article 104.3(1) of the Russian Criminal Code), criminal law, as it determines which property obtained as a result of committing a crime can be subject to confiscation, excludes theft (embezzlement) from the list of such crimes because stolen (embezzled) property has a legitimate owner.

Alienation of stolen property by perpetrators of theft does not amount to money-laundering because such an act is an element of theft. Any different interpretation would lead us to the concept of “selfless theft”\(^2\). If sale, pos-

---

1 Such transactions are not void at the moment of their conclusion, their voidness is “deferred”, it depends on whether the persons specified by law contest the transaction; such a transaction may never become void if the court rejects the claim for invalidation of the transaction filed by an interested party.

2 It must be noted that current law-making and law-enforcement practice has embraced the idea of “selfless theft” though it is not only theoretically inadmissible but also conducive to un-
session, use and disposal of stolen property by the perpetrator (in particular, for the purpose of entrepreneurial or other economic activity) are not part of theft, one has to ask what then constitutes the mercenary motive of theft. In addition, recognition of the thief’s acts aiming “to extract consumption value” from stolen property as a separate crime creates an absurd situation where such a “crime” never ends but is committed again and again or persists until the thief has alienated the stolen property.

The emergence of provisions on money-laundering was originally caused by the need to penalize unlawful actions that were not covered by the traditional rules of criminal law (in particular, the rules on liability for theft (embezzlement)). Money-laundering does not mean handling stolen property (that offence is covered by establishing criminal liability for theft (embezzlement) and applying provisions of civil law on recovery and compensation of damage); it means efforts to legitimize property that has no legitimate owner (or a person with a legitimate claim to such property) and consists of proceeds from crimes other than theft (bribery, revenues from the trafficking of arms or drugs, fees for contract killings, etc.). In such criminal operations, neither the source nor the recipient of criminal proceeds can be viewed as a legitimate owner.

One must take issue with the interpretation of this matter by the Russian Supreme Court, which clarified that it was possible to classify such crimes as theft and money-laundering jointly (see paragraph 22 of Resolution No. 23 of the Plenum of the Russian Supreme Court dated November 18, 2004, “On the judicial practice of hearing cases of illegal entrepreneurship and legalization of cash (money-laundering) or other property obtained by criminal means”). Such interpretation is in direct conflict with the aggregate meaning of Articles 33, 104.1, 104.3, 174, 174.1 and 175 of the Russian Criminal Code, as well as international obligations assumed by the Russian Federation. By allowing classification of operations involving stolen property as money-laundering, the supreme judiciary authority artificially creates a situation where the Russian Federation is formally in breach of its international obligations relating to the confiscation of criminal proceeds: the inaccurate and loose interpretation provided by the Russian Supreme Court extends, for no good reason whatsoever, the scope of property that can be subject of confiscation to include stolen property. Yet stolen property may not be confiscated because it has a legitimate owner.

acceptable practical consequences: the existence of “selfless theft” causes the mercenary motive of such crimes to be artificially incorporated in the elements of other crimes. Such practice is clearly anti-constitutional. Article 50(1) of the Russian Constitution stipulates that no one may be convicted twice for the same crime, and transfer of the mercenary motive to the elements of another crime does amount to double criminal prosecution for the same crime.
It must therefore be recognized that stolen property, i.e., property having a legitimate owner (or property to which somebody has a legitimate claim), may not constitute the subject matter of void transactions that are part of the objective aspect of crimes described in Articles 174 and 174.1 of the Russian Criminal Code. The subject matter of void transactions constituting the objective aspect of crimes described in Articles 174 and 174.1 of the Russian Criminal Code may only include property consisting of proceeds from crimes specified in Article 104.1(1)(a) of the Russian Criminal Code because such proceeds have no legitimate owner nor there is a person which has a legitimate claim thereto: neither the perpetrator of the crime nor the person from whom such criminal proceeds were obtained possess any legitimate rights or claims to such proceeds.

To sum up, one can say that the dispositions of Articles 174 and 174.1 of the Russian Criminal Code are very poorly formulated. to make matters worse, the Russian Supreme Court offered an unacceptably loose interpretation of those provisions. The understanding of the concept of money-laundering in the law-making and law-enforcement practice is so vague that it becomes virtually meaningless and hampers crime control. Money-laundering essentially means acts to create title (a legal foundation) in support of de facto possession of property obtained by the perpetrator in the process of, or as a result of, a crime but not against the will of other persons, which is why such property has no legitimate possessor (or owner or person having a legitimate claim thereto). The purpose of money-laundering is to obtain a legal basis (title) of possession in respect of property which de facto in possession of the perpetrator. Money-laundering results in the emergence\(^1\) of legal title to property that was obtained as a result of a crime and which is de facto in the possession of the perpetrator.

Emergence of legal title to property obtained as a result of a criminal activity is precisely what criminal law is designed to stop; that is also the objective of international agreements on money-laundering (including the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141)) to which Russia is a signatory and whose principles are supposed to underpin Russian criminal statutes, as provided for

\(^1\) The law-makers’ failure to understand that makes it impossible even to discuss at which moment money-laundering may be deemed completed or whether the elements of crimes described in Articles 174 and 174.1 of the Russian Criminal Code are real or formal, i.e., whether, for the crime to be deemed completed, title or appearance of title must arise as the legal foundation of ownership of property (possession of rights) or whether it is sufficient to enter into void transactions for the purpose of money-laundering, even if such money-laundering (emergence of title) never occurred.
in Article 1(2) of the Russian Criminal Code. Yet the treatment of money-laundering in Articles 174 and 174.1 of the Russian Criminal Code is so ambiguous that the actual meaning of those rules is very hard to define in the practice of law enforcement.

Money-laundering (acquisition of title to property obtained as a result of committing a crime) can only occur if property has no legitimate possessor (or owner or person having a legitimate claim thereto). Otherwise the perpetrator will find it impossible to obtain title because title to such property is held by others, and the law precludes two or more persons from holding the same title (right of ownership, 1 lease rights, etc.) to the same property.

Because that is misunderstood, statutory provisions are often inaccurately formulated and show inappropriate use of terms borrowed from other branches of law (like the word “transaction”). There can be no doubt that such an approach leads to the extreme and unacceptable ambiguity and ineffectiveness of Articles 174 and 174.1 of the Russian Criminal Code. As a consequence, persons who are not involved in money-laundering may face criminal charges while it might be impossible to prosecute actual perpetrators.

It would be wrong, however, to assert that, in drafting Articles 174 and 174.1 of the Russian Criminal Code, the law-maker was utterly unaware that money-laundering may not include acts in respect of other people’s property if such property has legitimate owners. The law-maker knows it perfectly well but will not admit so publicly. Evidence of that is the fact that Articles 174 and 174.1 of the Russian Criminal Code exclude property obtained as a result of crimes described in Articles 193, 194, 198, 199, 199.1, and 199.2 of the Russian Criminal Code from property that may be subject to legalization. Why did the law-maker choose to insert such a proviso? The answer is simple: the law-maker excluded from property that may be subject to money legalization any property the title or a claim to which is held by the state as the legitimate possessor or holder of claim in respect of such property 2. In other words, in drafting Articles 174 and 174.1 of the Russian Criminal Code, the state took good care of its own interests but chose to ignore all other legiti-

---

1. Of course that does not apply to multiple right-holders in cases of common or joint property where several individuals hold one ownership title, with or without definition of interest owned; nor does it mean relations that arise in the context of state-owned property transferred into [so called] economic management or operative administration.

2. Articles 193 (non-repatriation of hard-currency proceeds), 194 (evasion of customs duties), 198 (evasion of personal income tax and/or charges), 199 (evasion of corporate taxes and/or charges), 199.1 (breach of the tax agent’s duty), and 199.2 (concealment of money or property of an entity or an individual entrepreneur subject to taxes and/or charges) of the Russian Criminal Code stipulate liability for non-payment of money or concealment of property to which the state holds claims (including claims in the form of penalty and fines).
mate owners and holders of claims to property that may (in this case, actually may not) be subject to legalization.

The purpose of Articles 174 and 174.1 of the Russian Criminal Code is to deny legal title to property obtained as a result of a criminal activity and prevent involvement of such property in civil transactions. They are not designed to stop enrichment by criminal means; that purpose is achieved by other criminal-law provisions stipulating liability for specific predicate offences (if one uses the terms defined in the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141)). The provisions on money-laundering in criminal law specifically aim to prevent involvement in legal civil transactions of property (proceeds) without a legitimate possessor or a person having a claim thereto. If property held by the perpetrator does have a legitimate possessor or a person having a claim thereto, involvement of such property in legal civil transactions is prevented by provisions on recovery, compensation for losses and payment of taxes provided for by other branches of law (civil law, tax law, customs law).

It cannot escape notice that criminal-law provisions on confiscation of property being the object of legalization are essentially the criminal-law version of recovery from the actual (but illegal) possessor of property that has no owner (legitimate possessor) because it consists of criminal proceeds. This is not an accidental approach but the outcome of an evolutionary process. Thus, long before money-laundering emerged as a major legal and social challenge, K. Binding, in a study of criminal-law and civil-law issues arising from alienation of property by the actual possessor other than owner (in particular, with regard to the limitation of recovery), used the term “legitimization” to denote the taking of possession of such property.

Trying to find out which property may be the object of legalization reveals that the money-laundering model selected by the law-maker, i.e., transactions involving property acquired as a result of a criminal activity, is unacceptably abstract and includes acts that, by virtue of their essence, do not constitute money-laundering. Moreover, it is inappropriate because in the overwhelming majority of cases property acquired by criminal means forfeits its original status in connection with transactions and becomes property acquired by means of a transaction.

---


2. It is revealing that criminal law in foreign countries where civil statutes derive from the German model, like in Russia, and where money-laundering laws have been applied over a longer term, avoid any references to transactions in their definitions of money-laundering. See, e.g.,
Getting back to the definition of the purpose of legalization (money-laundering) in Article 174 of the Russian Criminal Code (and applicable, by virtue of the Russian Supreme Court’s interpretation, to Article 174.1 of the Russian Criminal Code), one should first of all point out that, from the perspective of civil law, the description of the purpose of legalization (money-laundering) transactions, i.e., “legalizing possession, use and disposal of property”, sounds peculiar. That formula postulates the unlawfulness of such transactions but, as any lawyer would confirm, it is tautological. By definition, the transaction, since it consists of acts designed to create, modify or terminate civil rights and obligations (as per Article 153 of the Russian Civil Code), necessarily aims to “legalize” property rights (possession, use and disposal). There can be no transactions that would pursue any objectives other than legalizing possession, use and disposal of property; that is the purpose (causa) underlying all transactions that entail the creation, termination or transfer of property rights. Figuratively speaking, money-laundering provisions look to the civil lawyer like an attempt to establish liability in cases where the purpose of acts is to make a round ball spherical.

Concerning the purpose of legalization (money-laundering) transactions, it should be stressed that the object here is possession, use and disposal of property obtained as a result of a criminal activity; those are the rights that have to be “legalized”. It cannot escape notice that this classical triad (possession, use and disposal) serves as a substitute for the term “ownership right”; it has been the traditional designation of ownership right in Russian law.

The following question has to be asked in this regard. If money-laundering basically amounts to creating legal title (or appearance of legal title) in respect of the classical triad and, consequently, the right of ownership (or, more broadly, other property rights) to property acquired as a result of a criminal activity, what about creating legal title in respect of contractual rights or other non-property rights? If the law-maker defines money-laundering as legali-

---

1 Definition of the ownership right by listing the rights of possession, use and disposal is not a universal pattern (foreign laws also contain other definitions of ownership rights); its history dates back to the reception of a respective rule contained in the Napoleonic Code and its subsequent amendment. For more details, see: Current Evolution of Soviet Civil Law. Moscow, Nauka, 1986, pp. 105–106 (Развитие советского гражданского права на современном этапе. М.: Наука, 1986. С. 105–106).

2 For example, where, as a result of money-laundering, the primary perpetrator takes possession of interest in the statutory capital of a limited-liability company or acquires lease or custody of property or exclusive intellectual-property rights.
zation of the classical triad, such legalization (creating legal title) in respect of non-property rights remains outside the scope of money-laundering.

Arguably the law-maker took a purely mechanical approach to defining the scope of money-laundering by creating, without any justification, some sort of surrogate rights of ownership to property acquired by criminal means. Evidence of that is the fact that, if the term “legalization” can be applied to the classical triad at all, it would only make sense with regard to possession and use. “Legalization” of disposal of property (which almost always means some form of alienation or permanent/temporary deprivation of possession) in the context, and for the purpose, of money-laundering is something that can only occur in parallel with termination of possession of property obtained by criminal means and, consequently, disappearance of the object of money-laundering. What does “legalization of disposal” mean if disposal amounts to termination of possession? However lawyers might try to answer that question, the logic of all such answers will rely on the argument of “legalizing the existence of disappearance”.

The above discussion suggests that the treatment of money-laundering by Russian law as transactions whose purposes consist in legalization of possession, use and disposal of property obtained by criminal means is completely wrong; it relies on the use of the terms and institutions of civil law in a manner that is mechanistic and inconsistent with the requirement of systemic integrity, creating gaping loopholes in the money-laundering rules of criminal law that cannot be closed without de lege ferenda.

V. Corporate Entity as a “Criminal”

Discussing how the criminal justice authorities take undue freedoms with the institutes of civil law, we should take a closer look at their interpretation of the institute of legal entity. In most instances the problem of qualifying acts by a legal entity as criminal offences is implicitly ”resolved” by treating acts by a legal entity and its bodies as acts by specific individuals (shareholders or co-owners of economic companies, executives, employees or representatives). That takes no heed of the fact that acts committed by an individual as a body of a legal entity are acts of that legal entity and not acts of that individual performed on behalf of that legal entity. Consequently, the criminal justice authorities deem it possible to hold individuals accountable under criminal law for acts which, according to civil law, were committed by another subject of law (legal entity). That means criminal liability for someone else’s offence.

Sometimes the law enforcement agencies qualify asset-disposal transactions performed by the executive body (the director) of a business en-
entreprise as misappropriation or embezzlement of that enterprise’s assets by such body. The law enforcement agencies build their case on the argument that the business enterprise’s body presumably acted against the intent and interests of the company. From the perspective of civil law, such argumentation is unacceptable. Legal entities acquire civil rights and assume civil obligations via their executive bodies (Article 53(1) of the Russian Civil Code). That is to say, as long as the body of a legal entity acts in conformity with the laws and the company’s foundation documents, it expresses the intent of that legal entity. The legal entity has no intent other than formulated by its body.

Until a transaction made by the executive body of a business enterprise has been invalidated by a court, that transaction continues to give rise to the business enterprise’s civil rights and obligations. Performance of such a transaction by the business enterprise would be perfectly in line with civil law; moreover, failure to perform the same would amount to noncompliance. Therefore, execution and performance of such a transaction may in no way be qualified as unlawful alienation of the enterprise’s property.

A transaction made by a business enterprise may be contested by that enterprise or its shareholder (participant) if the intent of the enterprise has been formulated in such a way that it violates the law. For example, major transactions or related-party transactions may be contested if they were entered into otherwise than pursuant to the statutory procedure. Unless it has been properly contested, any transaction by a legal entity expresses the genuine intent of that legal entity. Thus, by claiming that the intent declared by the executive body of a legal entity does not reflect the genuine intent of that legal entity and, consequently, property transferred by that legal entity under an uncontest ed transaction has been stolen, the law enforcement agencies come into direct conflict with civil law.

Obviously the public authorities are in no position to determine what constitutes “the genuine intent” of a business enterprise; they do not possess the appropriate powers to do so. It is the exclusive authority of the legal entity’s bodies to formulate and declare its intent. Nor may the public authorities determine the interests of a legal entity. Those interests are private, and the law is quite clear on that matter: the power to define such interests is vested in the executive body and shareholders (participants) of the legal entity. Article 53(3) of the Russian Civil Code reads as follows: “A person who, by virtue of the law or foundation documents of a legal entity, acts on its behalf shall act reasonably and in good faith in the best interests of that legal entity. At the request of the founders (participants) of the legal entity, unless otherwise provided for by law or contract, he shall be obliged to compensate the legal entity for any...
damages he has caused thereto.” Article 51(5) of the Federal Law ”On Joint Stock Companies” and Article 44(5) of the Federal Law ”On Limited Liability Companies” vest similar rights to claim compensation from the company’s executive officers in the company itself, represented by its executive body. That is to say, only the shareholders (participants) of the business enterprise and its executive body may decide what constitutes that enterprise’s “genuine interests” and whether they have been violated by the company’s officers. Moreover, acts by the business enterprise’s officers against the enterprise’s interests do not entail invalidation of transactions made by such officers; such transactions are voidable if they are a result of malicious collusion with the other party to the transaction (Article 179(1) of the Russian Civil Code). So acts by officers against their business enterprise’s interests may not per se form the objective aspect of theft (misappropriation or embezzlement).

It should be noted that the effective laws enable the business enterprise and its shareholders (participants) to protect their interests in case of their infringement by the enterprise executive bodies even if the transactions in question are free from flaws and may not be contested or if, for some reason, the business enterprise and its shareholders (participants) are unwilling to contest such transactions. Officers are liable to their business enterprise for damages caused by their culpable bad-faith and unreasonable acts. Damages caused to the business enterprise may be claimed from that enterprise’s officer by the enterprise itself or its shareholders (participants). As we can see, acts by an officer of a legal entity do not have to be qualified as theft for the property interests of that legal entity to be fully protected.

In order to stop abuse of power by the executive bodies of legal entities, the public authorities may (and must) evaluate specific acts by such executive bodies but they may not formulate the intent and define the interests of legal entities: this kind of “protection” is actually tantamount to infringement of the owner’s subjective right, which implies the right to decide whether or not there has been any infringement of the owner’s interest (or rights). By taking that approach, the criminal justice authorities virtually supplant the victim. As a result, the victim as a party to litigation becomes a fiction, a fact obscured by the absolute presumption that “where there is a crime, there is a victim”. That attitude turns the legal process on its head: instead of a situation where the existence of a victim generates the process of establishing whether there has been a crime, the initiation of criminal proceedings serves as ”proof” of the existence of a victim where no victim actually exists. Such practice creates “crimes” without victims and confuses the implementation of the legal entity’s intent by its executive bodies with criminal intent of an officer performing the functions of the legal entity’s body.
Importantly, such criminal justice practice is at variance with criminal law as well as civil law. According to Article 201 of the Russian Criminal Code, criminal liability is imposed for “abuse of power by a person performing managerial functions in a commercial or another organization against the lawful interests of that organization for the purpose of deriving profit and gaining advantage for himself or for other persons or for the purpose of causing damage to other persons, if such acts result in significant damage being caused to the rights and legitimate interests of individuals or legal entities or legally protected interests of the public or the state.” A note to Article 201 of the Russian Criminal Code reads as follows: “If the act specified in this article or any other articles of this chapter has caused damage solely to the interests of the commercial organization, which is not a public or municipal enterprise, criminal proceedings shall be conducted at the request or with the consent of that organization.” The note to Article 201 of the Russian Criminal Code indicates that the architects of criminal laws are perfectly aware that it is impossible and unacceptable for the public authorities to independently define the interests of a commercial organization. Therefore, the legal practice described above is inconsistent with the basic ideas underpinning criminal laws.

VI. De Lege Ferenda

• Add paragraph 8 to Article 3 of the Russian Civil Code to read as follows: “Rules, institutions, concepts and terms of civil law may not be applied or interpreted in other branches of law or by the judicial authorities other than as stipulated by the provisions of civil law”.

• Repeal Article 169 of the Russian Civil Code.

• Delete the phrase “or other persons” from Note 1 to Article 158 of the Russian Criminal Code.

• Amend Articles 174 and 174.1 of the Russian Criminal Code so as to avoid mentioning the term “transaction” in the definition of legalization (money-laundering).

• Annul all clarifications by the Russian Supreme Court where lawful civil-law relations are equaled with criminal offences.

• Annul all clarifications by the Russian Supreme Court where interpretation of gratuitousness differs from the statutes of civil law.

VII. On Legal Scholasticism

It is no secret that legal practitioners often dismiss theoretical legal studies of abstract ideas, e.g., detection of flaws in the integrity of the legal sys-
Yet such issues may be more relevant to the law-enforcement practice of our criminal justice bodies than we tend to believe. Taking into account Russian crime data\(^1\), we can no longer pretend that we do not understand the implications of such legal constructs as gratuitous theft, theft for third-party benefit, money-laundering in respect of property that has a legitimate owner, owner cum thief, victim cum accessory to theft and criminal intent in lieu of legal grounds for possession. In view of the fact that such interpretations underpin prosecution in cases accounting for at least several percent of the aggregate number of property crimes\(^2\), it becomes clear that we are facing a latent and recurrent social disaster.

---

\(^1\) According to the official data of the Russian Interior Ministry, in 2004–2008 (only the first eight months of 2008 were taken into account), the investigators cleared 839,738 cases falling under the provisions of the Russian Criminal Code that stipulate criminal liability for property crimes like fraud, misappropriation (embezzlement) and money-laundering.

\(^2\) Some people who were convicted on frivolous charges had the good fortune to be released from prison after the Russian Supreme Court annulled their sentences because, as the Russian Supreme Court conceded, they were convicted for civil-law acts (see, e.g., Ruling of the Judicial Collegium for Criminal Cases of the Russian Supreme Court of May 30, 2000. In: RF Supreme Court Bulletin. No. 12, December 25, 2000 (Определение Судебной коллегии по уголовным делам Верховного Суда РФ от 30 мая 2000 г. // Бюллетень Верховного Суда Российской Федерации. 25.12.2000. № 12)). “Good fortune”, however, might be the wrong phrase to describe the plight of perfectly innocent people some of whom were estimated to have spent several years in detention.
SECOND ROUNDTABLE

Discussions of Russian and foreign participants held in connection with the preparation of the monograph entitled “Rule of Law in Russia: Issues of Implementation, Enforcement and Practice”

“Rule of Law as a Major Factor Ensuring Uniformity of Application of Law and Law Enforcement”

2 March 2009, Moscow

AUTHORS OF INDIVIDUAL CHAPTERS:

Veniamin Fedorovich Yakovlev, doctor of law, professor, associate member of the Russian Academy of Science, advisor to the President of the Russian Federation, former Chairman of the Russian Higher Arbitrazh Court: Towards Uniformity of Law Enforcement – The Role of Russia’s Judicial System;

Tamara Georgievna Morschakova, doctor of law, professor, honored jurist of the Russian Federation, honored scientist, former judge of the Russian Constitutional Court: The Rule of Law and the Constitutional Basis for Uniformity in the Application of the Law by the Courts;

Victor Martenianovich Zhukov, doctor of law, professor, honored jurist of the Russian Federation, Deputy Director of the Institute of Legislation and Comparative Law under the Government of the Russian Federation, former Deputy Chairman of the Russian Supreme Court: Current Issues of Uniformity and Consistency of Judicial Practice;

Anatoly Valentinovich Naumov, doctor of law, professor, Head of the Department of Criminal Law Disciplines of the Academy under the Russian Prosecutor General’s Office, member of the Scientific and Advisory Council at the Russian Supreme Court: Artificial Criminalization of Economic Activity;

Andrey Gennadievich Fedotov, Ph. D (law), attorney with the Odintsovo City Bar Association: Application of Civil-Law Institutions in Other Branches of Law; and
Second Roundtable Discussions

**Andrey Victorovich Rakhmilovich**, attorney, partner with Margulyan and Rakhmilovich law firm (monograph chapter co-authored with A. G. Fedotov).

**Sponsors and Guests of the Round Table:**

**Vladimir Grigorievich Yaroslavtsev**, member of the Presidium of the Council of Judges of the Russian Federation, judge of the Russian Constitutional Court (*absentee participant of the round table*).

**Alexander Konstantinovich Golichenkov**, doctor of law, professor, dean of the law faculty of the Moscow State University named after M. V. Lomonosov, member of the Presidium of the Russian Association of Lawyers.

**Vladimir Saursevich Yem**, chairman of the Board of Directors of the Statut Publishing House, associate professor of the Civil Law Department of the law faculty of the Moscow State University named after M. V. Lomonosov.


**Alexander Vladimirovich Rozentsvaig**, Ph. D (law), attorney with the Almaty City Bar Association (Kazakhstan).

**Andrey Evgenievich Shastitto**, doctor of economics, professor, general director of the Bureau of Economic Analysis Foundation (Moscow).

**Mikhail Alexandrovich Subbotin**, Ph. D (economics), Institute of World Economy and International Relations, Academy of Sciences of the RF, Senior Researcher. Science-consulting company PSA-Expertise, Director. (Moscow).

**Merja Norros**, Ministerial Counsellor, Unit for International Affairs, Ministry of Justice of Finland.

**Henrik Bull**, Judge, Court of Justice of the European Free Trade Association (EFTA) States, Luxembourg.

**Mariana Karadjova**, Anti-Money Laundering Compliance Officer, Saxo Bank, Geneva, Switzerland, former Bulgarian Governmental Agent before the European Court of Human Rights (ECHR).

**Williams Simons**, professor of Leiden University (The Netherlands) and the University of Trento (Italy).

**Peter Sahlas**, member of the New York Bar, Russian Civil Law Reform Project Coordinator, McGill University, Faculty of Law (Montreal, Canada), Project Manager, Governance Advisory and Exchange Program.
ELENA VLADIMIROVNA NOVIKOVA, doctor of law, partner of Novikov & Advisers law firm (Moscow), head of the project on preparation of the monograph.

ELENA NOVIKOVA: The trend for unjustified and often unlawful criminalization of normal public relations is gaining momentum, which, in my opinion, manifests itself in the following ways:

Firstly, generally speaking, this process includes not only extensive imposition of criminal liability but imposition of administrative and tax liability as well. At the initial stage, liability of the above-mentioned types is imposed on legal entities (which may not be subject to criminal liability), and such liability is used as a convenient instrument in order to inflict reputational and property damage on them or sometimes to destroy them. At a later stage, criminal liability can also be imposed on legal entities’ officials. Thus, the trend for criminalization tends to intensify, and it shows both directly and indirectly.

Secondly, while growing as a cancer tumor, this trend embraces the practice of biased application and interpretation of not only rules of civil legislation but those of other regulatory branches of law as well. Currently, when advising clients, I often come across situations where rules of the Civil Code as well as those of the environmental laws and laws on use of natural resources, and, in particular, rules of the subsoil use legislation, are interpreted in the context of the dispositions of criminal law rules.

The language of the Criminal Code’s rules enables one to so interpret them, as evident from the practice. As a rule, regulatory rules of law may determine only general models of behavior, without providing excessive details, therefore, they are meant to be used by direct participants of respective legal relations, i.e. professionals, which include, first of all, entrepreneurs, users of natural resources, engineers, geologists, but in no case public prosecutors or investigators who interpret such rules under the battle-cry of public interests (which are misunderstood) or other interests which are passed off as public ones. And at the end of the day, it is clear that it is corruption that drives the process of artificial criminalization and encourages, to a great extent, such application of the above rules.

In relation to the fight against corruption, it might make sense to look at the Kazakhstan practice which is similar to and sometimes ahead of the Russian one. There, the fight against corruption brings unexpected results: employees of law enforcement bodies often choose not to take legit-
imate measures which can somewhat improve the situation for entrepreneurs even within their powers to do so because they are afraid of being accused of corruption.

It is very important for us to jointly try to resolve the legal deadlock situation which we have now, because, as we know, the jungle of laws and, in particular, of its authorized “interpreters” gives rise to the law of the jungle.

Same as last time, our esteemed colleagues, Andrey Gennadievich Fedotov and Andrey Victorovich Rakhmilovich, so-authors and moderators, will coordinate our round-table discussion.

ANDREY FEDOTOV: We talked about the fact that judicial practice, explanations and interpretations provided by supreme judicial bodies sometimes play a negative role (apart from their positive role) since they distort the actual content of legislation and law; that the practice of such interpretation runs contrary to the constitutional principle according to which the content of a law and, accordingly, the purpose of its interpretation should be based on human rights rather than any other interests; that broad interpretation is admissible only in respect of rules which set out one’s rights and inadmissible in respect of rules which set out liability and/or duties; that if these principles are forgotten there arises a possibility of such interpretation and such application of law and law enforcement that flagrantly violate the law, for example, as happened in case of the resolutions of the Supreme Court which equated a transaction (or a contract) with a crime.

A study of these problems suggests that very often they reflect a fight or, maybe even a war, between the public law and the private law, when under the pretext of public interests the private law is being ousted from its own domain. For example, it happens when criminal justice bodies give their own interpretation to various issues relating to transactions, gratuitousness, and other civil law institutes which contradicts the private law and, thereby, artificially criminalize legitimate private-law relationships.

Most probably, in the first place, the private law is different from the public law in that, in the private law, the content and nature of a subjective right, determination of whether or not such subjective right has been violated, and the decision to apply or not to apply to the State for protection is made by the subject of the right in question rather than by any external force, another’s will and, in particular, by will of the State. Such understanding of the private law enables one to understand why artificial and forced substitution of private law by public law gives rise to the use, in the criminal law domain, of such far-fetched, illogical and inadmissible legal structures as, for example, “unmercenary theft”, “theft in favor of a third party” or “theft without a victim”.

143
This country has a long and complicated history of interrelations and clashes between the public law and the private law. There were periods when the State altogether rejected the very possibility of the existence of the private law. Having adopted the Civil Code, we made a giant leap towards such condition of the law when the private law constitutes its most extensive and important component in terms of regulation. However, lately, one could not help noticing that the public law again started to encroach upon the private law. The question is not whether we should take note of this phenomenon, acknowledge its existence or pretend that it does not exist; rather we should try to understand if the today’s facts when the private law is quite officially suppressed and forcedly substituted for the public law represent some atavisms of our past or they are a sign of a completely new and separate stage of the ousting of the private law, i.e. the stage that is determined and defined by today’s political, economic, and social factors, and such vector of development has been deliberately and knowingly chosen by the State. Or is this not so?

When trying to answer these questions, one will see that the process of replacement of the private law by the public law has its logics. By suppressing the private law as part of the law generally, the public law suppresses the law at large. Suppressing a part of the law, one suppresses the law as a whole. Therefore, it is not surprising that, having started with the pushing out of the private law from its territory, the public law ends up rejecting the law at large, including the public law itself. As an example, one can refer to the resolution of the Plenum of the Russian Supreme Court pertaining to fraud cases. Having started with equating crimes, on the one hand, with transactions and agreements, on the other hand, the supreme judicial body inevitably ends up equating a crime with a judgment (!) when it states that a fraud may be deemed completed as of the moment when a judgment which, for example, acknowledges a certain right, enters into legal force.

Substantially, such interpretation runs contrary to law. In fact, quite often, the public law’s fight for its dominating position means rejection of the law at large, including the public law itself, as it turns into a “one-time” political or other official instruction which is selectively applied and, possibly, is advantageous for and reflects certain interests of specific persons who have access to the mechanism of the public law; at the same time, such “law” has nothing to do with real public interests, i.e. interests of the people as the subject of power.

In such a situation, to remain within the limits of the law at large, not only there is the need to object to public-law abuses but, as was long ago stated by Jhering in his famous speech, there is also the need to struggle for law. Related problems are quite different and complicated and need to be thorough-
ly analyzed. The only undoubtful thing is that the main battlefront of such struggle is in our courts, our judicial system.

VENIAMIN YAKOVLEV: I carefully read the materials of the first round table; frankly, I was impressed by their acuteness, depth and some gloominess. I think that one should always try to bring one’s perceptions in line with the reality, it is of utmost importance for a researcher. If a researcher deviates from this reference point in any direction, the results of his work will still be helpful though not as helpful as they could be if this analysis corresponded to the reality.

I want to dwell very briefly on two things: firstly, the mechanism used to ensure uniformity of the application of law, in this case, of its application by courts in Russia; and secondly, certain aspects relating to the substantive part of interpretation in relation to the application of law, which was discussed recently. So one should correctly highlight key points in the judicial practice and interpretation of existing law since this is, indeed, of utmost importance.

As to the mechanisms: usually they say that the best way to ensure uniformity of judicial practice is to combine all the courts within one unified system which would be headed by a single supreme court which is meant to be a temple of justice; such temple of justice will fine-tune the entire judicial system, it will be a tuning-fork for the latter, the latter will act in accordance with the tune, and, therefore, the justice system will operate smoothly. However, experience shows that apparently no such system exists because there is a certain trend: specialized courts exist along with general jurisdiction courts. And quite often, such specialized courts constitute separate judicial systems having their own supreme courts, as it is the case in Germany, which has five judicial systems, each headed by its own supreme court.

Many times I took part in discussions held among the chairmen of the supreme courts of European countries (as well as other countries) to determine whether it was better to move towards a “single-body” judicial system or not. As always, opinions differed. However, I recall a speech of a court chairman, an experienced and wise man. He said that our discussions reminded him of tidal waves moving first in one direction and then in the other direction, and so on. That is, we are being driven to one side and then to the other side. Why is this so? Just because each of these two options of structuring a judicial system has its pros and contras. The most important thing is to try, in any system, to minimize drawbacks and make use of advantages.

However, we can see that even if there is a single judicial system in place, there would still be differences in the judicial practice. Apparently, this is in-
herent in the justice system itself, since new relations arise, life is changing, and laws and the law follow its development. Justice is most closely related to life. Naturally, there arise new cases, new problems, new issues, etc. This alone lead to a certain lack of uniformity. Secondly, the law develops all the time. For example, I worked for many years in arbitrazh courts, and the system of arbitrazh courts, on the one hand, operated as a judicial belt-conveyor, i.e. considered cases, and, on the other hand, constantly learned to deal with new things, new relations, and new legislation.

Generally, in any country, the judicial system is the result of historical development and has individuality which is determined thereby. Nothing can be done about that, and, most probably, this is normal. One should simply presume that, regardless of the structure of a judicial system, there still will be a common task: to secure uniformity of application of law. Why? Because, failing such uniformity of application of law and its interpretation, if decisions are unpredictable, if different decisions are made in similar cases, then justice will become anti-justice. What is the task that justice is meant to fulfill? It is the task of securing that the law is implemented and complied with. And what is the task of the law? It should ensure certainty. If the law is meant to be used as a means of ensuring the certainty of relations between individuals, then justice is meant to be the most important tool to securing such certainty. Therefore, the law operates efficiently, and the rule of law is actually secured, insofar as the judicial system ensures uniformity of application of the law, judgments are predictable, and individuals know that under particular circumstances they will be deemed to be right and they will win their cases, and in other instances, they will lose their cases. It is as simple as that, though, of course, I prune things, because in real life everything is more complicated merely because life, law, and justice are complicated.

Strictly speaking, for any judicial system, its main court is a trial court rather than its supreme court. Why is this so? Because in the system of arbitrazh courts, 85 percent of cases do not go beyond the first instance court. So which court is the most important? Clearly, the first instance court. And its work should be properly fine-tuned. As to courts of all other instances, they all represent ways to fine-tune the work of the trial courts. Therefore, they are of secondary importance. In addition, uniformity of application of law should be achieved by all courts, rather than just by the Supreme Court or the Higher Arbitrazh Court.

As to uniformity of practice, it does not matter whether we call templates for resolving cases “precedents” or whether we simply talk about uniformity of judicial practice. I do not think these differences are very important, these are rather disputes regarding terminology, since everywhere it is nec-
ecessary to achieve uniformity of application of the law, regardless of whether
the legal system is based on precedents or statutes, the more so because his-
torically those two systems became closer to each other and currently do not
substantially differ from each other. If you ask a German judge or professor
if there are precedents in the German legal judicial system, they will give you
the positive answer. I think this is also true in Russia. However, this is not
the most important thing, the terminology does not matter here that much;
the thing is, it is the entire judicial system that should set precedents or de-
velop generally accepted templates for resolving cases. As a famous Russian
composer stated, music is created by the people, and we, composers, just
arrange it. Judicial practice is formed by the entire judicial system, and the
supreme court is meant to arrange it. That is, ultimately, it should do so on
the basis of its in-depth review, examination, study, analysis and compari-
son of such practice, using its spare time for that purpose, since lower courts
do not have any spare time to do it. The supreme court should find or do its
best to try to find and select such interpretation of a rule of law as will most
closely correspond to the substance of law and will be the wisest and most
widely accepted interpretation thereof.

Therefore, when we argue whether or not the resolutions of the Plenum
are binding on lower courts, you know that this question is answered differ-
ently in the Russian Code of Arbitrazh Procedure and the Russian Code for
Civil Procedure. I do not think this is fundamentally important and was not
in favor of inclusion in the Code for Civil Procedure of a provision providing
for a certain binding effect of such resolutions. Such binding effect will al-
ways exist because a higher court would overturn a judgment made by a low-
er court where such judgment does not correspond to an existing template;
therefore, on the one hand, there is certain binding effect. However, on the
other hand, it should not have such binding effect that one would give com-
mand and all the others would comply with the same. A precedent would
be a real precedent when it does not need to be confirmed by the authori-
ty of any governing bodies, when it is based on its own authority and when
it is acknowledged by the judicial community as the wisest option. Strictly
speaking, this is what one should strive for: the wisest interpretation and ap-
lication of law. In my opinion, this is what any Supreme Court or Higher
Arbitrazh Court should strive to achieve.

In the Russian system of arbitrazh courts, I believe, all required condi-
tions are in place. There are four instances: [one of them is] cassation in-
stance court. Each of the cassation instance courts reviews the practice of five
to seven territories and is able to do so and ensure uniformity of such prac-
tice. As to the Higher Arbitrazh Court, its task is to interact with the ten cas-
sation instance courts and, through their practice, ensure uniformity of the judicial practice across the entire system.

It should be mentioned that the task of ensuring uniformity imposed on the supreme instance court is a perpetual one. For example, time and again, the Russian Senate was criticized for its failure to fulfill two tasks which contradicted each other: first, the Senate was obliged, in its capacity of the third supreme instance court, as a cassation instance court, to eliminate all legal mistakes on the part of lower courts. One court is unable to do so. As to its other task, it had to ensure uniformity of the judicial practice. When it was busy identifying all minor things and eliminating all violations of law, it had no time to ensure uniformity of the judicial practice. On the other hand, when it engaged in ensuring uniformity of the judicial practice, naturally, it was unable to review a huge number of cases and eliminate all related mistakes.

So, we structured our judicial system with the account of negative historical experience of the Russian Senate. Cassation instance courts are obliged to eliminate all mistakes made by lower courts when considering cases. I mean mistakes relating to the area of law. As to the supreme instance court, its task is to ensure uniformity of the judicial practice. However, we have three supreme courts: the Constitutional Court, the Supreme Court, and the Higher Arbitrazh Court. And we should ensure uniformity of the judicial practice under the existing conditions.

Usually, in countries with several supreme instance courts, there exist mechanisms enabling them to reach a common position. In Germany, this is the Grand Senate (Große Senat), in France, this is the Conflict Tribunal (Tribunal des Conflits), and so on. In any case, contradictions relating to interpretation and application of the law can be eliminated at the level of a country’s supreme courts. We also have such a mechanism. We tried to provide for such a mechanism in the initial version of the Constitution. Maybe some of you recall that it used to include an article on the Supreme Judicial Body (Vysshee Sudebnoye Prisutstvie). Then the article was excluded from the Constitution, and so we do not have now the above-mentioned instrument. Therefore, we had to promptly search for some other ways to ensure uniformity, and so we chose a mechanism whereby the Plenums of the Supreme Court and the Higher Arbitrazh Court were to issue joint resolutions. Furthermore, I would say that most often draft resolutions initially were prepared by the Higher Arbitrazh Court and then both courts worked on them jointly. As a rule, we were able to complete such work and issue a joint resolution of the Plenums. I recall that during the first 10 years of its work the Higher Arbitrazh Court issued 50 resolution of its Plenum, and 12 of them were joint resolutions.
Unfortunately, no such work is carried out now. For the last four years, no joint resolutions were issued, and I think this is bad. In my opinion, this work must be resumed, and, by the way, it is also provided in an instruction issued by Dmitry Alexandrovich Medvedev, Russian President. Currently, at our initiative, another joint resolution is being drafted; it pertains to Part IV of the Russian Civil Code, since no resolution of the Plenum has been issued in respect of Part IV, and it is high time to issue a joint resolution of the Plenums and thereby resume these practices.

In addition, we are guided by precedents set by the European Court of Human Rights, they are a reference point for us. We also rely on court precedents set by the Constitutional Court. We do not take part in setting such precedents nor do we always fully agree with them but we unconditionally accept them because we are obliged to do so. Be it a precedent set by the European Court of Human Rights or a precedent set by the Constitutional Court, [we still should be guided by them], at least, I assume so.

We also tried to arrange for discussion of most important legal problems at the level of the three supreme courts, i.e. the Constitutional Court, the Supreme Court, and the Higher Arbitrazh Court. One such discussion was, indeed, held, and it was extremely interesting and useful. However, unfortunately, currently there is no such practice, nor there are any joint discussions, and it is a pity that this is so because each such meeting is held to discuss specific problems that arose lately, rather than particular cases.

We mentioned the problem of criminalization of civil law; this is, indeed, a problem and it should be discussed. It should be discussed not by bringing together people who share the same opinion but getting their opponents involved, so that this would be a real discussion. Then we would get some results, otherwise the discussion will be tilted, whether towards one side or the other side, but tilted anyway. We do not want it to be tilted, we need to ensure the rule of law, that is it. This is what I can say about ensuring the uniformity.

Secondly, as to the substantive part which is so hotly debated at our round table meeting. This part deals with substantive issues rather than with the mechanisms of ensuring the uniformity, including with criminalization and so on. I would start with some other issues because otherwise our foreign guests might get an incorrect perception of the Russian legal system, which is not good. I notice that our foreign colleagues’ perception always somewhat lags behind the reality, though it is natural. I constantly communicate with foreign colleagues, in particular, with German ones, and I am convinced that our meetings and discussions are extremely useful. For example, in the course of our most recent workshops held together with German judges we did the following thing: we chose a particular situation, say, a civil-law dis-
pute involving a foreign element, and the German judges resolved the dispute on the basis of German law, while we resolved it on the basis of Russian law. Then we compared our decisions. Can you imagine: there were no differences between our decisions! We issued identical decisions. Well, there were differences when subsequently we started to discuss our motives. But the decisions were the same. This was indeed very useful as we could better understand each other and, in particular, they learned more about the Russian legal system of which in the Western countries they have somewhat inadequate, incorrect perception. It should be more adequate and precise. We should hold honest and open discussion which should be balanced in terms of approaches.

Thus, the relation between the public law and the private law in our legislation and judicial practice is of the utmost importance. I was one of the first lawyers who started to raise this issue both in oral and written discussions. This is a very important issue for us. Why is this so? Because there was, indeed, a historic transition, similar to the transition which took place in 1917-8; the latter was the transition from a dualistic legal system which combined both private and public law to a system in which, essentially, the public law held an absolutely dominant position. So now we made a historic transition to a normal legal system consisting of both private and public law. The private law in Russia was reborn, primarily with the help of the Civil Code.

And when the Constitution was adopted (the Civil Code and its drafting were a bit ahead of the Constitution), it became a fundamental basis underpinning the Civil Code. In fact, the Civil Code was then drafted also in accordance with the Constitution. And the main provision of the Constitution relates to the man, his rights and freedoms being the supreme values for the state and the latter’s duty to protect these values.

Thus, the private law was restored, reborn and is in effect. If there were no private law, then there would be no [current economic] crisis in Russia, I am absolutely sure about this. The fact that there is the crisis in Russia means that private property is the most important form of ownership in this country. Therefore, our economy is predominately private. It is, obviously, the clearest evidence confirming that we did make the transition to a normal system.

However, this system needs to be revised and improved all the time. What was done initially constitutes just the first stage of this process. Apparently, now we need to fine-tune the interaction between the public law and the private law, and this is exactly what we are doing now in the area of civil law. There was a decree of the Russian President which set out this task, and we are working to fulfill it, i.e. to improve the civil legislation as private law.
Second Roundtable Discussions

However, it is quite regrettable and unfortunate that no similar efforts were taken in the area of public law. At least, certain concepts relating to the private law were developed, and, as a result, legislation was adopted. As far as the public law is concerned, I am unaware of any existing concept of development of Russia’s public law. One may consider the Constitution to be the only such concept. But there are no real concepts of development of administrative law, tax law, criminal law, and so on. Where are those concepts? I am not familiar with any of them.

Therefore, in this sense, Russian public law lags behind, and the situation needs to be rectified. The public law should be revised, amended, and developed, but not enfeebled. Why do we need to do so? Because the legal system is efficient insofar it consists of both the private and public law. If we weaken the public law, this will be a heavy blow to the private law. We would strike a heavy blow to the private ownership right, the right to participate in market turnover, and the rights of the Russian citizens. This is because only together these two parts of law can help solve the tasks defined in the Constitution; but they can do so only together.

However, for that purpose, it is very important, firstly, to correctly define the areas of application of both private and public law and to clearly distinguish between them and their institutes, to clearly understand that there are two different types of regulation in terms of its purpose and adequate relations. There should be extensive theoretical studies as well as recommendations which would be based thereon and which would concern particular legislative acts.

On the other hand, to a great extent, the division of law into its branches, into the public law and the private law, is a convention. The law is something whole. Only when it is applied systematically, only then its ultimate goal can be realized. Civil relations, ownership relations, relations arising from turnover of goods and funds should be regulated by the civil law but they should also be protected by the criminal law, this is mandatory.

Therefore, taken as a whole, the question is: which laws do we have in the area of civil law, do we have supporting laws in the area of the criminal law, and how do they correspond to each other? I think that from the conceptual standpoint, this should look as follows: the legal system should embrace both the private law and the public law. Which law would have the priority? Without any doubt, the public law had the priority in the Soviet times. Why was this so? Because Lenin said so? No, not because of that. It was so because the economy was based on public property, state-owned property, and this resulted in the priority of the public law. Now, after and as a result of the transition to normal economic relations, the private law was reborn. Now we
have to consider what the relation between the public law and the private law should be. I firmly believe that they should interact. But in the framework of their interaction, the private law should have the priority. The public law should ensure normal implementation of the private law. The public law has a supporting role. But we cannot do without it because, if the private law is not supported by the public law, it will turn in a jungle, where strong ones would eat weaker ones, where transactions would be mainly unlawful because they would be used to get hold of another’s property by any means, for example, by forging documents, which is very common, and by documenting or registering property on the basis of forged documents. Some transactions would just appear to be real transactions, there would be forged documents, public registration of such transactions, agreements and related ownership rights. What kind of ownership right this would be? It would all be based on one’s criminal actions, that’s it. Therefore, all details here should be thought-through more carefully, and the need to fine-tune such interaction should be expressly stated. Such fine-tuning should take place both in the text of legislative acts and, especially, in judicial practice; I fully agree that we have to address this task, and work over it very well.

Therefore, generally, I agree with the issue which was raised here though I do not always agree with all of the details. For example, I do not agree that no criminal case may be initiated if a voidable transaction has not been challenged. Why is it impossible? A transaction has not been challenged; therefore, no court decision has been issued. The transaction constitutes an element of the private relations, i.e. the relations between the two parties. As to the criminal law, it falls within the category of public law. And if the transaction is entered into in order to conceal a crime, and this is a public-law crime, i.e. unlawful taking of another’s property, it is absolutely clear that a criminal case may be initiated and pursued. And then a party to the transaction can choose to make use of it and challenge the transaction or decide against doing so at its own discretion because it might or might not be interested in bilateral restitution or any other consequences that may apply. Therefore, even if there is a court decision whereby a transaction is valid, a criminal case may be initiated and pursued but it will be necessary to prove, in the framework of such criminal proceeding, that a crime has been committed. If the crime was committed, it would constitute grounds for revising the civil case. If such crime is not proved, there will be no grounds for revising the civil case in question.

Recently, the Constitutional Court issued a resolution pertaining to a civil-law institute, to the acknowledgement of one’s lack of dispositive legal capacity. I thought this was a wonderful civil law institute (I have taught the civ-
il law for many years). However, in the course of economic reforms in Russia, very many criminal elements penetrated our economy which resulted in corporate raids, fictitious bankruptcies, destruction and taking another’s enterprises, and so on. Why did criminal elements penetrate our economy on such a large scale? There are two reasons for that. Firstly, reforms were carried out with a speed of lightning, when there was no legal framework for them. It was only after these reforms were implemented that we started to develop a legal framework for a market economy, private property, etc. Private property existed and operated on a large scale by then while we still worked on Part I of the Civil Code. As a result, the legal framework lagged behind the development of real relations. This is the first factor. Secondly, at that time the state was destroyed and weakened. As a result of these two factors, the economy turned to be under the strong influence of criminal elements. Fortunately, we have now managed to get rid of them to a great extent though not completely. So we are still facing this problem. But, from my point of view, it is not the most frightening thing: in fact, criminal elements penetrated the economy exactly for the same reason, because there was no State at the time of major economic transformation, when state-owned property was distributed and allocated. Who distributed it? Government officials did. So, because both criminal elements and government officials took part in this process, it entailed the creation of a criminal tandem between them. It was at that time that corruption emerged. Bribes existed even before that but corruption, as a wide phenomenon, emerged and developed at that time. I believe that even now, to ensure the stability of economic relations, to protect turnover of goods and funds as well as the rights and legitimate interests in the economic area, it is vitally important to deal with these two problems of corruption and criminal elements. We should, I believe, intensify the fight against corruption and criminal elements and then gradually the civil turnover will become better protected. Otherwise, in Russia, helpless elderly people who own apartments will be deemed to be incapable to act or will simply be killed. It happens in real life, does it not? Yes, it happens. And it is impossible to deal with both phenomena (I mean, the corruption and crimes) other than by means of criminal-law measures.

Therefore, I believe that we should now move on to the second stage of improvement of our legal system, i.e. to improve the private law, strengthen its influence on relations, further develop its principles, and implement it, including implementing such principle of civil relations as good faith on the part of its subjects. On the other hand, it might be advisable to develop, finally, concepts of the public law which would be suitable for the market economy since there are no such concepts in Russia, and to radi-
cally improve the whole body of our public law, including the administra-
tive law, the financial law, the criminal law, and even, subsequently, the
procedural law as well.

**ANDREY FEDOTOV:** What is your idea of the most efficient mechanism
for coordination of work of the supreme judicial bodies today?

**ALEXANDER GOLICHENKOV:** There are two questions which are relat-
ed to statements made by our moderator and Veniamin Yakovlev, the speak-
er. The first of those statements is as follows: there is a clash between the
private law and the public law, and the latter pushes out the former. So, my
first question is: what would you say if I state that the situation in a number
of branches [of law] is the opposite? There is an expansion of the private law,
and it is direct, open, and deliberate; as a result of such expansion, there are
attempts to bring under dispositive regulation certain relations that cannot
be regulated in such a way, for example, labor relations (relations arising out
of employment/hiring of employees), environmental relations, including
relations in connection with natural resources, which, to a great extent, are
of public nature. And the second question: what do you think of the state-
ment (my statement, in this particular case) that setting the priority of the
public law over the private law or the private law over the public law in re-
spect of each particular historic stage will lead us nowhere because no prior-
ity can and should be set there. This is, in fact, the swinging of a pendulum,
similarly to which Russia develops — first, to the left as far as it will go, then
to the right, at first the public law prevails over the private one, then vice ver-
sa. The setting of such priority at the current stage and its implementation
had extremely negative consequences in the area of regulation of certain re-
lations, in particular, those arising in connection with the use of natural re-
sources, in particular, as a result of the adoption of a series of codes, namely,
the Forestry Code and the Water Code which do not even mention the pro-
tection of nature or forests *per se*, they refer solely to a set of plots, i.e. land
plots and forest plots, that is all. Thank you.

**VENIAMIN YAKOVLEV:** I fully agree that the expansion is taking place
from both sides, and I think that it happens because our legal science, our
document substantially lags behind the developments in this country over
the last twenty years. We still discuss old problems or think over non-exist-
ent problems, while there are real major problems that require very serious
work on our part. So, this relation between the public law and private law
is, of course, a key issue. I mentioned in the beginning that, firstly, we need
to distinguish between the domains and objects of application of both public law and private law. Then, we should address the differences between them. And, thirdly, in my opinion, the most current problem is their relation. These issues have not been studied or have been inadequately studied by legal theorists so they are dealt with in a spontaneous way; sometimes certain things happen just because of uncontrollable powerful economic interests, when someone wants to achieve something and spends a huge amount of money to do so, and then respective legislative acts are adopted. I unconditionally agree with you that we have left the environment to be “torn to pieces”. As far as natural resources are concerned, the relation between the private elements and the public elements should be carefully determined, as both such elements should be present in a certain proportion which should be carefully calculated and checked, so that ultimately this would not be detrimental to private interests and, at the same time, so that the public interests would be protected as well, that is, the Russian society should not lose its natural resources in such a thoughtless way, as a result of purely predatory attitude and direct destruction of Russia’s colossal natural wealth.

As to the priorities, I would not insist on that, I believe that in a normal legal system... well, what is the public law? This is the law that regulates relations in which the State takes part, is it not? And what is the private law? This is the law which regulates relations between parties none of which is the State or, if one of such parties is the State, then the State acts as a private party, that is, it submits to the private law. That is the difference between them, isn’t it? So, what does exist for what, an individual for the State, or the State for an individual? In the Soviet time individuals existed for the sake of the State, frankly speaking, though the slogans they used were different, but in real life this was the case. Now we presume that the State exists for the sake of the individual, and the Russian Constitution says so; the State is obliged to ensure that the rights and freedoms of the individual are not violated, it’s the duty of the State. Therefore, the State should act in this capacity and it should protect the country’s natural resources in the same capacity. In whose interests should it be acting? In the interests of the individual. I think we should revise the very concept of “public interests”. In the Soviet times, the concept of “public interests” was replaced by the concept of “interests of the State”. We should reject this idea because the public interest is not the interest of a single citizen, it is the interest of all citizens of the country. A private interest is the interest of a particular individual; this is the difference between the public law and the private law. When the State acts as having public interests it should protect the interests of the society, all of the citizens rather than its own interests. Then the public law would be structured in favor of the soci-
ety rather than in favor of government officials. There is nothing to be shy about, the public law should be powerful, and it should protect the public interests. The criminal law should be efficient and it should not recede to a private interest when the latter abuses the law. That is it. Therefore, the private law should have a priority but I think this should be a priority in a sense that is consistent with the Constitution. I think that the Russian Constitution is very good, and though some people who are not lawyers might think that it is just another document, we, lawyers, should value each word contained in the Constitution because it is indeed very good. The only question is how well we will implement it in our legal system, in our judicial practice and in real life.

As to Article 90 of the Code of Criminal Procedure, in my opinion, its language is less than perfect. Of course, we have better provisions regarding a prejudicial effect in the Code of Civil Procedure and the Code of Arbitrazh Procedure. I think that there is a prejudicial effect, it should be there, but I would like to reiterate that if it has been established in a criminal proceeding that no ownership right exists and that the thief is just trying to pretend that there is one, then a civil case in which the court ruled that the person in question had the ownership right has to be reopened and considered anew. Otherwise, thieves will be owners in Russia, that is the most important thing. Therefore, the prejudicial effect should apply in both directions. It all boils down to what has been actually established and which court findings are untrue. That is, court decisions should be analyzed on the same basis, i.e. on the basis of actual circumstances, and should be properly evaluated from the legal point of view. If there was a lawful acquisition of an ownership title, then we are dealing with the ownership relations. Alternatively, if there was a theft or fraud which was subsequently concealed by means of forged documents or registration, then there is just the appearance of a transaction; no transaction was entered into, and it should be rejected as such. Therefore, in my opinion, the prejudicial effect should be two-fold, mutual. Ultimately, the prejudicial effect should ensure that respective judicial acts correspond to each other, but it should be achieved on the basis of actual facts rather than fictitious facts which have allegedly been established by court.

**ANDREY FEDOTOV:** I have the following question. We stepped on some new ground which had not existed before, we did start to move in the direction of independence of the courts and independent judges but then, at a certain moment in time, we saw a completely different side of this problem relating to the arbitrariness of judicial decisions. Moreover, such arbitrary decisions are not exceptional. How did we come to such a situation and what
can we do about it? Very often judicial decisions (both in terms of law and in terms of facts) are totally irresponsible. I would like to add that there are quite a few such cases because of the existing mechanism for holding judges responsible.

VENIAMIN YAKOVLEV: I will answer your question regarding the arbitrary judicial decisions. Of course, we should decisively put an end to such things. In the system of arbitrazh courts we have to deal with the following situation: when corporate disputes were transferred completely from general jurisdiction courts for their resolution by arbitrazh courts, methods which were previously commonly used to abuse the justice system in relation to corporate disputes started to be used in arbitrazh proceedings. Of course, it was more difficult to abuse the justice system in an arbitrazh proceeding because previously any district court [of general jurisdiction] could, for whatever reason, initiated a proceeding in relation to a corporate dispute in violation of the rules of jurisdiction, and smart lawyers representing the parties to a dispute invented various methods enabling them to move the case from one court to another, from Moscow to the Far East, for example, and then a court in the Far East would for some unknown reason issue a judgment in the dispute, and so on... When we first came across such cases, of course, we grew suspicious. At that time, we became able to apply provisional measures to promptly secure claims; it became possible to file an application for such measures even before a respective statement of claim was filed. However, the situation with such provisional measures immediately became very confusing since they were applied without a good reason. We immediately took steps to address the situation. Since we have to deal with arbitrary decisions, we brought respective judges for account for their actions. We think that in such cases we should be strict. If a judicial document is a complete outrage, and the judge who issued it was certainly aware of the existing rules and still, in violation of such rules, he issued the decision which had nothing to do with justice, of course, we must take certain measures. I am not saying that we should immediately dismiss such judges but we must take measures. Or, possibly, we might have to dismiss such judges as well.

VICTOR ZHUIKOV: I would say that the reason of the judicial arbitrariness is a more general one. The reason is that in the early 90s it became possible to grab what Leon Trotsky used to call a “beefsteak”, there appeared huge chunks of private property. None of those existed before. Starting with smaller things, like apartments (prior to that there had been no privately-owned apartments), in respect of which decisions were made
by general jurisdiction courts. When apartments became private property, they also became the object of criminal intent of different people because it was possible to get hold of them and sell them at a profit. The same things happened in arbitrazh courts that dealt with incomparably more valuable assets. Since there was an opportunity to achieve a fortune unlawfully, crimes in this field became more frequent. Governmental bodies and officials (including judicial bodies and judges) also became involved in those crimes, and money started to play a greater role in them as well. Nonetheless, I would say, based on my observations, that, so far as the general jurisdiction courts are concerned, now it is power that prevails rather than money; maybe, at least, this is more honest on the part of the courts, [judges] to not act for their private gain (I can say so with a great deal of certainty), and this is to a great extent [due to] the involvement of the authorities. Generally (or at least primarily) it is all about “sword and gold” [i.e. about power and money]. I should emphasize once again, however, that I am aware of a great many wonderful decisions issued both by general jurisdiction courts and by arbitrazh courts as well as of perfect resolutions of the Plenums. In conclusion, being an optimist, I would like to say that though there is a great many outrageous things, at the end of the day, they are being dealt with.

ALEXANDER ROZENTSVAIG: Since two speakers have already made quite optimistic statements, I would now like to swing the pendulum to the other side. Since I am a practicing defense lawyer, the problem of judicial arbitrariness affects and interests me to a great extent. I thought about it for a long time and it seems that the problem now became totally different. The problem does not boil down to just occasional events when an individual judge, whose motivation is not based on the legislation and the law generally, issues an unlawful and unjust court ruling. The problem is quite systemic. So, either there is no justice any longer, or there is no justice yet.

As a rule, it is better for a lawyer to talk about cases of which he has first-hand knowledge. However, I think I am well aware of the situation which exists not only in Kazakhstan where I came from but in Russia as well.

We have to deal with the situation when all too often it is simply impossible to obtain a lawful decision in a court. Naturally, I do not know about all of the court decisions but because I have been working as a defense lawyer for more than twenty years my sample is a representative one. For the entire period of my practice, there were just very few cases (whether civil or criminal) where court rulings were properly prepared and issued. Maybe, I am simply unlucky all the time.
Look what is going on. While a sound system is able to restore itself, get rid of unhealthy elements and purify itself, the existing judicial system tends to primarily get rid of conscientious, honest, and professional people who adhere to certain principles and act in good faith. No, you should not laugh, there are quite a few people here who are now “former this” or “former that” and who could still work [in their previous capacity] for a very long time thus proving that certain bad situations in the system are mere exceptions rather than repeated practice. The problem is the human factor. And who are the judges? I cannot answer this question. I hope we would be able to answer it together.

VENIAMIN YAKOVLEV: I totally disagree with such opinion. I cannot say anything about Kazakhstan, I do not live and have never worked there, I do not know people there, and so on, but I hope and believe that there are many respected colleagues and real lawyers. And generally, in my opinion, those who think that the system should be completely changed and that really honest and professional people should replace existing ones within the system must themselves go and work there. How can it be done otherwise? However, I personally know many people working in the arbitrazh courts’ system. Yes, some of them retired, and it is a pity that they did so, but the reason was their age, health and the like. There are quite a few people whom I trust more than I trust myself. There are a great many people whom I so trust. If our judges heard what you just said (for example, during some congress or meeting) they would think that the speaker stereotyped the judges and made too general and all-embracing conclusions which are effectively offensive to the overwhelming majority of judges who work honestly. I do think that there is an overwhelming majority of such judges. I also think that in most cases judges issue judgments in compliance with the law. This is true that our judicial system operates under conditions that are less comfortable and more difficult than those of the judicial systems in Western countries; it is quite obvious because there the judicial systems are properly protected by the State, and no one can pressure a court because it is a criminal offense. For example, when I was chairman of the Higher Arbitrazh Court, I used to keep the Criminal Code on my desk, and when someone called me I listened to him and then I would say to him: “Do you know what we are doing now, at least what one of us is doing now?”. And I would read a particular article of the Criminal Code dealing with “an attempt to unlawfully influence the court in order to make it issue a particular unlawful judgment”. And this was the end of the conversation. Even when I got a call from some highly positioned persons, I would say to them: “You do understand that I am a lawyer, don’t
you? Well, you ask me to look at the case “more carefully”, OK, we will do so but still we will issue a judgment in compliance with the law.” And nobody ever told me: “We will get rid of you, we will kill you, or we will bribe you” or that something else would be done to me. Boris Nikolayevich Yeltsin called me after his retirement (I was still chairman of the Higher Arbitrazh Court) and said to me: “I am now on vacation in the town of Kislovodosk, and I got a visit from representatives of its administration; they think that their arbitrazh court does an injustice to them; could you please have a look at their complaint?”, and so on. Then he paused and said: “Could you confirm that when I was President I never called you in connection with any particular case?” And I said to him: “Not only can I confirm that but I also repeatedly said so when speaking publicly, including at press conferences. You have never applied to me”. Then he said: “And may I, as a citizen, apply to you?” “Of course, as a citizen you may do so,” I said. So, I do not know, but unfortunately, there seems to be many such things, exaggerations, ungrounded accusations thrown at judges. At that, I do not rule out the possibility that what you are talking about does take place. That is, there are weak judges, dishonest judges, judges whom we need to get rid of, and so on; this is true. And this is something, most probably, that we should work on. However, if we say that “it is true of the entire judicial system, we simply do not have one”, then no work will be needed; if there is no judicial system, who cares? It would be better if the system did not exist altogether.

IGOR NOVIKOV: This discussion is generally very interesting, but I want to say a few words in support of Alexander Rozentsvaig. It seems to me that he was trying, in his emotional manner, to discuss a different aspect of the problem: most probably, he talked about the independence of the judicial power within the structure of the governmental system and the existence of preconditions that make this branch of power too dependent.

VENIAMIN YAKOVLEV: Okay, this is a different issue. As I said, I envy our Western colleagues because they work under more comfortable conditions. Why is this so? Because our judges are under pressure. Are they under pressure from criminals? Yes, to some extent. And from mass media acting because they are paid to do that? Indeed, not only newspapers but also television channels do this in relation to particular cases. In addition, there is certain pressure from authorities which, taken as a whole, means that the judges should be very resistant psychologically to such pressure. On top of that, the work of a judge in Russia is very difficult and does not pay well. Therefore, I invite you to work as judges: could you please contribute to this cause, it
is an extremely difficult work with a very high level of responsibility. A judge needs to be trusted and needs a high status while in Russia his status is very low, even among his colleagues, which is a pity. I don’t like that. Similarly, I do not like blanket accusations made by our defense lawyers. Therefore, we should all be joined in a certain guild, a corporate community, I mean the best representatives of the legal profession who can understand what the justice is and how to make it genuine and real. And indeed, therefore, rather than criticize those poor judges who are overloaded and stressed because of their huge responsibility, we should address the factors which make our judges so stressed and dissatisfied. As far as such factors are concerned, yes, I fully agree, the professional legal community should have started to participate in solving this problem long ago; we need to build a collective line of defense and forget that we are at the opposite sides of the bar in court. This does not matter, anyway, we are all trying to achieve the same purpose, to ensure the rule of law, and we should cooperate with each other to attain this purpose. If judges are experiencing difficulties, they need to get support; you see what challenges they are facing and how difficult it is for them, and most probably, because lookers-on see more than players, you see such difficulties more clearly than anyone else.

**TAMARA MORSCHAKOVA:** I think that the best approach to resolving any issues relating to the court as a specific institution will be the same approach as used in all other areas. Nothing will be achieved merely because of individual achievements of individual people, be it judges, defense lawyers, prosecutors or other legal professionals; nothing will be achieved unless we develop proper institutions as economists tend to say.

Indeed, to develop proper institutions in the area of law is more important, in my opinion, than to develop them in any other areas, for example, in the economic area. This is because the legal institutions are meant to ensure all the other things. So either we will have them, or we will not have the rest of the things that we need to have. This point of view is becoming increasingly common among all people in Russia who are related to entrepreneurial activity. There is a well-known quote, and I do not know who was the first to pronounce it on behalf of entrepreneurs: give us justice, give us the court that will be genuinely and fully independent, and we will do the rest on our own. Representatives of the business community say so. I even think that this is the only required condition that should be ensured, and it should be ensured by the State, simply by virtue of the duties which the State has assumed, and by virtue of the State’s intentions to limit its powers which were fixed in the Constitution, Russia’s fundamental law.
As everyone knows, constitutionalism is related to this particular task which the state power sets for itself and with which it voluntarily agrees, otherwise the state power would not exist in its present condition. Constitutionalism is always related to the task of self-limitation of the state power. However, in a constitutional system, self-limitation of the state power is primarily ensured by court, by the system of justice. And what is the reason for such self-limitation? Because the state power agrees to it as a *sine qua non* condition, because failing that nothing can be achieved. And therefore, of course, the creation of judicial power institutions is a task which is not meant to be fulfilled by judges themselves or even by the legal community (though we should by all means help increase the role of the legal community rather than diminish or underestimate it); rather, it is the task that should be fulfilled by the State. The State undertook to secure, through the system of justice, any and all rights which are recognized under the modern democratic Constitution of the Russian Federation. I believe that currently no lawyer would argue that the Constitution is not modern or democratic, though the society firmly believes (and, apparently, it is right to do so) that the Constitution is just a piece of paper with letters on it, because in real life it does not exist and is not in effect. However, in response to such arguments, I always suggest one to imagine that there is no such piece of paper and there are no letters on it. How would we all live then? What could we then appeal to? There would be nothing to refer to. And based on the program embodied in the Constitution, it is the state power that is obliged to ensure the independence of courts.

So, why did I start with this? I do not think that it is right to reproach individual judges for their poor work and lack of ability to make the justice system as it should be. On the other hand, I do not think that it is right to highly evaluate individual judges, regardless of how unbiased and well-grounded such opinions can be. I mean such opinions cannot be viewed as a factor which determines what the justice system is and what the court is. No heroic deeds on the part of highly respected people, a great many of whom work within the justice system, can solve the problem. And this is the main task which we face.

There is an American scientist, Thomas Carothers (I might misspell his family name), who, I think, managed to identify the most important feature typical of all nations and countries performing a transition to a rule-of-law State. He said that no efforts in this area can be efficient unless a single major factor is taken into account: within the paradigm of legal transformations, the main danger for the society comes from its own power elites who cannot be forced to submit to either legislation or law. I believe that this diagnosis is 100 percent accurate, and in this sense, the State should on its own ac-
knowledge that the independent judicial power is necessary and that it would comply with all decisions issued by the judicial system. The State should deem inadmissible any influence which might be exerted on the judicial power, not necessarily when it is exerted to secure a decision running contrary to law, but any influence whatsoever, even when it is meant to secure a lawful decision. It is because when the state power behaves well (let me use here this expression used by children’s psychologists) it can sometimes say to a court: please issue the right decision in a particular case. However, when this happens, this per se is a huge deviation from the rules of law, and one may argue that such things destroy the justice altogether, despite the fact that the decision issued in a particular case was irreproachable.

I said all this to make a simple conclusion: the state power has failed to create conditions for an independent justice system in Russia. Which conditions are lacking? We have very good rules set out in the Constitution and providing for all elements required to secure the independent status of the court and the judges; however, in real life, such elements do not secure their actual status but one should not blame this on the Constitution.

I liked the thing someone said — that the lawmaker is not that stupid as we think. We often say that the lawmaker lacks professionalism and that bad laws making our life more difficult are adopted because of such lack of professionalism or because those who adopt them are in a hurry or more focused on their own affairs. However, the lawmaker is not that bad. All “landmines” contained in laws were placed there to a great extent deliberately. Speaking of the guarantees of the judges’ status, it is no coincidence that such landmines are present in the law. They knowingly wanted to be given a free hand. What for did they need it? So they could get rid of anyone who proved to be unable to “fit” into the “unified judicial system” (I used this term here since we have been discussing the “unified judicial system” for so long). Stanisław Jerzy Lec, a Polish writer whom I like very much, is the author of a wonderful aphorism: “Listen to this grumbling,” he said, “this is a chorus of those who are not vocal — when all those who were vocal have been eliminated.”

This is exactly what the lawmaker allows to do with our judicial system.

[Firstly,] we should rule out the possibility of determining the content of a law without first carrying out most difficult professional work relating to the adoption of the law. It is another matter how we can do this through our public institutions. Secondly, there is the issue of the judicial power which applies these laws. There are just two levers; I do not see any other levers. Though,

---

1 Translator’s note: this is an untranslatable wordplay — it reads as a chorus of consonants (in Russian, the word also has another meaning — those who agree) — when all vowels (in Russian, the word also has another meaning — those who do not agree) have been eliminated.
these ideas can be supported by the society, and then there will be a chance of success, or, alternatively, they will find no support from the society, and there will be no chance of success.

It is exactly for this reason that I wanted to object to our moderator’s words about the arbitrariness of judges. Such arbitrariness exists, and I do not want to deny it. I want to raise objections because we need to understand the reasons of such arbitrariness. I witnessed many proceedings where judges were delighted to be able to demonstrate their high professional level and issue a judgment reflecting it, but it happened when no one interfered with their work. Therefore, when we talk about the arbitrariness of judges, we need to identify the reasons of it. It cannot simply be explained by the fact that someone made an “order” for a particular judgment. Nor does it boil down to the fact that the court may be under pressure of certain parties other than public authorities; we do not refer to such parties as criminals though essentially they are criminals. We reluctantly call such phenomena “corruption” though primarily corruption takes place when authorities exert pressure. In fact, the court acts the way it does because the existing system of laws and real institutions which determines the status of the judicial power and that of particular judges changes the purposes of justice. The justice is deprived of its true purpose; and its true purpose is to protect rights. The justice does not have any other purpose. However, if every judge may be asked to issue a particular decision (even if it happens once a year; maybe it happens more often than that, I think, most probably it does happen more often) then this inevitably changes his purposes in all other cases. It is because the judge understands that in certain instances he will have to issue a certain decision though it will not be lawful. Then the court comes to disregard its goal, the protection of a legal ideal (and the court should be trying to attain this goal and should realize its importance). If the court submits to the pressure, then it will have to choose all the time: either to [repeatedly] submit to such pressure or to fight heroically, as the famous little Dutch boy who used his finger to stop the flow of water. It is unlikely that the court would be able to continue to fight for a long time. It can perish at once.

Judges are not meant to be heroes, so one should not discuss how heroic they are or how firmly they adhere to their principles. One should not say that judges are saints and wonderful people because the problem would not be solved this way. There is a system of training of staff members of courts, and there is also a system of their selection (which is worse than the system of their training). Finally, there is a system of rejection of staff members of courts which is even more frightening that the first two systems. One
should not blame this on juridical conscience of the judges. That is why it is painful for me to talk about this. In a certain sense, judges are very unfortunate people: their juridical conscience is formed by the system within which they work. And it is so formed with the help of a very simple method: a person is appointed for the first time in his life for the position of a judge for a term of three years and then they would wait.... It has been stated a countless number of times that this three-year appointment system (as it exists in Russia) is inconsistent with the principle of irremovability from office which is provided for by the Constitution in respect of the judges. However, the three-year appointment system is still in place. I would like to tell you the following interesting thing: some time ago, the Constitutional Court provided its explanations on this issue and stated that it is possible to appoint a judge for a three-year term only if such term is considered to be a probation period, upon expiration of which certain facts will be brought to the attention of the judge to confirm that he is unfit to be a member of the judicial profession. He would then be able to challenge the facts which should be properly documented if the judge disagrees with them and believes that they are untrue; he may do so in court. However, all those wonderful explanations given by the Constitutional Court had no effect on the existing practice and were not taken into account. Currently, there is a noteworthy complaint filed with the Constitutional Court in connection with the situation where the complainant is prevented from being subsequently appointed to the position of a judge without receiving any explanation. This is because the document presented to a judge upon the expiration of his three-year tenure (and I don’t think that people, who are not lawyers and who criticize judges for every case they consider, are aware of this fact) contains nothing but a statement that his authority and powers of a judge were terminated upon the expiration of his three-year tenure and that such decision was made by a qualification commission of judges. In Russia, this is a special body of the judicial community that makes decisions by a simple majority vote. That is it. What motives or disputes can be there?

For three years, a newly-appointed judge is being “trimmed”, as Gadis Abdullayevich Gadzhiev, judge of the Russian Constitutional Court, likes to say. The judge learns how to behave the way he is expected to behave and how to become “fit” in all respects. If his legs are too long, he should bend a little. And so on. This is exactly what happens. He learns how to be obedient and be liked by the chairman of the court. If he obeys he will be promoted to the next qualification level in due time; it is very important for the judge, it is what his career is about. A judge builds a career sitting in one place, he has no other career ladder, he simply gets into a higher-level class. Throughout his term he will be liked or, alternatively, disliked by the chairman of the
court. And depending on the chairman’s will, various cases can be assigned to the judge, and certain cases might make his professional life much more difficult than other cases. Finally, he can find himself among those who can be trusted. If he can be trusted, the chairman of the court will be able to assign a particularly sensitive case to him because the chairman expects that this judge will not be too independent and that he will listen to everything that will be said to him and even to hints. Such judge already has his own “inner censor” who makes him adhere to the standards of practice.

You know, I would like to remind you of an idea which was stated by Gabri-el Shershenevich, a very famous Russian lawyer who lived before the 1917 Revolution (I don’t know how he got this idea, it was so unusual for Russian lawyers who lived at that time). He said: “It is awful if a judge thinks of and is guided by the positions of the cassation instance court, if, based on such positions, he decides in advance which of those positions he will choose when issuing a judgment in a particular case because this destroys the substance of justice.” In my opinion, this is very important. Like I said before my atti-tude to our work concerning the uniformity of judicial practice is controver-sial. I would prefer to use a different expression, even in the title of our work; maybe, we should talk about the rule of law instead. So far we are talking about certain terms only, but the concept of uniformity of judicial practice per se may be quite detrimental. You see, this is like in a story by Franz Kafka about a correctional labor camp; there was a machine which mutilated even its inventor when he decided to try himself how it worked.

In fact, if the uniformity of practice is being “implanted” from the top down, this is a very easy way to solve problems and eliminate inconsistencies in judicial practice. It is “implanted” from the top down, in particular, because higher courts by virtue of their functions are meant to eliminate, in re-spect of each particular case, any deviations from the rightful, lawful, and just procedure and rightful, lawful, and just resolution of cases on their merits; so, in one way or another, practice becomes increasingly more uniform and consistent. However, when we choose such directive methods of achieving the uniformity, even a law may turn out to be an excessively influential fac-tor (in the negative sense). Because if a law is bad, then the entire practice will be bad, and there will be nothing good about such practice. So, anyway, we should start with laws.

As to the second component about which I also started to talk, this is the status of a judge. This issue does not boil down to the ensuring of the judg-es’ irremovability from office. Let us assume that a judge has been appoint-ed to a respective position. Then everything in his life will depend, to a cer-tain extent, on bodies of the judicial community, however, in fact, he will de-
pend on those who initiate certain actions on the part of judicial community bodies. Those people are top managers of the courts, judicial bureaucrats. I know, Victor Zhuikov would criticize me for this expression, but I cannot do anything about it. Judicial bureaucrats do exist and they have become more powerful. And before we discuss how political authorities can influence the court we should analyze this factor, i.e. we should analyze the possible influence on the court exerted by judicial bureaucrats. The thing is, the latter may be driven by various motives. Sometimes they are driven by misinterpreted interests of justice or uniformity of practice, etc. Sometimes they can be driven merely by their personal interests. Why is this so? Let me remind you how the court manager is appointed. He is appointed for six years and then he may be reappointed for a new term. Who reappoints him? He is reappointed by the President, head of the State. What happens if, during the first six-year tenure, the court manager failed to behave less than perfectly or issued a judgment which was not quite exciting for the leaders of the State who can, in their turn, decide whether to appoint him for the next six-year term or not? It is clear that he will not be reappointed. So such court manager becomes merely a tool which transmits any will and wishes to judges. This is because the court manager wants a positive estimation of his work, i.e. for his management of the court system and the particular court. We need to have protection against all such things. Mechanisms that can be used by court chairmen are very powerful, and judges can be easily deprived of their status. Their status of a judge, I mean.

But when we discuss it, we say all the time that there exists an explicit mechanism of arbitrary application of law which allegedly was created by law. One area where this mechanism of arbitrary application of law most clearly manifests itself is the status of judges. For example, the time limits for considering civil cases in Russia are very tight, which is not so in almost all other countries. Even at the most recent congress of judges, people said that such time limits are unrealistic. Such unrealistic time limits were set forth deliberately because they can be used as a tool to influence and control judges. None of the judges is able to comply with such time limits. There will always be instances when such time limits are not complied with because they are unrealistic and also because one cannot, indeed, focus on the time limits rather than the quality of considering cases. One cannot consider a case in due time if an expert examination was not carried out or if witnesses or parties failed to appear. A judge simply cannot do this. Otherwise, the judge will get a reprimand in the form of overturning the judicial act he issued.

The overturning of a judicial act is another danger [for a judge] because it is viewed as proof of defects in his work. A judge may be deprived of his pow-
ers because of such defects or because any of judicial acts have been overturned or amended; but he will not necessarily be deprived of such powers. This is the most frightening thing, and it is the area where arbitrariness most clearly manifests itself. Even if we adopted another system, in which a judge would be dismissed every time when he fails to consider a case in due time, it would be better because people would soon realize that no judges are left within the court system. So these time limits for considering cases would be abandoned. However, such decision has not been made so far, which means that there is always a stick with which a judge can be given a shellacking. He may be just slightly hit, or his head can be cut off completely. And no one would ever be able to make these criteria for evaluation of a judge’s work more specific and precise.

Institutions for protection [of judges] should be created; today someone mentioned that, and I liked it very much too. Right, such institutions are needed. What should such institutions for protection of judges be? It is acknowledged worldwide that such protection should be ensured by the judicial communities. Everyone knows about the European Charter on the Statute for Judges; this document sets out (though it is in the nature of recommendations only) the major principles which should underlie the regulation of the status of judges. And we do comply with external principles the way they are stated. But we do not comply with them as far as the substance is concerned. For example, in accordance with these international indicative rules, an authority which makes a decision on termination of office of a judge should consist of independent members. Based on the experience of all other countries, who is supposed to be such independent members within the judicial community? Well, judges themselves. But in Russia, judges are not independent. Members of bodies of the judicial communities can be subject to disciplinary measures or deprived of their status in exactly the same way, for the same “omissions” in their work which are not defined with any certainty. Because, like everybody else, they work within the judicial system which fails to ensure the independent status in respect to all the judges to the same extent. So some other mechanisms are needed; for example, we need to ensure that judges who work in judicial community bodies trying to protect the status of judges are in a totally different position.

I can tell you about an idea which is started to be discussed now though I am very much afraid that it will be seriously distorted in the course of its discussion. The idea is as follows: the status should be protected by special

---

bodies, and there should be created a sort of Areopagus in the form of a disciplinary court. Only judges will be members of such disciplinary court and they will have the status of judges. But they will be judges who do not consider regular cases within the regular judicial system, either in general jurisdiction courts or in arbitrazh courts. They will be specifically appointed to become members of the disciplinary court and will work there only. So, as they say, they will be unapproachable by anyone. There will be no reappointment or any other things which may enable one to influence them. Why and when can one expect that such body will be a Holy Authority but not the Holy Inquisition? Only if and when the goals of such body are properly stated and there are conditions in place enabling the body to function properly.

As Victor Zhuikov prompted me, this is exactly the idea which is now being implemented by the judicial community bodies: they function as the Holy Inquisition. In practice, the above bodies were designed to persecute, though the idea of their creation was different. However, in fact, when such bodies were created, as planned, on the basis of the European Charter on the Statute for Judges, they were initially meant to solve a different problem, they were meant to ensure the protection of judges. Of course, they were not supposed to do so based on a well-known principle of “protection of our own scoundrels”. No, [such bodies] should protect a judge from any encroachment on his independent status. And of course, they should perform the function of purification of their ranks and do so as an absolutely independent body, not as the Holy Inquisition. Will [the above idea] be implemented successfully? I do not know. Now this idea has been slightly transformed: it is expected that the body in question will act as a superior body in respect of qualification collegiums, and that it will be possible to appeal decisions issued by qualification collegiums by applying to such body. I would still think that this might be acceptable if members of the body in question were not to retain their status of judges working in their capacity permanently and being relieved of their duties in court for just two months during a 6-month period. Because I know many judges of the Supreme Court who were dismissed. I do not know what the genuine motives were behind their dismissal but [in one of such cases] a judge was dismissed because six cassation court rulings issued on the basis of the judge’s presentation of respective cases (out of 110 cases on which he reported during the respective year) were subsequently overturned.

Why do I tell such freaky stories here? Because I heard what Andrey Fedotov said about the arbitrariness of judges. True, arbitrariness of judges does exist, because judges are not protected from arbitrary actions and decisions affecting them. In this case, under no circumstances, we should support the attitude of the general public who would prefer to see judges severely pun-
ished for any incorrect judgments and awards issued by them. The general public would prefer to dismiss judges or hold them responsible for every incorrect judicial act they might issue. However, it is sometimes difficult to say which judicial act is correct and which is not.

Let us go back to the issue of uniformity. Since for us it is a sort of decisive thesis which is reiterated all the time, let us discuss it focusing on the uniformity itself, its limits, acceptable limits, and, on the contrary, unacceptable uniformity. What dangers do I see here? We somewhat move away from the idea of the rule of law towards the uniformity of judicial practice which is claimed to be a certain goal which is justified objectively. We are moving away from the idea of ruling out the possibility of an erroneous judgment in a particular case. Judicial errors still happen. If a judicial error is made in a particular case and if it is not rectified, it destroys the very essence of justice, and it does not make any difference whether this phenomenon is statistically important or not.

You see, the court is not a body where only statistical indicators count. I recall that long ago, during the USSR era, there was a statistical department in the USSR Ministry of Justice; probably, you remember it. Whenever the issue of judicial errors arose, the head of the department, Zoya Grigorievna Yakovleva, a very active woman, used to say the following: “Why should we think about it? What for do you need to analyze it? Is this statistically important? These are just single cases, just negligible numbers. This is not important.” When we say that only few judgments are overturned in Russia, this means that we work very well; if few judgments are changed, this means that all cases are considered thoroughly and properly, that we are doing a good job. From the standpoint of justice, this is totally unacceptable because any error in relation to justice affects someone’s life. So, no statistical indicators may be used. One should be ashamed to demonstrate the wonderful uniformity and propriety of judicial practice solely because very little work is done in Russia to correct such errors. Objectively, the number of errors has been increasing (and this means that many people’s fates were affected by them), so more errors should be corrected. No statistical indicator is suitable for the purpose of evaluation of courts’ work. On the contrary, to encourage higher courts to try to identify and correct errors and reinstate violated rights of people to the maximum possible extent, their work should be evaluated positively (as compared with prior periods) if they managed to correct more erroneous judicial acts (in absolute terms). If they manage to correct more erroneous judicial acts than before, they are doing a good job. I would like to reiterate that this idea [of uniformity] is as absurd as the idea to evaluate the work of courts based on statistical indicators. Thus, such statistical uni-
formity of judicial practice is not something the justice system should strive for. This is also a “negative” goal of justice, not a “positive” one and not one that we should strive for.

Of course, courts should themselves be responsible for elimination of irregularities in their practice. But they can only do so if their goal, namely, the protection of law, has not been distorted. I would like to say a few words in relation to a question which was raised here before. The question concerned the importance of decisions issued by the European Court of Human Rights in relation to judicial supervision for the Russian judicial system. The Constitutional Court adopted a resolution in connection with this issue. From my point of view, there have been certain interesting changes; the position of the European Court of Human Rights has influenced our legal system, at least merely because the Constitutional Court, having taken account of the position of the European Court of Human Rights, stated that our system of judicial instances should be modernized and that it would be impossible to do without it. So, what was said? One cannot change just how the institute of supervision is regulated, this would not bring any positive results. Currently, the institute of supervision existing in Russia is perceived as something extremely important from the standpoint of protection of law. One should not think that whatever happens in the area of supervision has an adverse effect from the standpoint of protection of law. Supervision helps facilitate the protection of law but does so very selectively. It is precisely what the Constitutional Court said. If we decide against using this instrument, we will feel that we need it because our ordinary judicial instances are not adequately structured.

In Russia, first instance courts are bad and they are overloaded with cases. In a first instance court, in an arbitrazh court in Moscow, if a judge has to consider just 15 cases a day, he or she will be happy. Just think about these numbers: “just” 15 cases would make a judge happy. First instance courts are not adequate even within the arbitrazh courts system, because it is impossible to deal with such huge case load. The situation is even worse in the system of general jurisdiction courts. Unlike the arbitrazh courts system, in the system of general jurisdiction courts no appeals exist. Appeals exist only in respect of an insignificant portion of cases comprising even less than 30 percent of their total number. These cases are not most important ones, these are cases where a justice of peace issued a judgment for the first time with considering a legal dispute. That is all. Appeals are not made in other cases. When our procedural rules (both rules of criminal procedure and rules of civil procedure) were reformed, we were told all the time that, instead of all this, there was a cassation system in Russia, i.e. a cassation instance court may on
its own directly examine evidence and check whether or not facts were established correctly. Well, cassation instance courts may do so; but they don’t do it. And this is a statistically important thing, because if you look at the procedure for considering cases (respective research materials are available, and recently respective monitoring work was carried out) at the Moscow City Court (which is a second instance court, i.e. a cassation instance court for criminal cases), you will see that it takes the court 20 minutes to consider a case (including to read the ruling which, of course, has to be written beforehand because it is impossible to do otherwise). What can be checked by a cassation instance court which works under such time pressure? How, under the existing conditions, can we reject any other opportunity to check the correctness of a judicial decision? No legal stability can justify the rejection of the supervision procedure in the absence of other judicial instances.

I think that if someone from Russia files a claim with the European Court of Human Rights stating that his right to have his case reviewed by a higher court (as provided for in Article 2 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms) has been violated, the European Court of Human Rights will, no doubt, acknowledge that the said right has been violated. Moreover, in Russia, such right is deemed to be a constitutional right. It is stated [in the Constitution] that every person involved in a criminal case has the right to have his case considered (that is, thoroughly considered rather than briefly looked at for merely 20 minutes; consideration means consideration, each word has its own meaning). These terms, they all have certain meaning, and the term “court” has a certain meaning as well. A court means an independent court, and justice means fair justice, not something else which is just called so. So, the review of a case by a second instance court has a certain proper meaning; this proper meaning has already been interpreted by the European Court of Human Rights. The latter would acknowledge that the right to have one’s case reviewed by a second instance court is currently violated in Russia in relation to all criminal and civil cases. So, certain things for which the supervision procedure in Russia is rightfully criticized cannot be improved or eliminated merely by making some adjustments and changes to the procedure in question. That is what the Constitutional Court stated in its resolution.

Now I would like to say a few words about tools used to ensure uniformity of judicial practice. There is such a method of securing uniformity of judicial practice as a resolution of the Constitutional Court. Does this method work in Russia? This is a good method, not a bad one. However, it does not work because when one can choose whether to apply the method or not this means that the method does not work.
Let me give you an example. It is related to different procedural regulation of arbitrazh proceedings, civil proceedings, and constitutional proceedings. This issue has been addressed or mentioned by many scholars. Both arbitrazh courts and general jurisdiction courts would say: “We are unable to comply with resolutions of the Constitutional Court because we have no procedure enabling us to do so.” The Constitutional Court issued a resolution [in which], in accordance with the federal constitutional law, it expressly stated as follows: cases of applicants must be reviewed. In any case, courts must review them. By the way, speaking of how this rule initially appeared, it should be noted that when the rule was introduced other courts were its beneficiaries, not the Constitutional Court. The Constitutional Court did not interfere and stated: “We respect supreme courts. We do not review their judgments and awards on our own. Judgments and awards are reviewed by such courts on their own merely based on the fact that a regulative rule on which a respective judgment or award was based either ceased to exist because it was unconstitutional or was interpreted differently because its constitutional meaning was determined in a resolution of the Constitutional Court.” However, existing rules should not be interpreted in such a way that this would be inconsistent with the Constitution, even if such rules can be interpreted somewhat differently. So, then those beneficiaries stated that they had no procedure to review cases of applicants in accordance with the Constitutional Court’s resolution.” Is this true? Do they really have no procedure for that? Let us look at the Code of Civil Procedure and the Code of Arbitrazh Procedure. There is a section entitled “Proceedings upon discovery of new circumstances”. It reads as follows: there is a certain set of facts which may constitute “newly discovered circumstances”; usually they are confirmed by a verdict issued by a court (for example, various abuses in the course of legal proceedings). But there are also other grounds. What are they? For example, the legal ground on which a judgment has been previously issued ceases to exist. A certain legal document ceases to exist. The Code of Civil Procedure expressly refers in this connection to the situation when an act which was issued by a governmental body and on which a judicial act was based is repealed or ceases to exist. This is provided for both by the Code of Civil Procedure and the Code of Arbitrazh Procedure. So, the repeal of an act of a governmental body is mentioned [as constituting “newly discovered circumstances”]. What did the Constitutional Court do? It simply ruled that the ground (i.e. a regulatory rule) which had been in existence and had been used to resolve a dispute ceased to exist.

So why are courts complaining that there is no procedure they can use to review cases? Maybe because they are unwilling to review them? I assume that this is the only reasonable explanation.
There are many questions relating to the forms which can be used to secure the uniformity of judicial practice. Some speakers mentioned precedents, others spoke about a prejudicial effect. I am 100 percent sure that these are things that really needed, there can be no doubt about either of them. However, there is still an issue here: how should we define it from the standpoint of jurisprudence? There is also one more category which is very important for the purpose of ensuring uniformity of judicial practice: analogy of law (let alone analogy of statute). From procedural point of view, it plays a great role in ensuring the same standards of a just procedure. We do not have procedural codes that would regulate, with the same level of detail, procedures for appeals, cassation appeals, and supervision procedures. However, it has been always acknowledged that similar rules apply unless an exception to such rules is provided for by a special law.

On the one hand, there exist certain natural methods of forming uniform judicial practice which are based on (a) the rule of law principle, and (b) those general legal principles that are related to and stem from the rule of law. Generally, the practice as a whole should ensure that such general legal principles are implemented and complied with. There are such methods as prejudicial effect which should not be rejected. It ensures the legal stability. There are things that constitute (in their peculiar form) precedents in Russia though there are no pure precedents *per se*; there are also rulings of the Constitutional Court which, as I said before, in my opinion, have a prejudicial effect in respect of the establishment of a legal fact. Finally, there is analogy of law, and all those things are normal instruments which can be used to ensure uniformity in law. Veniamin Yakovlev said that we should have a sort of supreme judicial body which would be able to consider all such methods if they are used improperly and tell us how we should act in every situation.

There are a number of risks associated with such body. If it is a purely judicial body, if it is a supreme body which is higher than any other judicial body then, yes, it will be able to issue judgments. But then it will have to issue judgments in particular cases and all other courts will be obliged to comply with respective judicial acts because they will be lower than such supreme judicial body in the vertical hierarchy of courts. I am not sure if this will fully correspond to the requirement whereby there should be a fair trial of every case or not because in this case such supreme judicial body will be able to take any legal dispute (though it will depend on how its procedures will be set out by law) and consider it on its own. Such a situation always entails certain consequences, namely, as a result, the right of individuals to equal protection in court will be violated. Some cases will be finally resolved in the
Higher Arbitrazh Court or in the Supreme Court. And some cases will sud-
denly end up being considered by such supreme judicial body.

Germany has such an experience: they have the Joint Senate (Gemein-
samer Senat der Obersten Gerichtshöfe) which is rarely convened; maybe there
were just three meetings of the Senate for the last 40 years. And its meetings
were very interesting. The supreme courts would say: “Let us discuss a cer-
tain concept.” For example, the Senate discussed the concept of “a disabled
person” (or “an invalid” as we say in Russia; in Germany, such persons are
referred to as “persons with limited capability to do something using their
own physical efforts”). Courts of different jurisdiction were to agree how they
should understand this concept, i.e. when such persons would need protec-
tion, when they would need social allowances or professional training so that
they could live and be socially active. Thus, the supreme courts tried to clar-
ify the contents of this concept.

However, in Russia, the idea regarding the supreme judicial body was
quite different from the very beginning. And it becomes especially frighten-
ing when one finds out that not only judges but also representatives of admin-
istrative bodies may become members of the supreme judicial body in ques-
tion; of course, this is totally inadmissible. If, however, the chairmen of all
the courts become members of this supreme body, then they in their capacity
of judges will acquire certain additional powers as compared with the pow-
ers vested in other judges. So, as a result, they will have even more powers
as chairmen. By the way, currently it is proposed to provide chairmen with
wider powers; how is this proposed to be done? It is proposed that the chair-
man of the Supreme Court should be able to transfer a judge “horizontally”
to a court of the same level, i.e. to move the judge from the court in which
he works to another court of the same level located in a different place. Can
you imagine how important those powers will be? How can this be allowed?
How can independence of a judge be secured under such conditions?

Therefore, there are two ideas which come in conflict with each other all
the time. Let us encourage all judges to apply law in a uniform manner, but
let us not make a judge uniformly apply law based on an order, at the will, or
in accordance with an expression of will of a higher judicial official, be it a col-
legial authority (i.e. the plenum) or a one-person authority (i.e. the chairman
of a court). I think this is not quite right. We should insist on the rule of law
principle and on correction of judicial errors because rights of people which
have been violated in a legal proceeding should also be restored.

Further, there is also a good idea about victims who should be protected,
not necessarily by criminal–law means. This is provided here as well. If we
can compensate a victim in a case without applying criminal penalties then
there will be no need to initiate the procedure for overturning the final judgment upon the discovery of new circumstances. I would like to add that such compensation (without having to resort to criminal penalties) can be provided on a larger scale and under less burdensome procedural conditions. Because when the victim files a claim seeking to recover damages in a civil proceeding, he does not have to prove the charges. On the contrary, the guilty person who has inflicted losses on the victim has to prove that he is not guilty of that.

In fact, it seems to me that if lawyers could discuss every such problem without stereotypes and without being blinkered (I am not sure that this figure of speech can be understood in English), using only legal arguments, without presuming that criminal prosecution is always advisable and that the public interests have a priority over the private ones (these presumptions are quite questionable), and based on the real goal — to have a violated right restored by a court — we will be able to better understand each other and the situation generally, in particular, in respect of securing a uniform approach of courts to protection of rights.

By the way, I would like to say a few words about public interests as I understand them. Veniamin Yakovlev also said the same thing: these interests are public, not those of the State. In fact, public interests can be justified solely by goals which are approved by the Constitution and protected as public interests. All of them are listed in paragraph 3 of Article 55 of the Russian Constitution. However, one more aspect, I think, should be added; so far, it is not taken into account in Russia but it is emphasized in relation to the application of the European Convention. It is emphasized in the foreign law that a public interest is justified only in a situation when its goal is to protect a private interest which cannot protect itself on its own. Thus, the contract between people regarding the State and authorities that should represent and protect the public interests arises from what every man is unable to do for himself on his own. Thank you.

VICTOR ZHUIKOV:
— I would like to comment on the dilemma which was mentioned earlier: judges being “above” other judges versus judges acting to protect other judges. The same thing happened to qualification collegiums. I witnessed how these laws were drafted; I took part in the drafting of the law on the status of judges in the Russian Federation, the constitutional law on Russia’s judicial system, and so on. I remember all those discussions, in particular, in respect of the idea to establish a collegium of judges which would protect the judges from all encroachments; that’s right, the goal was to protect them. And it was with delight that I wrote commentaries on the federal constitutional law on the ju-
Second Roundtable Discussions

dicial system, back in 1997; I wrote there that, from now on, qualification collegiums would select candidates to positions of judges based on professional criteria and, further, that they would protect judges if unjustified complaints were filed against them, i.e. that they would fight for purification of judicial ranks: they would get rid of unworthy judges and those of them who caused damage to the reputation of the judicial system and, at the same time, protect worthy ones. Five years later, I had a chance to write commentaries on a collection of works prepared in connection with the centennial anniversary of the State Duma. I was asked to write commentaries on the same law or rather an article about it. I re-read what I had written before; and I could not help thinking how naïve I had been back then though I had been an experienced judge already. I had to write about the things the collegiums were meant to protect; I did not dare to describe what they were protecting in real life. Because the transformation which Tamara Morschakova described happened to the qualification collegiums. They dismiss many judges without any valid reason, based on unsubstantiated allegations.

So this transformation has happened. I am afraid that the same will happen to those judges who will have the same goal, i.e. will be in charge of protecting other judges. The same thing will happen to them. I am afraid of it, based on my experience. Sometimes I even think that it was probably better when, in the Soviet times, judges were dismissed by the Presidium of the Supreme Soviet, i.e. a legislative power body. Well, this was not right. But back then there were very few such cases; it happened once or twice a year. Now, every year they dismiss from 100 to 150 judges, and the Supreme Qualification Collegium talks about it with pride as if it were something good. “We got rid of these and these judges because they failed to consider cases in time.” Or they would say something along these lines. This is all connected with the principle of independence of courts. It is absolutely obvious that without independent courts there can be no rule of law. Thank you.

HENRIK BULL: I have a question for Ms. Morschakova. You spoke about the concept of “judicial error”. I was puzzled because there can be various errors. Firstly, there are actual mistakes when everybody agrees that a mistake has been made. Probably, it was the judge who made such mistake; something was omitted, ignored or not taken into account. At the same time, there can be a situation when a particular provision is set out in a law with insufficient clarity, or a situation where competent lawyers would disagree as to how a particular question should be resolved.

Quite recently, the Supreme Court of Norway issued a resolution which was based on the European Convention on Human Rights. As far as I un-
derstand (the court did not express such opinion), they discussed the fol-
lowing issue: if they disallowed an appeal to be processed, would this violate
human rights? If it is prohibited to submit or present an appeal, reasons for
such prohibition must be stated. Prior to that, under Norwegian law, it was
absolutely legal not to refer an appeal to a respective instance court without
any explanation for doing so. However, the Supreme Court found that this
would run contrary to European Convention on Human Rights, if one pre-
vents an appeal from being processed without an explanation. Generally, the
above resolution is quite controversial. Some observers believe that an appel-
lation can be, so to say, prevented, and the reasons for doing so do not nec-
essarily need to be stated. But the Strasbourg Court may have its own opin-
on on this matter. What is the situation in your country, maybe this issue
of appeals has never been raised, or higher instance courts may reject ap-
ppeals without explaining the reasons why such appeals are not allowed? In
any case, there should be some system to deal with such issues. Or, maybe,
there is lack of personnel, and there should be more people who would be
able to deal with this?

TAMARA MORSCHAKOVA: This is an interesting question for me, from
a professional point of view. This question is resolved differently in different
types of procedures in Russia. I know how foreign law regulates this insti-
tute, including both the institute of an appeal and the institute of a cassation
appeal; it provides that the court may allow or disallow a judgment to be re-
viewed. There is a similar mechanism in Russia, but only in respect of review
by way of judicial supervision. It concerns judgments which have entered in-
to legal force but are challenged by parties concerned (participants to a re-
spective proceeding). It is at the stage of judicial supervision review that this
mechanism was recently introduced in Russia and it is similar to your pro-
cedure for allowing or disallowing an appeal or cassation appeal to be proc-
essed. Because in a higher court which conducts such review, one judge is-
sues a ruling whether or not the court will review a respective case based on
an appeal. For me, the most interesting aspect of your question is how such
decision is substantiated. As far as judicial practice in Russia is concerned,
in fact such decisions are not really substantiated because their justification
usually boils down to the following phrase: judgments issued in your case by
the lower instance courts are lawful and justified, and, therefore, there are
no grounds for initiating a procedure of review of your case by way of judi-
cial supervision. However, generally, the Russian law requires such decisions
and rulings to be substantiated. In Russia, there has been a long argument be-
tween, say, defense attorneys and judges — they argue if the above phrase can
be considered to be such required justification or not. In one of its resolutions, the Constitutional Court stated that a mere reference to the lawfulness and well-foundedness of earlier court judgments does not mean, in fact, that the legal requirement on justification has been complied with. So, in Russia there is just one stage which is similar to the stage where [a foreign court] decides if an appeal may be allowed to be processed. Though this is decided on the merits, rather than on formal grounds. This exists only in relation to a proceeding initiated by way of judicial supervision. Under a general rule, in the other judicial instances, which in Russia are called the appeals instance and the cassation appeals instance, be it in a civil, arbitrazh, or criminal proceeding, any filed complaint is sufficient to initiate consideration of a respective case at a court hearing. In the Russian system of regulation of justice, this is considered to be a rule which ensures the access to court, not only in relation to a first instance court but in relation to a higher instance court — an appeals instance court or a cassation appeals instance court.

**ANDREY FEDOTOV:** Unfortunately, in Russia an external or even an internal conflict arises all the time. On the one hand, judges or former judges or even lawyers who are not judges understand that very serious problems affect the courts’ work. On the other hand, we have the society which looks at us from the outside (it is not allowed inside) and sometimes evaluates the existing situation based on certain statistical data. Certain questions to the judicial community are raised by those outside it. So, generally, should the judicial community respond to them somehow? Speaking once again of statistical data, if one looks at statistical data from the Strasbourg Court, it will be clear that there are 50 countries that are parties to the Convention, however, Russia alone accounts for 28 percent of all cases considered by the Strasbourg Court.

**TAMARA MORSCHAKOVA:** It is in proportion to populations.

**ANDREY FEDOTOV:** But those questions should be answered; no one gives answers to such questions, first of all, nobody gives answers to the public at large. For example, I was totally shocked when I realized how these things are done in Russia. Recently, Echo Moskvy radio station conducted a poll. Mikhail Khodorkovsky’s attorney was interviewed by a radio host, and the host asked the audience to answer the following question: Do you know what sentence will be imposed on Khodorkovsky in his new case? The numbers were shocking: 82 percent of people said that he would be sentenced to a new jail term; and 12 percent said that there would be no new jail term. Even if
one assumes that the audience of the radio is quite specific, that those 12 per-
cent can be multiplied by 3 or by another coefficient, it will not make any
difference: this will still mean that the [people’s] attitude to the court is very
problematic. So, the question is: in this situation, when the public at large
does not believe that a court may render a verdict of acquittal, what should
be done? It is frightening that the public at large knowingly believes that no
verdict of acquittal may be rendered.

Also, there is another question. Recently, the European Court of Hu-
man Rights issued a judgment upon a complaint filed by Ms. Kudeshkina,
a Russian judge rather than just an ordinary citizen. Do you know if it was
for the first time or not when a judge applied to the European Court of Hu-
man Rights?

TAMARA MORSchAKOVA: There are other such applicants. There was
a judge from the Novosibirsky Region Court, Ms. Filatova, she previously
applied to the Constitutional Court.

MARIANA KARADJOVA: As to the European Court of Human Rights,
what was the percentage? Twenty eight percent of cases considered by the Eu-
ropean Court of Human Rights come from Russia. First of all, I agree with
Ms. Morschakova, Russia is a big country and, therefore, it is quite natu-
ral that it accounts for a significant percentage of cases and that a significant
percentage of judgments are issued in Russia-related cases. I would also like
to add some arguments to what I said. Usually, when a new democratic coun-
try ratifies the European Convention, there is always a certain initial period
when very few applications are filed from the country which has just ratified
it, and of course, this is due to the lack of information and awareness. People
simply do not know about the opportunities they have under the Convention
for the Protection of Human Rights and Fundamental Freedoms, and law-
yers generally are not sufficiently trained and informed about the procedure,
so during such initial period the number of applications from such country
filed with the European Court is small. One can look at statistical data on
applications by Russian nationals at the initial stage following its ratification
[by Russia]: the number of applications was insignificant, there were indeed
very few of them. Then, during the next period, the number of applications
and cases is increasing because people are becoming aware of the existing
opportunities, of the opportunities provided under the Convention, and law-
yers are becoming increasingly more interested in filing complaints with the
European Court. Then there is a boom period, when the number of cases
soars; this happens in other countries as well, not only in Russia. And then,
after the country receives first few judgments of the European Court, it has
to pay money in accordance with the judgments and re-open proceedings
in respective cases in the national court.

However, it is much more difficult for a country to realize that certain gen-
eral measures need to be taken, in particular, that it might need to amend
its legislation. So a country sometimes would take specific measures in re-
sponse to judgments issued by the European Court but would not take re-
quired general measures. Later on, the European Court considers some cas-
es similar to those considered before, the judgments it issues start to repeat
themselves, because cases [from that country] are similar to each other, and
respective judgments are generally similar to each other as well. Then the
country would have to start paying large amounts of money based on the
European Court’s judgments, and at this point the only way to decrease the
number of applicants is to amend the country’s legislation; so, it will have
to take general measures.

I would like to emphasize that this problem exists not only in Russia. For
example, a few years ago a similar situation existed in Italy. Italy was the
country from which the European Court received the greatest number of cas-
es because in Italy civil cases took a very long time to be considered, and be-
fore Italy amended its legislation hundreds of similar cases from Italy were
referred to the European Court based on similar grounds.

I hope I made it clear that this problem exists not only in Russia. I had
to answer the same kind of questions in my country, in Bulgaria. Why there
are so many cases from Bulgaria? So it is just the period when this is so. Yes,
because Bulgaria used to account for approximately 3 percent of cases con-
sidered by the European Court, while Bulgaria is a very small country; for
such a small country, 3 percent is way too much.

Now I would like to discuss your second question about cases consid-
ered by the European Court where applicants were judges. There are cas-
es in which applicants are judges from countries other than Russia. Mostly,
such cases are related to a situation where a judge was interviewed by mass
media, made statements or expressed his opinion regarding particular cases
and subsequently a court found that it was inadmissible, affected the court’s
impartiality and made one doubt whether the judge was impartial.

As to the recent case involving Russia, case of Kudeshkina, you know that
the judgment was made against the Russian Federation. This was a judgment
that was really hard to make, this was a very complicated decision. I think
you know that there were four judges who were in favor of the judgment,
and three judges who were against it, and the Russian judge had his dissent-
ing opinion. As far as this case is concerned, I think, it was mostly related
to a statement made by Ms. Kudeshkina when she was interviewed by mass media. The court ruled that she had publicly disclosed very important information, and, so far as Article 10 of the Convention is concerned, I think, the question was whether or not measures taken in respect of Ms. Kudeshkina had been commensurate because she had been dismissed. I think if some other measures had been taken in respect of Ms. Kudeshkina (for example, it could be disciplinary measures), then the court could have delivered a different judgment. I do not know what was the decision of the Judicial Council, what measures were taken, but I know that Ms. Kudeshkina was dismissed. However, if she had been dismissed, then there still might be another judgment made in this case. I do not know it very well because it is a recent case, it was considered by the court not so long ago, and it is very complicated. Let us see if the precedent practice would continue in this case.

**TAMARA MORSCHAKOVA:** I am very glad that we heard here about the European Court. I have a personal view (but I think that this view can be shared by my compatriots who are present here) that the expression “Kudeshkina v. Russia” is nothing but a mere formula, a usual title for a judgment which was made by the Court. This judgment is made against Russia but, essentially, this is a judgment in favor of Russia. I want to say this because we have a limited range of methods which can be used to restore order within Russia and for our own good, not for someone else. We need such order, and we need to ensure that at least the provisions of our Fundamental Law are complied with. It is well known from the theory of constitutionalism and it is so in all countries that the European Convention always serves as a fallback position to protect their national constitution. So the only thing I want to say is that this judgment is made in favor of Russia, in support of its judicial system and the independent status of its judges, and it is very important for us to ensure that where the European Court sits people would not think that we see an adversary in the European Court. It is our supporter, it is a defender of our Constitution.

**MERJA NORROS:** As far as the European Court of Human Rights and its judgments are concerned, I can tell you that when Finland became a member of the Council of Europe (I think this happened in 1989, I was already a lawyer back then), there was very powerful resistance in Finland, the judges were against it and kept saying that they did not need it. By then the Ministry of Justice did lots of work, there was a big project, and a big memorandum was prepared to explain what were the consequences of the country’s becoming a party to the Convention and how the Convention was to be ap-
plied. The memorandum contained a long list of articles and laws which were to be changed and amended to make proceedings in Finland just and fair. We made those amendments over a long period of time, and gradually the number of reservations decreased as well. For example, for a long time in Finland there were no oral proceedings in the appeals instance courts, any such proceedings were held only in the written form. So we had this kind of problems. However, it turned out that now there is no such resistance. How many years passed? Twenty years. Twenty years passed, and there is no resistance, and it turns out that those problematic and, if one can say so, painful aspects, to which the European Court pointed, are indeed problematic and painful. That is, the most acute problem in Finland now is that sometimes a proceeding can last for too long. I think we have got already about ten judgments stating that proceedings in Finnish courts take too long, and the Finnish Government has taken certain measures to address this problem, so now we treat the European Court’s judgments with great respect.

Though we always tend to resist and disagree when we are being pointed at, I still think that in any such situation we should very thoroughly review it and try to understand if there is anything that we can improve in the course of a proceeding and if we need to introduce a new practice. I am saying this in relation to the European Court of Human Rights.

Many of you know that I am writing a doctoral thesis on legal assistance in civil cases; it is very difficult to compare two legal systems, for example, the legal system of Finland or any other Western European country, on the one hand, and that of Russia, on the other hand, and to do so objectively and with a kindly spirit because you have to deal all the time with different institutes and different concepts and terms which raise lots of questions. Sometimes, a term may look similar to one we use but its content can be totally different, and sometimes it is the other way round: a term may look weird but it turns out to be the same. I think (for example, it is very important for me) that if I am to compare something, this does not mean that I want to identify some problems or drawbacks. Firstly, I want to provide information on what is going on in Russia, and, therefore, I am very pleased to be here and listen to your discussion. Secondly, recently I read a book containing different aphorisms, and there was one by Vladimir Putin; he said that if a person is satisfied with everything he must be a complete idiot. So, of course, we need to improve the system. I think that sharing one’s experience is very important but it is not everything; for example, not only Russia should learn to act in accordance with Western standards, we may consider a different approach as well — to look what we can find in Russia’s system which may be useful for us. I have been working with the Ministry of Justice for 15 years,
and we first met with Mr. Yakovlev in Lappeenranta in 1999. Then Finland for the first time presided in the EU, and we held a seminar, Russia had just joined the Council of Europe and had not yet ratified any conventions on criminal cases (for example, the convention on extradition) or any of the Hague Conventions, except for the Hague Convention of 1954. So if you look at this 10-year period you will see a positive trend, you will see that certain progress has been made. Of course, the topics that we discuss here (that is, implementation and application of law in practice) are very important. I think (and I will write about this together with Peter Sahlas) that ratification alone is not sufficient; something else is needed to enable one to apply law in practice in a proper manner.

ANATOLY NAUMOV: During our discussion in the morning there were certain disagreements between the two groups — the defense attorneys and the judges who were present; frankly speaking, there were even certain hard feelings. It all depends on one’s standpoint. These positions are different: if one looks at the situation from the office of a deputy chairman of the Supreme Court or that of the chairman of the Higher Arbitrazh Court, the position will be different from that of an attorney who deals with realities in courts despite the fact that the process in Russian courts is now adversary. What is the attitude of the court to a defense attorney and to, say, a representative of the prosecution? There is still a [difference]. Of course, it would be strange for our Western colleagues to hear this but so far nothing has changed in Russia in this respect. How a representative of the prosecution is treated in court, and how is a defense attorney treated? It is true: the attitudes are different, and no command on the part of top authorities, no decision can help change it, because it is the issue relating to the country’s legal culture, so any change will take certain time to occur.

Now, I would like to say a few words about our monograph. As far as the application of civil law institutes in other branches of law is concerned, I believe that we probably need to be a little less radical in certain areas. The authors criticize the position of the criminal law and criminal-law science concerning the concept of “theft” because our criminal law provides for a “theft in favor of third parties”. Of course, when one talks about such classical forms of theft as “stealing in favor of third parties”, most probably I would agree with such criticisms. The same true of robbery or burglary, for example. I would agree with the authors. However, if we look, for example, at such types of theft as misappropriation and fraud (misappropriation in particular), then [such theft in favor of third parties] would not seem to be a fictitious concept. Well, I would probably agree with what was said about gratui-
MIKHAIL SUBBOTIN: Today Veniamin Yakovlev said that he read a transcript of the first round table discussion and that he had an impression of a “problematic and somewhat gloomy situation”. And then Anatoly Naumov supported his opinion and said that evaluations should be less severe, kinder, and generally “less radical”. Supposedly, these are just realities of the current historical period, there is some progress, and generally, everything is normal. Still, I would like to hear what you think about certain specific phenomena: are they normal or not? Yes or no? Because not everything that grows is necessarily normal. A tree can grow as a normal tree or, alternatively, it can become gnarly, decayed or rotten. So, why should we talk about this as if it were perfectly normal? An objective evaluation cannot be gloomy, severe or radical; a phenomenon is simply what it is. For example, in a book, would you describe real events that take place in this country or, alternatively, would you discuss the existing situation in a philosophical and detached manner, taking into account the peculiarities of the current historical period?

I am saying this because the uniformity of the judicial system and exclusion of legal “double” and “triple” standards constitutes one of the most important preconditions required to improve the country’s business climate.

Speaking today, Mr. Yakovlev mentioned that if there had been no private law, no [current economic] crisis would have occurred. He implies that we have to pay for a market economy which emerged in Russia and for Russia’s being part of the world economy. I think that this statement is not quite correct. On the face of it, everything seems to be similar: they have a crisis, and we have a crisis. However, a crisis may arise as a result of a “one crop” [i.e. undiversified] economy rather than as a result of the latter’s transformation into a market economy, and therefore, a cyclical one. A “one crop” economy is an economy which relies on exports of a single particular resource. When the price of such resource drops, such economy undergoes a downturn. Such economy is not necessarily a market one. The same happened to the Brezhnev-era economy following the drop in international oil prices in 1981-2, at the end of the second oil shock of 1970s, when the world oil prices dropped. In exactly the same way, the Gorbachev-era economy underwent a downturn after 1986 when the oil price dropped by 50%. That is, the crisis per se does not prove that the Russian economy is a market one. In a nutshell, I would like to say that there are some new myths which appeared recently. We should...
deal with such myths more carefully and we need to understand that the creation of public trust in a real sector of the Russian economy will, in fact, depend (among other things) on how successful your work will be. And I tend to disagree with those who think that there is no hurry, first it will take some time to publish the book, then certain amendments will be made to the legislation, then certain administrative decisions will be made and that, therefore, one should not overestimate the importance of such books. I think this is not so: business is a very sensitive animal and it feels the direction of the statesmen’s thought. Businesses were very well aware of the direction of the statesmen’s thought after the events of 2003; I am sure that in exactly the same way they will react — with gratitude — to a change in the above direction even before other (legal and administrative) terms and conditions will be changed. Maybe, lawyers tend to consider the current problems in Russia more calmly but in the current economic crisis situation, economists feel that all hell is about to break loose and that certain decisions are required to be taken without a delay in order to launch investment projects and help improve the economic situation.

I am talking about very specific and pragmatic things: businesses react to an improvement or worsening of the business climate in a perfectly understandable way. Generally, to change their behavior patterns (i.e. to stop fleeing the country, thus voting against the economic policy currently pursued by the state) and start actively working in this country, businesses do not necessarily have to wait till all required legal documents are adopted and all instruments improving Russia’s investment climate are in place. Recently I came across some statistical data according to which since the start of the crisis, more capital was withdrawn from the country that was invested in it from abroad for the last 13 years... That is why it is high time to revise the economic policy which was pursued during the recent years, otherwise the Russian economy will inevitably continue to head towards a dead end.

During these years, the attitude of the State to private businesses and foreign investors radically changed: it pursued its policy of “creeping nationalization” on a large scale doing so in the form of so-called “velvet re-privatization” and the “return of the State in the fuel and energy sectors”, moving from the Yukos case to scandals concerning Kovyktka and Sakhalin 2 projects. Therefore, when the crisis commenced, the country was already weakened since some institutes had not been yet created and other institutes had already

1 Translator’s note: apparently, he refers to the imprisonment of Khodorkovsky and subsequent events in his case.
been destroyed. Management of large industrial complexes became less efficient as a result of the activity of state-owned and semi-state-owned companies that were intensively growing and because of a series of actions aimed at limiting the activities of foreign companies (so called “Putin’s shears”\(^1\)) which culminated in the adoption in 2008 of a law on strategic industries. That is, right before the crisis, the authorities continued to push the foreign investors out of the country. In effect, foreigners were offered to agree to the following: exchanges of assets, their role of minority shareholders in major companies, their function of contractors for Russian companies under major projects, and the acknowledgement that Russian state-owned companies will necessarily play the dominant role and will not want to generously share revenues with foreign companies.

**ANDREY FEDOTOV:** Mr. Naumov, I have a question for you. We talked about it with you, and I expressed the following idea (it was not even my idea, I believe it was Igor Novikov’s idea): from a conceptual point of view, the existing Criminal Code was created when it was primarily used (at least, in respect of crimes against property) as an instrument designed to fight against the private property and embezzlement of socialist property. It seems that from a conceptual point of view, the existing Criminal Code has not changed in this sense. I would like to hear your opinion on this matter.

**ANATOLY NAUMOV:** Of course, I cannot agree with that. Despite the fact that the Criminal Code was adopted in 1996, I can assure you that the principles underlying the Code were entirely different. This is understandable since the Constitution had been already in place, and the principles of freedom of economic activity, competition, and equality of ownership rights had been declared. So it is totally incorrect to compare in this respect the existing Criminal Code with the Soviet-era Criminal Code; I would like our Western colleagues to be aware of that because ideological principles underlying the two Codes were totally different.

The former Criminal Code presumed the supremacy of socialist ideas and socialist ownership. The existing Criminal Code is based on totally different ideas, and the human rights and their protection constitute the cornerstone of the existing Russian criminal law. The Soviet criminal law always started with crimes against state. It is for the first time during the entire Soviet and post-Soviet period that the Special Part of the Russian Criminal Code starts (as in most other countries) with crimes against human life and health, and

\(^1\) Translator’s note: this expression is rarely used if at all.
then it covers crimes against human rights. Further, when setting out the con-
sequences of, say, economic crimes in the Criminal Code, priorities change:
first, they are set out in respect of individuals, then for the society, and finally, for the state. So, I will repeat it once again, the positions underlying the current Criminal Code are entirely different.

At the same time, it is true that some fine-tuning is still needed because, of course, public relations have changed, and we need to improve our criminal law in this respect. How should we do this? Anyways, the criminal law should at all times protect the interests which it is meant to protect as well as protect the human lives. Thirty thousand people are murdered every year in Russia. Human lives are protected only by the criminal law. Of course, to the extent it concerns the human lives, the criminal law should be strict; it should not turn into something that would just wag its finger at potential criminals. Generally, in terms of the level of sanctions set out in the Russian Criminal Code and its strictness, it is similar to criminal codes existing in Europe. As far as its strictness is concerned, the Russian Criminal Code is quite comparable to the criminal law of France, Spain, or Germany. In comparison, for example, with the laws of the United States, the Russian Criminal Code is more liberal and less stringent, but this is quite natural as Russia is closer to Europe than to the United States.

But, in particular, distortions occurred in relation to economic crimes. In my paper I tried to show, in different ways and based on my analysis of judicial statistical data, that criminalization of entrepreneurial activity does not bring any positive results; instead, it creates fertile soil for corruption in state authorities and law enforcement bodies. It does not bring any results, the more so as the respective Article is used against small and medium companies rather than big ones. This Article is used as a threat against small and medium businesses. So, my idea is to preserve the strictness of the criminal law where it should be strict. Maybe, the criminal law even should be amended to make it closer to the U.S. law, i.e. more stringent. But as far as economic offences are concerned, there has been an overkill, and in a number of cases I tried to show, based on specific articles, that entrepreneurial activity is artificially criminalized.

IGOR NOVIKOV: There is one very interesting question relating to a single concept of law. I do not mean that we should argue which law (the criminal law or the civil law) is more important; I am talking about a conceptual

---

1 Translator’s note: allegedly a reference to Article 171 of the Criminal Code of Russian Federation.
Second Roundtable Discussions

approach to a model of law of a new state which develops in a certain direc-
tion. I do not mean that we should reject every prior achievement and every-
thing that was done before. But apparently there is a dangerous trend which
should not be underestimated. Why do I think so? Because similar things
happened in our history, and it seems to me that the lack of a single concep-
tual approach is fraught with danger.

Today speakers already discussed which law is more important but, in my
opinion this question was analyzed from a different perspective, [not from
the perspective it should analyzed from]: which law, from a conceptual point
of view, should determine the relations with the State? So, if one assumes
that Russia is trying to establish market relations and protects private proper-
ty, then the concept underlying Russia’s market-oriented Civil Code should,
in accordance with the principles of logics, be embodied, first of all, in such
branches of law as the criminal law and the administrative law which must
not contradict the said concept.

In Kazakhstan, the Criminal Code has apparent conceptual defects caused
by the Soviet-era legacy when the Criminal Code was successfully used to fight
against entrepreneurial activity as such. At present, it is also efficiently used,
both by various clans and the authorities (I would not now focus on that)
to fight against somebody based on specific rules of criminal law (regardless
of whether such rules are good or bad).

I would like to focus on one more thing. You were absolutely right that
there have been certain changes in the Criminal Code: the chapter on human
rights was placed in the beginning of the Code, articles on crimes against state
were moved farther from the beginning, and Article 58 was deleted; this is all
very good. But no matter how much the Code is praised, the situation is not
getting better. Those particular cases that you mentioned and those mentioned
by other speakers attest to the existence of a dangerous system, i.e. the sys-
tem characterized by its lack of protection. Any one of us can turn out to be
totally unprotected; such lack of protection arises as a result of imprecise or
ambiguous language of provisions of the Criminal Code and more precise
language of tax laws which, for some reason, have never been evaluated ei-
ther from the standpoint of the presence of elements which might give rise
to corruption or from the standpoint of the level of their market orientation.
This would represent the conceptual approach to the law which is required
and logical. Recently, the Supreme Court of Kazakhstan issued a regulatory
resolution on false entrepreneurial activity, it has been posted on [its] web-
site and is publicly available. Do you know what is most surprising about this
resolution? Intermediary services, commercial intermediation, are included
in corpus delicti. Can you imagine that?
ANATOLY NAUMOV: As it was in the Soviet [Criminal] Code.

IGOR NOVIKOV: I do not exaggerate, it is exactly so, commercial intermediation is deemed to be a criminal activity which is explained by the Kazakhstan Supreme Court. I think, this may be caused by someone’s lack of education or erroneous concept or, alternatively, this was done based on a clear and unambiguous instruction of the authorities. When I refer to authorities, I do not mean any public interest, I mean the interests of individual government officials or their clans and the like. What am I worried about in this connection? Now I am worried not only because problems relating to the lack of legal protection afforded to me or any other people working in the private sector arise at the level of the country’s legislation; I am also worried because the Supreme Court as an independent body of judicial power, “sings in complete unison” with the legislative and executive branches of power and fully loses its independence which could guarantee my legal protection in respect of certain issues. I do not know what is going on in Russia but in Kazakhstan we feel that we are crossing some dangerous threshold after which people would feel unprotected. I am surprised that so many issues are discussed with that level of openness and surprised to hear many ideas about which the round-table participants speak openly. I am afraid that in Kazakhstan it would be difficult to hold such discussion openly in a similar manner. It is becoming a taboo already, it is becoming a prohibited subject.

There is one more thing I would like to tell you about in connection with my concerns about the entrepreneurial activity. In Kazakhstan, people are increasingly more often held liable without being guilty, for so called “consequences” of the entering into transactions with enterprises which later on were deemed to be fictitious enterprises. In other words, let us assume that Igor Novikov, as a law firm, retains developers who renovate his office. Five years later, it turns out that the developers had registered an enterprise while unwilling to engage into entrepreneurial activity. In such a situation, firstly, we would not be allowed to set off any amounts which we paid for the renovation, and, secondly, we would have to pay income tax for the period of 5 years assessed on the set-off amounts and penalties for the failure to pay the income tax and VAT to the state budget in due time. If this amount fits within the limits set forth in respect of administrative liability, I will be held liable for an administrative offense. However, if the amount in question exceeds a certain statutory threshold I will be held criminally liable. So there is a chance that I will be held liable for actions of some third party, with my reputation, property and freedom being put at stake. This situation results in the lack of legal protection about which I spoke before.
When, in the course of my work, I used the Kazakhstan Criminal Code and, previously, the Criminal Code of the Soviet era, I found out that their articles dealing with human life and health which had been borrowed from legislative acts of the tsarist Russia, worked very well, were sufficiently clear and understandable and could be normally used (even if there could be any abuse of those articles such abuse would itself be very close to a crime). However, to the extent the Kazakhstan Criminal Code concerns the economy and, in particular, the economy of the market period, it is an instrument which is used to fight against us and which can be used by malevolent persons, and we might end up being totally under control of such people.

I have a question: is a conceptual model of development of the criminal and administrative law sought-for in Russia? Is it sought-for and used by Russian authorities? Why do I ask about it? Because if it is not sought-for we need to knock all the doors, since otherwise we might end up in a situation in which, we thought, we would never be again.

ANATOLY NAUMOV: Igor Novikov asked a very difficult question, and there is no unequivocal answer to it. On the one hand, the criminal code was initially drafted as a code which should, after all, protect the market economy; it was one of the principles underlying it. But it was during the transition period. What kind of problems are there now? Why are people worried? They are worried because of how the current world economic crisis is perceived. In the existing situation mass media and everybody else keep blaming everything on liberals: “All this is a result of the course of actions chosen by liberals, that is how a liberal economy works, [this is because] the State no longer plays its role in the economy.” It is implied that everything should be blamed on the market economy, that the crisis emerged because of the market economy as such. OK, what should be done then? Should we try to make a transition from the market economy to a centrally planned one? Of course, not. There has already been a historical experiment of this sort.

Therefore, what are we talking about? Notwithstanding the fact that all the drawbacks and, of course, the current crisis are the result of the market economy and that a crisis can emerge at any time, a downturn is always followed by an economic boom. Karl Marx wrote about this (and nobody has disproved Marx’s theory). The most important thing for me now is not how we are going to live in the time of the crisis but what will happen after the crisis is over, how we or other countries will recover and live after that.

TAMARA MORSCHAKOVA: I would like to say about the idea of the rule of law in the form of the general principles of law. Well, look how the Supreme
Court defined the term “income” which serves as a basis for bringing criminal charges against an entrepreneur for his illegal entrepreneurial activity. I would like to ask a simple question. There is a certain requirement which was not provided for by law but was set out in a resolution of the Plenum of the Supreme Court; it provides that losses from such activity should be calculated with the account of not only profits but expenses as well. This requirement expressly violates Article 1 of Protocol No. 1 [to the Convention for the Protection of Human Rights and Fundamental Freedoms] on protection of property, does it not? I believe that it does flagrantly violate Article 1.

All the time I want to find some general maxims on the basis of which we could proceed in making proposals aimed at improving the legislation and judicial practice. I can give you an example which is unrelated to criminal law. A private notary in Russia pays taxes as provided for by a special rule of law which was recently included in the legislation on notaries’ activity. According to the legislation, a notary provides certain services free of charge, he is obliged to do so because in that way he helps the State to protect most vulnerable and poor. So, notaries do provide such services free of charge but then a notable amendment is made to the legislation: a new article is introduced whereby the amount which has not been received by a notary for services he provided free of charge may not be deducted from his taxable base; on the contrary, such amount should be included in his taxable base.

You see when we compare regulation in different branches of law we see some similarity and such similarity apparently results from the same perceptions existing in our minds and in our culture which formed over many years while the law was completely different from the one that exists in Russia now. It seems to me that everything that we see, be it in the Supreme Court, the resolution of the Plenum, or the legislation on notaries’ activity, is nothing but Freudian slips in their pure form: we reject profit though we pretend that we have the market-oriented Criminal Code.

In addition, we reject many maxims. I was also intrigued by the problem described by Anatoly Naumov in the section of the monograph that he wrote. This problem relates to the concept of cumulative offences and amendments to Article 17 [of the Russian Criminal Code]. Anatoly Naumov was absolutely right when he wrote that the law-makers wanted to provide that no one may be repeatedly held criminally liable for the same offense. So, he wrote: there is *corpus delicti* in respect of which, in accordance with the law, the committing of another crime constitutes an aggravating circumstance which implies that the punishment should be more severe (for example, the Code provides for such notable *corpus delicti*, namely, a murder coupled with a violent robbery); so the law-makers included the rule in the General Part of the Crim-
inal Code that this should not be deemed to be cumulative offences. Since the Criminal Code’s rule provides that liability shall be imposed for a murder coupled with a violent robbery, then the criminal should be punished for the murder, rather than for the murder plus the violent robbery because [generally] a violent robbery constitutes a separate corpus delicti. However, what happens in the judicial practice? The practice is quite different. The Supreme Court wrote: if a murder is coupled with a violent robbery, it should be deemed to be a crime falling under two articles [of the Criminal Code], namely, under Article 105 (on a murder coupled with a violent robbery whereby the violent robbery, as a cumulative crime, is viewed as an aggravating circumstance) plus under the Article on an assault related to robbery (which also provides for an aggravating circumstance, i.e. the causing of particularly severe injuries, including causing one’s death). It is clear that this flagrantly violates the principle “not twice for the same offence”.

Further, the Supreme Court insists on such position: the rule of law which would otherwise enable one to deal with such situation does not apply to ideal cumulative offences, and this is also supported by the Russian legal theory. Why does the legal theory provide that this rule applies only to real cumulative offences but not to ideal ones? It does so without any valid reason. Moreover, I need to say that the lawmakers (though they made the above-mentioned reservation ruling out the possibility of cumulative offences) are to be blamed as well. What for are they to be blamed? Because the lawmakers described the same wrongdoing using different wordings in two rules of the Criminal Code: first they describe it as a murder coupled with a violent robbery and then as a violent robbery coupled with a murder. I would not even mention the question of classification of cumulative offences here but I would like to ask one more question: given that there is such a double criminal prohibition set forth in respect of the same action, that the courts and law enforcement officials may choose (we assume that the law is applied in a uniform manner) between the corpus delicti provided for by Article 105 and the corpus delicti provided for by Article 162, how possibly can we place the courts and law enforcement officials in a situation when they need to choose between the corpora delicti? This practically destroys everything, including the justness of punishment and the prohibition which determines the justness of criminal punishment (“not twice for the same offence”). And you see this is also a Freudian slip. Because, nonetheless, we proceed from the old Criminal Code which was created based on rules of the branch, it never took account of rules that were unrelated to a particular branch of law or to regulation generally, or even principles of equity and natural justice. That is why I am always concerned about the basis for the uniformity we are talking about. Current-
ly, the Supreme Court ensured the uniformity of judicial practice in respect of all cases where a murder is coupled with a violent robbery, so such cases are classified as cumulative offences. So this is how this “wonderful” uniformity works. Moreover, I read the following explanations even in the criminal law literature: well, they would say, how can this be done in a different way? What can we do rather than deem such a crime to be cumulative crimes — as we can impose a more severe penalty based on Article 105 than under Article 162, can’t we? Such reasoning, in my opinion, is nothing but another Freudian slip. So, apparently, the main idea of the Criminal Code is not to justly determine the grounds for imposing criminal liability; this means that one should impose as severe punishment as possible and by all means find ways to impose extremely severe penalties that may be imposed.

Unless we turn to principles of equity and natural justice, the theory will not be able to create anything on its own. There are very many lawyers who agree with this position (“we should do it in this way and not in any other way”), and this illustrates perceptions of legal theorists, not only those of courts and law enforcement officials. That is why we cannot sort this all out. The same thing is true in respect of the explanations of the Plenum [of the Supreme Court] given in connection with money laundering cases. What is the position of the Plenum? “Well, all this private entrepreneurial activity taken as a whole is evil”, and these are Freudian slips as well. One cannot justify such perceptions and statements by explaining that during the so-called “wild 1990s” every piece of private property had some awful criminal origin, because at present normal development of law will only be possible if we turn a blind eye to all such things. How many times a tax amnesty, “summer cottage” amnesty or some other amnesty was proposed? We cannot use, as our starting point, the time when there still were no rules set forth by the State. As Veniamin Yakovlev rightly said, there was time when private entrepreneurial activity already existed but there were no rules for it. Who is guilty of that, the people who engaged in such activity or those who were to have established the rules?

That is why it seems to me that our branches of law still fail to take account of those general principles of law. Otherwise it would not be possible to reject Article 1 of Protocol No. 1 to the European Convention by means of an express rule of the criminal law, explanations of the Plenum of the Supreme Court, or a rule included in the legislation on notaries. This is not just a treaty, it is a commonly recognized provision of international law which concerns, in particular, property and protection of property.

What happened with money laundering? You gave a wonderful example of how our lawmakers tried to pretend that they took account of internation-
al agreements on fight against corruption signed by Russia. This is, indeed, a wonderful example: everything that the lawmakers did should not have been done because it had been already duly taken into account. The same thing happened with respect to money laundering, there was no need to take account of it, however, we continue to do so. There was a buzz about so called “restoration of confiscation”\(^1\). What kind of penalty did we restore that we could not impose before that? If something is acquired by criminal means then it is subject to mandatory seizure. Everything is set out in the law, is it not? If only you knew how many times I heard criticisms from high officials in connection with alleged violations by Russia of international conventions (allegedly Russia violates such conventions because confiscation of all property rather than one’s property acquired by criminal means could no longer be applied as an additional penalty) and in connection with our alleged connivance with criminals. And generally, at the time when the Criminal Code was drafted, there were some good ideas and it was meant to abandon previous practices, but all the time it was “reconciled” with prior law. Whenever someone tells you that “you connive with criminals, you destroy prosecutor’s office, you introduce the adversarial principle, or you are doing something else along these lines”, such statements reflect old ideas. We will not be able to improve the situation unless and until we conclude that both the judicial practice and the legislation should be based on something that corresponds to general legal principles.

Further, there are some strange rules which accuse people of something that is not clear enough, for example, in a situation when terms and conditions of licensing have been violated. Let us look, for example, at the terms and conditions of licensing applicable to a bank; in which acts have they been set out? They have been set out in acts of various levels, these are not just government acts, these can include even regulations issued by the Russian Central Bank. May criminal liability be established in such a way? Criminal liability is not just that certain participants of the banking sector will lose their licenses or will be subject to administrative penalties in the event that they fail to comply with terms and conditions of their licenses. Moreover, will the licensing system in Russia be ever evaluated by someone from the standpoint of various methods of legal regulation? Licensing, what is it? What method of legal regulation is it? Well, this is a purely authorization-based method of legal regulation: to be able to do certain things, one needs to obtain authorization. Long time ago other countries (could our foreign colleagues

\(^1\) Translator’s note: it was proposed that confiscation of property should be included anew in the Criminal Code as a criminal penalty
correct me if I am wrong) made a transition to a different system: there are certain standards that need to be complied with. If someone in the course of his business does something that does not comply with applicable standards, this person will be deprived of his right to engage in this activity or held liable. But in Russia, everything is subject to licensing now.

Therefore, I tend to agree to a greater extent that, regardless of many efforts embodied in the Criminal Code and many other laws to move away from this authorization-based method of legal regulation to something else, we have not made and, of course, currently will not make such transition, the more so because of the crisis. Though I fully agree with what Mikhail Subbotin said — that the “crisis” (and, probably, not only banks can say so) exists in people’s minds and that it enables lawyers to be relieved (at least partially) of their responsibility for the phenomena that continue to emerge in Russia as a result of their projects and ideas though such ideas are not legal ones. I wonder what should we do to compile of sort of a doctrinal manual containing those general legal ideas which should be mandatory for all? I do not know. I would recommend following international standards. In this sense, from my point of view, the position of, say, the European Court of Human Rights might be the most efficient instrument of modernization of our legal system.

Some time ago I proposed one bold idea which the Strasbourg Court would not accept for a long time yet (because of its tactfulness and commitment to respect national legal systems), though this idea would be very useful for Russia, for example. In my opinion, in the event that in order to comply with judgments of the Strasbourg Court certain general actions are needed which are planned and recommended by the Committee of Ministers [of the Council of Europe], such actions may be carried out in Russia in a very simple way, without applying to our law-makers and the Russian government. I believe that our Constitution and the Law “On Constitutional Court” provide sufficient grounds that the Committee of Ministers might need to apply, when fulfilling judgments rendered by the Strasbourg Court, to the Russian Constitutional Court requesting that the latter deem as unconstitutional certain rules of law which have to be repealed in order to eliminate certain kinds of violations specified by the Strasbourg Court. This is a very simple way which does not require one to apply to the Russian parliament or prove anything to the Russian government; no endless approvals and authorizations would be needed. This is very simple because, in accordance with the Russian Constitution, courts may raise the issue of possible failure of a national law to be consistent with the Constitution; further, the Strasbourg Court falls within the category of such courts which acts, in relation to Russian cit-
izens, on the basis of the Russian Constitution and is recognized to have jurisdic-
tion to so act, therefore, pursuant to the Russian Constitution, it may raise such issue as well.

Thus, we need some super-ideas, that is, ideas originating at a supranational level rather than at a national level. I understand that the measures that I am talking about would be considered extreme ones (or, in case of Russian lawyers, super-extreme ones) but they are efficient; otherwise, in what situation will we be all the time? Russia was the only country which has not ratified Protocol No. 14 to the European Convention improving procedures in the Strasbourg Court and its consideration of cases. So, is Russia able to prevent Europe from moving towards efficient procedures? Of course, not. Therefore, the problem should be solved in such a way that it would be possible to make any country (not necessarily Russia) ratify what it should ratify. Russia has not ratified Protocol No. 6 on abolition of the death penalty; so far, Russia does not violate anything just for a single reason: currently the death penalty is not applied in Russia since not everywhere in Russia one can be tried by jury. We are saved by this temporary rule provided for by the Russian Constitution; it is temporary because it was initially drafted in a way temporary provisions are drafted and contains the following words: “from now on, till abolition of the death penalty”. In fact, the death penalty was abolished in Russia long ago because the signing of Protocol No. 6 constitutes its abolition. Everybody knows that by virtue of the Vienna Convention, a protocol that has been signed but has not been ratified by a country has the same legal force for the country and prohibits the country that has signed it from carrying out any actions contrary to the subject matter and purpose of the treaty. We may not apply the death penalty, it has already been abolished in Russia, but members of the Russian parliament continue (whether in order to please the public or taking pride in their unprecedented independence from the world community) to insist that the death penalty still exists in Russia. Well, it does exist on paper but it is non-existent from the standpoint of the existing system of law because, in accordance with the Russian Constitution, an international treaty signed by Russia prevails (regardless of whether such treaty has been ratified thereby because there also exists the Vienna Convention on the Law of Treaties). Unless we find some starting point which should be fixed somewhere above our national law we will not be able to ensure that national regulation in Russia is adequately consistent with maxims of law, right? There will be no rule of law because the rule of law is not the same thing as the dictatorship of a law, is it? A law can be whatsoever, it can provide for “killing everyone”, “beheading everyone” or “calling everyone the same name”, as it happened in Nazi Germany, so
it can really be anything. Most of all I am afraid that bad laws will be widely used as a basis for uniform judicial practice; I reiterate the issue from which I started and which concerns me most.

ANDREY FEDOTOV: When I listened to Igor Novikov, I had a déjà vu feeling — he described as upon the expiration of five years a legal entity would be suddenly deemed to be a “fictitious entrepreneur” and another legal entity or individual which acted in good faith all the time would be punished for that. In Russia the person Igor Novikov talked about is called a “bad faith taxpayer”. This expression was used in one, two or more resolutions of the Constitutional Court (I am not sure about their exact number). What did the tax inspectorate immediately do? It built a whole concept based on the above expression; though the tax law does not provide for one’s liability for other persons, a taxpayer is always responsible for himself only, the same things happened in Russia: representatives of a tax inspectorate would check people who some time ago purchased electric sockets or some other stuff and would find out that the seller of such goods has failed to file tax reports. Then the tax inspectorate would say to such person: “You are a bad faith taxpayer because you traded with a non-existent company” and would punish him in the same way.

The thing is, our law generally proved to be not ready for the new conditions and new public relations; the Civil Code we adopted is good but, unfortunately, this has not helped us. When Tamara Morschakova says that we need some principles of equity and natural justice and supra-branch principles, I fully agree with her. Why is this so? Because when we fail to do so, such things as described above start to happen and sometimes it happens on the basis of something that the Constitutional Court said inadvertently.

Strictly speaking, the reason for that is not that we have good private law and bad public law; unfortunately, in Russia, there are certain unwritten principles that are used in public law. We are talking here about principles of equity and natural justice, but [in public law] its own different principles apply, and, in addition, its officially proclaimed principles differ from those that are actually used. In addition, it is obvious that there is some presumption of guilt, a certain presumption that private property (in its static condition) should be permitted at the end of the day but it should not be permitted to the extent it involves entrepreneurial activity. So there is some modified idea of an individual or company being a sort of “state-owned slave” that may be treated in any way whatsoever because the State does not consider itself to be bound by law. From my point of view, as far as principles of equity and natural justice are concerned, the most important of them is the principle whereby the
State should not only declare that it is bound by law but should also comply with its declaration, which is not the case now. This should be the case, but in the real world, we see quite the opposite.

In my opinion, it is quite clear that the branches of Russian public law are not up to the current conditions to such extent that we can feel it, unfortunately, every day. As Elena Novikova said, just look at any branch of law, be it environmental law or tax law, i.e. any public law branch where an individual may not decide on his own what rights he has and what he can do with such rights — strange things happen there and they start to happen at once. That is because there exists the absolute idea that the State is not bound by law. If we keep silence rather than discuss the problem, most probably, we will not be able to move anywhere, and in this sense I very much like the idea proposed by Tamara Morschakova – that the State is bound by law at least in terms of its international agreements. I also think this is the only possible way to deal with the situation because, frankly speaking, I do not see anything within Russia that can be used for that purpose.

We also correctly stated that there still might be some illusions at the level of judicial practice, while there can be no illusions as far as legislative regulation is concerned: as was stated during our prior round-table meeting, to understand this, one just has to read the law on Olympiad to be held in Sochi. The said law deprives owners of any rights; they may be deprived of all their property and will not be entitled to receive anything in compensation pursuant to it. This is despite the fact that constitutional rules and civil law rules on private property have never been repealed and are still in effect in Russia.

MIKHAIL SUBBOTIN: Once again I heard from Anatoly Naumov familiar words that now we are like everybody else, i.e. that in fact Russia’s becoming a market economy comes at a price, and the price we need to pay is crises, and even Karl Marx said so long ago. In essence, it means that crises constitute a certain special form of being part of civilization. I have already warned lawyers participating in this round table that it is dangerous to discuss certain predetermination of economic development (whether they consider it to be a positive or negative factor) and urged them to use economic terms and theories precisely and prudently. I will further clarify my point of view and then will stick to no-nonsense facts and theories. This topic was covered not only by Karl Marx who figured out that the crisis of 1825 was a starting point for some “periodic cycles of modern life”. The history of economic cycles and crises is very extensive and interesting. Apart from Marx, there were a great many famous economists who tried to identify and explain the reasons why the economy undergoes cyclic fluctuations. We know about neoclassical and
Rule of Law in Russia: Issues of Implementation, Enforcement and Practice

neo-Keynesian models of an economic cycle developed by James Duesenberry, Richard Goodwin, John Hicks, Hugh Rose, Joseph Schumpeter, Ragnar Frisch and other models designed to explain the origins of economic cycles. In particular, clumsiness of state interference in the economy, tardiness and unpredictability of real effects of such measures taken by the state were criticized by economists who favored Milton Friedman’s monetary theory.

I can talk about this for hours but the problem is not whether there are economic cycles and crises or not. Crises encourage one either to withstand them or to sit around and wait for better times when, as a result of recovery in the U.S. or world economy’s growth, the situation with our export goods will improve and when subsequently, the Russian economy as a whole will recover. Therefore, it is not enough to acknowledge that the economy “breaths” as a man: booms and downturns resemble tidal breathing. But even healthy people breathe differently, and the difference between a healthy person and an asthmatic one is even greater. People breathe in many different ways, and there are various reasons for that. That is why we need diagnostics which should be as accurate as possible as well as proper and speedy treatment. Or, speaking without metaphors, it would be more convenient for us to tell the truth when we are trying to identify the reasons for the current crisis or evaluate Russian economic, social, and political realities. It has nothing to do with radicalism, it is simply that our judgments should be sound and honest. Either we will discuss true realities and what we need to do to improve the economic situation or we will talk about the country and its economy being “a little bit pregnant”. Under the first scenario, we will discuss how the economy should be cured, and under the second scenario each of us will be to a certain extent responsible for the depth of the current crisis, its continuation, social and economic implications, and, ultimately, its political consequences. Thank you.

MARIANA KARADJOVA: As to compliance with resolutions and recommendations of the Committee of Ministers, I understand your position very well. However, apparently you very well understand what the goal of such recommendations is. They are meant to make the State do certain things rather than to allow the Strasbourg Court to work instead of the State.

TAMARA MORSHAKOVA: In fact, I propose that the Russian state, represented by the Constitutional Court, should carry out certain work. The Committee of Ministers applies to the government, does it not? So, that is enough. It is simply that a proper partner should be found. I understand that the situation is sensitive and that the Strasbourg Court would not
want to be accused of acting in circumvention of the government, but in fact this will just reflect the fact that the judicial authorities are not governmental bodies.

**ANDREY FEDOTOV:** I have a question for members of the judicial community (including former ones). What do you think about the current trend towards limiting, so to say, the domain of the jury trial? What is the reason for it? That is: is the jury trial efficient or not? I am asking this question because, as a defense lawyer, I believe that this trend (not in all but in many respects) attests to an extremely low professional level of investigation bodies in Russia. Because very often investigation is carried out so poorly that only a professional judge can render a judgment based on respective case materials, and a jury trial would render a verdict which would be completely different, even under circumstances which raise many questions.

**TAMARA MORSCHAKOVA:** Can I cheer everybody up a little bit now, so that we would hear some optimistic notes? Just three days ago, Dmitry Alexandrovich Medvedev, Russian president, scolded representatives of the prosecutor’s office who continued to criticize the jury trial. Medvedev said: “Don’t blame the jury trial, it is you that cannot work properly.” This is the first thing to be optimistic about. Another thing to be optimistic about is that a few days ago the State Duma’s legislation committee asked the Civic Chamber of the Russian Federation to prepare proposals on extending the domain of the jury trial in order to somewhat compensate for the exclusion from their domain of cases involving treason against the state, terrorism, espionage, mass riots, and unlawful seizure of power, by introducing the jury trial in respect of other categories of cases. I know that this happened because of the initiative of the Civil Society Institutions and Human Rights Council under the President of the Russian Federation headed by Ella Pamfilova. On behalf of the Council we wrote an application to the President, and he made a note on the application that he considered it necessary to discuss this issue.

**VICTOR ZHUIKOV:** I can repeat what I said and even wrote before: this counter-reform which is underway in Russia is similar to the one that took place in the 19th century. Then the domain of the jury trial was also limited, and it affected more or less the same categories of cases. If, by way of compensation, the scope of cases which can be tried by a jury extends, of course, it will be very good. Jury trials will play a greater role in other categories of cases but this will not be compensation for the current limitation of the scope of cases that may be tried by jury. The State has little interest in such
newly added categories — it does not matter that much if someone picked or did not pick someone else’s pocket; contrary to that, if a jury acquits someone accused of terrorism because there is no proof of this person’s guilt, it will be quite a different thing. That is why, unfortunately, there is a certain trend here.

Igor Novikov asked a most important question regarding whether or not we have a concept of development of law. Of course, there is some concept. For example, I work at the Institute of Legislation and Comparative Law under the Government of the Russian Federation. Currently, the Institute is working on the 5th edition of the Concept of the Russian Legislation; the previous edition was a thick volume, and this one is probably going to be even thicker. Starting from mid-90s, the Institute has been working on the general concept of law and concepts relating to branches of law (there were already four editions); but I think that few people read them and take account of them. And this gives rise to all those contradictions between the private law and the public law that we discussed trying to say which of them is more important. I think that neither of these two parts of the Russian law can have a priority, and, most importantly, in terms of regulation of every specific legal relations, there should be a sound balance between the private and public side. It is easier to say than to do but, in my opinion, this is the most important criterion. By the way, I would like to draw your attention to the fact that the Constitutional Court, when it finds a particular law to be consistent or inconsistent with the Constitution and issues a resolution to that effect, does so based on whether or not the above-mentioned balance of state interference in private interests has been destroyed. It is a very difficult task to determine whether or not it has been destroyed but, I think, it is the only criterion that can be used because one cannot say that for particular relations public aspects are more important, and, on the contrary, for some other relations private aspects play a greater role. You see, the more I deal with these problems the more I am convinced (and we talked about this today) that the divide between the two parts of law, though it does exist in the legal theory, is artificial and sometimes it is even detrimental.

And, of course, the rule of law should, in the first place, be implemented through the legislation. There is no doubt that law should at least be aimed at ensuring a single conceptual approach, so that regulation would be consistent. However, in Russia every person drafting a law thinks of his own interests in the first place and writes that his law in certain respects prevails over all the other laws, and all other laws which are inconsistent with it may not apply; such language is used in many codes and laws.
HENRIK BULL: I think that the problem of dissemination of information, in particular, concerning the application of laws on human rights, European laws, has to do with the case law rather than with the Convention. It has to do with judgments of the Strasbourg Court which are available in French and English. Even in Norway there is a problem relating to these judgments because we need to have them translated in the first place and then make them publicly available, as they should be available to lawyers and the public at large alike. Unless and until they are so available, you may not apply them. I believe I saw some books which were published by non-governmental organizations and which contained key judgments rendered by the European Court. What is the current situation? As far as I understand based on this discussion, as a rule, judges and, probably, lawyers and attorneys do not have access to such judgments. And, most probably, defense lawyers do not rely on such judgments of the European Court when preparing their oral arguments, and, when rendering a judgment, judges do not rely on such judgments either. As far as I remember, the Russian Constitution contains a provision whereby international obligations of the Russian Federation have a priority. So if the situation develops in a way in which it should develop, judges should be free to apply judgments of the European Court and, most probably, they would do so if they were aware of them.

ANDREY FEDOTOV: Judgments of the European Court are available but the problem is that they are not actively applied, at least by courts. You’ve rightly said that there is a certain discrepancy between the fact that Russia had signed the Convention for the Protection of Human Rights and Fundamental Freedoms, on the one hand, and application of particular judgments rendered in relation to particular cases, on the other hand.

VICTOR ZHUIKOV: The Russian Constitution is actually applied by courts. Back in 1995 the Plenum of the Russian Supreme Court issued a resolution whereby the general jurisdiction courts are to apply the rules of the Russian Constitution. A few years ago, the Plenum of the Russian Supreme Court issued a resolution on application by Russian courts of generally accepted principles and rules of international law and international treaties. So, generally, the position of the Russian Supreme Court is firm: the Russian Constitution and rules of international law prevail over the Russian internal legislation and should be applied. This is the general approach.

TAMARA MORSCHAKOVA: There is a discussion in Russian legal theoretical literature as to which judgments issued by the Strasbourg Court are
binding on [Russian courts] and which are not. There is unanimous recogni-
tion that judgments of the Strasbourg Court issued in respect of Russia will,
of course, be binding on us, regardless of how a particular judgment is be-
ing implemented at the national level, successfully or unsuccessfully, quick-
ly or slowly. Nobody denies and cannot deny this because, indeed, the sign-
ing of the European Convention constitutes one’s consent with its provision
whereby the Convention may only be interpreted officially by the Strasbourg
Court and a country which has signed it agrees with any such interpretation as
it submits to the jurisdiction of the Strasbourg Court. However, there is one
more issue: to what extent the [Russian] judicial practice and theoretical lit-
erature confirm that precedents established by the Strasbourg Court in cas-
es related to other countries can be binding on the Russian Federation. As
far as I understand, this issue is discussed in foreign legal theoretical litera-
ture in many countries, not only in Russia. So, in Russia certain people al-
so believe that precedents established in cases which are unrelated to Russia
may not be binding on it. However, I believe that this is not so. My position,
in particular, is confirmed by numerous decisions issued by the Russian Con-
stitutional Court, since it interprets the rules of the European Convention
and those of the Russian Constitution based on precedents set by the Stras-
bourg Court in cases related to other countries. Very many decisions in re-
lation to the European Convention were interpreted in such a way. For ex-
ample, we accepted the concept of “accusatory activity” which was defined
in the Strasbourg Court’s decisions in cases involving other countries; ac-
cording to this concept, such accusatory activity is evident from early signs
of prosecution regardless of whether or not any procedural acts have been is-
sued in the course of the proceeding to support the charges. This is just one
example. We provided for a greater scope of a person’s right to be defended
by a defense attorney in situation where he has not yet become an accused,
and in a legal proceeding in Russia this is called “a defense attorney for a wit-
ness.” We have many decisions which recognize that precedents relating
to other countries are binding on Russian courts, in Russia, based on a very
simple principle: first, the Strasbourg Court interpreted the substance of a
certain right protected by the Convention; second, its interpretation of the
right provided for by the Convention is official; and, third, the official inter-
pretation given by the Strasbourg Court was recognized by the Russian Fed-
eration when it signed the European Convention.

VICTOR ZHUIKOV: It is absolutely correct, I fully agree. And general-
ly, a smart state would learn from others’ experience. So, if in a case relat-
ing to another country, the European Court interpreted the provisions of the
Convention in a certain way, one should bear in mind that when a possible [similar] action is brought against the Russian Federation in the European Court there will be the same outcome. So one should take this into account. I can give you an example. The European Court issued a number of very interesting rulings in relation to the right of expression of one’s thoughts, opinions, and judgments (such rulings were issued in relation to other countries, I am not aware of any such case initiated against Russia). So, the European Court stated that it is impossible to disprove value judgments and that the protection afforded to the business reputation of an official holding a public office is limited because such officials are public figures. That is, they may be criticized, and journalists may not be held liable for doing so. These approaches were taken into account by the Plenum of the Supreme Court in its Resolution entitled “On Judicial Practice of Considering Cases Relating to Protection of Honor, Dignity, and Business Reputation”; the Plenum gave respective explanations based, to a great extent, on the European Court’s position on this issue, regardless of the fact that there were no respective actions brought against the Russian Federation in the European Court. So, the Supreme Court presumed that this should be taken into account and that possible negative situations should be prevented from the outset.
Chapter 3. The Rule of Law and the Constitutional Basis for Uniformity in the Application of the Law by the Courts

The axiomatic essence of the judicial application of the law being the adoption of individual legal decisions is unavoidably accompanied by the search for applicable law, i.e. it is realized through the comparison of the universal meaning of legal rules with particularities of the singular conflict being decided by the court. Therewith in disputed situations, specific decisions are, as a rule, problematic. The resolution of legal disputes falling within the same class is carried out by various officials who apply the law. The formalization of the search for decisions based upon exhaustive legislative support for the algorithm of such a search, as well as complete formalization of the law itself, are objectively impossible. For this reason, it is natural that ensuring uniformity in the application of the law is the subject of public discourse, including legal discourse, joining together the efforts of doctrine along with lawmaking and legal enforcement institutions. This joining together of efforts is objectively dictated by regularities in the life of the law. Of course the legislator may not forget about the legal content of the law, or allow calibration errors in regulation. The issues of its systematic character and compliance with legal principles deserve special consideration. Without limiting itself solely to the analysis of legal prescriptions, legal doctrine must develop argumentation methods and systems which can aid during the formulation and application of rules of law to level out the objectively limited capabilities of law, which establishes only rather abstract behavior models. The application of the law on the other hand can proceed neither from a mechanical application of rules of law to specific situations nor from absolute discretion in the choice of rules of law or their interpretation.

However, the goal and content of uniform judicial practice, i.e. its uniform approaches to the application of law, are determined not by the needs of practice itself, but by the intent and content of the law as such. On the other hand, as an effective means of law enforcement which makes it possible to differentiate law from “not law,” court procedures have special characteristics by virtue of which not just any methods for ensuring uniformity of law enforcement can be used but only those that comply with the essence of jurisprudence which constitutes a prerequisite for the rule of law, the legal peace and legal certainty in the social modernization processes.
Unlike legal positivism, contemporary perceptions of law do not connect law only with a normative act or statute, being the result of the State’s law-making activity and the sole source of the law, and assume that the concept of law includes a substantive value-oriented aspect. The rule of law is characterized not only and not so much as a requirement for subordination to the law, but first and foremost as a recognition of the inalienable character of the rights and freedoms of the person which act directly upon and determine the meaning and content of laws, which are accordingly reviewed and applied by the judiciary (this goal and the mechanism for ensuring the rule of law which corresponds to it are reflected in Article 18 of the Constitution of the Russian Federation). Moreover, the court does not have the right to apply laws with content which is outside the law, and judicial procedures must be just and guarantee the predictability of judicial decisions, i.e. exclude arbitrariness.

What should be the significance of ensuring the uniformity of judicial practice in this system of judicial goals and values? It is clear that it is not an end in itself: All the forms for ensuring the uniformity of judicial practice must be focused on excluding judicial mistakes and arbitrariness on the part of the court, including the court issuing decisions based upon a statute which is outside of the law or through unjust procedures.

The standards which determine such approaches — in accordance with legal principles recognized by democratic society — constitute also the basis for the Russian Constitution. Substantively, this is due to the recognition of the universal values which Russian constitutional lawmakers chose to regard as fundamental for current constitutional regulation.

In the usual paradigm, the uniformity of judicial practice relies upon adherence to the law in the broad sense of the word — i.e. the uniform interpretation of a normative act which has developed in judicial practice. From a historical perspective, the comparatively recent orientation of the national judicial systems towards paramount constitutional values did not lead to a real

---

departure from old positivistic positions. More often, the preferences of officials who apply and/or enforce the law and who tend to take account of normative acts rather than general legal principles, including those recognized by Russia as a member of the international community, led only to a decorative quotation of constitutional and international law provisions in judicial decisions to signify a formal attempt to follow them. However, the content of legal principles is practically never revealed and does not determine the substance of the argumentation when justifying individual legal acts. This is not required for ensuring uniformity of the application of law on the basis of the “dictatorship of law.” Moreover, it leads to the priority of the letter of the text of a law or regulation. In judicial practice this is in many cases considered to be more convenient, accessible and safe than to give effect to the Constitution or the legal positions of constitutional and supranational jurisdictions, which proceed exactly from the general principles of law.

However, the conventional positivism which prefers the letter of the law over its interpretation on the basis of legal principles actually does not ensure uniformity in the application of the law and in the end has the opposite effect. Lawmaking and application of the law based upon the unrealistic thesis that the text of the law, provided that it is always read in the same way, can and should lead to uniformity in judicial practice, frees one from disclosing the legal content of the law, on the one hand. On the other hand, such lawmaking and application of the law cannot ensure the elimination of the incompleteness of legislative regulation — despite all of its variety and the tendency for the volume of prescriptions to grow — or the competition between rules of law, the many ways in which they can be interpreted, and often also external inconsistency.

As a result, given an unavoidable inadequacy of regulation, the normativistic approach which requires that the judge should be bound by the text of the norm creates the conditions for arbitrary expansion of the sphere of judicial discretion without the necessary limitation provided by the framework of legal principles, which in contradiction to the goal of the uniformity of application of the law, may lead — within the positivistic tradition — to unpredictable decisions.

It is exactly the adherence to general principles of law which creates the proper foundation for a uniform application of the law. They certainly also bind lawmakers, who are also not free to choose regulation with just any sort

---

of content when they create rules of law. However, the particularities of legis-
slative procedures, their clearly political character, and the fact that many
people participate in them which makes it impossible to adopt effective de-
cisions without reaching a consensus among the required majority, includ-
ing preparing and adopting decisions with the help of professional jurists
only, and the variety of lobbying interests and many other things objectively
do not make it possible to hope that the rules of law themselves created by
such procedures will be a coherent incarnation of legal principles. Howev-
er, in jurisprudence, which by its essence excludes the influence of such fac-
tors, the general principles of law intermediate the revelation of the uniform
legal meaning of legislative regulation, including without turning to the law-
maker with suggestions for the amendment, concretization, supplemen-
tation, and approval of normative rules in those cases when the text of the law
by itself is insufficient for reviewing its authentic or proper content. Based
upon this, is also evident that the aspiration to exclude or minimize the sig-
nificance of judicial evaluation of the rules of law being applied as an ele-
ment of the professional legal consciousness and beliefs of judges, and con-
sequently to limit judicial discretion, is inadequate from the standpoint of the
tasks of individual legal regulation decided by the court\(^1\) and does not corre-
spod to the role of an autonomous and independent judicial power which
controls the legal content of laws.

The realization of the legal meaning of rules of law in the application
of the law, being a mechanism which ensures the rule of law within the
framework of a law-based State, is the only goal not only of jurisprudence
in concrete cases but also of uniformity of the application of law as a whole.
Otherwise, the uniformity of judicial practice has no grounds for legitimat-
ing itself.

In this way, uniformity in the application of the rules of positive law is so-
cially justified only provided that this ensures the rule of law, i.e. if it helps
implement the general principles of law which are recognized and in effect
in democratic society. This determines both the priorities for the content
of uniformity in the interpretation of rules of law and the allowable methods
for ensuring uniformity of judicial practice.

* * *

The uniformity of judicial practice does not directly figure into a constitution-
al context, since from the standpoint of the society’s interests it is needed only as

Moscow, Prospekt, 2008, pp. 63–64 (Алексеев С. С. Общая теория права. 2-е изд., пере-
a means ensuring the rule of law, and in another sense it could have a negative
effect, since it would lead to a cloning of practices which violate the law.

The experience of various types of political campaigns with the participa-
tion of the courts which have taken place repeatedly throughout the his-
tory of our country (for example, the fight against parasitism, hooliganism,
against the theft of state property or the general strengthening of the fight
against criminality), while they were accompanied by the unification of judi-
cial practice in every possible way — from the use of harsh stereotypes of pun-
ishment to the procedure of off-site show trials outside of courtrooms with
the mandatory participation of the audience which had been forced to attend
and public accusers — shows that such campaigns were always ineffective.
Moreover, the negative consequences of such means of ensuring uniformity
of the application of law appeared throughout judicial practice: the stan-
ards for evidence and lawfulness when examining cases in courts were low-
ered; judicial and societal legal consciousness were substantially deformed;
the sphere of the independent judiciary was substantially shrunk.

The constitutionally determined and necessary uniformity of the judicial
application of the law in essence ascends to equality before the law and the
court, to a prohibition on discrimination and arbitrariness in all areas dur-
ing the realization of any rights and obligations, including the right to judi-
cial protection, in particular, from illegitimate court decisions. The uniform-
ity of judicial practice should serve to ensure the provision of just due proc-
cess of law on the basis of the equality of citizens. The capabilities which have
been provided to eliminate deviations from legal standards and their varied
understanding by those who apply the law are dictated by the goal of pre-
venting and correcting judicial mistakes. It is just this pragmatic task of cor-
recting individual legal acts in accordance with legal principles, and not at
all the simple provision of a single state policy in the area of the judicial de-
termination of rights and freedoms which gives constitutionally justified sig-
nificance to the pursuit of uniformity in practice. Should it be erroneous, the
judicial application of law which is accomplished by the judicial act which
enters into lawful force contradicts the prohibition on the restriction of rights
and freedoms on a basis other than under and in compliance with federal law
and commensurate with the purposes of such restrictions provided for by the
Constitution\(^1\). A judicial act which does not comply with legal requirements,
contradicts the law, and is erroneous demolishes the uniformity of practice,
which is oriented towards adhering to the legislation and the law.

\(^1\) See: Resolution of the Constitutional Court of the Russian Federation of 2 February 1996
No. 4-P, Collected Laws of the Russian Federation. 1996. No. 7. Article 701 (paragraph 6 of the
“statement of reasons” section).
However both in doctrine and in legal activity, providing for uniformity of judicial practice and rectifying erroneous judicial acts are often not considered phenomena of the same level, although both are essential categories of the judicial application of law.

The purpose of ensuring uniformity in the judicial system and in the results of its activity is more often declared to be related to the category of public interests. Is it just in this manner that law on civil procedure and arbitrazh court procedure considers the violation of the uniformity of judicial practice as the basis for correcting judicial acts which have entered into lawful force exclusively through judicial supervision procedures: the discovery of any judicial mistake in the definition of rights and obligations alone, as well as substantial deviations from the procedures of just jurisprudence are not recognized to be sufficient for rescinding judicial acts which are to be enforced — it is necessary that there be confirmation of a certain general significance of the judicial act as violating established practice. Questions naturally arise: if the practice was contradictory, and not uniform, will it not be necessary to rescind the erroneous judicial act being enforced in those cases when an interested party made every effort to protect its rights at court; must one not recognize that the uniformity of judicial practice is a rather relative concept, and the interpretation of its violation as the basis for rescinding an act which has entered into force is an area of the discretion of the court, which may not be deprived of the capacity to evaluate how destructive not only a recurrent erroneous position of a court is for the uniformity of the application of law, but also a single one.

If the mission of jurisprudence is to ensure the defense of rights and freedoms, as this is declared in the constitutional norm (Article 18 of the Russian Constitution), then any sort of, shall we say, quantitative approach to the determination of the uniformity of judicial practice is hardly possible. The correctness of the application of law is not proven by a greater or lesser number of coincidences of judicial positions. Individual legal acts are necessarily based upon a certain judicial discretion, which depends upon taking into account the specifics of a concrete legal conflict, as well as the application of rules of law using both formalized and evaluative concepts in order to resolve it. Besides which, a rather firm or even absolutely uniform practice in the application of rules of law may not correspond to the ideas of the rule of law. This means that it must not be considered as something to be preserved, but on the contrary the destruction of such uniformity is required. Then a judicial act which departed from the usual unlawful practice cannot be recognized to be erroneous. The judicial application of law, the value of which is determined by the independent status of the judicial branch, court subordination
only to a legal law, and not to any directives from wherever they may have originated, requires recognition of the right of the court to make a decision guided by its own conviction in each case, including when it contradicts the position of a superior judicial instance. This is precisely what differentiates the vertical structure of judicial instances from the vertical structures of other branches of state power. As Shershnevich has justly noted, a mandatory orientation towards the possible or already expressed position of a superior court in a case destroys the essence of jurisprudence. The instructions of a superior judicial instance are imperative only insomuch as they relate to the elimination of violations of the law which took place when a judicial act was adopted. Although other divergences between a superior and a lower court may lead to the rescission of the latter’s decision, i.e. they are usually not resolved in favor of the lower court. However, a change in the position of the superior court is also not to be excluded, both in regard to a specific case as well as in regard to judicial practice as a whole.

It is clear from the considerations which have been stated above that the uniformity of the judicial application of the law is not its unambiguously positive characteristic. The social justification and legal value of uniformity in the application of law are determined by how effective it is for such goals as ensuring the rule of law, eliminating judicial mistakes, supporting trust in the courts as the means for legal protection, the attainment of legal certainty and as a guarantee of the independence of the judicial branch. The means which may be used to ensure uniformity must serve to attain these goals and may not contradict them. But since the uniformity of practice is a socially useful condition only inasmuch as it is oriented towards the aforementioned goals, one must also determine their proper hierarchy.

Based upon the constitutional priority of persons and their rights and freedoms as the supreme value (Article 2 of the Russian Constitution), which reflects the recognition of universal human standards, the first priority for the judicial application of law should be the court’s determination of the rights and obligations of each person, including without regard to the customary practice. In courts, this main value is provided by its procedures, which are mandatory when examining each case, and it dominates the court’s resolu-

---

tion of tasks both when establishing facts and interpreting the applicable law. The public interest in achieving uniformity of practice, which is more than anything else connected with legal certainty, predictability of judicial acts and the justified, including on this basis, trust in court procedures, in the state governed by the rule of law are justified by the fact that it serves the equal protection of individual rights and freedoms and not their violation, even if it be their equal violation. “In its essence, jurisprudence may be called such only provided that it meets the requirements of justice and ensures the effective restoration of rights.”

Their protection is limited only inasmuch as the realization of the rights and freedoms of the individual must not violate the rights and freedoms of other persons (Article 17(3) of the Russian Constitution).

Excluding erroneous application of law is the task of each judicial act upon the basis of which rights and obligations are determined. Moreover, when examining any case, a judge has the responsibility to examine the legal prescriptions which are to be applied as one of the tasks of judicial control. The court has the right and is obliged to evaluate the formal and substantive validity of the rules of law and the possibilities for applying them which depend upon this. It is not the superior judicial instances, but the court in a specific trial where the law is being applied which carries out the control of rules of law in the widest sense of the phrase when deciding a case. The result of the judicial control of rules of law is a decision on the lack of legal obstacles to applying the rule both from the point of view of its place in the hierarchy of legal acts (in the vertical) and the system of legal rules of law (in the horizontal), as well as based upon the content of the normative provision itself. The monopoly of the judicial branch over the control of rules of law which is realized in each act of the judicial application of the law differentiates it from any other law-enforcement process, which is reflected in the constitutional requirement for the subordination of judges only to those legislative acts which are consistent with the law (Article 120 of the Russian Constitution).

The judicial review of applicable law arises out of the prohibition to apply the rules of law which contradict not only the Constitution but also the generally recognized principles and rules of international law (Articles 15(4) and 17(1) of the Russian Constitution). The right and duty to carry out the control of rules of law in specific law enforcement procedures are limited only by the division of the responsibility between the courts for revealing the unlawful content of a law. Depriving such a law of its legal force, i.e. excluding it from

---

1 See ref. Resolution of the Constitutional Court of the Russian Federation of 2 February 1996.
the system of valid law is referred to the competency of constitutional jurisprudence in the Russian Federation, as in many other countries with similar mechanisms. Other courts which have revealed the unlawful content of a law are bound to refer this to the Constitutional Court of the Russian Federation\(^1\) for the purpose of ensuring the uniform constitutionally oriented position of judicial practice which will exclude a further application of unconstitutional rules of law. “In view of the interaction between courts with various types of jurisdictions and the delimitation of their competencies for revealing unconstitutional laws, the exclusion of the latter from among valid acts is the joint result of the realization, on the one hand, of the duty of courts of general jurisdiction to raise the question of the constitutional status of law to the Constitutional Court of the Russian Federation, and, on the other hand, the duty of the latter to resolve this question finally.”\(^2\)

* * *

In and of itself, the creation and functioning of the constitutional jurisdiction in pursuit of the goal of protecting the Constitution also helps attain the goal of the uniform application of law proceeding from just those general legal principles which are reflected in the Fundamental Law. The practice of constitutional justice is the most accessible means for disseminating an understanding of the law under which the legal content of the legislative activity and, accordingly, also the application of the law can be viewed as the only admissible basis for the uniformity of judicial practice.

In this sense, no other institution in the national judicial system could act as a more efficient mechanism for ensuring the rule of law and the uniformity of the application of law, which is aided by many objective legal prerequisites. First of all, the constitutional jurisdiction renders a decision which is mandatory for the bodies of all other branches of government — the legislative, executive and judicial. Secondly, the Constitution itself establishes a monopoly for constitutional courts in the official interpretation of constitutional rules of law, including the general legal principles contained in them for depriving unconstitutional prescriptions of their legal force, as well as for the obligatory constitutional interpretation of normative provisions. In the national legal system, there are no other public institutions which are authorized to interpret officially constitutional rules of law and to reveal the constitutional meaning of a law which acquire a significance which is not purely on a case-by-case ba-


\(^2\) Ibidem.
Chapters 3

sis. Thirdly, the legal force of decisions of the Constitutional Court contributes to uniform understanding and acceptance, in all judicial practice, of international legal standards of the defense of directly applicable rights and freedoms as well as the precedents of the supranational Strasbourg jurisdiction (the European Court of Human Rights): even if the lawmaker does not take them into account in positive regulation, the Constitutional Court recognizes their priority based on the substantive uniformity of constitutional and international law approaches in the areas of rights and freedoms. The precedents of the European Court of Human Rights have also been legitimated in the constitutional courts. Since Russia has recognized its authority to give an official interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg’s decisions are interpreted by the Constitutional Court as mandatory for lawmaking bodies and those who apply the law, i.e. they actually acquire normative force as universally applicable law (not only *ad hoc* and *ad personam*), which also facilitates the acceptance of the human rights world-view of the supranational jurisdiction for national judicial practice. Constitutional justice also encourages courts to use non-mandatory international rules of law, as the binding nature of the decisions of the Constitutional Court also afford imperative significance to their interpretation, in this way allowing one to take the perspectives of global legal development into account in actual practice. Finally, fourthly, constitutional courts introduce doctrines regarding the essence of the general legal principles of constitutionalism and the unified standards of humanitarian law not only to the scholarly realm but also to the practical application of law, which significantly facilitates the courts’ orientation towards modern democratic legal consciousness.

One can distinguish general law approaches which were not offered by Russian theory of the 20th century as a universal basis for uniformity in the legal system. They are used by constitutional courts methodologically when re-interpreting constitutional ideas on the rule of law in a law-based state and are based upon revealing the meaning, logic and inter-relationship between the rules of law of the Russian Constitution in the context of historical and legal realities of the country. Not only lawmakers should follow these ideas. The rule of law cannot be ensured without taking them into account during the practice of justice, since it assumes, among other things, such interpretation of the current normative prescriptions that is uniform and legal in its essence\(^1\). In ac-

\(^1\) Without simplifying the substantive significance of the principle of the rule of law, but extracting its quintessence that also defines its principal meaning in the area of the judicial application of law which realizes the goal of human rights protection, it would not be inappropriate to proceed from the fact that the rule of law may be considered to be a guarantee of the inviolability of the rights of the person, which is in effect thanks to a limitation of the state on the ba-
cordance with legal positions of the Russian Constitutional Court, it also fol-

lows from the constitutional recognition of the rights and freedoms which are

inalienable and belong to a person from birth as universal human values that

there can be no alternative to the supreme value of the human person in judi-
cial practice. Anything else would deprive the Constitution itself of its original

objective, which the judicial power is obliged to set, that is, to exclude any dis-

crimination against the people of Russia, who belong to the global democratic

community, in the area of ensuring the rights and freedoms of the person —
in comparison with the international standards of protection of human rights

and freedoms, which have also been adopted by national legal systems1.

Based upon this, the content of the principle of respect for the dignity

which belongs to all members of human society has been developed in con-
stitutional law, and it is the foundation for the freedom, justice and all the

inalienable rights of the person; it determines the obligation of the State

to provide for its protection. A conclusion which has universal significance

in mechanisms for the protection of human rights, first and foremost judicial

ones, is based upon this: in its interrelations with the state, the individual acts

not as an object of state activity but as a subject with equal rights, who can

protect his or her rights using all methods which have not been prohibited

by law and who can enter into a dispute with the state as represented by any

of its bodies2. In this way, the Constitutional Court deduced from the letter

and the spirit of the Constitution a prohibition on arbitrariness which with-

stands a return to totalitarian experience. Such an interpretation of the prin-
ciple of respect for the dignity of the person was used by the Constitutional

Court to protect the rights to freedom and personal inviolability, for access
to the courts and to judicial protection including judicial guarantees during

arrest and the right for correction of judicial mistakes, etc.

sis of legitimate laws, the constitutionally confirmed division of powers and the independence

of the judicial branch. Of course, this does not refute the significance of other aspects which are

inherent in the rule of law and which presume the existence of democratic institutions for the

constituting of the powers, an adequate civil society as well as a certain level of legal culture.

1 See: The United Legal Region of Europe and the Practice of Constitutional Justice. A Col-
lection of Lectures. Moscow, 2007, pp. 14—15, 135, 220, 245 and 253 (Единое правовое про-
странство Европы и практика конституционного правосудия: Сборник докладов. М.,

2 Resolution of the Constitutional Court of the Russian Federation of 03 May, 1995

No. 4-P, Collected Laws of the Russian Federation. 1995. No. 19. Article 1764 (paragraph 4

of the “statement of reasons” section); Resolution of the Constitutional Court of the Russian


Article 3393 (paragraph 4 of the “statement of reasons” section); Resolution of the Constitu-

2001. No. 29. Article 3059 (paragraph 6 of the “statement of reasons” section) et al.
Constitutional judicial practice has also recognized the general legal criteria of certainty, clarity and the lack of ambiguity of a law as features of its legitimacy. In accordance with the general legal approaches elaborated in the decisions of the Constitutional Court, it is the uncertainty of rules of law which impedes a uniform understanding of the requirements of the law, engenders contradictory practice and the opportunity for abuses, weakens the guarantees for the protection of rights and leads to arbitrariness. The position of the Constitutional Court is that as a rule, the elimination of the insufficiencies of an illegitimate law is impossible using a uniform interpretation of it in the practice of the application of the law, and requires the participation of either the legislative branch or constitutional courts of law, i.e. those instances which are authorized to deprive the law of its legal force, to amend it or, should its meaning be ambiguous, for the judicial body exercising constitutional control to issue an imperative constitutional interpretation. The requirement for certainty of the law as a regulator of social relations is a necessary prerequisite for trust in it based upon the predictability of the application of the rules of law, especially those regarding the definition of the legal consequences for one’s failure to comply with it and the application of sanctions. In substance, the Russian approach differs in that in constitutional justice, the criteria for the certainty of rules of law is practically directly deduced from the requirements for nondiscrimination before the law and the court (Article 19 of the Russian Constitution)

An essential guidepost for uniform approaches in the application of the law is strict compliance with the general legal principle of a broad interpretation of rights and freedoms. The basis for this principle in the legal positions of the Constitutional Court, which is addressed first and foremost to judicial practice, is based upon the recognition of rights and freedoms as the paramount value, upon a prohibition of their negation and diminution and the general permission to protect one’s rights by all means which are not prohibited by law (Article 44 and 55 of the Russian Constitution). The interpretation of these rules of law allowed the Constitutional Court to presume that the permissive method of regulation chosen by the constitutional lawmaker in the area of rights

and freedoms, which is also accepted in international and foreign national law and which determines, among other factors, the review of restrictions on rights and freedoms introduced by lawmakers in constitutional courts of law, objectively assumes that “by default” they may not be restricted. This means that neither the actions or decisions of the executive branch, nor a narrow judicial interpretation of rights in the absence of a precisely formulated prescription of the law which introduces a justified limitation upon them can inhibit the realization of a right. Federal lawmakers do not have the right to delegate their authority in the area of restricting rights and freedoms to any other levels or branches of government, nor can they introduce legislation which would infringe upon the very essence of any rights or which would lead to the loss of its real content. Such a legal position provides the basis for carrying out judicial control regarding both laws and normative prescriptions whose level is lower than that of the federal law, as well as judicial acts. Those who apply the law do not have the right to interpret the restrictions introduced by lawmakers expansively when applying the law. Even more so prohibitive rules of law, for example rules of law which establish liability, in particular, criminal law rules, may not be interpreted expansively. The inadmissibility of an expansive interpretation of restrictions and prohibitions in the area of public law liability is declared with even more certainty thanks to the special prohibitions, based upon general legal principles established in international acts and constitutional rules of law, on imposing liability for actions which are not directly provided for by law, including on the basis of analogy of statute, as well as prohibitions which give retroactive force to a law which increases liability and prohibitions on re-trial and punishment for the same action.

When the will of lawmakers is directed at restricting rights, it must be justified by constitutionally approved purposes: the defense of the foundations of the constitutional order, morality, health, rights and lawful interests of other persons, national defense and the security of the state. However, the purposes listed can be used to justify the restrictions introduced by the law and adopted by judicial practice only to the extent that the attainment of the purposes indirectly provides for the protection of rights and freedoms. This presents additional requirements for the justification of law enforcement acts. Other public interests which must be taken into consideration when introducing and enforcing restrictions are recognized to be sufficient grounds only if the protection

---

of the public (general) interest is necessary for the purpose of protecting the interests of each. In another context, the restriction of a right would diverge from the recognition of the person as the supreme value among the constitutional values. The expansion of the grounds provided for by the Constitution for restricting rights and freedoms through recognizing the purposes justifying these restrictions listed in the Constitution as values which compete with the supreme value of the human person may not be deemed to comply with the letter and spirit of the Constitution. Finally, the criterion of the proportionality of restrictions is not the least significant item in the dogma of the expansive interpretation of rights. It has effect when evaluating not only the decisions of lawmakers, but also when reviewing practical restrictions. A restriction cannot be recognized to be proportionate (commensurate) if it deforms the very essence of the law, if it leads it to be rejected or even if it is appropriate for one portion of those to whom it is addressed, but it does not take into account the position of others; the application of restrictions is incommensurate if there were other means for achieving the necessary goals.

The identification (although far from complete) of the above named general legal approaches has strategic significance for the formation of a unified application of the law. This is determined, on the one hand, by their constitutional significance as principles for the interpretation of applicable law, and, on the other hand, by the relative complexity of extracting them from the constitutional text during the immediate process of the application of the law. For this reason, this task is most effectively implemented through constitutional courts of law, which intermediate the constitutional programming of the practice of the application of the law as a whole.

Without recognizing and implementing the general legal principles as those which determine the meaning of the uniform application of law, one may not claim that the latter is a constitutionally approved purpose of the realization of the law. Constitutional regulation itself contains many other general legal requirements as the applicable unified standard for its legal content when carrying out due process of law. It is not the achievement, but the duty of constitutional courts to clarify their meaning as required. From the point of view of ensuring uniformity in judicial practice, the realization of these tasks by a constitutional court is by definition an effective means, although foreign experience of this institution uses its possibilities for achieving this purpose more broadly than in Russia, including the review and rescinding of judicial acts of other courts.

* * *

From the viewpoint of a doctrinal understanding of the law, adherence to the general principles of law, including those stipulated at the constitu-
tional level which substantively justify the uniform application of the law as an element of the rule of law is a more complex problem than the refinement of the technologies and institutional forms for ensuring uniformity in the judicial system and judicial practice. However, it is just these last tasks which interfere with the interests of practically all institutions of the judicial branch and therefore provoke a multitude of theoretical disputes and practical divergences in the approaches to determining the role and authorities of various judicial structures and institutions in the area of ensuring uniformity of the application of the law. Even that which is resolved simply on a theoretical level frequently becomes insurmountable in the practice of the interaction of judicial branch entities.

The institutional aspect of the problem of uniformity in judicial practice is related to the existence of various types of jurisdictions in the national judicial system, which are headed up by the three supreme/higher courts provided for by the Russian Constitution (the Constitutional Court, the Supreme Court and the Higher Arbitrazh Court), which represent accordingly the three branches of judicial power.

Not only certain specialists, but also the country’s leadership discuss possibilities for institutionalizing the unification of the judicial system, in a way that is “non-branch,” i.e. without organizationally separating it into courts carrying out the constitutional, administrative, arbitrazh and general (including civil and criminal) jurisdictions so that the judicial system would be led from a unified center, and namely, a judicial body which would stand at the head of the entire judicial system.

It appears that such an arrangement of the judicial system does not in any way resolve the task of the unification of the practice of the application of law; it complicates carrying out procedural direction of it by imposing discrepant functions on one and the same courts; it would inevitably lead to a great deal of chaos in the relations between superior and subordinate courts; it contradicts increasing the effectiveness of the courts of law on the basis of specialization of courts and judges; it would make more difficult and not facilitate the development of uniform approaches to the interpretation and application of the law; and most important, it would clearly be a step back in the organization of the judicial branch and the judicial system. On the contrary, a modification of judicial structures in terms of deepening specialization in jurisdictions could aid in uniform application of law, for example the creation of special juvenile courts, administrative courts, labor courts, etc. The following would also aid in achieving more uniformity: changing the territorial basis for the organization of the court system so that it was not attached to the territorial-administrative and state-territorial divisions, i.e. similar
to the way that this is done in the system of arbitrazh courts and in the organization of justices of the peace. In this way from the very beginning the tendency for local practices and local influences on judicial activity to arise is leveled out, and consequently more favorable conditions are created for uniformity in the understanding and application of law.

An approach to the understanding of the uniformity of the judicial branch and uniformity in the court system which complies with contemporary ideas while maintaining courts with various types of jurisdiction requires the fullness of their authority, under which the judicial branch as a whole and all courts together would exclude the possibility of a legal area which is deprived of judicial protection (the first aspect of the uniformity of purposes of the judicial branch). At the same time, its greatest efficacy is guaranteed based upon taking into account the specifics of various cases, while considering the unified general constitutional principles of fair justice (the second aspect of the uniformity of purposes of the judicial branch). Only if this is achieved and there are no gaps in effective judicial protection can the goal of ensuring the rule of law be attained, which constitutes the basis for the creation of the judicial power. The realization of this common goal by the joint efforts of courts of various jurisdictions cements the judicial branch as a unified system for the protection of rights.

It is the common task of all branches of judicial power to ensure the rule of law through the realization of due process of law, and it is just this which forms the basis of efforts to unify the application of law. This common task is naturally connected with the delimitation of authorities and definition of the relations between them, i.e. with the precise definition of the competency of each branch of judicial power so that they do not duplicate each other, and with defining the system for their procedural interrelations. Such procedural interrelations include the possibility for courts with various types of jurisdiction to turn to each other and to adopt decisions in situations where the jurisdiction is disputed as well as the significance of the acts of one branch of judicial power for the others.

Unlike other courts, the Constitutional Court, which protects against unconstitutional laws, is a body which only carries out the control of rules of law, and namely the review of normative prescriptions from the point of view of their compliance with the Constitution. Still, the control of the rules of law is also not excluded from the competency of other courts, since upon the claims of citizens and legal entities they adopt decisions on recognizing not only non-normative, but also subordinate normative acts as invalid if the latter contradict the Constitution and other federal laws. The procedure for adopting such decisions is defined in procedural law.
Besides, as was already mentioned, when examining any criminal case, civil or arbitrazh dispute, the courts must reveal the constitutional intent of applicable rules of law, i.e. to interpret them in accordance with the Constitution, and in those cases when such interpretation is excluded due to the content of the rule of law itself, they do not have the right to apply it to resolve a specific case (third aspect of the uniformity of purposes of the judicial branch).

Thus, all courts apply their own methods to resolve the task of purifying legislation and law enforcement practice from the effect of unconstitutional normative acts. However, this must not be viewed as a mixing of functions. But however paradoxical it might seem, the imprecise delimitation of tasks in the control of rules of law or the refusal of general or arbitrazh courts to check the lawful character of the law being applied would contradict the objective of uniformity in the judicial application of the law which is based upon the supremacy and direct action of the Constitution.

The Constitutional Court has the right to recognize laws as unconstitutional and as having lost legal force, a law being an act adopted by the parliament using the legislative procedures established by the current Constitution, while other courts are responsible for protection of citizens from unlawful and unconstitutional subordinate acts. Only when conducting an abstract constitutional control of rules of law which is unrelated to the review of acts which are to be applied to specific cases does the Constitutional Court have the right to review the constitutionality of normative prescriptions lower than a law upon the request of the state bodies which are exhaustively defined by the Constitution. This creates a clear basis for delimiting judicial competencies in the area of the control over rules of law. They are directly established in the Constitution of the Russian Federation and the Federal Constitutional Law “On the Constitutional Court of the Russian Federation.”

Unfortunately, in the practice of the relations between the Constitutional Court and the Supreme Court, which heads up the system of courts of general jurisdiction, the question regarding the role of the latter in the evaluation of the constitutionality of laws in the formal sense of the word, i.e. acts of the parliament, remains very much disputed. For example, in the Resolution of the Plenum regarding the direct application of the Constitution in general court procedures¹, the Supreme Court of the Russian Federation formulates a series of substantive recommendations meant to ensure the supremacy and direct action of the constitutional regulation of the rights and

---

freedoms of the person, in effect ignoring the competency of the Constitutional Court in the area of their protection against unconstitutional formal laws. In accordance with the interpretation given in the above Resolution of the Plenum, any court which discovers a contradiction between the law and the Constitution has the right to “disqualify” it as such. Of course, when considering a specific case, a court has the right and is required to recognize that a certain law contradicts the Constitution and, therefore, may not be applied. However, it remains an open question to what extent the evaluation of a law as contradicting the Constitution is significant beyond the boundaries of the given case in which the law was not applied by the court because it was unconstitutional, and whether it may be recognized to be binding for other courts. The position of the Supreme Court in this question significantly reduces the possibilities for judicial protection against an unconstitutional law as they develop outside of the boundaries of the case which has been considered, i.e. in the judicial system as a whole, since it does not resolve the problems of the existence and continued effect of this law in the legal system. Since unlike the decisions of the Constitutional Court, the position of other types of courts on the issue of not applying a law is not obligatory for other courts. A court decision in a specific case which is rendered by a general or arbitrazh court may not remove the law from the legal field. Such authority belongs to the Constitutional Court. According to the Constitution, all the other courts are required to be subordinate to the law, ensuring the equality of citizens before the law and the court, and in this way providing for uniformity of the judicial application of the law. The judicial system does not achieve any of these goals if a court is able to “lay aside” the law in each separate trial without raising the question of its further fate.

Unfortunately, in the Resolution of the Plenum mentioned above, the Supreme Court of the Russian Federation proposes that just such an unconstitutional position be adhered which does not correspond to the constitutional status of courts and judges, with their duty to follow the law, with their general task of eliminating rules of law which do not comply with the Constitution from the corpus of current legislation; this is exactly how a unified approach to the protection of the rights and freedoms of citizens in judicial practice should be ensured. A court may not and should not submit to an unconstitutional law, but at the same time it does not have the right to leave the question regarding the fate of the law open. The Federal Constitutional Law “On the Constitutional Court of the Russian Federation” requires courts of other types (and it requires them, it does not just give them the right) to request the Constitutional Court of the Russian Federation to review the constitu-
tionality of the law in such cases. Moreover, such a request is also manda-
tory both if the court examining a specific dispute considers that it is pos-
sible and sufficient to apply the rules of the Constitution for its resolution,
and in the case when the court considers that it is impossible to do so and
suspects consideration of the case in order to appeal to the Constitutional
Court. Regardless of whether or not the decision has been issued in a spe-
cific case, the obligation to refer the matter to the Constitutional Court re-
 mains. to act otherwise would be fraught with the risk of a violation of the
uniformity of court practice. “The refusal to apply a law which is unconsti-
tutional from the court’s point of view in a specific case without referring the
matter to the Constitutional Court of the Russian Federation would contra-
dict both constitutional provisions, in accordance with which laws are in ef-
effect uniformly throughout the territory of the Russian Federation (clause 4,
15 and 76), and at the same time it would place the supremacy of the Con-
stitution of the Russian Federation in doubt, since it cannot be realized if
divergent interpretation of constitutional rules of law by various courts is al-
lowed.1” The competency and procedural prescriptions which determine the
relationships between the constitutional court and other types of courts are
based upon the general responsibility of the judicial system for the condition
of the legislation which it applies.

However, the methods used by them to provide for the supremacy and di-
rect action of constitutional rules of law differ, according to the Constitution
itself. Courts of general jurisdiction and arbitrazh courts do not have the au-
thority to declare normative acts not to be in compliance with the Russian
Constitution and therefore to be invalid. Depriving them of legal force in con-
nection with their unconstitutionality is referred to the competency of the
constitutional court. This relates not only to federal laws, but also to the nor-
mative acts of the President, the chambers of the parliament and the govern-
ment, as well as the constituent acts of the constituent entities of the Russian
Federation, their laws and other normative acts, agreements between the ex-
ecutive state bodies of the Russian Federation and its constituent entities as
well as the international treaties of the Russian Federation which have not
yet entered into force. The corresponding delimitation of responsibility for
the legal content of laws is directly provided for in Article 125 of the Russian
Constitution: it categorizes the Supreme Court and the Higher Arbitrazh
Court of the Russian Federation as entities which have the authority to re-

---

1 See the referenced Resolution of the Constitutional Court of the Russian Federation ex-
change in 1998 (paragraph 5 of the “statement of reasons” section).
less of whether a specific case is being examined, i.e. as an abstract control of rules of law and the constitutionality of the acts listed alongside the requests of any court to review the constitutionality of the law which has been applied or which is to be applied in a specific case.

The duty of the courts to refer a matter to the Russian Constitutional Court in order to officially confirm the unconstitutionality of a law does not limit the immediate action and application of the Russian Constitution, since a law which in the opinion of a court does not comply with the Russian Constitution itself impedes the realization of constitutional provisions in judicial practice, and in order to ensure the direct effect of the Constitution, such a law must be deprived of its legal force using the constitutional procedures\(^1\), even when the case has already been decided by the court based upon a specific constitutional rule.

Eliminating an unconstitutional law from the system of legal acts cannot be achieved through deciding a case in civil, administrative or criminal due process of law, nor through clarifications on issues of judicial practice which are made by the Plenums of the Supreme Court and the Higher Arbitrazh Court in accordance with Articles 126 and 127 of the Russian Constitution. The latter are not authorized to determine any other procedures to provide for the direct application of the Constitution of the Russian Federation when resolving specific cases than those provided for by Article 125, among others, of the Constitution of the Russian Federation, which establishes the authorities and procedures for constitutional judicial control. Otherwise, the requirement for a lawful court for each case would not be met. At the same time, without complying with the requirement for a lawful court for each case, the uniformity of judicial practice and, in particular, the uniform application of constitutional regulation by the courts could not of course be ensured. This principle of fair and due process of law, which is established in both international and national constitutional law (Articles 47, 118, 120 and 128 of the Russian Constitution) as well as in specialized branch legislation assumes a legislative definition not only of the territorial jurisdiction and jurisdiction of courts of different levels, but also the subject matter jurisdiction of cases in the broad sense of the phrase, including a delimitation of competencies between courts with different types of jurisdiction.

The legal positions of the Russian Constitutional Court which have been examined are formulated in its resolution on the interpretation of separate provisions of Articles 125, 126 and 127 of the Russian Constitution which determine the competency of the three superior courts in the field of the con-

\(^1\) Ibidem.
control of rules of law, including their tasks for ensuring a uniform understanding and application of constitutional prescriptions first and foremost, which naturally provide the foundation for the uniformity of the realization of rights in lawmaking and in judicial practice. It is characteristic that it is the legislative bodies of the constituent entities of the Russian Federation which acted as the initiators of the relevant enquiries for interpretation in this case\(^1\). They explained that they submitted their petition to interpret these constitutional rules of law because of the divergent practice of the courts, which in a number of cases declared regulatory and legal acts to be unconstitutional and to have lost legal force, although a review of the constitutionality is referred to the competence of the constitutional jurisdiction.

It makes no sense to strive towards uniformity in the application of law, and the rule of law cannot be achieved if it is permissible to object to a uniform interpretation of the Constitution and the division of judicial authorities which is established by it and arises out of its rules.

The development of forms for procedural interaction between the constitutional court and other courts shows a rather contradictory attitude towards such interaction on the part of the latter. The authority of the courts to refer matters to the constitutional jurisdiction with requests to review the constitutional rules of law which are to be applied in a specific case was first established by the Russian Constitution in 1993 and the Federal Constitutional Law “On the Constitutional Court” which is based upon it in 1994.

When discussing the draft Constitution at the Constitutional Meeting\(^2\), the representatives of the Russian Supreme Court objected to providing each court and judge with the right to make a request to the Russian Constitutional Court regarding the constitutionality of a law which is to be applied in a specific case, and insisted that such authority belonged only to the Supreme Court. Other judicial structures and judges should only have possibility to state their opinion on the necessity to review the constitutionality of a law and address it to the Supreme Court, which always had the right not to agree with such an initiative on the part of the court. In this way, the Russian Supreme Court was to have been given a veto right regarding courts’ re-

\(^1\) The Legislative Assembly of the Republic of Karelia and the State Council of the Republic of Komi.
ferral of matters to the constitutional jurisdiction. Such a position was justified by the argument that in providing for uniform approaches in judicial practice to the grounds for referring matters to the Constitutional Court on the part of other courts, it would be possible to exclude an additional possibility to object against the established positions of the supreme court of general jurisdiction on issues related to the interpretation and evaluation of current law. However, such a method for strengthening the uniformity of judicial practice was rejected by the participants of the Constitutional Meeting as incompatible with the independence of courts and judges, and they received the authority to initiate the procedure of the specific constitutional control of rules of law.

After the adoption of the Constitution, the idea of providing for uniformity in judicial practice, permitting only centralized objections against the unconstitutionality of rules of law and their interpretation through the Supreme Court was clearly developed in the position of the Supreme Court, which, first of all, frequently overrules the decisions of lower courts to refer a question to the Constitutional Court, and, secondly, considers that judges not only can themselves decide the question of the unconstitutionality of a law which is to be applied, but that they are also not required to insist that the constitutional jurisdiction recognize such a law to be invalid. Although this directly contradicts the achievement of uniformity in the application of law, this goal probably yielded to a negation of the monopolistic prerogatives of the Russian Constitutional Court to deprive an unconstitutional law of its legal force, which supposedly reduced the independence of other courts. At the same time, it is true that the Supreme Court insisted upon and insists that a judge’s doubts about the quality of the law are sufficient grounds for judicial referral to the Constitutional Court — this follows from the Resolution of the Plenum of the Russian Supreme Court referred to above\(^1\), which actually diminishes the authority of the court applying the law to clarify the constitutional meaning of the rule of law independently. A court may not refuse to apply a rule of law based upon doubts regarding its validity, and eliminates it through case-by-case judicial interpretation. This is also confirmed by the direct prescription of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation” according to which when examining a case at any level, only after a court has come to the conclusion regarding the failure of the law which has been or is to be applied in this case to comply with the Russian Constitution, i.e. when it is convinced of the unconstitutionality of this law, the court is to make a request for it to be reviewed by the consti-

---

\(^1\) See paragraph 3 of the Resolution of 31 October 1995.
Unfortunately, the position of the superior courts on other questions regarding the interaction of judicial structures within the judicial system is also in confrontation with the constitutional status of judicial constitutional control and the Russian Constitutional Court which carries it out. It is clear that this does not foster uniformity of judicial practice nor even more so the rule of law, and the officially declared orientation of judicial practice towards the direct application of the Constitution becomes to a certain degree just declarative.

It would seem that within the system of other branches of judicial power, constitutional justice should serve as a unifying base. From the moment that it was instituted, its decisions aided in the establishment of judicial power as such, demonstrated the significance of its authorities as a counterweight to the legislative and executive branches, championed broad possibilities for judicial defense against the decisions and actions of any level of state authority, confirmed the fullness of the competency of judges in all types of court proceedings and their discretionary authorities, including in the area of the definition and interpretation of applicable law, the correction of unconstitutional interpretations of the law in court practice, and the application of the rules of the Constitution and international law. Many legislative decisions which limited the constitutional status of judges, their independence, their irremovability, and their immunity were disqualified in constitutional judicial proceedings; the uniformity of the federal judicial system was defended, as well as the idea it should not be allowed to lower the existing level of financing of the courts and remuneration of the judges; and the procedures for fair and due process of law were upheld.

Without this active support of its constitutional status of the part of the constitutional courts, it seems that it would not have been possible for the judicial branch to have become established in Russia so quickly.

At the same time, the regulation and practice of constitutional justice in the Russian Federation is characterized by its very definite self-restraint regarding the subject matter of judicial control, the limits of review, and the set of invectives which may be addressed to other courts. As opposed to other national and supranational constitutional jurisdictions, the Russian Constitutional Court makes decisions exclusively on issues of law; it does not examine the constitutionality of actions, individual and law enforcement acts; it does not investigate factual circumstances if this is within the competency
of other courts; it neither corrects nor rescinds judicial acts which are based on unconstitutional rules of law, but only recognize them to be subject to review using the usual procedures defined by procedural legislation.

In such conditions, based on the interests of a uniform application for the purposes of ensuring the supremacy of the Constitution, it is exactly the cooperation within the judicial system based upon a recognition of the binding nature of judicial acts adopted by a competent court within the limits of its lawful authorities which acquires special significance. The authorities and binding nature of the acts of constitutional justice are established by the Constitution itself, i.e. they have the highest level of legitimacy in the national legal system. They are also protected from the failure to enforce them through the imposition of liability provided for by federal law.

However, in the real practice of the application of the law, other courts do not recognize the significance of the direct constitutional regulation of constitutional justice as bestowing upon its acts a unique nature and a force which is recognized by the Constitution, and not only just the force of law.

The question is not whether the Constitutional Court stands higher than or is equal to the other superior courts in significance in the hierarchy of the judicial system. These characteristics are simply inapplicable to the relations of three superior courts which represent different types of judicial jurisdictions of the Russian Federation. Each of them acts within its competence and within this area of competence is the sole body authorized for this.

However, among all the superior courts, the right to officially interpret the Constitution has been assigned specifically to the Constitutional Court. This authorization means only one thing: the interpretation of the Constitution given by the Constitutional Court is binding for all, including other courts, and this is what provides for the sought after uniformity of judicial practice in the course of the application of constitutional rules of law by all courts.

The scope of the Constitutional Court’s binding interpretation of the Constitution is not limited only to acts of official abstract interpretation of constitutional rules of law. Both the interpretation of the Constitution which is given when examining the constitutionality of laws as part of the process of the abstract control of rules of law upon the request of authorized state bodies and that is given during the procedure of the specific control of rules of law upon the complaints of citizens and upon the requests of courts are binding. In these procedures for the control of rules of law, the act of interpreting a constitutional rule is always present — it defines the scale of the review of the constitutionality of the law. Besides, the Constitutional Court is empowered by the Federal Constitutional Law “On the Constitutional Court of the Russian Federation” to reveal the meaning of so-called simple laws —
without this it is impossible to evaluate their compliance with the Constitution. In this case, the position of the Constitutional Court is based in principle not only on interpretation of the Constitution, but also on interpretation of simple legislation. Therefore, it is impossible to delimit the competencies between the Constitutional Court and other courts based upon the simplified thesis that the Constitutional Court interprets only the Constitution while simple laws are interpreted only by other courts. Interpretation of the constitutional meaning of the law is that field of competency of the Constitutional Court which aids in attaining the situation in the judicial system under which constitutional rules of law can actually be effective and implemented in judicial practice. In the Russian legal system, there is no other body which reveals the constitutional meaning of a rule of law and gives it imperative significance for all other courts.

Is the constitutionality of judicial practice evaluated in this case? According to the Federal Constitutional Law “On the Constitutional Court of the Russian Federation,” all rules of law are to be evaluated based upon both their literal meaning as well as the meaning which is given to them by judicial practice (Article 74 of the above Federal Constitutional Law). In essence, this requirement of the law makes it possible to recognize the unconstitutionality both of a rule of law itself as well as the interpretation of its content by other courts. In this way erroneous judicial practice which contradicts the Constitution is excluded. Moreover, the right to rescind judicial decisions is held only by those courts which have been assigned the competency to review specific cases which had been resolved earlier on the basis of rules of law which lost their force in accordance with a decision of the Constitutional Court regarding their unconstitutionality or due to the possibility of applying them only in the sense revealed by the Constitutional Court, which the previous application of law did not correspond to. Such a review represents the realization in judicial practice of both the decision of the Constitutional Court and the constitutional rule upon which it is based.

Indisputably, the legal force of the decisions of the Constitutional Court provides them with the significance of substantial constitutional means for the formation of future uniform legal practice. But they are also simultaneously the method for correcting it. Unlike the law enforcement acts and other acts of superior courts, the acts of constitutional courts create the foundation for bringing into compliance with the Constitution and the constitutional meaning of the law not only the future application of the law and not only the decisions of courts which have already taken place within the framework of one trial in a specific case. By eliminating unconstitutional prescriptions from the legal field, they change the conditions for the application of law for
a whole series of cases which had been decided, i.e. for the uniform altera-
tion of judicial practice which had already developed, but not in a way which
was compliant with the Constitution.

The Federal Constitutional Law “On the Constitutional Court in the Rus-
sian Federation” provides for three differentiating situations for bringing such judicial practice into compliance with the acts of constitutional justice: (a) a decision rendered earlier by a court in the case of a claimant to the Con-
stitutional Court must be reviewed “in any case” (Article 100); (b) the de-
cisions of other courts which were based upon an unconstitutional act are
subject to review “in instances provided for by law” (Article 79); and (c) acts
similar to those which were recognized inconsistent with the Constitution or
ones that are based upon them are to be rescinded using the established pro-
cedures (Article 87), which, inter alia, also presumes that general jurisdic-
tion and arbitrazh courts recognize the invalidity of acts lower than the lev-
el of federal law which are similar in content to those unconstitutional rules
of law which had earlier been deprived of legal force.

One can only speak conditionally of these situations as demonstrating
the retroactive force of the decisions of the Constitutional Court as a nega-
tive lawmaker. For the other judicial jurisdictions, the issue of such their ef-
effect is the sorest one, since it demands a review of decisions which have al-
ready been delivered.

Abstracting oneself from the day-to-day realities of the judicial applica-
tion of law which are not justified by legal concepts, it is difficult to under-
stand the clearly negative attitude of judicial bodies at all levels to this pros-
pect which is mandatory for them; it really is similar to the review of a judicial
law enforcement act in any type of court proceedings by decision of a court
which is authorized for such review. The review of judicial decisions in con-
nection with the unconstitutionality of rules of law which has been revealed
has even fewer justifications for a negative reaction on the part of the judi-
cial body of any level which carried it out — it is less related to flawed activity
of the court, with the criticism of violations in ordinary judicial procedures,
and is practically equivalent to the consequences of a change in rules of law
made by the lawmaker that had adopted such rules. However, the practice
of other jurisdictions which refuse to review their acts based upon an uncon-
stitutional law is widespread, and since it is a uniquely Russian phenomena,
it deserves analysis.

The review of the case of a claimant who has won a dispute in the Con-
stitutional Court regarding the unconstitutionality of a law, which is directly
provided for in the Federal Constitutional Law as mandatory “in any case,”
is considered, in the framework of constitutional due process of law, to be
a privilege (bonus) provided to the claimant by force of law for its civil initiative allowing to eliminate the unconstitutional rule of law: in protecting its own personal rights, the claimant also acted in the public interest. An unconstitutional act, or its meaning which has been rejected as contradictory to the Constitution henceforth cannot be recognized to be the applicable law for determining the rights and obligations of the claimant, i.e. a valid normative prescription, regardless of whether the usual required conditions for review established by procedural law cannot now be complied with (for example, those connected with procedural time periods, general civil statutes of limitation, the requirements established by law to exhaust other means of defense, the payment of the corresponding court fees; such a set of conditions depends of the lawmaker regulating the procedures).

Theoretically, it would only be possible to refuse such review if the judicial act was not based upon the unconstitutional prescription. At the same time, such a justification cannot be established outside of constitutional judicial proceedings. In practice, this would signify that constitutional due process of law was carried out in violation of the conditions for the permissibility of a constitutional claim provided for by law, which is possible only when the law which was applied or which is to be applied violates constitutional rights. However, first of all, courts of other types of jurisdiction do not have the authority to examine the compliance with the requirements for the admissibility of an appeal to the constitutional courts. They are not the competent lawful court to resolve this question. Secondly, in the event that substantial violations of procedural form and procedural rights were revealed, even if from the point of view of the judicial body which is reviewing the judicial act they did not influence the essence of the decision as it pertains to the application of substantive law, the law excludes the possibility of refusal to apply such sanctions which restore rights, such as rescinding an act. This is even more inadmissible when, as is the case with constitutional judicial proceedings, we are speaking about constitutional rights.

The other arguments used by general jurisdiction and arbitrazh courts which lead to a refusal to review decisions adopted in contradiction to the Constitutional interpretation of the law seem to be frankly baseless. One can give examples when the superior courts of other jurisdictions consider that they have the right to insist on their interpretation of rules of law which were rejected by the Constitutional Court, or argue that a review of their judicial acts is mandatory only when the law applied by the courts is fully deprived of legal force because of its incompliance with the Constitution, i.e. they do not recognize that a review is obligatory when it is established that a rule of law is to be applied only within its constitutional meaning revealed by the
Constitutional Court. In their essence these arguments negate the competen-
cy of constitutional justice or narrow it in an unjustified fashion — in opposi-
tion to the rules of law of the highest level which stipulate it. Due to the gen-
eral legal requirements for lawful competent trial of each case, purely judici-
ary discretion regarding the refusal to carry out the acts of the constitutional
courts is impossible. Just as with the refusal of courts to apply an unconsti-
tutional law, it also requires the additional involvement of other judicial lev-
els, which are authorized to exclude the quasi-normative (in relation to their
general significance and obligatory nature) legal positions of the Constitu-
tional Court from the system of applicable law. This is possible only through
lawmakers eliminating the law which is the object of review in constitutional
judicial proceedings or through the Constitutional Court itself changing the
legal position formulated in it.

Sometimes, refusal to review judicial acts based upon unconstitution-
al prescriptions is justified by referring to the fact that there are no relevant
grounds in procedural legislation for rescinding or amending judicial deci-
sions, and that no sort of special procedures have been established to review
such cases. On the face of it, such refusal seems to be more “legal” but from
the point of view of procedural law, the respective argumentation is simply
odious. Firstly, in all branches of procedural law and in all procedures for re-
viewing judicial decisions, the judicial application of a law which is not sub-
ject to application when resolving a specific case is named among the grounds
for rescinding or amending judicial decisions. If upon a claim of a citizen the
Constitutional Court recognized that a certain law is unconstitutional, then
it has thereby recognized that this law is not subject to application, neither
in this case nor in all other cases. Since a law which has been recognized as
unconstitutional loses legal force, the regular procedures in which the deci-
sions of courts are corrected based upon the application of an improper act
must also be in effect in those cases when the application of law is exclud-
ed by virtue of a decision of the Constitutional Court. The obligatory nature
of decisions of the Constitutional Court and the obligatory nature of review,
on the basis of the ruling of the Constitutional Court, of the decision issued
in a case in which an unconstitutional law was applied stems from the general
legal nature of judicial decisions, inasmuch as confirmation of this obligato-
ry nature by any other bodies is not required in order to enforce any judicial
decision or in order for it to be recognized as generally binding. A decision
of the Constitutional Court also does not require such confirmation.

Secondly, just an indication of the fact that the case of the claimant who
has turned to the Constitutional Court is subject to review directly formu-
lates the grounds for review of the judicial decisions which have been ren-
dered previously. Moreover, this is established in the Federal Constitutional Law “On the Constitutional Court in the Russian Federation”, which occupies a higher place than procedural legislation in the hierarchy of legal acts pursuant to the current Constitution.

Thirdly, the reference to the absence of procedures established for such review by law testifies to the negation of the potential of current procedural regulation: it was established in civil procedural and arbitrazh procedural legislation from the very beginning that the judicial acts of any court which have entered into legal force may be reviewed in those cases when the act of a state body which has served as its basis is rescinded (paragraph 4 of Article 392(2) of the Russian Code of Civil Procedure and Article 311(4) of the Russian Code of Arbitrazh Procedure). There are no grounds for refusing to extend the concept of an act of a state body to laws, just as it is indisputable that depriving unconstitutional rules of law of their legal force is equal to rescinding them. It is clear that the corresponding procedure for the renewal of proceedings (upon the discovery of new or newly discovered circumstances) is also determined by the above-mentioned provisions of procedural law. Such an interpretation of procedural law is also confirmed in current lawmaking, and is also made specific thanks to an additional list of new or newly discovered circumstances which constitute grounds for renewing proceedings in a case. In the Russian Code of Criminal Procedure and the Russian Code of Arbitrazh Procedure, the Constitutional Court’s recognition of a law having been applied in a specific case as incommensurate with the Russian Constitution is now directly indicated among such grounds (Article 413(4) of the Russian Code of Criminal Procedure and Article 11(6) of the Russian Code of Arbitrazh Procedure).

Fourthly, the special procedure for renewing proceedings in connection with any new or newly discovered circumstances in the cases of claimants in constitutional courts does not exclude that other cases decided on the basis of unconstitutional rules of law can be reviewed. The language of Article 79 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation,” according to which such cases are subject to review in the instances provided for by law confirms the effect of general grounds in such cases as well as the judicial review procedures provided for by judiciary branch legislation provided that the conditions for their admissibility are complied with.

When using the procedural institutions employed for reviewing cases which have been previously resolved based upon unconstitutional rules of law, all

---

1 A discussion of the correct naming of procedures and the various content of grounds for them have no significance for the purposes of this analysis.
the conditions and time limitations apply which must be used when interested parties have the right to carry out the defense of their rights at their own initiative at the appropriate level of court. As for incidences of the review of such cases, one can speak of the retroactive force of acts of constitutional due process of law which are realized through the decisions of other courts in the application of the law (just like with normative prescriptions which have retroactive force).

In any case, the attainment or restoration of the constitutionally based uniformity of judicial practice using the method of constitutional due process of law is impossible without a practical recognition of the binding nature of its acts by other types of courts. It is dictated by the constitutional requirement of a lawful trial of each case; it is the essential feature of effective means of judicial protection and as such is considered as the property which is universally present in judicial acts, which is, alongside others, necessary for the uniformity of the judicial system.

The so-called precedent significance of Constitutional Court decisions is discussed in connection with this.

It is imprecise to designate the legal significance of Constitutional Court decisions as a precedent, since a precedent is the application of the legal conclusions of one court when another court examines cases in a situation when their factual circumstances are similar. One is not speaking of precedent in this sense in connection with the decisions of the Constitutional Court. If the Constitutional Court recognized some normative provision to be unconstitutional or has interpreted it, then its decision on this is binding for all cases when the question of the applicability of this normative provision is decided, or that of an act having exactly the same content. We are speaking here of an identical situation rather than just a similar one and of the same legal content of a statute as applicable law rather than just of similar factual circumstances.

In order to evaluate the legal significance of the decision of the Constitutional Court, the concept of prejudicial effect seems to be more appropriate, which implies the indisputable significance of the establishment of facts

---

1 See Rulings of the Constitutional Court of the Russian Federation No. 20-O of 14 January 1999 and No. 48-O of 4 May 2000 et al.

2 The right of the Constitutional Court to determine the procedures for the enforcement of its acts and, inter alia, consequently, to stipulate their application to previous judicial practice is actually similar to how this is stipulated in regard to the retroactive force of a law. The Constitution itself actually mentions cases of the mandatory application of any acts in effect for an undetermined circle of persons and prior period of time. The principle of the retroactive force of legal prescriptions which regulate imposing liability fully applies to the legal positions of the Constitutional Court.
by the original court for other courts. It is true that in constitutional justice, the concept of a “fact” requires a different shade of meaning. The fact established by the Constitutional Court, which must be recognized by other courts without investigating it again, consists in the presence or absence of legal content in a law, and its compliance or lack of compliance with a constitutional rule.

And although this phenomenon is a purely legal one, in a certain sense it can be considered to be a special fact which has prejudicial effect not only for other courts, but also for the lawmaker, which is indirectly confirmed by the prohibition against overcoming a decision on the unconstitutionality of the content of a law by adopting it once again. Moreover, the established fact of the unconstitutionality of the normative content of an act is not limited to the recognition of the unconstitutionality of a respective legal provision set out only in the act which has been reviewed by the court. The same legal content of other acts also does not have the right to exist from the moment that the Constitutional Court issues a decision on the unconstitutionality of the rules of law reviewed by them. The prejudicial effect of the fact of the unconstitutionality of a normative rule means that it is impossible for the same rules stipulated in other acts to be applied by other courts. The latter is an element of the mechanism for ensuring the uniformity of the application of law on the basis of the acts of constitutional courts.

* * *

In the context of the transformations in the country which began in the 90s, the reformation of the judicial system occurred in parallel with the establishment of constitutional justice. The latter had a definite influence on the judicial application of the law as a whole not only, as was already said, through the content of its decisions, but also by the contagiousness of the ideas of judicial power which were embodied in its status. The possibility of examining the legal content of rules of law during the judicial process and saying “no” to those who created the rules was gradually confirmed in the procedures for the control of rules of law in all courts. Of course this strengthened the sensation of the independence and autonomy of the judicial branch, whose guarantees were also expanded. Judicial practice was more and more considered to be a sphere not only for the application but also for the formation of law, especially in connection with the pronouncement of the direct action of rights and freedoms, the inclusion of universally recognized principles and rules of international law in the legal system of the country and the recognition of their priority over internal law. Legislative regulation was not updated immediately, however after the adoption of the new Constitution,
all legal acts which were in effect before it entered into force could be applied only in so far as they did not contradict its prescriptions, and in many cases the realization of its prescriptions became exclusive task of the practice of the application of law. Attitudes changed towards the significance of judicial decisions as the source for the formation of law in the broad sense of the word. Problems of precedent law became topical in scholarly discourse. Interest in it was also increased by the convergence processes of the common and statute law systems existing in the world, and by the direct use of foreign experience of development of legal systems by the scholarly expert community and in legal practice, and even the inclusion of foreign specialists in the development and expert evaluation of new legal texts.

In such conditions, perceptions regarding the prerogatives of courts changed, along with perception of their roles in the establishment of the legal system, the significance and correcting force of judicial acts and the fact that courts are bound not only by statutes but also by the law. to a certain extent, the previous uniformity in judicial institutions and in the judicial application of law wavered; new types of jurisdictions were created, jury trials appeared in courts along with the common myth that they could disregard the law. The binding nature of directive instructions from the supreme judicial body of the country, the rulings of the Plenum of the Supreme Court, which had previously been established by law, disappeared in the system of courts of general jurisdiction. All this made the problem of ensuring the uniformity of the judicial system and judicial practice more acute. Its solution was made more difficult by the affect of factors which led off in various directions. The pendulum swung in the direction of an expansion of judicial discretion and began to return to the formal binding of judges to the law, to the necessity of excluding judicial arbitrariness and expansion of the means for securing uniformity in judicial practice under conditions of the continuous and sometimes chaotically changing legislative regulation, which is not lacking in either contradictions or gaps. The weakening of public foundations (that which had previously been called lawfulness in the activity of our law enforcement bodies and courts) was supplemented by negative corrupt practices. Notwithstanding a series of successful steps, the judicial reform which had begun was not completed, although the state programs for the development of the judicial system up through 2011 were adopted and continue to be carried out. Moreover, neither in the judicial system itself nor in the circle of those governmental and expert institutions involved in judicial reform is there any conceptual uniformity on the measures which must be taken. And in this sense, the poorly managed situation in the judicial system may and will require various means for securing the uniform application of the law.
In connection with this, in a similar vein with the topic being examined of the constitutional foundations of such uniformity, it is necessary to examine several constitutional guideposts for the acceptability and efficacy of the methods being used for the unification of judicial practice.

The role of the jurisdiction of superior courts in eliminating contradictions in the judicial application of the law is indisputable. In the Strasbourg Court’s practice, the function of the superior courts for eliminating contradictions in the courts’ interpretation of applicable law is indisputably considered to be their task, since otherwise the superior court itself would become the source of legal uncertainty (the case of *Beian v. Romania* No. 1 of 6 December 2007, claim No. 30658/05). Oversight over judicial activity and the formulation of clarifications on questions of judicial practice (in the procedural forms provided for by law) have been referred to the constitutional authority of the superior courts of the Russian Federation (Articles 126 and 127 of the Russian Constitution). The examination of judicial acts by superior courts in all types of judicial proceedings and in all procedures makes it possible to correct the judicial interpretation and application of the law. This is covered by the broad concept of carrying out judicial oversight in its constitutional and (not in the judiciary-branch) meaning, including forms for the review of judicial acts in specific cases, both of those which have and those which have not entered into lawful force. The significance of the judicial decisions of superior courts in specific cases is indisputable for correcting practice. They always have definite legal consequences for the resolution of a particular case and, by affecting the relations of the participants of disputed legal relations and determining their rights and obligations, they intermediate the application of sanctions which restore rights within the framework of a certain law enforcement process, i.e. they can lead to the rescission or a change of an incorrect judicial act. Generally, one should not have doubts regarding the efficacy of these means in ensuring uniform approaches to the judicial application of law if one assumes that (a) the system of judicial levels of review makes it possible to realize the right of each to have a decision in his or her case reviewed by a superior court, (b) it is guaranteed that not only trial participants have access to the information on the practice of these courts, and (c) the activity of such appellate courts is not distorted by any circumstances which would lead to them being unable to provide fair and due process of law and to reveal judicial mistakes in the application of the rules of substantive and procedural law. It is difficult to agree that the significance of the uniformity of judicial practice for the realization of the rule

---

1 In foreign procedural theory and practice, a judicial act is deemed to be subject to fulfillment from the moment it is issued, while at the same time its entry into legal force means the finality of the judicial decision as a *res judicata* and excludes its review.
of law may be ensured without these conditions. Of course there are more simple ways to “harmonize” the practice of superior and lower courts: when a case is being examined, one can enquire as to the opinion of the appellate court regarding a specific decision in advance, one can declare the preferences of the superior court from the top down along the judicial chain, or, which is somewhat better, one can send recommendations on the application of rules of law, the choice of sanctions, etc.¹ In our judicial system, the use of the results of the generalization of judicial practice plays approximately the same role. However, any management methods applied to courts are limited by the principles of fair and due process of law which assume the independence of a court when deciding a case on the basis of the freedom of opinions and beliefs of judges, examination of legal conflicts only by the lawful competent court and using the proper procedures. It is just these characteristics which define the essence of the concepts of courts, justice, judicial power, and in a hierarchy of values, these characteristics cannot field to a simpler directive method, i.e. in essence, an administrative method of management, even for the purpose of excluding deviations from the uniform application of the law².

There are significant reserves in the Russian judicial system for increasing the potential of the upper-level and superior courts in resolving this task. The necessity of creating appellate instances for all cases in the system of courts of general jurisdiction has already been officially recognized (currently only the acts of justices of the peace are reviewed through appeal procedures). Due to the fact that they themselves are overloaded, and due to the use of particular procedures, cassation appeal courts are not coping with either the task of eliminating judicial mistakes, nor even more so with the de-

¹ In Canada, there is an annual discussion of the decisions of the Supreme Court involving not only judges, but also the scholarly community, as well as the practice of sending out proposals to American courts on standard sanctions/sentences depending on the circumstances and gravity of the violations proven in court.

² In its Resolution No. 5-P of 17 March 2009, the Constitutional Court of the Russian Federation indicated that a procedure for the extra-judicial review of judicial acts is inadmissible in principle, since in opposition to the forms for the review of justness of court decisions exclusively by superior judicial bodies which are determined by the nature of due process of law and provided for by procedural law, such an extra-judicial procedure would in essence signify the possibility of a replacement of the acts of courts of law with administrative directives, which is undoubtedly a deviation from the guarantees for the autonomy, fullness and exclusivity of the judicial power. This also does not comply with the position of the European Court of Human Rights according to which the authority of a court to issue a binding decision which cannot be changed by non-judicial powers is inherent in the very concept of a “court” (Judgment of 19 April 1994 in the case “Van de Hurk v. the Netherlands”). From this point of view, only those appellate levels which correct practice using [proper] procedural forms are recognized by the court.
development of uniform legal positions. Given the scale of Russia, the Russian Supreme Court acting simultaneously as the first, cassation and supervisory instance cannot compensate for the insufficiencies of the judicial application of law by lower-level courts in specific cases. This gives vital impulses for the development and reformation of the court system.

The many difficulties of the required transformations in the structure and tasks of all levels of courts incline one to use other forms for the correction of the judicial application of law. The significance of the precedents set by the judicial acts of the superior courts in specific cases and the binding nature of their clarifications in questions of judicial practice is being discussed.

The orientation towards the cases decided by a superior court and towards the legal positions formulated in the decisions on them when other cases are being decided in lower courts is an objective phenomenon in any judicial system. However, this does not mean that one can in all cases speak of their significance as precedents. One can say that in our theory and practice, such an attribute is probably just a provisory expression which reflects the desirability of following an example approved by a superior court when resolving similar cases, which does not match up with the essence of precedent as a legal phenomenon¹. In fact, we are speaking of the binding nature of the decisions of an upper or superior court for resolving not only cases reviewed by them but also other cases, and if it does not combine well with the additional conditions which set the limits for this binding nature, then it is obvious that it does not comply with the provisions on independence of judges and their subordination only to the law. As a minimum, one must provide for the possibility of rescinding the obligatoriness of decisions which have come down in other cases for a given case being examined by

¹ Precedent was characteristic as a source of law for undeveloped legal systems, in practice it replaced the absence of statutes and gradually developed into a system of generally binding rules; in several European countries the rules of so-called precedent law are incorporated into legislation; for many common law countries, the replacement of precedent with a statute is a topical issue. A precedent which interprets the rule of a law may in fact change its meaning. But as a rule, at the level of customs or norms, the addressees who are supposed to follow precedent are also determined, and these are lower-level courts and the upper-level courts which have created a precedent. A court possesses sufficient discretion to recognize that a certain precedent or all those which have been set earlier are inapplicable in a specific case — this must be justified, but does not require an appeal to the higher standing courts which have set the precedent. (See: V. A. Chetvernin. Precedent. Published in: Legal Encyclopedia. Moscow, Jurist. 2001, p. 867 (Четвернин В. А. Прецедент // Юридическая энциклопедия. М.: Юрист, 2001. С. 867); V. A. Chetvernin, G. B. Yurko. Judicial Lawmaking. Published in: XXI Century Jurisprudence: Horizons for Development. Notes. St. Petersburg, 2007, p. 368—395 (Четвернин В. А., Юрко Г. Б. Судебное правотворчество // Юриспруденция XXI века: горизонты развития: Очерки. СПб., 2007. С. 368—395)).
Chapter 3

a court, and it must also be possible to change the essence of a legal position formulated previously. At the same time, it would be incorrect to deny the instructive role of information on the algorithms which have been developed when deciding cases which are similar in their actual circumstances. Following their obligatory examples, it is easier for upper-level and superior courts to exercise their powers for rescinding judicial acts which diverge from their positions than in the absence of such examples. But they too should have the possibility to depart from the rules which have been previously inferred. In principle, the orientation on judicial precedent is, on the contrary, a more complex method for ensuring the uniformity of judicial practice than that which exists in the current Russian legal system on the basis of the requirement for subordination to the law. In addition, in our legal culture, the participants of a trial who appeal a decision can hardly count on the appellate court taking decisions on similar cases into account when reviewing their appeal. This is an uncharacteristic and often impermissible argument for justifying an appeal to a judicial act. When rescinding the decision of a court, even if the law provides for the violation of uniformity in the interpretation and application of the rules of law as a justification for such rescinding (as in Article 304 of the Russian Code of Arbitrazh Procedure), a court can scarcely discard a meaningful criticism of the specific incorrect understanding of the law which led to the erroneous judicial acts (as a minimum, it must refer to the content of its justifications stated earlier in another case). Anything else would not comply with the requirements of procedural law regarding the justifiability and reasonableness of judicial acts (Article 15(3) of the Code of Arbitrazh Procedure, Article 7(4) of the Code of Criminal Procedure, Articles 195, 198 and 199 of the Code of Civil Procedure) as interpreted by the Constitutional Court, and this would violate the requirements for just due process of law and the constitutional right to judicial protection by appellate courts.

As was already indicated by the Constitutional Court of the Russian Federation, as it applies to the decisions of the relevant courts, the requirements for just due process of law and the effective restoration of rights which are based on Article 46(1) and (2) of the Constitution of the Russian Federation, Article 14(5) of the International Covenant on Civil and Political Rights and Article 2 of Protocol No. 7 to the Convention for the Protection of Human Rights and Freedoms presume that the factual and legal justifications of the decisions adopted by them are mandatory, including the justification for a refusal to rescind or amend the judicial act under appeal, which is impossible without a systematic review and evaluation of the arguments of the relevant appeal... Appellate courts are not provided with the capability to ignore or arbitrarily dismiss the arguments of an appeal without providing factual and legal justifications for the refusal to grant the claims presented, since the justification of the court’s decision should in any case be based upon a review of the specific circumstances which were reflected in the materials of the case and the materials additionally presented by the parties, as well as the rules of sub-

1 As was already indicated by the Constitutional Court of the Russian Federation, as it applies to the decisions of the relevant courts, the requirements for just due process of law and the effective restoration of rights which are based on Article 46(1) and (2) of the Constitution of the Russian Federation, Article 14(5) of the International Covenant on Civil and Political Rights and Article 2 of Protocol No. 7 to the Convention for the Protection of Human Rights and Freedoms presume that the factual and legal justifications of the decisions adopted by them are mandatory, including the justification for a refusal to rescind or amend the judicial act under appeal, which is impossible without a systematic review and evaluation of the arguments of the relevant appeal... Appellate courts are not provided with the capability to ignore or arbitrarily dismiss the arguments of an appeal without providing factual and legal justifications for the refusal to grant the claims presented, since the justification of the court’s decision should in any case be based upon a review of the specific circumstances which were reflected in the materials of the case and the materials additionally presented by the parties, as well as the rules of sub-
The constitutional authority for superior courts to clarify judicial practice is considered by the representatives of these jurisdictions as justifying the binding nature of such clarifications. They actually do have binding significance in the real application of law. This is confirmed by the use of references to them in judicial acts of all levels, i.e. when issuing decisions and when they are corrected by higher courts. However, the Constitution does not legitimate the binding nature of clarifications provided by superior courts. As such, their significance is determined by the force of the reaction to deviations from the legal positions contained in them. Why must one disagree with a prohibition on lower-level courts deviating from the clarifications? Such prohibition or even recognition of their legally binding nature contradicts the rights and obligations of the court in any trial to review applicable rules of law from the point of view of their compliance with the Constitution and the law. This monopoly of the courts on carrying out the selection of applicable law in the process of the application of law, including through confirmation of the legal contents of a law based upon the independent status of judges is the main constitutional undergirding of the principle of the separation of powers and judicial support of rights and freedoms. In the hierarchy of constitutional legal principles it represents a higher value than the uniformity of judicial practice and compliance of all courts with clarifications, which are in essence instructions (“ukazaniya”) — that is how they are described in the texts of the resolutions of the Plenums of superior courts — regardless of how correct they are in essence.

In order to exclude deviations from the uniform practice of the application of the law, it is sufficient for it to be corrected by rescinding and amending judicial acts. However, one may object that this is insufficient for preventing deviations, i.e. for a preventative, so to say prophylactic adjustment towards the correct interpretation of rules of law, since neither the law itself nor juridical legal awareness are sufficient for this. But then the necessary means should be examined which would eliminate the possible negative consequences of binding judges with something other than constitutional principles and rules of law, and which are also not subject to any sort of control. It is not allowed to appeal the resolutions of the Plenums of superior courts by judicial procedure like acts of any other bodies, including legislative ones; they can only be deprived of their subjects if lawmakers change the regulation or if they are changed by the superior courts themselves.

From the point of view of the process of administration, in the judicial system the binding nature of the clarifications of the superior courts makes them an easier management method than just having the requirement for subordination to the law, since the Supreme Court and the Higher Arbitrazh Court can make a law more specific in their clarifications, clarify its terms, fill in gaps, i.e. as a result regulation becomes more definite, and at the same time lower-standing courts are freed from the difficult autonomous search for its legal content. However, there is no level in the court system of the country which could check (confirm or reject) that a law that has been interpreted — through general clarifications — in accordance with its legal content in a way similar to the way that this is done in constitutional proceedings when reviewing the meaning of a rule which is given to it by the practice of the application of the law. The resolutions of the Plenums of the superior courts are not an act of the application of the law in a specific case. They are actually perceived as creating a general, even if subordinate, regulation and in a sense they have a quasi-normative or precedent character. A theoretical dispute about the validity of such characteristics has no significance against the background of the recognition of the generally binding character of these acts of abstract judicial interpretation of the law. But then to evaluate an interpretation carried out in such a way as binding requires a logical continuation which, first of all, corresponds to its sub-legislative nature, and, secondly, would determine its place in the system of the constitutional interpretation of rules of law which is carried out both in constitutional courts and in the rest of judicial practice. The logic of the judicial review of any applicable rules of law regarding their compliance with general legal principles, the Constitution and the law is clearly breached when, on the one hand, as was already mentioned, the Supreme Court insists that any court may reject a law as the basis for resolving a case without raising the question of depriving it of legal force through the constitutional jurisdiction and, on the other hand, when the clarifications of superior courts are excluded from being the subject of judicial control when they are applied in a specific case. In this series of discussions, the cases of the refusal of general jurisdiction and arbitrazh courts to follow the legal positions of the constitutional court by which the constitutional meaning of rules of law are revealed also do not fit into constitutional conceptions of the hierarchy of normative rules. Clarifications of superior courts which should in their turn only reveal the meaning of the law in reality turn out to be more binding than the law and its interpretation by the constitutional court, although the binding nature for judges of any acts other than the Constitution and lawful statute is excluded.
There are two possible options for escaping such a situation: either the judicial system of Russia, including courts of all types of jurisdiction, will proceed from the thesis that there is nothing binding for a court except for the law, including, of course, the Fundamental Law, and that acts of abstract judicial interpretation have a recommendatory significance, or that there should be a protection against unlawful and unconstitutional resolutions of the plenums of the superior courts. Foreign constitutional judiciaries are also familiar with this problem. If the instructions given by superior courts to lower courts on the basis of generalized judicial practice are recognized to be binding, this means that it is necessary to permit them to be disputed and their constitutionality to be reviewed. This is just how the assertion of the obligatoriness of the directives of the superior court was overcome, for example, in Hungary. In our judicial system, if one insists on the mandatory significance of instructions of the plenums of superior courts for the courts, such review should be carried out by the Constitutional Court.

The custom which has developed in the courts for checking the decision in the case against the acts of abstract judicial interpretation provokes the perception that not only the resolutions of the Plenums of the Supreme Court and the Higher Arbitrazh Court are binding, but also the positions contained in the reviews of judicial practice distributed by them, informational letters, answers to the questions of judges on problems in the interpretation and application of law, clarifications of the Supreme Evaluating Judiciary Collegium and even of the Judiciary Department¹. Courts have practically no way to dispute even these recommendations which have been developed completely outside of any sort of procedural forms.

The danger consists precisely in the fact that such methods which are similar to administrative ones are proliferating ever more widely as means of interpreting the law and even as means for amending it. For example, the fair-

¹ Although neither the Supreme Evaluating Judiciary Collegium (as a body of the community of judges) nor the Judiciary Department (in the role of carrying out judicial administration) under the Supreme Court are authorized to interpret applicable law, the extensive documentation which emanates from these bodies acting under the Supreme Court in essence contains clarifications of the provisions of legislation both on the status of judges and on procedures in courts whenever the latter need organizational support and resources. So that such an assertion does not seem to be unsubstantiated, one must only look at the clarifications from the Supreme Evaluating Judiciary Collegium on how the justification for decisions regarding depriving a judge of his or her status should be understood (they may later be appealed to the Supreme Court) or the instruction from the Judiciary Department on the procedures for realizing the right of every accused and convicted person to receive copies of the materials of a criminal case at his or her own expense, including using technical devices, as presuming not only payment for copies and the depreciation of equipment, but also the accused or his or her representative making such copies with the assistance of their own equipment delivered to the court.
ly well-known Resolution of the Plenum of the Russian Higher Arbitrazh Court No. 14 of 14 February 2008\(^1\) in reality replaced the supervisory procedures for reviewing cases by the Presidium of the Higher Arbitrazh Court — as the sole supervisory instance — using as its justification the violation of the uniformity of judicial practice based on the instruction of the Presidium to other courts on the review of acts which had been issued by them previously and which had already entered into legal force in the procedure for reopening cases when there are newly discovered circumstances, recognizing the practice of the application of certain provisions of the law formulated by the Higher Arbitrazh Court as a new justification for such a review. It is clear that a direct order from the top throughout the entire judicial system according to the principle “do as I do” is incompatible with the status of a court as a body of judicial power, and is built upon recognition of such a status only for the superior courts. Moreover, in many cases it turns out that substantive requirements for the application of rules of law by courts are forgotten, such as the prohibition on expansive interpretation of restrictions, the requirements for a competent court for each case, clarity and certainty in the legal position to be formed, the inadmissibility of discrimination, etc. In specific cases it is possible to review compliance with these principles, since there is an entity for such review, namely the Constitutional Court, but as far as abstract guideline clarifications are concerned, to review their compliance is impossible\(^2\).

Such methods of administering judicial practice as the improper usage of statistical targets and disciplinary practices against judges should also be named among those which distort the essence of due process of law. For decades before the formation of the country’s judicial system in its current form, the practice of evaluating the quality of the performance of due process of law through statistical targets had developed, which is by its nature unsuitable for characterizing the work of judges. Moreover, the percentages of rescinded or amended judicial acts used for these purposes, taken together with

\(^1\) Bulletin of the Higher Arbitrazh Court. 2008. No. 3.

\(^2\) It is true that for some time the decisions of the Constitutional Court justifiably considered the content of the resolutions of the Plenums of the superior courts as revealing the meaning given by judicial practice to a law which has been disputed in the constitutional courts. Unfortunately, since a great deal of stress has built up between the superior courts, such an approach has become less and less pronounced: Adhering to the idea of constructive cooperation in the judicial system, the Constitutional Court has tended towards self-restraint in this area of its competency, although it fully corresponds to not only the subject matter of review as it is defined in the Federal Constitutional Law “On the Constitutional Court of the Russian Federation,” but also corresponds to the legal nature of the Constitutional Court and its mission as a judicial body of constitutional control (Articles 3 and 74).
other data give a picture of the condition of judicial work both statically and dynamically, and from this point of view they make sense (if only the statistical methods do not distort it). They are used to reward a judge for seeking out by far not the best decision in a case, but the expected one which was acceptable in advance for the entire system as a whole and the superior court in particular. Any failure of the latter to agree with a decision issued by the lower court is considered to be a negative characterization of the trial and the final document in the case. But first of all, the fact that a superior court came to a different conclusion in the case does not at all signify that the lower court made a mistake, and secondly, if the general responsibility of the judicial system for the quality of its activity is measured by percentages of rescinded and amended judicial acts, this forces superior courts to use such sanctions very parsimoniously, and thus to refuse to restore the rights of those who turned to the courts for protection and whose rights were violated during judicial proceedings. As a result, a judicial practice which outwardly strives for really is, indeed, formed but uniform just due process of law is not attained and, moreover, it ceases to be the sole goal of the judicial system.

The situation is made even worse by the use of data on the rescinding or amendment of judicial decisions as an indicator of the erroneous work of a judge and as the basis for applying disciplinary measures against him or her. Practically all disciplinary practice uses these indicators to characterize a judge, which, depending on their numerical size alone are sufficient to make conclusions regarding his or her professional incompetence. Such an approach is actually a deviation from the constitutional and general legal principle of a judge’s lack of liability for the essence of the decisions adopted by him or her in a case, which — similar to the principle of deputies’ lack of liability for their voting in Parliament — guarantees that an independent court can carry out due process of law in accordance with the judge’s own opinion and belief based upon the factual circumstances established by him or her and applicable law without any sort of influence by external or internal motives which would distort his or her position.

* * *

The constitutional framework for striving towards uniform practice of the courts is set by the parameters of just due process of law and the appropriate legal status of the courts and judges which serve to guarantee this. The uniformity of judicial practice which expresses the rule of law therein is provided for first and foremost by its general principles. From this point of view, the theoretical development and practical solution of the problems which objectively impede the application of a unified legal standard are important
not only when interpreting a specific rule of law within the boundaries of one jurisdiction, but also within the system of courts as a whole. It is necessary to reveal such problems and make them known to lawmakers so that procedures for the judicial protection of similar rights in differing jurisdictions do not discriminate against participants in similar legal relations. The lawmaker also has to ensure the systemic character of legal regulation in such a way that branch legislation would not proceed from the possibility of ignoring the substantive uniformity of the legal categories used and would not pretend to an exclusive autonomous definition of them. Otherwise, the legal essence would disappear and the uniformity of their embodiment in the application of the law would be excluded. Unified approaches for resolving objectively unavoidable situations are needed in the practice of the application of law. These situations are related to colliding and competing rules of law, as well as gaps in the law which are eliminated on the basis of general principles of law, which justify, inter alia, the hierarchy of legal values, including the recognition of the priority of the principles and rules of international law, and also using analogies of law and statute.

A systematic solution of the definition of the permissible borders for the activity of courts which establishes rights is needed, as well as for the mutually binding force of the acts of differing jurisdictions, including the possibility of refuting the prejudicial effect of judicial decisions only when using procedures in the framework of which the original establishment of facts is carried out, and also the recognition of the legal force of judicial acts of other jurisdictions adopted within the limits of the competency, and the confirmation of a uniform approach for overcoming the contradictions between them. Otherwise, the objectively necessary striving towards uniformity of practice may engender the use of inadmissible means for attaining it and lead to negative results which degrade the judiciary as an effective means of legal defense which provides everyone with a competent, independent and impartial court established by law and adopting binding decisions when determining a respective person’s rights and obligations in the course of consideration of his or her legal conflict.\(^1\)

\(^1\) Article 14(1) of the International Covenant on Civil and Political Rights, Articles 6(1) and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms.
Chapter 4. Towards Uniformity of Law Enforcement — The Role of Russia’s Judicial System

The uniformity of law enforcement in any national judicial system and — in the present-day world — also in international mechanisms such as that of the Council of Europe is of overriding importance to the quality and efficiency of justice. The due process of law after all is a principal means of exercising rights. A right, for its part, in essence is a means of regulating, streamlining, and stabilizing public relations and recognizing and upholding the interests of their participants.

One cornerstone principle for the exercise of a right — that of legal certainty — only turns from an empty declaration into a reality subject to the uniformity of judicial practices in interpreting and invoking legal provisions and to the predictability and identity of judgments in similar cases. Law enforcement consistency on the part of the courts is an indispensable prerequisite condition for both the actual triumph of the law in the life of society and grassroots trust in the judicial system. One can say that uniform judicial practices make an intrinsic quality of true justice.

Any ideal homogeny in the practices of the courts, however, is in principle unachievable since the law and justice are in a non-stop process of evolution. But the task and efforts to attain judicial law enforcement uniformity have existed at all times, everywhere, and under all judicial systems.

The international community has accumulated a great deal of experience in ensuring consistency in judicial law enforcement. It is marked, on the one hand, by distinctions in the mechanisms existing to ensure such consistency in jurisdictions which belong to different legal systems (the continental European system, the Anglo-Saxon legal system, etc.) and, on the other, by the employment of common methods and a gradual rapprochement of the national systems, especially within the frameworks of such international umbrellas as the EU, the Council of Europe, and the CIS.

In line with its traditions and applicable legislation, Russia has been using the following ways and means to ensure uniform judicial practices.

Firstly, the training of legal practitioners in general and candidate judges in particular, including, but not limited to, follow-on and upgrade training for judges, is based, *inter alia*, on teaching materials stressing the need and discussing methods to ensure the uniformity of judicial law enforcement.
Among other things, the training concerns regulations on interpreting legal provisions, principles for their application, rules for filling gaps in the law by the analogy of statute and the analogy of law, the powers of the Constitutional Court of the Russian Federation to exercise constitutional oversight and construe the Russian Constitution, and the authority vested in the nation’s Supreme Court and Higher Arbitrazh Court to issue clarifications on questions of judicial practice.

Professional development training for judges and their assistants covers aspects of ensuring uniformity of judicial practice in relation to certain complicated and new categories of cases.

Keeping judges posted on certain typical judicial errors is another means of ensuring uniformity of law enforcement.

Secondly, all courts have the material technical and organizational preconditions for providing judges, their assistants, and other legal specialists with such information as is required in order to keep abreast not only of current legislation, but also of enforcement practices in certain categories of cases. Available databases cover all cases tried by the Higher Arbitrazh Court of the Russian Federation and federal arbitrazh courts at circuit level, which are cassation [or second-tier appeal] authorities.

Lower courts may rely upon such databases to check if the higher judicial authorities have ever ruled on similar disputes and to review the resulting judicial acts so as to determine whether any uniform position has been worked out in invoking certain applicable substantive or procedural law provisions, and can be followed by the judiciary at lower levels lest there should be any disarray in the manner of administering justice and judicial errors.

Each arbitrazh court has a division which is responsible for analyzing and generalizing judicial practices and uniform practices in specific categories of cases and producing relevant reports and overviews based on such analysis.

Thirdly, another means of ensuring uniformity of judicial practice is judicial transparency and public openness of trials and judgments. Making legal proceedings open to the general public and the mass media, as well as the parties to the respective cases, and availability of databases containing judgments contribute to public control over judicial acts and enable scholarly communities and the media to identify and extensively discuss court rulings from the standpoint of their uniformity and consistency with earlier legal stands taken by courts.

The scientific advisory boards formed at higher instance tribunals and many other courts provide academic lawyers with opportunities to discuss the most important problems arising in the course of justice, among them those related to the equivalence of court practices.
Papers resulting from legal scholars’ and legal practitioners’ examination and summation of judicial practices are widely published and distributed through a range of journals and other publications, including many journals of jurisprudence, as well as via the Internet.

While all courts have a say in generating judicial practices and ensuring their consistency, a special role belongs to the supreme courts which are at the heart of the judicial system.

Alongside with the Federal Constitutional Court, in the Russian Federation there are courts of general jurisdiction, headed by the Supreme Court of the Russian Federation and arbitrazh courts, for which the Higher Arbitrazh Court of the Russian Federation is the highest judicial instance.

Courts of general jurisdiction exercise civil, administrative, and criminal justice within their jurisdiction. arbitrazh courts take up civil and administrative disputes between persons engaging in business operations and between such persons and state and municipal authorities.

The country’s Supreme Court and Higher Arbitrazh Court have identical statuses and functions. Articles 126 and 127 of the Constitution provide for them to act as the highest judicial instances for cases and disputes within their respective terms of reference, exercise judicial supervision over lower courts in the procedural forms provided for in the law, and offer clarifications on court practices.

With the two higher courts’ positions being overall identical, despite certain differences when it comes to their organization and modi operandi (which will be discussed later), let us take a look at the Russian Federation’s Higher Arbitrazh Court as an example of the role played by the top judicial authorities in ensuring law enforcement uniformity.

Under the Federal Constitutional Laws “On the Judicial System in the Russian Federation”, dated December 31, 1996, and “On Arbitrazh Courts in the Russian Federation”, dated April 28, 1995, arbitrazh courts which administer justice in the field of Russian economy are federal judicial panels comprising an integral system. The trial (first instance) courts are the arbitrazh courts of the Russian Federation’s constituent territories (including republics, krais or areas, oblasts or regions, and autonomous okrugs or districts). The regular-appeal authorities (second instance courts) are 20 appellate arbitrazh courts, with several constituent territories in the catchment area of each. The third appeal level is formed by the federal arbitrazh courts which operate in ten federal judicial circuits. These ten courts fulfill a function of cassation instance. The Higher Arbitrazh Court’s jurisdiction extends to the entire territory of the Russian Federation and it is the only authority in Russia to try the cases upon litigant complaints by supervisory review, i.e. exclusively with a view to ensuring uniformity of law enforcement.
The system of arbitrazh courts in the Russian Federation thus is a four-tier arrangement. Of the four tiers, three are superior courts which take up cases tried by the lower courts upon litigant motions to test the preceding judicial acts’ conformity with applicable substantive and procedural laws and thus make for the uniformity of enforcement at their corresponding levels. But each of these authorities also performs a special role in tackling the job.

The appellate courts at the second level move, when asked by the parties to proceedings, to verify the validity and legality of judgments to the extent concerning both their consistency with the facts of the cases and their compliance with the relevant substantive and procedural laws. Where necessary, these authorities are empowered to look into additional circumstances of relevance and broaden the evidentiary base of the respective judgments. This is why they are in a position to be able to overturn or modify trial courts’ judgments with reference to facts and to overturn or modify such judgments and deliver new judgments on legal issues. By point of fact, these authorities replicate the trial-court tier.

Those at the third level — cassation courts — check the lower judiciary’s acts only to see whether the applicable laws have been observed, applied, and interpreted properly. They may not deny any request for such review which is based on references to applicable legal grounds, which means that they are open to cassation appeals from any party questioning earlier judgments from the standpoint of the law. The cassation courts are expected to correct any detected breaches of legislation, while also making for the uniformity of law enforcement throughout the territory in charge, as well as in the cassation appeal venues themselves.

The procedure to be followed by the supervisory-review authority is substantially different from that binding on cassation-appeal panels, because their functions are different. The mission of a cassation court is to act upon litigants’ applications to remedy any identified breaches of substantive or procedural laws, which have affected earlier court acts and detracted from the efficiency of judicial relief for the parties’ injured rights and interests. This is why the cassation authorities should be readily available for assistance to those locked in litigation and the submission of a cassation appeal in Russia never fails to result in the official review of the respective case by the cassation court.

The supervisory-review court (i.e. the court of the fourth instance) at the summit of the judicial system is called upon, as the latter’s linchpin, to ensure the uniformity in judicial practices. In addition, in fact, it fulfills two other functions. On the one hand, the Russian Higher Arbitrazh Court serves as an extra guarantee for those parties who have failed to find efficient protection
for their rights at the trial courts, appellate authorities, and cassation panels. On the other hand and as importantly, the Russian Higher Arbitrazh Court accumulates the experience of all arbitrazh courts in the Russian Federation to play a key part in advancing the law and working out such legal stands as are perceived as precedents by the lower arbitrazh courts. This supervisory-review body, therefore, deals with only such exceptional cases as can be used as examples. That’s what makes supervisory-review instance unique. The submission of a motion for a revision by way of a supervisory review does not each time automatically entail a re-examination of the case.

Russia’s procedural legislation that governs proceedings of the supreme supervisory authorities which oversee the courts of general jurisdiction and the arbitrazh courts underwent notable changes over 2002-08 to make review proceedings into full-fledged trials. The amendments have taken account of the critical assessments of the prior supervisory-review procedures that were made by the European Court of Human Rights.

Firstly, the new rules allow a judgment to be revised by supervisory review only upon the request of one of the litigants, or upon a complaint from another person whose rights have been affected by the contested judicial act, or upon a representation made by the public prosecutor involved in the case.

Secondly, the discretionary powers previously vested in the presidents and vice-presidents of the higher courts and in the Prosecutor General of the Russian Federation and his deputies to initiate reviews have been taken away.

Supervisory review proceedings presently consist of the following three stages: the acceptance of an application for a supervisory review, the examination of the application and decision-making on whether to put the corresponding case to a supervisory review, and, finally, the supervisory reappraisal of the case and the delivery of a judicial act to quash, modify, or uphold the appealed judgment.

Thirdly, since the focus of such oversight, just as at the cassation-appeal phase in the proceedings, is on the trial court’s judgment which has come into force (without as yet becoming final) after passing the appellate phase or upon the expiry of the period reserved for an appeal and which is thus subject to enforcement, Russia’s restated procedural legislation — in line with the principle of legal certainty and judicial act stability — has set a time limit on, and prescribed specific grounds for, any revision of such judgment by supervisory review.

The Russian Code of Arbitrazh Procedure of 2002 allows an application or submission for a judicial act’s supervisory review to be filed with the Russian Higher Arbitrazh Court within three months of the effective date of the latest judicial act challenged in the case where the other possibilities for verifying
the legality of that act have been exhausted. A judge with the Russian Higher Arbitrazh Court may restore the period reserved for the initiation of review proceedings if it was missed for reasons beyond their initiator’s control unless the latter files its application later than six months after the effective date of the contested act or the day when such person learned or should have learned about the act having breached its rights or legitimate interests.

Any persons seeing their rights and interests affected by a judicial act may apply for its revision by supervisory review should they believe the injury caused to the rights and legitimate interests to be material and to have resulted from the arbitrazh court’s violation or improper invoking of relevant rules of substantive or procedural laws.

An application for such revision must meet the requirements listed in Article 294 of the Russian Code of Arbitrazh Procedure and, inter alia, specify the grounds for the remedy sought, including the breaches or misapplications of the rules of law that have abused the applicant’s rights and legitimate interests.

The judge accepts the application for consideration subject to compliance with those requirements or, alternatively, rejects it.

Within the following one month, a panel of three judges of the Russian Higher Arbitrazh Court examines the application to see whether it does report such grounds as merit the referral of the case for its supervisory review to the judicial authority’s governing Presidium.

The grounds for the submission of a case to the Presidium of the Russian Higher Arbitrazh Court and for its alteration or reversal of the disputed judicial act are the same. Pursuant to Article 304 of the Russian Code of Arbitrazh Procedure, the Presidium of the Russian Higher Arbitrazh Court may modify or overturn a judicial act if the latter (1) disrupts uniformity in the arbitrazh courts’ interpretation and application of rules of law; or (2) violates any human or civil rights granted in accordance with the generally recognized principles and standards of international law and the Russian Federation’s international agreements; or (3) abuses the rights or legitimate interests of an indefinite circle of persons or other public interests.

The Presidium of the Higher Arbitrazh Court takes up cases in the order of their submission thereto, but in each instance within three months of the issue day of the ruling by the panel of judges to refer the dispute to the Presidium.

As the supreme judicial authority on cases subject to Russian arbitrazh courts, the Presidium of the Russian Higher Arbitrazh Court through its acts lays the legal grounds required for the uniformity of enforcement in the field of economic justice.
Even though judicial oversight within the Russian arbitrazh court system has been brought into line with the applicable European standards, as reflected, in particular, in the legal stands taken by the European Court of Human Rights in its resolutions, one can still encounter claims that the supervisory-review authority is redundant. The argument is that it revises judgments which are already “final”, thus destabilizing civil turnover, and that the supreme judicial authority could be reduced to acting as the cassation-appeal panel.

Accepting any such proposals, however, would entail a palpable decline in the efficiency of justice in upholding the rights and interests of individuals.

Firstly, as stated above, the cassation-appeal panels likewise deal with “final”, or *sui juris*, judgments which are subject to execution.

Secondly and even more importantly, the combining of the supreme judicial authority, which ensures enforcement homogeneity, and the cassation-appeal arm of the arbitrazh court system is far from being always efficient. The Senate in pre-revolutionary Russia, which also “sat on two chairs”, drew fire by failing to cope with both functions without detriment to at least one of them. Any such “dual jobholding” in fact only seems to work in comparatively small countries. In large nations like Russia, this creates unmanageable dockets of cases for their supreme courts, which reduces their efficacy as centerpieces of their judicial systems.

Apart from everything else, the delegation of appellate functions at the cassation stage to the higher court would close the latter to a majority of those seeking reviews through cassation procedures. In Russia, the ten cassation courts hear between 80,000—90,000 disputes of this kind every year. In contrast, the Presidium of the nation’s Higher Arbitrazh Court only takes up no more than 200—300 such cases annually.

The perceptibly enlarged workload on the higher judicial authority will unavoidably detract from the thoroughness of its work and its law-advancing potential — a failing bound to be particularly stinging now that the Russian legal system has been going through rapid change and development.

There is no doubt, however, that judicial supervision, just as the administration of justice as a whole, is in need of continued improvement. One is apt, for example, to go along with proposals to overhaul the mechanism for appeals against judgments within the system of courts of general jurisdiction to lend greater say to regular-appeal and cassation-appeal authorities and amass overseeing functions in the Supreme Court of the Russian Federation.

Judicial oversight as a means of ensuring the uniformity of law enforcement is typical in that it is related to the higher courts’ resolution of specific cases. Clarifications issued by the Plenum of the Higher Arbitrazh Court of the
Russian Federation on the interpretation and application of laws through the issue of relevant resolutions is a less common, but no less efficient tool serving the same purpose. The possibility of recourse to this instrument of ensuring the uniformity of application of law has been provided by Articles 126 and 127 of the Russian Constitution, which give the nation’s Supreme Court and Higher Arbitrazh Court the authority to elucidate and explain various aspects of judicial practices. By way of elaborating on the Constitution and defining the specific powers of the Plenum of the Russian Higher Arbitrazh Court, the Federal Constitutional Law “On Arbitrazh Courts” stipulates in Article 13 that the Plenum is to offer clarifications on practical judicial matters upon reviewing and generalizing the arbitrazh courts’ practices in applying regulatory legal acts.

Among the judicial acts interpreting rules of law, the resolutions of the Plenum of the Supreme Court and the Plenum of the Higher Arbitrazh Court of the Russian Federation are of major judicial force within their respective judicial systems by resting on a constitutional footing represented by Articles 126 and 127 of the nation’s Constitution. In addition, those resolutions enjoy the greatest authority among the judicial and legal communities, as they are approved by the corresponding courts’ full complements, upon a careful review of relevant generalized practices of all the lower courts, and with due regard for the related opinions from the courts and legal theorists.

The strong points of the Plenums’ resolutions also include their systemic nature and dovetailed clarifications of many issues related to the application of specific legislative acts such as the Civil Code of the Russian Federation or to court practices in the resolution of a particular category of cases, for example, tax disputes.

Since Russia has two co-existing judicial systems — courts of general jurisdiction and arbitrazh courts — and these often apply the same legislative acts, there arises a very significant need — that of preventing contradictions in the respective legal positions taken by the higher courts at the helm of the systems in question. Judicial legislation, alas, offers no clue as to how these supreme authorities are to coordinate their stands. However, they have been able themselves rather quickly to find a practical way to do so — in the form of joint resolutions by the Plenums of the Supreme Court and the Higher Arbitrazh Court of the Russian Federation. Such resolutions have been issued on — and proved a success to the extent concerning — the demarcation of judicial competence between the courts of general jurisdiction and arbitrazh courts, the application of provisions set out in the Russian Civil Code and many other legal acts.

For the existing practice of joint resolutions by the plenums of the country’s top judicial authorities to carry on, however, it is advisable for the Fed-
eral Constitutional Law “On the Judicial System in the Russian Federa-
tion” to provide for the possibility and necessity for such joint steps to con-
tinue to be taken.

The Constitutional Court of the Russian Federation has an important part to play in ensuring uniformity in judicial practices. By virtue of Article 125 of the Russian Constitution, the Russian Constitutional Court is the only authority empowered, upon requests from appropriate government agencies, among them Russia’s supreme courts, to rule on whether federal laws and other regulatory acts, and the constitutions, laws, and other regulatory legal acts of the country’s constituent territories on matters falling within the jurisdiction of the Russian Federation or within the joint jurisdiction of the Russian Federation and its constituent territories are consistent with the federal Constitution. Acting upon complaints filed by individuals about abuses of their constitutional rights and freedoms and upon motions from courts, the Constitutional Court also verifies the constitutionality of a particular law invoked or to be invoked in a specific case.

It is only that authority also that is entitled to interpret the Constitution of the Russian Federation upon requests from such government agencies as are listed in Article 125 of the fundamental law.

For the purposes of uniform court practices, it is especially important that the Constitutional Court assesses the constitutionality of regulatory acts with account taken of the meaning imparted to the respective provisions in the course of practical judicial enforcement.

The legal positions spelled out in the judicial acts of the European Court of Human Rights to the extent concerning the interpretation and application of the European Convention of Human Rights and Fundamental Freedoms play a similar role in ensuring the consistency of enforcement.

Article 104 of the Russian Constitution gives the Constitutional Court, the Supreme Court, and the Higher Arbitrazh Court of the Russian Federation (among other government agencies) the right of legislative initiative. This enables the higher courts on the basis of judicial practices in applying relevant laws and other regulatory legal acts, including their analysis and generalization, to make proposals for improvements to existing legislation, among them those required to iron out inconsistencies and remove contradictions.

Upon reviewing the rulings issued by the European Court of Human Rights following applications from Russian nationals, the Supreme Court of the Russian Federation has prepared a draft law on the damages which may be payable to individuals having suffered from the unduly long times courts have taken to deal with particular disputes and from the untimely execution of judgments.
Other means of ensuring the homogeneity of judicial enforcement have also been brought into play. Under Article 16 of the Federal Constitutional Law “On Arbitrazh Courts in the Russian Federation”, the Presidium of the Russian Higher Arbitrazh Court at its meetings examines individual matters relating to court practices and briefs the lower arbitrazh courts on the results of its corresponding deliberations. It usually does so by generalizing the practice of lower courts or debating controversial issues of interpretation or application of new legislation for which no uniform legal position has yet been formed.

An unremitting search is under way to find and upgrade the leverage available to make for practical judicial consistency. One draft law in the pipeline, for example, concerns lower courts’ queries to the Higher Arbitrazh Court on the more complicated matters connected with the application of new legal provisions which lack judicial interpretation. The related discussion will make it possible, with due regard, to relevant foreign and international experience, to weigh the pros and cons of such judicial queries and chart the right path to take.

Soviet jurisprudence in its time utterly rejected the role of judicial precedents as a tool for advancing legislation, with only statutes and subordinate legal acts recognized to constitute the source of law. This is no longer so in modern Russia. Just like in many continental-law countries, a number of jurists, scholars, and legal practitioners, among them judges, have gone on record to stress the significant part played by court practices in carrying forward existing legislation and to point to certain judicial precedents institutionalized as such in the acts of the Constitutional Court of the Russian Federation, as well as those of its Supreme Court and Higher Arbitrazh Court and especially in the resolutions of their Plenums, which explicate some of the thornier and debatable matters pertaining to proceedings at law in civil, administrative, and criminal cases. Legal literature usually examines the courts’ perception of the stands taken by the supreme courts in similar cases in the context of the need to ensure uniform law enforcement without prejudice to the constitutional principle of independence of the judiciary as the underlying factor for justice.

As to the conceptual aspects involved in the interpretation and application of law, the new Russia has seen some radical change taking place as a consequence of ongoing reform in both the legal system and in the due process of law.

The main innovation in evidence in the legal system of Russia is the revival of private law. In Soviet times, the absolute preponderance of public property and the pervasive dominance of the State in social affairs reduced the
body of law to almost only its public branch, with merely fragments of private law managing to survive.

Russia’s changeover to a civil society based on democratic institutions and a free market economy based on private ownership has necessitated the reinstatement of private law. The Russian Federation’s 1993 Constitution has provided the mainstay for the new legal system comprising both public law and private law.

All branches of Russian legislation have undergone change in accordance with the principles laid down in that fundamental law.

The renascence of private law has been fueled, first and foremost, by the drafting and approval of Russia’s new Civil Code over 1994–2006. New labor, housing, family, and land codes along with numerous follow-up legislative acts elaborating on certain aspects in the regulation of legal entities, banks, the financial market, transport services, etc. were adopted.

The co-existence of private law and public law within the legal system confronts enforcers, among them courts, with extra tasks and problems (which are sometimes very formidable) when it comes to the interpretation and application of legislation.

For one thing, it is not to be forgotten that private law and public law are two different types of legal regulation.

Private law governs economic and other relations existing in a normal society between individuals and their associations in which and by means of which their participants promote their needs and interests encompassing ownership, including intellectual property, commodity-money relations, employment and housing arrangements, and family life, on the basis of equality, freedom, and concerted action.

Private law provides the parties to such relations with rights as legal means of projecting interests and having requirements satisfied, with the corresponding regulation directed at according rights and a freedom of action. It is geared to placing the development of such relations on the footing of the parties’ legal equality and preventing any dominance and subordination in their dealings. The parties enjoy legal autonomy, independence and liberty in the regulation of their relations by means of the contracts they make, which must be consistent with applicable legislation. Legal regulation itself is optional, leaves room for self-regulation, and is largely decentralized.

In contrast, public law governs relations involving the State as an authority and providing governmental direction of certain aspects of public life, for example, the maintenance of public order, national defense, the administration of justice, taxation, and government budgeting.

Public law ensures the satisfaction of interests pursued by society as a whole, i.e. public interests. Relations in public law are based on subordi-
nation, authority of one party and subjection of the other. That is why re-
spective regulation is imperative and centralized. Legal directions mostly
take the form of binding orders (for example, in tax law) or proscriptions (in
criminal law).

The stark differences between public law and private law require that en-
forcers should correctly identify, firstly, the legal nature of the provisions to be
invoked (as belonging to private law or to public law) and, secondly, the char-
acter of the relations subject to such provisions, considering that public law
and private law have each their own subject matter and scope of regulation
and are intended to stay confined to their own regulatory domains. In addi-
tion, the enforcers should not fail to distinguish between the functions of pri-
ivate law and those of public law. The ownership of assets in controversial
cases, for example, should be ascertained on the basis of civil law and as part
of civil proceedings, while a determination as to whether a person has com-
mitted a criminal encroachment upon another person’s ownership title is at
all times subject to criminal law and criminal procedures. Last but not least,
the interpretation of public law and private law have each their own special
features stemming from distinctions between these branches of legislation.
The prohibitive provisions of criminal law and the binding clauses of admin-
istrative law should not be interpreted broadly, while the right-granting pro-
visions of private law, on the contrary, should not be construed restrictively.
Gaps in private law can be filled by the analogy of statute or by the analogy
of law, but this is inadmissible in public law, for example, for the purposes
of determining the competence of an authority or official.

Secondly, the interpretation and application of private law and public law
should proceed with account taken of their various correlations within the le-
gal system. In a totalitarian state, public law takes precedence, because the rul-
ing principle is “man is for the benefit of the State”. In contrast, private law
comes to the fore in a civil society cultivating an environment where “the State
is called upon to serve people”.

The balance of private law and public law in present-day Russia is es-
tablished by Article 2 of its Constitution which proclaims: “The individual
and human rights and freedoms are the supreme value. The State is obliged
to recognize, observe, and uphold human and individual rights.” Article 7
of the Constitution mandates that “the Russian Federation is a social state
the policies of which aim to create conditions ensuring a worthy life and free
development for individuals.”

These and other like tenets set forth in the Constitution presently in force
in Russia should serve as the points of departure for its courts, which sug-
gest that human rights and freedoms, including, but not limited to, those

259
available under private law, must be protected and defended by public law as priorities.

Correlations between private law and public law also predetermine the functions vested in justice or at least influence them. In a totalitarian state, justice is substantially punitive, while in a civil society it is predominantly used to safeguard human rights. Russia has switched from one set-up to the other. Judicial statistics on the numbers of civil, administrative, and criminal cases tried testifies that the country has passed from predominantly punitive justice to that which mostly focuses on protecting human rights.

Thirdly, the body of legislation is a single whole, and individual components and branches in practice are applied by way of interaction — a factor that largely predetermines the effectiveness of law.

The experience of legal regulation, for example, in the economy demonstrates that legislation only turns into an efficient regulator of social relations subject to smooth networking among all branches of law and to the combined and concerted application of their rules. Such dovetailing is a must in both lawmaking and law enforcement.

Ownership, business, exchange relations, and the utilization of creative endeavors are overall subject of private law. But their regulation on the latter’s part may be weak and inefficient unless supported — or, the more so, if deformed — by public law regulation. One’s impression is that in Russia (and, apparently, elsewhere) today, it is the inadequately organized interaction of private law and public law that is behind many economic and social predicament, among them the crisis which has hit the world economy.

Firstly, the networking of private law and public law in the process of law-making and enforcement should make for the implementation of such constitutional principles shared by all branches of legislation as the supremacy of protection of human and individual rights and freedoms.

Secondly, branches and rules of public law should be such as to provide essential conditions for the normal operation of private law institutions. If a nation is a market economy, for example, it should have an efficient system for antitrust regulation. Otherwise, normal competition as the cornerstone of the market-based economy will be out of the question. Bankruptcy as an element of private law must at all times be backed by criminal law provisions on liability for premeditated bankruptcy or fraudulent bankruptcy. Without such propping, bankruptcy may turn into a tool for illicit and hostile business takeovers. The arrangements made for the state registration of legal entities and rights to real estate should be such as to augur for veracity. Otherwise, a state registration effectuated without even a basic check on submitted documents to verify, for example, that they are not forgeries can well turn from
a means of protecting ownership rights into a criminal tool for misappropriation — and this is what is all too often the case in evidence.

Thirdly, public law should uphold private rights against illegitimate infringements.

Efficiency in protecting ownership rights, including, but not limited to, the use of civil law remedies against fictitious and deceptive transactions, deals based on forged documents, etc., remains rather high on the order of the day.

The criminal law protection of authors’ rights in works of science, art, and literature merits special attention.

Fourthly, where private rights and freedoms are breached, public (judiciary) law should provide effective remedies by restoring injured rights or securing compensation.

But private law itself should also include such rules and institutions as are required to ensure the parties’ good-faith conduct in their relations and avert any abuses of rights and freedoms to the detriment of other persons and public interests.

This is particularly important to the financial market, banking, and credit and payment relations, where wrongdoing may assume a large scale, affect a large number of persons, and damage public and national interests.

In the realm of private law, work is currently under way in Russia to hammer out a concept for updating civil legislation. Similar conceptual work on public law with a view to making it more effective in conjunction with private law could be as significant. It would be useful, for example, to come up with further criminal law provisions to combat economic offences. It is advisable, in particular, to analyze where it may be necessary to decriminalize certain offenses, on the one hand, and to add certain missing elements of crime to the criminal law by way of rebuffing socially dangerous attacks on normal economic relations.

It is even more vital to perform a conceptual study of the administrative law impact on present-day economic relations from the standpoint of improving its effectiveness, especially to the extent concerning the machinery of uncovering and promptly stopping any abuses of private rights which are capable of causing substantial harm to the economy and rights of individuals.
Chapter 5. Current Issues of Uniformity of Judicial Practice

I. General Principles of Uniform Judicial Practice

Uniform judicial practice is understood as a uniform (identical) application of the same legal rules by all courts of the country in the course of hearing and resolving cases within their jurisdiction.

Ensuring uniformity of judicial practice has always been regarded as a very significant issue facing, first and foremost, courts of higher instances. In Soviet times, the Supreme Court of the USSR (with regard to application and enforcement of the Union laws) and the RSFSR Supreme Court; and currently, the Supreme Court of the Russian Federation and the Higher Arbitrazh Court of the Russian Federation. The major means to ensure uniformity of judicial practice have always been Resolutions of the Plenums (Plenary Meetings) of the above courts (their role and significance, and other ways to ensure uniformity of judicial practice will be discussed below).

In 2002, the concepts of “uniformity of judicial practice” and “consistency in the interpretation and application of legal rules by courts” were for the first time introduced in procedural legislation (the Code of Civil Procedure and the Code of Arbitrazh Procedure of the Russian Federation).

Article 377(3) of the Russian Code of Civil Procedure establishes, for instance, that violations of “uniformity of judicial practice” by the rulings of the Judicial Collegium on Civil Cases and Military Collegium of the Russian Supreme Court issued thereby in a review procedure shall be deemed conditions for the appeal thereof filed to the Presidium of the Russian Supreme Court, while Article 389 of the Russian Code of Civil Procedure establishes that Chairman of the Russian Supreme Court or his/her deputy have the right (in the event certain conditions stated in the above Article and to be studied below are met) to file to the Presidium of the Russian Supreme Court a submission for review of judicial rulings pursuant to a supervisory review procedure in order to “ensure uniformity of judicial practice”.

Article 304(1) of the Russian Code of Arbitrazh Procedure states that grounds for changing or overruling, in the course of a supervisory review procedure, a judgment which has entered into legal force shall be a violation by the judgment of “uniformity in the interpretation and application of rules of law by arbitrazh courts”.

262
In view of the above changes, the study of issues relating to the uniformity and consistency of judicial practice are becoming increasingly important.

Based on the structure of judicial system of the Russian Federation (in fact, the existence within it of two independent systems — general jurisdiction courts and arbitrazh courts) it is possible to map out two aspects in ensuring uniformity of judicial practice:

(1) ensuring uniformity and consistency of judicial practice in each of the above systems (i.e., specifically in general jurisdiction courts and arbitrazh courts); these are the goals that face both the Supreme Court and the Higher Arbitrazh Court of the Russian Federation, which in conformity with Articles 126 and 127 of the Russian Constitution are placed at the top of the respective systems;

(2) ensuring uniformity in applying legislation as a whole in the judicial system of the Russian Federation, that is, both by general jurisdiction courts and arbitrazh courts when they apply the same rules of law (who is to resolve this goal is not stated by the law; apparently, this should be a common goal of all the three Supreme Courts, as established by the Russian Constitution: the Russian Constitutional Court, the Russian Supreme Court, and the Russian Higher Arbitrazh Court).

Before going over to the study of specific issues relating to the uniformity of judicial practice it seems important to provide answers to some general questions of extreme importance:

Does uniform judicial practice always prove beneficial and is it really worthwhile to strive towards it?

If such uniformity is beneficial, what should it be in essence and what goals and objectives should it then pursue?

The judicial history of Russia knows a lot of facts which are evidence of both positive and negative consequences of uniform judicial practice being formed by supreme courts with regard to certain categories of cases.

A lot of research has been done relating to the positive influence of the Resolutions of the Plenums of the USSR Supreme Court and the Russian Supreme Court (formerly the RSFSR Supreme Court) which would form uniform and consistent judicial practice. This issue will be covered below.

However, in order to have a comprehensive idea about problems relating to ensuring uniformity of judicial practice and to be able to provide adequate answers to questions stated above, it is necessary to also study the negative aspects of uniformity of judicial practice. This will help to avoid similar situations in future.

Negative phenomena in judicial practice would specifically show in the adoption of erroneous clarifications by higher courts regarding issues arising
in courts when they apply various legal acts. Particularly unfavorable consequences appeared as the results of clarifications in the sphere of criminal law relationships, when courts aiming to facilitate struggle against crime (though such “struggle” was not within their jurisdiction) would provide broad construction of certain rules of criminal codes.

Such a situation may be illustrated by examples from both our recent past and current practice.

It is common knowledge that in the times of the Soviet Union national economy used to develop on the basis of government plans which were adopted in the form of laws. At the time “over-fulfillment” of production plans (producing extra amounts of goods), building extra capacities, and creating extra items was encouraged by the authorities. For producing extra amounts exceeding the parameters set by the plans workers would get money bonuses. Failure to fulfill a plan was regarded as violation of state discipline. Data on plan implementation was included into the state reporting. Write-ups in statutory reports aimed to produce a seemingly better result and provision of other intentionally distorted reporting data on the implementation of plans was prosecuted under the criminal law (in the RSFSR, such actions were prosecuted under Article 152.1 of the Criminal Code as “antigovernment actions causing damage to the national economy of the USSR” which provided for a penalty up to imprisonment for a term of up to three years; in other republics of the USSR, under respective Articles in the Criminal Codes of the Republics which provided for similar penalties).

At this point we shall not be going into the assessment of such an approach of the legislator to establishing liability for the above actions, since in this particular case the more essential aspect is that court practice of applying criminal law in hearing such categories of cases has led to a broad interpretation of law, which is inadmissible from the legal standpoint.

In Paragraph 10 of its Resolution No. 1 of 12 January 1973 “On judicial practice in dealing with write-ups and distortions in reporting on the plan implementation” (as amended by Resolution No. 4 of 25 February 1977), the Plenum of the USSR Supreme Court stated as follows:

“If write-ups in statutory reports and provision of other intentionally distorted data on the implementation of plans went hand in hand with further illegal intentional issuance or execution of documents and appropriation of assets into one’s ownership or the ownership of other persons [hereinafter emphasis added. — V.J.], such actions should be classified as an offence as provided by the articles of the Criminal Code which provide liability for write-ups and theft of socialist property. One should do so on the basis of the total amount of funds received by an official who was involved in write-ups
as well as the funds transferred to other persons in form of bonuses or other payments.”

The above clarification — while the criminal law remained unchanged — resulted in a situation when officials (directors of enterprisers, etc), who stated false data with figures exceeding the planned parameters, would be found liable not only for offence provided for by Article 152.1 of the RSFSR Criminal Code but also for the theft of state property, that is, bonuses received for the “over-fulfillment” of the plan not only by them personally, but also by all the workers of the enterprise. Since the aggregate amounts of bonuses paid out, particularly at major enterprises, were significant, directors of such enterprises who personally received insignificant amounts, quite often were convicted for theft of state property on an extremely large scale (at the time this meant theft of 10,000 rubles and over), which under Article 93.1 of the RSFSR Criminal Code provided for a penalty either in form of imprisonment from eight to 15 years (at the time it was the maximum time to be served in prison) followed by forfeiture of property, or capital punishment and forfeiture of property.

Courts on which the above clarification of the USSR Supreme Court Plenum was binding would unflinchingly enforce it.

That is the how “uniformity of judicial practice” was achieved with regard to cases on write-ups and other distortions of reports on plan implementation. Since criminal law was interpreted broadly by courts, such cases fell under the effect of the rules of law on liability for the theft of state property without appropriate legal grounds.

It is quite easy to imagine to which extent judicial practice had unjustifiably become more severe with regard to the above cases and how many people were unjustly sentenced to long imprisonment terms for the crimes of theft of state property they had never committed.

Nonetheless, the Plenum of the USSR Supreme Court retained such approach and in Paragraph 10 of new Resolution No. 7 of 21 June 1985 dealing with this problem. The Resolution was entitled “On practice of applying laws by courts in cases on write-ups and other distortions in reporting on plan implementation”, and provided a clarification similar to that mentioned above (Resolution No. 1 of 12 January 1973 was deemed to have lost legal force.)

It was only in its Resolution No. 15 dated 24 December 1987 that the Plenum of the USSR Supreme Court changed its position and provided a clarification in the new version of Paragraph 10 of the former Resolution:

“Write-ups which were not aimed to appropriation of state property (all such write-ups and distortions were not performed specially for this purpose,
but were aimed exclusively to create a false impression of plan implementa-
tion. – V.J.), if they resulted in illegal payment of salaries, bonuses or write-
offs of assets, which inflicted significant damage, should be classified as an
offence provided by Articles 152.1 and 170 (“abuse of power or official posi-
tion” for which, if material damage was inflicted to state interests, the max-
imal penalty was, same as under Article 152.1 , imprisonment for the term
of up to three years. – V.J.) of the RSFSR Criminal Code and respective ar-
ticles of criminal codes of other republics of the USSR.”

Therefore, the USSR Supreme Court acknowledged that the above actions
shall not be deemed theft of state property, and the previous judicial practice
in relation to such cases which it helped to establish was erroneous.

This reasonable and important clarification, though belated, put an end
to erroneous judicial practice and contributed to the elimination of numerous
extreme decisions taken by courts under the influence of the previous clarifi-
cation in the course of their hearing criminal cases on write-ups and distor-
tions of reporting on plan implementation. After that the RSFSR Supreme
Court revised, pursuant to a supervisory review procedure, a host of crimi-
nal cases of such category, when individuals were unlawfully sentenced for
theft of state property, and incorporated appropriate amendments to verdicts,
which considerably improved the position of such individuals.

Thus, as a result of erroneous approach to forming “a uniform judicial
practice” (improper increase of criminal liability here was introduced by
courts, not by legislators!) in the hearing of the above cases, the rights of many
people were irreparably violated, and later on, the burden of correcting the
mistakes committed was placed on courts, which took up a lot of court time
and efforts. Had the approach to such cases been adequate from the very start,
the time and efforts could have been used for a much greater benefit.

It is undoubtedly fair that the Supreme Court of the USSR acknowledged
the erroneous nature of its stand with regard to the formation of such judicial
practice but it should have been a great deal better had the Supreme Court and
all other courts of the country never allowed such errors to be committed.

A story like that should become a good lesson for the development of cur-
rent judicial practice in Russia. Life shows, however, that mistakes tend to re-
peat.

Today, for instance, liability for illegal entrepreneurial activity was estab-
lished in the Russian Federation. According to Article 2 of the Russian Civ-
il Code entrepreneurial activity shall be understood as activity aimed to sys-
tematically derive profit from the use of property, sales of goods, perform-
ance of works or provision of services performed independently at the own
risk of a person registered in accordance with the statutory procedure as an individual entrepreneur.

Such activity is deemed to be an offence entailing criminal liability if it is carried out by a person without being registered as an individual entrepreneur or in violation of registration rules or without obtaining a license (in instances, when pursuant to federal laws, such license is mandatory) but with one of the mandatory conditions being in place, specifically:

— infliction of significant damage to individuals, entities or the State, or
— receipt of income on a large scale (Article 171(1) of the Russian Criminal Code).

If the above deed is committed by an organized group or involves the receipt of income on an especially large scale it is classified as an offence provided by Article 171(2) of the Russian Criminal Code which provides for more serious liability as compared to that provided for in Article 171(1) of the Code.

In the event the above conditions are not in place, illegal entrepreneurial activity entails administrative liability (Article 14.1 of the Russian Code of Administrative Offences). Thus, one of the criteria for making a distinction between the above elements of crime and an administrative offence shall be the amount of income received from illegal entrepreneurial activity.

Pursuant to the Note to Article 169 of the Russian Criminal Code, an income of an amount exceeding 250,000 rubles shall be recognized as large, and an income of 1,000,000 rubles as extra large.

Therefore, if the income from illegal entrepreneurial activity does not exceed 250,000 rubles, such activity shall not be deemed a criminal offence and shall entail administrative liability only, while if it does exceed the above amount, then criminal penalty shall ensue. If the amount of income is below 1,000,000 rubles the penalty shall be imposed in accordance with Article 171(1) of the Russian Criminal Code, and, if the amount exceeds 1,000,000 rubles, in accordance with Article 171(2) of the Russian Criminal Code.

That is why it is very important to determine the amount of income received from illegal entrepreneurial activity in taking a decision on liability of individuals engaged in such activity. How should such amount be determined? Since the Russian Criminal Code does not provide an answer to this question, it should be resolved in the course of judicial practice. The extreme importance of the right solution is absolutely obvious, since the decision on initiating criminal prosecution against individuals depends on it.

The Plenum of the Russian Supreme Court (once again, for the purpose of adequate and consistent enforcement of law by courts) adopted Resolution No. 23 dated 18 November 2004 “On the judicial practice of hearing cases of illegal entrepreneurship and legalization of cash (money-laundering) or
other property obtained by criminal means”. Paragraph 12 of the above Resolution offers a clarification: “Income in Article 171 of the Russian Criminal Code shall be understood as proceeds from the sale of goods (works, services) during the time of engagement in illegal entrepreneurial activity without deducting expenses which were incurred by the person in connection with his illegal entrepreneurial activity.”

The above clarification seems inadequate, running contrary to the law and irrational.

Due to the application of the above clarification of the Russian Supreme Court Plenum by courts, court practice will be “uniform”, nonetheless, absolutely erroneous and, sooner or later, it will have to be reviewed anyway, same as the judicial practice described above which used to be uniform with regard to cases of write-ups and distortions.

The above examples of clarifications provided by supreme courts, and in fact, judicial interpretation of criminal laws by the USSR Supreme Court Plenum and Russian Supreme Court Plenum, call for a necessity to determine a principle-based approach to providing such clarifications (interpretation) in similar situations (in the event of controversies, vagueness, lack of clarity in laws and other regulatory acts), and not in the sphere of criminal law only, but in the regulation of public relationships when individuals and the State (its agencies or officials) act as parties to the process.

This approach could be derived from Part One of the Tax Code of the Russian Federation adopted in 1998.

An extremely important provision is fixed in Article 3(7) of this Code: “All irreconcilable doubts, controversies and ambiguities of legal acts on taxes and levies shall be construed in favor of the taxpayer (payer of levies).” Such approach to the interpretation of doubts, controversies and ambiguities in the rules of substantive law directed towards the benefit of a human is directly fixed in our branch law for the first time, and at first sight, without any additional regulation, may be applied in the sphere of tax relationships only (the rule of the benefit of the doubt in favor of the individual laid down in the criminal procedural legislation regulates drastically different relationships and is aimed to prove the guilt of a person accused of crime, and for the issue in question is irrelevant).

Meanwhile this approach (I believe that it has full right to be set as a principle) fixed in the Tax Code of the Russian Federation that regulates relationships with regard to establishing, introducing and collecting taxes in the

---

1 See detailed justification of this statement in the Chapter entitled “Artificial Criminalization of Economic Activity” by A. V. Naumov.
Russian Federation (Article 2 of the Russian Tax Code) ensues from provisions having a more general role than a rule of a certain area of law and greater legal force, namely, the provisions of Article 18 of the Russian Constitution under which the rights and freedoms of a man and individual determine the essence, content, and application of laws, the activity of bodies of legislative and executive power, local self-government bodies and shall be ensured by justice. Proceeding from this constitutional principle which is a provision forming the foundations of the legal status of an individual in the Russian Federation (Article 64 of the Russian Constitution), all grounds are in place to apply the above approach (principle) also to the interpretation and application of other (not only relating to the tax sphere) regulatory legal acts governing public law relationships.

Had the USSR Supreme Court and the Russian Supreme Court in examples referred to above construed the ambiguities of Article 152.1 and Article 171 of the Russian Criminal Code in favor of individuals against whom criminal proceedings were initiated, they would have not provided such clarifications and would have not violated the rights of such individuals.

These examples of negative consequences of ensuring uniformity of judicial practice (unfortunately the list of examples is not exhaustive) fully evidence that uniform judicial practice may be erroneous and dangerous, and harm the people. Obviously, there should be no room for such “uniformity” in our life.

Then what uniformity of judicial practice is needed and what should it be like?

The Russian Constitution having incorporated generally accepted principles and rules of international law into the legal system of Russia, having determined in Chapter 2 on the basis of these principles and rules the foundation for the legal status of an individual and the priority of human rights and freedoms, established that the rights and freedoms have direct effect, determine the essence, content and application of laws, the activity of legislators and executive power bodies, and are secured by justice, that each individual is guaranteed to have judicial protection of his or her rights and freedoms (Articles 2, 15, 18, and 46).

It is absolutely obvious that proceeding from the above constitutional principles any person (both an individual and a legal entity) shall have the right to expect efficient defense of his/her rights, freedoms and interests protected by law in any region of the Russian Federation equally, that is, by any court under whose jurisdiction falls his/her case, be it general court or arbitrazh court, federal court or a court of a constituent subject of the Russian Federation.
In this connection ensuring uniformity of judicial practice becomes increasingly important so that the Russian Constitution and federal laws based thereon (and conforming thereto) would be adequately applied by all courts in the Russian Federation, and therefore, applied consistently irrespective of whatever attempts are made locally to restrict or distort the effect of such legal acts.

Hence, the uniformity of judicial practice in Russia is necessary in principle, however, with a significant reservation stated below which will not allow the existence of judicial practice described above or similar practice violating human rights.

Judicial practice should ensure supremacy of law across all the territory of the Russian Federation, that is, it should guarantee life and development to law, and not be aimed at trampling it down and eliminating it. Only thus may and should the uniformity of judicial practice be manifested (it is “uniformity” with a positive connotation that is meant in this paper).

There should be no judicial practice which runs contrary to law. If such practice still emerges (that most frequently occurs under the influence of the country’s higher courts (the Russian Supreme Court or the Russian Higher Arbitrazh Court), all individuals should have an opportunity to defend themselves against such practice, get it changed and be compensated for the harm inflicted thereon.

We do not have any specially developed mechanisms of such protection. Two options seem to be possible today:

– appeal of the law on the basis of which such practice has been formed in the Russian Constitutional Court;


However, the above methods are not too efficient as it might seem at first sight.

The resolutions of the Constitutional Court of the Russian Federation and judgments of the European Court of Human Rights are perceived as related exclusively to those persons with regard to whose complaints such judicial acts are issued, and hence, do not lead to the review of similar court rulings adjudicated by courts with regard to other persons.

There were many cases, for instance, when the Russian Constitutional Court recognized a Russian law on the basis of which a judgment was rendered by a general jurisdiction court as running contrary to the Russian Constitution, which naturally resulted in the revision of such law. At the same
time, the courts, including the Russian Supreme Court, would deny revision of numerous similar judgments with regard to other individuals, referring to the fact that these individuals have never applied to the Russian Constitutional Court and its resolutions is not applicable thereto. The result was that the rights of these persons remained violated.

Such a problem — protection of rights of individuals and entities who suffered from court practice running contrary to law — requires a special study and being of extreme importance should be resolved. As a general conclusion it should be noted that judicial practice may be deemed conforming to law and ensuring supremacy of law (the society, the state that proclaimed itself a state with the rule of law, and individuals are all interested in the uniformity of such court practice) when it is based on:

— priority of human rights and freedoms,
— the state being bound by law,
— distinction between the concepts of “law” and “statute”, and the priority of law over statute.

In summary that means the following.

The state should serve the interests of the people. It is not free in adopting laws (statutes), since laws might contradict such interests, be extremely cruel and unfair, abolish human rights and freedoms, or restrict them without any justification. Such statutes cannot be deemed lawful. Prohibition to issue such statutes is based on the generally accepted principles and rules of international law (“Universal Declaration of Human Rights, International Pact on Economic, Social and Cultural Rights”, “International Pact on Civil and Political Rights, Convention on the Protection of Human Rights and Fundamental Freedoms and Protocols thereto), and is expressly stated in Articles 55(2) and 55(3) of the Russian Constitution.

Hence, the legislator is obligated to issue, and courts to enforce only lawful statutes. Given the above, the constitutional principle stating that judges shall be independent and shall obey only the Constitution of the Russian Federation and the federal law (see Article 120(1) of the Russian Constitution) which is essentially important for judicial activity, and, in particular, the formation of uniform judicial practice should be understood as follows: a judge shall not obey any law, but that which does not run contrary to the Russian Constitution and the generally accepted principles and rules of international law.

The Russian Constitutional Court has a great role to play in the organization of such assessment of laws with regard to their conformance to law.

Only abidance of courts by law will be conducive to the formation of court practice the uniformity and consistency of which people are interested in and which will be useful to the society and the state.
II. Factors Impacting the State of Judicial Practice and Its Uniformity

The role and significance of the court practice has considerably increased in 1993 with the adoption of the new Russian Constitution. This is accounted for by the fact that the Russian Constitution has considerably raised the status of the court and broadened its powers.

The court has become a body independently executing state power in conformity with the separation of powers principle established by the Russian Constitution (Articles 10 and 11), able to influence other branches of state authority – the legislative and executive power.

The Russian Constitution fixed the competence of courts in the sphere of protection of rights, freedoms and legitimate interests of individuals and entities which had been radically broadened not long before that (when the Congress of People’s Deputies of the USSR adopted on 5 September 1991 the Declaration of Human Rights and Freedoms as an act binding on all government bodies, officials, entities and individuals).

The right to judicial protection was proclaimed as a right not subject to any restrictions (by way of adopting laws either) and as a guarantee of other rights and freedoms.

These provisions are set as a basis for the legal status of an individual in the Russian Federation which may not be revised by incorporation of amendments to the Russian Constitution (Chapters 2 and 9), in other words, such rights are guaranteed a high level of stability: the revision thereof may be possible through the adoption of a new Constitution by popular vote only.

Right to judicial protection (fair trial) is also laid down at the level of international law: in Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms which was ratified by Russia and is binding on it since 5 May 1998.

This resulted in the court competence covering all cases on the protection of rights, freedoms, and legitimate interests of individuals and entities without exceptions (previously the right to judicial protection could be restricted by laws, which was fairly widespread). Courts received full jurisdiction with regard to all such cases in resolving all relevant issues, both regarding issues of law and facts (before that, decisions of administrative and other agencies as well as of officials would often be of prejudicial significance).

Certain cases important for individuals and relating to determining their legal status, but which did not involve a dispute regarding law (such as cases on adoption, emancipation, etc.) were passed into the jurisdiction of courts.
Chapter 5

The courts began to exercise control over the actions of certain government agencies and officials which related to limitation of the rights of individuals to personal privacy, inviolability of residence, secrecy of correspondence, telephone communication (such limitations may now be imposed on the basis of a court judgment only), etc.

In connection with the broadening jurisdiction of courts and emergence of new ways of judicial protection, new categories of cases appeared relating to the exercise of voting and other political rights (in connection with the creation and liquidation of political parties, public organizations, etc.), protection of right of ownership, performance of business activity, challenging normative legal acts, challenging non-normative decisions and actions of government authorities and their officials which violate the rights and freedoms of individuals and entities, including the rights of an indefinite group of persons, etc.

The establishment of the Russian Constitutional Court which impacts greatly both the legislation and judicial practice is also related to the creation of the new legal system in Russia.

With the account of the considerably increased role of courts the state of judicial practice to a great extent determines the state of the legal system of the Russian Federation generally and the situation with the observance of human rights.

Naturally the responsibility of courts increases, and their errors, both in hearing specific cases and in forming judicial practice, may cost a lot more to people than it used to in the past.

Many factors impact the quality of judicial practice.

The following seem to be particularly important (apart from the activity of the court *per se*, which is to be considered separately):

1. The state of substantive law, that is, the law applied by courts in resolving cases.
2. The state of procedural law, that is, the law that determines the judicial procedure in the courts of the Russian Federation, both general jurisdiction courts and arbitrazh courts.
3. The organization of judicial system in the Russian Federation.

Deficiencies in each of the above components contribute to errors, and most often generate them in judicial practice.

Let us consider the above factors.

1. *The state of substantive law and its impact on uniformity and consistency of judicial practice*

The system of regulatory acts applied by courts in resolving cases is very sophisticated.
In general terms it is set forth in the Russian Constitution and (to a different degree) its details are provided in Codes and other laws.

The system in accordance with the Russian Constitution is composed of:
– the Constitution itself which enjoys the supreme legal force and has direct effect, and shall be applied on the whole territory of the Russian Federation (Article 15(1));
– generally accepted principles and rules of international law and international treaties of the Russian Federation (Article 15(4));
– federal legislation adopted with regard to issues falling within the jurisdiction of the Russian Federation (Article 71) and joint jurisdiction of the Russian Federation and its constituent subjects (Article 72);
– legislation of the constituent subjects of the Russian Federation adopted with regard to issues falling within the joint jurisdiction thereof with the Russian Federation (Article 72) and within their own jurisdiction (Article 76); and
– normative legal acts adopted by local self-government bodies (Chapter 8).

A more detailed list of normative acts applied by general jurisdiction courts and arbitrazh courts in resolving cases (with the exception of criminal cases, which are resolved on the grounds of one act only, specifically the Russian Criminal Code) is provided in Article 11 of the Russian Code of Civil Procedure and Articles 13 and 14 of the Russian Code of Arbitrazh Procedure.

The components of the legislation regulating certain relationships are listed in detail in codified acts (for instance, Civil, Family, Labor Codes) and other laws.

In certain cases courts resolve cases on the basis of analogy of statute or analogy of law, or customary business practices (Articles 3, 5, and 6 of the Civil Code); they also apply rules of foreign law.

It might be very difficult to get a thorough understanding of the system, correctly resolve numerous conflicts of various regulatory legal acts, or close gaps in legal regulation, which on its own leads to significant problems in law enforcement, and might lead to errors in judicial practice, the more so to the extent that its uniformity is concerned.

Such problems are increasing due to existing unfavorable trends in legislative activity, which are manifested in the following:
– laws are adopted with certain provisions running contrary to the Russian Constitution, which leads to problems for individuals in the exercise of their constitutional rights and in the formation of judicial practice conforming to the law (the Russian Constitutional Court certainly plays a decisive role in the process, since the Constitutional Court alone is granted the
powers to deem laws as running contrary to the Russian Constitution and invalidate such laws);

– laws are adopted which contradict one another, which evokes serious problems in resolving conflicts between them;

– laws are adopted with certain provisions obviously beyond the jurisdiction of the area of legislation to which they refer, and such laws fail to take into account the fundamentals (basic principles) of the area which they invade, which again in its turn evokes problems in law enforcement;

– vice versa, laws which are necessary, including laws which the Federal Assembly is obliged to adopt by virtue of direct prescriptions of the Russian Constitutional Court contained in its rulings are not adopted, which creates legal ambiguity.

For instance, in its Resolution No. 1-P of 25 January 2001 (!), issued on the case “On the verification of the constitutional consistency of the provision of Article 1070(2) of the Russian Civil Code in connection with complaints filed by I. V. Bogdanov, A. B. Zernov, S. I. Kalyanov, and N. V. Trukhanov”, the Russian Constitutional Court issued a prescription to the Federal Assembly “to settle, by means of legislative acts, the grounds and procedure for compensation by the state of harm inflicted by unlawful actions (or failure to act) of a court (judge), and also to determine the jurisdiction over cases...” Nonetheless, a law necessary for individuals to exercise their constitutional right to be compensated for harm inflicted thereon by a court (as provided for by Article 53 of the Russian Constitution) has not been adopted yet.

Absence of such law generates controversial judicial practice: arbitrazh courts accept for consideration statements of claim for compensation of harm inflicted by unlawful actions (failure to act) of a court (judge), including harm inflicted as a result violation of the right to a trial within a reasonable time, and resolve disputes on the merits of the case, while general jurisdiction courts do not accept such claims for consideration on the grounds that the above-mentioned law has not been adopted.

Lack of uniformity of judicial practice in such a constitutionally-based issue places individuals into an unequal position with regard to law and the court, and is not conducive to the development of law.

For instance, attempts to regulate by budget laws certain relationships which are not budgetary in essence and should be regulated by other legal acts generate serious problems.

Thus, certain relationships arising in the course of execution/enforcement of court judgments were regulated in a federal law on the annual budget.

In this connection, in its Resolution No. 8-P of 14 July 2005, the Russian Constitutional Court noted that incorporation of provisions regulating such
relationships “into special statutes (and federal laws on the federal budget for the coming year fall within the category of such statutes) leads to a situation where the mechanism of enforcement of respective court judgments is not backed by a stable legal framework which violates the principle of supremacy of law that includes as a mandatory element legal clarity and precision.”

In accordance with Federal Law No. 197-FZ of 27 December 2005, the Russian Budget Code incorporates Chapter 24.1 which is entitled “Enforcing judicial acts with regard to levying execution against funds of the budget system of the Russian Federation”. Meanwhile the relationships relating to enforcement of court rulings, including recovery of funds from the budget funds, do not fall within the category of budget relationships which are listed in Article 1 of the Russian Budget Code; instead, such relationships should be regulated by laws on legal procedure (by respective sections of the Russian Code of Civil Procedure and the Russian Code of Arbitrazh Procedure, as well as by the Federal Law “On Enforcement Proceeding”) which are based on principles absolutely different from those of the budget legislation.

This approach generated a situation which seems impossible: contradictions arose between the Russian Code of Criminal Procedure and the Russian Budget Code, and serious problems appeared with regard to the reinstatement of property rights of individuals who were indicted for criminal offence and exonerated at pretrial stage – in instances when criminal prosecution was terminated by the investigator or inquirer on exonerating grounds.

In such instances, pursuant to Article 135 of the Russian Code of Criminal Procedure, either an investigator or inquirer shall, upon the application of an individual, determine the amount of property harm inflicted on him/her (salary which he/she lost due to the criminal prosecution, amounts paid by him/her for the provision of legal assistance, and other expenses), and issue an order on making respective payments (with the account of inflation) to compensate for the harm. Such order was sufficient for the individual to receive the money specified therein.

A simplified procedure for compensation of harm (whereby individuals do not need to go to court) also existed prior to the enactment of the Russian Code of Criminal Procedure, from the 1st of June 1981 (based on the Decree of the Presidium of the Supreme Soviet of the USSR of the 18th of May 1981).

However, Article 239 of the Russian Budget Code (as amended by Federal Law No. 63-FZ of the 26th of April 2007) established the so-called immunity of budgets by virtue of which execution against the budget funds of the budget system of the Russian Federation may be levied exclusively on the basis of a court judgment (with the exception of instances specified in the same Article
which bear no relation to the rights of individuals and do not take into con-
sideration the provisions of the Russian Code of Criminal Procedure.)

As a result, individuals, who are exonerated at the pretrial stage, have
to apply to court requesting compensation for the inflicted material harm,
which considerably complicates the process of protection of their rights. This
has become possible due to the fact that the Budget Code when establishing
a rule on the immunity of budgets proceeded exclusively from the necessity
to provide comprehensive protection of them and failed to take into account
related provisions of criminal procedural legislation which are based on the
priority of human rights. Hence, these rights suffered.

Conflicts of law as well as gaps in legislation, generating serious problems
in judicial practice, also arise in connection with different (without any rea-
sonable need) regulation in different areas of law of relationships similar in es-
sence, which shows that that the legislator has no conceptual approach to-
wards the development of law (even to a greater degree this situation is man-
ifested in procedural law which will be discussed below).

Judicial practice cannot wait for the legislator to eliminate such problems
through additional regulation. It has to resolve conflicts and cover the gaps
on its own, basing on the supremacy of law principle.

Unfortunately this does not always happen.

Thus, a very significant problem emerged in judicial practice in this con-
nection relating to the imposition of administrative penalty in accordance
with the Russian Code of Administrative Offences enacted on the 1st of June
2002.

The new Code of Administrative Offences, as compared to the previously
effective one, considerably raised administrative liability. For certain admin-
istrative offences only one penalty may be imposed, that is, the judge in such
cases has no discretion to take into account specific circumstances: admin-
istrative arrest, deprivation of right to drive a transport vehicle (see, for in-
stance, Articles 12.15(4), 12.26, or 12.27(3)).

Other very serious penalties have been introduced: disqualification and
administrative suspension of activity (Articles 3.11 and 3.12).

It is quite easy to imagine how serious a penalty may prove to be for an in-
dividual in form of an arrest, and this is the only possible penalty under the
Code of Administrative Offences, or deprivation of a special right (specifi-
cally, driving transport vehicles), or suspension of the person’s activity as an
individual entrepreneur.

Therefore, the practice of imposing a penalty by judges for an adminis-
trative offence (determining the form and degree thereof) has acquired par-
ticular significance.
A question arises whether or not the judge has the right to impose a penalty for an administrative offence lower than the lower level provided for by a respective Article of the Code of Administrative Offences, or to adjudge a milder form of a penalty than that provided for by the Article in question, or to decide against imposing additional kind of penalty provided for as a mandatory one, the way the court has the right to do it (in the event of exceptional circumstances) on the grounds of Article 64 of the Russian Criminal Code (and prior to its enactment, Article 43 of the RSFSR Criminal Code of 1960) when imposing a penalty on a person who is found guilty of committing a crime?

The Code of Administrative Offences does not provide for such a right of the judge.

Given the above, understanding and applying the Code of Administrative Offences in a formal manner (in isolation from the whole system of law, being guided by a heartless principle “if not provided by law, then impossible to do”), in paragraph 21 of its Resolution No. 5 of 24 March 2005 “On certain issues arising in courts when applying the Russian Code of Administrative Offenses” (as amended by Resolution of the Russian Supreme Court Plenum No. 12 of 25 May 2006), the Plenum clarified that a judge has no right to do so.

The above clarification aims to ensure the consistency and uniformity of judicial practice (and it certainly does) in resolving issues relating to the imposition of penalty for administrative offences.

Is this clarification consistent with law?

The essence of this problem lies in a possibility to apply by analogy (in a subsidiary manner) to relationships regulated by the Code of Administrative Offences, rules regulating similar relationships (with regard to imposition of penalty) in criminal law.

At first sight, analogy is inadmissible in such relationships (a possibility to apply criminal statute by analogy was categorically and fairly rejected after the deplorable use of this principle in the years of reprisals).

However, if we analyze the situation in a more profound and less standard manner, taking into account all the details and niceties, including among other things the aims of applying Article 64 of the Russian Criminal Code to relationships arising in the course of imposition of administrative penalty, I believe, it becomes obvious that such application in this case is not only possible, but even necessary from the standpoint of rationality, fairness, priority of human rights—all being the elements of the principle of supremacy of law.

Application of provisions of Article 64 of the Russian Criminal Code regulating relationships arising when a penalty is imposed on a person found
guilty of committing a criminal offence, to relationships arising when a judge imposes a penalty for an administrative offence (these relations are in many ways similar, the difference mainly lies in the degree of social danger of a crime and an administrative offence, therefore, approaches to regulation, in principle, should be common), is aimed — in the event of exceptional circumstances — to improve the situation of an individual as compared to the situation he or she found him/herself when such application is impossible. In other words, such approach is for the benefit of an individual, which fully corresponds to the provisions of Article 18 of the Russian Constitution.

As a result, the judge gets an opportunity to impose a really fair penalty on a person who committed an administrative offence, and to avoid in a certain situation the imposition of an unjustifiably severe, and to be more precise, cruel penalty, which is fully in harmony with the goals of justice.

The above clarification of the Plenum of the Russian Supreme Court deprives judges of such right, while the individuals are deprived of the hope that certain exceptional circumstances will be taken into account by the judge when imposing an administrative penalty upon him/her.

2. The state of procedural law and its impact on uniformity of judicial practice

The procedural law of the Russian Federation, same as substantive law, has undergone considerable changes. A lot of new provisions have appeared which received positive response.

At the same time there are a lot of deficiencies.

The major deficiency generating a host of problems is that there is no single and wholesome concept for the development of procedural law.

The result of it is that in procedural codes (the Russian Code of Civil Procedure, the Russian Code of Criminal Procedure, and the Russian Code of Arbitrazh Procedure) which determine the judicial procedure in general jurisdiction courts and arbitrazh courts, there appeared many fundamental and unjustified differences in the regulation of similar relationships, which, in violation of Article 19 of the Russian Constitution, places the participants in the case during the trial in an unequal position with regard to the law and the court, and creates extra problems in ensuring uniformity of judicial practice.

The following conceptual differences have the greatest impact on ensuring uniformity and consistency of judicial practice.

Codes of procedure establish different rules for the resolution of conflicts between the Russian Constitution and federal laws by general jurisdiction courts and arbitrazh courts.

Pursuant to Article 13(3) and Article 143(1) of the Russian Code of Arbitrazh Procedure, if an arbitrazh court when hearing a specific case arrives at
a conclusion that the law applied or to be applied in the case runs contrary to the Russian Constitution, the court shall request the Russian Constitutional Court to determine the constitutionality of the law and suspend the procedure in the case until the request is considered by the Russian Constitutional Court. This means that the arbitrazh court has no right to independently apply the Russian Constitution and repeal the law running contrary thereto. Meanwhile, in conformity with Article 11(2) of the Russian Code of Civil Procedure (which is based on the respective provision of Article 5(3) of the Federal Constitutional Law “On Judicial System of the Russian Federation”), a general jurisdiction court in the same situation has the right (and is obliged!) to resolve the case without turning to the Russian Constitutional Court, by directly applying the Russian Constitution as an act having the greatest legal force.

There are quite a lot of instances when general jurisdiction courts resolve conflicts between the Russian Constitution and federal laws (primarily apparent controversies are meant here when their resolution does not require the disclosure of meaning and special construction of certain provisions of the Russian Constitution, for instance the conflict between Article 46 of the Russian Constitution and the federal law limiting the right to judicial protection). General jurisdiction courts should apply to the Constitutional Court only when there appears ambiguity in the understanding whether a certain law applied or to be applied in a specific case conforms to the Russian Constitution. Clarifications with respect to the issue were provided by the Plenum of the Russian Supreme Court prior to the enactment of the Russian Code of Civil Procedure, in paragraphs 2 and 3 of Resolution No. 8 of October 31, 1995 “On certain issues relating to the application of the Russian Constitution in administering justice”.

In the same manner general jurisdiction courts resolve controversies between the Russian Constitution and federal laws when hearing and deciding criminal cases and cases on administrative offences.

For example, on the basis of direct application of Article 59(3) of the Russian Constitution (whereby citizens of the Russian Federation whose convictions and faith are at odds with military service, and also in other cases stipulated by federal law shall have the right to the substitution of an alternative civil service for military service), the Severnomorsky garrison military court issued a non-guilty sentence on 19 June 1995 (long before the adoption of Federal Law No. 113-FZ of July 25, 2002 “On Alternative Civil Service”) to a military constructor M., against whom criminal proceedings were initiated on the grounds of Article 249(a) of the then effective RSFSR Criminal Code for the evasion from military service. The military court established that M. was a member of Jehovah’s Witnesses, a le-
gitimate religious organization, and his faith and convictions were at odds with military service, hence, the above provision of the Russian Constitution was directly applicable to him without any additional legal regulation. Higher judicial instances, including the Presidium of the Russian Supreme Court, left the sentence unchanged.

It is not too difficult to imagine how long the defendant M. would remain in custody (and those like him in similar cases), had the military court suspended the proceedings in the case, which in similar situations the arbitrazh court should also be obliged to do, and would keep waiting for the solution of an obvious matter by the Russian Constitutional Court.

Resolutions issued by courts with regard to this case played a great positive role in judicial practice.

A similar problem emerged in judicial practice when complaints against rulings on cases on administrative offences were reviewed.

Article 30.11 of the Russian Code of Administrative Offences provides for a possibility to review rulings which entered into legal force with regard to above cases only upon the protest lodged by prosecutors (prosecutors of constituent subjects of the Russian Federation, their deputies, Prosecutor General of the Russian Federation and his/her deputies) to be considered by chairmen of oblast and other courts equal in jurisdiction thereto, the Chairman of the Russian Supreme Court or his/her deputies.

This meant that persons with respect to whom rulings were issued in cases on administrative offences and other persons who have, in conformity with the Russian Code of Administrative Offences, the right to appeal, pursuant to a judicial procedure, judicial rulings that have not entered into legal force (victims and others), could not file a complaint against a ruling that has entered into legal force directly to an official of a court that was competent to review it; instead, they would have to turn to the respective prosecutor on whose discretion depended whether to lodge a protest or deny it.

The Russian Supreme Court deemed such an approach to be a limitation of the constitutional right of individuals to judicial protection, and in its overview of judicial practice for the 4th quarter of 2003 provided a clarification that officials listed in Article 30.11 of the Russian Code of Administrative Offences have the right to review rulings that were issued in cases on administrative offences and have come into legal force not only based on the protests brought by the prosecutors, but also on the basis of complaints of persons with regard to whom the rulings were issued and other persons listed in Article 30.11 of the Russian Code of Administrative Offences1.

1 Bulletin No. 3 of the Russian Supreme Court, 2004.
Appropriate amendments were incorporated to the Russian Code of Administrative Offences only by Federal Law No. 240-FZ of December 3, 2008.

Such an approach (and there are lots of facts to confirm it) to the resolution of obvious conflicts between the Russian Constitution and federal laws in general jurisdiction courts (while there is no ambiguity in this issue) tells favorably and works more promptly (there are no significant losses in time for the proceedings in the Russian Constitutional Court) with regard to the formation of uniform and consistent judicial practice than in arbitrazh courts which do not have such an opportunity.

In different codes of procedure possibilities to apply procedural laws by analogy are also regulated in a different manner.

The Russian Code of Civil Procedure allows analogy of statute and analogy of law (Article 1(4)) in a civil law proceeding.

The Russian Code of Criminal Procedure and the Russian Code of Arbitrazh Procedure say nothing with regard to the possibilities of applying analogy in criminal and arbitrazh proceedings, which enables one to deny its admissibility and refuse — if there is no rule of criminal procedural law or arbitrazh procedural law, as the case may be, regulating relationships arising in the course of proceedings in the case — to apply the rule regulating similar relationships, and if there is no such rule, proceed from the principles of administration of justice.

Such contradictive regulation of procedural relationships tells negatively on the formation of judicial practice, since it may create obstacles in exercising the right to justice by persons concerned.

Meanwhile, the need to apply analogy not only in the civil, but also in criminal and arbitrazh procedures exists.

On the 1\textsuperscript{st} of November 1991, for instance, the Presidium of the RSFSR Supreme Court repealed the ruling of a judge who postponed the consideration of a complaint filed by G. with regard to the prosecutor’s order on taking G. into custody. The complaint was filed on the grounds of Article 15 of the Declaration of Human Rights and Freedoms, and the judge postponed its consideration until such time when the procedure for considering the same would be settled in the criminal procedural legislation (as the then effective RSFSR Code of Criminal Procedure did not establish such a procedure). The Presidium of the RSFSR Supreme Court proceeded from the fact that the Declaration of Human Rights and Freedoms, which was adopted on the 5\textsuperscript{th} of September 1991 by the Congress of the People’s Deputies of the USSR as a legal act binding on all government bodies, officials, entities and individuals, granted individuals the right to verification by the court of legality of their arrest with the sanction of the prosecutor (Articles 2 and 15 of the Declaration of Human Rights and Freedoms as amended by the Decree of the RSFSR Supreme Court of March 24, 1992).
Rights and Freedoms). Having taken a decision on postponing the considera-
tion of such complaint until the adoption of the respective criminal procedural
law, the judge left the complaint without consideration thus violating the law.

Amendments to the RSFSR Code of Criminal Procedure regulating the
procedure of court verification of legality and validity of holding a person
in custody were incorporated only on 22 May 1992. Prior to that courts would
consider the complaints of individuals against placing them in custody on
the grounds of direct effect of the above Declaration, basing on the princi-
ples of administration of justice, that is, applying the analogy of law in crim-
inal procedure.

Regulation of evidentiary procedure in procedural legislation — gathering
(presenting) and assessing evidence in order to establish facts relevant for the
case — is of great importance for judicial practice.

General evidentiary rules (standards of evidence) are established in Chap-
ter 6 of the Russian Code of Civil Procedure, Chapter 7 (Evidence and Proof
of the Case) of the Russian Code of Arbitrazh Procedure and Chapter 11
(Proof of the Case) of the Russian Code of Criminal Procedure.

It should be noted that there are significant differences in establishing
grounds for quittance from provision of evidence (prejudgment) in criminal
judicial proceedings as compared to other types of judicial proceedings.

Both in the Russian Code of Civil Procedure and the Russian Code of Ar-
bitrazh Procedure, from the substantive standpoint, the grounds for prejudg-
ment are described identically: facts established by a ruling of a general ju-
risdiction court or an arbitrazh court which entered into legal force shall not
have to be proven again and shall not be challenged at the trial in which the
same persons are participating either in a general jurisdiction court or in ar-
bitrazh court. In a criminal case, the verdict of the court which came into ef-
fect shall be binding both on the general jurisdiction court that hears the case
on civil law consequences of the actions of the person with regard to whom
such verdict was issued, and for the arbitrazh court considering whether or
not such actions had taken place and whether they were performed by this
very person (Article 61 of the Russian Code of Civil Procedure, Article 69

Thus, in the cases above the ruling of the general jurisdiction court is-
sued in the civil case and the verdict in the criminal case which entered into
force are of prejudgment nature for the arbitrazh court, and the award of an
arbitrazh court having entered into legal force — for the general jurisdiction
court hearing the civil case.

For criminal procedure, however, the prejudgment rules are defined in Ar-
ticle 90 of the Russian Code of Criminal Procedure in a radically different
manner: facts established by a verdict that entered into legal force shall be recognized by a court, if such facts evoke no doubts of the court.

This means that if such doubts exist (but how can they have any legal consequences if the first instance court hearing the criminal case may not verify the adequacy of the conclusions of another court made thereby in its verdict in another case?) the court would not necessarily recognize such facts and would issue its verdict containing conclusions on certain facts which might contradict conclusions on the same facts contained in the verdict of the other court that entered into legal force.

Isn’t the situation absurd when in one kind of legal procedure (namely, criminal legal procedure) verdicts containing mutually excluding conclusions on the same fact may be issued, and how does that situation impact court practice and the trust to court? I believe these questions are rhetorical.

This, however, is not all. It follows from Article 90 of the Russian Code of Criminal Procedure that rulings issued by general jurisdiction courts in civil cases and those issued by arbitrazh courts that entered into force have no prejudicial effect whatsoever for the court hearing a criminal case.

Such regulation also encourages situations like that and leads to the violation of rights of individuals.

For instance, S. was convicted for theft of state property, namely, air-navigational equipment. His cassation complaint where he made reference to the arbitrazh award that had come into force and found the transaction with the equipment conforming to the law was rejected on the grounds that the court did not violate the prejudgment rule.

It so happened that the arbitrazh award that came into force established that S. while alienating the above equipment had not violated the law, at the same time the verdict issued by the court in the criminal case stated that he had stolen the above equipment.

S. filed a complaint to the Russian Constitutional Court challenging the constitutionality of Article 90 of the Russian Code of Criminal Procedure.

In its Decision No. 193-0-P of 15 January 2008 the Russian Constitutional Court stated an important legal position: facts confirmed by an award of an arbitrazh court which are evidence in favor of the defendant should be taken into account in a criminal proceeding and may be disproved only after the review of the award in accordance with the established procedure.

With the account of the above position of the Russian Constitutional Court, the verdict with regard to S. should be reviewed.

Certainly, this position is also applicable to resolutions issued by general jurisdiction courts in civil cases. Thus, with the participation of the Russian Constitutional Court, legal foundation was created for the uniform applica-
tion of Article 90 of the Russian Code of Criminal Procedure by general ju-
risdiction courts. Unfortunately, general jurisdiction courts failed to do that
on their own, but it should be recognized that it was the legislator who first
and foremost played a negative role in the situation.

Procedural codes establish different rules for judgments/verdicts/awards
coming into legal force.

According to the Russian Code of Civil Procedure (Article 209) judg-
ments of all courts, including judgments of the Russian Supreme Court,
and with regard to all cases come into legal force pursuant to general rules:
if they have not been appealed, upon the expiration of the appeal term or, if
they have been appealed, after the hearing of the case by a higher court, un-
less the judgment is overturned.

According to the Russian Code of Arbitrazh Procedure, the awards of the
Russian Higher Arbitrazh Court and decisions issued in cases on challenging
regulatory legal acts, as an exception from the general rule similar to that es-
tablished in the Russian Code of Civil Procedure, shall come into legal force
immediately after the adoption thereof (Article 180(2)).

The significance of such differences (the reasons for that are difficult to ex-
plain rationally) is great, since the procedure of judicial decisions coming in-
to force impacts considerably the procedure of their possible appeal and ex-
ecution, and also the formation of judicial practice, since it is from the mo-
ment when the judgments come into legal force that they start influencing
judicial practice.

The Russian Code of Civil Procedure establishes the procedure to ap-
peal decisions of justices of the peace (Chapter 39). Appeal procedure is the
procedure in the court of second instance, and after that the only possibil-
ity of review of such decisions is to have the same reviewed upon their enter-
ing into force, either pursuant to a supervisory review procedure or because
of new or newly discovered facts (Chapters 41 and 42 of the Russian Code
of Civil Procedure).

In conformity with the Russian Code of Criminal Procedure, a verdict or
any other judgment of a justice of the peace in a criminal case may be ap-
pealed in accordance with the appeal procedure in a district court, and the
appellate decision of a district court (which does not enter into legal force
as of the moment of its adjudication), in a cassation instance court, that is,
in district (oblast) judicial collegium on criminal cases or another court equal
thereto (Articles 323, 354, and 355).

Thus, decisions of the justices of the peace and appellate rulings of dis-
trict courts in civil cases enter into legal force (if an appeal is filed) after their
consideration in the second instance court (appellate instance) and may
not be appealed in the cassation instance court, whereas the same decisions in criminal cases enter into force after consideration by a cassation instance court, which for such a case would be the third instance. Notwithstanding the provisions of the Federal Constitutional Law “On the Judicial System of the Russian Federation” which is of a greater legal force than a federal law and which establishes that courts in the system of general jurisdiction courts considering cases in appellate or cassation procedure are deemed to be of a higher standing than the first instance courts of the same system of courts (Article 36), i.e. the courts of second instance.

The procedures of considering complaints against resolutions of the first instance courts are also different.

In civil procedure, complaints against decisions of justices of the peace are considered in appellate procedure, which means reconsidering the case under the procedural rules of the court of first instance with a possibility to freely provide new evidence. Complaints against decisions of federal courts are considered in the cassation procedure, where the possibility to provide new evidence is restricted. A review of the case pursuant to a supervisory review procedure is yet another possibility (Chapters 39—42 of the Russian Code of Civil Procedure).

In arbitrazh procedure, the appellate instance comes first and then (after court judgment comes into force), the cassation and the supervisory instances follow (Chapters 34—36 of the Russian Code of Arbitrazh Procedure).

The grounds for overturning court judgments pursuant to a supervisory review procedure are defined differently in respect of general jurisdiction courts and arbitrazh courts.

In accordance with the original version of Article 387 of the Russian Code of Civil Procedure, such grounds were defined as fundamental violations of the rules of substantive and procedural law.

Federal Law No. 330-FZ of the 4th of December 2007 supplemented the above provision with an ambiguous wording, whereby the grounds for overturning court judgments pursuant to the supervisory review procedure shall be the above violations, that have “influenced the outcome of the case and without elimination of which the restitution and protection of the violated rights, freedoms and legitimate interests, as well as safeguard of public interests protected by law, will be impossible.”

This provision that allows a court judgment to be overturned pursuant to the supervisory review procedure as a result of gross violation of rules of substantive or procedural law, suffers ambiguity and grants courts of supervisory instance virtually unrestricted discretion to decide whether or not to overturn or uphold the appealed court judgments. Therefore, it will gener-
ate problems in forming uniform judicial practice in supervisory review procedure of general jurisdiction courts.

Under the Russian Code of Arbitrazh Procedure (Article 304, as amended by Federal Law No. 25-FZ of the 31st of March 2005) the grounds for overturning judicial acts of arbitrazh courts pursuant to the supervisory review procedure are different from those existing in the general jurisdiction courts and are as follows:

(1) breach of uniformity in the interpretation and application by arbitrazh courts of the rules of law;

(2) violation of the rights and freedoms of a man or individual in accordance with the generally accepted principles and rules of international law and international treaties of the Russian Federation; and

(3) violation of the rights and legitimate interests of an indefinite group of people or violation of other public interests.

It is obvious that such a radically different regulation of the grounds for supervisory review of judgments issued by general jurisdiction courts and arbitrazh courts generates different judicial practices in supervisory review procedure in these courts.

There are also considerable differences in the grounds for review of court judgments on the basis of newly discovered facts, which leads to different judicial practices.

Article 311 (7) of the Russian Code of Arbitrazh Procedure, for instance, states as one of such grounds, the detection by the European Court of Human Rights of a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms committed by an arbitrazh court when considering a specific case, the award in which was appealed against in the European Court of Human Rights.

Similar grounds for such review are established by Article 413(2)(4) of the Russian Code of Criminal Procedure.

However, the Russian Code of Civil Procedure (Article 392) does not provide for such grounds for review because of newly discovered facts.

One of the grounds for the said review in general jurisdiction courts and arbitrazh courts is that “the facts that are of substantial importance for the case and that were not and could not have been known to the applicant” (Article 392(2)(1) of the Russian Code of Civil Procedure, Article 311(1) of the Russian Code of Arbitrazh Procedure).

The judicial practice has always considered such facts to be related to the actual aspects of the case.

The Plenum of the Russian Higher Arbitrazh Court has introduced into this practice a fundamental and, it appears, a rather disputable legal in-
novation, having supplemented Resolution No. 17 of the Plenum of the 12th of March 2007 “On application of the Russian Code of Arbitrazh Procedure in review of judicial acts that have entered into legal force in light of newly discovered facts” with Resolution No. 14 of the 14th of February 2008 which states (in its paragraph 5.1) as follows:

“Under Article 311(1) of the Russian Code of Arbitrazh Procedure, a judicial act, challenged by an applicant pursuant to the supervisory review procedure and based on the provisions of legislation, the practice of application of which after the adoption of such act has been established by a resolution of the Plenum or Presidium of the Russian Higher Arbitrazh Court, including upon review of another case pursuant to the supervisory review procedure, may also be reviewed on the basis of newly discovered facts.”

Hence, the Plenum of the Russian Higher Arbitrazh Court in fact expanded the grounds for review of judicial decisions on the basis of newly discovered facts, with the facts that are related not to the factual, but to the legal aspect of the case (adequate application of legal rules), and that, in light of this legal regulation, constitutes grounds for overturning a court judgment pursuant to the supervisory review procedure.

The above fundamental differences in the codes of procedure (their list is not exhaustive) evoke the necessity to elaborate a single concept of procedural law and develop its uniformity. Obviously, such concept should take account of the actual specifics of each type of legal proceedings requiring special regulation.

3. Organization of the judicial system and its impact on the uniformity of judicial practice

In accordance with Article 118(3) of the Russian Constitution, the judicial system of the Russian Federation shall be established by the Russian Constitution and the federal constitutional law.

The Russian Constitution, while establishing the judicial system in very general terms, determines the fundamental feature of its organization — the existence of two autonomous and independent sub-systems (general jurisdiction courts and arbitrazh courts governed by the Russian Supreme Court and the Russian Higher Arbitrazh Court respectively). It also provides for a judicial body, the Russian Constitutional Court, which does not have its own sub-system and occupies a special place without belonging to any of the above sub-systems (Articles 125–127).

The autonomous and independent nature of general jurisdiction courts and arbitrazh courts is manifested in their independent passing of final judgments in cases within their jurisdiction and having no right to re-examine the decisions of each other. Therefore, they form judicial practice independently.
Specifically, they should be called autonomous systems, the system of general jurisdiction courts and that of arbitrazh courts, which were already discussed above.


This creates problems in ensuring uniformity of judicial practice, as it allows for situations where the same law in different systems (for example, the Civil Code in general jurisdiction courts and arbitrazh courts) is applied differently, which would mean errors and violations of the rights of interested parties in at least one of these systems (or possibly in both).

How are these problems to be overcome?

There is some experience of judicial practice in this respect.

Specifically, the Russian Supreme Court and the Russian Higher Arbitrazh Court arrange joint discussions of disputable questions in relation to application of legislation and adoption of joint resolutions of their Plenums which contain clarifications on issues addressed for general jurisdiction courts and arbitrazh courts.

The adoption of joint Plenum resolutions by two highest judicial instances is not provided for by law (this is most certainly due to the legislator falling behind the needs that have arisen as a result of the creation of the system of arbitrazh courts). However, such practice is not contrary to the law. It is essential and has a large positive impact on judicial practice, as it ensures its uniformity and consistency in the overall judicial system.

As an example one should name the following joint resolutions of the Plenum of the Russian Supreme Court and the Plenum of the Russian Arbitrazh Court:

- “On certain issues relating to application of Part 1 of the Civil Code of the Russian Federation” No. 6/8 of July 1, 1996;
— “On the practice of application of the provisions of the Civil Code of the Russian Federation on interest for the use of another person’s monetary funds” No. 13/14 of October 8, 1998; and  

However, the joint resolutions of the Plenums of the Russian Supreme Court and the Russian Higher Arbitrazh Court cannot solve all the problems for the following reasons:

— firstly, due to the absence in the Federal Constitutional Law “On the Judicial System of the Russian Federation” of provisions regarding joint clarifications by these courts of common issues of judicial practice, the adoption of such clarifications is totally dependent on the discretion of the Chairmen of the Russian Supreme Court and the Russian Higher Arbitrazh Courts, rather than the needs of judicial practice;  
— secondly, the preparation, discussion and adoption of these clarifications require considerable time, whereas a lot of issues should be resolved urgently; and  
— thirdly, in certain instances the adoption of such clarifications turns out to be impossible, due to differences in the positions of the Russian Supreme Court and the Russian Higher Arbitrazh Court with respect to the issues in question.

In the latter case, general jurisdiction courts and arbitrazh courts guided by the Russian Supreme Court and the Russian Arbitrazh Court, respectively, form different judicial practice.

Thus, some time ago contradictions arose in the application by general jurisdiction court and arbitrazh courts of Articles 167 and 302 of the Russian Civil Code which contain, respectively, general provisions governing consequences of invalidity of transactions and guaranties for the protection of the rights of a \textit{bona fide} purchaser against vindication of property that the purchaser had purchased for compensation.

In applying Article 167 of the Russian Civil Code, general jurisdiction courts often did not ensure the protection of a \textit{bona fide} purchaser’s rights guaranteed by Article 302 of the Russian Civil Code. Arbitrazh courts decided similar cases based on the priority of the provisions of Article 302 and ensured such protection of a \textit{bona fide} purchaser’s rights.

The Russian Constitutional Court resolved contradictions in such judicial practice with a view to ensure its uniformity and protect the constitu-
tional rights of the citizens in its Resolution No. 6-P of the 21st of April 2003 “On the Verification of Constitutionality of Articles 167(1) and 167(2) of the Civil Code of the Russian Federation in relation to claims of citizens O. M. Marinicheva, A. V. Nemirovskaya, Z. A. Sklyanova, R. M. Sklyanova, and V.M. Shiryaeva”.

In this Resolution the Russian Constitutional Court expressed its position on the interpretation and application of Articles 167 and 302 of the Russian Civil Code. This position is of importance for shaping a uniform judicial practice, however, there is no need to examine it now, as the core of the problem is different: why did the Russian Constitutional Court acknowledge its jurisdiction over this case, given that the resolution of conflicts between two legal rules (in this case, Articles 167 and 302) falls within the jurisdiction of other courts?

The Russian Constitutional Court expressed an interesting principle-based stand on this issue (in paragraph 3 of its Resolution No. 6-P of the 21st of April 2003).

The Russian Constitutional Court acknowledged that general jurisdiction courts and arbitrazh courts independently decide which rules are applicable in a specific case. At the same time, the Russian Constitutional Court stated that courts apply Articles 167 and 302 of the Civil Code inconsistently and controversially, which leads to conflicts with regard to constitutional rights, which are exercised on the basis of the above Articles by the owner and the bona fide purchaser, whereas judicial practice should ensure that regulatory provisions are interpreted in the light of the Constitution. Therefore, as the Russian Constitutional Court pointed out: “In cases where ambiguity and inconsistency in the interpretation and application of legal rules lead to conflicts of constitutional rights exercised on the basis of such legal rules, the elimination of this conflict acquires constitutional importance, and therefore, falls within the competence of the Russian Constitutional Court which ... ensures in these cases the adequate understanding of the constitutional meaning of the effective law.”

Thus, the Russian Constitutional Court acknowledged that where federal laws are interpreted and applied by courts inconsistently (i.e. when there is no uniformity of judicial practice), which affects the constitutional rights of a man and individual, the issue acquires constitutional importance and falls within the competence of the Russian Constitutional Court, for the court to determine an adequate constitutional meaning of this law and adopt a resolution for the purposes of forming judicial practice based on the principle of supremacy of law.

There is another example to illustrate the situation.

General jurisdiction courts have formed a practice based on Article 152(7) of the Russian Civil Code in accordance with which rules governing compen-
sation of the moral harm in connection with dissemination of information harming business reputation of an individual shall also be applied in cases of dissemination of such information in relation to an entity.

A clarification on this matter was given in paragraph 5 of the Resolution of the 20th of December 1994 issued by the Plenum of the Russian Supreme Court entitled “Certain issues of application of legislation on compensation for moral harm” (as amended).

Arbitrazh courts took the opposite stand whereby the compensation of moral harm to an entity was unacceptable. Therefore, it was impossible to issue a joint clarification regarding this issue by the Plenums of the Russian Supreme Court and the Russian Arbitrazh Court.

The Russian Constitutional Court resolved this controversy in the judicial practice of the two judicial systems.

By its Ruling No. 508-O of the 4th of December 2003, the Russian Constitutional Court rejected the claim filed by Sh., who challenged the constitutionality of Article 152(7) of the Russian Civil Code in the meaning accorded thereto by the above mentioned clarification of the Plenum of the Russian Supreme Court (a general jurisdiction court recovered a compensation from the claimant for moral harm in favor of an entity), which confirmed the adequacy of the given clarification.

Thereafter the judicial practice of arbitrazh courts has changed: they started recovering compensation for moral harm in favor of legal entities, calling such harm “reputational”, which, however, does not change the essence of the issue.

Thus, the uniformity of the judicial practice was ensured also in this particular issue.

I believe that this approach of deciding conflicts in judicial practice with the assistance of the Russian Constitutional Court is correct and at the time is the only possible one (particularly in the absence of other possibilities, in situations when the Russian Supreme Court and the Russian Higher Arbitrazh Court take conflicting positions).

The specifics of organization of the Russian judicial system requires close interaction between the Russian Supreme Court and the Russian Higher Arbitrazh Court for the purposes of immediate discussion and resolution of issues arising in the practice of general jurisdiction courts and arbitrazh courts and for forming uniform judicial practice.

Additional legislative regulation may also be possible (this does not mean amending the Russian Constitution), which would be aimed, for example, at creation by the Russian Supreme and the Russian Higher Arbitrazh Court of a standing body competent to resolve disputable issues of judicial practice.
III. Activity of Courts Aimed to Ensure Uniformity of Judicial Practice

The supreme courts of the Russian Federation in their activity use the following principal methods of ensuring uniformity of judicial practice:

1. Adoption by the Plenums of the Russian Supreme Court and the Russian Higher Arbitrazh Court on the basis of Articles 126 and 127 of the Russian Constitution, respectively, of resolutions containing clarifications on issues of judicial practice addressed to general jurisdiction courts and arbitrazh courts (as stated above, the Plenums sometimes also adopt joint resolutions);

2. Study of various issues considered by the courts of the Russian Federation, preparation and publication of reviews of the judicial practice or responses to the questions that arise;

3. Publication of court judgments issued in specific cases by the Russian Supreme Court and the Russian Higher Arbitrazh Court as a first instance court and pursuant to the supervisory review procedure, and by the Russian Supreme Court — also in the cassation procedure (the Russian Higher Arbitrazh Court does not consider cases in the cassation procedure).

Clarifications of the Plenums of the Russian Supreme Court and the Russian Higher Arbitrazh Court play the most important role in ensuring uniformity of judicial practice. It used to be clarifications of the Plenum of the USSR Supreme Court and the Plenum of the RSFSR Supreme Court called “the guidelines” that played the same role.

Many clarifications not merely ensured uniformity of the judicial practice, but allowed courts to directly apply the provisions of the Russian Constitution, the generally accepted principles and rules of international law and international treaties of the Russian Federation, resolve conflicts in the legislation, fill in the gaps therein and in fact became sources of law.


These resolutions encouraged the courts to apply directly the Russian Constitution and the rules of international law.

A very important role belongs to the resolution of the Russian Supreme Court “On the application by the courts of the Russian Federation of the Labor Code of the Russian Federation” No. 2 of the 17 of March 2004 which was adopted because the enactment of the above Labor Code on the 1st of Feb-
ruary 2002 gave rise to numerous very difficult and important issues in judicial practice.

Part of these issues resulted from the fact that certain rules of the Labor Code, which pertained to significant rights of the citizens failed to take into account the provisions of the Russian Constitution and international treaties ratified by Russia (the International Pact on Civil and Political Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms, the Conventions of the International Labor Organization).

The above problems related to the conclusion of fixed-term labor contracts, temporary transfer of employees, upon the initiative of employers, to jobs within the same organization not provided for under the labor contract in case of operational need, application of disciplinary sanctions to employees, payment of salaries in a non-monetary form, etc.

The Plenum of the Russian Supreme Court in general terms drew the attention of the courts to the fact that, when considering labor disputes, the courts should take into consideration the clarifications of the Plenum contained in the above Resolutions No. 8 of the 31st of October 1995 and No. 5 of the 10th of October 2003 and bear in mind that, where an international treaty of the Russian Federation governing labor relations provides for regulation different from that provided for by laws and other regulatory acts containing labor law rules, the court should apply the rules of international treaties (paragraph 9 of the Resolution).

Furthermore, this Resolution of the Plenum of the Russian Supreme Court clarified a number of specific issues of judicial practice (related to the possibility to enter into fixed-term labor contracts, possibility of temporary transfers of employees to another job, application of disciplinary sanctions, and payment of salaries in non-monetary form) directly considering the rules of international law, in particular ILO Forced Labor Convention No. 29 or ILO Protection of Wages Convention No. 95 (paragraphs 13, 17, 53, 54).

Federal Law No. 90-FZ of the 30th of June 2006 introduced significant changes to the Labor Code, many of which took into consideration Resolution No. 2 of the Plenum of the Russian Supreme Court of the 17th of March 2004. Therefore, on the 28th of December 2006, the Plenum by Resolution No. 63 approved its new version (thus, the necessity for many previously required clarifications was gone).

A list of exceptionally positive clarifications of the Plenums of the Russian Supreme Court and the Russian Higher Arbitrazh Court that have played a significant role could be expanded.

However, the fact that also erroneous clarifications were made (some of which were mentioned above) should not be disregarded.
In this respect it is worth mentioning the clarification made by the Ple- 
num of the Russian Supreme Court in sub-paragraph 3 of paragraph 3 of the 
Resolution “On application of the rules of civil procedural legislation in the 
courts of supervisory review instance in relation to the adoption and enact-
ment of the Federal Law No. 330-FZ of the 4th of December 2007 “On In-
truction of Changes to the Russian Code of Civil Procedure”.

In particular, Federal Law No. 330-FZ of the 4th of December 2007 intro-
duced amendments to Article 376(2) of the Russian Code of Civil Procedure 
and established that court judgments that have entered into legal force may 
be challenged in a court of supervisory review instance “provided that the 
challenging parties (filing an application to the court of supervisory review 
instance — V.J.) have exhausted other methods of appeal of the court judg-
ment prior to its coming into force provided for by this Code”, i.e. methods 
of appeal in an appeal instance court (if the case was tried by a justice of the 
peace), or a cassation instance court (if the case was tried by another gener-
al jurisdiction court).

In this respect the Plenum of the Russian Supreme Court in sub-par-a-
graph 3 of paragraph 3 of the above Resolution clarified: “The supervisory 
review appeal and the submission of the prosecutor with respect to court res-
olutions, that have not undergone the appeal or cassation, shall be returned 
without examination on the merits of the case on the basis of the court rul-
ing by virtue of Article 379.1 (1)(5) of the Russian Code of Civil Procedure 
as submitted with violation of the rules of jurisdiction established by Article 
377 of the Russian Code of Civil Procedure.”

This regulation set out by Article 376 of the Russian Code of Civil Pro-
cedure and the above clarification of the Plenum of the Russian Supreme 
Court appear rather reasonable for the parties that participated in the case 
and were notified of the time and place of the court proceedings: the parties 
that have themselves refused to “exhaust” the possibility of appeal of the 
court judgment in the court of second instance shall be deprived of the 
right to appeal against the above judgment in the court of the third (super-
visory) instance.

What should be done about the right to appeal the court judgment by par-
ties that were not brought into the proceedings and whose rights were violated 
by such judgment, and right of the parties that participated in the proceedings, 
but who in violation of law were not notified by the court about the time and 
place of the proceedings, whereas the case was considered in their absence?

It is absolutely clear that these parties, not having known about the con-
sideration of the case and the judgment issued in the case, did not have an 
opportunity to file an appeal or cassation complaint within the stipulated pe-
period of time (10 days), i.e. to “exhaust” this method of appeal with respect to the judgment of the court of first instance. They never refused to use such method; instead, the court unlawfully deprived them of such an opportunity. The unlawfulness, moreover, would continue — the Plenum of the Russian Supreme Court by virtue of its clarification denied the parties the right to file a claim to the court of supervisory review instance. Under such circumstances the deprivation of the party of its right to file a claim to the court of supervisory review instance — when the court impedes the party from participation in the examination of the case in the courts of the first and second instances — is a violation of this party’s rights to judicial protection (right of access to justice) laid down in Article 46 of the Russian Constitution and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

For those who found themselves in such a situation there is an only way out, to file an appeal on the basis of Article 125(4) of the Russian Constitution to the Russian Constitutional Court to challenge the constitutionality of Article 376(2) of the Russian Code of Civil Procedure in the meaning afforded to it by the above clarification of the Plenum of the Russian Supreme Court. Should the appeal be satisfied, the Plenum of the Russian Supreme Court will have to change its clarification (this is possible not only on the basis of the final decision in the form of a resolution, but also on the basis of a ruling stating the relevant legal stand of the Russian Constitutional Court on this issue). Incidentally, the judicial practice regarding the application of Article 376(2) of the Russian Code of Civil Procedure will have to be changed even if the Plenum of the Russian Supreme Court will not make the relevant change.

Given the existence of such controversial, both positive and negative, clarifications, the following issues with respect to their meaning become particularly important: are clarifications binding on the court; is the court entitled to refuse application of the clarifications when delivering a judgment; how can the interested parties protect themselves from these clarifications, should they contradict the law?

The question as to the meaning of clarifications by the highest instance courts arose back in the Soviet times and was discussed broadly in the academic circles — then in relation to the clarifications of the Plenum of the Supreme Court of the USSR and the plenums of the highest courts of the republics.

The courts treated these clarifications as mandatory given the weight of such courts and the existing tradition.

The Law of the USSR “On the Supreme Court of the USSR” of the 30th of November 1979 summarized the scholarly discussions, and in Article 3
set out a rule stating that the guidelines of the Plenum of the USSR Supreme Court shall be binding on courts and other authorities and officials applying the law in relation to which the guidelines were adopted.

The question with respect to the guidelines of the Plenum of the RSFSR Supreme Court was resolved in the same way in Article 56 of the Law “On the Judiciary in the RSFSR” of the 8th of July 1981, which in absence of the Federal Constitutional Law “On General Jurisdiction Courts of the Russian Federation” remains in force as of today to the extent not running contrary to the Russian Constitution and the Russian legislation.

The Russian Constitution retained the right of the Russian Supreme Court to pass clarifications on issues of judicial practice of general jurisdiction courts (and fixed the same right of the Russian Higher Arbitrazh Court created by the time of its adoption). However, the Russian Constitution did not specify that these clarifications have the nature of “guidelines”, which resulted in disputes in relation to the meaning of clarifications (the status of “guidelines” in relation to clarifications of the Plenum of the Russian Supreme Court in Article 56 of the Law “On Judiciary in the RSFSR” ran into conflict with Article 126 of the Russian Constitution).

At the legislative level the question as to the weight of clarifications of the Plenum of the Russian Supreme Court has so far not been resolved.

In the course of drafting Federal Constitutional Laws “On General Jurisdiction Courts of the Russian Federation” and “On the Russian Supreme Court” this issue caused debates once again.

However, the issue was resolved in the Federal Constitutional Law “On Arbitrazh Court of the Russian Federation” — without any disputes — with respect to clarifications of the Plenum of the Russian Higher Arbitrazh Court. Thus, it was established that they are binding on the arbitrazh courts (Article 13).

Article 170 of the Russian Code of Arbitrazh Procedure (the substantive part of the award) includes a rule whereby the statement of reasons of an award of an arbitrazh court may include references to the resolutions of the Plenum of the Russian Higher Arbitrazh Court on issues of judicial practice. It should be noted that Article 198 of the Russian Code of Civil Procedure contains no similar rule determining the substantive part of the judgment of the general jurisdiction court. Furthermore, the proposal to include such a rule at the stage of the discussions in respect of the draft Russian Code of Civil Procedure was declined, which again serves evidence that there is no conceptual approach to the development of the procedural law.

It is absolutely obvious that clarifications of the Plenum of the Russian Supreme Court and the Plenum of the Russian Higher Arbitrazh Court that
have the same constitutional basis shall be given the same weight. There-
fore, if the legislator set out that the clarifications of the Plenum of the Rus-
sian Higher Arbitrazh Court are binding on arbitrazh courts, then the clar-
ifications of the Plenum of the Russian Supreme Court have to be binding
on general jurisdiction courts.

Under these circumstances other questions set out above become even
more important: is the court nonetheless entitled to refuse applying clarifi-
cations when rendering a judgment, and resolve a case on the basis of its own
understanding of the law, and are the interested parties (the parties in relation
to which the said clarification may or may not be applied) entitled to appeal
against such judgment to the Russian Constitutional Court?

If one assumes that the court has no such right, an unnatural controversial
situation arises: the court, on which a particular law is generally also bind-
ing, is entitled to refuse to apply it, should it come to the conclusion that
the law in question runs contrary to the Russian Constitution, the generally
accepted rules and principles of international law or international treaties
of the Russian Federation. However, the court would not be entitled to do
the same with respect to clarifications of the Plenum of the Russian Supreme
Court and the Plenum of the Russian Higher Arbitrazh Court. The interest-
ed party has the right to appeal in the Russian Constitutional Court against
the law applied or to be applied in his/her case. However, such party would
not be able to appeal against the clarifications of the Plenum of the Russian
Supreme Court or the Plenum of the Higher Arbitrazh Court. It, therefore,
follows that such clarifications are of greater legal force than the law.

It appears, however, that basing on the principle of supremacy of law and
the necessity for the court to submit to this principle, when examining a spe-
cific case, the court may (and to be more precise, should) resolve the case
on the basis of its own understanding and interpretation of the law and de-
cline a controversial in its opinion clarification of the Plenum of the Rus-
sian Supreme Court or the Russian Higher Arbitrazh Court. The adequacy
of the court’s conclusions on the case may in case of appeal be verified by
higher judicial instances.

As far as the possibility of appeal against the above clarifications to the
Russian Constitutional Court is concerned, it already has jurisdiction to con-
sider such clarification (however, otherwise than in connection with com-
 plaints filed by individuals). The former Russian Constitution (Article 165.1
as amended on the 21st of April 1992) did not define exhaustively the com-
petence of the Russian Constitutional Court. As a result, it became possible
to include in Article 36 of the Law “On the Procuracy of the Russian Fed-
eration” a rule whereby the Russian Prosecutor General may file a submis-
sion to the Russian Constitutional Court if, in his opinion, the clarification of the Plenum of the Russian Supreme Court failed to conform to the Russian Constitution.

The currently effective Russian Constitution exhaustively determines the competence of the Russian Constitutional Court and does not provide for a possibility for review by the Russian Constitutional Court of complaints of individuals or submissions of the Russian Prosecutor General with respect to clarifications of the Plenum of the Russian Supreme Court and the Plenum of the Russian Higher Arbitrazh Court. Therefore, the only way to grant the interested parties the right to appeal against the above clarifications in the Russian Constitutional Court is to amend Article 125 of the Russian Constitution. It appears that this would be useful.

So far the interested parties only have the above right to appeal to the Russian Constitutional Court against the law in relation to which the clarification was given.

It appears that the clarifications of the Plenums of the Russian Supreme Court and the Russian Higher Arbitrazh Court require special legal regulation at a level no lower than that of a federal constitutional law.

Another method to ensure uniformity of judicial practice is examination by courts of the highest instances of judicial practice in respect of various categories of cases or specific matters dealt with by general jurisdiction courts or arbitrazh courts, preparation and publication of reviews of such practice or answers to the questions which arise.

In accordance with Article 16 of the Federal Constitutional Law “On Arbitrazh Courts in the Russian Federation”, the Presidium of the Russian Higher Arbitrazh Court examines specific issues of judicial practice and informs arbitrazh courts about the results of such examination (in the form of newsletters approved by the Presidium).

The Presidium of the Russian Supreme Court adopts and publishes “reviews of the legislation and judicial practice of the Russian Supreme Court” on a quarterly basis. Such reviews include: a list of new regulatory acts (federal laws, decrees of the Russian President, resolutions of the Russian Government and regulatory acts of the federal executive authorities), resolutions of the Plenum of the Russian Supreme Court, resolutions and rulings of the Russian Constitutional Court, judicial practice of the Presidium as well as the Judicial Collegium on Criminal Cases and Judicial Collegium on Civil Cases of the Russian Supreme Court, responses to specific questions of the courts (as a rule, on civil matters).

These reviews and newsletters undoubtedly prove very useful for judges and everyone who is interested in judicial practice, since they bring to their
attention the official position of the highest judicial instances on particular legal issues and promote their correct and uniform settlement in specific court cases, i.e. uniformity of judicial practice.

It happens, however, that the positions reflected in these documents are arguable.

In the 1990s, for example, general jurisdiction courts faced an issue as to whether or not it was possible to review (i.e. to increase) the pension of former military servants and employees of law enforcement agencies granted in accordance with Russian Law No. 4468-1 of the 12th of February 1993 “On Pensions of Former Military Servants, Servants of Law Enforcement Agencies, State Firefighting Service, Agencies for Drug and Psychotropic Substances Control, Institutions and Agencies of the Penal Enforcement System and their Families” as a result of an increase in the monthly cost of the ration provided to military servants.

Under Article 49 of the above Law, the procedure for review of the pension amounts with respect to individuals to whom such pensions are granted under this Law shall be determined by the Russian Government.

The above procedure was established by Russian Government Resolution No. 941 of the 22nd of September 1993. In particular, this Resolution states that the review of pensions as a result of an increase in the monetary allowance of military servants and servants of law enforcement agencies shall be carried out without the account of an increase in the cost of the ration provided to these servants.

The Russian Supreme Court in its Ruling of the 2nd of August 2001 refused to deem this rule contradicting the law.

By its Resolution of the 4th of October 2001, the Cassation Collegium of the Russian Supreme Court overturned the above Ruling of the Russian Supreme Court and invalidated the respective part of the Russian Government Resolution, as pursuant to the Russian Law of the 12th of February 1993, an increase in the monthly cost of the ration and an increase in the cost of other components of the monetary allowance provided to military servants and employees shall entail the revision of the pension amounts.

The Ruling of the Cassation Collegium of the 17th of February 2004 of the Russian Supreme Court clarified that the above provision of Russian Government Resolution No. 941 of the 22nd of September 1993 shall be ineffective as of the moment when the Resolution of the 4th of October 2001 was adopted.

The question arose: whether or not the pensions of former military servants and servants of law enforcement agencies should be recalculated in relation to the period from 1993 to the 4th of October 2001.
The Presidium of the Russian Supreme Court in its review of legislation and judicial practice for the 3rd quarter of 2004 described the above legal setting and stated that the fact that the invalidated rule of the Russian Government Resolution had lost its legal force from the 4th of October 2001, does not mean that the right to recalculate the pension arose no earlier than from that date. The Presidium of the Russian Supreme Court gave the positive answer to this question on the basis of Article 58(2) of the Russian Law of the 12th of February 1993 whereby the amount of a pension which was not timely received by a pensioner through the fault of the authority competent to assess or pay out the pension shall be paid for the past period without any limitation as to the time: pensions had to be recalculated starting from 19931.

The answer is absolutely correct, as contrary to the Law, the pensioners were refused to have their pensions recalculated precisely from 1993 and their rights were to be reinstituted in full. The Russian Government Resolution could only determine the procedure, but not the grounds for the recalculation. Therefore, the date when it has been partially invalidated is in this particular situation irrelevant.

However, basing only on the fact that Russian Government Resolution No. 941 of the 22nd of September 1993 has lost its force from the 4th of October 2001, the Presidium of the Russian Supreme Court in its review of legislation and judicial practice for the 4th quarter of 2007 gave a different answer to the same question and established that pensions for the period prior to the 4th of October 2001 shall not be recalculated. The Presidium also stated that the legal view set out in the review for the 3rd quarter of 2004 shall not be applied2.

How shall this approach of the Russian Supreme Court Presidium with respect to resolution of issues arising in judicial practice be treated? This approach, that has changed the clarification of the court to directly the opposite one, that has significantly impaired the position of pensioners, whose pensions for a long time remained underpaid, and which was adopted in three years time without explanation as to any objective reasons, radically new facts or convincing grounds for refusal from the former position. Is this a law-based approach?

These examples certainly cause reasonable concerns in the evaluation of the significance of the mentioned means to ensure uniformity and consistency of judicial practice and when trying to answer the questions: whether or not the legal stand expressed in the reviews of the judicial practice

---

1 See Bulletin of the Russian Supreme Court No. 4 of 2005.
2 See Bulletin of the Russian Supreme Court No. 5 of 2008.
and information letters of the Presidium of the Russian Supreme Court and the Presidium of the Russian Higher Arbitrazh Court shall be binding on the courts.

The answer is certainly not. With due consideration given to their usefulness on the whole, they merely serve as information sources for the courts. If a judge comes to a conclusion that one of these legal standpoints is wrong (in particular, in relation to the review for the 4th quarter 2007), he or she should not be guided thereby.

Publication of the resolutions of the courts of highest instances in specific cases, in which essential legal issues are solved, are also of considerable importance for ensuring uniformity of judicial practice.

The practice of reviewing specific cases by courts of the highest instances, often significantly influences judicial practice on the whole and even the development of the legislation.

For that matter the following example relating to the activity of the jury trial may be of interest.

The Moscow District Court in its Resolution of the 19th of February 1997 satisfied the petition of the state prosecutor to dismiss the jury trial who have issued a verdict of acquittal.

The Cassation Chamber of the Russian Supreme Court in its Ruling of the 25th of July 1997 overturned the above resolution, and the criminal case was referred for re-trial to the same court with the same composition starting with the stage of the judicial examination.

The Cassation Chamber absolutely fairly overturned the above court resolution as it was rendered in violation of Article 461(5) of the Russian Code of Criminal Procedure. Under said Article, a decision on dismissal of the jury trial may only be adopted in cases when, in the opinion of presiding judge, there are grounds provided by the law for rendering a judgment of acquittal, despite the guilty verdict of the jury trial (in this case a verdict of acquittal was issued which excluded the possibility to dismiss the jury trial and entailed the judgment of acquittal).

However, having referred the case for a new examination (i.e. for the examination in full from the very beginning), the Cassation Chamber essentially has not eliminated the consequences of the violation of law by the presiding judge, since as a result of the ruling of the Cassation Chamber, the legal force of the acquittal verdict of the jury trial, cancelled by the unlawful decision of the judge, remained unrestored.

The Presidium of the Russian Supreme Court, having tried this case pursuant to the supervisory review procedure on the 8th of October 1997, arrived at the conclusion that such formal application of law by the Cassation Cham-
ber not only lead to the violation of the rights of the acquitted in this case, but also created a possibility for abuse on the part of the judges in similar cases. Basing on the above, the Presidium amended the ruling of the Cassation Chamber and indicated that the case shall be referred for re-trial from the moment when the verdict of the jury trial was pronounced for the purposes of further actions provided for by the law.

The situation that occurred in relation to this case was not provided for by law and, given its specifics, required special legal regulation that was principally different from the familiar, standard approaches. The Presidium of the Russian Supreme Court resolved it in full compliance with the aims and principles of administration of justice having created in essence a rule of law that would be applicable to any other similar cases.

The legislator took this position of the Presidium of the Russian Supreme Court in consideration, and in the new Russian Code of Criminal Procedure adopted in 2001 provided for a possibility of the cassation instance to refer a criminal case for re-trial in the court of first instance from the stage of “the court’s actions following the rendering of the jury trial verdict” (Article 378(1)(3)).

In the context of the above problem, a judicial precedent is of certain importance.

Our legal doctrine and legislation have traditionally denied the possibility to use judicial precedent in our legal system.

Nevertheless, I tend to believe that certain steps to promote judicial precedent in our legal system have been taken.

Without doubt, the resolutions of the Russian Constitutional Court and the European Court of Human Rights have the value of precedent, and courts rely thereon in their resolutions issued in specific cases, including their own legal standpoint set out in the statement of reasons of these resolutions.

The new Russian Code of Civil Procedure enacted on the 1st of February 2003 introduced a rule that has the direct relation to the issue in question (the same rule is not to be found neither in the Russian Code of Arbitrazh Procedure nor the Russian Code of Criminal Procedure, which is also evidence of the inconsistency of the legislator).

Article 389 of the Russian Code of Civil Procedure states that:

“1. For the purposes of ensuring uniformity of judicial practice, the Chairman or a Deputy Chairman of the Russian Supreme Court are entitled, upon the complaint of the interested parties or the submission of the prosecutor, to file an application to the Presidium of the Russian Supreme Court for review, pursuant to the supervisory review procedure, of court judgments that infringe upon the rights, freedoms or legitimate interests of an indefi-
nite group of people, other public interests, or are adopted in violation of the rules of jurisdiction.

2. The complaint of the interested parties or the submission of the prosecutor may be filed within six months from the day when the court decision entered into legal force...”

It follows from the above rule that resolution of the Presidium of the Russian Supreme Court regarding cases specified in such rule, which are of significance as seen from the list thereof, shall be issued to ensure uniformity of judicial practice. Surely, such resolution acquires the value of a precedent.

The problems raised above certainly require further research and additional legal regulation. I believe it would be useful that courts be granted a right to refer in their resolutions also to judicial practice of the courts of higher instances made public, when they take it into account and use it to justify their own conclusions on the interpretation and application of the rules of law.
THIRD ROUNDTABLE
Discussions of Russian and foreign participants held in connection with the preparation of the monograph entitled “Rule of Law in Russia: Issues of Implementation, Enforcement and Practice”

“Securing Property Rights”
5 June 2009, Moscow

THE PARTICIPANTS:

Veniamin Fedorovich Yakovlev, doctor of law, professor, associate member of the Russian Academy of Science, advisor to the President of the Russian Federation, former Chairman of the Russian Higher Arbitrazh Court;

Tamara Georgievna Morschakova, doctor of law, professor, honored jurist of the Russian Federation, honored scientist, former judge of the Russian Constitutional Court;

Victor Martenianovich Zhuikov, doctor of law, professor, honored jurist of the Russian Federation, Deputy Director of the Institute of Legislation and Comparative Law under the Government of the Russian Federation, former Deputy Chairman of the Russian Supreme Court;

Vladimir Illich Lafitsky, Ph. D (law), Deputy Director of the Institute of Legislation and Comparative Law under the Government of the Russian Federation;

Anatoly Valentinovich Naumov, doctor of law, professor, Head of the Department of Criminal Law Disciplines of the Academy under the Russian Prosecutor General’s Office, member of the Scientific and Advisory Council at the Russian Supreme Court;

Andrey Gennadievich Fedotov, Ph. D (law), attorney with the Odintsovo City Bar Association.

Andrey Victorovich Rakhmilovich, attorney, partner with Margulyan and Rakhmilovich law firm;
Rule of Law in Russia: Issues of Implementation, Enforcement and Practice

PETER SAHLAS, member of the New York Bar, Russian Civil Law Reform Project Coordinator, McGill University, Faculty of Law (Montreal, Canada), Project Manager, Governance Advisory and Exchange Program;

WILLIAM SIMONS, professor of Leiden University (The Netherlands) and the University of Trento (Italy);

LEONID MARKOVICH GRIGORIEV, Ph. D (economics), Director of the Institute for Energy and Finance Foundation, Dean of the Management Faculty of the International Management University (Moscow), member of Sigma Group, former Deputy Minister for Economy and Finance of the Russian Federation (1991-2), former Chairman of the Foreign Investment Committee, former advisor to the Russian Directorate of the International Bank for Reconstruction and Development (1992-7);

MIKHAIL ALEXANDROVICH SUBBOTIN, Ph. D (economics), Institute of World Economy and International Relations, Academy of Sciences of the RF, Senior Researcher. Science-consulting company PSA-Expertise, Director. (Moscow).

LEONID VITALIEVICH GOLOVKO, doctor of law, professor of the Department of Criminal Proceedings and Procuracy Supervision of the Law Faculty of the Moscow State University named after M. V. Lomonosov;

ALEXANDER VLADIMIROVICH ROZENTSAIG, Ph. D (law), attorney with the Almaty City Bar Association (Kazakhstan), member of the Presidium of the Kazakhstan Union of Lawyers;

VADIM VLADIMIROVICH KLYUGANT, Ph. D (history), attorney, former People’s Deputy of the Russian Federation (1990-3), member of the Committee on Legal Issues, Law Enforcement and Crime Control under the Supreme Soviet of the Russian Federation, former member of the Constitutional Commission and the Constitutional Assembly, former mayor of the city of Magnitogorsk;

NATALIA ALEXANDROVNA LOPASHENKO, doctor of law, professor of the Saratov State Academy of Law, Director of the Saratov Center for Studies of Organized Crime and Corruption, expert of the Legal Department of the State Duma of the Russian Federation (as absentee participant of the round table);

JULIA VALEVIJEVNA UROZHAEVA, Head of the Economic Analysis Department of Vnesheconombank of Russia;

JEFFREY D. KAHN, Assistant Professor of Law at the Dedman School of Law, Southern Methodist University, Dallas, Texas, USA (formerly: trial attorney in the Civil Division of the U.S. Department of Justice, Washington D.C.; lecturer on European human rights for the A.I.R.E. Centre (London & Moscow));
**ELENA NOVIKOVA:** As you remember or learned from the transcript, at the last round table, the question was raised regarding the reasons for the obstacles to the establishment of stable economic relations and the protection of the property rights which originated during the period of large-scale economic transformations at the beginning of the Perestroika period. This was explained by the lightening-fast reform, the lack of a legal framework, and as a result, the mass influx into the economy of criminal elements, which had grown together with the bureaucracy.

This explanation is confirmed by numerous examples from everyday life, and other facts. It finds support in the professional environment and in judicial practice. As a result, entrepreneurship began to be consistently associated with and even identified with the criminal element. Both the repeated waves of redistribution of property, the so-called nationalization and “Operation Energy” testified to this, when dozens of natural resources users were unjustifiably subjected to trials and investigation, and much else.

Yes, in the interests of quickly reaching political goals, the State in fact sacrificed its legitimacy. Moreover this occurred not only during the process of privatization, but if we have to sort out the causes, then also before it began. According to Mr. Gaidar, “the scope of the plundering by the nomenklatura in 1990—1991 greatly exceeded that which we had in this field in 1992—1994, that is after the adoption of the law “On Privatization.” Who is guilty, the people who participated in privatization, or those who should have created the rules? Today’s realities are such that the passions surrounding the legitimacy of the acquisition of property by entrepreneurs and the subsequent wave of nationalization still shake the country, and as we see, our previous discussion also did not circumvent them.

This is the question of questions, which one must answer in order to develop the legal groundwork for a truly stable position for owners in Russia. And this question is formulated thus: are the problems and passions related to the loans for shares auctions of the 90s (including the preceding stage of plunder by the nomenklatura), or is this the redistribution of property using the power of the State which, possibly, takes place as a result of such ill-performed privatization?
As we know, contemporary nationalization and re-privatization is also characterized by a lack of a sufficient legal framework, i.e. of a law on nationalization.

As they say, “after something” does not mean “as a result of something.”

The comprehension here is crucial for us to resolve this question with the assistance of our guest specialists in the conterminous scientific fields. This is why we invited Leonid Markovich Grigoriev to make a report on Recent History of Property Acquisition in Russia. We expect to reflect on the future of this institution within the framework of the principal topics of the roundtable.

We are now at the crossroads and depending on the path we choose at our level of expertise at least, we may come to a balanced assessment of the current situation and possibly forecast the next stage of development. This is the reason for choosing the topics.

Let us start with discussing the new chapter by Vladimir Lafitsky titled The Court in a Struggle for Property and Power. Historical and comparative law essay.

VLADIMIR LAFITSKY: The court must serve the law, and not somebody’s interests. Yes, this is how this task is formulated, but no one can resolve it. After all, take the United Kingdom itself; surveys were also conducted there, moreover among various social groups, and it was shown absolutely clearly that not only marginal social groups mistrust the courts, but also many other social strata. This is completely explainable, because judges — again I returned to this theme — are made of flesh and blood. They have more trust in those who belong to the same class that they do. This is a well-known fact.

The second thing is adversarial proceedings. As to me, I do not like adversarial proceedings very much. This is my profound conviction as a lawyer. I consider that one must place certain limits upon adversarial proceedings, since it is clear that whoever has more money will hire the best lawyers, can better prepare themselves for the trial, and people who do not have funds do not have the ability to protect their interests. Even if the law is on their side. And this is what happens everywhere. Not only in this country, but also in Great Britain and other countries. Adversarial proceedings do much harm. One can cite many examples to confirm this. I have written much about American law, which belongs to the same common law family as British law. Therefore I can confirm: one should not idealize the courts of these countries. Since proceedings are adversarial, the courts will always render a decision in favor of party who was best able to defend their own rights. And the best defense is far from always being on the side of justice and truth.
ANDREY FEDOTOV: What is the real alternative to adversarial proceedings? Because I do not know any. I am often in court, and I cannot imagine what it would be like if there were no adversarial proceedings. We will forget all about any law at all.

VLADIMIR LAFITSKY: No, the fact is that both in English courts in our courts, the adversarial principle has been made absolute. And I am convinced that it is necessary that during a trial judges nevertheless assist those who cannot defend their own rights and lawful interests. Guided by the supreme values of the law. I understand that I do not have the most extensive experience, but nevertheless it is sufficient: I have around 30 court trials under my belt. I had various trials, including the trial for seizing ROSNEFT shares, when they were seized from their lawful owners by order of Yeltsin. I have been to court in Sakhalin, defending the interests of large English investors who had been robbed by the Russian managers of one of the oil companies. In certain cases, the court’s assistance is required for many participants of the trial, and the judges are silent. This is not right.

ANDREY FEDOTOV: Vladimir Ilich, I think that the examples that you cite are exactly the examples when the courts assisted one of the parties... Vladimir Ilich, there is one more question. We often hear about the corruption in the courts. It sounds different from different sides. But for instance I have the feeling that very often decisions in those cases which are called corrupt are actually adopted by the judges under some sort of “self-censorship,” as I’d call it.

VLADIMIR LAFITSKY: Corruption often hides behind poorly reasoned court decisions. Therefore, one of the instruments in this fight is presentation of strict criteria for judicial acts. They must not be composed on half a page. One can find complex cases where the entire decision takes up 10 lines. Usually arbitrariness or corruption hides behind such lines. Of course this must be stopped.

Corruption is and will be, but not on the scale that is attributed to it. Our people love to organize “rule by campaigns.” And this is very dangerous, because if we began accusing courts indiscriminately, without any judicial trials (and currently all levels in our country talk about us having corruption), the public will stop believing in the courts.

I remember a judicial trial, I already mentioned it: in Sakhalin in 1997. The task was to take the case to court. So that contract killings would not begin. Transferring the case to court was already a guarantee that everyone
would remain alive. Even if we lost individual trials there, everyone remained alive. This is simply an example of how things were in the past. And now we revive the previous stereotypes: “but why go to court, they are all for sale there, why lose time when you can hire a killer and shoot someone.” This dangerous trend is developing now.

VENIAMIN YAKOVLEV: It seems to me that in itself, the idea of examining the administration of justice and the courts from the perspective of their relationship with property and power is extraordinarily valuable. Because my own 14 years experience of judicial work confirms quite well the necessity of performing just such research. Because the conflicts which a court decides upon are generated and resolved (or not resolved) in this very triad: power-property-courts. And historically all this was united into one, it was controlled by the same authority, was it not? So the sovereign is power, this is property, and these are the courts. This is the history, through which all peoples and countries have passed. And then there was a gradual separation and individualization. The separation of property from power or power from property and the separation of the courts. And it seems to me that the excellence or lack of excellence of a social structure depends upon how correctly this triad is constructed. On the one hand, the extent to which they are separated, and history teaches us that there is an urgent need for this, and on the other hand, the extent to which the relations between them are correctly established. The extent to which balance, so to speak, is provided for. Moreover, this balance has many expressions. For instance, if one takes power, if one takes property, then of course here there is a balance of deep economic interests. Because in our time, property is not only small individual property which serves to satisfy individual needs, but also colossal property, concentrated in private hands but performing what is in essence a very important social function. As a matter of fact, this is where the social functions of property come from. This is where the social significance of these relationships comes from. And so, if the balance of interests is not provided for here, the property will be used poorly. It will be used selfishly. It will be used to cause conflict of public interests. It will generate revolutionary situations. This is basically unavoidable, isn’t it?

Second is power. Of course, power must be separated from property. Only then can it fulfill its social function. And the function of power lies exactly in the fact that it preserves the balance of social interests. This means the employer and employee. This means large business and small business. This means the creditor and borrower. This means the seller and the buyer. In what way? By means of legal regulation. In this way, the State must help property to perform its social function, naturally while preserving it as pri-
vate property, preserving the powerful interests inherent in the very institution of private property.

Well and finally, the courts. I am afraid that the balance of interests in the normal development of society — steady, stably, without convulsions, without revolutions and, as much as possible, without crises, is possible only when the law has developed very well, when it is applied very well, and consequently when the administration of justice is well established. The administration of justice must be wise, just, honest, conscientious, open, accessible, and effective from the point of view of providing for the protection of interests.

So you see, this topic reaches towards the depths of social relations, and I think that is very important to discuss it right now, because the crisis has actually shaken the world. It has ruined several of the largest economic structures. Most important, it has resulted in poverty and misery for people, for masses of people. And this is the offspring of property. This means that actually one must think about how to develop mechanisms which, without destroying private property, nevertheless deprive it of the possibility to thus create quite dangerous situations for huge number of people. Here the law, domestic law, international law, law in all its manifestations, in all its branches must play its role. It seems to me that it would indeed be worthwhile to work on this.

I should say that our court system, of course, worked and continues to work in conditions which are very difficult and very uncomfortable. Why is that so? Well, because our judicial system was created during a period when there was no effective power in society, and well-developed private property also did not exist yet, but was only being born. But everyone wanted to have more property and more power. That is, we actually did go through a period of acute struggle for property and power. Unfortunately, this all became united. Because power actively participated in all the processes together with property. After all, many of the authorities got rich during this time, didn’t they? But today the question is not whether to declare, shall we say, privatization to be unlawful and to nationalize property and then try to once again privatize it, etc. God protect us from that! And it seems to me that the policy of power, of the authorities, is precisely directed at this, in principle. Private property is to be preserved, private property is to be protected and the methods for its protection must be found. At the same time, balance between the economic and social interests must be ensured.

We have now begun perfecting civil legislation. We have prepared a concept, presented to the President, and if it is approved, then we will begin realizing it. And we are trying to perfect civil legislation not through some sort of punctuated, strange, accidental decisions or as the result of lobbying pres-
sure from the side of the other party, but proceeding from the overriding goal which we are speaking of now, to protect private property, to develop material rights (rights \textit{in rem}), this is the first thing which is present in the concept, to develop material rights, to make them more diverse, to make more effective, to perfect relations under the law of obligations, that is the circulation of goods and money, to improve state regulation where this is necessary (and in my view, this is absolutely necessary), to improve it, to advance it. When doing this, we must use the development experience of foreign civil legislation in Holland, in Germany, in France, and in other countries. It is necessary to use the achievements of international law, especially the economic law of United Europe, and regulation standards. Actually, this task was given to the developers of the concept by a Presidential Decree, and we are pursuing these tasks.

It is correct that judges should be provided with high status, and adequate compensation for their work. Unfortunately, the status of judges has not been strengthened in our country as of late. And in my opinion, this tendency is truly worrying. But on the other hand, the liability of judges and control over their income and expenses is also correct. Is necessary to preclude pressure from being exerted on courts in any form, and pressure is being exerted by all who take the trouble, as they say. The authorities are trying, the criminal element is trying, public opinion is being used and the mass media are being used to exert pressure during the consideration of specific cases. We have all seen this and are well acquainted with it, but evidently public control is still needed, a system of public control. I also agree with this. But the main thing is the selection of professionals, training, the quality of the judges in the judiciary, because person who is professionally trained and morally strong will not be subject to anything, not to any pressure. Even though judges are sometimes killed. And there are many such professional, honest people in our judicial system! I can testify to this, because I know many such people. I would trust many of these people more than I trust myself. I have always said this and continue to say it. There are very many honest and honorable people, this is their very difficult work, their very heavy cross, but thank God they are people who work with great dignity.

Uncovering those people whose qualities make them incompatible with the functions of the administration of justice is a very important task which must be worked on constantly. The administration of justice requires the proper infrastructure, without infrastructure there is no administration of justice. For example, as far as investigation is concerned, it is correctly criticized for its insufficiencies. What is needed is quality, and independence of the investigation. But it is true not of investigation only, but also of a system of court
bailiffs to no less a degree. The position and role of the prosecutor’s office are also far from ideal. Judges’ high moral qualities are needed, along with their responsibility for the quality of judicial decisions. Openness and the publication of judicial decisions are needed as methods in the fight against strange, poorly reasoned decisions.

For example, the judicial arbitrazh system has gone over to comprehensive publication of judicial decisions and awards, that is complete openness of the judicial system. The publications and a database of judicial decisions are available on the Internet. The courts are becoming absolutely open, one can see every court decision, one can see how the decision was reasoned. I agree completely that there is something behind a poorly motivated decision -- either a bribe, or a lack of professionalism, or an inability to write court decisions et al. And one must react to this in a proper way.

We need to ensure the accessibility of the administration of justice. The courts are horribly overloaded. You know, 20 million cases a year are examined in Russia’s courts. Twenty million cases! Of these, about a million are criminal. All the rest, 19 million — are civil and administrative disputes. These are conflicts. These are real conflicts. As you can see, the demand for the administration of justice is simply enormous, therefore there are no grounds to say that our judicial system is not good for anything, when I hear these types of judgments, I consider them to be unprofessional judgments. It works. It has many shortcomings, but it works. And it is overloaded. Overloading is a scourge. Overloading creates difficult conditions for the administration of justice to be authentic. For this reason, these issues must be resolved. I think it is necessary to resolve them using contemporary methods and using alternative methods for conflict resolution, negotiations between the parties, intermediary procedures and third-party arbitration proceedings. Everything which was actually typical of our justice system before the revolution, and even, strange as it may seem, during the Soviet period. Because these extra-judicial forms were also actively used during the Soviet period. These are obligatory claims in commercial disputes. For instance, comrade’s courts, courts of honor or labor dispute commissions. I think the alternative conflict resolution methods in new forms must certainly be used. First and foremost, of course, negotiations between the parties using specialists and intermediaries. The efficacy of these methods for resolving conflicts is known worldwide, as well as the fact that they unburden the courts quite substantially.

Complaints which are received regarding the activities of judges must be examined, and disciplinary liability must be perfected. I think that we should create an independent disciplinary court. A project has been drafted for this, and they are arguing about how to staff the court. Who should be a judge and
who should not. I think that retired judges are good idea. The most respect-
ed judges, who received the status of independent judges when they retire. This is probably the judges who are ready for the disciplinary court. The judg-
es in the disciplinary court will be retired judges.

Well and of course, one needs a legal culture among the public, and sure-
ly international courts as a means for a certain control over the quality of the national court system in Russia. And all this must work together, everything must work together. Of course, our legal community must participate in solving these problems.

**ANDREY RAKHMILOVICH:** I am very interested in the question that the stronger, more prepared side may achieve some sort of advantages due to his qualifications; this does not seem to be completely justified to me.

I will tell you the old, well-known story regarding the reminiscences of one famous pre-revolutionary lawyer about the time when he was making what from his point of view seemed to be a brilliant speech at the Cassation De-
partment of the Governing Senate, and after this on behalf of the other side spoke not even an attorney at law, but a private person acting under power of attorney from somewhere in the Western provinces. This person, not very educated, not very qualified, said a few words. He said: my Lords Senators, I cannot compete with Mr. Lawyer. There is only one thing I want to say: I think, if someone takes something that belongs to somebody else, then he should give it back. And he won the trial. Why? Because there were good judges. This was the beginning of the 20th century. And we can imagine what kind of judges there were, and what kind of lawyers met in the Cassation De-
partment of the Governing Senate.

That is in the first place, and the second is a matter of the legislation. If the legislation is sufficiently developed, then no beautiful speech, no professional ability will enable you to move judges to impinge upon the rights of your pro-
cedural adversary. Procedural guarantees are also significant, in particular the distribution of the burden of proof. For example, the Law on the Protection of Consumer Rights places the burden of proof upon the stronger side.

**LEONID GOLOVKO:** As for the adversarial system, one would like pay attention to a more global problem through the prism of this procedural principle, because we probably gathered here not only to be happy about our achievements, but also in order to pay attention to the miscalculations and painful moments, to those deformations of the legal system which exist. The problem with the understanding of the adversarial system is a characteristic example. The weak spot, shall we say, of all post-Soviet legal sys-
tems is the mixing of law enforcement activity and social activity. Here one must be aware that the law itself cannot solve all social problems. Moreover it should not solve them (unless of course one speaks of the social security law as a special branch of law).

Let’s return to the adversarial system. In any trial there will always be one side which is weaker (technically, physically, materially, etc.). And of course, any civilized State must undertake work for the social support of the weaker side — the disadvantaged, minors, the sick, etc. But it should undertake such social work without using the methods which have always been used in our country, which have become traditional for post-Soviet states, including Russia. Here I mean the transfer of the social function to the law enforcer. The social function must not be an additional function for the law enforcement official, but a special one — imposed upon other bodies and services, which must be created and financed by the State. In this sense, the State is required to create social services, finance access to the administration of justice, finance legal aid, moreover, finance them from the budget, and not with the funds of lawyers (thus imposing upon them the additional burden and requiring some sort of altruism from them).

A certain will should exist on part of the State — by saving funds on the construction of some sort of additional “Potemkin villages,” these funds can be spent on social aid, including the weak side of a trial. And thereby equalizing the situation itself — making the adversarial system not just a formal proclamation, but socially achievable. Here everything is absolutely catastrophic, since any discussions of social functions, including in the area of the administration of justice, rely upon the fact that sooner or later these functions will be transferred either to a police (militia) officer, or to a judge, or to a trial attorney or to someone else. This is the first item.

But from here proceeds the second and even more global problem related to the fight against criminality. Of course, this fight must be undertaken, however the repressive function, which also has unavoidable social consequences, cannot be mixed with the functions which are social as such. I’ll give you a typical example. I do not think I am disclosing any big secret if I tell you that the discussion of this problem is currently intensifying in Kazakhstan. The Parliament there prepared (I participated a bit as expert) a large law on the prevention of violations of the law. The law was conceived as being absolutely social (the social prevention of criminality), but it turned out to be... absolutely repressive. And thus an elementary lack of understanding arose. Because when experts read the law, they say: “Yes, this is full of repressive norms.” In other words, all the prevention can be summarized in the fact that there is a Criminal Code, there is a Code of Administrative Offences, there
is a Ministry of Internal Affairs, which for the purposes of “prevention” carries out criminal prosecution and the imposition of administrative liability and so forth. But where, is the prevention, actually? Where is the social activity of the State? Where is the social support for the potential victims of violations of law? It’s not there! At the same time, the representatives of the legislative branch, thinking in a way which is, so to say, very near to us in spirit, say: “Well, we were proceeding from the best intentions. We would like the police not only to punish, but also to be engaged in social prevention of offenses...” Of course, these are completely different functions! There is a social function, there is a repressive function, and there is a law enforcement function. And until there is a clear functional logic here, until there is separation of the social, law enforcement and repressive functions from each other, until there is real will on the part of the State to spend a certain amount of real money on social function, while there is only a desire to put something on the shoulders of someone else (the police, the judge, the lawyer, etc.) and then report that everything is wonderful with us in the social area, then probably we can’t expect anything good in our country.

Thus the adversarial system and the protection of the weaker side are absolutely not contradictory things! The adversarial system must be provided for, however if one of the parties is “weak,” then it must be given social support “from outside,” that is with the aid of social services, and not from “within” the trial (with the aid of the court). Moreover, one should not speak of an equalizing provision of social aid, but providing it to those who are really in need of it. If your level of income does not meet some sort of minimum, then there should be certain procedures for receiving social assistance which make it possible to afford legal aid (a lawyer). When one looks at comparative law, there are perfectly developed mechanisms available. One probably needs to proceed along just these lines, without breaking procedural logic and without putting the principle of the adversarial system under doubt.

Finally, one more thing. There is one more aspect in which we are tremendously behind. If the social role of the court should appear somewhere, then it should manifest itself in relation to individualized punishment, individualized criminal repression, including the possible dismissal of it. In our country, the courts simply do not have the procedural and institutional means to engage in true individualization of punishment. Here special social services attached to the courts are truly necessary — probation services or other mechanisms which would allow the courts to receive exhaustive information on the personality of the accused, which would make it possible to study his personality, moreover to study it not just in a formal fashion. Work must be conducted in this area, and in some way, indirectly, the courts will then par-
ticipate in the prevention of crimes, but participate again indirectly, since the court itself is not such a “social service.” One must in principle separate law enforcement activity from social activity. Otherwise, we will constantly walk in a “vicious circle.”

**YULIA UROZHAeva:** I beg your indulgence, but we economists look at a court as an entity which provides services. Completely definite services, the service of the administration of justice, in the ideal. Unfortunately, this is of course not the way it is. And when we look at a court as a body which provides certain services, we must think about the consumers. Now we designate these users of the court: bandits, large business, medium-sized business, small business and private persons. They each use the courts entirely in their own way! So when people begin to go to court against energy companies for the fact that they issued an invoice twice, this will be a much bigger step than when we’ve pinned down yet another big businessman. It is very difficult for me to say in this sense, but it seems to me that, one of the things that economists always try to stress are mechanisms. So, how do you do this? Possibly some sort of educational things, some sort of informational things will have a much greater effect than yet another change of legislation.

And the second thing which frankly scared me a bit as representative of liberal economic thinking is imposing social functions on property owners. I will explain why. Because “looks smooth on paper, but I forgot about the ravines” this is how this is now understood. If you want to reduce employment during a crisis, which is the proper reaction of business throughout the world, the prosecutor and plenipotentiary representative of the president in the district will come to see you. What is business doing? Anyway, businesses will have to make their way out because they need to reduce employment. The second example is short. The managers of an enterprise came and said that they have very high employment, therefore they must urgently be given money. In the first period of the crisis, in October-November [2008], funds were distributed. And you know where this money went? to pay bonuses to managers. Moreover, these enterprises’ need for working capital increased three times over. Therefore it seems to me that one needs to be very very careful with this. The ideal thing will be specific, fine mechanisms. Because if the laws are changed yet again, this will be especially dangerous during the crisis. That which we are observing in Pikalevo now is simply a catastrophe, in my opinion.

**Vadim Klyuvgant:** Well of course, there were always problems with courts, if it had not been so, there would not have been the sentence in the
ancient holy books that there is a court above the judges. It did not just appear there accidentally, as we know there is not one excess letter in these books. So therefore the question of course is not this, but probably the scale of the afflictions, which are after all different in different periods. I would not say that the judicial system does not work in contemporary Russia: it works. It exists of course, and enormous efforts were made for this. It is scarcely possible that anyone can doubt this today. At the same time, there is no doubt that there are “lagoons” in the system which need not only therapy and not only surgery. Where catastrophe medicine is needed. It is most unfortunate, one must say without any satisfaction, it is very sad, but it is where disputes arise with the State, or where there is persecution on the part of the State. These are today’s realities, I do not think anyone likes them. Well, except for those who believe in the principle “the worse things are, the better.” I am sure that among those who are sitting at this table, there are no proponents of that principle, “the worse things are, the better.”

Unfortunately this is so, this is why trust in the courts is decreasing alongside a definite increase in demand for, shall we say, their services. And from a social point of view, this may be correct. In principle, in our country, the State, as represented by all the authorities, provides services to the public. Generally speaking, this is probably true, but the demand is great, that’s true. And why does trust in the courts as an institution decrease along with this? Is it only because propaganda is being directed in the wrong place? Although just as in everything else, we can’t do without kinks and “campaign” struggles, but Ivan Andreevich Krylov said long ago “it’s no use blaming the mirror,” indeed, as the first cause. Still, there probably still are problems, serious ones which come from inside.

And I would like to touch upon the topic of the adversarial system, without which, well, how could a practicing lawyer or trial attorney manage, even more so in the case which was mentioned? Here how one can propose this issue to be thought about: is the criterion for being the weak side always only a material criterion? Well, it is more or less clear what is to be done with this criterion. So for example, in my view, Leonid Golovko spoke very correctly about the measures which must in principle be taken for overcoming this social inequality. Not for overcoming — that is an impossible task, but at least for lessening the gap. And what happens when the State is a party to a dispute? And is the State capable of being a party in our country? And can the State be a party with equal status in our country? In civil court, let us say, in a tax dispute? In criminal proceedings, where it is the party of the prosecution? And if I understand correctly, I am afraid of getting a D in criminal proceedings, but the equal status of the parties is an integral part of the prin-
principle of the adversarial system in my understanding. And the court is required to aid the weaker party. Whether this is a civil trial or a criminal one.

Maybe it makes sense to think about the principle of the adversarial system and its practice in present-day judicial proceedings in this perspective also. Because unfortunately, the representatives of the State authorized to act in the name of the State in our courts for the most part not only do not want to compete as adversaries, they are not capable of doing so. And another resource is used as an alternative to this, that which the esteemed Vladimir Ilich also spoke of here. In my view, this is a mixed administrative and corruption resource, because today a bandit does not at all need to go to a judge and exert some form of pressure on the judge. After all we now have a certain vertical of power, yes, sometimes with its own costs. This same bandit can exert influence on the judge not only directly, but also through some gallant representatives of the executive branch who may simultaneously also be bandits. We see many examples of this, or something similar to it. Well, these are the realities of our life.

For this reason, when we only talk about the level of corruption in connection with this type of problems, we probably need to remember that corruption exists not only in direct forms, when an envelope or a piglet is brought to a judge, which probably did not happen as often as it was described in the classics of the 19th century, or as often as uninformed representatives of the broad public think. And one can juxtapose this with the self-censorship which was already mentioned, when a judge understands who he really depends upon in this life. Simply as a person and as a judge who occupies this judicial position. And when one adds to this and compares it with the sources for the formation of the judges in the judiciary which prevailed today. After all is impossible to become a judge today, well practically impossible. There are exceptions which confirm the rule, but today it is impossible to become a judge unless you are an investigator, prosecutor, the secretary of the judicial meeting or a judicial clerk. For example, how many trial attorneys have become judges recently? Of course, this is a number which is an exception, and the exception as we know only confirms the rule. Perhaps in this sense not only the corporate instinct of the judiciary is a problem, as much as the whole comprehensive situation which determines the level of justice in many things, which means also the administration of justice. And this means the quality of those services, if we are to use this terminology, especially in those cases when the stronger side is the State, and accordingly, any other participant in judicial proceedings which is against the State is by definition the weaker side. And believe me, this does not depend at all on its material situation. It does not depend on it in the least!
VICTOR ZHUIKOV: Here are two of my observations, which in recent years have confirmed for me again and again by examples. It may be that they sound very pessimistic (I do not want to say that I am a well-informed optimist, but slightly informed), they also provide grounds for me to look somewhat skeptically and pessimistically on many of our very positive things. So the first observation, which everyone knows quite well from philosophy, is that everything positive is also accompanied by disadvantages. The ancients said: “all that is most perfect has disadvantages.” But now in our country in recent times these disadvantages have begun to prevail over the advantages rather frequently. My second observation is that more and more frequently these days we have to choose not between the “good” and the “very good,” but between the “bad” and the “very bad.” And in connection with this, I will give you a few examples which are close to our topic.

Let us look at the courts. In the 90s, the status of the courts was elevated in the most fundamental way as a result of this judicial reform. Never in the thousand-year history of our State have the courts possessed such authorities. Even after the reform of 1864, which affected judicial power. Then the courts were connected to executive power. At the time of the Emperor. The authorities of the courts and the legal guarantees of independence are some of the highest in the world, and perhaps even the very highest. Although recently, attempts have been made to lower them. I would emphasize, the legal guarantees of independence. The courts have begun to decide questions of immense importance. There are colossal sums in the arbitrazh courts, and it is mainly enormous capital which prevails. In the courts of general jurisdiction, questions of power are often decided in cases regarding the protection of citizens’ voting rights, the formation of local self-government bodies, the bodies of power in the constituent entities of the Russian Federation, in the Duma and so forth. And what does this lead to? A need to interfere in judicial activity appears, the need to manage things from all sides, as you said on the part of the bandits, and business people, and private individuals, but most of all the need of other branches of power. For me, this is more dangerous.

I worked for a long time in the judicial system of general jurisdiction courts, and I can note that it’s not from corruption that the greater danger comes, but from the interference of authorities who strive to force the courts to adopt a decision which is favorable for someone. I know quite a few cases, simply appalling unlawful decisions evident to a student, and I know that there was no money whatsoever.

The need for interference is huge, and therefore we are experiencing that which we experience. Of course, there is enormous interference in judicial
activity. This is where all the discussions which began last year come from regarding the necessity of accomplishing judicial reform and accomplishing it in order to create truly independent courts. Independent from interference, I say. The courts should depend only on law. From my point of view, it may be that the courts are one of the most dependent. For this reason, they cannot do anything they want. It may create law, decide, protect rights, but it must be independent from interference and from being forced to adopt non-legal decisions.

Further, as to the fight against corruption. Like with the many campaigns which were undertaken during Soviet times, which I was a witness to, I am waiting to see whether there may again be unfavorable consequences. It may be that now the number of those incarcerated will determine the effectiveness of the fight against corruption, as it often happens. But there is one more thing! This is an absolutely correct phenomenon. One of the methods of fighting corruption is the limitation of the discretionary capabilities of officials. Of course, so that he did not have the option for unlimited choice, so that he could pick red, green, white etc., yes? That’s right! But now they say that one has to also limit the possibility of the courts’ discretion. Judicial discretion. You know, this is a fundamental position, judicial discretion has existed since ancient times. to choose one among several options. Because the law, as you well know cannot regulate every specific situation in an entirely precise way. Will this be good or bad? Judicial discretion is bad. It carries with it much that is negative, because it allows the possibility for arbitrary, non-legal discretion. But if it does not exist, things will be even worse.

Now we were speaking of the adversarial system, from a slightly different area, but approximately the same subject matter. We had two types of trials: the so-called inquisitorial, and the adversarial. Until recently, until 1995, when the civil procedural code was changed, there was the so-called inquisitorial trial. I participated in it quite often working in people’s courts, in district courts, and in city courts. Well, it was ineffective. The judge was in a most difficult position when he was required to do something, but couldn’t. There were huge abuses of the rights of the parties. Now we have adversarial trials. Maybe we have gone a little overboard in some areas. However, in general I do not see this in civil trials, and I won’t take it upon myself to judge criminal trials. This may be the case in some ways, but in my opinion, the rights of today’s courts are quite well defined. They also have obligations. Judges must organize the trial. They must tell the parties who must prove what in accordance with the law. They must provide assistance in the discovery of evidence. And on the basis of the rules of material law, they
must themselves decide the dispute, regardless of the rule of law which the parties refer to. In my opinion, this is a very effective, reasonable distribution of these duties. I think that we have after all chosen the best approach, all the more so because the adversarial principle is written into Article 123 of the Russian Constitution.

ANDREY FEDOTOV: I have conceived a question which is probably completely rebellious for a trial lawyer and somehow inadmissible. We have been speaking about the fact that there are bad judicial decisions, very bad judicial decisions, and entirely bad judicial decisions. And the same time, as far as I know, the rules in our Criminal Code regarding the knowingly unlawful initiation of a criminal case and rendering of a knowingly wrongful decision are never used. So I have a question for my colleagues: isn’t it time to bring them to life?

VICTOR ZHUIKOV: This is a difficult question for me. Knowingly wrongful decision! I participated in the examination of several cases when I worked in court. In the Presidium of the Supreme Court. These cases came up to the Supreme Court. Cases regarding imposing criminal liability on judges were examined. Do you understand? After all one has to prove that they knew that they were rendering a knowingly unlawful decision. Prove it!

So I remember something related to this. The book “English Law” was published here in our country. Lord Denning said: “A judge should not leaf through the pages of his books with fingers shaking in fear thinking what will happen to me if I do this, or if I do that. As long as a judge is convinced that he is acting correctly, he must not bear any liability.” And here he draws a further a parallel with physicians: if a surgeon does an operation and the executioner stands behind him and says that if you drive the patient to the grave I will chop off your head or your arm. Will he do this operation? It is the same thing if a judge fears what will happen to him, if he will be locked up or not locked up, if he will be thrown out of work, or not thrown out of work, then he will never be independent when he considers a case. Never! This is even more dangerous! Here we are again choosing the worst among that which is worse. Even now a judge can be intimidated.

This is once again the pursuance of the infamous fight for the purity of the ranks, which sometimes reminds one of the activity of the Holy Inquisition: not “we will purify ourselves,” but “who remains.” This should work like a fine instrument. Dishonorable, disreputable and unprincipled people should not work in the courts. We must indeed free ourselves from them. But as they say, the fish rots from the head down, and it is always
LEONID GRIGORIEV¹: As Ostap Ibragimovich Bender said to his client Koreiko², the majority of large fortunes have been gained dishonorably. We who are the contemporaries of large-scale privatization are doomed to long discussions of the degree and scale of the “honesty” in this process. For us (economists) the success of privatization is not in its justice. Unfortunately, it is unattainable! An acceptable result of mass privatization would be a conscientious effective owner, moderate (European) inequality, the legitimacy of property in the eyes of citizens, and the stability of property rights within business and between business and the State. And one must admit right from the start that there is no distinct economic theory which would allow one to plan, realize and evaluate the efficacy of mass privatization.

The shifts in the character of property during the past two decades have not occurred in a homogeneous space. There are three systems of property in the world, which are fairly easy to differentiate for economists, and apparently from a legal standpoint also: the Anglo-Saxon, the continental European, and the Asian variants, where informal institutions play a much greater role alongside mutual holdings. We proceeded from continental law through an Anglo-Saxon privatization with Asian traditions and we developed our own rather complex hybrid. It is my understanding that the attempt to bring a set of Anglo-Saxon elements to our continental legal system was rather divorced from reality. Conflicts appeared, and in practice the Anglo-Saxon idea was applied in order to pump out the old property, but inasmuch as neither the morals, nor the traditions nor the psychology of the public, the authorities or owners were Anglo-Saxon, what we got is an awful hybrid of all three models. It has not been determined in its pure form.

There are no works where they say clearly: this is right, this is wrong. By the way it is still possible to create one, and it would probably require the work of lawyers, and not only economists. For example, we have a term which was introduced by me, the “quasi-concealed” owner, that is an owner who everyone knows by name, they see him, he makes decisions, he fires and hires, he sells and buys. But he is formally concealed behind offshore accounts, and he


² Translator’s note: A reference to a popular Russian satirical novel “12 chairs” by I. Ilf and E. Petrov.
is represented at the shareholders meeting by a lawyer. A lawyer comes with eight powers of attorney, because it is necessary that each is less than 10%, and represents 75 plus 1% of the holdings, that is, full control. A simple example: they are all foreign, among large companies I know direct owners who are not the presidents, but the advisers to the president, and they conceal themselves in this way. This “quasi-concealed” owner, is a completely different mentality with another definition of objectives, with models from the Anglo-Saxon or continental system followed during the privatization in Russia.

Returning to the economists, I would remind you that if you have a different legal system, a different definition of objectives for an owner, different corporate governance, not corporate management, but corporate governance; here in Russia we have mixed this up in the translation, and one has to be very careful, because economists are confused with this... Let us note, that if an economist emphasizes corporate management, then he thereby consciously or unconsciously hides the problem of ownership and corporate control from being studied.

The corporate governance type determines who actually owns, why they own, and what he is going to do with this — this is the problem here. The Russian hybrid gives us the “quasi-concealed” owner, and this is the key moment for a large owner — he is concealing himself from the authorities. We know several cases when extraordinary efforts were made at the level of the entire State in order to seize the property of one person, in order to later conceal it.

Secondly, when there is a systematic overthrow of property, the problem of the speed and quality of the transfer of rights arises. But this is a false problem, this is also a method for disguising the lack of a definition of objectives and methods for achieving realistic goals. If privatization does not resolve key problems, then speed does not help. Privatization may be pragmatic, but you cannot fully ignore social factors, because then the problem of legitimacy arises, people do not accept the privatization if they were deceived, or if they believed that they were deceived.

One of the reasons for the weakness of property rights is who gave away this property and why. There is a work from the year 2000 that was done by two economists from Europe who had done a great deal of work in Russia; it is called “Machiavellian Privatization.” It was done based upon experience of six privatizations, but the Russian one is not there. If at first you had the sensation that: Machiavelli and privatization — that is us, well, no. It is very interesting, they’ve taken two Chilean, two French, one Czech and one English privatization. Why are these privatizations Machiavellian? They were conducted by political parties of the government in the interests of their
own supporters and their own electorates in the anticipation of elections with a complex system of preferences for their own electorate. In this sense they are Machiavellian. Five were successful — and only the French once did not vote for those who gave them property, who fed them; the others voted the way it was conceived.

There is the concept of a business cycle, when the government begins to pump up money before crisis, creates deferred inflation, the so-called business cycle with political causes. This is the same thing that happens with us. The people who worked on Russian privatization wrote about Russian privatization, they have work on this topic, and they did not include Russia in the model because it is impossible to include it. It turns out the government acted against the interests of its electorate. That electorate which could have supported that pro-market government did not receive anything during privatization. It was critically important that it was conducted against the interests of the potential middle-class and intellectuals who supported the market and democratic transformations.

In theory, the only thing that one can grasp onto during the conduct of privatization is this: what are its goals? The goals of the government are usually very simple. The majority of privatizations, especially the Latin American ones during the 90s had the following goals: reducing expenses for loss-making state corporations and providing income for the state budget. This is 30–50 billion dollars of revenue for the state budget in the leading countries. I would remind you that the entire Russian privatization of 50,000 enterprises brought in gross revenue of 7 or 8 billion dollars according to official statistics when calculating those rubles at then existing exchange rate. In order to make it clear to the esteemed lawyers gathered here, and also to the observers from abroad, the income of the Russian government from privatization was less than the expenses of the Russian government for the upkeep of the Privatization Ministry during that period. This was a loss-making undertaking for the Ministry of Finance! Moreover, Brazil and Argentina sold only 20–30 enterprises.

And thus, the first goal was to be relieved of ineffective state companies which brought losses to the state budget, that is to relieve the budget, that is the direct goal of the Ministry of Finance — to be relieved of expenses. The second goal is to increase effectiveness. State corporations are always overgrown with security guards and cousins, but this is well-known, and for this reason their effectiveness is very low. However if we take systematic large privatizations, let us say in Latin America, the telephone companies went very well, the privatization had a very good result, electricity — more or less, and water utilities didn’t work (there are many poor people there — given the large degree of inequality, the privatization of water led to uprisings in Latin
America). Around five countries quickly wrote a prohibition on the privatization of water into the Constitution, because the poor cannot pay.

During systematic privatization, the choice of a reasonable mix of goals and methods is always a huge problem; you must take into account the structure of the population and the character of the transformation. The budget, effectiveness — well, some sort of little sops at enterprises, some sort of social justice through vouchers at enterprises. Vouchers were invented in England in amount of up to 3% under Thatcher for workers so that they would receive something up front and not rebel. Obama is now doing the same thing with General Motors, they gave 40% of the securities to the trade union in exchange for reducing salaries, dismissals; later they will be valuable and things will be good for you.

A voucher was always a sort of bribe to workers during privatization, but not a method for distribution. Never, until our privatization, until the 90s, never was the voucher system been used as a main method anywhere. As a method of systematic privatization, it turned out to be invented only for us. That is, it was invented by the Poles, who turned out to be smarter than us and never used it. We will not examine the Czech privatization now, I can talk about it separately if you'd like, it has absolutely no relation to us, except for the word “voucher.” It is some other sort of beast entirely, a computer game with a zero sum, everything is a closed circle there, and this has no relation to us at all.

Now the only thing that one can at least theoretically grab a hold of is the theorem of the Nobel Laureate Coase from the 1930s. The purpose of privatization is of course the transfer of state property to an effective owner, but this is unjust to the mass of the population, it is unjust to the workers at the enterprise, it is not just at all or in any sense. However, this is an attempt to create a working system with a serious owner. If an effective owner does not appear as a result of privatization, then it has been a failure, regardless of anything else. The only reasonable criteria for privatization must be an effective owner, who will take reasonable decisions and not ruin this property: he invests, borrows, conducts normal business activity and in this way creates the country's economy. Moreover it is desirable that he does not have legal conflicts with the authorities regarding the privatization or with the public regarding legitimacy. And then we can gradually enter into a system that works. According to my calculations, jumping ahead, we still have a generation until we reach this condition, since we conducted our privatization extremely unsuccessfully. And so now regarding Coase's Theorem.

Coase's Theorem was formulated by this great person (by the way he is still alive, he is 94 years old now). It is likely that he formulated it in 1938.
This great person wrote a rather obscured main sentence, which supports the entire theory of privatization and several Nobel prizes. It goes something like this: when there are low transaction costs for the transfer of property, its original distribution is not so important. Hope rests upon this one obscure sentence: if you have low transaction costs, then it is not important how you privatized, because if there are low transaction costs for the transfer of property, then they will rapidly change and everything will fall into place. The problem is that almost nowhere do we find this easiness — it is easiest to transfer property among the Anglo-Saxons. The supposition that it would be easy to buy something into one’s ownership in Russia was incorrect and unfounded.

But they latched on to this sentence, and throughout the 90s, the supporters of simple and quick privatization in Russia said: “low transaction costs — this is how we will privatize after all. We are going to privatize anyway, afterwards everything will be all right, everything will fall into place.” But this works with low transaction costs! But who said that after privatization there will be an owner who gives everything up easily? I haven’t found one well-reasoned quote from Chubais at all, except the recognition that nobody likes him, but that is political in nature, not economic. But there are charming quotes from those who justified it (Yegor Gaidar, Vladimir Mau and Maxim Boiko), who wrote distinctly that they were conducting privatization for political motives, that it was being used for the fight against communism. But if you conducted privatization not for economic, but due to other motives, for other goals and with other methods, then the economic system which arises has some sort of parameters which lay within the framework of an entirely different type of thinking, methods, goals and instruments.

And so it turned out: we can like this privatization, perhaps some of our relatives are getting fat of it -- this has absolutely nothing to do with the evaluation of it. The privatization which was conducted in our country does not have any relationship to the history of privatization, to the historical methods which have been developed for it, and it does not have much relationship to the goals of privatization that are recognized by those who invented and conducted it (its ideologues), and does not have any relationship to securing property rights or to securing them during the legalization of property. All the more so, after a history of communism for three quarters of a century, this problem had to be solved fundamentally, that is to create an owner, so that no one would attack him, and so that he knew that if he worked and invested, that this property and this income would not be seized from him. Instead of this, something absolutely to the contrary was done.

The mechanism for the transfer of property was maximally weakened: that is those who received it had no guarantees of its safety, but they did not have
any debts or obligations either. What else of substance occurred during this process? This was actually a transfer at an evaluation near to zero. The Nobel Laureate James Tobin thought up the “Q-ratio” — this is the ratio between the market value of an asset (usually a company) to the balance sheet value thereof (which refers to reproductive value of fixed capital), that is as it were an attempt to measure the market value against the “real value” of the firm — it varies of course from 0 to 1.

This means the transfer takes place at zero if the market evaluation of the transferred property is equal to zero. But if there is some sort of denominator, even the most dingy little asset, when a recovery eventually raises it, a simple problem arises: why do you need to conduct ordinary business activity when you can wait for a little rise and then sell it? And then reselling begins, infinitely or at least for an extra 10 years.

Only when this Q-ratio is restored more or less reasonably in market conditions, only then does a normal stimulus appear for conducting regular business activity. For this reason, the transfer of the value is senseless from the viewpoint of the owner, because the rational behavior of a person who has received an asset for free is not the behavior of a strategic investor, but of a portfolio investor — this is a portfolio asset, which can be resold. This is a completely different strategy of life, a completely different type of property.

Thus an incorrect reading of Coase's Theorem was part of the ideological justification of the simplicity of transfer. In addition, all texts from 1993—1995 (the end of privatization) were united in the following, there was one key phrase: “External investors will now buy everything from internal ones — everything will be fine.” Nothing of the sort occurred. By the way, all the figures on the reduction of the share of internal investors in favor of external ones are a pack of lies. A very simple lie, because this was simply the transfer of the property of Russian directors to offshore companies. That is, these are formally external investors, but they are offshore companies, it is the same people, this is the “quasi-concealed” owner.

Besides which, the “blocking stake” played a negative role under unstable conditions. For five years I have been proposing to eliminate the “25+1” blocking stake, because this makes 75% the controlling stake. As a result, theoretically no more than 20% of shares outstanding [in any single company] are being traded on our stock exchanges. In large Western companies, the controlling stake is 5%, 7%, or 10%, and American statistics record full control at 10%. In our country, anything less than 75% is not control, you are always bound, and the whole rise in the first decade of the 21st century has been connected with the fact that large companies were engaged in purchases in order to get 75%, because when selling our companies among offshore
companies, you had to sell 75%. Therefore, all of our big mergers in the last
decade are first of all offshore operations, no money came into the country,
and secondly it always had to be 75%, because it was only possible to sell with
full control, otherwise it was senseless.

Further, there is the theory of discrete alternatives. What were the alter-
natives at the start of Russian privatization? The real threat was the Yugoslav
alternative, that is the distribution of enterprises to the people, and this was
fought against. It was indeed difficult, and the choice was between distribu-
tion and the usual privatization. The latter was painful, torturous, every other
privatization minister ended up in jail and three out of four deputy ministers
should go to jail because they'll do something that isn't quite right, political
careers are destroyed; is it some sort of insane asylum. The third alternative
was the voucher. It was completely artificial, it was used in only a few coun-
tries, it is certainly a swerving from the main road, and after 1995, having
experimented a little bit with us, no one has ever used it anywhere. This is a
complete swerving from history.

Privatization is always mud, huge income for the “wrong people” and suf-
ferring, the alternative — distribution to the people, well it is clear that this does
not work. The main fight was with this main alternative. But instead of fighting,
instead of torturing oneself with this alternative, they thought up a third one,
but this third one, voucher privatization, did not exist earlier as a type of sys-
tematic privatization. In the 1995 report of the World Bank (I have a reference
to it in my work), there was a table given about how different countries con-
ducted privatization. Estonia, Mongolia and other countries are in the vouch-
er lists, and there is a column for insider privatization, and there stands Russia.
The World Bank already recognized us to have conducted an insider privatiza-
tion in 1995, and not users of voucher privatization, and I will explain why.

The employees of the World Bank correctly understood the unreality
of voucher privatization: there are excellent specialists, and they were against
voucher privatization. And in July of 1992, a booklet was published by John
Nellis and Kikeri. Nellis is an outstanding specialist, and the joint part was
written at the end (“a funny one” about privatization, a sort of instruction
from the World Bank): and now the ideas of voucher and mass privatization
have appeared, and all this is from the devil, be careful with this, there is such
and such problems. There is literally a half a page attached to the end. And
in December of 1992, Chubais asks for loans: 90 million [US dollars] from
the World Bank and 40 million [US dollars] from the EBRD for privatiza-
tion. In the text of the privatization loan there was not one word about insti-
tutions, not one word about owners, not one word about control, only quick-
ly — and with a voucher system.
The World Bank took responsibility for this affair. All the specialists at the World Bank who consider this to be foolishness hideout for 4–5 years, and as soon as the situation begins to be analyzed to find out who did what, already in 1995 the following appears in the text of the World Bank’s materials: “Russia’s privatization is an insider privatization.” But an insider privatization, this is something else entirely and is considered to be a guilty verdict in the world!

What is an insider privatization? This is when things are transferred not quite legitimately, very cheap, when it is allowed to steal and seize. The directors had disposal and usage rights, and of course when they were also given the right to own, they closed the circuit. Then you are uncertain, you receive property on some sort of very doubtful grounds, and you are afraid. And after this the owner, the one who received it, the first thing he does is he conceals the property abroad, hides it behind an offshore company.

Secondly, just in case he plunders everything that is possible, and allocates some kind of additional cushions: a trove here, a trove there...the Caymans, Germany, apartments in Paris. This is even more reliable, an apartment in Paris — that is always good. If he is hiding this, then he is hiding liquidity. He doesn't do anything, he doesn't invest, and we are still amazed that we did not have any growth in the 90s. But we put the new owners in idiotic position: when an owner begins to invest from the income of the enterprise, he becomes an object for raiders. This process cannot be stopped at all, because if there is no recognition of the legitimacy of large-scale property in society, then the State is there right away.

We do not have any parties who are for nationalization. The Communists are completely ready to live with that. We do not have this problem; this is a purely hypothetical struggle; it is driven exclusively by the desire to use illegitimacy for seizure of property by new individuals. Generally speaking, there is no movement for reviewing privatization, but when surveyed, everyone talks like this: “Well, if there is a chance, then we would do it easily, we are ready,” but nobody dares to risk without coverage. New owners always go to the stage of robber barons, remember this is also classics... Then they become stationary bandits, but I would read the word “bandit” literally, not only in a theoretical way, that he stopped being a wandering bandit and became stationary. For this reason new owners are usually in a position to protect their property, naturally unless some sort of a new grandiose crisis occurs. But there is a struggle between them, complaints appear among them. If 10 years ago it was possible to seize property, and five years ago it was possible, then why not seize property today? We do not have a barrier for legitimization under the law. Politically, the privatization amnesty has already passed,
although new seizures on the part of the State are always popping up through attempts to receive additional taxes. But there is no sensation of legitimacy in society, and for this reason, the new owner is defenseless. So a strange situation of lack of confidence develops.

At the end of the recent expansion, features of normalization began to appear, property evaluations rose and it started to make sense for one to invest: life is still stronger than the worst privatization, whatever you might do, life is still stronger. Sooner or later, gradually, we built a building on a swamp. Well, so, the gables are falling off, the windows fly off and the doors are crooked, and everyone is discussing whether we should fix the door or fix the roof. Of course the problem is in the foundation. But these windows and doors, the foundation are gradually crumbling, and we know that every swamp is gradually filled up with wreckage from the buildings, but this takes a huge amount of time, suffering and loss of economic growth etc. We are now at the stage of a swamp under the building being filled up with wreckage from the building. We haven't even succeeded in filling up the swamp yet, when new problems arise: the crisis and attempts to solve the problems of the crisis using state corporations: here is a good asset, if you include it and get a good income from it, then you can toss it over here... There is an attempt to subsidize ineffective types of activity, or the types of activity that were usually carried out by the State, but for which there is no money, by including profitable assets in state conglomerates.

A threat emerges that income from profitable assets will be buried inside such conglomerates by unprofitable assets used for some other purposes. And of course, there is the return of corporate social services and paternalism, because privatization is a tough thing, during which of course you get rid of corporate social services: it should be rationalized, paternalism goes away, but then it returns again in large companies which begin to take care of their staff for completely different reasons. They protect their human corporate capital; that which these large corporations call social responsibility is of course no responsibility at all. This is greed, normal business greed which defends one's capital from flowing away to competitors, to other companies, etc. I created this, but then I hold it in my hands, not letting it go.

Now as to that which we currently have. I will not say anything new here, I think that there will be an attempt to privatize the assets which are currently being transferred to the State in the course of the soft nationalization of the banking system, etc. The State basically now uses three large banks, two state ones and one “Gazpromian” one, although formally it has left Gazprom and belongs to some sort of third parties — Gazprombank; they have been loaded down with an enormous number of assets and bad loans. Sooner or later they will have to give this up, otherwise they won't be able to survive. I do not think
that Sberbank will keep Opel for long. It will hold it for a certain time there, the crisis will end, and it will sell it.

The privatization of those assets which the State or state-owned banks acquired, bad assets and others will inevitably begin, in other words, we will have privatization very quickly. Now the time has just arrived to work with the rules and the meaning of privatization, its goals and its consequences. The crisis will end, and there will definitely be privatization, but it will be very similar to the 90s, that is, access to assets will be selective and will take place according to the rule “All animals are equal, but some animals are more equal than others.” This will definitely happen, because it is that type of situation. There is nothing amazing in this, the country is used to such things. In the booklet on privatization that I mentioned, there are two chapters on legitimacy. The strong one is that written by Kapelyushnikov, who showed quite well in general that the people of this country do not in fact demand nationalization, and what really can strangle business in the conditions of our life is, of course, this our Asian stock. You’ll remember there was the expression “a mix of French and Nizhny Novgorodism.” And here we have a mix of Asian with the Anglo-Saxon — this is difficult. When the financial markets are Anglo-Saxon, you can take out credits just like that, you can borrow like that, you can go here you can go there, you can easily take out money to other countries, you can easily put in money, you are the controller from abroad.... Capital suddenly appears here, which is entirely foreign, protected by foreign lawyers. On the other hand, this owner puts in his own capital, which nevertheless he had to take out of the country beforehand! This involves transaction costs for taking out and transaction costs for putting in!

But frankly, I can say one thing, that the only thing worse than a corrupt system is a corrupt system where corruption disappears and the laws begin to be enforced. Of course, this is given that the legislation is bad. Then you immediately have full paralysis, simply full paralysis! Because all the “grease” disappears — and that’s it! That is, one cannot leave corruption behind just like that, for free, this is also very dangerous. The Hindus live, they grease a little bit and grease, they managed to take a photo of a Minister of Defense who was receiving a bribe of $4,000. But from our point of view, $4,000 — why that is just enough to go out for dinner with one's girlfriend.

I do not have a radical, painstakingly developed program for re-privatization. In principle I consider that we totally failed the transition period, that we failed this matter. Although now I am publishing everything that I did then, and I am not ashamed: that which I wrote in 1990 and that which I write today do not differ greatly, at least ideologically, however there are differences in details and scope.
Now we are sitting next to a swamp, and the task should be put in this way: so some sort of problems are not being resolved here, there are some shortcomings with the property system, legal stability, etc. I will not touch the judicial part, everyone here knows more about this than I do. How does one leave all this behind and enter a more stable, normal European system? We need to stop taking on airs that we are Anglo-Saxons and acknowledge our Asian nature and little by little return to Europe.

There’s one more small item. During the transformation, we jumped from a quasi-elitist to a Brazilian society. Remember the horrible Soviet corruption with the illegal sauna of the factory director, the Lada automobiles for his son, and the entrance into MGIMO [the Moscow State Institute of International Relations] for his daughter... This was such horrible corruption, there were such angry newspaper articles on the saunas, it was a terrible thing! Now we have in fact become a field of battle between Asian and European corruption. Both are victorious at the same time!

You might remember, that only recently the Americans managed to force the French in the OECD, to stop writing off bribes as costs. That is, you may pay them, but you should also pay taxes, that is, you should consider them to be profits and pay taxes! Because previously, all the bribes to various Arab princes were charged to expenses in the European tradition. When the Americans began to pressure Europe in the OECD, Europeans said: “Well, now this is arrogance! They are doing the same thing, only using offshores!” But formally, they have no corruption. Therefore now European-style corruption has come, the corruption at the top.

By the way, we have developed a new classification of corruption, a very accurate one, by subject and by object... There are four types, otherwise it turns out that one has the “average temperature of patients in the hospital.” One does not just have corruption — there are four types of them. Moreover, three of them are in one direction, and the fourth is capture of the State. This means that the company of the captured state has come.

Who remembers “Cabbages and Kings”? What was the ruckus about, what did O. Henry’s book end with? Well it ends when they are saying goodbye to their good president and are sitting on the shore talking... The representative of the food company says, well all the same, somehow we need to lower the price back from three cents for a bunch of bananas to two... That is, all the history is about, from a political point of view, to change the president so that the bunch was two cents and not three.

And well they decreased this captured state, such fine work! This one came from Europe, with all the trappings, with children at Harvard... One of the first measures, I will not disclose his last name, a famous American pro-
Somehow they had to pay some Russian reformers. The first thing they did was to fly to a conference in Geneva, then boarded a train and rode to Luxembourg. In the 90s, there was no problem with this. Accounts were opened for everyone using an American passport, and later consulting fees went there. Thus privatization started as a simple act of legitimizing people’s income. They had to be paid for their work somehow, true? Well, this is how they paid them. It was not allowed to go here, it was not allowed to go there, a neutral country... And everything is fine.

Because we will never get out of this situation if we limit ourselves to looking for someone to blame, or begin to search for how it could have been done differently, or what may have been correct... We should now formulate the minimum requirements for a workable system. Not just from the legal point of view, shall we say, in relation to a judicial reform in its pure form, rather we must devise a chain: how such a property structure corresponds to a certain type of legal system. We live in a unified world, there is no fragmentation, these parts must somehow correspond to one another. If we have Anglo-Saxon rules, then things must be one way, if they are Asian ones, then there must be a certain amity, if you have state capitalism, then there must be yet another version. But the rules must be consistent, and they must liberate the possibility for people to work.

Asian corruption is when everything is for sale. As soon as Eastern physicians appeared in Moscow, it began to cost money to get any sort of doctor’s note, i.e. the problems with receiving doctor’s notes disappeared, because this is normal in a culture where anything is sold. As soon as Eastern traditions came, the educational and medical systems also quickly changed their operating modes — this is clear. We are a “corruption hybrid” made up of several types, and now we should play along with this. This is how we are, now we have to study ourselves as we are, and try to imagine what system we would like to have in 10 years from now.

For now we have bypassed Europe and turned up in Latin America. The distribution of income in the country is Anglo-Saxon, and the distribution of property is Latin American. For this reason, the issue of vertical migration arises. Because the Anglo-Saxon system results in tremendous income inequality, but gives you great social mobility — within a lifetime one can break through to the top. The European system gives you a small degree of inequality, small ratios and low mobility, but greater protection. The Latin American system doesn’t give you either: it gives Anglo-Saxon distribution of income, but the lower strata of population are in a very difficult position.

In our country very educated people are poor. This is just our special situation, the inheritance of the Soviet Union — our poor are educated people.
In Brazil, 40% of the poor are so uneducated that it is impossible to change this situation. So it is impossible to transform these 40%, but we have not yet reached the point of having 40% of uneducated poor, we don’t have this and for this reason we have a chance. But it seems that we would like to become part of Europe... If we are in Latin America, then we need to move from Latin America first to the United States, and from there with a jump to England, and then little by little to Europe. If we would like to be in Europe, then this is our only path.

**ANDREY FEDOTOV:** Leonid Markovich, for me the central idea which you pronounced is that property distribution relations are easier to start than to stop. These processes did not formally end with privatization, they continue each day, moreover state institutions are used in making them happen. For the most part, and in almost the overwhelming number of cases. And not only when this occurs by force, or when it is economically justified, as in the case of the takeover of bad banks. But usually property is taken away using law enforcement bodies, courts, more or less legally or not entirely legally. I would like to understand what economic mechanisms stand behind this, because we lawyers are thinking about how to stop this, but this is probably a deep process.

**LEONID GRIGORIEV:** You understand that office-holders have been used to stealing in Russia since the country’s earliest days. You understand that in the Russian Empire, bureaucrats were not paid a salary for a long time. This means that economically there was a simple result, a system of limited access to business activity developed. Here there is much politics and psychology. This holds business back. There is the governorship, where you pay something, let’s say modestly, for city needs, you unbutton your purse, and feed the governor, and they won’t touch you, i.e. everything was very irregular.

I am not ready to solve all problems, I want to say how to approach them. Everyone remembers the payments crisis before 1998. A virtual economy! That was complete nonsense. The fact was that the government imposed absurd taxes, and imposed crazy penalties on unpaid taxes. I myself calculated all this, and tried to explain it to the authorities... Enterprises were supposed to pay two or three years’ profits in advance in order to come out of the shadow, in order to start functioning normally. Two or three years’ profits -- this is complete nonsense, it is physically impossible. Yes, but at that time the tax authorities could directly debit money from bank accounts! This means that as soon as you let any money show on your account, they would seize it, because you had not paid a whole bunch of taxes, and penalties had been
imposed upon you. Of course, money disappeared, everyone was accused of non-payments, everyone said that they were not paying anything.

Did enterprises really not make payments among themselves? Was even one person killed for this? Well of course, everyone paid. It was just that an additional system of offshore accounts through side enterprises was created, from which everyone paid.

It is very difficult for me to say what needs to be done so that they would stop stealing. If we have started up a machine, when a new head of the police department comes and wants to have his income, and the police compete with criminal elements in providing “roofing” [protection]... This is a difficult process — first you get corruption, then you are trying to get rid of it for the rest of your life. It is easy to get it, it is difficult to free oneself of it. Of course, this should also go from the top down. I can give you the example of Lee Kuan Yew, although I would remind you that he too started with strict things.

MIKHAIL SUBBOTIN: Frequently, despite the fact that now a great deal of analytical material is available, quite reputable people, very respected economists who are related by professional ties with those who conducted privatization continue to assert that everything that was done was done correctly and this is the only possible option for privatization. We know one well-respected economist who wrote an article with Leonid Markovich at the beginning of the 90s regarding the fact that privatization had been unsuccessful, and when the whole thing ends, everyone, those who participated and those who did not participate — would be muddied from the same puddle. Now he says that we have to defend privatization, because if we say a bad word against those who conducted privatization, we will thereby inflict irreparable damage from the standpoint of accurate analysis of the privatization. And the people in the group that unquestioningly supports those who conducted privatization are quite influential.

I think that the problem of privatization does exist after all, and there is also the problem of the environment in which the property owner acts. If one sells an automobile without a road, it will be very difficult to complain later that the vehicle doesn’t run. This is the way it seems to me, since I was closer to the formation of our legislation in the area of concessionary models.

Basically, if there is state property, and it is necessary to do something with it, then one needs to look for an effective property owner or an effective manager. If there is only one of these two tools — that is to sell, i.e. privatize, choosing the owner, but there is no possibility of transferring the state-owned property temporarily to a manager for compensation, then this automatically transforms privatization into a cripple, who can only act with one
There is the concept of a hostile takeover, when the buyer company jumps past the Board of Directors, appealing directly to the shareholders, purchasing large blocks of shares and trying to receive a controlling stake. So in our country, almost the entire economy turned out to be in the situation where entrepreneurs lived and acted in constant expectation of a hostile takeover. In my opinion, this is a very high stress situation, which makes the normal development of the economy impossible in principle! Roughly speaking, it is one thing to privatize a room, it is another thing when you that having opened the door of this room and gone out of it, and you immediately fall into a hostile environment, into gangland battles. This is the problem of the external business environment and of privatization itself. Then you are better off sitting at home and staying put, i.e. not developing the business which you obtained as a result of privatization.

And so, a few comments in connection with that which we heard from Leonid Grigoriev. First. What was done to lower transaction costs, i.e. so that property was easily transferred from one party to another? Either not enough was done, or was the matter simply left to gravity flow? Second. Everyone should take care of their own affairs. If the State is occupied with ideology instead of economics (remember how Leonid Grigoriev spoke of the ideological goals of privatization), or when the State is occupied with business instead of business itself (which is the version present in contemporary nationalization), or if business replaces commerce with so-called social responsibility, and thus violates the main charter principle of any joint-stock company or a limited liability company — which is obtaining maximum profitability for their business, then the result may turn out to be quite different than the one which was expected. Completely unexpected deformations occasionally occur. And third. Could a freshly-baked private owner effectively manage the property which he obtained in one way or another in the 90s?

And now I’ve finally got to the question I wanted to ask: after all, how crucial (where’s the chicken and where’s the egg) is the use of one privatization mechanism or another: is the conduct of a privatization which is correct in every respect more important, or is it after all more important to form normal rules of the game for the future. That normal business environment which the property owner falls into, and where he begins (is forced to begin) to act effectively regardless of whether he is a gangster or a cultured person?

LEONID GRIGORIEV: First regarding gangsters, for it is more interesting. Since they had a good education obtained in the sports institutes dur-
ing the Soviet period, our gangsters speak a smattering of foreign languages, they’ve traveled the world over, — now they live in California and manage the Far East, or they live in England and manage the Middle East (I mean the Near West, i.e. us here). They have turned into stationary gangsters in 10–15 years. Meyer Lansky, started this in the 30s, and it took him 40–50 years, for the Italian Mafia... For this reason our gangsters are “better”, so as the other things.

For this reason, I hold that history is gradually filling the swamp by pieces of buildings, but these buildings are going down the swamp, so we are constructing on the roof of the building, we are constructing, and in the end, somehow it gets built. Of course when the government or some bureaucrats for the sake of their self-interests or using the pretext of the crisis begin to turn off somewhere, again destabilizing property rights, then this is dangerous. For this reason, the role of personality and the role of economic policy remain huge. I simply want to say that we should already look at this environment and see where we can go from this environment, using it as our starting point rather than discussing the situation “in general.”

It is very difficult to think up some sort of ideal system which would be correct. But I think that much depends upon the task you set for yourself. If you set a goal to, let’s say, transfer state-owned property to an effective owner, then this is a question of pre-qualification. After all, you remember that there were monstrous conflicts at the Siberian and Urals enterprises — with fistfights and knifing? In the 90s, when factory management was seized, etc. How is this knifing different from privatization in other countries? Both parties had court decisions from various levels of courts! Russia gave an example of how the seizure was always documented in parallel, i.e. there were attempts to provide legalization.

Further, there is one more unclear thing. Did anyone destroy vouchers after they were used? Did anyone check this? This is something we know nothing at all about. No, they all say that they were canceled and destroyed. But the matter isn’t the canceling and the destruction! First of all, is not true that this was done to all of them, secondly is unclear how they were marked, thirdly if such games are played with shares, then why not with vouchers, aren’t they a piece of paper? Was it impossible to print them? Since they found guys in Israel who made an unlimited number of authentic company seals...

But even that’s not the problem! Let’s assume that they didn’t counterfeit them, let’s assume that they destroyed them. But before privatization took place, they could have been borrowed, collected from someone, shown for participation, and then taken back, but by then privatization had already taken
place! That is, one and the same voucher could have been shown in various privatizations. And the degree of procedural stringency was approximately the same as for investment obligations, which certain people have even been convicted of. We understand that not everyone performed their investment obligations, because they were insane, unrealistic and accepted under completely different macroeconomic conditions. By the way, now we have the exact same thing.

I do not believe that at the beginning of the 90s the people in this country were corrupt from the start and unsuitable for the market... All the surveys showed that we were market-oriented! Two or three million of our people emigrated — 100% commercial success in the 90s! They became excellent middle class abroad, they work well there! The criminality which is ascribed to us boils down to three or four gangsters there, there is no criminality, people live and work excellently and are able to cope with everything quite well. Here, a crowd of such people can’t cope. There was no public which was unsuitable for the market!

A strict answer to the question that was raised: if you have a problem with the chicken and the egg, then fix both at once! It is impossible to first resolve the problems of the environment, and then those of enterprises. Corporate governance at an enterprise corresponds to the system of property and forms the environment, and together with the environment they form each other. A small example. In Poland, competition worked without privatization of large enterprises (with state managers) — and they had the best economic growth in all of Europe. It turned out that competition is more important than ownership, if corporate governance is provided for, even in the absence of privatization. In the end, there should be consistency between the system and the egg. The egg should be from the correct bird. That is, if it is a chicken, then the egg should be from the chicken, if it is a duck’s egg, then better from a duck. They should be provided concurrently, they should be as a pair, they should correspond to each other.

This refers to the attempts to review the results of that privatization — this is a Pandora’s box. There will be paralysis in the country for a lifetime of another generation, this is very bad. I think that discussions about reviewing privatization results originate with businessmen who are sufficiently wealthy, but who have found that they can’t get any further. The private and state oligarchs are sitting there — these are those among us who are unsatisfied with privatization, these are rich people who have no possibility for a further breakthrough. They are looking for some sort of political figure, regroup into a wedge formation and are trying to break through. This is not a popular movement and not a political movement.
VADIM KLYUVGANT: Leonid Markovich, I agree with your assertion that we do not have political forces in the correct sense of this term, even more so popular forces which would promote the slogan of a review of privatization and which would strive for this goal. This is true. And it is also true that there is a “swine wedge” (or how shall I put it?), and it is not all that weak, to put it mildly. Does it not seem to you that this is much more dangerous than if they were political forces, because taking into account where this wedge has climbed up to today, and how it has “verticalized” itself, and what is subordinate to it and what it controls, there is a real possibility that despite statutes of limitations or some other “unimportant formal things,” someone might say that a particular action had been unlawful, or that particular taxes had been paid incorrectly 10 years ago, and to impose three times more penalties on them, and to bring this all through the courts? And I am not simply fantasizing about this, all of us gathered here know these sad realities of our days. Doesn't it seem to you that there is some sort of serious problem here, which needs to be identified, diagnosed, and then we should try to understand what is to be done with it?

LEONID GRIGORIEV: I agree with you completely, but I have no advantage here. Yes, I agree. But I don’t have any sort of secret that I could tell to this audience.

TAMARA MORSCHAKOVA: Still, here is the opinion of one venerable economist: at our current stage, can legal rules correct what had been done and seems to constitute danger? Which is exactly what somebody was asking.

LEONID GRIGORIEV: Of course, legal rules put a brake on both sides. If they’re bad, they could restrain implementation and the gaps in them are also used either by the government or by the tax authorities et al., or by dishonest people who try to build their business around this. They also restrain the process of thievery. For example, measures were taken in relation to bankruptcy proceedings. In general, the Law on Bankruptcy adopted then was considered by economists to be absolutely the worst of all laws adopted from an economic point of view. Because it was used not for regulating bankruptcies, but for re-privatization. For this reason, of course, legal rules can do a great deal.

My suggestion is only that we need to somehow close the ranks among the remainders of the legal and economic intelligentsia in what is usually con-

---

1 Translator's note: a reference to Putin's “vertical of power.”
sidered to be an economic justification, a goal and a law. And when we speak of privatization, we should have a clear idea of what we want. In a number of cases I am horrified by all sorts of changes. If the country was left with its bad legislation and with its bad climate, and relations between property and law would be frozen for say 10 years, — I assure you that life would still go on. That is, as an economist and historian I believe that life corrects formal incongruities at the level of informal institutions.

But law, as we know, may restrain but cannot withstand political “bull-doze”. For this reason, there is the threat that if a force appears which begins to push through decisions using political means, then the law will not withstand this, they will side-step it. For this reason, it is necessary to strive for the creation of a correct system, so that it can oppose the system [sic], but at the same time it is necessary to understand that we cannot correct the system by means of rules, the rules are what they are. This is the sense of all the Nobel topics on institutionalism, the new economic school and others. That the world consists of formal and informal institutions, and all the holes in the formal ones are filled in by the informal. In some societies they coincide more closely and regulate... In Anglo-Saxon societies formal rules regulate more, but even there a tremendous number of informal ones operate! But there no such harsh conflict exists.

ANDREY FEDOTOV: In 1948, Mr. Venediktov, member of the Academy of Science, published his famous work “State-Owned Socialist Property,” which became a classic fundamental work and which, strictly speaking, fairly for its time and thoroughly described those relations which developed in the area of property; and in the sense of socialist property, it became a sort of map, a rather reliable map which we followed on the way and used to orient ourselves, shall we say. Seventy [sic] years have passed since then, serious changes had taken place in the area of property relations, great changes have occurred in the last 20 years, when as the result of privatization, transformation of state enterprises into joint stock companies, and other processes, property relations in our country changed in the most fundamental way. Formally this is first and foremost because private property was recognized legislatively and there was a rejection of the idea of the rule of socialist property, of the supremacy and dominating role of state socialist property, including that which is formally codified in legislation; you may remember that there was, for example, no statute of limitations for the reclamation of state property.

We rejected these ideas. And the transformation processes continued on, first of all of state socialist property into a different type of property, into pri-
vate property. But besides this, another transformation took place, when the state socialist property which remained state-owned property stopped being socialist and turned into another peculiar form of property which remained state-owned, but it was unclear whether it was at the same time private capitalist property — I mean by the forms, methods and rules of its functioning — or was it something else? Because Russian legislation establishes that there is state-owned property and private property, not disclosing any differences or commonalities between them.

As a result of those changes which I spoke about, on the whole a system of property relations was created which is completely different from that which existed previously. And we turned out to be in a situation which is absolutely different from that which existed in the socialist period of the country’s life. Today the State is the largest owner, and at the same time an owner not only in the sense of the holder of the treasury and the distributor of the state budget, but also an owner who is in possession of private companies, i.e. joint stock companies or entities which are called state corporations (I really don’t understand what this is).

I would like to understand what hand of cards we have in the area of property relations, both in the sense of market relations, and in the sense of the equality of the participants of these relationships. If, for example, a simple commercial company operates in a market, and next to it a commercial joint stock company operates, but one which is wholly-owned by the State? We have this situation in our country and it is necessary to at least record it, and at best to analyze it.

Privatization processes have taken place in our country, and private owners have appeared, including large ones. They say that many such owners received their property unjustly. And immediately this lack of justice is transformed into illegitimacy, a sort of inconspicuous transition. Unjustly obtained private property and illegitimate private property — although the connection here is implicit, there are still questions that need to be discussed. But state property also became something else in our country. It became something completely different. And due to this, the system of property relations in our country in general — well, it is quite original, shall we say. A system is being developed where property relations are such that the largest owner is the State, who simultaneously, of course, is endowed with the power and the authorities and capabilities which it possesses; there are large businesses, which are suddenly in the same markets as the State, there are state corporations, through which state budget money is transformed into the formally, strictly speaking, private property of a legal entity — the state corporation, (which at the same time, in accordance with the law, strange as it may seem, is a non-
commercial organization, which in itself requires some sort of clarification). This is an extremely strange system of property relations.

And when we speak of these problems, it is not only that some sort of official persons who have access to power receive the ability to nurture their prosperity, so to speak. That’s not the problem at all! The fact is that this started to develop in completely legal institutions. When state property, by-passing formally announced privatization, de facto transforms into private property through state corporations. Even formally. That is, apart from what Leonid Grigoriev spoke of: of the quasi-concealed owner and so forth. No, this is completely official, legal — there were state budget funds, and they became non-budget funds. And in this way these relations receive a completely legal covering and become a legal juridical institution. Well, one probably needs to evaluate this.

And besides this, the previous system of ownership relations was characterized by the following: strictly speaking, during socialism there were no social or economic conditions for property, especially large property, to be redistributed in some way, since there were limitations. That is, there was a system: there was the state-owned socialist property of the State, there was the property of collective farms and public organizations, such property was used for non-consumer purposes and was not limited in size, and all other entities and individuals were limited in this, in the sense of the procedures for usage and in the sense of the size of the property. When this situation ceased to exist, then it suddenly turned out that completely different rules began to take effect between owners. And when there is a large owner — the State and a bunch of other owners, including large ones, then suddenly there arise processes for the so-called redistribution of property, which are often called “de-privatization.”

But I do not know a proper name of these processes, I would call them a “forced change of owner using state institutions.” Why? Because very often, as a result of those relationships which they call de-privatization, it is not the State which becomes the owner of the property, but other private entities or individuals. The question is: what does de-privatization consist of here? A forced change of owner — yes, using state institutions — yes, but then why do we refer to de-privatization? In the end, the State did not turn out to be an owner at all. I am not even speaking of the fact that very often the property which was formally pronounced to be state property is in fact used in the interests of specific private persons, groups of persons or, shall we say, other beneficiaries which are not related to the State to a sufficient extent.

The problem is that this redistribution of property that we are speaking about, when the forced change of an owner occurs using state institutions,
whether this is law enforcement authorities, the courts or even when it happens through legal bankruptcy proceedings, all these processes are not reflected in the law. It is unclear, should they be reflected, or shouldn’t they not? It would seem that we have adopted a pretty good Civil Code. But it turns out that in our country there is written law, and there are real relationships — they develop very differently. Here, as regards the protection of property rights which have been pronounced, exists a clear gap between the formally announced guarantees of property rights and how they are implemented in reality.

For example, this is what Vadim Klyuvgant said: that if you are on one side in court, and the State is on the other side, then it is likely, you will not be very comfortable. Because here, unfortunately, power united with property defends its rights in court much more effectively, shall we say. And besides this, there is a tendency which is, in my opinion, completely evident: in our country, the real protection of property rights takes place through the joining of property and power. That is, those who do not have such ties, either permanent or institutional, through family connections — it does not matter, really — or on a one-time basis in the form of a bribe, that person has only formal guarantees of his property rights. It turns out that those who have these ties have an advantage and actually protect their property rights. Those who do not have these ties often turn out to be without property at the end of the day. They lose it.

In this sense, the following trends in property relations in our country seem obvious to me: as I already said, this is the formal, but not guaranteed nature of the protection of the private property rights of those owners who do not have a relationship with the authorities; further, the forcible change of property owners using state institutions, which takes place constantly; and the use of state property as de-facto private property, which, without formally being private, is actually used for the interests of unconcealed or concealed legal or illegal beneficiaries.

It is very sad that these forcible changes of owner processes very often occur under the slogan of [rectifying the wrongs done in the course of the] unjust privatization. The following explanation is offered: so if the owners acquired this property, shall we say, not in a completely just way, then it can also be taken away just as unjustly. Moreover, it is characteristic that we are speaking of unjust privatization and “just” de-privatization, in both cases the State acts as the main actor and feels very comfortable, and at the same time it seems that it should not bear any responsibility for this.

It was said here correctly that the relationship between power, property and the courts was always a central question in any society at any stage
of its development. But in my opinion, in order to understand what system of property relations we live in, besides coming to grips with private property, we need to also give an answer to the question of what sort of state property we have. That is, is it state property in the sense that it serves the interests of the State exclusively? All others should then simply be entities filling up the state’s pockets, that is the state budget, and should not influence any other processes, even in terms of control. Then we we understand that this is a certain model, a certain type of a mechanism. If we say that the State must after all be used as some sort of representative of the people, and yet, under the Constitution we are a social State and should use this state property in the interest of the entire population, then this is a completely different model of state property. If we say that this is the model which I mentioned, when it is de jure state property, and de facto it is used in the interests of private persons or groups of private persons, and we have a third model of state property. In my opinion, unfortunately, all three models exist simultaneously in our country. I have a very strong feeling that within the framework of formally pronounced state property, all three models exist in Russia.

VADIM KLYUVGANT: Honestly, listening to this very interesting and deep discussion, I experienced an inner struggle, because one part of me, after all in the past I was the head of a large municipal administration who felt all of this on his own skin, that which we are talking about. On the other hand, all day today I have been leaning towards another change, for the reason that in my view, despite its undoubted bite and relevancy, the problem that is now being discussed nevertheless requires immediate but therapeutic measures. I would like to talk about the measures which require the interference of catastrophic medicine. A preview of this was already made during the first part of our session.

I read the materials prepared for this round-table with great interest, and found words in them which reverberated to the depths of my intellectual, volitional and emotional self. It has to do with the stability of civil interaction being the mega principle upon which everything must be built. For this reason, I think that what I will say now may be a rebellious thing, but it is not only rebellious, which is comforting. Despite all the holes, gaps and contradictions of our current legislation, if one would imagine oneself in some sort of rosy dream, that if the spirit, I would emphasize, that if the spirit and letter of law would be followed when it is applied, then we would not suffer like we suffer now. The main thing is that people would not suffer, and that their fates and lives would not be broken.
Unfortunately, we simply do not like to talk about this, but our practice in the application of law is replicated, and this is an additional problem. It is replicated with the speed and scale of a landslide. Today it affects one, two, five persons, tomorrow it will affect 500, and the day after tomorrow it will affect everyone.

The techniques which were used in the YUKOS case were utilized not only in this case, they were probably replicated and applied during raider attacks with the use of administrative and law enforcement resources, and both against small and middle-sized business. That is, this literally became a problem for each and all. Even when one suggests that the YUKOS case was made possible for some noble purposes and that it was sort of, allow me to say “law enforcement exception in order to instruct others,” (and, unfortunately, such assumptions are made at the level of state authorities or top government officials, and they find no objections or resistance even in the legal community!) — this is a blasphemous approach from a legal point of view. But today this is no exception. More precisely, this is an exception which has become the rule. And in connection with this, what stability of civil interactions, and what property rights can we speak of in such a situation? For this reason, I simply wanted to illustrate to the participants of our round-table and the authors of the future monograph in a more or less generalized form that which we actually mean when we speak of the crudest violations of the law and the stability of civil interactions. Because while the legal elite creates the cultured appearance that it knows nothing about these problems, then everything will become even more catastrophic. What do I mean?

Well, first of all, that which is called selectivity. Speaking plainly, transfer prices. There is a commonly accepted opinion: Khodorkovsky violated the same rules that everyone violated back then. This is not true. The untruth is not in the fact that Khodorkovsky did the same thing that everyone did, but the truth is that everyone is also doing this now, including the largest state monopolies. And the second truth is that this is legal. There is no violation in this. This was somehow considered to be a tax violation (initially, an administrative one, and then a criminal one) for only one company, for specific people. But now they have gone further and said that now this is not a tax crime, for which people were already convicted and the verdict entered into lawful force, now this same thing became the theft of the entire production output — the very same one that taxes were either not paid for, or not paid for in full. This is the chain of reasoning. What will be next? This is not only the question of the stability of civil interactions in general, but also of the results of privatization in particular.
Further. In our trials, the following takes place. They look at a particular thing, for example, the “general shareholder meeting” or “board of directors.” The thing is renamed, it becomes an “organized group.”\(^1\) The decisions of the general shareholder meeting become the decisions of the organized group. The decisions of the board of directors become the decisions of the organized group. We say: “Esteemed state prosecution, please explain to us, was this decision adopted by the organized group or by the company’s governing body provided for by its charter in accordance with its powers?” The prosecution tells us: “You understand everything quite well.” On this basis, the prosecution says that the organized group decided to steal everything. What is meant by this? This means that ten years ago, a general shareholder meeting or board of directors passed a resolution to approve transactions on the purchase and sale of oil. Now these actions are called criminal. I am not making this up. This also concerns the stability of civil interactions and property rights...

Now, I would like to say a few words about what is happening with civil law in the framework of the criminal law. If I remember correctly, in 1997, a version of the Criminal Procedural Code was adopted either in the first or second reading; according to this version, all doubts not only as to whether guilt was proven, but also in the interpretation of laws were to have been interpreted in favor of the accused. In the current version of the Criminal Procedural Code, this provision has disappeared somewhere. For this reason, you can do anything you want in a criminal trial in relation to other branches of the law. Take account of them, ignore them, or interpret them as you like.

So we have transactions which are not only not recognized by anyone to be corrupt, but which have never been disputed by anyone, and the statute of limitations had expired long ago. Transactions for compensation. These were multi-billion transactions in scale. Strange as this may seem, such a transaction for compensation is the subject of investigation in a criminal case as a method of theft. That is, a transaction — an action encouraged by the law — leads to a criminal charge.

The prosecution classified such multi-billion transactions as transactions without compensation, since otherwise it is impossible to present charges of theft, after all theft is an action which does not involve any compensation. And the prosecution bases its actions on the clarifications given by the Russian Supreme Court in December 2007. It is clear that the Supreme Court probably did not intend this. But how can the country’s highest judicial

\(^1\) Translator’s note: a reference to the organized group for the purposes of the Criminal Code, which constitutes a heightened gravity of the crime committed.
body, which carries out constitutional functions for the analysis, generalization and development of recommendations for judicial practice, write such things: that “if not equal in value it is theft.” The Civil Code says: if the parties thus agreed, it is equal in value, because this is beneficial for them. “No, says investigator X. I, investigator X., consider that it was not beneficial for this party, and therefore I charge you, the other party with theft!” This is the law enforcement practice of Russia in the 21st century.

This practice exists in far from one case charging Khodorkovsky and Lebedev and their ilk. It is becoming more and more widespread. And it is terrible that it is extending to transactions which have already been performed. It extends not even to fraudulent transactions, all the various “Social Initiatives,” who knowingly sold one and the same apartment to five different people, or the Gypsy fraud artists who pay with paper instead of money— we will leave these aside. The transaction has been executed, the parties are satisfied with it, the parties entered into it many years ago. Then the law enforcement authorities would come and say: “This was seizure without compensation, taking possession of certain things, and trading in them” and then also they would say that this was “laundering.” Laundering is the same transactions. Because oil has the property of flowing in the pipeline, and during this time is sold many many times; that is, the contractual rights may be sold several dozen times while the oil flows from the producer to the end consumer. It does not change its location, it is not offloaded by these ten buyers. But each of them becomes an owner. So, the first sale here in our country becomes theft, and all subsequent ones, are the legalization. This is the stability of civil interactions that we defend so, because it is the constitutional mega principle. However, the application of Articles 174 and 174.1 of the Criminal Code has assumed simply astronomic proportions in the country— with a slight wave of the hand, any disposal of property is declared to be legalization with a prison term of up to 15 years.

Esteemed civil law specialists, you probably do not know that according to our law enforcement authorities, there exist such civil law concepts in our country as, for example, “fictitious transfer of property rights” or “transfer of fictitious property rights” (apparently these are different things in the opinion of the investigators). We have “sham contractual terms,” and “knowingly disadvantageous terms of knowingly sham contracts.” These are the criminal-civil “terms” in the case in which I am a defense lawyer, there are dozens of them.

And the courts seriously examine this stuff and pronounce sentences. Guilty of course, and often with not at all light sentences.

Presumption. In cases related to business activity, it seems that the subjective side does not exist at all, because if one can change the sign “Board
of Directors” to the “Organized Group” sign, then after this it is not necessary to prove any sort of criminal intent. Because there is the decision of the organized group (i.e. the general shareholder meeting or the board of directors): here they took possession of something, here they took control of it, etc. Who did what specifically and for what purpose, according to the concepts of current prosecutors, this is superfluous, and one must not bother with it.

But we have one more presumption. This presumption of the good faith of the participants of civil legal relations, of civil interactions. And how can it be overcome? Well, it is simply ignored. They don’t bring it up. Moreover, they include Article 10 of the Civil Code in a criminal charge, turning its meaning inside out and saying that there was supposedly an abuse of a right, because the transactions were executed “on knowingly disadvantageous terms,” “harming the other party,” even if for its part the party entered into the transaction, performed it and never disputed it. This is how it seemed to the investigator and prosecutor, and they consider this to be completely sufficient.

In the case that I am handling — there was a discussion on the victims — all the victims were designated by the prosecution, since it was not by their own initiative that they appeared in the case. Well, one of them is Rosimushchestvo [the Federal Agency for State Property Management], a governmental body, that is understandable. But there are also victims who are commercial organizations with various forms of ownership which are now part of Rosneft. They all received letters from the investigators who “explained” to them that damage had been inflicted upon them. And therefore they have the right to be deemed to be victims in this criminal case. Damage was caused to those who bought oil from them on terms and conditions that were knowingly disadvantageous for them — they didn’t decide this for themselves, the investigator explained this to them. However such damage (lost profits) is not sufficient for theft, any second-year student knows this, that only direct damage must be present to constitute a theft.

Now there is an interdisciplinary question, when a civil law dispute (let us assume for a second that there was such dispute) is introduced in the format of a criminal law proceeding. We understand who is the stronger side in criminal proceedings. We also understand how it performs its evidentiary obligations. But if this dispute is to be resolved within the framework of civil proceedings, such a party will have to prove the circumstances which it refers to. Moreover, the consequences of losing a dispute are only property-related ones. That is, it turns out that although it seems that there is guaranteed protection of the party under prosecution in a criminal case in the form of a presumption of innocence, and that the duty of the accusing par-
ty to contest it, in fact the situation there is worse than it could have been in civil legislation. If this dispute had taken place and been examined where it should have been. Because a person is locked behind the bars, how and what can he prove? They say to him: “So you would like some help requisitioning evidence? [No,] our job is to prove your guilt, and not to collect evidence in your favor.”

And not one motion of the defense was granted in this case, with one exception (I made this comment in connection with the question from the esteemed Vladimir Ilich regarding bad adversarial proceedings). For example, an arbitrazh court told us that it would not give us a copy of a decision which had entered into legal force. Do you know why? “Because you, specifically you, Mikhail Borisovich Khodorkovsky, were not a party to or a participant in these court proceedings. And you are not entitled to them under the law,” says the arbitrazh court. We petitioned the court which was examining the case to requisition of these arbitrazh decisions, and this was the only petition which was granted. All the other petitions were not granted. At least the above-mentioned court replied: “We won’t give it,” but other esteemed instances simply did not reply to lawful requests to provide information.

But the most impermissible thing is that the prosecution refuses to provide the defense lawyers and the court with those documents which were seized and which the prosecution possesses but which contradict its position. The prosecution says: “No, that which we have in another case is not related to this, we won’t give it. Go get it wherever you like.” Once again, I am saying this in connection with the question of the adversarial nature of the process.

I’ve talked about quite a bit, and I could talk about quite a few more things. But if today we take the story of Russneft oil company, if today we take the story of Arbat-Prestige, if today we take a multitude of other cases, then there will be the exact same thing, only at the appropriate scale. Therefore, one can extend this list.

But I will say something else. A book came out, a very interesting one, in my opinion, from Natalia Alexandrovna Lopashenko¹, it is called “Criminal Politics.” She analyzes the criminal policies of contemporary Russia. And I fear for our country, since based upon a multitude of documented supporting materials, the conclusion is made that on a doctrinal level, the transformation of criminal law and criminal judicial proceedings into an instrument for the redistribution of property is a key element of contemporary

state criminal policy, among the first series of priorities for contemporary state policy. The transformation of criminal policy into a tool for administering the economy. Not into a tool in the fight for justice and legal inevitability, but into something else.

For this reason, it seems to me that given these realities, it is legitimate to raise the question that in order to properly protect the rights of owners and civil interactions as the realization of the rights of owners, legislative measures are not the first thing that is necessary, despite their importance and necessity, but something completely practical – measures for the application and enforcement of the law. In my opinion, this won’t take place until all lawyers and specialists whose name means something start shouting from all the hilltops and saying that these are not fairy-tales. This is not a fantasy, not the intrigues of oligarchs who are fighting to slide away from the punishing sword of Femida. And these are today’s realities, which punish everyone.

I did not want to exaggerate or paint nightmares, as they say today, and would very much like to speak about some pleasant things. Unfortunately, in order to be honest with myself, I have to say what I see. And the problems related to the topic of today’s round-table regarding this primacy of law in the area of property rights, and everything that is connected with this I see first and foremost here. And if I found some bit of understanding and support, then I’ve not come here in vain.

MARIANA KARADJOVA: I’d like to stress that we have a decision that a review by the European Court has been accepted. The courts decided that the claims of YUKOS regarding access to the courts under Article 6, on tax issues, and also on the insufficiency of legal grounds for the State’s actions in regard to YUKOS (this is Article 7 of the European Convention) are acceptable for examination in the European Court. I think that this is a positive moment.

VADIM KLYUVGANT: This is an optimistic addition to my pessimistic speech. We also have two other complaints which were recognized by the European Court as acceptable. You mentioned the complaint of the company YUKOS. This objection was submitted by the management of the company independently of Khodorkovsky and Lebedev. And of course for us this is very important, and in general this is all very important. There are three more complaints from Khodorkovsky, one of which was recognized as acceptable, having been submitted five years ago to the Strasbourg Court. And there is also the complaint of Platon Lebedev, which was the first to be rec-
Ognized as acceptable and has already been resolved, which was submitted more than five years ago. The rest are still waiting for their time to come.

Of course, this is a positive event, but there are two “buts”: first of all, we do not yet know how and within what periods this Strasbourg line will develop; and secondly, strange as it may seem to some, we would still very much want it, he speaks of this constantly, my client Mikhail Khodorkovsky. He says all the time: “I wish to be judged justly in my own country! I don’t want to be “Khodorkovsky vs. Russia.” I am not against, I am for Russia. And for this reason, I don’t want this to happen in Russia to me or to anyone else!” For us, the Strasbourg Court is an instrument for movements towards these goals.

ALEXANDER ROZENTSVAIG: Since we are sitting next to each other, and both are not at all overflowing with optimism, I have the following question for Vadim Vladimirovich: after all, doesn’t this whole situation signify that the main expectations for receiving even the smallest lawful and just results, that is, those which have been sought for, must be shifted from the local legal system to the shoulders of the subjects of an international law defense of Russian citizens?

VADIM KLYUVGANT: I see. First of all, I fear that it won’t work that way. Whether we like it or not, the Strasbourg Court does not consider cases on the merits, and does not evaluate evidence, and does not decide on questions of guilt or innocence and cannot decide them. It can only say that in this case the right to just judicial proceedings were violated, which in accordance with the Convention and our criminal procedural legislation requires a review of the case, but again, in the national jurisdiction.

Secondly, the Strasbourg Court does not even accept a complaint for proceedings, and does not recognize it to be acceptable if the means of defense in the national jurisdiction have not been completely exhausted. This means that we nevertheless have to go through our mournful path, and more than once. And if we still have to go through it, then maybe we will try to somehow fix something very basic here in Russia.

This question led me to one more thought which has been spoken of more than once: we have a State representatives acting on its behalf — generally, whose interests is it acting in? That is, what is the interest of the State — is it just in satisfying the requests, interests and rights of citizens? Of course. But of course this interest must be understood in one way or another, and the specific representative of the State who goes to specific court proceedings should bring it with him. For example, the investigators who wrote
the indictment in the case, and the investigators who support the prosecution in the court hearings. Do they act in the interests of the State at all, even those which they don’t understand quite correctly? Are they acting in the interests of the third parties who now are somehow connected with the former YUKOS assets?

I think that here the case bends more towards the material side as a motivation for its movement. For this reason, from the point of view of state interests, however you might understand them, the State does not need this case today. It is even harmful to it, not simply unneeded. But there are those who bear the power of state authority who keep it moving.

**ALEXANDER ROZENTSAIG:** Then I will ask you one more question to make things more concrete. Vadim Vladimirovich, do you agree that the prosecution in the broadest sense of this word is now in principle forming a very serious field for you specifically, if one speaks of strategic moments. They are now filling up the entire trial with slow-motion mines which should go off. Of course, not immediately, evidently several more years will go by (God forbid that years will be spent on this!), But from the point of view of defense strategy, they help you now. Isn’t this true?

**VADIM KLYUVGAN:** Yes, this is a paradox, but a fact. True, it is rather discouraging that “[none of us will] live in these wonderful times”.... I won’t continue, but it’s true, that’s how it is. Therefore, when we chose a strategy of greater transparency in this trial, there was an immediate reaction: we started with great pomp, with video monitors, with a special room for the press, with permission for any interviews during the breaks between sessions — today we have no broadcasts, today there isn’t even a room for the press, today it is forbidden to go into the court building with a video recording device, except for the participants of the trial, and with the permission of the judge. Today video recording in the courtroom is forbidden. Today interviews during the breaks between court sessions are prohibited. And each time, every living word on the part of the defense is followed by dissatisfaction on the part of the prosecution.

**ANDREY FEDOTOV:** I also want to ask Vadim Vladimirovich about the topic which was present in the preparatory materials for our round-table. It is said that, according to the opinion of the Constitutional Court (I am quoting the text regarding the mandatory redemption of shares from minority shareholders), such redistribution of shareholder property should be viewed as the mandatory alienation of the property of minority shareholder-
ers for state needs, that is, for public law purposes in the meaning of Article 35(3) of the Russian Constitution. It may be that I am a little off-topic, but as far as I understand, the actual actions amounting to redemption of shares from minority shareholders are one of the episodes which are being charged in the case under examination? Or am I mixing something up?

VADIM KLYUVCYANT: There is no such episode in this case... At least we don’t have this, thankfully. There is no such charge against our clients today, but we have a very interesting history with minority shareholder victims. In one case, where our clients “stole” all the oil that was extracted over six years according to the prosecution, the damage was done to the companies that were subsidiaries of YUKOS, to the oil producers. And they were pronounced to be the victims, not the minority shareholders. Although if anyone was dissatisfied in the early stages of this whole story, when YUKOS was developing, before the consolidation, these were definitely the minority shareholders. They were not dissatisfied with the prices, but with how this would affect the capitalization of their minority blocks of shares when those would be subsequently redeemed. But this plot line is present as a reputa-
tional background, but not as an accusation.

On the other hand, there is another episode where our clients “stole” the shares of the subsidiary company Eastern Oil Company (VNK), that is, the shares of the “grandchildren” of the parent company YUKOS. Do know how they were stolen? They were stolen through barter transactions. So this is what seizure and taking without compensation is. And there for some reason it turned out that damage was done to the minority shareholders of VNK. For example, to the Russian Federation and a few others... But again for some reason only them who were designated. After all there were other shareholders, but for some reason they were not deemed to be victims. The damage is formulated in the way, that the value of the company VNK decreased after all these swapped assets were seized, which means that the interests of selected minority shareholders suffered. But what about the ma-
ajority shareholder? With such logic it suffered most of all?! There is no an-
swer to this question. But the charge exists, overturning all foundations of law, both criminal and civil.

But consolidation was conducted at YUKOS... They were the first to do this, and the only disputes that arose between the minority shareholders and YUKOS itself as part of the consolidation were about the fair redemption price. In my opinion, the Constitutional Court very correctly said about it in its judicial decision; it stated that this should be a matter for judicial con-
trol. And this is the guarantee of minority shareholders’ rights.
Mikhail Subbotin: I would like to say something regarding transfer prices. An economic view. Here there are two problems: one is the problem of internal prices within a company, the internal life within a company, the other problem is the usage of this mechanism for evading taxes. These are two different problems, therefore when they say that it is necessary to fight transfer pricing, I don’t really understand the way the question itself is posed. Can one in principle fight with certain procedures which occur within the company? And which support its ongoing work. How do they propose to do this?

On the 12th of February of this year, Mr. Putin held a meeting in Kiri-shi on the problems of the oil and gas sector. One of the decisions which was recommended for the Government to adopt and from which several additional decisions followed later was the possibility of a transition from an extraction tax, and accordingly profit tax, to a so-called tax on additional income, or NDD. Comments followed from Mr. Shatalov, Deputy Minister of Finance, who is actually responsible for tax reform. According to Mr. Shatalov, it is not excluded that after 2011, it will actually be possible to introduce such a tax on additional income, if by this time the government succeeds in regulating transfer pricing. I would like to say that there was no legislation which would clearly regulate these questions either in the 90s nor in the first decade of this century, it is not even planned to be introduced earlier than 2011.

So, it is clear that there can be no unconditional criteria for deciding whether or not YUKOS has used transfer prices for tax evasion purposes. As a taxpayer, I would like there to be clarity in this question, but after 20 years of reform neither the executive nor the legislative branch has created anything comprehensible in this area.

Your speech echoes the problem that Leonid Grigoriev spoke of, in a rather curious way. Because when we speak about state property, state ownership, of the repurchase of property by the State, of nationalization in some form and so forth, then we are usually speaking about the fact that there is some sort of private property which cannot survive a crisis, but it is socially significant and therefore the State takes it on, puts it in shape and then sells it, i.e. releases it for privatization. With YUKOS the situation was completely different: when the State practically nationalized this company, the latter was not suffering any sort of breakdown in its economic activity. I would like to remind the non-economists that 2003 was the year when YUKOS moved into first place among the oil companies in paying taxes. It was this year that it surpassed Lukoil. It is true that it was a small difference, somewhere around $100 million. But this is an actual fact that the largest taxpayer among the oil companies, which also ex-
ceeded the other leaders of the industry in terms of rates of growth of taxes paid thereby, was subject to nationalization for non-payment of taxes.

By the way, regarding the way that the State manages its property, there are rather interesting calculations of Evsei Gurvich, a well-known person, who calculated how much the State received for the budget from all state property in 2007. Well, the share of the State in the form of dividends, income and so forth from state property was 1 (one) percent. In this case, I cannot agree with the evaluation that there remains ten percent of state property which has not been divided up in the course of the privatization. Well, it is sufficient to say that all subsoil resources are state property.

Recently business has learned to play by the rules, and it knows exactly that discussing the questions of the protection of property rights, the judiciary, the stability of contracts and so forth is almost the same thing as getting involved in politics. From now on these are forbidden topics for it. For example, in advance of today’s St. Petersburg forum, Alexander Shokhin, head of the RSPP [Russian Union of Industrialists and Entrepreneurs] declared to Vedomosti daily newspaper: “Is important to hear the government’s additional arguments on tax measures, regarding the use of tax instruments as anti-crisis instruments. We would also like to hear an evaluation of the techniques for the State withdrawing from business, and how the reduction of State interference in the economy will occur in different countries.” Shokhin is a politically sophisticated person, and for this reason he speaks only of taxation instruments, and of state interference in other countries. This is our contemporary business political correctness.

In practice, when we look at the picture we have today, a very curious maneuver has taken place. If Russian business people spoke for stability in the 90s, and Western business people said: “We do not interfere in the formation of Russian legislation, it is your internal affair, God forbid and heaven help us!” then in the 2000s, and with each subsequent year, I would say that it was exactly the Western business people who spoke out more and more fiercely to the authorities regarding the issue of the lack of stability of contracts and problems with the protection of property rights.

At last year’s 12th St. Petersburg international economic forum, the head of the BP group of companies Tony Hayworth spoke, and he said that in order to increase the size of investments in the energy sector in Russia, the authorities had to resolve three main tasks: the creation of an effective fiscal system; respect for property rights; and respect for the rule of law. And the Chairman of the board of directors and Chief Executive Officer of Exxon Mobil, Rex Tillerson declared that in order to improve the investment climate in the energy sector of the Russian Federation it was necessary to “improve the work of the judicial system and the courts,” and
added: “Today there is no trust in the judicial system which exists in the country.” Frankly, I have not heard such words from a foreigner for a long time.

Today many have already spoken, in particular Grigoriev himself said that foreign business can do much in Russia. And that a foreign investor is better off with us than in India... I won’t remind you of the international surveys regarding the business climate in various countries — I already spoke at our first Round-table about the fact that according to the overwhelming majority of surveys, Russia is wagging about at the tail end of the world. I had already quoted the head of Shell, who has taken on what I would say is a rather mocking tone. While giving a long interview to the country’s main official newspaper, the “Rossiyskaya Gazeta,” he said approximately the following: I have the feeling when I speak with my colleagues that one can actually do business in Russia, unless it is related to the natural resource industries. Therefore, those who produce ice cream — welcome to Russia!

Not long ago there was another survey among our enterprises. What do they want, first and foremost in the conditions of our growing crisis? As it turns out, subsidies, tax decreases and no strengthening of the ruble rate... One can interpret this as a limited world-view and striving towards state paternalism, but one can also interpret it differently: domestic business learned the lesson of YUKOS, and no longer raises the question of the judiciary or property rights. It seems to me that a serious change of consciousness has taken place where on the one hand business does not raise this question, and on the other hand it votes with its feet. Under such conditions, there will be no one to overcome the crisis.

When we today encounter the problem of economic crisis, this needs to be taken into account, because we are always being told that “economists did not predict this,” “the elites did not expect”... Wait! What, has anyone said that state companies are effective or that they create a normal competitive environment? Or that attracting direct foreign investments is harmful for the economy? What is this, have any of the sane economists said this? Because when we speak of today’s crisis, then it is necessary to keep in mind that we entered into it not with established, but in many cases with destroyed market institutions. Today’s crisis is to a significant degree the result of the five years after 2003, because this year was amazingly not only the date of the YUKOS case, but also the beginning of the crazy growth in oil prices. They were good from 99 through 2003, but from 2003 through 2008 they grew fantastically.

**VADIM KLYUVGANT:** I would like to say a few words regarding the judiciary to this audience. I know that your previous round-table, which I was unfortunately not able to participate in, was dedicated to the hot topic of the
uniformity of the application of law, and in particular judicial practice. How good is this, and in what conditions is this good or bad? Here is only an illustration, it seems to me that no special commentary is even necessary. In the first sentence of 2005, Khodorkovsky and Lebedev were held to be guilty, including of tax evasion, which was expressed in the fact that there were benefits indicated in the reporting that were actually not provided to them. Well, not to them personally — to companies. These were companies acting in so-called closed territorial formations, also called “domestic off-shore zones.” But at the same time there also were verdicts against the heads of these municipal areas, who were held to be guilty of illegally providing these benefits to the same companies. The sentences entered into force, and not one of the court instances reacted to the fact that there are these intractable contradictions.

The executives of the subsidiary oil extraction companies were held to be guilty of aiding in the evasion of taxes through participating in these sales schemes through the use of transfer prices and operational companies. In these verdicts which entered into legal force, it was written that these sales schemes were created for the purpose of illegal tax evasion. Which is what Mikhail Subbotin spoke of. In the case which is currently being examined, the prosecution considers these same schemes with participation of the same organizations to be methods for stealing oil.

ANDREY FEDOTOV: That is, taxes were not paid from that which was stolen...

VADIM KLYUVGANT: Yes, and this is also legalization. Further. When YUKOS was bankrupted, additional taxes were charged to it. On what? On this very same “stolen” oil. If one considers the oil to be stolen, then how can this be the basis for additionally charging taxes? In the decisions of the arbitrazh courts which entered into legal force, it is written that the actual owner of all the oil extracted and sold was YUKOS. Now it is written in the indictment that all this oil was stolen by the organized group. Question: what is to be done with the taxes? What can be done with the bankruptcy of YUKOS, where the main creditor was the tax service? If one recognizes the current charges to be justified, then it is necessary to return the taxes and restore YUKOS.

The oil that the prosecution considers to be stolen was purchased in accordance with general agreements which were concluded between each of the subsidiary companies and YUKOS. All these general agreements were disputed in court by the tax or anti-monopoly authorities, and in individual cas-
es by certain minority shareholders at the time when they were concluded. There are court decisions for all of these lawsuits, adopted by courts in various regions of the country at all three levels. In the relevant judicial acts, all the arbitrazh courts said that these general agreements were lawful and did not impinge upon the interest of the State or other persons. They ruled that the lawsuits were to be dismissed. Now the prosecution interprets these general agreements as a method of theft.

In January of 2008, the Constitutional Court said that alongside other evidence, it is also necessary to take into account the decisions of the arbitrazh courts. And it is possible to overturn these decisions only using the appropriate procedure. I do not know what the court which is examining the case will do with this. This is regarding the uniformity of judicial practice in our actual conditions.

TAMARA MORSCHAKOVA: First, a few words about general things. What do I want to say? We spoke of the rule of law, Russian legal doctrine and Russian legal practice. There are very few people who differentiate the rule of law from what they call in our country the rule of legislation or even its dictatorship. And in connection with this I would like to say that it is exactly that which in previous decades was considered to have created an advantage that has led to negative consequences in our legal development. Namely, a normative approach. Here we are speaking of the maximum, what we can call upon from our fellow citizens, our law enforcement officials and our State as a whole or the elite who are in charge of it, this is some sort of desire to follow the law, at the same time we are forced to endlessly lament that it is still not followed. Actually, compliance with the law is no salvation. This depends not only on one’s frame of mind or legal consciousness, but also on the condition of the legislation.

Today the participants said that legal norms vary, are frequently contradictory, so it is just this tendency to only call for following the law, based upon the old normative approach, that deprives us of being able to hope for a positive result, even including the autonomy and independence of the judicial branch, because if a court is bound to the law, then it is simultaneously also bound to its systematic violation or to the systematically incorrect interpretation of this law issued through official channels, i.e. which takes place on the part of official public power, including the highest judicial instances. I would like to draw your attention, — and this should be the main idea of the monograph, which somehow unites all of us, — that if we do not pronounce a normative slogan of following the text or the letter of the law, but pronounce another slogan — a slogan of following the general principles
of law, then (perhaps all those present here will forgive me this assertion, often called demagogy), I repeat, if we insist upon the priority of general principles of law (I will not speak now about what sources we will draw upon for this), then to a certain extent we can hope for the autonomy of the courts. Although this demands complex development. But this is simply a thesis. This is thesis number 1.

Thesis number 2 is related to the speech of the esteemed Mr. Grigoriev. Of course, this is an economically very interesting portrayal of the history of our privatization, but it still concludes with the sentence that the law cannot withstand a political “bulldoze”. And this sentence makes me anxious. Why? I am completely ready to agree with this thesis that the law cannot withstand political “bulldoze”, but with one qualification. Here is what the qualification consists of. One can agree with this thesis if power and the law are things which are incompatible, if power is not subordinate to the law, then of course there is no possibility of withstanding a political “bulldoze”. And in connection with this, I have already spoken in our excellent club about what Thomas Carothers once said about this, and I insist on repeating this thesis. It seems to me that there is a certain legal educational energizing effect if you will; perhaps I am too optimistic or utopian in my views, but I consider that it is necessary to repeat it for those who strive towards the formation of a State governed by the rule of law in transformational states: the main danger in this process are the power elites, who do not want to be subordinate to the law. If we do not insist upon the rule of law, then I do not know what other method we have for educating power, all the more so because it is exactly lawyers, apparently, who should call for it. And it seems to me that one needs to return to this all the time.

Today we have been constantly returning to one thesis regarding fish. I consider that the goal that is the real engine for the activity of judges is given to them by the authorities, not even by society. It is given by power. The authorities substituted their authentic goals of constitutional activity with other goals, goals of self-preservation, self-defense, because they are powerless before the authorities. That’s it. We want judges to be heroes, this will never happen. In general this would be a waste, it’s not necessary. Do you know Brecht’s famous saying: pity the peoples and the societies that need heroes. This should be a behavioral norm. There can be one hero, but this does not make for a stable legal system. Therefore mechanisms are needed.

VLADIMIR LAFITSKY: Excuse me, but if a person takes responsibility for the fate of other people, then this is already heroism. In my view, as I perceive it, a person who decides the fate of other people who can judge,
who can pardon, — this is already heroism. After all, we’re speaking of the fate of another person.

TAMARA MORSCHAKOVA: Please excuse my involuntary cynicism, but in dealing with specific judges both in Moscow and beyond its borders, unfortunately one is forced to see the following: without noticing it, they pronounce these words with complete serenity: my bosses, my administration, what will I report, I cannot explain this to the administration. This is on the one hand. On the other hand, in deciding peoples’ fate, unfortunately they only think about peoples’ fate in second place, in the first place they think about what I mentioned in the first place. Unfortunately these are the realities, and they actually probably did not arise by themselves, and they probably did not arise just because the worst people became judges in our country. But what is, is. This is unbelievably sad and tragic, but not recognizing this would probably mean driving the problem deep within.
Chapter 6. The Court in a Struggle for Property and Power
(Historical and Comparative Law Essay)

Introduction

Over the past several years courts in Russia have often been accused of hav- ing become part of a single corrupt system generated in the era of overall redistri- bution of property. This era having started with the privatization of state- owned property later saw the process unwinding into bloody showdowns and shootouts for property between warring entrepreneurs and criminal groups, and in the past several years the so-called phenomenon of property capture in raiding has been observed, as well as fraudulent and criminal real estate deals (a phenomenon which received the name of “black” real estate trans- actions in Russia), and white-collar offences aimed at plundering state and private funds.

Many schemes for the redistribution of property were carried out either with the direct participation or under the cover and protection of courts. This evoked a powerful outflow of rage and indignation, which potentially could destroy not only the courts, but the week sprouts of the Russian economy. That is why it is so important to understand the very nature of this phenom- enon, disclosing the reasons for and forms of participation of courts in the struggle for property and power. This, as a matter of fact, started not just in the troubled 1990s, but a great lot earlier and not only in Russia, but in other countries too, without any exceptions.

1. Justice as reflected in religious texts

All religious texts tell us about the cruel and on-going struggle for prop- erty and power.

Rigveda, the sacred writing of the Indo-Aryan peoples which goes back to time immemorial, calls the readers not only to offer sacrifice to find allies among gods but also to observe law in the struggle for property:\footnote{Cited from the Russian translation of Rigveda (Moscow, 1989), X, 42. (Ригведа. М., 1989)\nEnglish translation: www.scribd.com/doc/416163/RIG-VEDA.}

“Eternal Law hath varied food that strengthens; thought of eternal Law, removes transgressions.
The praise-hymn of eternal Law, arousing, glowing, hath opened the deaf ears of the living.

Firm-seated are eternal Law’s foundations in its fair form are many splendid beauties.

By holy Law long lasting food they bring us...

Fixing eternal Law he, too, upholds it swift moves the might of Law and wins the booty”¹.

Rigveda urged to set the power of law against those who “guard the dwelling place of falsehood” and are “the protectors of the speech of liars”, “who uttered wicked words against the righteous”².

The Ancient Iranian prophet Zarathustra thus sang the praise to Law:

“And if the foe of Law
Would hurry to my home, hostile and militant,
Ahura! Deprive Thee him of quiet and peaceful life,
And thrust him into darkness...
And be repaid he with the Evil for the Evil!
Who was the first to breathe out into ages
That Thee are both the Helper and the Judge?
And what the Law would solemnly declare to Ox-creator,
We shall learn from Thee, Thy Thought,
Which fully I obey...”³.

Minos, the first law-maker in the ancient tradition, the legendary king of Crete, after meeting Zeus once in nine years and listening to Zeus’s revelations had been instituting his laws. He is the author of the saying which is just as acute nowadays as ever: “Laws should be above the sovereign and the people”. In Ancient Greek mythology Minos became the judge of the dead in the Hades.

“Minos, the glorious son of Zeus, golden sceptre in hand, giving judgment to the dead from his seat, while they sat and stood about the king through the wide-gated house of Hades, and asked of him judgment” (Homer. Odyssey)⁴.

The most vivid pictures of the struggle for property and power are described in the Old Testament. In order to stop that struggle Moses established courts and introduced rigid criteria for the selection of judges. The first criterion set was the ability to administer justice and govern society. It was expected

¹ Rigveda IV, 23.
² Rigveda V, 12.
that judges should have certain knowledge and the ability to use it, and be re-
pected by their compatriots. The second criterion presupposed fear of God. Judges should believe in Justice of Heaven when they were brought to account for their unrighteous decisions. Belief in God relieved them of many vices or constrained the manifestation thereof. The third criterion was truthfulness. Judges should strive for getting to know the truth, have righteous judgments and take fair decisions. The fourth criterion was the rejection of mercenary self-interest and gain¹.

It was obvious that Moses was aware of the danger that courts might turn into tools of struggle for property and power. For that matter he set rigid re-
quirements for judges permanently insisting that they fulfill the commandments which had been received from God and which consolidated the people of Israel into a single nation². I would like to cite just some of those commandments:

“...thou shalt not follow a multitude to do evil; neither shalt thou speak in a cause to decline after many to wrest judgment:

Neither shalt thou countenance a poor man in his cause...
Thou shalt not wrest the judgment of thy poor in his cause.
Keep thee far from a false matter; and the innocent and righteous slay thou not: for I will not justify the wicked.
And thou shalt take no gift: for the gift blindeth the wise, and perverteth the words of the righteous”³.

“Hear the causes between your brethren, and judge righteously between every man and his brother, and the stranger that is with him.
Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man; for the judgment is God's”⁴.

An attempt to stop the never-ending struggle for ownership and power was undertaken by Confucius, the great philosopher who created one of the most original and impressive theories of ethics and law. He is the author of words which have never lost their acuteness even to the present day.

“Guide the people by law, aline them by punishment; they may shun crime, but they will want shame. Guide them by mind, aline them by cour-
tesy; they will learn shame and grow good”⁵.

I would like to quote another saying by Confucius: “At hearing lawsuits I am no worse than others. What is needed is to stop lawsuits”⁶.

¹ Exodus 18:21.
² Leviticus 18:3.
³ Exodus 23:2-3, 6-8.
⁴ Deuteronomy, Chapter 1, Verses 16 and 17.
⁵ Лунь Юй, the Analects of Confucius, 2:3.
⁶ Лунь Юй, the Analects of Confucius (Лунь Юй, 12:13).
This is actually the lofty aim of law, which as a rule we tend to forget. Buddha was also trying to stop the everlasting struggle for property and power. “My law,” he said “is the law of loving kindness for all”. Incessantly would he call upon the people to do good demonstrating “enduring love to those of higher and lower creation, to our equals, knowing no limits in love, bearing neither hostility, nor rivalry... That is what is called life in God”. (The Dhammapada).

“Not of this world” was the Kingdom of Jesus Christ either (John 18:36). And there, according to the ancient behest:

“He hath put down the mighty from their seats, and exalted them of low degree. He hath filled the hungry with good things; and the rich he hath sent empty away.”

In the Kingdom of God there were no courts because all people were to forgive all sins to one another. Justifying His vision of the new rule of law He would repeat the words of the Almighty: “I will have mercy, and not sacrifice”. And He urged: “Judge not, that ye be not judged. For with what judgment ye judge, ye shall be judged: and with what measure ye mete, it shall be measured to you again”.

An appeal to genuine justice is also contained in the Qu’ran: “Verily, Allah commands you to deliver the trust committed to you to their due owners, and that when you judge between people, to judge with justice”.

“Verily, this is My way, leading straight: follow it: follow not (other) paths: they will scatter you about from His (great) path: thus doth He command you that ye may be righteous”.

In resume, it could be noted that religious texts of all cultures were aimed at putting an end to lawlessness, establishing a foundation for justice following the example of the highest Judgment, that of God. But that was the goal not to be attained by anybody.

2. Justice as reflected in literary monuments of the past

From time immemorial all courts would serve not only good, but also evil. Most likely, they used to serve evil even more often than good, since the court was

---

1 Lún Yū, the Analects of Confucius (Лунь Юй, 12:13).
3 John 18:36.
5 Matthew 12:7.
6 Matthew 7:1,2.
7 Qu’ran. Sūra 4:61.
one of the most efficient tools in the struggle for property and power. That was
the way it has always been, as confirmed by a host of evidence from the past.

One of the most ancient literary monuments of China, Shi Jing (the Book
of Odes), which goes back to XI-VI BC, narrates the troubles the country had
to suffer due to the oblivion of the ideals of law and justice:

“To Heaven I look up…
Alas! The Skies send us no pity,
There is no rest, no peace…
Just overload of trouble!
Where is the power of my Motherland? Foregone?
We suffer, our nation’s dying…
There is no end to sorrow…
Alas! We are entrapped in laws —
Be that by day, or in the dark of night —
No, nothing gives relief”\(^1\).

These words are remarkably in harmony with what Hesiod (VII-VIII BC),
an ancient Greek poet, wrote in his verses describing the evils of lawlessness:

“The mighty fist will reign instead of Truth.
The Cities will be all destroyed and robbed,
And those who took the oath and kept it for the people,
Those who were just and fair —
Will suffer disrespect, humiliation, sorrow!
All glory will be passed to those in Power.
Where power reigns, there shall we see the Law”\(^2\).

The Bible, starting with Genesis, tells the story of world creation, the cru-
cifixion of Christ and the first days of Christianity, providing ample examples
of law where rulers proved to be criminals, laws were unfair, and the most
horrible of all — courts were unrighteous.

In one of his psalms King David addresses the Judges:

“Do ye indeed speak righteousness, O congregation? Do ye judge up-
rightly, O ye sons of men?
Yea, in heart ye work wickedness; ye weigh the violence of your hands
in the earth.
The wicked are estranged from the womb: they go astray as soon as they
be born, speaking lies”\(^3\).

\(^1\) Shi Jing — to Luoyang, the King (Шицзин. Царю Ю-Вану // Конфуций. Уроки муд-
\(^2\) Translated from the Russian version of Hesiod Works and Days (Гесиод. Труды и дни,
189—192. Пер. В.В. Вересаева, О.П. Цыбenko. Лабиринт, 2001. 256 с.).
\(^3\) Psalms 57:2—4.
The same motif rings in Asaph’s psalm:

“How long will ye judge unjustly, and accept the persons of the wicked? Selah.

Defend the poor and fatherless: do justice to the afflicted and needy.
Deliver the poor and needy: rid them out of the hand of the wicked.
They know not, neither will they understand; they walk on in darkness: all the foundations of the earth are out of course.
I have said, Ye are gods; and all of you are children of the most High.
But ye shall die like men, and fall like one of the princes”.

The essence of justice was distorted even in the blessed days of King Solomon, the evidence to which we see in Ecclesiastes.

“I saw under the sun the place of judgment, that wickedness was there; and the place of righteousness, that iniquity was there.

Terrible pictures of absolute lawlessness were depicted by the Biblical Prophets. Prophet Isaiah with pain in his truthful and righteous heart condemned the sins which swept Jerusalem:

“How is the faithful city become an harlot! It was full of judgment; righteousness lodged in it; but now murderers.
Thy silver is become dross, thy wine mixed with water:
Thy princes are rebellious, and companions of thieves: every one loveth gifts, and followeth after rewards: they judge not the fatherless, neither doth the cause of the widow come unto them”.

Further would He write:

“The way of peace they know not; and there is no judgment in their goings: they have made them crooked paths: whosoever goeth therein shall not know peace.
Therefore is judgment far from us, neither doth justice overtake us: we wait for light, but behold obscurity; for brightness, but we walk in darkness”.

Ages would pass, and nothing would change. The court, just as in years foregone, would be turned into a poisonous tool: judgment turned “to wormwood,” while “righteousness left off in the earth”.

That is why Jesus would say addressing his disciples:

“When thou goest with thine adversary to the magistrate, as thou art in the way, give diligence that thou mayest be delivered from him; lest he hale thee to the judge, and the judge deliver thee to the officer, and the officer cast thee into prison.

---
1 Psalms 8:1,2–7.
2 Ecclesiastes 3:16.
3 Isaiah 1:22–23.
5 Amos 5:7, 12–13.
I tell thee, thou shalt not depart thence, till thou hast paid the very last mite”

Several centuries would pass. Christianity would become a dominating religion in many states of Europe. Courts there, however, would remain unrighteous and unfair.

In proving this let me show the description of the Sergeant of Law in Geoffrey Chaucer’s (1340–1400) The Canterbury Tales.

“There was also, full rich of excellence.
Discreet he was, and of great reverence -
He seemed swich, his wordes weren so wise,
Justice he was full often in assize,
By patente, and by pleyen commissioun;
For his science, and for his high renown,
Of fees and robes had he many oon.
So great a purchaser was nowhere noon”.

Francois Rabelais (1494–1553) gave a brilliant picture of the seamy sides of justice:

“Processes and suits in law, at their first bringing forth, to be numberless, without shape, deformed, and disfigured, for that then they consist only of one or two writings, or copies of instruments, through which defect they appear unto me, as to your other worships, foul, loathsome, filthy, and misshapen beasts. But when there are heaps of these legiformal papers packed, piled, laid up together, impoked, insatchelled, and put up in bags, then is it that with a good reason we may term that suit, to which, as pieces, parcels, parts, portions, and members thereof, they do pertain and belong, well-formed and fashioned, big-limbed, strong-set, and in all and each of its dimensions most completely membered... The sergeants, catchpoles, pursuivants, messengers, summoners, apparitors, ushers, door-keepers, pettifoggers, attorneys, proctors, commissioners, justices of the peace, judge delegates, arbitrators, overseers, sequestrators, advocates, inquisitors, jurors, searchers, examiners, notaries, tabellions, scribes, scriveners, clerks, pregnotaries, secondaries, and expedanean judges by sucking very much, and that exceeding forcibly, and licking at the purses of the pleading parties, they, to the suits already begot and engendered, form, fashion, and frame head, feet, claws, talons, beaks, bills, teeth, hands, veins, sinews, arteries, muscles, humours, and so forth... Thus becometh the action or process by their care and industry to be of a complete and goodly bulk, well shaped, framed, formed, and fashioned according to the canonical gloss...

---

Ligitando jura crescunt; litigando jus acquiritur.
Ligitando jura crescunt
Ligitando jus acquiritur
(Suits compel laws to flourish
Suits strengthen law)"

The words of M. Montaigne (1553–1592), another French writer and philosopher, rang as a real sentence to the courts of the time.

“...to make sale of reason itself, and to give to laws a course of merchandise... What can be more savage, than to see a nation where, by lawful custom, the office of a judge is bought and sold, where judgments are paid for with ready money, and where justice may legitimately be denied to him that has not wherewithal to pay; a merchandise in so great repute, as in a government to create a fourth estate of wrangling lawyers, to add to the three ancient ones of the church, nobility, and people; which fourth estate, having the laws in their own hands, and sovereign power over men’s lives and fortunes, makes another body separate from nobility...”

At this point let us turn our glance to Russia, or rather to the way Leo Tolstoi (1828–1910) describes in his novel Resurrection the way law operated in the country of that time. I would like to offer to the reader just a single episode — a dialogue between the lawyer and Nekhlyudov, the main character of the novel:

“That is where the mistake lies, that we are in the habit of considering that the prosecutors and the judges in general are some kind of liberal persons. There was a time when they were such, but now it is quite different. They are just officials, only troubled about pay-day. They receive their salaries and want them increased, and there their principles end. They will accuse, judge, and sentence any one you like.”

“Yes; but do laws really exist that can condemn a man to Siberia for reading the Bible with his friends?”

“Not only to be exiled to the less remote parts of Siberia, but even to the mines, if you can only prove that reading the Bible they took the liberty of explaining it to others not according to orders, and in this way condemned the explanations given by the Church. Blaming the Greek orthodox religion in the presence of the common people means, according to Statute the mines.”

“Impossible!”


“I assure you it is so. I always tell these gentlemen, the judges,” the advocate continued, “that I cannot look at them without gratitude, because if I am not in prison, and you, and all of us, it is only owing to their kindness. to deprive us of our privileges, and send us all to the less remote parts of Siberia, would be an easy thing for them.”

“Well, if it is so, and if everything depends on the Prosecutor and others who can, at will, either enforce the laws or not, what are the trials for?”

The advocate burst into a merry laugh. “You do put strange questions. My dear sir, that is philosophy”\(^1\).

An appropriate final chord to this part of the essay should rightfully become a parable by Czech writer F. Kafka (1883–1924). A polyphony of voices sounds in it: condemnation of unrighteous courts, pleading for mercy and clemency, a dream about a new law:

“Before the law sits a gatekeeper. to this gatekeeper comes a man from the country who asks to gain entry into the law. But the gatekeeper says that he cannot grant him entry at the moment. The man thinks about it and then asks if he will be allowed to come in later on. “It is possible,” says the gatekeeper, “but not now.” ... The gatekeeper gives him a stool and allows him to sit down at the side in front of the gate. There he sits for days and years... He grows old...his eyesight grows weak, and he does not know whether things are really darker around him or whether his eyes are merely deceiving him. But he recognizes now in the darkness an illumination which breaks inextinguishably out of the gateway to the law. Now he no longer has much time to live. Before his death he gathers in his head all his experiences of the entire time up into one question which he has not yet put to the gatekeeper. He waves to him, since he can no longer lift up his stiffening body. The gatekeeper has to bend way down to him, for the great difference has changed things to the disadvantage of the man. “What do you still want to know, then?” asks the gatekeeper. “You are insatiable.” “Everyone strives after the law,” says the man, “so how is that in these many years no one except me has requested entry?” The gatekeeper sees that the man is already dying and, in order to reach his diminishing sense of hearing, he shouts at him, “Here no one else can gain entry, since this entrance was assigned only to you. I’m going now to close it.”\(^2\)

To conclude this part of the essay I would like to add that anyone could follow the fate of that “man from the country” we just read about, even he who today has strength, wealth and power.

---


3. The double face of Legislation

The key goals of statutes are to protect the foundations of the state, consolidate the power of a tsar, king or nobility, and ensure the interests of forces dominating society.

One of the most ancient monuments of legislation is Hammurabi’s Code (XVIII BC) which declared the rule of the King over all the people\(^1\). Other legal acts also fixed the supreme power of rulers in the same manner. Providing grounds for such provisions, Shang Yang (390–338 BC), one of the founders of the China legalist school, wrote openly that when a sovereign was made to rule, respect of the wise was rejected and the worship of those in supreme position was enforced\(^2\).

It should be noted that similar rules were also typical for other states, not only for Oriental despotic regimes.

In 1086, for instance, twenty years after the conquest of England, William the Conqueror declared himself the supreme owner of all the land and demanded that all landowners swear allegiance to him. Thus, they all became vassals of the King\(^3\). That same year a census and complete inventory of lands in the Kingdom were performed. Over 15,000 estates (manors) and over 200,000 households were entered into the Doomsday Book. This act strengthened the power of the King\(^4\).

There were many similar acts in the history of law of Western countries.

One of the examples is The Act of Supremacy issued by Henry VIII in 1534 that was aimed to break the existing bondage with the Catholic Church. The adoption of this act was justified by the necessity to increase the “virtue in Christ’s religion within this realm of England, and to repress and extirpate all errors, heresies, and other enormities and abuses heretofore used”.

The means to attain this goal was not just turning the King into “the only supreme head in earth of the Church of England”, but also transferring to him “all honours, dignities, preeminences, jurisdictions, privileges, authorities, immunities, profits, and commodities to the said dignity”\(^5\).

It is quite remarkable that ages later a similar legal model was applied in the RSFSR Constitution of 1918. It abolished private ownership of land,

---

\(^1\) http://www.hist.msu.ru/ER/Etext/hammurap.htm.
“and the entire land” was “declared to be national property...Similarly all forests, treasures of the earth, and waters of general public utility, all equipment whether animate or inanimate, model farms and agricultural enterprises...all factories, mills, mines, railways, and other means of production and transportation” were proclaimed to be national wealth.\(^1\)

The state represented by its only party, the party of the Bolsheviks, became the owner of all the above property. In fact, that meant bringing back to life the old forms of serfdom with the only significant exception: the privilege to exploit a human being from now on belonged to the state.

There is no need to prove that courts at all times were actually on guard of the interests of those in power, be they monarchs, dictators, democratically elected governments or ruling political parties. Courts are state power bodies. As such, they cannot be impartial with regard to the interests of the state, and to those who represent it. It is extremely difficult to draw a line between such interests. History shows that courts would make that distinction very rarely. One may cite many court proceedings of the past which were initiated either for the purpose of replenishing the treasury or for annihilating those who claimed power and were of potential danger.

Courts were biased in many cases giving preference to representatives of their own social strata or to those who enjoyed greater power and authority. For the sake of illustration let us turn our attention to one of the most expressive legal acts of Medieval England. King Edward III issued a special Statute (Ordinance) in 1346 which reflects general problems of justice not only of the past but of the present day as well:

“Edward, by the Grace of God, &c., to the Sheriff of Stafford, greeting: Because that by divers complaints made to us, we have perceived that the Law of the Land, which we by our oath are bound to maintain, is the less well kept, and the execution of the same disturbed many times by maintenance and procurement, as well in the court as in the country...we have ordained these things following:

“First, we have commanded all our justices, that they shall from henceforth do equal law and execution of right to all our subjects, rich and poor, without having regard to any person, and without omitting to do right for any letters or commandment which may come to them from us, or from any other, or by any other cause. And if that any letters, writs, or commandments come to the justices, or to other deputed to do law and right according to the usage of the realm, in disturbance of the law, or of the execution of the same, or of right to the parties, the justices and other aforesaid shall

\(^1\) [http://www.marxists.org/history/ussr/government/constitution/1918/index.htm](http://www.marxists.org/history/ussr/government/constitution/1918/index.htm).
proceed and hold their courts and processes, where the pleas and matters be depending before them, as if no such letters, writs, or commandments were come to them; and they shall certify us and our council of such commandments which be contrary to the law, (that is, “the law of the land,” or common law,) as afore is said.

And to the intent that our justices shall do even right to all people in the manner aforesaid, without more favor showing to one than to another, we have ordained and caused our said justices to be sworn, that they shall not from henceforth, as long as they shall be in the office of justice, take fee nor robe of any man, but of ourself, and that they shall take no gift nor reward by themselves, nor by other, privily nor apertly, of any man that hath to do before them by any way, except meat and drink, and that of small value; and that they shall give no counsel to great men or small, in case where we be party, or which do or may touch us in any point, upon pain to be at our will, body, lands, and goods, to do thereof as shall please us, in case they do contrary. And for this cause we have increased the fees of the same, our justices, in such manner as it ought reasonably to suffice them.”

The appearance of such statutes was explained by the growing awareness that the state would not survive if courts remained unrighteous.

Therefore, in the laws from time immemorial there was a trend towards protecting not only the interests of the authority and those in power, but also establishing the genuine basic principles of justice, such as equity, clemency and equality.

Evaluating the laws of his country, Solon, the Athens ruler (circa 640-559 BC)\(^1\) wrote:

> “Such power I gave the people as might do,  
> Abridged not what they had, now lavished new.  
> Those that were great in wealth and high in place,  
> My counsel likewise kept from all disgrace.  
> Before them both I held my shield of might,  
> And let not either touch the other’s right”\(^2\).

The Justinian Code (529–534) states that “judges quite justifiably are called priests, since they care about justice, propagate the concepts of the good and fair, trying to distinguish between just and unjust, authorized and

---

prohibited. They also desire that all good people would strive for perfection not for fear of punishment, but through encouragement by awards, while striving for genuine...philosophy”\(^1\).

The Achen Capitulary De Villis of the IXth century issued by Charles the Great (known as Karl der Grose in German) contained the following remarkable appeal:

“And let no one, through his cleverness or astuteness—as many are accustomed to do—dare to oppose the written law, or the sentence passed upon him, or to prevail against the churches of God or the poor, or widows, or minors, or any Christian man. But all should live together according to the precept of God in a just manner and under just judgment...”\(^2\).

The Doom Book, the first code of laws in the times of King Alfred (late IXth century) offered the following instruction to the judges: “Doom very evenly! Do not doom one doom to the rich; another to the poor! Nor doom one doom to your friend; another to your foe!” The following reflects Mosaic Law: “You shall do no injustice in judgment! You shall not be partial to the poor; nor defer to the great! But you are to judge your neighbour fairly!”\(^3\)

An even more outspoken demand to judge righteously is reflected in the Laws of the Danish King Canute who conquered England in 1017 (Canute, or Cnut the Great in another version). He wrote then that the first thing he would desire was to introduce “good laws and all the lawlessness be eliminated, annihilated and done away with to the greatest extent possible and with the utmost zeal in this Land”. He also expressed his will that “God’s Truth would settle on Earth and from that time on each and every, be he poor or rich, would enjoy the protection of the people’s law, and judged be they righteously and fair...”\(^4\)

An appeal to genuine justice was expressed in the Magna Carta of 1215. It was established that “no free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his stand-


\(^3\) Medieval Sourcebook: The Anglo-Saxon Dooms, 560–975 (http://www.fordham.edu/halsall/source/560-975dooms.htm).

ing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land...”

From the late Xllth century many civil cases would be heard in England by jury trial, with the participation of twelve jurors who would assess facts and not the applicable law. The jury trial started also to be used in criminal proceedings. Its functions included the determination of a verdict of guilty or non-guilty for the person who faced the trial. Starting in the XIVth century a grand jury composed of 24 free landowners of a principality was introduced for the approval of guilty verdicts. It should be noted, however, that prior to 1670, jurors could be brought to account and punished either with a fine or imprisonment if the judge deemed the verdict delivered by them wrong.

A remarkable document with regard to its profound insight and essence, but strangely not known to a broad scholarly community, deserves special attention: that is the Russian legal act of the second half of the XIIIth century, known as the Measure of Righteousness (Merilo Pravednoje) which contained instructions to judges and rules of canonic and secular law.

The compilers of the document were absolutely convinced that the Russian land could be rescued exclusively by the revived Christian commandments and firm basic principles of justice. For that matter they compiled the book as “a genuine communication to the world, enlightenment to reason, a landmark to an eye, a speculum of conscience, light glowing in the dark, a helping hand to the blind, a sample of wisdom and keen and penetrating mind”.

Casimir III, known as Casimir III “the Great” (1333–1370), insisted on the same criteria of justice and justified them from the same standpoint. When sanctioning the Code of laws for Great and Lesser Poland he was guided by the same principles listed above, and that is the act that earned Casimir the title of “the Polish Justinian”:

3 In 1962 the original text of the historic document was published in the form of photographic images of the manuscript without any translation and commentaries. Merilo Pravednoye. (The Measure of Righteousness). Cited in translation from the Russian text translated from the manuscript of the XIVth century (Moscow, 1962) (Мерило Праведное: По рукописи XIV в. М., 1962).
4 Ibidem (translation).
“In legal matters dealing with just and fair judges one cannot attain anything by deceit, reach one’s goal through partiality, upset the scales of justice for payment...judges having the scales of justice in the hands thereof, weighing in equal measures should deliver a just sentence, while God himself will be before the eyes thereof while they think the sentence over and deliver it. They should not be wasteful with the honor they have been granted and the persecutors thereof, inflicting damage to any party against their own conscience and contrary to justice, they should not do so either of partiality or for any gifts”\(^1\).

Another example of the efforts taken to create a legal framework is the Landslag (The Law of the Land) issued by the King of Sweden in 1347, establishing the following obligations of the king: “to defend, love and protect by his Royal right and power all just and genuine and suppress all unjust, unworthy and unrighteous...to be true and loyal to all his people, and in no manner inflict damage either to the life, or body either of the poor or the rich, unless the latter was exposed of crime under the law and by the rights of the Kingdom...and not to forfeit property from anyone other than by law and by legal court judgment”.

The trend towards ensuring genuine justice was observed even more clearly after the adoption of the Bill of Rights in England in 1689, which legally fixed the prohibition to create special courts, suspend the effect of law or relieve anybody of liability.

In Pennsylvania, for instance, The Great Law of 1682 in every detail, following the tradition of Anglo-Saxon law, but in the spirit of Christian values, regulated the issues relating to judicial power: “And be it further Enacted by the Authority aforesaid to the End that Justice may be faithfully and Openly done according to Law that all Courts of Justice shall be Open and Justice shall not be denied or delayed” (chapter 44)\(^2\).

After the War of Independence new basic principles of the judiciary and justice were entrenched by the United States Constitution of 1787. It specifically stipulated that “judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish... The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Au-

\(^1\) Oriental Literature. Historical Sources of the East and the West (Восточная литература. Средневековые исторические источники Востока и Запада) // http://www.vostlit.info/Texts/Dokumenty/Polen/XIV/Kazimir_Statut/text).

The principles of justice are revealed from another angle in the French Declaration of the Rights of Man and of the Citizen, of 1789:

“Law is the expression of the general will... It must be the same for all, whether it protects or punishes” (Article 6)².

“The law shall provide for such punishments only as are strictly and obviously necessary, and no one shall suffer punishment except it be legally inflicted in virtue of a law passed and promulgated before the commission of the offense” (Article 8)³.

Fifteen years later the above principles were strengthened by the French Civil Code of 1804. Its text incorporated, for instance, the following rule:

“A judge who refuses to give judgment on the pretext of legislation being silent, obscure or insufficient, may be prosecuted for being guilty of a denial of justice” (Article 4)⁴.

The principles of justice proclaimed by two revolutions – American and French – were inherited by many countries. In the Constitution of Poland of 1791, for instance, the following provision was established:

“As judicial power is incompatible with the legislative, nor can be administered by the king, therefore tribunals and magistrates ought to be established and elected. It ought to have local existence, that every citizen should know where to seek justice, and every transgressor can discern the hand of national government” (Article VIII)⁵.

The XIXth century codes of justice which were developed practically everywhere regulated in every detail all the stages for the trial of a case and the rights and obligations of persons participating in them.

However, courts would not become more righteous.

4. Popular movements in search of genuine justice

Indignation caused by arbitrary and voluntary judicial actions resulted in powerful popular movements. Certain legal acts would justify opposition to arbitrary rule and lawlessness. The Sachsenspiegel (literally,
“Saxon mirror”), the code of Saxon Laws, compiled by Eike von Repgow in 1220–1235 contained a provision which ran that “each may...resist illegal actions of one’s king or judge and even provide assistance in the defense against them in any manner... and thus he does not act against his obligation to be loyal”\(^1\).

It would frequently happen that the people themselves tried to establish new principles of justice. Giovanni Villani (1276 or 1280–1348) writes about one such episode describing a new order established in Florence in 1292. As he narrates the story:

“These laws they called the Ordinances of Justice. In order to preserve and execute them they ordained that, besides the six priors who governed the city, there should be a standard-bearer of justice from each district, changing every two months as the priors did. When the great bell tolled, the people were to assemble in the church of San Piero Scheraggio and present the standard of justice, which had not been customary before. They also ordained that no priors should come from the houses of those nobles called Grandi.

The ensign and standard of the people was to be a white field with a red cross. One thousand citizens were elected, the total number being divided among the districts with standard-bearers for each ward and fifty foot-soldiers (each with hauberk and shield marked with a cross) for each standard. At any disorder or summons by the standard-bearer these citizens were to assemble at the house or palace of the priors and act against the Grandi. The number of foot-soldiers later grew to two thousand, then four thousand\(^2\).

In Czechia during the Hussites Wars (also called the Bohemian wars) the Taborites – representatives of the radical part of the revolutionary movement – came forward in 1420 with a demand that all the system of justice be radically transformed, and trial would be administered in conformity with the Law of God\(^3\).

The desire to observe and fulfill the biblical commandments in administering justice actually led to the Reformation and Peasant War in Germany.

Martin Luther, the inspiration of the Reformation (1483–1536), urged doing away with the existing law, insisting that law and statutes were eternal enemies, and hence demanded that genuine Christian justice be revived\(^1\).

Thomas Munzer (1490–1525) had more radical claims. He made an attempt to establish a new Kingdom of God on earth, a Kingdom of fraternal equality, of freedom and happiness wherein everything that harms the rule of Christ, all that thrusts the people into grief and trouble and keeps people in poverty is vanquished\(^2\).

Among the acts adopted in the course of the Peasants War the Twelve Articles of the Peasants (1525) are of particular interest, since they reflect the aspirations of the common people and their dream of a righteous court in conformity with New Testament principles:

“We are burdened with a great evil in the constant making of new laws. We are not judged according to the offense, but sometimes with great ill will, and sometimes much too leniently. In our opinion we should be judged according to the old written law so that the case shall be decided according to its merits, and not with partiality...We will no longer endure it, nor allow widows and orphans to be thus shamefully robbed against God’s will, and in violation of justice and right, as has been done in many places, and by those who should shield and protect them”\(^3\).

“Popular” justice, however, should not be idealized. Almost in all cases it was marked by blind hatred either to class enemies or political opponents, the evidence to which we see in many chronicles of the past describing riots, spontaneous unrest and framed-up trials. “Courts of the people” were just as much of a far cry from true justice as royal courts. It should be noted at the same time, that all such courts, irrespective of their initial goals and procedural forms, would serve one aim: the struggle for property and power.

William Shakespeare brilliantly revealed the nature of this phenomenon in the historical chronicle Richard VI. A certain Cad, one of the characters, who lead the popular riot, promises to do away with all the lawyers (“let’s kill all the lawyers”)\(^4\). He is quite outspoken in those plans of his; though he keeps certain dreams to himself:

“...The proudest peer in the realm shall not


wear a head on his shoulders unless he pay me tribute; there
shall not a maid be married but she shall pay to me her
maidenhead ere they have it. Men shall hold of me...” 1

Comparing law and order, imperfect as it was, to the spontaneous and un-
controllable people’s riots, Shakespeare gave preference to the former.

“Authority, though it err like others,
Hath yet a kind of medicine in itself,
That skins the vice o’ the top” 2.

The situation changes radically when people turn into a “monster of mul-
titude” without a trace of truth, mercy or justice 3.

The Decree of June 10, 1794, “On the Institution of Revolutionary Tribu-
nals” (The Law of 22 Prairial Year II) may serve as a good example:

“The Revolutionary Tribunal is instituted to punish the enemies of the
people.

The following are deemed enemies of the people: those who have instigat-
ed the reestablishment of monarchy, or have sought to disparage or dissolve
the National Convention and the revolutionary and republican government
of which it is the center...

Those who have supported the designs of the enemies of France, either
by countenancing the sheltering and the impunity of conspirators and ar-
istocracy, by persecuting and calumniating patriotism, by corrupting the
mandatories of the people, or by abusing the principles of the Revolution
or the laws or measures of the government by false and perfidious appli-
cations;

Those who have deceived the people or the representatives of the people,
in order to lead them into undertakings contrary to the interests of liberty;

Those who have sought to inspire discouragement, in order to favor the
enterprises of the tyrants leagued against the Republic;

Those who have disseminated false news in order to divide or disturb the
people;

Those who have sought to mislead opinion and to prevent the instruction
of the people, to deprave morals and to corrupt the public conscience, to im-
pair the energy and the purity of revolutionary and republican principles, or
to impede the progress thereof, either by counterrevolutionary or insidious
writings, or by any other machination...

The penalty provided for all offenses under the jurisdiction of the Revo-
lutionary Tribunal is death.

2 W. Shakespeare. Measure for Measure. Act 2. Scene 2
The proof necessary to convict enemies of the people comprises every kind of evidence, whether material or moral, oral or written, which can naturally secure the approval of every just and reasonable mind; the rule of judgments is the conscience of the jurors, enlightened by love of the Patrie; their aim, the triumph of the Republic and the ruin of its enemies; the procedure, the simple means which good sense dictates in order to arrive at a knowledge of the truth, in the forms determined by law”

The Decree of June 10, 1794 not only abolished judicial procedural restrictions; in fact, it became a real inspiration for the Reign of Terror of the Jacobins. Anatole France (1844–1924) brilliantly depicted the force of its magnetic attraction leading to death and destruction:

“No more sifting of evidence, no more questioning of the accused, no more witnesses, no more counsel for the defence; love of the fatherland supplies everything that is needful. The prisoner, who bears locked up in his bosom his guilt or innocence, passes without a word allowed before the patriot jury, and it is in this brief moment they must unravel his case, often complicated and obscure. How is justice possible? How distinguish in an instant between the honest man and the villain, the patriot and the enemy of the fatherland...?

Disconcerted for the moment, Gamelin quickly learned his new duties and accommodated himself to his new functions. He recognized that this curtailment of formalities was genuinely characteristic of the new justice, at once salutary and terrifying, the administrators of which were no longer ermined pedants leisurely weighing the pros and contras in their Gothic balances, but good sansculottes judging by inspiration and seeing the whole truth in a flash. When guarantees and precautions would have undone everything, the impulses of an upright heart saved the situation. We must follow the promptings of Nature, the good mother who never deceives; the heart must teach us to do judgment, and Gamelin made invocation to the manes of Jean-Jacques:

“Man of virtue, inspire me with the love of men, the ardent desire to regenerate humankind!”

His colleagues, for the most part, felt with him. They were, first and foremost, simple people; and when the forms of law were simplified, they felt more comfortable. Justice thus abbreviated satisfied them; the pace was quickened, and no obstacles were left to fret them. They limited themselves to an inquiry into the opinions of the accused, not conceiving it possible that anyone could think differently from themselves except in pure perversity. Believing themselves the exclusive possessors of truth, wisdom, the quintessence

1 The Law of 22 Prairial Year II (10 June 1794) // http://chnm.gmu.edu/revolution/d/439/.
of good, they attributed to their opponents nothing but error and evil. They felt themselves all-powerful; they envisaged God. They saw God...

5. On the mechanisms of self-purification (and judicial codes of ethics).

Judges, naturally, tried to struggle against the deficiencies of the judicial system, attempted to change it from within and urged to observe incessantly religious and moral principles.

One of the first who strived towards reforming a judicial system was Mkhitar Gosh, a great Armenian theologian and scholar of law, the author of the first Code of Laws of Armenia (1184). Mkhitar Gosh wrote that “a judge should be both experienced, strong in learning, and knowledgeable of the Holy Scripture, and the judge should have also knowledge and understanding of human matters. He should be major, thoughtful, and sensible so that he could administer justice with no fail or error. Hence...to administer justice is the cause of God, since God is the true judge, while all the rest are called judges in imitation of Him”.

H. Bracton (1210–1268) was the first who addressed the issue of moral perfection of judges. In his work On the Laws and Customs of England (1250) he urged adherence to moral principles and ethics, since they determine the usual rules of conduct. First and foremost, this requirement was ascribed to the activity of the judges.

“Let no one, unwise and unlearned, presume to ascend the seat of judgment, which is like unto the throne of God, lest for light he bring darkness and for darkness light, and, with unskilful hand, even as a madman, he put the innocent to the sword and set free the guilty, and lest he fall from on high, as from the throne of God, in attempting to fly before he has wings.”

One of the first model codes of ethics was developed by Philippe de Rémi, sire de Beaumanoi, a French lawyer, who compiled in 1282 Coutumes De Beauvaisis – a set of common laws of the north-eastern part of France. De Beauvaisis established ten commandments for the execution of justice by royal officials and local nobility. The key concepts were wisdom, love for God,

---


2 Code of Laws, Mhitar Gosh, Chapter 5 of the Introduction. (Судебник Мхитара Гоша. Глава пятая Введения.)

3 Ibidem.

tranquility and kindness, patience, courage and energy, generosity and submission to the higher order, knowledge of one’s work and loyalty.

Ages would pass and codes of judicial conduct would appear in all countries. Thus, in Russia, the Code adopted on the 2nd of December 2004 by the VIth All-Russia Congress of Judges is currently in effect.

International organizations have elaborated documents in this field. One of them is the Basic Principles of the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Milan, 26 August to 6 September 1985), and endorsed by General Assembly resolutions 40/32 of November 29, 1985 and 40/146 of December 13, 1985. The document calls upon judiciaries to ensure that “judicial proceedings are conducted fairly and that the rights of the parties are respected” (Paragraph 6). It also includes a requirement that “persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law” (Paragraph 10).

The Bangalore Principles of Judicial Conduct were developed by chairmen of courts of numerous states and approved on November 25–26, 2002 by the UN Commission on Human Rights. These principles are of particular interest as they lay down key ethical values: independence, impartiality, integrity, propriety, equality, competence and diligence.

However, according to many judges, such internationally-elaborated principles remain mostly ineffective, primarily because judges do not regard them as rules of law and perceive them as ideals having little to do with reality.

6. Contradictions and paradoxes of theory and practice

One of the most popular scholarly works in law, Commentaries on the Laws of England, by William Blackstone (1723–1780) — which has the authority of judicial doctrine in the legal systems of Great Britain and the United States — says the following on private property:

---

“There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe....not caring to reflect that (accurately and strictly speaking) there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land...”\(^1\).

That is certainly so, unless these “other persons” are judges themselves. Such an addition to the words of the great English lawyer is necessary since judges, as was repeatedly mentioned, may take any decisions, including those which deprive legal owners of their property. This, as a matter of fact, happens not only in the developing countries of Asia, Africa and Latin America, and young democratic countries of Eastern Europe (including Russia), but also in states with deep-rooted traditions of democratic rule and supremacy of law.

A lot depends on judges. They are granted the right to dispose of the fortunes of other people. They may either convict or pardon — it is for them to decide either to grant clemency or retribution. They may either accelerate or protract the hearing of cases, they may either accept or reject complaints and motions. Very often the choice depends on whether they are given a bribe or not.

Corruption is a phenomenon which exists in judicial systems of all states. It is not accidental that in 2007 Transparency International made corruption the topic of its Annual Report\(^2\).

This document provides the following data. According to polls, bribes are given in 21% of cases in Africa, 18% in Latin America, 15% in the CIS and Asian-Pacific region, 2 % in the United States and 1 % in the European Union\(^3\).

Furthermore, according to the estimates of the UN Special Rapporteur on the Independence of Judges and Lawyers, from 50% to 70% of federal judges and lawyers in Mexico are corrupt\(^4\).

This vice is inherent in all legal systems without exception, including in the United States. It is common knowledge that the constitutions of many Amer-

---


\(^3\) Ibid., p. 11.

ican states provide for direct elections of judges by the citizens. In order to be elected, however, it is necessary to invest huge funds. The money is readily provided by major corporations. For that kind of financial assistance judges have to pay, and they pay in the currency which is at their disposal, that is, by judicial judgments.

For example, in the state of Illinois in 2004, in running for judicial elections, Lloyd Karmeier received financial assistance in the amount of $4.8 million from the staff and lawyers of the State Farm Insurance Company. After being elected he participated in the consideration of the claim filed against the above company and voted for rejecting the claim. Moreover, it is noteworthy that not only the courts of the state but federal courts too rejected the petition to review the above court judgment.

Corruption is, certainly, manifested mostly in other latent and disguised forms. In the Russian legal community there is even a saying which appeared fairly long ago: “In the court you don’t need a knowledgeable lawyer, you need a “gifted” one”. I.e. one needs a lawyer capable of giving a bribe to the court. Indeed, most frequently in criminal, civil and arbitrazh cases clients are more interested in the advocate’s ties and pulls, with which of the judges the advocate has relationships of trust, and not so much the professionalism and experience of the lawyer.

That is not only the situation in Russia. In Latin America, for instance, there is the following saying: “Why hire a defense lawyer when you can hire a judge?” At the same time it is worth noting that such stereotypes have not been done away with even in the states which fall into the category of “model” ones with regard to the rule of law.

**Certain conclusions based on the survey**

Concluding the essay based on historical and comparative law research it is necessary to emphasize that courts have always been and will always remain a tool in the struggle for property and power. Therefore, the objective is not to eliminate the phenomenon altogether, but to mitigate the effect of negative factors and minimize the potential for arbitrariness and abuse in courts.

The objective may be reached only with the application of the complex of all the available means and measures. Some of them are listed below.

1. As the experience of many countries shows one of the most effective means of combating arbitrariness and abuse in courts is to perfect the coun-

---

try’s legislation: to eliminate gaps, controversies and those norms which are potentially corruption-generating.

2. In fact, measures are being taken universally to raise the status of judges. In achieving this task, as a rule, the salaries of judges are being raised. It is recognized that this is a means of bringing down the level of corruption. Practice shows, however, that such measures are not sufficient since along with the growth of remuneration the demands of judges are also rising. New horizons are opening up and new possibilities and temptations are in store for them.

3. In order to combat corruption, measures are introduced to monitor the income and expenses of judges. This however rarely is effective since it runs contrary to the principles of independence and immunity of judges. Nonetheless, many states raise the requirements thereof by law and introduce new tools for the disclosure and verification of information on the income of judges and members of their families.

4. One of the most important trends is ensuring independence of judges against the pressures of legislative and executive organs and the chief executive officers of the courts. This however achieves an appropriate result only when it is combined with measures preventing the impact of private persons on the court and restraining the personal vices of judges.¹

5. Great significance is paid to instruments of public supervision over judges creating an atmosphere of intolerance for any manifestations of arbitrariness and abuse of power in courts.

6. In many countries today the systems of selection and professional training of judges are being revised in order to raise the professional capacities of the judiciary.

7. As the experience of many states shows, combating corruption and other forms of illegal actions in courts (committed by judges and court staff) leads to no end unless it is accompanied by the same severe struggle with such phenomena in agencies of inquiry, investigation, prosecution and execution of penalties.

8. In recent years measures have been taken to improve the systems of promotion of judges, with particular attention paid to their training in ethics.

9. Numerous countries conduct monitoring of procedural rules and of internal rules of courts from the standpoint of potential threats of corruption and other negative phenomena in order to eliminate the provisions which give rise to them.

10. An effective means of reform is heightened liability of judges for the quality of decisions they take. Corruption and judicial abuses are often disguised by the foreground of poorly motivated judgments.

11. An important safeguard is the publication of court judgments or placing thereof on websites. As the practice of other countries shows, such information becomes an object of the most careful analysis on the part of the press and human rights organizations — provided that judicial decisions are published and not just the summaries thereof.

12. In the past several years, pretrial and arbitration proceedings are expanding in all countries, objectively leading to a decrease in corruption and other negative trends in courts.

13. Other measures aim at reducing the excessive caseloads on courts, in particular through the liberalization of criminal liability, and the creation of administrative courts and other specialized judicial and quasi-judicial entities.

14. Particular attention is given to enhancing mechanisms for investigating complaints of individuals against judicial acts.

15. Measures of disciplinary liability of judges are becoming more rigid in the event that violations of professional duties are detected.

16. Overcoming legal nihilism is an important condition for improving the quality of judicial work.

17. Increased attention is given to norms of international law in combating arbitrariness in courts. The most effective means is the right to appeal against decisions of national courts in international courts.

The last, but not the least element which should be noted is that no measures will prove effective unless the judges become conscientiously aware of the responsibility that they are vested with and which is determined by two key principles — those of justice and clemency.
From the very interesting and detailed Round Table-III discussions we can see that the big challenge for Russian lawyers is how to guarantee stability of private property.

We should not forget that 20 years ago, under communism, Eastern European countries had extremely reduced the rights in private property. There were different kinds of use and usufruct, but it was only or mostly the State that was able to dispose freely of property. Thus it was public law that regulated property rights. Private law didn’t exist in communist legal systems.

After the collapse of communism, Eastern European countries began a re-introduction of private property in their economies. But there were many questions regarding the extent of private property rights, the limits of State interference in those rights, etc. Each Eastern European country answered these questions according to their legal traditions before communism, and the role of private property in their economy during communism. Thus for Central European countries (Hungary, Poland, etc.) the process seemed to be easier than for countries such as Russia or Bulgaria, where private property was almost forbidden under communism.

During the first years of the transition period it was difficult even for Eastern European lawyers to understand the limits of private property and to make distinction between private and public law.

As Eastern European countries ratified the ECHR (European Convention of Human Rights) and thus admitted the jurisdiction of the ECHR (European Court of Human Rights), the ECHR principles of property rights protection could serve as guidelines for Eastern European lawyers and authorities
in case of doubt, but also serve to correct injustices related to voluntary or non-voluntary private property rights violations.

For this reason I would like to underline again the importance of ECHR principles on property protection. In its judgments James v. the UK (21.02.1986) and Lithgow v. the UK (08.07.1986) the Court explained the requirements of the Convention concerning deprivation of property. These requirements were later confirmed in several other judgments and can be seen as the basic principles of ECHR property rights protection.

1. The deprivation should be **provided for by law**. The law (not in a restrictive sense of the word, but including regulations, directives, etc.) should be clear, adequately accessible and sufficiently explained. It should meet the requirements of the rule of law to avoid arbitrary deprivations.

An interesting question for reflection for our Russian colleagues would be to see how art.35 par.3 of the Russian Constitution answers the ECHR requirement for deprivation provided for by law. This paragraph provides that “No one may be deprived of property otherwise than by a court decision”, but should we accept that “court decision” is equal to “provided for by law”?

The ECHR allows a margin of appreciation to public authorities, and even more so for those in countries going through a transition period. Thus in its judgment Credit Bank v. Bulgaria (Decision on admissibility from 30.04.2002) the Court admitted that: “An important feature of the present case is the fact that it concerns legal regulation of economic activities in Bulgaria in a unique period of transition from a wholly State-owned and centrally planned economy to private property and a market economy. The co-existence of legislation from such incompatible systems inevitably carried a measure of uncertainty as regards the outcome of a business dispute in an area as complex as that concerning the regulation of the gas debt and in respect of transactions that had never before been tested in court. While legal uncertainty may not satisfy the Convention requirements of clarity and foreseeability and may contravene the prohibition of arbitrariness, in the assessment whether such a situation obtained in the present case and whether, consequently, there was an unjustified State interference contrary to Article 1 of Protocol No. 1 to the Convention, due account must be taken of the special transitional period in Bulgaria at the relevant time”. We can see that the principle of a clear, accessible and stable deprivation law should be subject to ECHR interpretation depending on the concrete circumstances. But the purpose remains to guarantee the stability of private property in a market economy.

2. The deprivation of property should be **undertaken in the public interest**. This means to pursue a legitimated social policy. In its judgment James v. The UK (21.02.1986, par. 46) the ECHR admitted that: “Because of their
direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is ‘in the public interest’. Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken. Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation.”

The Court underlined that the public interest can exist even if the community at large has no direct use or enjoyment of the property taken (James v. The UK (21.02.1986, par. 45).

But even if a large margin of appreciation is given to State authorities to define the public interest, they should prove that such interest exists in each case of deprivation. In the case Brumarescu v. Romania (28.10.1999) Romanian Courts started to make decisions on claims related to illegal expropriations under communism. The Courts found the decree regulating these expropriations was unlawful and pronounced restitution of property illegally expropriated. Then the Romanian Supreme Court ruled that the Courts did not have competence to pronounce the illegality of a Decree and thus the judgments on restitution were declared void. After the examination of the Brumarescu case, the ECHR observed in its judgment that “no justification has been offered for the situation brought about by the judgment of the Supreme Court of Justice. In particular, neither the Supreme Court of Justice itself nor the Government have sought to justify the deprivation of property on substantive grounds as being ‘in the public interest’. The Court further noted that the applicant had by then been deprived of the ownership of the property for more than four years without being paid compensation reflecting its true value, and that his efforts to recover ownership had to date proved unsuccessful. We can see that even when authorities try to correct their own actions, they should always act in the public interest.

3. According to the ECHR case law, in the event of property deprivation there should be a fair balance between individual rights and public interests. This fair balance includes on the one hand means proposed to achieve the purpose of expropriation and on the other hand a just compensation. The compensation can be equal to the property value but in case of clear social purposes it could be lower that the real property price. However compensation is in general necessary for the achievement of a fair balance between individual and public interests.

To decide whether a fair balance between public interest and individual fundamental rights exists in a particular situation, the ECHR examines es-
especially whether a measure taken is both appropriate for achieving its aim and not disproportionate thereto.

The Bulgarian case of Velikovi v. Bulgaria (09.07.2007) raised questions on property restitution limits. Under communism the claimants bought property which was initially nationalized by the original owners and then sold to an individual. This person sold it to the claimants. After the adoption of the Bulgarian Restitution Law, the original owners filed a claim for restitution of their property and the Bulgarian Court found that there were defects in the title of the individual from whom the claimants had purchased the property. Thus the claimants saw their property seized. In this case the ECHR recognized “the exceptional nature of the Restitution Law and accepted that in the difficult conditions of transition from a totalitarian regime to a democratic society its aims could not be realized without affecting third parties in certain circumstances”. But even in such circumstances the Court admitted that “The approach applied in the applicants’ case meant that anyone who had purchased in good faith a formerly nationalized property from an individual could not be certain about his or her ownership rights and may lose the property without compensation reasonably related to its market value. The Court considered that the authorities’ failure to set clear limits on the restitution of property from \textit{bona fide} third parties and to have regard to the principle of proportionality, generated legal uncertainty”. This is a good example of a situation where the taking of the applicant’s property can be a clearly disproportionate measure and not necessary in a democratic society.

These three requirements were admitted especially for deprivation of property measures, but they can be seen as a basic guidance for property rights protection in a larger sense. Indeed, it might seem strange, but these requirements could be used as guidance even in the privatization process.

According to the ECHR case law, the European Convention of Human Rights does not guarantee a right to acquire property. Only already acquired rights are protected. Thus a right to acquire property through privatization cannot be protected by the ECHR.

But in the case of profound economic transformation such as the post-communist privatization of state property, public authorities in Eastern European countries should remember the basic principles of property rights protection if they want to avoid new injustices. The social mission of the privatization requires a strong protection of State property to be privatized.

To answer to these principles, a privatization should be provided for by a law that is clear, predictable and accessible for every citizen. The privatization should be undertaken in the public interest. Even if an Eastern European privatization was presented as pursuing a clearly public interest, each case
should be examined in its own context regarding the interest of the society. The public interest concerns also limits of privatization. Authorities should ask themselves about the real public interest in case of privatization of property related to justice, health, education and defense. And finally a privatization should answer the requirement of fair balance between individual and public interests, including compensation. In case of privatization the price paid for the property privatized could be seen as a compensation for society. According to the ECHR case law, the compensation for property taken should be reasonable and in relation with property value.

Even if the purpose of a privatization process is to reduce public property and facilitate private property expansion, it should be conducted with respect to the State as a manager of the social order in the country. The ECHR does not protect public property but violations of public property can be the cause of human rights violation as well.

Thus, in conclusion: to guarantee the stability of property rights in a transition society, authorities and lawyers should inspire their actions by the ECHR principle of property rights protection: *deprivation or restriction of property provided for by law, should be undertaken in the public interest and should be answering the requirement for a fair balance between the public interest and individual fundamental rights.*
Comments

by Jeffrey Kahn,
School of Law, Southern Methodist University

I have learned a great deal from listening carefully.
Ernest Hemingway

Those who study Russia from afar (no matter their academic disciplines) seem especially fond of gerunds and participles. This is as true for post-Soviet Russia — my bookshelf bends with Leading Russia,1 Judging Russia,2 and Ruling Russia,3 to name a few — as it was for the Soviet Union (one need only recall the signal sent when Jerry Hough published a third edition of Merle Fainsod’s classic How Russia is Ruled with the title changed to How the Soviet Union is Governed)4. Were I to follow this convention, this modest set of remarks would probably be titled “Listening to Russia,” which describes the opportunity I was given by an invitation to join the Third Russian Roundtable held in Moscow on June 5, 2009.

Scholars often travel to Russia with an established research agenda in mind, or to search an archive for specific documents, or to conduct interviews on a set topic. It was an unexpected change, therefore, to have been asked by the conveners of this gathering to accept a seductively (and deceptively) straightforward task: “observe and comment.” That is what I endeavored to do and the thoughts that follow are the result. I hasten to note at the outset that the conversation was always conducted at an exceptionally high intellectual and professional level. The participants were among the leading lights of the Russian bench and bar. And the discourse was always courteous and

disciplined. In short, it was a pleasure and a privilege to be in attendance. The Roundtable discussions present a model that should be referenced, repeated, and imitated.

This brief commentary presents my reflections on two separate topics that were raised during the Roundtable: (1) the foundation of a governmental system of checks and balances; (2) adversarial legal systems in theory and practice. I present these thoughts not as part of a larger argument, or to suggest a relationship between them, but merely as two observations out of many that could have been made out of such a wide-ranging discussion at the Roundtable.

The Foundations of a Governmental System of Checks and Balances

On several occasions, the discussion at the roundtable turned to issues that could be characterized as concerning the checks and balances necessary for political and judicial institutions to function in tandem in a complex, rule-of-law society. What role should courts play in moderating (critics would say “interfering with”) the natural political competition between powerful, competing, societal interests? How much independence from the executive or legislative branches of government should the judiciary enjoy? To what extent can corruption in judicial institutions be avoided or diminished by the regulation of tenure, salary, or judicial selection? One might have asked as well about the external regulation of the internal administration of courts, the investigation of law enforcement agencies (Quis custodiet ipsos custodes?), and other timely questions of the day.

These and other eternal questions were raised during the Roundtable. They are at once the most basic and the most intractable questions that every legal system confronts. Restated more generally, they ask where the boundary lies between law and politics. This is not a boundary that is easily located. Nor does this boundary remain fixed. There is nothing scientific about it. It is a constantly shifting, evasive, and often blurred line, in much the same way that law is a fluctuating mixture of rules, standards, norms and raw experience.

It struck me as I listened to the participants that none of these questions could be adequately addressed without exerting efforts to improve conditions for trust. No system of justice that relies on oath-bound human beings

---

1 Oliver Wendell Holmes, Jr. *The Common Law*. London, Macmillan, 1887 (“The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”).
for its operation can function in the absence of at least a modicum of trust between the participants. This is not a prescription for naïve idealism; the trust I have in mind is exemplified by the Russian maxim that U.S. President Ronald Reagan repeatedly used during nuclear weapons negotiations: “trust, but verify” (“доверяй, но проверяй”). Concrete instances of that need are found throughout modern legal systems. For example, it is found in the requirement of reasoned opinions in support of judgments (rather than a system of short orders or decrees) — the idea being that a reasoned judicial act verifies that the bench analyzed the problem. It is found in the expeditious publication of those acts — the idea being that transparency promotes trust in the proper functioning of the system. It is found in open courtrooms and journalists dedicated to thoughtful coverage of the work of the courts. The old saying is cliché only because it is true: justice is only done when justice is seen to be done.

The discussion of the roundtable brought to mind a conversation reported between Chairman of the Constitutional Court of the Russian Federation Valery Zorkin and Frank Wagner, the Reporter of Decisions for the Supreme Court of the United States. The conversation took place in Washington D.C. in spring 1993. As reported by Mr. Wagner:

Near the end of our discussion, after we had parsed the ins and outs of preparing and publishing court opinions, Chairman Zorkin asked me a final question. It nearly threw me for a loop when he inquired: “How do you keep the press and your enemies from lying about what you’ve decided in important cases?” As I understood it, the Chairman was not simply asking whether or how the Supreme Court tries to dissuade its critics from putting unwarranted spin on its rulings. Rather, he seemed to be asking the much more basic question of how we defend ourselves against bald-faced liars bent on distorting our work in order to destroy the Court’s credibility and, thus, its effectiveness as a functioning arm of Government. The question was so astonishing to someone raised in the western democratic tradition that it took me several moments to arrive at the answer. Finally, a light dawned. I told Chairman Zorkin that what we do is disseminate our decisions as promptly and as widely as possible through a variety of print and electronic media so that those interested can quickly and easily determine for themselves what the Court has ruled on a particular question. Since the Chairman’s visit, I have come to believe that public access

---

to the Court’s decisions, no matter what the medium or source, is one of the bearings that keeps democracy’s wheels turning true. All of Russia’s top courts now have websites that expeditiously disseminate their work. This is how it should be. It is part of the foundation of democratic government and a source of strength for the judiciary and for the society in which it operates. It is true that sometimes the deliberative process is not aided by immediate and complete transparency. But the default expectation should be openness to the light of public scrutiny. Trust does not grow well in the shade.

Adversarial Legal Systems in Theory and Practice

Early in the work of the Roundtable, the discussion turned to the adoption of adversarial principles in Russian criminal procedure. It quickly became apparent that strongly held opinions existed on the merits and failings of an adversarial system of justice. References were made to American and British practices. Adversarial systems were criticized in general terms for their perceived failure to guarantee true “equality of arms” between parties with very different economic or political resources. What good is the right to an attorney, for example, if one doesn’t have the money to hire counsel at least as skilled as one’s opponent’s counsel?

It occurred to me that it is less useful to discuss adversarial principles in the abstract or in general terms than to debate the effectiveness of particular adversarial procedures in a particular legal context. This is true for two reasons. First, every system of justice suffers from economic and political inequalities, some more than others. A powerful criticism of the Soviet inquisitorial system was that the state’s monopoly control of the investigation, claimed in order to ensure the “complete, objective and full investigation of the circumstances of the case”\(^2\), often masked precisely the same inequalities of arms that resulted from influential political or economic forces. Second, no country, including the United States, operates a system of criminal justice that is either purely adversarial or purely inquisitorial. At the stage of a criminal investigation, for example, adversarial principles are typically at their nadir in every criminal justice system\(^3\).

---

3. McNeil v. Wisconsin, 501 US 171, 181 n.2 (1991) (“Our system of justice is, and has always been, an inquisitorial one at the investigatory stage (even the grand jury is an inquisitorial body), and no other disposition is conceivable. Even if detectives were to bring impartial
It is worth noting, therefore, something that was not said at the Roundtable: broadly stated adversarial principles, which were re-introduced into Russia after the Soviet era at the encouragement of both American and European bodies (most notably the Council of Europe) led to the creation of distinctively Russian adversarial processes. This was not a foregone conclusion. Although Article 123(3) of the Russian Constitution provides generally that "judicial proceedings shall be conducted based on adversarial principles and equality of the parties," the term is not defined there, and the drafting history of this clause sheds little light as to what the drafters intended as there was no discussion of the term’s actual meaning.

The adversarial principles that are identified in Article 15 of the Russian Code of Criminal Procedure combine both common-law approaches that may be identified with aspects of American law and civil-law approaches that may be identified with German and other European legal systems. This is most clearly apparent in the retention of the case file ["delo"] in Russian criminal procedure. The dominant feature of criminal justice in the European civil law tradition is the formal preliminary investigation, which culminates in the case file that is the pivot around which the court’s work revolves. Historically, because the file’s contents have carried such great weight (as the Latin expression goes: “quod non est in actis, non est in mundo”), only officials of the state have been trusted with its compilation. In common-law systems, on the other hand, none of the contents of such a file would constitute per se admissible evidence:

magistrates around with them to all interrogations, there would be no decision for the impartial magistrate to umpire.

1. Elena Mizulina, Chairwoman of the Duma Working Group on the Code of Criminal Procedure, recognized from the floor of the Duma the assistance provided to the Working Group by Council of Europe and American Bar Association experts, among others. See Verbatim Notes of State Duma Session July 20, 2001 (Государственная Дума, стенограмма заседания, 20 июня 2001 г.), at page 9 (noting participation on multiple occasions of experts from the Council of Europe and the American Bar Association). For example, Professor William Burnham of Wayne State University School of Law in the United States worked since 1999 as a foreign law expert with the Working Group.

2. Constitutional Meeting: Verbatim Notes. Materials. Documents. April 20 – November 10, 1993, in 20 volumes (Конституционное совещание: Стенограммы. Материалы. Документы. 20 апреля — 10 ноября 1993 г. В 20 т. М.: Юридическая литература, 1995–1996), vol. 13, pp. 95–98, http://www.constitution.garant.ru/tom.php?pg=00000096&tom=13. At the very least, this history suggests awareness that adversarial principles demand absolute equality of procedures, not of resources or talent, for each side. Id. at 97 (Constitutional Court Judge Morshchakova observed that “…by wealth adversarial principles should not be destroyed. Yes, one pays a lawyer more and engages a better one, but this exists in every process nowadays. The key thing is that each could represent one’s own interests before the court by strictly equal procedural means. But there are always better and worse lawyers. And in this sense, real equality is violated in every process”) (translation by Jeffrey Kahn).
only evidence obtained through the testimony of live witnesses subject to cross-
examination at trial can serve as a basis for a court’s verdict. There is no formal
investigative phase and thus no case file that could result from one. Prosecution
and defense are expected to conduct separate, independent investigations to
collect their own evidence, which they will then present to a court that ideally
possesses no prior familiarity with it (although various rules are intended to
prevent a conviction secured through surprise or by withholding of exculpatory
evidence found in the course of the state’s investigation).

One can easily see how both common-law and civil-law traditions have in-
fluenced what “adversarial principles” means in Russian criminal procedure,
even if they come from very different perspectives. Russian criminal procedure
has retained the case file but strengthened the rights of defendants (through
counsel) to influence its content and to present evidence extraneous to it. Trial
proceedings of a sort more associated with common-law systems have been
augmented. The importance of live-witness testimony has been increased,
sometimes (but not always) at the expense of the role of the case file.

This short description, however, is a gross over-simplification. While the
new Code retains the formal preliminary investigation and its end product,
the case file, that stage is not what it once was. On the one hand, a state
official (the criminal investigator [“sledovatel”]) still enjoys considerable
quasi-judicial powers in conducting the preliminary investigation and com-
piling the case file. Its contents — summaries of witness statements, docu-
mentary evidence, reports of experts and forensic specialists, and records
of searches and other investigative actions — are compiled by decidedly
non-adversarial methods. Records of interrogations and other actions are
made in non-public sessions by the investigator without the participation
of the defense, except for actions taken with the accused present or at the
request of the defense

On the other hand, the old Soviet requirement that the investigator con-
duct a “complete and objective investigation” (watchwords of the civil law
tradition) has been deleted from the new Code and the criminal investigator

\footnote{1 Code of Criminal Procedure of the Russian Federation, hereinafter “CrPC” (Уголов-
но-процессуальный Кодекс Российской Федерации) Art. 47(4)(10) (requiring investiga-
tor’s permission for defendant or his counsel to take part in investigative actions conducted at re-
quest of the defense); Art. 53(2) (permission of the investigator required for defense counsel to
ask questions). Actually, it is more accurate to call these sessions “secret,” since it a crime to re-
veal anything learned from them without the investigator’s express permission. See Art. 161(3)
CrPC (permission process for disclosure) & Art. 161(2) CrPC (referencing Art. 310 of Criminal
Code, which defines unauthorized disclosure to the public as a criminal offense punishable by up
to three months imprisonment).

\footnote{2 Art. 213(3), CrPC of the RSFSR (1960).}
has been placed squarely on the “prosecution side” of the criminal process. These changes are an “admission that the investigator in the current criminal process is not an unbiased investigative judge.” The amendments also reflect another important change from the old Soviet Code of Criminal Procedure: the prosecution side has been stripped of its “judicial” power to order pretrial detention and the power to order searches of home or private correspondence. These actions now require explicit judicial pre-authorization. And that means a greater opportunity for adversarial argument aimed to influence such important pre-trial decisions, the outcome of which may well decide the outcome of the trial itself.

The question of adversarial principles in Russia’s criminal procedure is a complicated one. Aspects of different traditions are evident and sometimes in apparent conflict. Much more can and should be done to improve their effectiveness for Russian defendants. But their introduction — required by the Constitution — seems to me a step in the right direction.

---

1 See Art. 38 (describing role of investigator), included in Chapter 6 “Participants in Criminal Proceedings on the Prosecution Side.” As then Duma Deputy Elena Mizulina explained from the floor of the Duma at the Code’s second reading, this was a deliberate choice to reflect their procedural function. See Государственная Дума, стенограмма заседания, 20 июня 2001 г., at 9 (“We did not become cunning but simply named things with their own names in order to be procedurally clean, in order that each would understand which role he plays, which function he discharges in his duties, and there was not here any kind of craftiness or duplicity.”) (Translation by Jeffrey Kahn).


3 It is interesting to note, however, that the constitutional provision on the procuracy, Article 129, appears in chapter 7 of the Constitution, entitled Judicial Power (“Судебная власть”). See Gordon B. Smith, The Procuracy, Putin, and the Rule of Law in Russia, in Russia, Europe, and the Rule of Law 7 (Ferdinand Feldbrugge, ed. 2007).

4 See CrPC, Art. 29(2) (general powers of court); Art. 108 (pre-trial detention); Art. 165 (general procedures for judicial warrants); Art. 182(3) (search of a dwelling); Art. 185(2) (interception of correspondence); Art. 186 (monitoring or recording communications).
RUSSIA’S PARTICIPATION IN INTERNATIONAL AGREEMENTS (POST-ROUNDTABLE DISCUSSION)

The Russian Federation’s Accession to and Implementation of the Hague Conventions on Private International Law – Moving Towards Uniform Practice in Achieving the Interests and Meeting the Obligations of Cross-Border Judicial Cooperation

by Merja Norros and Peter J. Sahlas

What is the Hague Conference on Private International Law?

The Hague Conference held its first meeting in 1893, and became a permanent inter-governmental organization upon entry into force of its statute in 1955. The statutory mission of the Hague Conference is to work towards internationally-agreed approaches to matters such as jurisdiction of the courts, applicable law, and the recognition and enforcement of judgments in a wide range of areas, including international civil procedure, international commercial law and international child protection.

The Hague Conference has become a key facilitator of international judicial and administrative co-operation in these areas. Personal and family or commercial situations which are connected with more than one country are now commonplace, and may be affected by differences between the legal systems in those countries. With a view towards bridging geographical divides and resolving problems resulting from variances across legal systems, the Hague Conference has developed consensus-based mechanisms for cross-border judicial cooperation in the form of numerous conventions.

Russia’s Involvement in the Hague Conference

Tsarist Russia participated in the early ad hoc meetings of the Hague Conference, giving the Soviet Union and later the Russian Federation, as successor states, an automatic right to membership, though this right lay dormant until 2001. While it did ratify the 1954 Convention on Civil Procedure, the Soviet Union did not join the Hague Conference itself. Links with the rest of
the (Western) world, particularly in spheres of civil relations, were minimal throughout much of the Soviet era. Only after the Soviet Union opened up did the exponential spread of cross-border relations inevitably lead to increased pressures on traditional means of international judicial assistance. The need to shift towards Hague Convention mechanisms became apparent.


Russia’s Practice Today – a Mixed Record

With globalisation and the opening of the Soviet Union’s successor states to the world since the 1990s, there has been a continuing increase in commercial, personal and family situations involving Russian citizens and legal entities in the rest of the world, and foreign citizens and legal entities in the Russian Federation. The Russian Federation’s membership in the Hague Conference and accession to the 1965 and 1970 Conventions provide a potentially effective framework for international judicial and administrative co-

1 A regional convention is also of importance: the 1993 Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, between members of the Commonwealth of Independent States, seeks to assure nationals and the other persons resident on their territories the same degree of legal protection for their personal and proprietary rights in each of the contracting states as is accorded to their own nationals, and seeks to develop assistance between their justice authorities.
2 Hague Convention of 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters
3 Hague Convention of 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters
4 Hague Convention of 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption
operation. In practice however, overall implementation has faced significant delays and other problems.

After a three-year delay the 1965 Hague Service Convention is now well on its way towards optimal operation; in contrast, progress on the 1970 Hague Evidence Convention and the 1993 Hague Adoption Convention appears to be frozen.

Implementation of the 1965 Hague Service Convention stalled from its entry into force in 2001 until 2005. It took until August 2004 to designate a Central Authority (the office responsible for receiving requests from abroad and for day-to-day operation of the Conventions). The Russian Ministry of Justice was designated as a Central Authority for the Service Convention. The designation of a Central Authority should have been done immediately upon entry into force of the Convention.

However, since 2005, the rapid improvements in implementation of the 1965 Hague Service Convention have been highly welcome and commendable. The Central Authority now functions efficiently enough. Clear progress has been made towards the development of the administrative structures and procedures necessary for effective implementation and operation of the Convention, including in territorial organs of the Ministry of Justice and local courts across the Federation. Compilation and analysis of statistics on Hague Service Convention requests have showed improvements in times required for the execution of requests. However, academic research has revealed that processing times still are longer in Russia than in most of the other Convention states parties¹. On the other hand, comparing the results of service (served vs. non-served), Russia is at the same level. In general, more efficient domestic and foreign co-operation and communications now occur. Consistency has improved, and procedures have become more transparent. Authorities now work proactively on requests under the Convention. Indeed, Russia’s growing adeptness in implementation of the 1965 Hague Convention is a model for implementation of other Conventions to follow².

Meanwhile, implementation by Russia of the 1970 Hague Evidence Convention has been completely blocked despite entry into force in 2001, with no Central Authority yet designated for the Convention. Furthermore, at

---


² At the international level, one persistent problem exists with respect to Russia’s operation of the 1965 Hague Service Convention. Due to a dispute between Moscow and Washington DC over the latter’s imposition of service fees by a private contractor in implementation of the Convention, Russia has suspended all judicial cooperation with the United States on civil and commercial matters since 2003. In practice, requests are sent by post directly to the addressees.
the time of signing Russia neglected to declare a requirement for Russian translations of communications transmitted under the Convention. Today there is some uncertainty as to whether Russia will be able to impose a translation requirement for requests it receives from abroad under the Convention, although a retroactive declaration to this effect may be possible. If these issues are favourably resolved then implementation of the Convention may well be unblocked, however there has been little sign of any movement or prioritization.

Finally, nine years on, the 1993 Hague Adoption Convention remains signed but not ratified, despite a growing orphans crisis in Russia and despite the robust regulatory mechanisms for monitoring of adoption processes that would be available under the Convention.

Russia’s delay in implementing the 1965 Hague Service Convention, and the ongoing frozen status of the 1970 Hague Evidence Convention and 1993 Hague Adoption Convention, have caused dismay among authorities worldwide responsible for international cross-border cooperation under these multilateral instruments. Russia’s non-compliance with its obligations under these instruments has been unprecedented in the Hague Conference system.

**Time for a Renewed Implementation Effort by Russia**

Irrespective of the legal status of any particular Hague Convention in Russia, there have been multiple barriers to implementation. Particularly early on, many of these barriers were administrative in nature — due to certain divergences in the policies, interests or practices of the courts, the Ministry of Justice and the Ministry of Foreign Affairs. Some of Russia’s international peers have sensed an environment of general inertia on behalf of the Russian authorities in respect to these issues. Competing domestic interests inside Russia may have also exerted pressure against implementation.

These problems are not difficult to solve, and there are several specific steps that can be taken immediately to address the most pressing issues. The success since 2005 in implementing the 1965 Hague Service Convention can serve as a model. However, lacking political prioritization of these issues, there is a real risk that implementation may stall for years to come.

The starting point for a fair trial is proper service in due time; without such service there is no protection of the defendant or access to justice. Likewise, without the capacity to collect evidence where it is located, a court’s basis for rendering judgment is impaired. In matters of family law, where a child’s interests can be best protected through international judicial cooperation mechanisms, there is no justification for frustrating those interests by blocking
such mechanisms. Russia must honour its legal guarantees that justice can be administered, not only in purely domestic cases but also in cross-border matters.

Pacta sunt servanda is a fundamental principle of civil and international law. Article 26 of the Vienna Convention on the Law of Treaties states that “every treaty in force is binding upon the parties to it and must be performed by them in good faith.” This entitles co-signatories to require that obligations be respected, and to be able to rely upon those obligations being respected. Interestingly enough, this principle has both negative and positive dimensions. In terms of the negative ones, a state cannot refer to domestic provisions of law as grounds to derogate from its international obligations. But the positive effect of the maxim is that when a state is bound to an international treaty it must, in one way or another, amend its domestic law and practices in order to conform to the provisions of the treaty in question.

The unblocking and further enhancement of Russian implementation the Hague Conventions are important for the development of the full array of Russia’s international legal cooperation channels. Russia should move now to bridge the disparities between its principles, norms and obligations on one hand, and its actual practices on the other, both domestically and internationally. In the meantime, further stalling of implementation will impede consistent and uniform application of fundamental norms of international civil procedure. This harms the interests of both foreign and Russian parties and impedes the administration of justice in Russia and abroad.
The analysis conducted by foreign participants of the roundtables regarding the situation with the Russian Federation’s performance of its obligations arising out of a series of international treaties within the framework of the Hague Conference inevitably raises a broader and no less topical problem — determining the stance of Russian authorities towards compliance with international law not only on the level of diplomatic relations, but in the activity of law enforcement authorities and the bodies responsible for the application of the law. It also raises the question regarding the extent to which contemporary practice of the application of law in Russia conforms to the standards of international law. Without claiming to have an exhaustive analysis of this problem, I would like to note several of the most characteristic items in this brief commentary.

The official legal position of the Russian Federation regarding the issue under consideration is quite civilized and contemporary: the rules of international law are an integral part of Russian legislation, and should there be a conflict with national rules of law, the rules of international law have priority. This also follows from the dispositions of the Constitution of the Russian Federation, and from the relevant clarifications of the Constitutional and Supreme Court.

Unfortunately, in practice the realization of these provisions is, to put it mildly, extremely far from the ideal. Russia is the absolute champion in the number of complaints regarding the violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which one could explain by the scale of the country alone, were it not for the realities of the activity of our courts and law enforcement bodies, for whom ignoring the rules of international law (as well as the rules of national legislation which reproduce them), is unfortunately not at all some sort of extraordinary excess. It is just for this reason that Russia maintains a steady lead both in the number of violations recognized by the ECHR, including violations of such fundamental rights as the right to freedom and personal inviolability, to a fair trial established in accordance with the law, and the inadmissibility of prosecution for the purposes other than the pursuit of justice.
Foreign courts and governments frequently refuse to grant the requests of Russian authorities for extraditions and legal assistance, which vividly testifies to and is indicative of the systematic violation of these and other fundamental rights and freedoms by Russian courts and law enforcement bodies. Thus, according to official data of the General Prosecutor’s Office of the Russian Federation, 423 requests to extradite persons sought by the Russian law enforcement authorities were sent to foreign states in 2006, of which 225 were granted, including 206 by CIS states, and refusals to extradite for the purpose of imposing criminal liability or executing a sentence were received for 36 persons.¹ In other words, of those requests that were sent to countries other than CIS countries (where, unfortunately, there are problems with compliance with international law similar to those in Russia), only 19 of (presumably) around 200 requests were granted. According to data of the National Central Bureau of Interpol at the Ministry of Internal Affairs of the Russian Federation, in 2008 the number of persons extradited to the Russian Federation from countries outside the former Soviet Union was “around 20 persons”,² which speaks of a certain stability in these statistics. Such a state of affairs can hardly testify to the compliance of the general position of the requesting party with the rules of international law.

As an illustration of the position of Russia’s law enforcement bodies, one can consider the practice of permitting requests for legal assistance in cases related to YUKOS, its shareholders and employees. In the past few years, there were refusals to grant requests from the Russian side regarding extradition or the provision of information on the part of the authorities of Great Britain (on multiple occasions), Spain, Cyprus, Lithuania, Liechtenstein, Germany, Switzerland, Estonia and others. Moreover, many of the persons whose extradition was requested by the Russian authorities were given political asylum precisely due to their prosecution in the Russian Federation not for the purposes of justice, but for “other” purposes. In a number of such decisions, the political nature of their prosecution was directly specified, and without exception each one indicated bias and lack of sufficient guarantees of a fair trial in the Russian Federation, which meant there were no grounds to grant the request. A court in the Netherlands refused to recognize the decision of a Russian court regarding the bankruptcy of YUKOS, stating that it did not correspond to basic legal standards. Furthermore, there are no grounds for assuming that such a position on the part of foreign courts is an accidental coincidence or has some sort of extralegal subtext.

¹ See: http://genproc.gov.ru/smi/events/actions/news-5543/
² See: http://www.mvd.ru/struct/100072/100073/6128/
Especially taking into account the extremely irritable attitude of the Russian authorities towards any criticism on the part of foreign and international courts and other bodies which the Russian Federation recognizes the jurisdiction of in the issues being considered, these circumstances, as well as the failure to adopt any sort of effective measures to normalize the situation over a lengthy period of time, testify to the presence of profound problems related to the fact that contemporary Russian practice in the application of law is often of an extralegal nature, however monstrous this word combination may seem.
Russia’s performance of its international obligations is indeed a vital task for all state structures — it requires an active stance from the legislative, executive, and judicial branches. In many cases, the priority which the rules of international law possess, as entrenched in the Russian Constitution, is not respected in practice. In essence, even the provisions on the primacy of universally recognized international standards in the area of the rights and freedoms of Russian citizens which proceed from part 1 of Article 17 of the Russian Constitution are not recognized in the judicial practice of the general jurisdiction and arbitrazh courts, despite their unconditional recognition in constitutional regulation as one of the foundations of the constitutional and legal status of Russian citizens. In the best case, the courts either apply the special rules of international treaties, or instead of a case-by-case interpretation and application of universally recognized international principles, which is exactly what is necessary if the legislators did not write the relevant formulation in the text of a law, they tend to avail themselves of what are essentially decorative (or demagogic) citations of them in judicial acts. The conversion of such a “nominal” use of international law into real usage is hindered not only by the courts’ habit of acting upon a law or instruction even if it clearly is against the principles and rules of law of a higher level, but also by the “constraint” of the judiciary through direct instructions coming down along the vertical of power from superior judicial structures, and indirectly from extrajudicial structures. As before, it is considered possible to orient oneself towards universally recognized humanitarian standards during the application of the law only after a special instruction. For example, according to the recommendations formulated by the Supreme Court in the Resolution of its Plenum of 10 October 2003 “On the application of the universally recognized principles and rules of international law and international treaties of the Russian Federation by courts of general jurisdiction,” when examining specific cases, courts are prescribed to apply only those universally recognized principles of international law which
are codified in international pacts, conventions or other documents (in particular, in the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights), and only those international treaties for which a federal law has provided consent to their mandatory nature, that is, only if the international treaty has been ratified. This is a clear limitation in comparison to the constitutional rule of law, which knows no such provisions — the very concept of the sources of the universally recognized principles and rules of international law is narrowed. In this very same resolution, it is recommended that when difficulties in the interpretation of universally recognized international principles and rules of law arise, courts should turn to the Legal Department of the Ministry of Foreign Affairs of the Russian Federation and the Ministry of Justice of the Russian Federation. However, these offices have no authority to determine the law applicable to cases being examined in court. This exclusive authority of the courts may even more so not be made dependent on whether the offices mentioned can cope well with their tasks for providing official translations and publications of international instruments. In addition, legal scholars still remain skeptical regarding the direct application of the universally recognized principles and rules of international law in Russia in instances where they establish rules other than those provided for in domestic law. Moreover, many authors hold that only a treaty, but not the universally recognized principles and rules of international law, can have priority over a national law. However, in international law, no difference is made between ratified and unratified rules of law in regard to their legal force.

Objectively serious difficulties have been encountered in Russian parliamentary practice when bringing national legislation into compliance with the acts of a higher level, including with constitutional and international standards in the area of rights and freedoms. It turns out that when examining legislative initiatives, the legislators are either not ready to recognize their existence from the very beginning, or are not even able to make the necessary changes to their acts where such changes are expressly specified as necessary in the decisions of the constitutional or supranational authority. This situation is due to the blatant failure to recognize constitutional and international law standards and, accordingly, the impossibility of forming the majority opinion necessary for adopting or amending a law. Official data exists regarding this phenomenon in the legislative activity in the Russian Federation: as of the beginning of 2008, the State Duma of the Federal Assembly of the Russian Federation failed to complete legislative regulation
Russia’s Participation in International Agreements

to cure the violations of laws and freedoms confirmed by the Constitutional Court, as provided for by the Russian Constitution (and also the European Convention), in respect of more than 20 federal laws. For this reason, in Russian practice, the Strasbourg court continues to play the role of a second line of defense after the Constitutional Court, even for the defense of the Russian Constitution itself.

It is well known that there have been repeated failed attempts to ratify Protocol No. 6 to the European Convention, which had already been signed by the Russian Federation back in 1997 and which requires the member states to prohibit the death penalty in national practice. From the legal point of view, this failure to ratify does not withstand criticism. Yet there is persistent work to influence public opinion by asserting the opposite, justifying the preservation of the death penalty in the law as subordination to the will of the people. Here we are not even speaking of the inadmissible idea that the country may permit itself not to perform the international obligations which it has taken on. The issue is whether one can publicly promote the violation of one’s own Constitution, which guarantees rights and freedoms to its citizens in accordance with international legal principles and which requires that the application of a domestic law cease if it contradicts an international treaty. The European Convention, which we signed and ratified, made the abolition of the death penalty a mandatory condition for Russia to join the Council of Europe. There is one more international law rule contained in the Vienna Convention on the Law of Treaties, according to which up until its ratification, a state which has signed any treaty (and Russia signed both the European Convention and Protocol No. 6, which is an integral part of it) may not carry out actions within the country which would contradict the goals or subject matter of the international treaty which has been concluded. One can be released from these obligations only through exiting the treaty. While this has not been carried out officially, actions which contradict the goals or subject matter of the concluded but unratified treaty may not be carried out in the country. The provisions of the Russian Constitution which allowed for the possibility of a temporary preservation of the death penalty in the law, literally according to its text only “henceforth until it is repealed”, are meant for the transition period, which has already expired, because the signing of an international treaty leads to the termination of the effect of a national law which contradicts this treaty. This took place precisely by force of the Constitution; no temporary provisions meant that a transition period may serve as the basis for not recognizing the constitutional regulation of rights and freedoms, and in the Constitution
of the Russian Federation the right to life is named as the first one in the series of rights and freedoms of the person. The Constitutional Court already confirmed this in 1999. This corresponds to the spirit and letter of the Constitution, according to which no law may repeal or reduce rights of the person which the Constitution recognizes, including freeing the State from the duty to ensure such rights in accordance with the rules of international law. Even though it has not been ratified, the international treaty has priority over the law which contradicts it, and paralyzes the action of the articles of the Russian Criminal Code which permit the application of the death penalty. Russia's signing of the international treaty prohibiting the death penalty is a form of its repeal in the national legal system. Again the matter is not that the State's violation of universally recognized standards of humanitarian law is related to a lack of trust towards it in international relations, but that the authorities are negating their constitutional obligations to citizens.

This *modus operandi* has also been continued with the failure to ratify Protocol No. 14 to the European Convention, which is aimed at amending ECHR procedures in order to increase effectiveness and accelerate the review of cases.¹ Russia is the only country which has refused to ratify this document. However, the justifications given for this action in essence reveal a desire to prevent its citizens from realizing their constitutionally recognized ability to turn to the Strasbourg court for the protection of rights which have been violated. On the face of it, these justifications consist of a logically unfounded apprehension that the procedures established in the new rules of the protocol, which accelerate and simplify proceedings in the ECHR, will be used “against” Russia, since they permit individual judges to render decisions on the admissibility of an appeal and on the significance of a violation. These decisions would be prerequisites for the transfer of the case for review by a collegium of judges, and thus accordingly make it possible to more quickly and easily make a decision which requires curing violations of the rights of Russian citizens inside the country. In essence, such justifications testify to the fact that the legislators first of all do not consider themselves to be bound by the current rights and freedoms of the person which have direct effect and which must determine the activity of state authorities, and consequently not bound by the constitutional rule of law which sets out the above requirement (Article 18 of the Russian Constitution), and secondly, they consider the

¹ Editor’s note: Russia finally ratified Protocol No. 14 in January 2010. Protocol No. 14 was signed by Russia in May 2006, however since December 2006 the State Duma had opposed ratification.
restoration of a citizen’s violated rights as causing damage to the State, while the authentic meaning of curing violations is that doing so serves the rule of law, and in this way promotes the country’s progress. By the way, the number of appeals to the ECHR from Russia is proportional to its population and does not exceed those received from other countries in relation to their populations. But regardless of the number of such cases, this must force one to search for methods which are aimed not at obstructing such appeals, but at modernizing the national means of legal protection.