

ACTA UNIVERSITATIS UPSALIENSIS

*Uppsala Studies on Eastern Europe*

9

# The Uppsala Yearbook of Eurasian Studies

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# The Uppsala Yearbook of Eurasian Studies III

EDITED BY  
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UPPSALA  
UNIVERSITET

2022

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In this volume, we sought to preserve the contributors' individual linguistic expression, spelling and bibliography style as much as possible in an effort to give respect and recognition to different academic traditions and cultures as well as conflicting conventions accepted in various distant disciplines covered by the present volume.

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Production: Graphic Services, Uppsala University  
The main text typeset with Times New Roman

Distributor:  
Uppsala University Library  
Box 510, 751 20 Uppsala, Sweden  
[www.ub.uu.se](http://www.ub.uu.se)  
[acta@ub.uu.se](mailto:acta@ub.uu.se)

ISSN 1104-6481  
ISBN 978-91-513-1213-2  
<http://urn.kb.se/resolve?urn=urn:nbn:se:uu:diva-439546>

Printed in Sweden by DanagårdLiTHO AB, Ödeshög 2022

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# Statement of Editorial Policy

On 11 March 1985 Mikhail Gorbachev was elected General Secretary of the Communist Party of the Soviet Union. This was the time when Europe was divided into two. Like Germany, the European Continent consisted of two parts called East and West, the origin being the Yalta Conference of 1945 and its monument, the Berlin Wall. Gorbachev launched a reform process, known as perestroika, which profoundly influenced developments not only in his own country, but also the rest of Eastern Europe, eventually leading to the opening of the Berlin Wall on November 9 1989 and to the reunification of Germany, a year later. These remarkable events in turn catapulted the reform process into unknown directions. Eventually the dissolution of the Soviet Union ensured the collapse of the communist system there, as well as in Eastern Europe. All these countries, which were planned economies with the accompanying legal, political and economic consequences, have now been transformed, or are still in the process of being transformed.

The primary focus of the Yearbook is scholarly study of the economic, legal and political aspects of this transformation process, its historical roots, the various forms and methods used, the problems, results and the consequences. At the same time, the Yearbook strives to be a publication for practitioners both in the private and public sectors. It is the firm belief of the Editors that scholarly analysis and research can and indeed must – go hand in hand with practical experience. This is particularly true in a constantly and rapidly developing geographical area such as the landmass to which we now refer as Eurasia. By the same token, it is the ambition of the Yearbook to cover all areas of law, politics and economy. This transition process has no historical equivalent, yet it is burdened with the legacies of the past. These legacies must be studied, analysed and assessed so that we may understand what is happening today and what will happen in the future.

The Yearbook is concerned with the legal, political and economic systems of all the former planned economies in the former Soviet Union, Central and Eastern Europe, and to a limited extent in China, collectively for present purposes, albeit somewhat imprecisely, referred to as Eurasia. Some observers might take the view that transition cannot go on forever, that it must be completed at some point. An economist might perhaps argue that with respect to some countries in Eastern Europe the transition must be over when they have become members of the European Union, since membership requires a functioning market economy. For the lawyer and legal scholar, however, transition and its consequences will continue to cast a long shadow over the legal systems concerned for many years – indeed decades – after membership of the European Union. For example, building appropriate and efficient institutions, educating and training lawyers, and strengthening the rule of law will

take considerable time. A functioning legal system, in particular a robust and impartial judicial branch, is a cornerstone for a functioning market economy. The rule of law in turn presupposes a certain political structure as well as both political stability and flexibility.

Neither a serious publication, nor scholarship need be dull. The Yearbook seeks to be scholarly and practical, lively and readable. The Editors wish the Yearbook to remain on the desks of busy practitioners and scholars alike and not to fly past like an autumn leaf in the wind. The Editors do not necessarily share, or endorse, any particular view expressed in contributions to the Yearbook. The Yearbook will not shun controversy or unpopular views – indeed controversy is expected and welcomed. It is believed that confronting issues from all sides, rather than avoiding them, is a better way of understanding the past, present and future development in the countries comprising Eurasia.

Uppsala, 2022-01-13

# ARTICLES



# The 30th Anniversary of the Department of Commercial Law of St. Petersburg State University

(Review of the Conference)

ZLATA E. BENEVOLENSKAYA

Professor Anatoliy A. Sobchak became the first chairperson of the Department of Economic Law of Leningrad (St. Petersburg) State University (LGU) when it was founded in 1985. Prior to that, he had been a faculty member of the Department of Civil Law at the same university. In the newly established Department of Economic Law, he was joined by Konstantin K. Lebedev and Vladimir F. Popondopulo – also from the LGU Civil Law Department – and by L.L. Gremiako, N.T. Osipov, A.S. Shesteriuk, and V.S. Timeskova (Shishkina) who were previously associated with the LGU Department of Collective Farm (*kolkhoz*) and Land Law which, by that time, already had been closed down.

To put this development in a national context, it should be noted that by 1985, economic law departments were already functioning at some of the leading universities of the USSR, including Kyiv State University and Kharkov University of Law; there also was an Economic Law Sector within the prestigious Institute of the Law and State of the USSR Academy of Sciences. Yet, by no means was the concept of Economic Law studied in a uniform fashion throughout the USSR;<sup>1</sup> rather, it was differently interpreted by legal scholars from various schools of thought.

Some argued that Economic Law was an independent branch (*otrasl*) of public law that regulated both state control over the economy and economic activity itself, united in a homogeneous system of relations. Their goal was to create a new Economic Code (*khozyaystvenniy kodeks*), bringing together rules and regulations already enshrined in Soviet administrative law and civil law – concerning governmental control and economic activity, respectively.

However, there were others who emphasized the fundamental difference between state regulation of the economy on one hand, and the legal (and other) relationships among those engaged in economic activity on the other. In their view, the first realm should be governed by administrative law, the second by civil law. From this perspective, Economic Law could not be seen as an independent branch of law.

The latter approach – the “civilistic” concept of legal regulation of economic activity – inspired the creation and activity of the LGU Economic Law Department. Economic Law was seen as a multi-layered branch of law, and a scholarly discipline

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<sup>1</sup> We do not refer to the understanding of economic law in other jurisdictions here.

arising from the interface of centralized planning and cost-accounting management that then existed in the socialist economy. There is no dissent from the proposition that success in this field belongs to Professor Sobchak – the first Mayor of St. Petersburg, as well as a prominent politician at the national level. Part of his broad vision was to invite scholars who shared his views to join the Department, allowing him to ensure that the work of the Department would continue in the future.

The Department's roots in academia and society grew as a result of Russian economic reforms in the 1990s: the rapid transition to a market economy and new legislation implementing this change prompted the Department to engage in teaching and legal research in the new field. Vladimir Popondopulo (from 1989, the acting department head, and elected head of the Department in 1992,) developed and introduced a new core discipline at the Faculty: Commercial Law (*kommercheskoe pravo*). This proved to be the inspiration for renaming the Department, at his suggestion.<sup>2</sup>

To mark the 30-year anniversary of the Department of Commercial Law,<sup>3</sup> a conference – presided over by Professors Popondopulo and Skvortsov – held in mid-

<sup>2</sup> See “Kafedra Kommercheskogo Prava,” <http://law.spbu.ru/structure/departments/commprava/About.aspx>.

<sup>3</sup> The main publications of the Department included A.A. Sobchak, V.F. Iakovleva, N.D. Egorova (Eds.), *Kooperativnoe Pravo. Uchebnoe Posobie*. (SpbGU, St. Petersburg, 1992); V.F. Iakovleva, V.F. Popondopulo (Eds.), *Kooperativnoe Pravo. Uchebnoe Posobie*. (SpbGU, St. Petersburg, 1993); *Aktualnye Problemy Nauki i Praktiki Kommercheskogo Prava: Sbornik Statei*. (SpbGU, St. Petersburg, 1995); V.F. Iakovleva, V.F. Popondopulo (Eds.), *Kommercheskoe Pravo. Uchebnik. Chast 1*. (SpbGU, St. Petersburg, 1997); *Kommercheskoe Pravo. Uchebnik. Chast 2*. (SpbGU, St. Petersburg, 1998); *Aktualnye Problemy Nauki i Praktiki Kommercheskogo Prava: Sbornik Statei, Vypusk 2*. (SpbGU, St. Petersburg, 1998); *Aktualnye Problemy Nauki i Praktiki Kommercheskogo Prava: Sbornik Statei, Vypusk 4*. (SpbGU, St. Petersburg, 2002); V.F. Popondopulo (Ed.), *Kommercheskoe Pravo Zarubezhnykh Stran. Uchebnoe Posobie*. (SpbGU, St. Petersburg, 2003); V.F. Popondopulo (Ed.), *Kommentarii k Federal'nomu Zakonu "O Nesostoitel'nosti (Bankrotstve)"*. (Moscow, 2003); V.F. Popondopulo (Ed.), *Mezhdunarodnoe Kommercheskoe Pravo. Uchebnik*. (Moscow, 2004); V.F. Popondopulo (Ed.), *Kommentarii k Federal'nomu Zakonu "O Nesostoitel'nosti (Bankrotstve)"*. 2 Izdanie. (Moscow, 2004); V.F. Popondopulo (Ed.), *Kommercheskoe Pravo Zarubezhnykh Stran. Uchebnik*. (SpbGU, St. Petersburg, 2005); O.A. Gorodov (Ed.), *Kommentarii k Zhilishchnomu Kodeksu Rossiiskoi Federatsii (Postateinyi)*. (Moscow, 2005); V.F. Popondopulo (Ed.), *Mezhdunarodnoe Torgovoe Pravo. Uchebnoe Posobie*. (Moscow, 2005); A. Khokhlov, Iu. Bushev, and O.Iu. Skvortsov, “The Theoretical Underpinnings of Commercial Law: A Russian View of Bankruptcy and Securities”, *Review of Central and East European Law*, 2–4 (2005); V.F. Popondopulo, O.Iu. Skvortsov (Eds.), *Aktualnye Problemy Nauki i Praktiki Kommercheskogo Prava: Sbornik Statei. Vypusk 5*. (Moscow, 2005); V.F. Popondopulo (Ed.), *Mezhdunarodnoe torgovoe pravo. Uchebnik. 2 Izdanie*. (Moscow, 2006); O.A. Gorodov (Ed.), *Kommentarii k Zhilishchnomu Kodeksu Rossiiskoi Federatsii (Postateinyi)*. 2 Izdanie. (Moscow, 2007); V.F. Popondopulo, D.F. Nefedov (Eds.), *Aktualnye Problemy Nauki i Praktiki Kommercheskogo Prava: Sbornik Statei. Vypusk 6*. (Moscow, 2007); V.F. Popondopulo (Ed.), *Kommercheskoe (Predprinimatelskoe) Pravo. Uchebnik. V 2 Tomakh, 4 Izdanie*. (Moscow, 2009); O.A. Gorodov (Ed.), *Kommentarii k Zhilishchnomu Kodeksu Rossiiskoi Federatsii (Postateinyi)*. 3 Izdanie. (Moscow, 2009); V.F. Popondopulo (Ed.), *Kommentarii k Federal'nomu Zakonu "O Nesostoitel'nosti (Bankrotstve)" (Postateinyi)*. 3 Izdanie. (Moscow, 2011); O.A. Gorodov (Ed.), *Kommentarii k Zhilishchnomu Kodeksu Rossiiskoi Federatsii (Postateinyi)*. 4 Izdanie. (Moscow, 2012); V.F. Popondopulo, O.A. Makarova (Eds.), *Kommercheskoe (Torgovoe) Pravo Zarubezhnykh Stran. Uchebnik. 2 Izdanie*. (Moscow, 2013); V.F. Popondopulo (Ed.), *Mezhdunarodnoe Torgovoe Pravo. Uchebnik. 3 Izdanie*. (Moscow, 2013); *Johdanto: lyhyt historiallinen kuvaus* (monograph); Soili Nysten-Haarala, Olga Makarova, and Onerva-Aulikki Suhonen (Eds.), *Sopimusoikeus Siomessa ja Venäjällä*. (Helsinki, 2013); Olga Makarova and Soili Nysten-Haarala (Eds.), *Kontraktное Pravo Rossii I Finlandii* (Saarbrücken, 2013); V.F. Popondopulo, D.A. Petrov (Eds.), *Kommentarii k Federal'nomu Zakonu "O Zashchite Konkurentsii" (Postateinyi)*. (Moscow, 2013); E.V. Gritsenko, G. Maissen, and A. Himmelfreich (Eds.), *Publichno-Chastnoe Partnerstvo v Munitsipal'noy Sfere. Germanskii i Rossiiskii Opyt*.

2015<sup>4</sup> in St. Petersburg was devoted to a discussion of selected issues in the theory and practice of commercial (business) law.

I. University Prorector Marina Iuryevna Lavrikova welcomed participants and guests to the conference opening with the following speech:

“Today, the Department grapples with some of the most important problems of the modern world: making the realm of Commercial Law particularly relevant in the present. The market is constantly changing, and these changes also continuously require our attention in the form of clinical legal thinking, as well as legal rules and regulations that need to be in alignment with global economic needs. This means that the Department faces a bright future for its further academic work.

“In closing, I would like once more to extend heartfelt congratulations to one and all, and to wish to all the conference participants debates that will surely be interesting, and discussions that undoubtedly will be productive. Last, I invite those who regularly attend convocations on Twenty-Second Street – the way in which we often refer to the Law Faculty here in St. Petersburg – to maintain your interest in the Department of Commercial Law in particular and, in general, in the problems that are discussed in this and in the other halls of academia within our august university.”

II. Following these words of welcome from academia on behalf of the Law Faculty and the University, the floor was given to the judicial branch: Igor Mikhailovich Strelov, Chairperson of the North-Western Circuit *Arbitrazh* (Commercial) Court:

“My dear colleagues, I am delighted to add my words of welcome to all at this impressive gathering, which brings together scholars from leading legal institutions – as well as research institutes – of the Russian Federation. The Department of Commercial Law enjoys remarkably robust links with our *Arbitrazh* courts, and the Department’s entire research horizon, in fact, encompasses the whole range of issues encountered in our courts. Many scholars who work at the Department are active participants in our court’s academic advisory council on Energy Law, including Andrei Iuryevich Bushev and Oleg Alexandrovich Gorodov. Vladimir Fedorovich

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(Moscow, 2014); V.F. Popondopulo, D.A. Petrov (Eds.), *Bankovskoe Pravo. Uchebnik*. (Moscow, 2014); V.F. Popondopulo, N.A. Sheveleva (Eds.), *Publichno-Chastnoe Partnerstvo v Rossi i Izarubezhnykh Stranakh: Pravovye Aspekty*. (Moscow, 2015); V.F. Popondopulo (Ed.), *Kommercheskoe (Predprinimatelskoe) Pravo. Uchebnik. V 2 Tomakh, 5 Izdanie*. (Moscow, 2015); V.F. Popondopulo (Ed.), *Kommentarii k Federalnomu Zakonu “O Nesostoitelnosti (Bankroistve)” (Postateinyi)*. 4 Izdanie. (Moscow, 2015)

<sup>4</sup> This essay was translated into English in the second half of 2016. The author expresses great gratitude to Professor W.B. Simons (University of Tartu, Estonia) for the great intellectual and creative work contributed to the translation of this essay. The author of the essay had no opportunity to publish materials in the West, and was recommended for publication in the *Uppsala Yearbook* by Professor J. Henderson (King’s College, London). The author expresses her great gratitude to Professor J. Henderson for her recommendations. This essay was sent for publication to the *Uppsala Yearbook* in April 2018. The conference materials were first published in Russian in the briefest version: D. A. Petrov, D.A. Zhshmulina, and A.M. Barinov “Review of the Results of the Interschool Scientific and Practical Conference ‘Actual Problems of Science and Practice of Commercial Law.’” *Business Law, No. 4*, 2015; *Competition Law, No. 4*, 2015.

Popondopulo always provides us assistance in drafting advisory opinions and participating in our legal conferences, for which we are always grateful.”

III. The Chair of the Department of Commercial Law, Professor Vladimir Fedorovich Popondopulo,<sup>5</sup> delivered the Conference’s keynote speech titled “Problems of the Interaction between the State and the Business Sector.”

“In my opinion, it is wiser to establish a methodological ground for discussion, which is the *first goal* of my remarks today. The *second goal* is for us, as specialists in the field of (international) commercial law, to mention some names that may be new to others. Despite the fact they are already often cited in works of philosophy, economics, and the theory of law (or even another field), they seem – for reasons that are unclear to me – to be marginalized by some in our field. Nevertheless, they are key names for developing our methodology. One of these is the renowned German philosopher Wilhelm von Humboldt, whose little-known work on the limits of state action<sup>6</sup> (dating from 1792, but only published posthumously in 1851), in my opinion, answers the question about whether the state should provide for security alone, or for the whole physical and moral well-being of the nation: ‘The State is to abstain from all solicitude for the positive welfare of the citizens, and not to proceed a step further than is necessary for their mutual security and protection against foreign enemies; for with no other object should it impose restrictions on freedom.’<sup>7</sup>

“Despite the fact that social relations obviously have changed since then, von Humboldt makes a sound point, i.e., that the sole goal of the state should be protecting society and its members from harm from within and without.

“Since then, economists have made the most of progress in examining questions about the interaction between the state and entrepreneurial activity. This can be explained by the obvious fact that the field of economic research are intimately linked with those economic and social processes that are subject to various limitations, including those of an institutional (*inter alia*, of a legal) nature. These processes are shaped not only by the usual hurdles that stand in the way of the development of a

<sup>5</sup> Professor V.F. Popondopulo has published more than 300 works, including: *Dinamika Obiazatel'stvennogo Pravootnosheniia i Grazhdansko-Pravovaia Otvetstvennost (Monografiia)* (Vladivostok, 1985); *Pravovoi Rezhim Predprinimatel'stva (Monografiia)* (St. Petersburg, 1994); *Kommercheskoe (Predprinimatel'skoe) Pravo. Uchebnik. 3 Izdanie.* (Moscow, 2008); *Bankrotstvo: Pravovoe Regulirovanie (Monografiia)* (Moscow, 2012); *Kommentarii k Federalnomu Zakonu "O Nesostoitel'nosti (Bankrotstve)" (Postateinyi). 3 Izdanie.* (Moscow, 2011). He also took part in the following research projects on the development of the following model laws for CIS (Commonwealth of Independent States) member states: “O Bankrotstve Bankov” (2005); “O Torgovle” (2008); Development of the Model Law for CIS Members “O Sudoustroistve i Statuse Sudei” (2010–2011); “O Gosudarstvenno-Chastnom Partnerstve” (2013–2014); “O Predprinimatel'stve” (2014–2015); “O Treteiskih Sudah” (2014–2015). See <http://law.spbu.ru/structure/departments/commprava/member/20ec8188-4560-4952-a216-04c0a2e29afc.aspx>.

<sup>6</sup> Wilhelm von Humboldt, *Ideen zu einem Versuch, die Grenzen der Wirksamkeit des Staatszubestimmen* (Trewendt, Breslau, 1851), available at [http://www.deutschestextarchiv.de/book/show/humboldt\\_grenzen\\_1851](http://www.deutschestextarchiv.de/book/show/humboldt_grenzen_1851); in Russian as *O Predelakh Gosudarstvennoi Deiatel'nosti* (Fond Liberalnykh Program "Svobodnyi Mir", Biblioteka GVL, Seriya politika, Sotsium, Cheliabinsk, 2009); and in English as *The Sphere and Duties of Government (The Limits of State Action)* (John Chapman, London, 1854, Joseph Coulthard, Trans.), available at [http://files.libertyfund.org/pll/pdf/Humboldt\\_0053\\_EBK\\_v7.0.pdf](http://files.libertyfund.org/pll/pdf/Humboldt_0053_EBK_v7.0.pdf).

<sup>7</sup> *Ibid.*

free economy (scarcity of resources, fluctuation of prices, and market mechanisms), but also by public limitations (legal rules, administrative barriers, and court costs). Ludwig von Mises highlighted this well in his 1949 work on human action. As with other Western economists, he believed that the individual – with her own egoistical interests pursued through a constant cost-benefit analysis – is the main subject of social interaction. While defining economics as the philosophy of human life, Mises based his findings on the method of ideal construction: detached from the facts of objective reality in order to understand hypothetical consequences of their absence, and thus realize the nature of the examined relations. Suppose there is no state or no other limitations: how would the economy and market develop? The ideal model of market structure includes the existence of division of labor and private property; thus, requiring the need for the market exchange of goods and services. This activity is not hindered by institutional factors. Therefore, the state and other forms of social control aim to protect the market system, not damage its functions. These assumptions form the basis of Mises' explanation of the principles of a pure market economy, and problems arising from interventions in the market by the government (or other authorities) are part of the author's analysis. Mises writes: 'The state, the social apparatus of coercion and compulsion, does not interfere with the market and with the citizens' activities directed by the market. It employs its power to beat people into submission solely for the prevention of actions destructive to the preservation and the smooth operation of the market economy. It protects the individual's life, health, and property against violent or fraudulent aggression on the part of domestic gangsters and external foes. Thus, the state creates and preserves the environment in which the market economy can safely operate.'<sup>8</sup> As one can see, both Mises the economist and Humboldt the philosopher share the same view on the role of the state in society and, more importantly, base their beliefs on the same solid scientific method: the primary nature of society and secondary nature of its institutions, including law and state. Many lawyers have views that are narrowed by the paradigm of legal relations, disregarding the fact that they (legislation, administrative acts, and court judgments) are dependent on the state of social – primarily economic – relations. For example, the late Italian philosopher and lawyer Bruno Leoni wrote in 1961 that 'It seems to be the destiny of individual freedom at the present time to be defended mainly by economists rather than by lawyers or political scientists.'<sup>9</sup>

“As for lawyers, they are, of course, initially obligated to speak from the standpoint of their legal systems, which only leave a space for freedom that is shrinking

<sup>8</sup> Ludwig von Mises, *Human Action: A Treatise on Economic* (The Ludwig von Mises Institute, Auburn, AL, 1998, original English-language edition. 1949), available at <https://mises.org/library/human-action-0>; originally issued as *Nationalökonomie: Theorie des Handelns und Wirtschaftens* (Editions Union, Genf 1940), available at <http://austrian-library.s3-website-us-east-1.amazonaws.com/books/Ludwig%20von%20Mises/Nationalokonomie%20Theorie%20des%20Handelns%20und%20Wirtschaftens.pdf>; and in Russian as *Chelovecheskaia Deiatelnost: Traktat po Ekonomicheskoi teorii* (Ekonomika, Moscow, 2000).

<sup>9</sup> Bruno Leoni, *Freedom and the Law* (Liberty Fund, Indianapolis, IN, 1991 3rd rev. ed., Arthur Kemp, foreword), 3; and *id.*, *Svoboda I pravo* (Institutraspostraneniainformatsiiposotsial'nymiekonomicheskimnaukam, Moscow, 2008, V. Koshkin, transl.).

rapidly and constantly. The voluntarism of the legislator and the executive branches of government – in Russia as well as abroad – damages the economy and societal life as a whole. Individuals have to comply with an increasing number of restrictions and incur additional costs, which later become a burden for the whole of society: the functioning of the economy will slow down, and the standard of living will decrease. It is, therefore, no coincidence that of late, a number of Russian scholars are promoting what for us has become a new area in legal science and economics: law and economics (the economic analysis of law [*ekonomicheskii analiz prava*]<sup>10</sup>) as the design of legislation – certainly in this branch of law and the application thereof – depend, to a large degree, on whether patterns of societal development are taken into account and, if so, how this is done. It does not mean that law cannot impact society: on the contrary, legislative, administrative, and judicial regulation is meant to organize public life. However, this regulative process should take the form of responding to delinquent behavior of people who infringe the rights and lawful interests of others. Yet there can be ‘too much of a good thing’, and, regretfully, no branch of power in Russia is free from shortcomings resulting in excessive governmental intervention in public and private life, including in the business sphere. This notwithstanding, I am a firm believer in the role of judicial regulation – protecting the rights and lawful interests by means of court proceedings – as the most suitable type of such government activity, for reasons which I shall set forth here.

“Since legal proceedings are initiated by parties to a dispute, not the court itself, and since court judgments can always be examined – and, where necessary, revised or overturned – by higher courts, there is the least voluntarism in this branch of state power (dare we call it the ‘least dangerous branch?’).<sup>11</sup> My belief in the role of judicial regulation remains strong, despite concerns of some with the issue of the (extraordinarily) high dependence of the Russian judiciary on the executive branch.

“Administrative regulation of social relations, on the contrary, can be characterized as being the most subject to voluntarism. In recent years, there have been attempts to limit supervisory checks, remove administrative barriers, launch a transition to the self-regulation of business sectors, etc. This is all fine, but nevertheless, the presence of the state in all spheres of entrepreneurship – as well as in other spheres of social activity – remains noticeable, to say the least.

“This continuing, ubiquitous state presence is often explained by the existence of a permanent crisis that is used as an apology for so-called *ruchnoe upravlenie*

<sup>10</sup> See, e.g., Gadis A. Gadzhiev et al., *Konstitutsionnaia ekonomika* (Iustitsinform, Moscow, 2010); since the works of Ronald Coase and Guido Calabresi appeared in print in 1961 (“The Problem of Social Cost”, 3(1) *The Journal of Law and Economics* (1960), 1–44; and “Some Thoughts on Risk Distribution and the Law of Torts”, 70(4) *Yale Law Journal* (1961)”, 499–553, respectively), the works in the field in English are numerous. Therefore, only one citation here to a work in English which also has been translated into Russian: Richard Posner, *Economic Analysis of Law* (Wolters Kluwer Law & Business, Alphen aan den Rijn, The Netherlands, 2014, 9th ed.), and *id.*, *Ekonomicheskii analiz prava*, 2 Vols. (Ekonomicheskaiia shkola, St. Petersburg, 2004, V.L. Tambovtsev, transl.).

<sup>11</sup> Alexander M. Bickel, in *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill, New York, NY, 1962), cited, for example, a Russian translation of Ronald Dworkin’s 1977 work *Taking Rights Seriously: O Pravakh Vserez* (*Rossiiskaia Politicheskaiia Entsiklopediia*, Moscow, 2004, M.D. Lakhuti and L.B. Makeeva, transl.).

(‘manual control,’ administrative regulation). In turn, this means that state officials – the face of the state – often feel compelled (if not entitled) to act not according to the letter (or even the spirit) of the law, but according to some higher authority which, while good for the ‘checklist,’ might amount to a violation of the law. There are more than enough examples of this, which shall remain outside the framework of this presentation.

“Voluntarism in the law-making process, regrettably, flourishes as well – even (or is it especially?) in recent years. One can come away with the impression that different legislative bodies are engaged in a bizarre kind of competition with one another, leading to the question of what the fundamental ‘yardstick’ is in this area: the greatest number of draft bills, or those that are adopted? This, in turn, results in an increase in the amount of legislation enacted in one year compared with the prior year. The Russian legislator does not seem to realize that when legislation changes too frequently, it can destabilize society, including conditions under which businesses must operate. This legislation, therefore, is not even technically ‘legislation’ but, rather, administrative acts promulgated in a different form. Leoni notes that: ‘legislation appears today to be a quick, rational, and far-reaching remedy against every kind of evil or inconvenience, as compared with, say, judicial decisions, the settlement of disputes by private arbiters, conventions, customs, and similar kinds of spontaneous adjustments on the part of individuals. A fact that almost always goes unnoticed is that a remedy by way of legislation may be ... too directly connected with the contingent views and interests of a handful of people (the legislators), whoever they may be, to be, in fact, a remedy for all concerned. Even when all this is noticed, the criticism is usually directed against particular statutes rather than against legislation as such, and a new remedy is always looked for in ‘better’ statutes instead of in something altogether different from legislation.’<sup>12</sup>

“He attributes this to the dependence of the legislature on the executive branch, excessive legislation, and a substantial increase in pseudo-lawful activities of the government. Therefore, traditional lawmaking powers of the parliament are becoming weaker due to the expanding quasi-legislative powers of the executive. However, Leoni goes on to say that ‘One cannot lose sight of the fact that the ever-growing power of governmental officials may always be referred to some statutory enactment enabling them to behave, in their turn, as legislators and to interfere in that way, almost at will, with every kind of private interest and activity. The paradoxical situation of our times is that we are governed by men, not, as the classical Aristotelian theory would contend, because we are not governed by laws, but because we are. In this situation, it would be of very little use to invoke the law against such men. Machiavelli himself would not have been able to contrive a more ingenious device to dignify the will of a tyrant who pretends to be a simple official acting within the framework of a perfectly legal system.’<sup>13</sup>

<sup>12</sup> Leoni, *op.cit.* note 7

<sup>13</sup> *Ibid.*, 7.

“To be sure, Leoni does not advocate the complete rejection of the legislation; rather, he argues that ‘legislation is actually incompatible with individual initiative and decision when it reaches a limit that contemporary society seems already to have gone far beyond’.<sup>14</sup> However, defining what should not be done is the sole task of legislation.

The lawyer Leoni, therefore, holds the same views as Humboldt the philosopher and Mises the economist: none of them rejects the role of state and society, but they all posit that there should be limits on the actions of these institutions. A proper understanding of interaction between state and society is directly linked to an answer to the question of the correct understanding of the role of law itself. Legal theorists and thinkers in various branches of law take great pains in defending their views on the correct answer to this question. Yet, only a few are able (or willing?) to focus on the origins of law: philosophical, economic, and moral. And those who consider these factors often take a myopic view and find only one niche – in doing so, dismissing the possibility of the existence of other origins of law; *i.e.*, pluralism in the origins of law.<sup>15</sup>

“For example, in his work on legal theory, Vladimir Mikhailovich Syrykh argued that ‘the modern understanding of law can only be materialist’.<sup>16</sup> Such a Marxist understanding of law can be appropriate only when it is considered as one of the many diverse approaches to understanding law. However, if we consider law as a totality of rules of conduct that express the will of the ruling class and are embodied in legislation – a view that the author, thankfully, does not espouse – we once again return to the ubiquitous power of the state, which gives us law in the form of legislation that it produces. Unfortunately, support for this view can still be seen among Russian jurists; but, here too, ‘naming names’ in this regard shall remain outside the framework of this presentation.

“Professor Romanets, in his engrossing work ethics and law, alas, fails to connect the origins of law to the will of the individual; rather, he contends that ‘God creates laws for each of its creations, including humans. For that reason, by the will of God, public institutions, primarily the state and law, were created in order to preserve moral values.’<sup>17</sup>

“It should not be denied that, alongside the social origins of law, there definitely is a place for spiritual and moral values in the origins of law as well as for materialist, judicially oriented, and other understandings. Different types of legal consciousness only enrich what is an extraordinarily broad concept. But when I imagine the modern state with its bureaucratic system and abuses of power, my own powers of reason refuse to link all of this to spiritual and moral values of society. The state often seeks to exploit the religious feelings of people by using religion as a substitute for its own – alas, all too often subjective – decisions.

<sup>14</sup> *Ibid.*, 7.

<sup>15</sup> In general, see F.J.M. Feldbrugge, *Law's Beginnings...*

<sup>16</sup> *Materialisticheskaia Teoriia Prava*, 3 Vols. (RAJ, Moscow, 2011).

<sup>17</sup> *Eticheskie Osnovy Prava i Pravoponimaniia* (Zertsalo-M, Moscow, 2012).

“Research into the multiple dimensions of forging social relationships has been conducted by Professor Maltsev, embodied in his *abcd* work on the social foundations of law.<sup>18</sup> Although written during the Soviet era, it has not lost its topicality – which, from my perspective, makes it a valuable source of inspiration in our considerations in the XXI century. He writes that the institutional dependence between individuals and the market, in the event of positive conditions that lead to commercial success, affects the ability of market agents to successfully assimilate into institutional market structures, adapt to changes, and affect the process of their establishment. The state includes a large number of hierarchically intertwined bureaucratic structures.

“Frequently, in order to avoid responsibilities connected with major social problems and simultaneously create the impression of active work, a modern bureaucracy has adopted the habit of simply reacting to complicated questions of social life: it creates masses of meaningless laws and establishes useless institutions that are not needed by society at all. The author highlights that social – primarily economic – institutions appear as a result of effort of many social subjects, natural and legal persons, civil society, and, obviously, the state. In this regard, the economic mission of the state is subject to criticism, and the spectrum of views on this issue is enormous – ranging from libertarian, which reject the state and idealize the entrepreneur and the concept of private property, to socialist.

“Less radical liberal views – classic Western liberalism and its different types – also promote the privatization of state functions and limitation of its regulation in the economic sphere. I argue that the state should be maximally detached from private matters, its main duty being to protect the individual and society as a whole by adopting necessary legislation, executive orders, and court judgments reacting to deviant behavior. For a proper understanding of social interactions, individuals and society should be treated as primary and political institutions first, and the state and law second. The distinction of human activity between private (free from legal impediments) and public (secondary, functional) types of action is crucial for the characterization of entrepreneurship and the state, the structure of society, legal framework, and activity – understanding the role of state as defined in the theory of entrepreneurship, as I wrote in 1994<sup>19</sup>.

“Our colleague, Professor Andrei Vasilyevich Poliakov, is correct in concluding that the individual is the core of society, and her rights are an institution that is able to exist without orders from the state.<sup>20</sup> While opponents may say that human rights are as important as state, religion, and morality, these institutions never will be a goal in and of themselves. Only mankind can qualify as this goal. However, as mankind is not an isolated species, this goal implies a communicative society and interaction among human beings. Therefore, the state should protect this communication from all kinds of abuse on the part of the communicating parties themselves; however,

<sup>18</sup> *Sotsial'nye Osnovaniia Prava* (NORMA, Moscow, 2007).

<sup>19</sup> Popondopulo, V.F. *Pravovoi Rezshim Predprinimatelstva*. Izdatelstvo SPbGU, 1994.

<sup>20</sup> Poliakov, A.V. *Verkhovenstvo Prava, Globalizatsiiai Problemi Modernizatsii Filosofii i Teorii Prava*// Pravovedeniie, 2013 №4, p. 24

first and foremost, it must self-purify itself from the misuse of power by its huge army of representatives. The enormous number of representatives can be explained in the context of a socialist, or, according to Mises, interventionist economic system. However, this is paradoxical – to say the least – in a market economy. This is a result of the bureaucracy is directed, primarily, to serving itself – something that society does not need.”

IV. A presentation titled “Legal Principles on Freedom of Economic Activity” was delivered by Professor Evgenii Porfirevich Gubin<sup>21</sup>, chair of the Department of Busi-

<sup>21</sup> The basic research works by Professor E.P. Gubin: “Poniatiie Interesa v Grazhdanskom Prave.” *Vestnik Moskovskogo Universiteta. Seriya II. Pravo.* 1980. № 6.; “Interes i Grazhdansko-Pravovoeobzatelstvo.” *Vestnik Moskovskogo Universiteta. Seriya II. Pravo.* 1980. № 6.; *Obespecheniie Interesov v Grazhdansko-Pravovikh Obiazatelstvakh. Avtoreferat na Soiskaniie Uchenoi Stepeni Candidata Uridicheskikh Nauk.* M., 1980; *Effectivnost Grazhdanskogo Zakonodatelstva (Aktualnii Voprosi)* / Pod redaktsiiei V.P. Gribanova M., Izdatelstvo Moskovskogo Universiteta. 1984; *Praktikum po Sovetkomu Grazhdanskomu Pravu. Uchebnoie Posobiie. Ch.2.* m., Izdatelstvo “Visshaia shkola” 1984; “Krupnomasshtabnii Ekonomicheskii Eksperiment (Organizatsionno-Pravovii i Ekonomicheskii Problemi). Kruglii Stol Zshurnala ‘Sovietskoiie Gosudarstvo i Pravo.’” *Sovietskoiie Gosudarstvo i Pravo.* 1985. № 7. *Pravovoiie Regulirovaniie Khoziaistvennogo Mekhanizma APK.* M., Izdatelstvo Moskovskogo Universiteta. M., 1988; “Kategoriia Otvetstvennosti v Zakone SSSR: O Gosudarstvenniih Predpriiatiakh (Obiedineniiax).” *Vestnik Moskovskogo Universiteta. Seriya II. Pravo.* 1988. C. 15–16.; “Pravovoiie Regulirovaniie Sozdaniia i Deiatelnosti Finansovo-Promishlennikh Grupp.” V knige: *Finansovo-Promishlenniie Gruppi. Zarubezhnii Opit. Realii i Perspective v Rossii.* M., 1994.; “XXVII Syezd KPSS i Pravovoiie Problem Sovershenstvovaniia Khoziaistvennogo Mekhanizma.” *Vestnik Moskovskogo Universiteta. Seriya II. Pravo.* 1986. № 6; *Khoziaistvennii Dogovor. Obschiie Polozheniia. Uchebnoie Posobiie.* Sverdlovsk, 1986; *Effectivnost’ Grazhdansko-Pravovikhsredstv.* Pod redaktsiiei V.P. Gribanova. M., Izdatelstvo Moskovskogo Universiteta. 1988.; “Gosudarstvennii zakaz: itogi i perspektivi.” *Politicheskoiie Samoobrazovaniie.* 1989. № 4; *Razgosudarstvenniie i Privatizatsiia: Sposobi i Formi.* M., 1990.; *Sbornik Dokumentov po Voprosam Zashchiti Prav Predprinimatelei.* M.: Universum, 1994.; *Pravovoiie Osnovi Rinka Tsennikh Bumag.* M., Finansovii Izdatelskii Dom “Delovoi Express,” 1997.; *Uchastiiie v Podgotovke Nauchnj-Prakticheskogo Otcheta “Analiz Zakonodatelstva i Normativnikh Aktov, Reguliruiushchikh Rabotu Predpriatii Ugolnoi Promishlennosti v Rossiiskoi Federatsii, a Takzhe Instituttsionalnoi Bazi, i Razrabotka Predlozhenii po Ikh Sovershenstvovaniuu.”* Rabota podgotovlena kollektivom avtorov po zakazu Fonda Sodeistviia Restrukturizatsii Ugolnoi Promishlennosti “Reformugol.” M., 1999; “*Raschiotnii Forwardnii Contract. Zakonodatelstvo,* 1998. № 10; *Upravleniie i Korporativnii Control v Akcionernom Obschestve.* M., 1999; “Gosudarstvennoie Regulirovaniie Ekonomiki v Stranakh YeS: Licenzirovaniie Ekonomicheskoi Deiatelnosti.” *Mezhdunarodnii Seminar: Prepodavaniie Prava Yevropeiskogo Soyuza v Rossiiskikh Vuzakh II m., Rossiiskii Universitet Druzhibi Narodov,* 5–7 December 2000. M., 2000. “Pravovoiie Formi Vzaimodeistviia Predprinimatelstva v Gosudarstvom.” *Tezisi Doklada na Obshcherossiiskoi Konferentsii “Juridicheskaiia Nauka i Praktika Rossii na Poroze Tisiacheletii: Itogi i Perspektivi,* 22- 23 December 2000. M., 2000.; “Pravovoiie Regulirovaniie Otnoshenii na Srochnom Rinke (Rinok Proizvodnikh Finansovikh Instrumentov).” *Bankovskoiie Pravo Rossiiskoi Federatsii. Osobennaia Chast.* M., 2002. 294 – 319.; *Predprinimatelskoiie Pravo. Uchebnik. Osobennaia Chast.* Pod red. E.P. Gubima i P.G. Lakhno. M., Jurist, 2001.; “Gosudarstvennoie Regulirovaniie Ekonomiki i Pravo.” V knige: *Gosudarstvo i Pravo na Rubezshe Vekov. Materiali Vserossiiskoi Konferentsii.* M., 2001.; “Osobennosti Rassmotreniia v Treteiskom Sude pri Mezhdunarodskom Finansovom Dome Del s Uchastiiem Publichno-Pravovikh Obrazovaniia. *Treteiskii sud.* 2001. № 3/4.; *PredprinimatelSkoie Pravo. Uchebnik. Osobennaia Chast.* Pod red. E.P. Gubima i P.G. Lakhno. M., Jurist, 2003; “Osobennosti Pravovogo Statusa Gosudarstvennogo Unitarnogo Predpriiatiia. Pravovoiie Regulirovaniie Deiatelnosti Khoziaistviuishchego Subekta.” *Materiali Mezhdunarodnoi Nauchno-Prakticheskoi Konferentsii “Problemi Razvitiia Predpriatii: Teoriia i Praktika.”* 10–12 Oktober 2002, Ch.. III. Samara: Izdatelstvo Samarskoi Gosudarstvennoi Ekonomicheskoi Akademii. 2002, 42–45.; “Pravovoiie Regulirovaniie Deiatelnosti Investor na Rinke Tsennikh Bumag. *Dogovor v Rossiiskom Grazhdanskom Prave: Znacheniiie, Soderzhaniiie, Klassifikatsiia i Tolkovaniie.”* Materiali Vserossiiskogo Mezhdvuzovskogo “Kruglogo Stola.” 28–29 Oktober 2002, Samara: Izdatelstvo Samarskoi Gosudarstvennoi Ekonomicheskoi Akademii. 2002.

ness Law of Moscow State University and Esteemed Jurist of the Russian Federation: “I welcome the participants of the conference and, first of all, would like to congratulate the St. Petersburg Commercial Law Department on the occasion of its 30-year jubilee.

“Before choosing the topic for my presentation today, I thought long and hard, since I have only recently begun to examine the problem of freedom of entrepreneurship and legal protection thereof. Earlier this month, we held the fourth conference on entrepreneurial law in Moscow, although, this year it was held at the Moscow State Academy of Economics and Law.<sup>22</sup> It was a fascinating event, which nearly prompted me to change the topic of my presentation. However, while listening to speeches and interviews from the St. Petersburg International Economic Forum, I kept noticing that this problem freedom of business, of entrepreneurship – is a major issue these days. Therefore, it might not be out of place to talk about this issue. I am convinced that the hurdles we are facing today can only be overcome under one condition: only by providing for freedom of business and freedom of entrepreneurial activity. There is no other way to solve this problem. Therefore, it is crucial to analyze what freedom is in the area of entrepreneurial activity, what the interrelationship should be of freedom with law, of freedom vis-à-vis the state, and other categories. This is what I shall attempt to do.

“I could cite many authors – philosophers, economists, and jurists – who worked in the field of understanding freedom as it is. However, this probably would not be the right thing to do, although some of these viewpoints are quite interesting and paradoxical. For example, ‘freedom is when no one can make me do what I do not want’. Who said that? Obviously, Catherine the Great; being the empress, she was able to put it that particular way (although I am not sure whether we can). Paul Holbach, the famous French XVIII century philosopher, wrote: ‘Little reflection will suffice to convince us, that man is necessitated in all his actions, that his free will is a chimera.’ There is a completely different definition, that of Berdyaev, whom we all respect: ‘Freedom, speaking positively, is art.’ I will not give any more citations, rather remarking only that it is impossible to make effective decisions and achieve social and economic goals of our state society without freedom. I intend to offer you that definition which I believe is most appropriate. Freedom of economic activity (entrepreneurial activity as well as professional activity) is the ability to choose one of the many available behavioral patterns in a specific economic context – including the choice of the path of economic development in the interests of satisfying the de-

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51–53.; *Predprinimatelskoe Pravo v Rinochnoi Ekonomike*. M., Novaia Pravovaia Kultura, 2004.; *Gosudarstvennoie Regulirovanie Rinochnoi Ekonomiki i Predprinimatelstva: Pravovii Problemi*. M., Jurist, 2005.; *Predprinimatelskoe Pravo. Uchebnik. Osobennaia chast*. Pod red. E.P. Gubima i P.G. Lakhno. M., Jurist, 2006.; *Predprinimatelskoe Pravo: Prakticheskii Kurs. Uchebno-Metodicheskie Posobie*. Pod red. E.P. Gubima i P.G. Lakhno. M., Jurist, 2007.; *Korporativnoie Pravo. Uchebno-Metodicheskie Posobie*. Pod red. Shitkinovoi. S., M., Wolters Kluwer, 2007.

<sup>22</sup> 4 June 2015, the IV International Conference of Science and Practice, Law and Business: Convergence of Private and Public Law in Regulation of Business Activity. *Predprinimatelskoe Pravo* №3, 2015, p.72.

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mands of the appropriate subject. While there is a plethora of definitions, the essence thereof is the freedom of choice based on one's own understanding of the situation.

“Naturally, there is a question concerning state. Vladimir Fedorovich was quite right in saying there are many points of view, including those that undoubtedly can be challenged. While Vladimir Fedorovich cited Mises' proposition that ‘the state is the social apparatus of coercion and compulsion,’ he also seems to be agreeing with this. This is something with which I do not agree. I believe that the state's primary function is not as a body of coercion and compulsion, but rather as an entity promoting the development and expansion of freedom of action. We need to change the paradigm from that which existed in the XVII-XIX centuries of the state as ‘night watchman’ to a newer one, in which the state serves other goals and aims to facilitate development, providing for the possibility of the creative realization of its potential. Until we reach this point, quite frankly, we shall not be able to resolve anything. Of course, this undoubtedly means that there must also be changes taking place in our heads. Having said this, let me underscore that the ‘night watchman’ point of view naturally has a right to exist, since it remains in place. But I think that it is outdated – no more than that. Naturally, in discussing the freedom of business activity, one needs to take into account several normative acts. One is a very concise (two-and-a-half page) June 2015 Presidential Edict. Yet its small size belies its importance: in a way, it does not limit anything, but rather, it supports, protects, and guards aspiring entrepreneurs, which is the right change in the state's approach in dealing with the problem. Nevertheless, I take issue with some of the statements, for example, that ‘crisis is a reason for government intervention in the economy,’ as it is not what prompts the state to act. Moreover, the notion of the state preserving freedom of economic agents and protecting them by possible means while not intervening in the economy – influencing business by way of using those instruments of development that exist – is not a new one. This is reflected in the 1993 Constitution of the Russian Federation (for example, the provision about the social state) and in scholarly works written long ago by our mentors. This is something that we all need to keep in mind as we move forward with the idea that we are creating something that is new to all. ‘The state may not be estranged from private affairs.’ This is something with which I agree and disagree with Vladimir Fedorovich, when he argues that the state should not intervene in private matters. This is because I believe that the free-market economy has its faults, its market failures that make it unable to act efficiently without the intervention of the state. The state must and will always play a role in the economy. Thus, it is important to find a point of convergence of state and private relations, to find possibilities and goals for the role for the government as an instrument – along with systems – that will promote the development of business.

“The next point in my presentation can be summarized briefly as follows: freedom and law – how do they interact, and what is the law's primary objective? First of all, as Vladimir Fedorovich noted, the law should promote a balance among the interests of different economic agents that will root out social inequality and establish freedom of economic relations. Naturally, when we speak of the freedom of business, a

key element in this freedom is contractual freedom. Clearly, this is private, but it is also a very important phenomenon. However, the existence of such freedom appears rather questionable – more like “non-freedom of contract” – when reading a Decree of Plenum of the Russian Federation Supreme Court (*Verkhovnyi Sud Rossiiskoi Federatsii*).<sup>23</sup> When considering the role of law, the law should preserve freedom and responsibility, which are “two parts of one single entity, human conscience: freedom creates responsibility, and responsibility guides freedom.”<sup>24</sup> It is important to acknowledge that the state influences businesses by all existing means.

“Law makes it possible to use such tools – price, tariffs, etc. However, what is more relevant is its relation to the concepts of imperative and dispositive principles, which are now frequently discussed in the academic community. But is this ever within the framework of the topic that we now are discussing? I proposed that we take a look at this, briefly, here and now, which is easy to do, since I have a copy of the 2014 Law amending the RF Civil Code with me. These amendments are full of provisions of a mandatory (*imperativnyi*) nature, despite the matter being part-and-parcel of private law. What is to be one? It seems clear to me that only the principle of choice (*i.e.*, to use a dispositive [*dispositivnyi*] norm) facilitates the freedom of economic activity. Mandatory rules and regulations should only be used to protect vulnerable segments of the population, to achieve a balance of interests, and to avoid or resolve crises. Therefore, to my mind, current tendencies are quite remarkable and cannot exist within the paradigm of civil law; they should be reversed.

“I appreciate the wisdom of the proposition that – in some circumstances – the state needs to impose restrictions on economic activity. Yet the imposition of restrictions upon human endeavor should not be the sole purpose of the state; it should also exercise its power to facilitate deregulation. Unfortunately, as we have not yet paid proper attention to the question of deregulation. While we regulate economic relations in times of crisis, when the crisis ends tomorrow, the legislation usually remains in place. How should this mechanism work? In my view, this issue remains unresolved.

“As far as legislation is concerned, the following brief remark: The first and obvious flaw in the system is that legislation is not created systematically; at least, I cannot see any system in this. The second flaw is a lack of stability. Legislation changes, but without any systematic approach to these changes. These problems are exacerbated because they cannot be solved only within one branch of law, only within one chair of a law faculty, only within one discipline. The economy is so diverse that it is impossible to oppose private-law relations to those in the sphere of public law. This failure to understand the simple proposition can be seen in the title of one of the recent works issued by the Institute of Comparative Law and Legislation: *Potentsial Chastnogo Prava kak Protivoves Publichnomu Davleniiu na Biznes* (The Potential of Private Law as a Counterweight to State Pressure on Business). Yet, in

<sup>23</sup> Postanovleniie Plenuma Visshego Arbitrazhnogo Suda RF 14.03.2014 № 16 “O Svobode Dogovora i Ego Predelakh” *Vestnik VAS RF* № 5, May 2014.

<sup>24</sup> R.I. Kosolapov, V.S. Markov, *Svoboda i Otvetstvennost*. Moscow, 1969.

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reality, there is no opposition, there is no need for a counterweight! Scholars and, it often seems, everyone try to push us into conflict. At the end of the day, when do we find the language of consensus, when do we understand that there are no conflicts? To be sure, in some cases, there are unjustified burdens upon business. But I will not go into those here, in the interests of keeping my presentation short. Quite simply, these are problems that need to be resolved. And to do so, in part, legislation needs to be drafted to introduce a new regime or modify an existing one. But how? We already have a Council on the Codification of Civil Legislation, but it should be obvious that this institution does not resolve anything. A Council on the Codification of Administrative Law in the field of economic and commercial law has been proposed. But this would not resolve anything either. Most of us will be familiar with the fact that an institution is being created under the name of the Center for Legal Reform. What needs to be done is to create an atmosphere promoting the resolution of such tasks, and formulation of general opinions, discussions, and debates. They will be no chance of success if we seek to resolve such problems one by one. As wonderful as the current civil law is, it cannot resolve the existing problems on its own.

“A few points about economic sanctions, beginning with the simple wisdom that they come and go. I compared the Russian Government’s 2008 Plan with the 2015 Plan on Economic Development and Social Stability; they are one and the same. What we need is to create a mechanism so that we will not spend six months every time deciding which measures need to be adopted – although I appreciate that there is a lot which needs to be done. While the problem of the European Court is an interesting one, I shall not delve into that issue here in detail. For now, it is enough to note the wisdom in the following proposition: the European Court of Justice created the European Union because its judgments have created the foundation and framework for the functioning of the European Union. Whether or not this will be the case in our region is a matter for a separate research project.

“A court is not an institution to which each one of us should run with trivial matters. Our goal as lawyers is to ensure that no such cases are filed, and the legal professionals who allow this should definitely face consequences. In a recent case, the Presidium of the Supreme Court repealed the decision of the Highest Commercial (*Arbitrazh*) Court for the first time, as the latter violated the principle of objectivity by canceling the Arbitration Tribunal’s (*Treteiskii Sud*) decision regarding a dispute involving Sberbank and a corresponding non-profit organization. We must understand that Arbitration Tribunals are not enemies of our society. When I presided on such a tribunal, some decisions were questioned in the press, but it should be acknowledged that I am a judge, I am elected, and therefore the court’s decisions should be respected.

“I will not touch the subject of self-regulation, as many experts in this field are here. However, freedom of business activity and self-regulation are still closely connected, as self-regulation frees entrepreneurs’ activities. To conclude, “legal science

and education are losing their significance, while the role of those who apply the law grows stronger.”<sup>25</sup>

V. The floor was given to Professor William Simons, a scientist well known in Russia. He represented the University of Tartu, and spoke on “Delocalization or localization of commercial laws: backwardness?” William Simons said: “On behalf of all your colleagues and friends – I would even like to say, on behalf of all countries – but I’d rather be more modest, and name the countries presented in a panel of our *Journal of Reviews of East European Law*, where you participate as well: the Netherlands, Estonia, Austria, the Russian Federation, Kazakhstan, Great Britain, Belgium, Germany – they also give their congratulations. Also, let me congratulate you and express my congratulations as follows: it is the anniversary of our department. So far, not all the members of our editorial board have had the pleasure to visit you, and so far, not all the members of your department have visited us. Even to mention Leiden, Tartu, or Graz. As one of our singers sang, we are in for a good future. I’ll talk in brief, starting with two steps back. Reading your wonderful book, which has already been partly published in the Internet, I could notice that you have already seven doctors of legal science, including one, maybe more, lecturing abroad. And I can regretfully state that in Tartu, we have not a single contender for the doctorate degree in law, none from Russia. This is our mischief, I think. You have 67 candidates of legal science (PhD Law), and I see here again 34 basic works of your department. It’s great. Let me note with pride that essay number 16 is the work by Vladimir Fedorovich published in our journal, *Review of East European Law*. So once again, I would say, it is our common department. Thirty years ago, there was little in common between us, except for the urge for happiness of our families and our loved ones. Then Pepsi-Cola came, and further – McDonald’s. So, everything is in place – all we have in common. The example with McDonald’s is trite, I know. But the fact is that it exists. It has an international brand, McDonald’s, having dividends worldwide. And so on. Naturally, I realize that McDonald’s products are Russian products. Most of them. And what is important, the cash desk has no queues; the attendant’s voice is Russian. This is how it should be. Then, 30 years ago, it seems to us, everything was easy, or at least easier. The Iron Curtain – and nothing more. No communication, we understood each other little, we in fact did not understand you at all. And now, in the light of globalization... one might argue, where the localization of law is more complicated, what aspect of commercial law is used, for instance, and what it should be. The next paragraph. What about the Russian backwardness? By the way, I have seen your treatment of the word backwardness, so I quote: “its backwardness from the European countries in this respect” – end of the quote. Actually, here in your booklet, the citation was aimed to describe the absence of trade in Russia in the XIX century. What were the manifestations of backwardness? You know, this view of backwardness of Russia still exists with us, regretfully. And when we sometimes address the issue of back-

<sup>25</sup> <http://www.vedomosti.ru/opinion/articles/2015/05/28/594036-umozritelnoe-pravo-i-venauchnoe-pravoprimenenie>.

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wardness of the Russian Federation, for instance, regarding the backwardness of law, I give at least three answers. First, you have a brilliant civil code, second, you have a brilliant way of publishing all your legal acts since 2009. However, as you probably know, and I have already mentioned it, we are looking forward to the extension of this wonderful mode of yours, and for the works of all plaintiffs and defendants to be publicly issued, and for the transcript to be fully published. My third answer is that the backwardness of Russia is connected with us. I quote: “The right to fair, comprehensive and effective judicial protection” – end of the quote. This is a 2012 citation from a judgment of the Supreme Arbitration Court on the case “Russian telephone company against Sony Ericsson.” Faster, higher, stronger. In addition to these healthy words in the case against Sony, how are things in respect of the other legal acts in the Russian Federation? For instance, what can we say about the doctrinal concepts, the principle of good faith and reasonableness, Article 10 of the Civil Code, the foundations of law and morality, Article 169, public order (I am indifferent to this subject), proportionality. I will not dwell on the so-called telephone rule, although this issue is raised with us, oddly enough. This issue of the so-called telephone rule in Russia was raised by a Judge Sir Christopher Clark in 2008, in the judgement of the British Supreme Commercial Civilian Court on the case “Cherny against Deripaska.” Another interesting question, to my mind, is how things work in Russian judicial acts with reference to the legislative history in Russia as a source. Not a source of law, but a source of common sense. And how about the references to scientific literature? Not foreign literature, of course, but primarily the Russian research literature in court judgments in the Russian Federation. Further, the investigation of such issues in the Russian Federation or in other legal systems, with global actors such as Russia – this would not only be desirable, but needed. But such research must be made with the accuracy of a physicist, to be identified with the accuracy of lawyers, researchers, teachers, attorneys, judges. Even, perhaps, with the accuracy of a president. And vice versa. Time, we have too little time. Thirty years – this is great, but we still had little time. Yes, everything is still ahead.”

VI. The floor was given to a well-known expert on trust ownership, PhD (Law) Zlata Engelsinovna Benevolenskaya, who gave a report on “Current Views of British Scientists on Trust”: “Probably everybody knows what trust management is. And all know what trust ownership is: it is the relation in favor of a third party between the founder and the trustee for the benefit of the third party-beneficiary. This is our continental view of trust ownership, but in fact, the situation is much more complicated. But I have reminded about it so that, after having listened to many posts on the Russian law, we could shift our attention.

Currently there are three pressing problems in British legal literature. This is classification of types of trust, classification of grounds for origination of the law of constructive trust, and a new approach to the resulting trust. All of these are types of trust ownership. Michael Haley has proposed a classification of trust by entities and goals. This is the last classification recently offered, and it has its drawbacks.

Michael Haley proposed to divide the trust as based on the criteria of entities and of goals. Taking the entities, he divided the trust into expressed and implied trust, and according to the objectives – into charitable and private trusts. This is a controversial approach toward classification, because fundraising trust and private trust can both be expressed or implied. The previous, more distant in time, though more correct, classifications, shared by the author of the present communication, state that trust is classified into expressed, with the intention of the settler to create trust, which is important, and implied trust. The implied trust is divided into constructive trust and resulting trust. The constructive ownership originating when a person finds out that they did not know that they were an illegitimate owner is constructive trust; the resulting trust is the one where the property arising from any legal relations tends to return to the settler. So this is the first issue pointing at the faint credibility of the Michael Haley’s new classification. The next problem is classification of constructive trust. Constructive trust may be established by a court if a person having the property knows that their actions were unfair. Constructive trust arises by virtue of ownership of property through illegal means, that is, the person may not know originally that they have acquired a property belonging to others. But when this is revealed, they become a constructive trustee. Their duty is to either return the property to the original owner, or leave this matter to the discretion of the court. The presently known classifications are by Penner, Thomas and Hudson, and according to Michael Haley, whom I have already mentioned. I shall not list them to spare your time, but the basic idea of the constructive trust is the trust imposed on a person by virtue of the law of equity through meeting the claims of justice and good will, without recourse to expressed or presumed intention of the parties. Strictly speaking, English law applies constructive trust in cases of fraud, in cases of murder when the property is at the misuse of the unlawful owner, and in all other similar cases. These classifications mentioned by me are new; currently they are actively discussed – what classification of grounds of constructive trust meets its substance and its types most of all. But still, I would rather omit it and mention the third topical issue in the British legal literature: a new approach to the resulting trust. The resulting trust is a trust in which the property arising from any legal relations tends to return to the settler. So, the new approach now expressed by the British scientists is an approach to the resulting trust in terms of “jumping back”; that is, the property returns back to the settler, and this is the principal essence of the resulting trust.”

VII. The other reports were as follows: Professor of the University of Helsinki Vladimir Georgievich Orlov spoke on “Topical Issues of Interpretation of Business Contracts,” Deputy Dean of the Faculty of Law of the Russian Academy of National Economy and Public Administration named after M.M. Speransky under the President of the Russian Federation, Doctor of Law, Professor, Maria Alexandrovna Egorova, with the report “The Problems of Anti-Monopoly Regulation of the Distribution Relations in the Russian Federation.” Professor Inna Vladimirovna Ershova, head of the Department of Business and Corporate Law of Moscow State Law Uni-

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versity, Honored Justice Worker and Honored Higher Professional Education Worker of the Russian Federation, Doctor of Law, addressed the topic of “Business Law in the Light of Russia’s Membership in the Eurasian Economic Union”; “The Question of the Topic and Structure of the Business Law Course” was addressed by Professor Elena Viacheslavovna Kvanina, head of the Department of Business and Commercial Law of South Ural State University; a speech on “Legal Personality of an Insolvent Commercial Organization” was given by Dr. Elena Nikolaevna Bychkova; Judge of the North-Western Circuit Arbitrazh Court, Head of the Department of Financial Law of the Higher School of Economics, Candidate of Sciences (Law), Dmitrii Viktorovich Nefedov, made a speech titled “Problems and Perspectives of Teaching Commercial (Business) Law”; Alla Nikolaevna Varlamova, Professor of Moscow State University, Doctor of Law, made an address on “Trade Aspects in Competition Law”; Evgenii Valerevich Vavilin, Professor of the Saratov State Academy of Law, Doctor of Law, presented a lecture on “The Contract of Lease Motor Vehicles: Topical Issues of Theory and Practice”; Sergei Anatolievich Parashchuk, Candidate of Sciences (Law), Associate Professor of Moscow State University, made a speech on “The Problem of Determining the Boundaries of Competition Law in Russia”; Lidia Iurevna Mas, Candidate of Sciences (Law) and Associate Professor of the Russian Presidential Academy of the North-Western Institute of Governance of the National Economy and Public Administration, spoke about “Government’s Responsibility for the Damage Caused to Entrepreneurs”; Rum Rumovich Ushnitskii, a representative of the North-Western Federal Ammosov University, gave a speech titled “The Concept of Legal Personality in the Light of the Corresponding Legal Relationship.”

## VIII. CONCLUSION

The modern period of development of the Department originates from the time of launching of reforms in the 1990s. There appeared due legal grounds and a possibility to organize teaching and carry out research connected with legal regulation of the market economy; market legislation was emerging. From 1989, the duties of the head of the Department were assigned to assistant professor V.F. Popondopulo, and in January 1992, he was elected to this position through a formal competition. By that time, V.F. Popondopulo had developed a course of lectures on commercial law and secured inclusion of this discipline in the curriculum as the main year course, being the principal lecturer. He proposed to rename the Department of Economic Law as the Department of Commercial Law. In August 1992, the department was renamed the Department of Commercial Law, thus the name of the Department was brought in line with the content of its subject.

Instructors at the Department are as follows: Professor V.F. Popondopulo, Doctor of Law, The Chair of the Department of Commercial Law, Saint-Petersburg State University, Honorable Worker of Science of Russian Federation; Professor O.U. Skvortsov, Doctor of Law; Professor O.A. Gorodov, Doctor of Law; Associate Professor O.A. Makarova, Doctor of Law; Associate Professor D.A. Petrov, Doctor of Law; Associate Professor N.S. Kovalevskaya, Candidate of Jurisprudence; Associate

Professor K.K. Lebedev, Candidate of Jurisprudence; Associate Professor A.U. Bushhev, Candidate of Jurisprudence; Associate Professor D.A. Zshmulina, Candidate of Jurisprudence; and Assistant A.M. Barinov.

For 30 years, instructors at the Department have published approximately 1,000 scientific and educational-methodical works, including monographs, textbooks, tutorials, scientific and practical comments, and articles in Russian and foreign magazines. In addition, under the aegis of the Department annually since 2008, the magazines *Vestnik of Saint Petersburg University. Series 14. Law and Competition Law* have been published. Each year, the Department organizes and holds scientific conferences and scientific-practical seminars on topical issues of legal regulation of business activities. Instructors at the Department actively participate in other scientific conferences, symposia, and seminars, including conferences abroad.<sup>26</sup>

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<sup>26</sup> <http://law.spbu.ru/AboutFaculty/Departments/Commprava/About.aspx>.



# Some Remarks on the Occasion of Awarding the Title of *Juris* *Doctor Honoris Causa* to Professor William E. Butler by Uppsala University

[The remarks below were delivered to the Faculty of Law of Uppsala University by Professor William E. Butler on 25 January 2018, the day preceding the conferral of the title of JDhc at a University ceremony.]

Dean Dahlberg, Distinguished and Learned Colleagues.

What a pleasure it is to join those select few who during the past 540 years have been privileged to receive the honorary title *Juris doctor honoris causa* from the University of Uppsala Faculty of Law. The telephone call received from Dean Mattias Dahlberg was, according to the legends that persist in the western media, very much in the tradition of the Nobel Prize. More than one of my colleagues has drawn attention to the analogy. So, it was only natural when Dean Dahlberg asked whether I would attend the ceremony that I wondered if his due diligence had made him aware that I attended the same high school as the recent American recipient of the Nobel Prize for Literature – who chose not to attend the presentation ceremony in Stockholm. But there is nothing like academic pageantry, and Sweden does this better than anyone else on the planet. I would not have wished to miss the occasion.

I fully appreciate that in doing honour to me, you are also paying respect to the field of research, public service, examination, and teaching in which I have specialized for more than half a century, in particular to the legal system – and eventually family of legal systems – of which my chosen legal system formed the core. I refer to Russian Law in its pre-Soviet, Soviet, and post-Soviet guises.

Why *Russian Law*? I originate in a generation of international and comparative lawyers which was passing through undergraduate and postgraduate University studies at a time when space exploration – an ancient dream of mankind – had not only become a reality, but the country responsible for this remarkable achievement had been presumed in western media to be incapable of such a feat. Massive introspection ensued – for a brief period Russians were presumed to be superhuman and everything American or western was presumed to be deficient or lacking in some key way, including our language training, our systems of secondary and higher education, our priorities, and our imaginations. By the time I was coming of age, Stalin was in the mausoleum with Lenin, the early stages of peaceful coexistence were

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emerging, the so-called “third world” was gathering numbers and importance, the Russian language was considered to be among the languages of the future, and, in my young perception, there appeared to be “space” for individuals trained in international affairs, law, and Russian.

I set out precisely to pursue that combination. A pre-law course at Hibbing Junior College (A.A.), followed by transfer upon graduation to the School of International Service (SIS) at The American University in Washington D. C. (B.A.). There I commenced the formal intensive study of the Russian language, taught jointly by adjunct instructors – an ex-marine and a White Russian with the apposite name of Mr. Balalaykoff. Surprisingly perhaps, my first law course – on the history of international law – was at the SIS, together with others taught by individuals experienced in foreign policy. Alas, I am not a natural linguist; my performance in the Russian language was very average. In Summer 1960, however, I joined eleven other Americans through the Experiment in International Living to travel to the Soviet Union for six weeks – and that constituted the breakthrough so far as language was concerned. In Sochi I purchased my first book in the Russian language on Soviet law – I. B. Novitskii’s *Источники советского гражданского права* [Sources of Soviet Civil Law] (1958) and began to accumulate the necessary vocabulary. By serendipitous visit, I also visited the Park Book Shop in Washington D. C., where there was a secondhand review copy of John Hazard, *Settling Disputes in Soviet Society* (1960) at \$4.50. The seeds of a career in international and comparative law had been planted.

Thoroughly enjoying being in the nation’s capital and drawing upon the intellectual resources of the Slavonic Division of the Library of Congress, I enrolled in the M. A. program at the School of Advanced International Studies (SAIS) of The Johns Hopkins University, also situated in Washington D. C. That institution offered a 2-year master’s degree with a requirement of oral fluency to United States Foreign Service standard – in my case, Russian. Without dwelling on details, I consider that four years of specialized work in international relations and foreign policy fundamentally shaped my subsequent approaches to international and comparative law.

I then turned to a degree in law proper, making a difficult choice between pursuing these at Columbia or Harvard law schools. Both law schools had pre-eminent specialists in Soviet law – John Hazard at Columbia and Harold Berman at Harvard. In the end, after much soul-searching, I opted for the latter, but always retained a close relationship with the former. During my law school days, I published two bibliographies on Soviet law, translations of the USSR customs code and Russian family code, and developed an interest in the law of the sea – as it happened, the right of innocent passage through the Arctic waters and straits north of the Soviet Union. This led to Comments on the right of innocent passage, a third-year thesis on the law of Soviet territorial waters – eventually published in the American Journal of International Law – and a monograph on the same subject, and finally a Ph.D. dissertation on The Soviet Union and the Law of the Sea.

After completing law school, I returned to Washington D. C. to work on contract for the United States arms control agency on a research project pursued at the Wa-

shington Center for Foreign Policy Research at SAIS. When the project was completed, I returned to Cambridge, Massachusetts, as a Research Associate in Law at the Harvard Law School in order to collaborate on designing and teaching a course entitled “Soviet, Chinese, and Western Approaches to International Law”. Between developing this course and completing my Ph.D. dissertation, I had laid the theoretical and intellectual foundations for what has come to be called “comparative international law”.

In 1970 I accepted appointment as the Reader in Comparative Law at the University of London, tenable at University College London Faculty of Laws. The Readership had been created originally in the field of Soviet Law; an inability to find a specialist to fill the Readership had led to its being renamed, but with a preference for an individual in that field. My tasks as a Reader were both simple and overwhelming. As my Head of Department put it to me shortly after taking up the post in England: “Your job, Bill, is to develop your field”.

And so I did, for 35 years at University College London, and 13 years continuing at Pennsylvania State University. In London I designed and introduced an LL.B. course entitled “Introduction to Socialist Legal Systems” and took over part of an existing LL.M. course on Soviet Law.

Given my background in international affairs and law, I now had to face the question of: why? Why should one teach Soviet (and later, Russian) law? What should be taught? Why should my colleagues accept courses on this subject-matter into the curriculum? Why should students elect to study the course? How would Soviet Law compete in the world of comparative law with what might be called the classic approach to teaching foreign law in a Common Law jurisdiction: emphasis upon the principal paradigms of comparative law – French law and German law, with a strong dosage of Roman law, at least at the time?

Because of my earlier experience with “comparative international law”, I realized something quite quickly: so many of the factors that distinguished Soviet approaches to the law of the sea from those of other States lay in domestic Soviet legislation, in the domestic legal system. I had made a contribution to Soviet approaches to the law of the sea because I had plumbed to a theretofore unparalleled degree Soviet legislation, other forms of State practice, and doctrinal writings. To be an effective international lawyer on these matters, in other words, one had to be an effective comparative lawyer and acquire a command of the domestic legal materials in their own right without relying solely on how Soviet international lawyers handled these materials.

In England I also encountered another phenomenon well known to you, but not part of the American legal academic tradition – the textbook/treatise. These, I discovered, are exceedingly difficult to write – to encapsulate concisely the essence of a legal tradition, legal system, legal institutions, and legal rules is an art form in itself which my English colleagues had honed to a fine edge. *Soviet Law* (1982) was the first attempt, with a revised edition in 1988; both inspired at the time by a senior executive at Butterworths. I took research leave to complete the first edition at Harvard

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Law School, where I knew the collections so well. A good half of the manuscript was completed amidst those collections, and the balance in London.

This was an occasion to articulate what had been implied or latent in my increasingly maturing approach to the subject-matter.

I noted the increased importance of law in the Soviet Union. As Soviet society has matured and the concerns of comparative law had expanded, so too, I argued, had the reasons for studying Soviet law. This was still the heart of the Cold War: an improved knowledge and understanding of the Soviet Union was important. Avoiding miscalculation in times of political tension is a vital consideration – “know thine adversary” – but the legal issues posed when relations improve can be even more daunting – because they are real legal issues that contemplate, at least at some level, interaction, harmonization, of legal systems – a process that must transpire for the systems to communicate and to do “business” with one another. Closer relations ordinarily involve greater interaction in practical transactions, whether interpersonal, commercial, or intergovernmental, and consequently there is a greater need to come to terms with legal rules and institutions that genuinely are – for legal reasons – obstacles to understanding or intercourse.

One responsibility, I contended, of comparative legal studies, including Soviet legal studies then and Russian legal studies now, is to train national elites to deal effectively with their overseas counterparts.

A particular attraction of Soviet legal studies, I always assumed, was that it offered the same scope of comparative enquiry as continental European and Scandinavian legal systems, yet offered in addition fundamentally different and challenging approaches or views for the contemplation of law students. The multi-lingual and multi-jurisdictional dimension of the former Soviet Union and Russia today raise comparative issues in a highly instructive way. During the Soviet era, we encountered a nation with an elaborate, specific, and articulate concept of what law is, why it exists, how it develops, and what its ultimate fate will be; in post-Soviet Russia we encounter the legacy of that approach – what I call a transitional legal system: how the post-Soviet republics move away to different legal theories or explanations, and what the legacy of the Marxist-Leninist ideology is in these republics, how that legacy affects the mentality of post-Soviet jurists seeking new paths either in their historical heritage, and/or in ideas imported from other legal traditions, and/or in post-Soviet legal theories that originate in post-Soviet legal experience. As comparatists we traverse ground never before encountered – although the dissolution of empires is hardly unknown in the history of law.

We have just completed a commemoration of the first century following the 1917 Russian Revolution. Whatever one’s view of those events, few would not recognize the Russian Revolution a century on as one of the ranking revolutions in modern history – together with the Great Reformation, the English Revolution of 1689, the American Revolution of 1776, and the French Revolution of 1789. In studies of Russian law, we encounter, first, the impact of the Revolution upon the pre-existing law and legal order and, second, the rejection of the Revolution and its approach to law

– all within the confines of one country. The tension between revolutionary change and the need for order, stability, and predictability are manifest not merely in the substance of law and schemes for its systematization and codification, and in the types and functions of State and social organizations engaged in the “administration” of legality – as Soviet jurists put the proposition – and, in its post-Soviet version – the administration of justice.

Much of the transition represents a readjustment of the relationship between the State and the individual – the balance to be struck between the individual liberties and social justice and social responsibilities. Soviet law postulated the explicit role of socialist law in connection with theories of ideal personality – “Soviet Man” – and of institutional possibilities, both State and non-State. These are not necessarily ideas rejected by western legal systems, perhaps including especially Scandinavian legal systems. They continue, in my view, to be present in post-Soviet legal systems, although perhaps more latent than previously.

The Soviet legal system was always a model for other legal systems in the socialist and third worlds. Now it serves as a historical model for those socialist legal systems remaining, which although few in number (not exceeding six?), contain a substantial percentage of the planetary population. As a model, the Soviet legal system may contain negative experience to be avoided or positive experience to be emulated. One of the continuous debates within the family of socialist legal systems was and remains which facets of the model are mutable and which are absolute prerequisites. And this, in turn, draws attention to the larger question that has preoccupied comparative legal studies in the twentieth century: the classification of legal systems into families or groupings based on their similar and differing characteristics. The Russian legal system, whether of the pre-Soviet, Soviet, or post-Soviet era, reminds us of how many parts make up the whole and how those parts are in constant motion, changing because of autonomous factors and interaction with others. The criteria of classification, in other words, are not and will never be stable. A sophisticated kaleidoscope may offer the best paradigm for what we are witnessing when we observe legal systems, so to speak, from above or from afar.

The legal aspects of the planned economy in the Soviet Union continue to be of practical relevance for, perhaps, the most unexpected reasons. The planned economy affected, and affects, concepts of ownership, principles and techniques for allocation the possession, use, and disposition of property, including land, water, forests, subsoil resources, enterprises, and the like; the obligations arising out of contracts or arising out of delicts, especially when State agencies or officials are concerned; the relationship between law and planning or directive documents; the legal status of State-owner juridical persons; the traditional distinctions between public and private law, or between civil law and economic law. The dissolution of the former Soviet Union has not made these issues disappear. Although central directive State planning has been abolished, the Russian Federation still devotes considerable efforts as part of its budgetary process to achieving targeted objectives, adopting special programs or projects, and similar measures intended to stimulate the economy or accomplish

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particular aims that are considered to be the responsibility of a “social” State mandated by the Constitution.

Moreover, a significant – some would say substantial – portion of former State enterprises continue to be either in direct ownership of the State or, using corporate forms introduced after 1991, under the control of the State. The Russian Civil Code therefore preserves a dual legal regime: one for market-based entrepreneurial activity and another for the State sector. This, I suggest, is one of the features of a “transitional” legal system. Another is the continued existence of earlier doctrines and legislative manifestations of economic law – the principal example being Ukraine, with its Economic Code.

The interface between civil, economic, and administrative law incorporates survivals of the Planned Economy and the transitional role of the State in an increasingly market-oriented system. The Soviet approach to administrative law was characterized by an opaqueness and descriptiveness and an absence of institutions which would reduce administrative abuse, or offer administrative redress, or provide even elementary measures of administrative accountability – these are surely factors that cannot have failed to contribute to the years of terror in that legal tradition. Even in the post-Stalin and post-Soviet era one encounters a range of offenses and penalties which have no equivalent at least in the Common Law systems. Even in the criminal law there is a distinctive and often disappointing equation of public and individual rights, a hybrid system of investigation and adjudication more akin to continental and Scandinavian jurisdictions than those of England and the United States or other Common Law systems.

Comparative issues of this magnitude and nature help us to rethink social and economic questions which confront our own legal systems, the historical foundations of our law, and the appropriate role(s) for law and legal institutions in society. Russian legal studies offer a convenient analytical screen for approaching and better understanding our own problems with perhaps a fresh and even unique perspective.

Post-Soviet Russia has opened up opportunities for the legal practitioner. Law reform advice imposed special challenges and responsibilities on foreign practitioners. Commercial transactions required adaptation to Russian ways of doing things. Notions of public policy, State immunity, and principles for the settlement of disputes remain areas of difference between East and West and are familiar areas of concern for the harmonization of law and practice.

The value of comparative legal studies transcends the traditional realm of analyzing national legal systems, however. Russian State practice in the form of foreign affairs legislation contributes in the broadest sense to the development or clarification of public and private international law. Such claims may be assertive in the sense of postulating a claim or a position on a matter not wholly regulated by international law, or reinforcing in the sense of expressing a concordant view shared with other States, or receptive in the sense of transmitting to the municipal level rules of conduct prescribed by international law or by an international tribunal. The Russian legal system increasingly interacts with the international legal order, and for inter-

national lawyers a basic understanding of at least the principal legal traditions and families is indispensable.

The Russian international lawyer is the product of his/her municipal system of legal education; his/her concepts of law, including international law, his/her legal mentality and legal consciousness, and the manner and style of expounding his/her views are all deeply indebted to the domestic legal milieu in which he/she was trained. Part of his/her milieu includes the domestic and international lawyer's understanding of what role(s) a lawyer has in giving counsel to his/her employer or client.

These are salient among the principal considerations which guided me when writing *Soviet Law* (1983; rev. ed., 1988) and in its subsequent iterations in *Russian Law* (1999, 2004, 2009), my essays revised for *Russia and the Law of Nations in Historical Perspective* (2009), and the latest version of my treatise: *Russian Law and Legal Institutions* (2014).

In my view, they are all propositions that proved to be properly raised, considered, expanded and adapted as appropriate – and continually relevant. That this Faculty should choose to honor my contributions embodied in these works is gratifying beyond my ability to express – and the more so for such acknowledgement to emanate from the most venerable University in the land of my forefathers.



# Dynamics of Russian Orthodox Ethics of Peace and War: Sketching Shifts from the Cold War to the War in Ukraine

REGINA ELSNER

## *Abstract*

For a long time, social ethics in general and peace ethics in particular were not a serious issue for Russian Orthodox theology. However, questions of peace and war have resulted in the first attempt to engage with social ethics from a theological point of view. This paper analyzes the historical and content-driven dynamics of discourse about peace and war in Russian Orthodox theology. Taking the Church's statements on two crucial topics, justice and disarmament, I follow the development of Russian Orthodox peace ethics from its beginnings during the Cold War to the current war in Ukraine. Over this period, the entanglement of theological reason and political strategy becomes obvious.

*Keywords:* Russian Orthodox Church; social ethics; peace ethics; Russia; state-church relationship

## Social ethics as an issue in the Orthodox tradition and the question of peace and war

Social ethics is not a genuine issue for Orthodox theology in general. Orthodox theology, in a strict understanding, deals with dogma and liturgy, as these are decisive elements in the lives of Christians on the path to salvation. There are, therefore, rules of individual ethics surrounding the question of how a person can gain salvation in his or her everyday life. But the question of how a community can have a good common life according to God's will does not arise when the community is entirely Christian, and the state or ruler decides on all relevant social problems on a Christian basis.

Therefore, for Orthodox churches, social ethics as a single subject occurs only – but not always – when society in some way becomes secular but still leaves enough space for the Church to define crucial elements of social life. In this perspective, it comes as no surprise that Orthodox churches took their first steps toward genuine socio-ethical thinking in the twentieth century. At that time, many Orthodox theologians found themselves in a mostly secular diaspora, and core Orthodox countries and societies were confronted with secularization and militant atheism.

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At the same time, global processes of secularization led to a diminishing self-evidence of the Church's role in society, which challenged the Church to rethink its own ecclesiology. The dictum of "liturgy after liturgy"<sup>1</sup> as a genuine Orthodox tradition, meaning that charitable activities in the world are the natural prolongation of the Church's liturgy, paved the way for an ecclesiological based approach to social engagement. The importance of this ecclesiological turn in the twentieth century lies in the transfer of responsibility for social activity from the individual to the Church. That does not mean that people's social responsibility has ceased. However, due to the fact that the Church was accustomed to developing its ethical and ecclesiastical thinking in relationship either to the individual or to the state, the emergence of a public space between the state and the individual enabled the Church to rethink its social role and institutional mission to transform the world.

The first attempts by the Russian Orthodox Church (ROC) to come to terms with a mostly secular society and state took place at the beginning of the twentieth century. The vivid theological discourse of the time touched on issues of democracy and labor rights, as well as the role of women and questions of peace and war. Although initial efforts at systematic socio-ethical thinking were pushed mainly by (lay) intelligentsia and risked being called a renewal or politicization of theology that was not common to Orthodox tradition, ecclesiastical intelligentsia later took up most of the ideas and brought them to the Local Council in 1917–1918.<sup>2</sup> These efforts came to an abrupt end with the militant atheism of the Communist state. Religion was banned in the private sphere, and those who practiced it were persecuted, while theological thinking or actions in the social sphere were prohibited.

It is a common belief that the systematic social thinking of the ROC started only after the breakdown of the Soviet Union, when religious freedom and a growing civil society required the Church to make statements on social issues. Although this hypothesis is right in terms of free and self-confident theological reasoning, it is wrong in terms of fundamental social thinking in general. My argument is that, while an instrument of socialist propaganda after the Second World War, the Church was nevertheless challenged to find a theological position on the crucial socio-ethical issue of the time: the question of peace and disarmament.<sup>3</sup>

Starting in the 1950s, the Church entered the international arena of the worldwide struggle for peace. The Church carried out its engagement at several different levels: the World Council for Peace, the Christian Peace Conferences in Prague, the World

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<sup>1</sup> Ion Briia, *The Liturgy after the Liturgy: Mission and Witness from an Orthodox Perspective*. Geneva: World Council of Churches, 1996.

<sup>2</sup> For analyses of the theological discourses before the Bolshevik Revolution, see, e.g., Vera Shevzov, *Russian Orthodoxy on the Eve of Revolution*, Oxford: University Press, 2004; James Cunningham, *A Vanquished Hope: The Movement for Church Renewal in Russia, 1905–1906*, New York: St. Vladimir's Seminary Press, 1997; Sergej Firsov, *Russkaja Cerkov' nakanune peremen (koniec 1890ch-1918gg.)*, Moskva: Duchovnaia Biblioteka, 2002.

<sup>3</sup> The first attempts to engage with this topic took place at the beginning of the twentieth century, when the Church and some religious thinkers formulated a position concerning the Russian-Japanese War. See Thomas Bremer, "Das Jahrhundert der Kriege. Die Russische Orthodoxie, der Krieg und der Friede." *Osteuropa* 2–4 (2014), 279–290.

Council of Churches, the Conference of European Churches, several bilateral ecumenical dialogues, and other forums for peace and disarmament.<sup>4</sup> The Church firmly endorsed the installation of a special theological commission within the Christian Peace Conference, and hosted the first session of this commission in 1965 in Lenin-grad. This move points to the hypothesis that, in addition to political calculations, the Church also had a purely theological interest in its peace work.

Of course, the Church could not have done this work without the permission of the Soviet state; state officials, the secret service, and official state propaganda dictated most official statements.<sup>5</sup> Regarding the peace engagement in Eastern Europe during the Cold War, Hall admits,

When Christians and Communists collaborate as they do occasionally in Eastern European countries, skepticism concerning the peaceful intentions of both often appears to be well-founded. The Church is known to be strictly controlled by the State in Eastern Europe, and thus when [C]hurch leaders in organizations such as the Christian Peace Conference endorse disarmament proposals, both the proposals themselves and the sincerity of those endorsing them are questionable.<sup>6</sup>

It is not the aim of this paper to explore the question of instrumentalization and influencing of the Church during all of its international activities from the Cold War to today. As the Finnish researcher Heta Hurskainen has underlined, at least for the ecumenical level of peace engagement, the political and societal contexts of dialogue do not erase its theological logic.<sup>7</sup> Bearing in mind the context, we have to take the theological meaning of this first socio-ethical engagement by the Russian Orthodox Church into account.

This is even more true when we turn our attention to current official statements by the Church's hierarchy on questions of war and peace. In 2015, Metropolitan Ilarion (Alfeev), the head of the Church's Department for External Church Relations, traced the path of Russian Orthodox peace work back to Prince Vladimir in the first millennium CE and called the Russian Orthodox Church the "vanguard of peace work."<sup>8</sup> In this speech to the Third International Conference on Religion and Peace in Mos-

<sup>4</sup> There is very little research on the development of the issue of peace in ecumenical dialogues with Russian Orthodox participation. Most valuable in this regard are the works of Heiko Overmeyer, *Frieden im Spannungsfeld zwischen Theologie und Politik. Die Friedensthematik in den bilateralen theologischen Gesprächen von Arnoldshain und Sagorsk*. Frankfurt/Main: Lembeck, 2005; and Heta Hurskainen, *Ecumenical Social Ethics as the World Changed. Socio-Ethical Discussion in the Ecumenical Dialogue between the Russian Orthodox Church and the Evangelical Lutheran Church of Finland 1970–2008*, Turku: Schriften der Luther-Agricola-Gesellschaft, 2013.

<sup>5</sup> William Fletcher, *Religion and Soviet Foreign Policy, 1945–70*, Oxford: University Press, 1973; Jane Ellis, *The Russian Orthodox Church: A Contemporary History*, Bloomington and Indianapolis: Indiana University Press, 1986.

<sup>6</sup> B. Welling Hall, "The Church and the Independent Peace Movement in Eastern Europe," *Journal of Peace Research*, Vol. 23, 2 (1986): 193–208, 193.

<sup>7</sup> Hurskainen, *Social Ethics*.

<sup>8</sup> Metropolitan Ilarion, "Mirotvorčeskaja dejatel'nost' Russkoj Pravoslavnoj Cerkvi: mežreligioznye i mežkonfessional'nye aspekty." 30 October 2015, accessed 18 January 2019, <http://www.patriarchia.ru/db/text/4258596.html>.

cow, Ilarion described engagement for peace as a traditional task of the Church in cooperation with the state. Significantly, peace engagement during the Cold War was included in the legacy of the Church on the seventieth anniversary of the Department for External Church Relations in 2016.<sup>9</sup> The following year, Ilarion repeated his conviction that “the engagement for peace is the fundamental function of the [C]hurch in external political and international questions.”<sup>10</sup>

As in this speech, most official statements by Church leaders since the Cold War lack a genuine theological basis for peace engagement, and speak instead about politics. In this regard, the ecumenical dialogues of the time of the Cold War are highly valuable: they challenged the Russian Orthodox Church for the first time to detect and develop the theological basis of its peace work. In this paper, I aim to show how these theological efforts have developed and changed during recent decades.

Methodologically, I focus on official statements of the Moscow Patriarchate on the Church’s relationship with society and on external Church relations.<sup>11</sup> This includes speeches and texts of the Patriarch and the heads of the main offices of the Patriarchate connected to the relationship to society and media and to ecumenical dialogue. The main topical texts are speeches of official delegations of the Church in ecumenical meetings on peace issues, and official comments on military interventions by the Russian state. I am aware of a broader discourse on the issue of peace ethics in the ROC, especially in the framework of popular Internet platforms like *pravmir.ru*, *pravoslavie.ru*, or *ruskline.ru*. It will be the task of further studies to include these debates in the Church in a systematic analysis.

## The dynamics of peace ethics

Peace ethics consists of two dimensions. On the one hand, and in a positive sense, it is about humanizing conditions of life. On the other hand, and in a negative sense, it is a question of limiting or civilizing war and conflict.<sup>12</sup> Thus, ethics of peace and ethics of war are two sides of the same coin. The history of Christian theology underlines this duality because, since the beginning of the Biblical tradition, there has been a complementarity between advocating peace and framing violence. In the case of the ROC, it is intriguing to understand where the focus of the Church’s argumentation

<sup>9</sup> “Cerkovnyj MID” i ne tol’ko, 19 May 2016, accessed 18 January 2019, [https://ria.ru/religion\\_expert/20160519/1436314119.html](https://ria.ru/religion_expert/20160519/1436314119.html).

<sup>10</sup> Metropolitan Ilarion, “Mirotvorčeskaja missija religii v sovremennom mire,” 10 July 2017, accessed 17 January 2019, <https://mospat.ru/ru/2017/07/10/news148250/>.

<sup>11</sup> For the time before the breakdown of Soviet Russia, the *Journal of the Moscow Patriarchate* is the most interesting source. From the beginning of the 1950s, the *Journal* published not only all relevant statements and decisions, but also theological texts on the topic of peace under the special section “В защиту мира” (“In defense of peace”). At times – especially in the early 1950s – this section was almost more extensive than the other, more spiritual sections. This points to a context of repression in which translating the engagement of the Church for peace in accordance with the Soviet position was the price for having a journal and the ability to be a social actor at all. In the 1990s, this section disappeared and was replaced by a section on societal matters in a wider perspective.

<sup>12</sup> Ines-Jacqueline Werkner and Klaus Ebeling, *Handbuch Friedensethik*, Wiesbaden: Springer VS, 2017, 2–3.

leads, and what factors influence the dynamics. Following the twofold character of peace ethics, this analysis deals with examples from both sides: first, justice as a key condition for peace; and second, the question of disarmament and war.

*Justice as a condition for peace*

In almost every statement on the issue of peace and war, the ROC points to structural conditions (beyond individual conditions in each person) that must be achieved to gain sustainable peace. At the beginning of the ROC's peace engagement in the 1950s and in the face of the nuclear threat, the Church named trust (*doverie* in Russian) as the main condition for peace.<sup>13</sup> In 1956, Metropolitan Nikolaj gave an interesting answer to the words of a US delegate that "peace is the fruit of faith, freedom, and justice," identifying the "fight against mistrust" as a key issue.<sup>14</sup> In the early 1960s, in the context of the international decolonization process and strengthening of the ROC's ecumenical contacts, a *just* relationship between nations was identified as the crucial condition for sustainable peace. Justice is key for peace, but the idea of justice remained diffuse and was subject to change during the decades of peace engagement.

In Soviet times, the slogan of justice was mostly accompanied by demands to end all discrimination and racism as well as colonialism and slavery. The statements of Church officials gave these aims a Biblical foundation. Thus, in 1965, the new head of the Department for External Church Relations, Metropolitan Nikodim (Rotov), underlined in a speech in Budapest that the basis for a Christian understanding of justice lay in the equality of every person as the image of God. Without exploring the implications of this paradigm for the question of individual human rights, he argued that every people on earth should be allowed to decide their own way of living. Any intervention of external states was marked as "unjust." Nikodim stated that

Is it not clear from this [the equality of all persons] that also every people, inhabiting the whole face of the world, is equal to every other people in its natural rights and in its noble human vocation and dignity?! Is it not clear that racial discrimination is a challenge and an affront not only to human common sense but also to the will of almighty God and the creator of the world?!<sup>15</sup>

At the beginning of the 1970s, the communiqués of theological dialogues underlined the issue of social justice as a condition for peace, defining it exclusively in social

<sup>13</sup> Patriarch Aleksij I., "Reč Patriarcha Moskovskogo i vseja Rusi Alekija na pjatoj vsesojuznoj konferencii storonnikov mira." *ZMP* 5:1955, 31; Metropolitan Nikolaj, "Vzaimnoe doverie – put' k miru," *ZMP* 8:1955, 29.

<sup>14</sup> Metropolitan Nikolaj, "Problemy mira," *ZMP* 8:1956, 40.

<sup>15</sup> Metropolitan Nikodim, "Reč Mitropolita Ladožskogo i Leningradskogo Nikodima na plenarnom zasedanii sessii Soveščatel'nogo komiteta prodol'ženija raboty Christianskoj Mirnoj Konferencii," Budapest, 14 October 1965. *ŽMP* 11:1965, 32–35. Notably, this speech by Nikodim in Budapest in 1965 appears to be one of the rare moments when the understanding of justice is connected to the issue of truth; this highly important notion of truth is missing in current argumentations. The Social Concept mentions truth in the chapter on war and peace only as "truth of God" and not as an element or condition of reconciliation or justice.

categories: “social, economic, international justice ... against exploitation of humans by humans, humiliation of the dignity of the human person, against racism and all forms of discrimination, hunger, poverty.”<sup>16</sup> It is also remarkable that Metropolitan Filaret (Vachromeev), in his speech in the same year on the theological foundations of the Church’s peace work, drew much attention to the social role and responsibility of the Church for peace and justice.<sup>17</sup>

In 1971, Alexej Osipov, professor of the Moscow Theological Academy and long-term participant in ecumenical dialogues, held a programmatic lecture during a theological dialogue with the Finnish Lutheran Church in Zagorsk. He explained the Orthodox understanding of justice and violence, making a strict distinction between a juridical (secular) concept of justice and a theological concept, according to which justice is based exclusively on the conscience of the believer.<sup>18</sup> By doing so, he was able to justify violence as just in certain cases, if its motivation is love.<sup>19</sup>

It is interesting that, after this speech by Alexej Osipov, there was no further official theological engagement with the concept of justice as condition for peace. In 1996, Metropolitan Kirill (Gundjaev) held a speech at the World Mission Conference in Brazil on the topic of the Church’s mission in the world.<sup>20</sup> He underlined that the Church’s engagement for peace and justice was and should be subordinate to its work on transforming the individual souls of the people. He thus defined justice and peace as a question not of social structures but of individual righteousness. In doing so, he turned the mission of the Church away from social critiques and toward a reinforced moral discourse.

In 2000, the Basis of the Social Concept did not mention justice (*spravedlivost’*) as a condition of peace. However, Chapter VIII.5 defined *Pravda* – the German translation is “Gerechtigkeit”; the official English translation calls it “righteousness” – as a key condition for peace, insofar as it is the key to an individual’s relationship with God.<sup>21</sup> Furthermore, the Social Concept strongly emphasized the conviction that peace is a gift of God to every person. It underlined that “peace as a gift of God, which transforms the inner man, should be also manifested outwardly” and that “war is a physical manifestation of the latent illness of humanity, which is fratricidal hatred” (Gen. 4:3–12). Peace therefore begins inside every person, and accordingly, there can be no true external peace when inner peace is missing. Due to the sinful character of human nature, real peace occurs as a future vision of the eschaton and an element of soteriological discourse.

<sup>16</sup> “Kommjunike i resjume bogoslovskogo sobesedovanija.” *Bogoslovskie Trudy* 7 (1971), 212–214.

<sup>17</sup> Episkop Filaret. “Bogoslovskaja osnova mirotvorčeskoj dejatel’nosti cerkvi.” *Bogoslovskie Trudy* 7 (1971), 215–221.

<sup>18</sup> Osipov, Aleksej, “Spravedlivost’ i nasilie.” *Bogoslovskie Trudy* 11 (1973), 193–198, 195f.

<sup>19</sup> In 1998, in a re-adoption of his ideas from 1971, Osipov appropriated the concept of just war and explained that justice is always connected to violence, and violence may likely be just if it is based on love (Osipov 1998).

<sup>20</sup> “Metropolitan Kirill: Blagovestie i kul’tura.” *Cerkov i Vremja* Nr. 1:4 (1998), 15–34, 19–20.

<sup>21</sup> On the puzzle of translating different meanings of “justice” in Russian, see Thomas Bremer et al. (Eds.), *Kulturen der Gerechtigkeit*. Paderborn: Fink, 2015–2019.

Nevertheless, due to the Social Concept, peace is not an unreachable promise in the afterlife. The Church and every Christian are called upon to take action on the path toward God's peace on earth. As far as peace is a person's inner state, it is first and foremost the task of every person to gain this peace by overcoming sinful behavior. In accordance with the fundamental focus of Orthodox ethics, the conditions for peace are a question of individual ethics.

In 2010, Alexandr Vasjutin participated as an official ROC delegate in a consultation of the World Council of Churches on Just Peace in Syria. In his presentation, he outlined the ROC's fundamental disagreement with what he called the psychological rather than rational foundations of the underlying concept of justice and its political – meaning secular – framework.<sup>22</sup>

The dynamic of the issue of justice as a condition for peace points to a change from an understanding of justice as social justice to a category of personal responsibility and consciousness. In his analysis of the different ecumenical dialogues, Martin Illert, a long-term participant in dialogues between the ROC and the Evangelical Church of Germany, shows how the Russian Church changed the focus of its ecumenical engagement in general.<sup>23</sup> In his observation, the focus changed from social issues to issues of personal, individual belief and salvation – from the aim of transformative impact on the world, to inner ascertainment.

Nevertheless, there is a continuation of Metropolitan Nikodim's social argument in the current discourse on sovereignty of nations and cultures. In Soviet times, the demand of giving every nation and every people the free and equal possibility to develop their own model of social life was a key issue in anti-imperialistic and anti-capitalist rhetoric. After the breakdown of the Soviet Union, this argument shifted slightly to one in which every nation should be granted the possibility to develop freely within the frame of its own religious and cultural tradition.

In the chapter of the Social Concept on international relationships, the ROC questions the principle of state sovereignty. The Church does so in favor of a spiritual understanding of unity: "Remembering that unity is good and disunity is bad, the Church welcomes the tendencies for unification of countries and nations, especially those with common history and culture" (XVI.1).

In accordance with this shift in argumentation, in 2013, at the beginning of the Ukraine conflict, the ROC synod stated that

The Church will always stand for the eternal moral values given by God, on which the life of our people, the inherits of the historic Rus', grew and will grow. Only these values give a future to the people of Ukraine. And this is why the historical decision of

<sup>22</sup> Alexander Vasjutin, "Understanding the Concept of Just Peace in the Contemporary Teaching of the Russian Orthodox Church," In *Just Peace: Orthodox Perspectives*, Semegnish Asfaw, Alexios Chehadah, and Marian Gh. Simion (Eds.). Geneva: WCC Publications, 2012, 261–272.

<sup>23</sup> Martin Illert, *Dialog-Narration-Transformation. Die Dialoge der evangelischen Kirche in Deutschland und des Bundes der evangelischen Kirchen in der DDR mit Orthodoxen Kirchen seit 1959*. Leipzig: Eva, 2016, 127–128.

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the Ukrainian people should not lead to a destruction of these eternal and redeeming values.<sup>24</sup>

The protests on Kyiv's Independence Square (Maidan) in 2013–2014 and the following conflict and war appear to have been the trigger for a revival of a Russian Orthodox approach to justice. The term occurred again in official statements, mostly in the framework of demanding justice from state officials on one hand, and recognizing and “doing justice” to the allegedly repressed Russian-speaking population and believers of the Ukrainian Orthodox Church on the other. In contrast to the argumentation during the Cold War, justice is mentioned not as a condition for peace, but on the same level as peace. In 2014, Vsevolod Chaplin, then head of the Department for the Relationship of Church and Society, explained this understanding of justice:

A just peace can be achieved only when all people will be heard, when their different ideas about the future of the country and about the direction of the development of its people will be taken into account, even if these ideas seem incompatible. To live in one house with different positions means to try to reconcile all of these different positions somehow and to do nothing that completely eliminates one of these positions, forces to refuse from maintaining and implementing it. We will hope that it will be like this, that God will help the Church to elect a new primate [for the UOC after the death of Metropolitan Vladimir] who will unite everything that is incompatible from a human perspective, and at the same time will not compromise when it comes to the fidelity or infidelity to God's truth and to the eternal moral values and spiritual values, given by God in the Gospel. Peace, but not at the cost of injustice. Unite different positions, but not at the cost of relativism regarding the Gospel of God's truth.<sup>25</sup>

This definition of justice differs from those at the beginning of the ROC's peace engagement. While handing over the question of social justice as a condition for peace to state and civil actors, at the same time, the Russian Church defines the measure of a just or unjust peace in terms of religious, or at least moral, righteousness.

In a 2015 speech, Patriarch Kirill emphasized his hope for a “just peace” in Ukraine, giving a twofold definition of justice as both a juridical (social justice according to law) and a spiritual (justice of God) concept.<sup>26</sup> He characterized the latter as coming before the former, which means that the demand to forgive each other should be a basis for the social context. In a similar attempt, in 2017, Patriarch Kirill described the search for secular social justice – recalling the Russian Revolution of 1917 – as a trigger for conflict and even war, because this search is anthropocentric. He warned of the danger of repeating this mistake “by searching for some justice again ... harming our fatherland”<sup>27</sup> (Kirill 2017), implicitly pointing at current events in Russia and Ukraine.

<sup>24</sup> *Zajavlenie Svjatejščennogo Sinoda Russkoj Pravoslavnoj Cerkvi v svjazi s sobytijami na Ukraine*, 23 December 2013, accessed 17 January 2019, <http://www.patriarchia.ru/db/text/3480916.html>.

<sup>25</sup> Vsevolod Chaplin, “Pamjat' Blažennejšego Mitropolita Vladimira” 17 July 2014, accessed 17 January 2019, <http://www.patriarchia.ru/db/text/3690065.html>.

<sup>26</sup> Patriarch Kirill: Slovo posle liturgii. 22.2.2015, <http://www.patriarchia.ru/db/text/3998354.html>.

<sup>27</sup> Patriarch Kirill: Slovo posle liturgii. 19.2.2017, <http://www.patriarchia.ru/db/text/4808057.html>.

Furthermore, there was a shift from a socio-ethical understanding of justice – demanding an end to discrimination on grounds of race or social status – to a discourse of the people’s moral state. This speaks to the changing conditions of the Church’s ethical thinking: during Soviet times, it was forced to focus on social, external issues to prove its right to exist in the public sphere. After the breakdown of the atheist system, it explored its traditional task of changing the world by changing people’s hearts. The problem arises when this moral claim ignores the boundaries of individual ethics and tries to become a political agenda. Thus, in 2018, Patriarch Kirill stated that the “the only possible universal foundation for a peaceful coexistence of cultures and nations is moral consensus.”<sup>28</sup>

In the case of war or societal conflict, as in Ukraine, this shift from social to moral measures of justice means dismissing the question of justice and truth regarding victims, aggressors, and concrete reasons for conflict or social discontent. Of course, by assessing these questions from a spiritual point of view, the Church insists on the personal responsibility of every person for his or her good and bad deeds. The distinction between “human justice” and “God’s truth” refers to the fact that in history there have been “manifestations of terrible injustice under the slogans of achieving justice.”<sup>29</sup> However, without trying to define an understanding of social justice as a condition for peace on the basis of theological reasoning, the Church has ceased participating in this crucial social discourse.

Finally, in terms of tradition, there is a vivid engagement with the Biblical and patristic tradition when interpreting the right understanding of justice. However, it is obvious that theological arguments have lost weight in this discourse. The texts of Osipov, ecumenical discussions, and even the Basis of the Social Concept all include extensive quotes from, and references to, the Old and New Testament as well as Church fathers. Thus, a comprehensive theological argumentation on justice as a social issue and the ambiguity of Biblical and patristic texts is missing. This counts even more in the context of the war in Ukraine, where the theological notion of justice and truth could be more valuable for peace and reconciliation than arguments in favor of the defense of a spiritual civilization.

### *War and disarmament*

In this second case study, I will focus on the question of war and arms as an element of the second dimension of peace ethics: civilizing war and conflict. For historical reasons, the issue of war is much more likely to be a subject of theological assessment than is peace, which should be the norm. Accordingly, the chapter “War and Peace” in the 2000 Social Concept devotes much more space to war than to peace: sections VIII.1–4 deal with the former, while only section VIII.5 covers the latter. The above-

<sup>28</sup> Patriarch Kirill, “Doklad na otkrytii XXVI Meždunarodnykh Roždestvenskich obrazovatel’nych čtenii,” 24 January 2018, accessed 17 January 2019, <http://www.patriarchia.ru/db/text/5136032.html>.

<sup>29</sup> Patriarch Kirill, “Slovo Svjatejščego Patriarcha Kirilla posle molebna u moščeju svjatitelja Tichona,” 7 April 2014, accessed 17 January 2019, <http://www.patriarchia.ru/db/text/3621353.html>.

mentioned texts by Osipov and Vasjutin also cover war, although they were originally asked to deal with peace. In her recent research on the 1904 Russo-Japanese War, Betsy Perabo gives a valuable overview of the Russian Orthodox tradition on the issue of war.<sup>30</sup>

During the peace movement in the Soviet Union, the emphasis of the ROC was quite different. At the 1955 session of the Soviet Committee for the Defense of Peace, Metropolitan Nikolaj (Jarushevskij) underlined that politics “from a position of power” is against the Christian teaching (Nikolaj 1955b, 48). He advocated the prohibition and destruction of all nuclear weapons. Already in the early 1950s, Patriarch Aleksij I (Simanskij) firmly supported all international initiatives against nuclear weapons and called for an international ban on them.<sup>31</sup>

In 1965, Metropolitan Nikodim (Rotov), the head of the Department for External Church Relations, published a theological article on the Bible Book of Wisdom and its references to peace. In the texts of this book from the Old Testament, he found arguments for destroying all arms and transferring huge amounts of money for military objects to support for poor people and nations.<sup>32</sup> In other texts, Nikodim and others repeated this demand for the destruction and prohibition of all arms, referring to the Prophet Isaiah and his words: “He shall judge between the nations, and shall decide disputes for many peoples; and they shall beat their swords into plowshares, and their spears into pruning hooks; nation shall not lift up sword against nation, neither shall they learn war anymore.” (Is. 2:3–4) The slogan “Swords to Plowshares” is the main motto of the international anti-war movement.

The consequent rejection of arms and armed conflicts was, of course, due to the political situation of the Cold War and the pressing danger of nuclear war. Yet, the Church found genuine theological arguments for its pacifist position: the vision of the world as God’s creation, the indestructible value of human life, the prohibition of murder, and the rule of the love of one’s enemy.

However, as early as 1956, the notion of “just war” occurred in an article by Metropolitan Nikolaj, in which he admitted the possibility of war and the blessing of the Church for the armed defense of the good.<sup>33</sup> Later, in the 1970s, in his above-mentioned lecture, Osipov proposed the argument of “just violence.” This lecture took place in the framework of theological discourse rather than that of an international peace movement – a framework that offered a more open space for purely theological reasoning and profiling one’s own position. Moreover, the text was published only in 1973, when the politics of détente between East and West were stabilizing. Aware

<sup>30</sup> Betsy Perabo, *Russian Orthodoxy and the Russo-Japanese War*. London/New York: Bloomsbury, 2017, 65–79. The only comprehensive book on Orthodox engagement with ethical questions of peace and war so far is the compilation “Orthodox Christian Perspectives on War” edited by Hamalis and Karras (2017, Notre Dame). Remarkably, this highly valuable work also focuses on war rather than on peace.

<sup>31</sup> Patriarch Aleksij I, *ZMP* 6/1950, 3.

<sup>32</sup> Metropolitan Nikodim, “Razmyšlenija nad knjigami premudrogo,” *ZMP* 9 (1965), 34–38.

<sup>33</sup> Metropolitan Nikolaj, “Voprosy voiny i mira v svete biblii,” *ZMP* 3 (1956), 24–29, 29.

that pure pacifism had never been a mainstream tradition in the Orthodox Church, the Church started to evaluate the corresponding theological arguments as well.

Only after the end of the Cold War and the repression of the ROC did the Church openly articulate its position beyond mere pacifism. As Osipov had already argued in 1971, the use of violence could be justified by proper means. After 1990, this argument was developed in several directions: the blessing of arms and soldiers, a theory about conditions for just war, and, finally, the recent discourse about the right of parents to punish their children physically.<sup>34</sup>

Besides theological reasoning, practical steps followed. Already in the late 1980s, the Church was in contact with the military structures of the state. The main argument for this cooperation was and is the patriotic commitment of the Church. In 1995, Patriarch Aleksij II addressed new conscripts as follows:

Never forget that the military armor was adorned once by the holy princes Boris and Gleb, Alexander Nevsky, Dimitri Donskoy, and many other of our ancestors, who shed their blood “for their friends.” Military service to the Fatherland has always been blessed by the Church, and the prayer for the Christ-loving army never ceases in the Church.<sup>35</sup>

The Basis of the Social Concept puts a clear emphasis on the worldly reality of war and the eschatological hope for peace, so it seems much more obvious to engage with the questions of war. In section VIII.3, the Basis gives a theological justification of the just war theory.<sup>36</sup> It points to the necessity that “the question of whether the Church should support or deplore the hostilities needs to be given a special consideration every time they are initiated or threaten to begin” and explores the “special concern for the military, trying to educate them for the faithfulness to lofty moral ideals ... for bringing the military back to the established Orthodox traditions of service to the fatherland.”

In 2009, an official of the Department for the Relationship of the ROC with the Armed Forces published an article in the official journal *Cerkov i vremja* on the issue of military chaplaincy. He wrote,

Cooperation between the Armed Forces of the Russian Federation and the Russian Orthodox Church over the past fifteen years has become an essential factor in the revival of the age-old historical traditions of the Russian Army and Navy. First of all, this

<sup>34</sup> This question has been widely discussed in state and Church media since 2016, when the Russian State Duma proposed and passed a law that decriminalized domestic violence. See Irina Kosterina, “Russian faux family values: Domestic violence decriminalized in Russia.” 6.2.2017, <http://www.gwi-boell.de/en/2017/02/06/russian-faux-family-values-domestic-violence-decriminalized-russia>.

<sup>35</sup> Patriarch Aleksij II. “Obraščenie k pravoslavnomu junošam-prizyvnikam 1995 goda.” 9 October 1995, accessed 17 January 2019, <http://patriarh-i-narod.ru/slovo-patriarha/tserkov-i-armiya/1199-obrashchenie-k-pravoslavnym-yunosham-prizyvnikam-1995-goda-9-oktyabrya-1995-goda>.

<sup>36</sup> On the just war theory and its interpretation by the ROC in the Social Concept, as well as in its new but not yet approved Catechism, see Nicholas Sooy, “Just War and Orthodoxy: A Response to the Catechism of the Russian Orthodox Church.” *The Wheel*, 12/2018, 51–56.

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concerns returning to the Russian Army an understanding of military service to the Fatherland as truly holy, charitable, and sanctified by the Church.<sup>37</sup>

In 2009, the Institute of Military Chaplains was restored. The official document “Regulations on the Military Clergy of the Russian Orthodox Church in the Russian Federation” stated that

The position of the Church in respect of military service is based on the fact that military service is salutary for the Christian, if subject to observance of the commandments about the love of God and one’s neighbor, up to the readiness to put his soul “for his friends,” which, according to Christ the Savior, is the highest manifestation of sacrifice of Christian love (Jn. 15:13). ... From the point of view of Christian dogma, war is the physical manifestation of the hidden spiritual ailment of mankind – fratricidal hate (Gen. 4:3–12). By recognizing war as evil, the Church blesses its children to participate in fighting when it comes to the defense of their neighbors and their homeland. The Church has always respected the soldiers who gave their lives and health of their duty.<sup>38</sup>

In 2011, Metropolitan Ilarion, the head of the Department for External Church Relations, wrote in his book about rituals of the Orthodox Church, “Some orders of the Missal are related to war and military actions. The Orthodox Church has never been in the position of absolute pacifism, it has always blessed warriors to fight against the external enemy and, in times of war action, raised their prayers for the gift of victory over the enemy.”<sup>39</sup>

The question of military service differs in some way from the issue of arms because of its pastoral component: taking care of those who serve in the army. By paying more attention to the righteousness of soldiers, the Church emphasizes the meaning of individual ethical behavior in war. Simultaneously, it is important to notice the shift in the Church’s argument concerning armament, especially on the issue of nuclear weapons.<sup>40</sup> In line with the rejection of nuclear weapons and armament during the Cold War, in 2009, Patriarch Kirill, as head of the Church, stated that the “Church stands for a world without weapons.” Yet, in his statement during a visit to Sarov, the historical home of the Holy Seraphim and the birthplace of the nuclear bomb<sup>41</sup>, he underlined,

<sup>37</sup> Aleksij Marčenko, “Problema vvedenija instituta voennogo duhovenstva v sovremennoj Rossii i puti ee rešenija”, *Cerkov i vremja* 19 (2009), accessed January 17, 2019, <https://mospat.ru/church-and-time/19>.

<sup>38</sup> Polozhenie o voennom duhovenstve Russkoj Pravoslavnoj Cerkvi v Rossijskoj Federatsij, December 26, 2013, accessed January 17, 2019, <http://pobeda.ru/polozhenie-o-voennom-duhovenstve-russkoy-pravoslavnoj-tserkvi-v-rossijskoj-federatsii.html>.

<sup>39</sup> Metropolitan Ilarion, *Obrjady Pravoslavnoj Cerkvi*. Moskva: Izdat. Moskovskoj Patriarchii, 2012, 174.

<sup>40</sup> On the issue of the Church’s attitude to nuclear weapons, see also Nicholas Sooy, “The Russian Church Must Work for Disarmament.” 4.9.2018, <https://berkeleycenter.georgetown.edu/responses/the-russian-church-must-work-for-disarmament>.

<sup>41</sup> “Jepiskop Savvatij ob osvjaščenii OMU: Nužno prislušivatsia k narodu.” 6 May 2021, accessed 1 June 2021, <https://ria.ru/20210505/episkop-1731139485.html>.

The struggle against human sin, the renewal of the moral sense, the combination of morality with politics, with the economy, with the sphere of international relations – that can predetermine the peaceful development of the human race without any military conflicts, that's what the world can provide without a weapon. But this is not the case today. And today, the very weapons that are being developed in Sarov are a deterrent. Of course, the very fact of the presence of weapons is a huge danger, a huge challenge to humanity. And once again, I want to say that we should strive for a world without weapons, but in a way that this desire does not destroy, including our country, so that we remain able to be a sovereign state.<sup>42</sup>

Since 2020, the Church discusses a new document on the blessing of arms and soldiers, yet especially the proposal to ban the blessing of weapons of mass destruction initiated intense debates without a solution<sup>43</sup>. Bishop Savvatij, head of the Synodal department for cooperation with the armed forces, underlines the significance of nuclear weapons for the sovereignty of Russia and suggests to decide the question in accordance with the spiritual needs of the soldiers, and not as an issue of social ethics<sup>44</sup>.

Here, the Church's teaching that violence can be justified in some cases leads to an argument in favor of weapons, and even nuclear weapons – an argument impossible to even imagine during the peace engagement of the 1950s and 1960s, when the Church claimed that “nuclear weapons are unnatural for the religious conscience.”<sup>45</sup> The ability to remain a sovereign state was a strong element of the diplomatic struggle at that time. Now, it is above all a patriotic argument that justifies the blessing of warriors and weapons, and – not least – the interventional military actions of the Russian state.

Since the start of military action in Ukraine, the ROC has remained silent in its official statements on the actions of the Russian military. It has also remained silent in the face of the blessing of arms by Russian Orthodox priests, a so-called “Orthodox army” in the Donbas region, and an aggressive instrumentalization of Orthodox rhetoric by supporters of the annexation of Crimea. Given the connection of war and patriotism on one hand, and the linking of patriotism and the concept of Holy Rus' as the bearer of the true faith on the other, it becomes clear that the Russian military intervention could be justified by Russian Orthodox arguments as part of the so-called civilizational conflict of values in Ukraine.<sup>46</sup>

<sup>42</sup> Patriarch Kirill, “Jadernoe oružie v svjatome meste?” 13 September 2009, accessed 17 January 2019, <https://www.pravmir.ru/yadernoe-oruzhie-v-svyatom-meste/>.

<sup>43</sup> Proekt dokumenta “O blagoslovenii pravoslavnykh christian na ispolnjenje voinskogo dolga.” Accessed 1 June 2021, <https://msobor.ru/document/51>.

<sup>44</sup> “Jepiskop Savvatij ob osvjaščenii Omu: Nužno prislušivatsia k narodu.” 6 May 2021, accessed 1 June 2021, <https://ria.ru/20210505/episkop-1731139485.html>.

<sup>45</sup> “Prizyv k verujuščim vsech religij mira,” ZMP 5 (1956), 21.

<sup>46</sup> See the comprehensive analysis of the impact of the Russian Orthodox Church in Ukraine by Mikhail Suslov: *The Russian Orthodox Church and the Crisis in Ukraine*. In Andrii Krawchuk, Thomas Bremer (Eds.): *Churches in the Ukrainian Crisis*. New York/London: Palgrave Macmillan, 2017, 133–162.

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The connection of patriotism and just war is even more obvious in the case of Syria. In 2015, Vsevolod Chaplin called the intervention of the Russian army in Syria “a holy battle against terrorism, for a just peace, for the dignity of the people.”<sup>47</sup> He was sharply criticized by Christians all over the world. Nevertheless, in May 2016, Patriarch Kirill called Russia’s participation in the war in Syria a “holy battle.”<sup>48</sup> In February 2018, Patriarch Kirill stated that

The fact that Russia entered the fight against worldwide terrorism in order to stop it far away from the Russian borders, that fact appears to be a very brave decision. ... Without doubt, Christians would have died or left the places of their historical home in masses. But what is most important – the enemy would have come near our borders and would threaten our people directly.<sup>49</sup>

The latter phrase about evil near Russia’s borders chimes with the words of Metropolitan Ilarion in 2014, when he expressed the conviction that the conflicts in the Middle East and Ukraine were “part of the same strategic plan ... to create a hotbed of chronic confrontation at the borders of our country.”<sup>50</sup> Later, and more generally, Ilarion justified Russia’s participation in war as a fight against evil: “Moral Christian law condemns not the struggle against evil, not the use of force in relation to its bearer, and not even the deprivation of life as a last means, but the evil of the human heart.”<sup>51</sup>

An impressive symbol of the justification of war and an growing militarization of the ROC is the newly erected “Cathedral of the Armed Forces of the Russian Federation”<sup>52</sup>. Beyond being a memorial complex honouring the victory of 1945, the icons in the church embrace recent military activities like the annexation of Crimea. The cathedral serves as a place for the blessing of soldiers, arms and therefore the very idea of a nation at war.

As with the question of justice, we can observe a dynamic in argumentation, from a social level during the Cold War, to a spiritual level after the breakdown of the Soviet Union, and back to a social level with moral measures in recent years. Boris Knorre shows in his article on the new “theology of war” how the spiritual theological argument of the inner struggle – “spiritual warfare” against evil – is transferred

<sup>47</sup> “Vsevolod Chaplin: Bor’ba s terrorizmom – svjaščenna.” 30 September 2015, accessed 17 January 2019, <http://ren.tv/novosti/2015-09-30/vsevolod-chaplin-ob-operacii-vvs-rf-v-sirii-borba-s-terrorizmom-svyashchenna>.

<sup>48</sup> Patriarch Kirill, “Patriarch Kirill nazval svjaščennoj vojnoj operaciju RF protiv terroristorov v Sirii.” 6 May 2016, accessed 17 January 2019, <http://www.interfax-religion.ru/?act=news&div=62926>.

<sup>49</sup> Patriarch Kirill, “Svjatejšij Patriarch Kirill pozdravil rossijskich voennoslužbaščich na aviabaze v Chmejmim s prazdnikom Paschi.” 8 April 2018, accessed 17 January 2019, <http://www.patriarchia.ru/db/text/5176643.html>.

<sup>50</sup> Metropolitan Ilarion, “Bližnij Vostok i Ukraina – časti odnoj strategii,” 5 August 2014, accessed 17 January 2019, <https://ria.ru/religion/20140805/1018849101.html>.

<sup>51</sup> Metropolitan Ilarion, “Interv’ju Serbskoj Gazete,” 21 January 2016, accessed 17 January 2019, <https://mospat.ru/ru/2016/01/21/news127055/>.

<sup>52</sup> Cathedral of the Armed Forces of the Russian Federation, official web-site. Accessed 1 June 2021, <https://hram.mil.ru/>.

to an external, social understanding of fighting personalized – moral – evil.<sup>53</sup> While Knorre refers mostly to priests and Orthodox activists at a lower level, there can be no doubt that the hierarchy supports this rhetoric by enforcing the discourse about strategic alliances and a common front in a battle of civilizations and value systems.<sup>54</sup> If war is justified not only as defense of the fatherland but also as a fight against evil and defense of one's neighbor, then reasons for a just war and the use of arms can be stretched quite extensively.

## Conclusion

At a 2018 conference on the ecumenical concept of peace in the face of the war in Ukraine, three representatives of churches of the Moscow Patriarchate were present. When asked about whether the concept of just peace was adopted or matched by the Orthodox tradition, all three spoke not about peace, but about war. Sergej Chapnin, the former chief editor of the *Journal of the Moscow Patriarchate*, underlined that for the Russian Church as well as for Russian society in general, Russian identity is wholly justified by victory in the Second World War.<sup>55</sup> For a society that understands itself as justified by war, the concept of just war is much more practical than just peace, or even pacifism – although both have references in the Orthodox theological tradition.

As shown, there has been a shift in the predominant interpretation of the Orthodox tradition from one in favor of pacifism and disarmament to one in favor of justifying arms and, in some cases, even war. At the same time, there has been an evolution from understanding justice as a condition for peace in a social dimension, to interpreting it in the dimension of individual spirituality. Both shifts took place under conditions of the Church's liberation, when the Church could work out its theology independently of the state. The dynamic of these shifts also shows parallels with the increase and decline of the Church's commitment to ecumenical dialogues.

As Martin Illert of the German Evangelical Church affirms, for bilateral ecumenical dialogue, the theological thinking of the Russian Church after the breakdown of the Soviet Union focused on the Church's acquisition of its own history and legacy as well as on genuine theological spiritual traditions, rather than on the politically imposed commitment to social transformation. However, Illert pays no attention at this

<sup>53</sup> Boris Knorre, "Bogoslovie vojny v postsojetskom rossijskom pravoslavii." *Stranicy* 19:4 (2015), 559–578.

<sup>54</sup> Patriarch Kirill, "Sovremennyy chelovek stradaet ot ostroj nekhvatki nastoyashchej lyubvi..." 17 September 2017, accessed 17 January 2019, <http://www.patriarchia.ru/db/text/5015258.html> ("We, the Orthodox Serbs and Russians, are called, as previously, to stand shoulder to shoulder in this battle for our spiritual identity, for preserving Orthodox civilization, defending the understanding of God-established marriage as a union of man and woman, the value of human life from conception to natural death, not succumbing to temptations of visible material well-being, and not being tempted by false ideas about human freedom and happiness.")

<sup>55</sup> See also Sergej Chapnin, "Pravoslavie v publičnom prostranstve: Vojna i nasilie, geroi i svjatye." *Stranicy* 20:1 (2016), 69–79.

point to the growing distance of the Church's hierarchy from ecumenical engagement and its theologically based discourse on social transformation.

By emphasizing the historical legacy and spiritual traditions in this period and simultaneously withdrawing from Western theological discourses, the Church entered an open commitment to patriotism based more on historical than on theological tradition. This commitment entailed consistent support of all military activities of the Russian state, whether verbalized or only symbolic<sup>56</sup>.

The armed conflict in Ukraine and Russia's participation in the war in Syria challenged the ROC to engage again with questions of peace and war. In this context, the former spiritual dimension was directly connected to the social dimension. In this way, moral measures became a crucial issue for justifying conflict and war, while issues of structural social justice, truth, or disarmament did not matter in terms of theological reasoning.

Nevertheless, what remains behind the official socio-ethical statements is an unbroken commitment to peace in the liturgical life of the Church. A crucial move in this respect is the canonization of the so-called new martyrs, the victims of Communist militant atheism. For Orthodoxy, where liturgical issues are core theological matters and have a wide impact on believers, this aspect is quite important – but it is almost irrelevant for secular social discourse. By describing the dynamics of Russian Orthodox peace ethics, it seems that in the shift from the social to the individual (spiritual) dimension and back again, the aspect of conditions of peace remained on the level of individual responsibility, while the aspect of conditions of war returned to the social dimension.

When analyzing the ROC's statements in this secular discourse, the problem we observe is not the theology of war, but the silencing of the responsibility for ethics of peace in the public discourse and in the Church's official institutes. Peace is placed in the responsibility of the individual and God, while war, in terms of defense of the good, is seen as the responsibility of the state.

Finally, this situation points to the crux of socio-ethical theology in current Russian Orthodoxy: between the individual and his or her spiritual responsibility, on the one hand, and the state as defender of the righteous and good, on the other, the social dimension is missing – society as a space for negotiating and practicing peace, justice, and truth. The most valuable benefit of the ecumenical and peace movement of the second half of the twentieth century was to enable the ROC to discover its theological potential for addressing society rather than the state or the individual in social issues. The ROC has not used this potential since it re-discovered its tradition of symphonic life with a hierarchical or even authoritarian state.

As for future prospects, the development of the same issues in Ukraine during the last decade seem to offer another path. Due to a stronger civil society and a lack of one major – state – religion, the Orthodox Church has to address society. In 2018, an

<sup>56</sup> See Dmitry Adamsky's book *Russian Nuclear Orthodoxy: Religion, Politics and Strategy*, Stanford: Stanford UP, 2019, where he extensively analyzes the intertwining of militarization in church and politics, yet misses the theological logic behind the political agenda.

ecumenical working group met twice to discuss questions of “Truth, Peace, and Reconciliation between Russia, Ukraine, and EU.”<sup>57</sup> Almost at the same time, a conference organized by the Kyiv Theological Academy discussed ways of reconciliation in Ukraine<sup>58</sup>. Finally, in 2021 an ecumenical project with Orthodox participation started to systematically work on the role of the churches in the reconciliation process<sup>59</sup> in Ukraine. These The current efforts of Orthodox initiatives in Ukraine to develop an independent interpretation of the historical and theological legacy of Russian Orthodoxy promise intriguing results, especially on the issue of war and peace.<sup>60</sup>

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<sup>57</sup> Nicholas Sooy, “Church seminar considers questions of war and peace in Ukraine“. 10 October 2018, accessed 1 June 2021, <https://incommunion.org/2018/10/10/news-church-seminar-considers-questions-of-war-and-peace-in-ukraine/>.

<sup>58</sup> The proceedings of this conference are published: Sergij Bortnyk (ed.) (2021), *Strategii primirennja. Rol' cerkov v Ukraïni*. Kyiv: Ridzhi.

<sup>59</sup> Porozuminnja, web-site of the project. Accessed 1 June 2021, <https://oou.org.ua/peacebuilding/>.

<sup>60</sup> In 2018, an ecumenical working group met twice to discuss questions of “Truth, Peace, and Reconciliation between Russia, Ukraine, and EU.” <https://incommunion.org/2018/10/10/news-church-seminar-considers-questions-of-war-and-peace-in-ukraine/>. Almost at the same time, a conference organized by the Kyiv Theological Academy discussed ways of reconciliation in Ukraine. On the position of the Orthodox Churches in the situation of war in Ukraine, see Regina Elsner, *Friedensstifter oder Konfliktträger? Der Krieg in der Ukraine als sozioethische Herausforderung für die orthodoxen Kirchen*. ZöIS-Report 2/2019, <https://www.zois-berlin.de/publikationen/zois-report/zois-report-22019/>.



# The Eurasian Union through Russian Collective Memory and the Dilemma of Identity

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## *Abstract*

The Eurasian Union project recently put forward by the Russian government has become the object of broad speculation among political analysts regarding Russian intentions and goals regarding the former non-Russian Soviet republics, or what has become known as “the near abroad.” These accounts mainly consider the project within the “Realist” approach and discuss its political or economic aspects. Rarely, however, do they touch on its cultural or psychological dimensions. The article argues that the idea of Eurasian Union, well beyond any political or economic rationales, is underpinned by traditions of Russian collective memory and identity. This essay analyses such Russian historical narratives as a specific type of “mnemonic” device in this context, suggesting how they work as cultural tools to promote collective remembering.

*Keywords:* Russia, Eurasian Union, Eurasianism, collective memory, identity, historical narrative

## In lieu of an introduction

On October 4, 2011 Moscow-based daily *Izvestiia* published the article of Vladimir Putin, then the Russian Prime Minister, in which he called for creation of the Eurasian Union<sup>1</sup>. Putin suggested to CIS countries (former Soviet Republics) to join this Union in order to establish a common space for economy, currency and customs. He also denied proposing to re-create the Soviet Union: “The prospective union will not be a new U.S.S.R. or a replacement for the CIS, but an effective link between Europe and the Asia Pacific region, an association with close coordination of the economic and currency policies.”<sup>2</sup> However, Russia’s attempts to set up the project of the Eurasian Union aimed to integrate several CIS countries, as it is assumed, into some sort of supra-state formation have evoked extensive speculations among political analysts

<sup>1</sup> Putin V. (2011). Novyi Integratsionnyi proiekt dlia Evrazii – budushcheie, kotoroe rozhdaetsia segodnia. *Izvestia*, 4 October, 2011. URL: <http://izvestia.ru/news/502761> (Accessed February, 2013).

<sup>2</sup> Ibid.

regarding Russian intentions and goals. These speculations, in accordance with the “Realism” school of thought, look mainly into political or economic aspects of the project. It is worth noting that Putin himself has also described the proposed Union strictly in political and economic terms. However, I believe that the “Eurasian project” in some essential ways is forged by certain cultural and psychological phenomena including Russian collective memory and Identity. In this article I will try to trace and identify the underlying cultural and psychological sources of the Russian Eurasian project. Before dwelling on this issue let me start with one particular episode that happened several years ago and which stimulated my thoughts on this matter.

### Do Russians remember Tsargrad?

On May 12, 2010 a visa-free travel agreement was signed between Russia and Turkey. On the next day I participated in a roundtable devoted to the role of Russia in the Middle East which was organized by Baku Center for Strategic Studies in collaboration with the Russian Institute for Strategic Studies (RISS)<sup>3</sup>. During the discussion I asked the assembled guests if they found the new visa agreement remarkable given the highly tense relations between Russia and Turkey in the past. After all, *twelve* Russo-Turkish wars were fought between the Russian and the Ottoman Empires during the last 200 years alone. I then asked our Russian speaker (Leonid Reshetnikov, director of the RISS): Could Russian memories of numerous wars with the Ottoman Empire, wars that were often encouraged by the slogan “Let liberate Tsargrad!” (referring to Constantinople, later Istanbul) undermine the growing cooperation between Russia and Turkey? I expected a formal, diplomatic answer from the speaker, who by the way had been a high-ranking Russian intelligence officer. To my surprise, the speaker’s response was long. He was at pains to point out that the Russian-Turkish past did not create an obstacle in his view. Finally, he said – “Who remembers those wars today? The majority of Russians do not even know what Tsargrad stands for”.

At first glance his answer sounded rather convincing. It might be that new generations of Russians did not know that Tsargrad was the name given in medieval Russian chronicles to Constantinople, the capital of Byzantium, later renamed Istanbul, the capital of Ottoman Turkey. Indeed, who (except professional historians) might remember events back in the Middle Ages? However, as more I thought on this issue I realized that it was not as simple as it first appeared. From memory studies we know that there are different types or levels of memory: *individual* memory, as well as *collective, social* and *cultural* memories<sup>4</sup>. Some scholars also talk about

<sup>3</sup> See: <http://sam.gov.az/en/events/roundtables/20110719041218039.html> (Accessed February, 2013).

<sup>4</sup> Halbwachs, M. (1992). *On Collective Memory*, Chicago: University of Chicago Press; Assmann, J. (2011). *Cultural Memory and Early Civilization: Writing, Remembrance, and Political Imagination*. Cambridge: Cambridge University Press; Wertsch, J.V. (2012). Deep Memory and Narrative Templates: Conservative Forces in Collective Memory. In: A. Assmann and L. Shortt (eds.), *Memory and Political Change*. London: Palgrave Macmillan, pp.173–185.

*deep* memory<sup>5</sup>. There are different interpretations of these types of memory, but the general understanding is they bear qualitatively different natures that cannot be treated as a sum of individual memories. Therefore, even if one imagines that we have conducted a special sociological survey and got data testifying that majority of young Russians did not know Tsargrad, how can one be sure that this knowledge is not somehow remembered in a different way or in a different context? So, taken from the perspective of collective memory studies, the Russian speaker's answer is not so obvious. In order to get some insights on this issue I explore Russian collective memory in this context in greater detail.

## Collective memory and cultural trauma

In my research I follow a particular version of collective memory developed within the framework of a socio-cultural approach<sup>6</sup>. According to this approach historical narratives are considered to be cultural tools, promoting collective remembering. Certain properties of narratives affect the collective remembering process in a very specific way. James Wertsch identified an abstract and generalized form of narratives, including one such property, which underlies numerous narratives and which he describes as the "schematic narrative template" or SNT<sup>7</sup>. These templates differ from one cultural setting to another, require special reflection to be identified, and are used to mold stories about key historic events, even in cases where historical events do not fit certain models. Based on these theoretical premises I look into the Russian cultural memory through the analysis of Russian historical narratives as a specific type of "mnemonic" device, as cultural tools promoting collective remembering.

Collective remembering is interconnected in some essential ways with cultural trauma. The notion of cultural trauma should be distinguished from psychological trauma in some essential ways. If psychological trauma refers to immediate experience by an individual of a distressing or life-threatening event<sup>8</sup>, cultural trauma is experienced by a group, irrespective of being an immediate witness or victim of the act of violence<sup>9</sup>. More precisely, psychological trauma is experienced if there is a direct threat to physical existence of the individual while cultural or collective trauma may occur if community members experience a threat to their collective identity. According to Neil Smelser:

<sup>5</sup> Irwin-Zarecka (1994). *Frames of Remembrance: The Dynamics of Collective Memory*. NJ: Transaction Publishers.

<sup>6</sup> Cole, M. (1996). *Cultural Psychology: A Once and Future Discipline*. Cambridge: Harvard University Press; Wertsch, J.V. (2002). *Voices of collective remembering*. Cambridge: Cambridge University Press.

<sup>7</sup> Wertsch, *Ibid.*, p. 62

<sup>8</sup> Foa, E.B., Keane, T.M., Friedman, M.J., & Cohen, J.A. (2009). *Effective treatments for posttraumatic stress disorder: Practice guidelines from the International Society for Traumatic Stress Studies*. Second Edition. New York: Guilford Publications.

<sup>9</sup> Alexander, J.C. (2004). Toward a Theory of Cultural trauma. In: J.C. Alexander, R. Eyerman, B. Giesen, N.J. Smelser, and P. Sztompka. (Eds.), *Cultural trauma and Collective Identity*. A: University of California Press, pp. 1–10.

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“A cultural trauma refers to an invasive and overwhelming event that is believed to undermine or overwhelm one or several essential ingredients of a culture or the culture as whole... [For example] The Protestant Reformation qualifies as a cultural trauma because of fundamental threat it posed to the integrity and dominance of the Catholic cultural worldview”<sup>10</sup>.

Unlike psychological trauma, which is diagnosed by psychiatrists or psychologists, cultural trauma is often determined or established by cultural, religious, social or political figures. As Smelser put it:

“A claim of traumatic cultural damage (i.e., destruction of or the threat to cultural values, outlooks, norms, or, for that matter, the culture as a whole), must be established by deliberate efforts on the part of cultural carriers – cultural specialists such as priests, politicians, intellectuals, journalists, moral entrepreneurs, and leaders of social movements”<sup>11</sup>.

Cultural trauma also differs from psychological trauma in terms of its mechanisms and possible effects and outcomes:

“The mechanisms associated with psychological trauma are the intrapsychic dynamics of defense, adaptation, coping, and working through; the mechanisms at the cultural level are mainly those of social agents and contending groups”<sup>12</sup>.”

Stated otherwise, if psychological trauma “operates” on an individual level and deals mostly with psychological processes “inside” the mental life of an individual, cultural trauma affects groups, their cultural memory, group identity and worldview or ideology. One possible way of dealing with cultural trauma could be identified as performing acts of collective remembering for rebuilding an appropriate identity<sup>13</sup>. Another option comes in the rediscovering or emergence of new ideology in a “traumatized” community. As one scholar has written:

“Perceived and traumatic shared experiences under certain conditions might lend themselves to divergent interpretations and conceptualizations. In such situations, it is possible that major ideologies that were dormant in the specific society would be rediscovered and even born anew.”<sup>14</sup>

In brief, cultural trauma that is perceived as a disastrous threat to collective identities can play a particular role in generating new ideologies, collective memory, and

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<sup>10</sup> Smelser, N.J. (2004). Psychological Trauma and Cultural Trauma. In J. C. Alexander, R. Eyerman, B. Giesen, N.J. Smelser, P. Sztompa (Eds.), *Cultural Trauma and Collective Identity*. Berkeley: University of California Press, pp. 31–59 at p. 38.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid, pp. 38–39.

<sup>13</sup> Aarelaid-Tart, A. (2009). Cultural Trauma as the Mnemonic Device of Collective Memory. In: E. Koresaar, E. Lauk & K. Kuutma (Eds.), *The Burden of Remembering*. Helsinki: Finnish Literature Society, pp. 197–221.

<sup>14</sup> Hechter, T. (2003). Historical Traumas, Ideological Conflicts, and the Process of *Mythologizing*. *International Journal of Middle East Studies*. Vol., 35, pp. 439–60, at p. 442.

identity constructions. Keeping in mind these postulates let us turn to a historical episode that happened in 1453 in Minor Asia and which had great traumatic impact on the Russian mind.

## The fall of Tsargrad as Russian cultural trauma

Tsargrad (Constantinople, the capital of Byzantium) was a sacred place for many Russians, from which they received their Orthodox Christianity (Curtis, 1996). When the Turks captured Constantinople in 1453 it was perceived by Russians as a terrible disaster. As Russian cultural historians put it:

“For the Russian religious consciousness, accustomed to checking its ideas and acts against the authority of the true faith, the indestructible stronghold of which was the esteemed second Rome – Constantinople, the fall of this stronghold... with the capture of the city by the Turks in 1453 – was equivalent to a universal catastrophe”<sup>15</sup>.

Within the cultural trauma paradigm, the fall of Constantinople can be identified as a Russian cultural trauma. To support this thesis, I suggest the following arguments:

1. Among various identifications that Russians might have had at that time, one of the most or the most salient for them was their Orthodox identity. Therefore, they would definitely perceive the fall of Tsargrad as a threat to this formation;
2. Soon after the fall of Tsargrad, Russian clergy responded to this event by creating the ideologem of “Moscow – the third Rome”<sup>16</sup>. This notion postulated that “Constantinople was the second Rome, and “Moscow – the third” allowed for a new identity as the “God-chosen Russian people”. These activities on the part of Russian clergy fit well into what cultural trauma literature describes as a strategy of coping.
3. The fall of Tsargrad was actively remembered through the creation and production of different narratives – “almost simultaneously with its creation by Filofei, a whole series of legends, tales, and stories developing the idea were born”<sup>17</sup>.

Thus, shortly after this event four historical narratives describing this event have appeared: 1) a story with brief factual description of siege and fall of Tsargrad, translated from the Greek; 2) an extensive historical tale “About Tsargard, its creation and capture by Turks in 1453”, based on witnesses’ observations; 3) “On capture of Tsargrad by godless Turks”, translated from the Latin (XVI century); and 4) a lyric lament full of bitter complaints about the fate of the destroyed world capital. This

<sup>15</sup> Novikova, L.I., and I.N. Sizemskaia. (1997). *Russkaia filosofia istorii*. Moscow: Magistr, p. 36.

<sup>16</sup> There are different opinions about the authorship of this concept, but usually it is attributed to Filofei (ca. 1465–1542), a monk and the father superior of the Pskov Spaso-Eliazar Monastery (Gol’dberg, A.L., and R.P. Dmitrieva (1988). Filofey. In *Slovar’ knizhnikov I knizhnosti Drevnei Rusi*, vol 2. St.Petersburg: Nauka).

<sup>17</sup> Novikova, L.I., and I.N. Sizemskaia *Op.cit.*, p. 37.

was entitled “On the capture of Tsargard by the godless Makhmet, son of Amuratov, Turski”, which was included in the *Russian Chronograph of 1512*<sup>18</sup>.

Among these narratives the most widespread was the historical tale “*About Tsargard, its creation and capture by Turks in 1453*” whose authorship is usually attributed to Nestor-Iskander or Iskander. This tale was reproduced in several historical narratives through the sixteenth to eighteenth centuries which in turn were republished numerous times, until the beginning of the XIX century. Thus, this tale was later reproduced in the XVII century in such narratives as: “*Tale of the History of Kazan*”, “*Tale of the book of old days*” attributed to I.M.Katyrev- Rostovskii, “*Tale of the beginning of Moscow*” by Avraamii Palitsin, “*Scythian history*” by A. Lyzlov (1692); and in the XVIII century “*History of the last destruction of the Holy City of Jerusalem by Tit, the Roman Caesar, son of Vespasian, a Second [History] about the capture of the glorious capital city of Greek Constantinople (the sameas Tsargrad) by Turski Sultan Maxomet II*” which was first published in Moscow in 1713, and then republished in 1716, 1723, 1745, 1765, 1769 and so on until the beginning of the XIX century<sup>19</sup>. Due to its popularity it is plausible to assume the novel’s strong influence on Russian worldview and collective memory. It therefore seems reasonable to dwell on this novel a little more.

### “About Tsargrad, its creation and capture by the Turks in 1453” by Nestor-Iskander

This tale, which is said to have been created in the XV century, but is preserved in copies of not earlier than XVI century, begins with a story about the creation of Constantinople, then goes into a detailed description of the siege and capture of the city by the Turks and ends with a prophecy about the fate of Constantinople. The prophecy has two parts: the first part speaks about the inevitability of the destruction of Tsargrad; the second announces that Tsargrad will be liberated from Muslims by “fair-haired kin”. This prediction about the liberators of Tsargrad in due course has been interpreted in a sense that the “fair-haired kin” are Russians who will defeat the Turks<sup>20</sup>. Though the factual accuracy of details given in the tale testifies that its historical basis is written by eyewitnesses and participants of the siege of Constantinople, the story is already a new literary elaboration whose author, undoubtedly, is Russian from the epoch when a concept about Moscow as a successor of Tsargrad and its future liberator from Turkish power is being created<sup>21</sup>. This is the concept of “Moscow – the third Rome” which was certainly an imperial concept. However, two

<sup>18</sup> Tvorogov, O.V. (2003). *Povesti o vzyatii Konstantinopolya turkami v 1453 godu*. Elektronnyie publikatsii Instituta russkoi literatury RAN. URL: <http://www.pushkinskiydom.ru/Default.aspx?tabid=4515> (Accessed 28 January, 2013).

<sup>19</sup> Shambinago, S.K. (1945). *Istoricheskie povesti v literature Moskovskogo knyazhestva kontsa XIV i XV vv. Istoriya russkoi literatury v 10 tomax*. Vol. 2(1). Moscow-Leningrad: Nauka, pp. 201–225; Tvorogov, O.V. (1981). *Literatura Drevnei Rusi*. M.:Prosvesheniie.

<sup>20</sup> Shambinago, Op.cit.

<sup>21</sup> Ibid.

points brought about important correctives to this seemingly perfect imperial idea: 1) the idea of Moscow as a successor and heir for the legacy of Constantinople; and 2) from the very beginning, this concept was covered by a specific type of “victim” or “sacrificial” narrative reproduced in genre – “lament about the fallen world city of Tsargrad”. This conjunction between the ideas of succession with “victim” narratives would have resulted in *meaning transformation*. On the one hand, the idea of Moscow as a successor and heir for the legacy of Constantinople promoted a very specific understanding of the conquest. Within this concept the conquest(s) could be interpreted and perceived as taking back possessions that were “inherited” from Byzantium by the right of a “successor” of Constantinople. On the other hand, “victim” narratives, as we know from conflict psychology literature, can block the empathy and recognition of the opposite side’s sufferings, status and rights<sup>22</sup>. The combination of these two elements would have resulted in a particular type of interpretation and/or perception of annexation and conquest by Russia.

In what follows I give some examples of interpretations presented in major Russian historical and artistic narratives devoted to Russian military campaigns from the XVI to the XX centuries which reframe annexation and conquest as “liberation”, as “triumph over alien forces, and as “Russian sacrifice”.

### Conquest as liberation

The *Tale of the History of Kazan* [Kazanskaia istoriia], created in the second half of the XVI century, is a good illustration for the “Conquest as liberation” framing. This tale is a literary story of the three-century history of Russian–Tatar relations from the time the Golden Horde was formed up to 1552, the year Ivan the Terrible conquered the Kazan khanate, a branch of the Horde that dated to the mid-XV century<sup>23</sup>. In fact, this is one of the first, if not the very first, historical narrative dedicated to the aggressive campaigns of the new Muscovite state. In this respect, analysis of this narrative allows us to capture vividly the aspects of perception and interpretation of the events that depict many of the assumptions underlying this text. *Tale of the History of Kazan* is structured against the backdrop of Nestor-Iskander’s story of the capture of Tsargrad, as well as a lament on the destruction of Tsargrad in the *Russian Chronograph of 1512*. Any historical point in the tale is interpreted both as a parallel to the history of the fall of Tsargrad (and thus, grief about Kazan’s inhabitants) and, at the same time, as connected with the idea of its liberation (and thus, the glorification of the Russians, the liberators). The destruction of Kazan is presented as the destruction of Byzantium under the blows of its enemies, the liberation of Kazan as the liberation of Byzantium from the Muslims. In this way, the text presents a type of conscious-

<sup>22</sup> Nadler, A. (2003). Post resolution processes: an instrumental and socio-emotional routes to reconciliation. In G. Salamon & B. Nevo (eds.), *Peace education worldwide: The concept, underlying principles, and research* (pp. 127–143). New Jersey: Erlbaum.

<sup>23</sup> Kazanskaia istoriia, trans. T.F.Volkova. (1991). In *Za zemliu Ruskuiu! Drevneruskie voinskie povesti*, comp. M.E.Ustinov. Cheliabinsk, pp. 149–532.

ness that perceives a conquest not as a “conquest” but rather as “liberation.” At this point, one might question the degree to which this perception of events was reflected in the collective mind. We have at our disposal a kind of sociological indicator, that is, the degree to which a given story was in demand among its readers. According to Pliukhanova: “Apparently, the readers of the XVI–XVII centuries did not notice any inconstancies and discrepancies in the *Tale of the History of Kazan*. The numbers of copies and the owners’ inscriptions testify to the exceptional love readers had for this work”<sup>24</sup>. All this gives reason to believe that the type of perception that did not pay attention to the “discrepancies” in the text was not a rare phenomenon.

Another example for the above-mentioned reframing is the dictum, “Liberate Tsargrad!” which was very popular in Russian society for a long while. It should be noted that since the XVI century the idea of “liberating world city Tsargrad” exposed in different forms was presented in many Russian historical narratives. The first historical narrative of the XVI century, the “Russian Chronograph”, which appeared in 1512, already contained this idea. On the one hand, it neatly contained a “lament on destruction of Byzantium”, a kind of “sacrificial” narrative. On the other hand, it clearly expressed a hope for the liberation of the “great Tsargrad” with the simultaneous glorification of Russia as a last bulwark of Christianity.

This idea was also widely exploited in Russian politics and literature in the XVII, XVIII, XIX, XX and XXI centuries. For example, in a poem written by court poet Simeon Polotskii in 1672 in honor of the birth of Peter the First, Peter was named as a “future liberator of Tsargrad”<sup>25</sup>. The idea of the “liberating world city” had also direct connections with Russian politics. One should mention here the so-called “Greek Project,” which aimed to demolish Ottoman Turkey and to enthrone one of Russian Empress Catherine’s (II) grandsons, a strategy which was pursued by Catherine’s minister Grigorii Potemkin. It is worth noting that Russian military mobilization for the 1877–1878 Russo-Turkish War was also held under the “Liberate Tsargrad!” slogan. In the beginning of the XX century the same idea accompanied Russian involvement in the imperialist World War I<sup>26</sup>.

Even more striking, counter to the remarks made by our visiting Russian speaker at the outset of this essay, is that “Liberate Tsargrad” continues to exist in Russian narratives of the XXI century. See for example the series of articles entitled “Tsargrad and Russia. Should Constantinople be Ours?” published in contemporary Russian Orthodox press<sup>27</sup>.

<sup>24</sup> Pliukhanova, M.B. (1987). “Vitiistvo I ruskaia istoricheskaiia mysl’ 16–17 vekov.” In *Aktual’nyie problem semiotiki kul’tury. Trudy po znakovym sistemam*, vol. 20. Tartu, pp. 73–84 at p. 80.

<sup>25</sup> Vodovozov, N.V. (1972). *Istoriia drevnei ruskoj literatury*. M.:Prosvesheniie.

<sup>26</sup> Senyavskaya, E.S. (1999). *Psixologiiia Voiny v XX veke: IstoricheskiiopytRossii*. M.:ROSSPEN.

<sup>27</sup> It is rather curious that the author of this article who is also a chief editor and publisher of the Russian Orthodox newspaper is someone by name Grigorian – ethnically Armenian. See: Grigorian, V. (2004). “Tsargrad & Russia. Should Constantinople be ours?” *Vera*” (Faith), North Russian Christian Newspaper, # 472, 473, 474. URL: <http://rusvera.mrezha.ru/472/7.htm> (Accessed 31 January, 2013).

To give just one example:

“There are many reasons to say that the fate of Byzantium remains unresolved. The will of those who died on the walls and streets of the King of the cities in the last battle should be fulfilled. Constantinople should be ours! But ours means, orthodox, and not necessarily Russian...Whether or not we want it to be so, history repeats itself like a bad dream... In one of these circles once again, we will probably find ourselves involved in the battle for Tsargrad. It is hard to believe it when you can see so many Russian tourists and traders rolling through Istanbul nowadays...”<sup>28</sup>

## Conquest as triumph over alien forces

This type of reframing conquest can be found in abundant numbers in Soviet history textbooks, as has been pointed out by James Wertsch. According to his analysis of Soviet and post-Soviet school history textbooks there is a specifically Russian schematic narrative template underlying narratives which he called “triumph over alien forces”. This narrative template consists of the following components:

1. An “initial situation in which Russia is peaceful and not interfering with others;
2. Trouble, in which a foreign enemy viciously attacks Russia without provocation;
3. Russia nearly loses everything in total defeat, as it suffers under the enemy’s attempts to destroy it as a civilization;
4. Through heroism and exceptionalism, against all odds, and acting alone, Russia triumphs and succeeds in expelling the foreign enemy.<sup>29</sup>

The author points to its wide dissemination as the model for plot construction of the most important events in Russian history, as well as its high degree of plasticity, that is, its ability to take on extremely diverse forms. Finally, he indicates that this schematic template is used even in cases that do not seem to fit the confines of this scheme. After all, the history of Russia, as he rightly notes, abounds not only in events where Russia was a victim of aggression. In many cases, Russia itself was the attacking force; otherwise, it would have been difficult to explain the creation of the vast Russian empire. Nevertheless, even in these cases, the schematic template described above underlies the narration, as Wertsch shows using textual examples from Soviet and post-Soviet history textbooks<sup>30</sup>.

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<sup>28</sup> Ibid.

<sup>29</sup> Wertsch, J.V. (2002). *Voices of collective remembering*. Cambridge: Cambridge University Press, pp. 95–96.

<sup>30</sup> Ibid.

## Conquest as sacrifice

This kind of trope is peculiar for Russian literature devoted to the conquest of the Caucasus in the XIX century. Among the first was Pushkin with his poem “The Captive of the Caucasus”. The poem written in 1821 told a story of Russian aristocrat who seeking adventure set off to the war in the Caucasus. Soon he finds himself captured by Circassians, only to be released when a young maiden, experiencing strong affection towards him, sets him free. Later prominent Russian poets and writers such as Bestuzhev-Marlinsky, Lermontov, Tolstoy and others also broadly exploited the Caucasian captive plot in their poems and novels. In a sense, the captive plot is a perfect manifestation of the mentioned above combination of the imperial idea with the Russian tradition of sacrificial or victim narratives. The ubiquity of this theme has prompted various explanations. According to Bruce Grant (2009), the Caucasian captive plot could help accommodate Russians to the issue of their invasion<sup>31</sup>. The author discussed this reiterated pattern in terms of a “gift of empire” and “sacrifice” and pointed out that: “Russians gave of their own ...to legitimate imperial, colonial, and later communist interventions”<sup>32</sup>. In Susan Layton’s view, these narratives serve the function of [re]constructing of Russian identity as semi-European, semi-Asian people<sup>33</sup>.

## The fall of the Russian Empire: Eurasianism as response to cultural trauma

The collapse of the Russian empire and the civil war of 1917–1920 can also be considered within the cultural trauma paradigm. As is well known from Russian history, this period was marked by brutal cruelties, violence and massacres on a mass scale, taking place during the fierce civil war between “Reds” and “Whites”. From this point of view, Russians would definitely experience a threat to their collective identities. In such troubling circumstances<sup>34</sup> a group of Russian émigré intellectuals proposed a new ideology, Eurasianism, which suggested a quite different sense of this world<sup>35</sup>. The concept announced that: “Asia is a significant part of Russia and Russians are mainly Asians not Europeans”<sup>36</sup>. Within this approach to Russian

<sup>31</sup> Grant, B. (2009). *The Captive and the Gift: Cultural Histories of Sovereignty in Russia and the Caucasus*. London: Cornell University Press.

<sup>32</sup> *Ibid.*, p. xv

<sup>33</sup> Layton, S. (1994). *Russian Literature and Empire: Conquest of the Caucasus from Pushkin to Tolstoy*. Cambridge: Cambridge University Press.

<sup>34</sup> The cultural and psychological climate of Russian society that conditioned the emergence of Eurasianism is described by one research: “We cannot understand Eurasianism unless we bear in mind the disappointments and disillusionment suffered by the Russian intelligentsia during the events of 1905 and February 1917...Eurasianism was thus born in the context of a crisis, in an atmosphere of eschatological expectations: Its proponents had the feeling of standing at a turning point in human history...” (Laruelle, M. (2008). *Russian Eurasianism: An Ideology of Empire*. Woodrow Wilson Center Press, pp. 19–20).

<sup>35</sup> *Iskhod k Vostoku: Predchuvstviia i sversheniia: Utverzhdeniie evraziitsev*. (1921). Sofia.

<sup>36</sup> Vernadskii, G.V. (2000/1927). *Nachertaniie russkoi istorii*. SPb.: Lan’, p. 34.

identity construction Asia was perceived not as an “exotic” “Other” but as an “exotic “Self”. Nevertheless, even if Eurasianism looked like a new approach to what it means to be Russian, it employed with slight modifications the old imperial idea of “Moscow – the third Rome”. Thus, Eurasianists stated that Mongols preserved the Byzantine Empire for Russians. The Mongol Empire gave Russia an identity that manifests itself in geography (territory of the country). Now along with the religious connection between Constantinople and Moscow, a geographic legacy passed on from Byzantium via the Mongols to Moscow<sup>37</sup>. However, Eurasianism failed to be a dominant ideology in Russian society at that time as Moscow’s leadership turned, instead, to communism.

## The collapse of the Soviet Union and the re-emergence of Eurasianism

Falling into oblivion during the Soviet period, Eurasianism surprisingly reemerged soon after 1991. The re-emergent Eurasianism, or as some may call it, [Neo]-Eurasianism, slightly adjusted its basic postulates to the changed historical, political and other contexts. It posits that: a) the collapse of a specific regime like Soviet power did not entail the collapse of the country; b) any secession is destined to fail, and the new states have no choice but to revert to a unified political entity; c) Russia must, by nature, be a superpower<sup>38</sup>. The political analysts rightly identifying this movement as *restorationist* are striving to understand why a former obscure émigré ideology would be resurrected after the collapse of the Soviet Union. The explanations of this fact are given mainly in political terms. Some interpret it as a substitute for “empire savers”<sup>39</sup>. Others view this as an attempt to substantiate Russia as a “Natural Power”<sup>40</sup> or as Russia’s intention to reject the “intrusive” West<sup>41</sup>. Without casting doubt upon these explanations, I would like to look at these phenomena within the context of cultural trauma.

## Cultural responses to a crisis and Russian identity

It is strange that the breakdown of the Soviet Union is rarely discussed in terms of cultural trauma. Maybe one of the reasons for skipping this issue comes from the widespread belief that fall of the Communist system was perceived positively by the world community, including peoples of the former Soviet Union. However, even if the Soviet plan to shape a new “Soviet man” failed and the majority of Soviet nationalities preserved their ethnic identities, there still were people with inculcated Soviet

<sup>37</sup> Laruelle, M. (2008). *Russian Eurasianism: An Ideology of Empire*. Woodrow Wilson Center Press.

<sup>38</sup> Ibid.

<sup>39</sup> Dunlop, J. (1993). *The Rise of Russia and the Fall of the Soviet Empire*. Princeton University Press.

<sup>40</sup> Laruelle Op. cit.

<sup>41</sup> Schimmelpenninck van der Oye, D. (2010). *Russian Orientalism: Asia in the Russian Mind from Peter the Great to the Emigration*. New Haven & London: Yale University Press.

identity, the so-called “internationalists”<sup>42</sup>. For this category of population<sup>43</sup> the fall of the Soviet Union was really a disaster. They have definitely experienced a threat to their collective identity. This is especially true for some Russian intellectuals, people from military, security and old-line Communists who felt strong disappointment, constructing a nostalgically viewed past, and pervasively used emotional language about how Russia had been “shamed,” “humiliated,” and reduced to a “second-rate state”. It is not an accident that the Russian president, Putin (a former KGB officer), once called the collapse of the Soviet Union the greatest geopolitical catastrophe of the 20<sup>th</sup> century<sup>44</sup>. Individuals from these groups have taken an active part in reviving Eurasianism after the breakdown of the Soviet Union. Taken from this perspective, the re-emergence of [Neo]-Eurasianism can be considered in terms of a cultural response to cultural trauma caused by the fall of the Soviet Union.

So far we have observed three examples of Russian cultural responses to cultural trauma caused by different events: a) response to the fall of Tsargrad in the 1453 by creating a new ideologem “Moscow – the third Rome” and a new identity construction of “Russians – the God chosen people”; b) a response to the fall of the Russian Empire in the 1917 by creating the doctrine of Eurasianism with a new look at Russians as Asians; c) a response to the fall of the Soviet Union in 1991 by the [re] emergence of Neo-Eurasianism, which asserts a common identity for former Soviet peoples. As one can see, these Russian cultural responses include a set of ideas regarding ideology and identity. It should be noted that if ideas regarding what it means to be Russian vary (from Orthodox to Asians, or even Turanians) ideological construction remains constant by reproducing the same imperial idea (“Moscow – the third Rome”) in different coverings (Eurasianism, Neo-Eurasianism). This constant ideological core, which can be regarded as sort of Russian *cultural DNA*<sup>45</sup>, helps us to understand the imperial nature of Russian identity. In this connection a question may arise as to why we find the persistent [re]birth of the imperial Russia concept. The analysis of Russian narratives presented above provides us with some insights. Our analysis has shown that the Russian historical narrative tradition has preserved the imperial ideologem of “Moscow – the third Rome” through many different forms<sup>46</sup>

<sup>42</sup> Ignatieff, M. (1994). *Blood and Belonging: Journeys into the New Nationalism*. New York: Farrar, Straus and Giroux.

<sup>43</sup> If one is to believe to the results of a referendum on the future of the Soviet Union held not long before its collapse on March 17, 1991, the number of such individuals was not few. According to this referendum at least 70% of voters in all Soviet republics except three Baltic and two Transcaucasian states voted for preservation of the renewed Soviet Union (Nohlen, D., Grotz, F. & Hartmann, C. (2001). *Elections in Asia: A data handbook*, Vol. I.)

<sup>44</sup> URL: <http://www.volgainform.ru/allnews/444083/> (Accessed February 7, 2013).

<sup>45</sup> Wertsch, J.V. (2012). Deep Memory and Narrative Templates: Conservative Forces in Collective Memory. In: A. Assmann and L. Shortt (Eds.), *Memory and Political Change*. London: Palgrave Macmillan, pp. 173–185.

<sup>46</sup> Transformed form is a philosophical category introduced by Karl Marx for analysis of complex systems (Marx, K. (1962). *Capital*. Volume III. Moscow: Foreign Languages Publishing House). Having no space to go into details of this complex category I only offer some examples of these transformations. For example, these are dreams which may symbolize (in transformed form) instinctive desires (Freudian concept) or capital which is derivative of exploitation of workers by capitalists (Marxist concept).

such as “conquest as liberation”, “conquest as triumph over alien forces”, or “conquest as sacrifice”. In this context, we can conclude that Russian historical narratives as mnemonic devices and cultural memory tools very much sustain the [re]construction of imperial idioms.

These considerations also provide us with insight regarding the question posed at the beginning of the essay: Do Russians remember Tsargrad? The answer would be formulated as following: So far as “imperial” constructs are preserved in a Russian narrative toolkit, Russians do remember Tsargrad on a collective or cultural memory level. It also means that even if new Russian generations do not remember the Tsargrad story specifically, and their “imperial identity” is dormant, they might be “reminded” and “awakened” one day by specific constellations of domestic and/or international political events and political/cultural/religious entrepreneurs since collective memory “devices” provided by narrative toolkit are always there.

## Conclusion

Based on these discussions, let us return to the “Eurasian Union” project. This Russian project, which is to some extent inspired, in the view of some political analysts, by postulates of Neo-Eurasianism, evokes some concerns among post-Soviet countries<sup>47</sup>. For several reasons post-Soviet countries are wary of Putin’s “Eurasian Union” project. Their reluctance to share power with any kind of supra-state structure is usually explained by the post-Soviet countries’ leaderships’ fear of a serious weakening of their sovereignty and their access to natural resources along with the unattractiveness of contemporary Russia for their neighbors<sup>48</sup>. From the perspective of my analysis, the issue of Russian imperial identity should be also taken seriously into account. This type of imperial identity confounds Russians’ quest for safe and a sustainable modern Russian consciousness. In this regard, Putin’s article, “Russia and the National Question” which was published soon after he took the post of president on 23 January 2012, hardly made the appeal for a new “Eurasian Union” more attractive for neighboring peoples. The article confused terms and notions related to categories of nation and identity, not to mention history. I list just some of these aspects of this article without comment: 1. There is nowhere in the article reference to “Empire” but instead, “historically great Russia”; 2. “The Russian people have a great mission to join, to pin together our Civilization”; 3. “We are a multinational state but a single people”; 4. Nowhere in the article does one find reference to “Rossiiane”(a term for civic identity) but to “Russians” (russkie); 5. All people in Russia are Russians: “Russian Armenians, Russian Tatars...”; 6. “Russian people made their choice to

<sup>47</sup> Laruelle, Op. cit.

<sup>48</sup> Aliyev, F. (2012). Discussing Eurasianism and Eurasian Integration within the Azerbaijani Context. In Central Asia Program Publications Memo 2012. The Institute for European, Russian, and Eurasian Studies (IERES). The George Washington University. URL: [http://www.centralasiaprogram.org/images/Publication\\_Memo\\_2012.pdf](http://www.centralasiaprogram.org/images/Publication_Memo_2012.pdf) (Accessed February 2, 2013).

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live together with other nations”-self-determination”; 7. “To be Russian means to be culturally Russian: Russian Language, Russian Literature, and Russian History”<sup>49</sup>.

This discourse is simply embarrassing for peoples of post-Soviet states, and evokes two interrelated questions: How do Russians address their identity problem in the twenty-first century? Will Russia become a multinational, democratic country or return to the old Soviet boundaries to be drafted by the “Eurasian Union”? The future of the Russian Federation and to some degree of the CIS countries depends on how the dilemmas of Russian national identity formation (imperial, national-ethnic, or national-civic) will be resolved in upcoming decades.

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<sup>49</sup> Putin, V. (2012). Rossiia: national'nyi vopros. *Nezavisimaia Gazeta*, 23 January, 2012.  
URL: [http://www.ng.ru/politics/2012-01-23/1\\_national.html](http://www.ng.ru/politics/2012-01-23/1_national.html) (Accessed February 2, 2013).

# Ten Hears that Shook the World. How Russia Became a Market Economy – or Did It?

KAJ HOBÉR

At 23:00 hours Moscow time on 10 March 1985, a meeting of the Politburo of the Communist Party of the Soviet Union commenced in the Kremlin. Konstantin Chernenko (1911–1985) had died earlier that day. The meeting was convened in order to appoint Chernenko’s successor. The next day, 11 March 1985, Mikhail S. Gorbachev was elected General Secretary of the Communist Party.

This was the starting point of the reform process launched by Gorbachev that became known as “perestroika.” He soon started to navigate in the uncharted waters of political, economic, and legal reforms in his own country. This was a time when Europe was divided in two. Just as Germany, the European continent consisted of two parts – called East and West – the origin being the 1945 Yalta Conference and its ultimate monument, the Berlin Wall.

Gorbachev’s reforms, however, influenced developments not only in his own country but also in the rest of Eastern Europe, leading to the opening of the Berlin Wall on 9 November 1989. This remarkable event catapulted the transformation process in unknown directions. Continuing at a breathtaking pace, the reform process led to the failed *coup d’état* in Moscow in August 1991, to be followed by the formal dissolution of the Soviet Union toward the end of the same year. Almost literally with a stroke of the pen, the so-called Minsk Agreement, signed on 8 December 1991, and its subsequent ratification did away with Soviet law. No other rules and regulations, let alone a legal system, formally replaced Soviet law; however, this left the Russian Federation, and other member-states of the Commonwealth of Independent States, with a clean slate in this respect.

For many lawyers, this was more than a revolution – it was *Götterdämmerung*. For other lawyers, it was a golden opportunity to fill the slate with a new, modern, and efficient system. Indeed, over the years, many lawyers and politicians scribbled on the slate, and the scribbling continues. One important result thereof was the Russian Constitution, adopted 12 December 1993 by a referendum following the dissolution and bombing of the Parliament of the Russian Federation in October 1993.

Another major accomplishment was the adoption of Part One of the Civil Code of the Russian Federation in October 1994. It entered into force, with certain exceptions, on 1 January 1995 and was intended to introduce civil law norms suitable to a market economy. This had become necessary due to the collapse of the Soviet Union and its planned economy, and also because Russia had undergone a comprehensive

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privatization process that started in September 1992 and was by and large over with the completion of the 1995 Privatization Program, also called the Loans for Shares Program.

Thus, between 1985 and 1995, Russia was transformed from a centrally planned economy to a market economy, at least in embryonic form. This transformation is a central piece in the jigsaw puzzle that we call Russian legal history. These mind-boggling historical changes, which took place during a short period of time, shook not only Russia, but also the world. This is the story of how it happened.

The perspective taken in the account that follows is primarily legal and regulatory, it being understood that most detailed legal aspects cannot be addressed in this summarized account. The main purpose is to present a brief overview of the legal aspects of the transformation process in Russia. In addition, there are, needless to say, several economic, political, and sociological aspects that must be taken into consideration when evaluating this stunning revolution. This, however, can only be done in a broader study, in a context where all relevant circumstances are taken into proper consideration. The purpose of this contribution is not to pass value judgments – economic, political, or moral – on the Russian transformation process. Rather, the purpose is to describe what happened from a legal and regulatory perspective.

In order to properly understand the magnitude of this Russian revolution, a basic understanding is necessary of how the planning system worked under Soviet law. This is briefly discussed in the next Section, “The Legal Regulation of the Soviet Planned Economy.” The following section, “Perestroika Reforms Begin,” deals with early reforms in the foreign trade area that soon had an effect on the domestic scene.

At about the same time, the Soviet Union experienced a constitutional crisis that, to a large extent, was generated by claims to sovereignty from several constituent republics of the Soviet Union, including the Baltic States. The constitutional crisis led to the so-called War of Laws, meaning, in essence, that the republics started to promulgate their own legislation, disregarding federal legislation. The constitutional crisis eventually led to the disintegration of the Soviet Union. This phase of the development is addressed in the section “The War of Laws, Katastroika, and Dissolution.” The final section, “Privatization,” will address the privatization of the Russian economy.

The events described in these sections are chronologically overlapping and factually interdependent. It is not possible – nor meaningful – to try to disentangle and analyze every aspect of the revolutionary period between 1985 and 1995 in detail. The important thing is to describe and make understandable, from a general legal and regulatory perspective, what happened during these ten years that changed Russia, as well as the world.

## Legal regulation of the Soviet planned economy

The permeating nature of the plan best illustrated the distinctive features of the legal regulation of Soviet enterprises. A few remarks on Soviet state enterprises and their legal environment may serve as a useful point of departure.

In general, the management of a Soviet state enterprise, to a large degree, consisted in the fulfilment of administrative orders from superior agencies. The manager of a Soviet state enterprise had limited opportunities to make his own commercial decisions. Under the Soviet economic system, the state owned all the means of production. Although state enterprises were separate juridical persons under Soviet law, they did not own the property entrusted to them. Rather than ownership of the means of production, state enterprises exercised so-called operative management with respect to their property. In many formal respects, this form of management resembled ownership in its traditional form. In fact and in law, however, the use and disposition of property was severely limited by, and always subordinated to, the Plan. The autonomy of Soviet state enterprises was always conditioned by their role and function within the planned economy.

Soviet economic and commercial life was governed by an extraordinary morass of statutes, rules, and regulations of primarily an administrative and civil law character. As far as civil law was concerned, the basic legislative acts were the 1961 Fundamental Principles of Civil Legislation of the USSR and Union Republics, and the civil codes of each republic; for example, the 1964 RSFSR Civil Code. Soviet civil law regulated “horizontal” relations between Soviet economic organizations, including contracts between state enterprises and the property rights of state enterprises. Administrative law, on the other hand, regulated “vertical” legal relations; that is, the form and extent of control exercised by superior agencies towards subordinate agencies and entities.<sup>1</sup>

In addition to the bifurcation of civil law and administrative law – in a broad sense – confusion resulted from recurring shifts of policy and reforms. The latest of such reforms – prior to the reforms initiated by M.S. Gorbachev – took place in 1973 and 1974.<sup>2</sup> This reform saw the creation of the production association as the smallest legally autonomous unit in the Soviet economic system. Enterprises – which were separate juridical persons and enjoyed a non-negligible degree of autonomy as

<sup>1</sup> The relationship between the law and the economy had been the subject of constant debate among Soviet lawyers. It began in the first years following the October Revolution in 1917, re-emerged again in the early 1930s and the late 1950s and was – at least seemingly – put to a halt in 1961 when the Fundamental Principles of Civil Legislation were enacted. The Soviet planning system had created a body of planning, administrative, financial, contract, and corporate law that many Soviet lawyers felt would be dealt with as a special branch of law – economic law – outside the civil law. The economic law debate re-emerged again in the late 1960s resulting, *inter alia*, in a draft USSR Economic Code. See W. E. Butler (ed. and transl.), “Economic Code of the USSR (Draft of Basic Provisions)”, *Soviet Statutes and Decisions*, XII (1976).

<sup>2</sup> The basis for this reform was a joint decree of the Central Committee of the CPSU and USSR Council of Ministers entitled «О некоторых мероприятиях по дальнейшему совершенствованию управления промышленностью» [On Certain Measures for the Further Improvement of the Administration of Industry], ЦП СССР (1973), no. 7, item 31.

a result of the 1965 economic reforms – were transformed into production units of the production association. At the same time, so-called industrial associations were established. They were purely administrative agencies to which the production associations were subordinated. The industrial associations, *inter alia*, determined the planned tasks for production associations. The functions and jurisdiction of production associations were governed by the Statute on the Production Association (or Combine).<sup>3</sup> The activities of state enterprises – the primary form of organization of economic activity prior to the 1973/74 reforms – were regulated in the Statute on the Socialist State Economic Enterprise.<sup>4</sup> This statute, enacted in 1965, was the first codification of the law governing state enterprises in the Soviet Union. On 30 June 1987, a Law on the State Enterprise (Association) was enacted that entered into force in 1 January 1988.<sup>5</sup>

The 1988 Law provided for a number of changes in the legal status of enterprises concerning property rights, planning, contractual, and other obligations. The Law was intended to implement the underlying philosophy of the reform then underway in the Soviet Union: to decentralize decision-making and decrease the role of the central planning authorities in order to increase the role of the market and contractual arrangements in the economy.

### Establishing the plan and its legal effects

The first national economic plan of the Soviet Union was adopted in 1929. This marked the end of the New Economic Policy (NEP) introduced by Lenin in 1921. During approximately seventy years of Soviet planning, certain distinctive features crystallized. The following is a brief summary of these features.

First, the Soviet planning system was highly centralized. This did not mean that lower reaches of the Soviet economy took no part in the economic planning. On the contrary, they supplied all information without which the planning system would have been impossible. As a general rule, the plan and the planning tasks for the State enterprise acquired legally binding force only when issued by the competent agencies of central authority.

Second, the Soviet planning system was detailed. The degree of detail varied depending on the level and sphere of planning. The Supreme Soviet of the Soviet Union, for example, never adopted plans as detailed as those issued by the USSR Council of Ministers. Furthermore, on the basis of the plan confirmed by the Council of Ministers, each economic ministry prepared still more detailed plans for subordinate economic organizations.

Third, time was a distinctive feature: the Soviet planning system was calculated for different time periods. There existed numerous systems of long-term planning. Soviet practice had known ten-year and even twenty-year long-term plans, but in

<sup>3</sup> ЦП СССР (1974), в ЦП СССР, no. 8, item 38.

<sup>4</sup> ЦП СССР (1965), no. 19–20, item 731.

<sup>5</sup> Ведомости Верховного Совета СССР (1987), no. 26, item 385.

practice, such plans had never been considered as anything but officially declared policy. However, with respect to five-year plans, they acquired actual importance by either establishing binding planning tasks, or serving as an obligatory prerequisite for current planning. The latter had one year as its main period, with further subdivisions into quarterly or monthly, and sometimes even ten-day or one-week planning.

As will be briefly discussed below, the provisions contained in the 1987 Law on the State Enterprise (Association) seemed to modify some of the aforementioned distinctive features. Generally speaking, the planning system was to be less centralized and less detailed in the sense that more discretion and independence were to be granted to individual state enterprises.

There were many types of plans in the Soviet planning system, for example all-union plans, republic plans, plans of economic ministries, and plans of enterprises. The plans of enterprises did not specify to whom the products of the enterprise were to be delivered, nor did they establish who was to supply the enterprise with the necessary materials. The plan of an enterprise directed its internal operation, but did not create relations with buyers or supplies.

In terms of establishing the plan, we shall first look at the plans for production and supply, respectively, as setting forth the basic patterns of Soviet planning. Generally speaking, the first step in planning the Soviet economy was to establish the volume of production output. Then followed the task of distributing production resources among producing entities and the goods thus produced among various Soviet user or consumer entities.

During a given fiscal year, each production association sent detailed information about its production prospects for the coming period of current planning to its superior agency. This information was aggregated by the economic ministry, to which the association was subordinated. The aggregated information was relayed to Gosplan (the State Committee for Planning) and served as a basis for production planning. Gosplan was not bound by the information received. It could impose a planning task broader or narrower than available resources warranted on the economic ministry. If the plan was confirmed with such a divergence between production capacity and production obligation, the production association had to receive additional funds or some part of its funds would be withdrawn by the superior agency.

It was mandatory for Gosplan to draft a production plan for the coming fiscal year and submit it for consideration to the USSR Council of Ministers. After the Council of Ministers confirmed the plan, the Politburo considered the same plan with all the necessary details and introduced modifications. This procedure led to two different documents: the summary plan, and the detailed plan. The Council of Ministers submitted the summary plan to the Supreme Soviet of the Soviet Union, which issued it as the "Law on the State Plan for Economic and Social Development of the Soviet Union" for the corresponding year. The plan thus became a legally binding document. In conformity therewith, the Council of Ministers adopted a detailed plan by way of its own decision.

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As soon as the process from bottom to top was finished, a corresponding top-to-bottom process began. On the basis of the plan, Gosplan distributed planning tasks to economic ministries. The ministries continued the distribution to industrial associations, which in turn determined planning tasks for production associations subordinated to them.

As noted above, the production plan of an enterprise did not specify to whom the products of the enterprise would be delivered, nor did the plan establish who was to supply the enterprise with the necessary raw and other materials. This was done in the supply plan. Soviet legislation distinguished two objects of supply: products for production-technical use, and consumer goods. Each economic organization submitted its demand for such products to its superior agency. Demands compiled by economic ministries were accumulated by those state agencies that were tasked with planning distribution of means of production, raw materials, and energy resources. The most important products were included on a special list established by Gosplan. All other objects were distributed by Gossnab (the State Committee for Supply). Gosplan and Gossnab prepared the necessary drafts and eventually confirmed them by their own decisions. The quota stipulated in the plan was then communicated to prospective suppliers and purchasers, respectively, through economic ministries and other agencies.

Planned tasks to be performed by a production enterprise originated from planning agencies superior to the enterprise in the hierarchy of the planning system. These tasks took the form of an administrative order and resulted in an administrative legal relationship. The planning agency had the right to demand fulfilment of the plan, whereas the addressee of planning task – the production enterprise – was obligated to fulfill it. The scope of this administrative duty varied: sometimes it precluded any deviations, and sometimes it allowed deviations (at least, to some extent). Despite such variations, the fundamental nature of the planned task was that the addressee, that is, the state enterprise, was under an administrative legal obligation to its superior agency to fulfil the planned task.

The production plan created a relationship only between the planning agency and the production entity. It did not affect anyone else. By contrast, all other plans confirmed by planning agencies dealing with either building or supply were addressed to at least two entities: the customer and contractor, and the supplier and purchaser, respectively. This led to the creation of a legal relationship of a different nature. Both addressees were subordinated to the planning agency. The relationship between the agency and the addressees of the plans was thus of an administrative nature. At the same time, however, both recipients of the planned task had to establish some kind of relationship between themselves. To establish mutual relationships between economic organizations – at the horizontal level – only one method was possible under Soviet law: to establish a civil law relationship. Thus, in effect, the planned task resulted in an obligation, or a right, to enter into a civil law contract. Depending on the area of planning and the economic activity involved, this effect of the plan took different forms of expression.

First, the planned task could unconditionally oblige both its addressees to make a contract. However, the specific economic operation provided by the plan could be commenced only after the contract was actually concluded. This was, for example, the case with planning of capital construction. Neither the customer nor the contractor had the right to refuse to conclude the contract, and until the contract had been concluded, the contractor could not begin to build, and the customer could not pay for the work of construction.

Second, the plan could unconditionally obligate one of its addressees to make a contract, and only conditionally obligate the other. In this case, too, the specific economic operation provided by the plan could commence only subsequent to conclusion of the contract. This was, for example, the case with plans for supply. Generally, the supplier could not refuse to conclude the contract, but the purchaser could do so within ten days after receipt of the necessary information. This meant that after ten days, the purchaser's duty to make the contract was converted from a conditional into an unconditional duty. At the same time, however, the delivery could not be executed until the contract had been concluded, and could be executed only within the framework of the contract.

A third way of describing the legal effect of the plan would be to focus on situations where the plan obligated both addressees to make a contract, but some part of the specific economic operation would have to be performed directly in accordance with the plan during the process of making the contract. In this case, too, the economic activities in their entirety could not be performed until the contract had been concluded. Planning of carriage goods by railroad transport was an example of this.

It follows from the information above that, despite the pervasive and binding nature of the plan and planned tasks, contracts were needed in the Soviet system of planning to detail the plan, to check and correct the planned tasks, and to support and ensure their actual performance.

### Perestroika reforms begin

By the beginning of 1987, it had become clear to the Soviet leadership that radical economic reforms were necessary. The economy was ailing. Oil prices on the international market were falling. Foreign trade had always been of critical importance to the Soviet economy. It was therefore not surprising that this was an area in which reforms started early.

The fundamental distinctive feature of Soviet foreign trade was the principle of the state monopoly of foreign trade. This meant that all trade and, in principle, all commercial contacts with foreign countries were entrusted to certain state organizations that reported to the USSR Council of Ministers. Soviet foreign trade was centralized, a consequence of which was that the various union republics had no right to engage in foreign trade.

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The highest body in the domain of foreign trade was the USSR Ministry of Foreign Trade. The Ministry and its subdivisions occupied the central position in Soviet foreign trade.

The responsibilities of the Ministry of Foreign Trade included participation in the preparation and development of export and import plans as part of the planned Soviet economy, and the direction and control of the activities of foreign trade entities. The ministry participated in the development and negotiation of trade agreements between the Soviet Union and other countries.

Most Soviet foreign trade took place through foreign trade organizations (so-called FTOs) that answered to the Ministry of Foreign Trade. These were, as a rule, organized by industry, which meant that each organization was responsible for a certain group of goods. Responsibility was divided in such a way that it was, in theory, impossible for two organizations to be assigned the same type of goods. Competition among FTOs was thus precluded.

FTOs were created by the Ministry of Foreign Trade, which confirmed the organization, or created by decree of the USSR Council of Ministers. The charters, which were published, included a list of the product groups for which each organization was responsible. Publication itself, however, had no legal effect. The organization became a separate juridical person through the decision made by the Ministry of Foreign Trade.

All Soviet FTOs were separate juridical persons.<sup>6</sup> Under Soviet law, this meant that they each had their own assets and that only these could be used to pay the organization's debts.<sup>7</sup> The Soviet state was thus not liable for the organization's debts, and the organizations were, in turn, not responsible for the obligations of the Soviet state.<sup>8</sup> An FTO, just like all other state organizations that were separate juridical persons, had no right of ownership in its own name, however. All rights of ownership belonged to the state. FTOs had a so-called right of operative management over property in their possession. This meant that the organization could possess, use, and transfer property in accordance with applicable laws and regulations. When the 1990 RSFSR Law on Ownership was promulgated, however, a new concept was introduced, adapted from the 1987 USSR Law on the State Enterprise: full economic jurisdiction, together with outright (private) ownership.

Consequently, Russian legislation on ownership at that time recognized these two forms of ownership, or quasi-ownership, in addition to the right of operative management. As mentioned above, state enterprises did not own the means of production, but had a right of operative management with respect to them. The state remained the owner. One important consequence of this bifurcation of the rights to means of production was that the state – as the owner – could at any time instruct a state

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<sup>6</sup> This was explicitly set forth in the charters of the foreign trade organizations. For example, in the case of the FTO Stankoimport, Section 1 of the charter stipulated, *inter alia*, that Stankoimport “shall be an autonomous economic organization, shall enjoy the rights of a juridical person.”

<sup>7</sup> Article 32, RSFSR Civil Code.

<sup>8</sup> Article 33, RSFSR Civil Code.

enterprise as to what to do with the means of production, despite the fact that state enterprises were always described as separate juridical persons. If a state enterprise held property by right of full economic jurisdiction, the owner of the property, that is, the state, only retained the right to a share of the profit produced by the property in question and a rather loosely defined right to control the efficient use of the property, including the right to withdraw the property from the enterprise.

The organization of Soviet foreign trade saw little change until January 1987. Radical reforms took effect on that date, however. In January 1987, the first step in the decentralization and liberalization of the foreign trade system was taken by granting foreign trade rights to approximately seventy State enterprises and twenty-one economic ministries, departments, and State committees. Prior to this reorganization, virtually all Soviet foreign trade was conducted through approximately fifty FTOs subordinated to the USSR Ministry of Foreign Trade.

In September 1987, the Central Committee of the Communist Party and the USSR Council of Ministers issued a joint decree calling for further improvements in the management of foreign economic relations. This decree contained, *inter alia*, several provisions intended to facilitate and stimulate the use of foreign currency funds of State enterprises, organizations, and ministries. In January 1988, another step was taken: the Ministry of Foreign Trade and the State Committee for Foreign Economic Relations (GKES), the latter having primary responsibility for foreign trade with developing countries, were dissolved. At the same time, the Ministry for Foreign Economic Relations was established, replacing the Foreign Trade Ministry and GKES.

In December 1988, yet another step was taken whereby foreign trade was further liberalized. On 2 December 1988, the USSR Council of Ministers issued a decree that stipulated, *inter alia*, that by 1 April 1989 all enterprises, organizations, producing cooperatives, and other entities having competitive products or services to offer would be entitled to conduct foreign trade directly, provided that they were registered with the Ministry for Foreign Economic Relations. The state monopoly of foreign trade had thus been abolished.

The reorganization and reform of Soviet foreign trade profoundly altered the well-established patterns of doing business in the Soviet Union, which in turn had a significant impact on the negotiation and completion of contracts with foreign parties.

As a result of the decree adopted on 2 December 1988, foreign trade became open to practically all enterprises and organizations in the former Soviet Union, and the conduct of foreign trade gradually shifted from the traditional FTOs to other enterprises and organizations that had obtained the right to engage in foreign trade transactions. It was believed that foreign trade was thereafter, to a large extent, carried out by entities other than the FTOs in their original or transformed legal form; many FTOs were transformed into joint-stock societies, governed by relevant Russian legislation.<sup>9</sup>

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<sup>9</sup> Joint-stock societies in the Russian Federation were governed by Decree 601 of the RSFSR Council of Ministers confirming the Statute on Joint-Stock Companies.

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The month of January 1987 saw another groundbreaking development. On 13 January, the USSR Council of Ministers adopted Decree No. 49 on joint enterprises in the Soviet Union. The decree made it possible for the first time since the 1920s to make direct foreign investments in the Soviet Union. Decree 49 was heralded as the beginning of a new era in Soviet foreign trade and investment, which indeed it was in many respects.

Joint enterprises became a popular form of doing business in the USSR. By the end of 1989, the number of joint enterprises reached almost 1,000. Under Decree 49, joint enterprises were separate juridical persons under Soviet law. The property of joint enterprises was to be used and disposed of in accordance with Soviet law and in accordance with the purpose of its activity. The charter fund of a joint enterprise could be formed by participant contributions such as cash, buildings, equipment, and the right to use land, water, and other natural resources.

One problem relating to joint enterprises was that they operated within the planned economy. Depending on the specific activities of a joint enterprise, it was, to varying degrees, dependent on the planning system in the Soviet Union.

In addition to reforms in foreign trade, other steps were taken toward modernizing the Russian economy. As mentioned above, new legislation was adopted regulating state enterprises. On 30 June 1987, the Statute on the State Enterprise was adopted. It entered into force on 1 January 1988. Stated in general terms, it foresaw a more independent role for state enterprises.

Article 10 of the 1987 Statute on the State Enterprise (Association) contained provisions on planning. It was provided that the enterprise should independently work out its five-year and one-year plans, the latter constituting a breakdown of the tasks under the five-year plan. When working out the five-year plan, the enterprise was expected to take into account the following factors:

- control figures (контрольные цифры), which were said to represent the minimum level of production at the enterprise. However, control figures were not mandatory for inclusion in the plan;
- state orders (государственные заказы) – established by Gosplan, confirmed by the Council of Ministers, and issued by the enterprise's superior agency – were mandatory for inclusion in the plan.<sup>10</sup> State orders were said to guarantee fulfilment of essential needs of Soviet society. Judging from reports in the Soviet press at the time, there was uncertainty as to how state orders would and should be used in the planning system: on one hand, there were complaints that the state orders covered too large a portion of the planned production of an enterprise (indeed, sometimes all production). On the other hand, complaints were raised about the fact that some enterprises had not received any state orders at all, which had a detrimental effect on the earning capacity of the enterprise;<sup>11</sup>

<sup>10</sup> It was not explicitly stated in the new Statute on the State Enterprise (Association) that state orders were to be established by Gosplan and confirmed by the Council of Ministers. However, this was stated by Mr. Reut, First Deputy Chairman of Gosplan, in an interview in *Ekonomicheskaya Gazeta*, no. 1 (January 1988), p. 4.

<sup>11</sup> See, for example, *Ekonomicheskaya Gazeta*, no. 1 (January 1988), pp. 4–5. According to *Der Spiegel*, no. 2 (11 January 1988), p. 97, more than half of the production of enterprises was required for state

- long-term economic standards (долговременные экономические нормативы), which were said to remain stable during the entire five-year plan and intended to link general economic interests with those of the enterprise. Long-term economic standards defined, *inter alia*, matters related to the state budget, establishment of the wage payment fund, as well as funds for economic incentives; and
- limits, or ceilings, for centrally distributed material resources (лимиты). Such limits determined, for example, capital construction and other major investment projects.

Article 10 also stipulated that an enterprise should take account of direct orders from other enterprises using its products and supply agencies. With respect to both the five-year plan and the annual plan, it was provided that the enterprise should work them out independently. The philosophy underlying Article 10 was to grant a larger degree of freedom to the enterprise. At the same time, however, it was expected that ministries and other agencies would coordinate the plan of the enterprise with their own activities.

The 1987 law tried to replace the plan with contracts between state enterprises. However, the law did away with the plan only in theory. The plan survived in the form of state orders, which were still binding on the enterprises.

Even though the Law on the State Enterprise meant a radical change for Soviet enterprises in many respects, it soon became clear that it would do little in the way of taking the Soviet economy a further step toward becoming a market economy. This required changes in the ownership structure.

At the beginning of 1990, the USSR Supreme Soviet issued a number of legislative acts purporting to change the ownership regime in the Soviet Union, namely: the 1990 USSR Law on Ownership,<sup>12</sup> the Fundamental Principles of Legislation of the USSR and Union Republics on Leasing,<sup>13</sup> and the Fundamental Principles of Legislation of the USSR and Union Republics on Land.<sup>14</sup> In principle, this legislative package taken as a whole contained all the elements necessary to demonopolize the Soviet state economy. However, many individual provisions were fraught with uncertainty regarding their actual meaning and scope.

Despite ambitious legislative attempts to introduce at least market economy concepts, real life did not change much. One explanation was that the power and bureaucratic structure of the planned economy remained and permeated Soviet economic life. At the same time, it was widely understood that there could be no market economy until all the markets, in particular capital and labor, were freed.

The most pressing point on the legislative agenda soon became the introduction of comprehensive privatization legislation with a view to introducing a market economy in the Soviet Union. Indeed, there were developments in this field. In February 1991, the newspaper *Ekonomika i Zhizn* published the Draft Fundamental Principles for

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orders, and in the case of the machine-building industry, 86%. In an article in the *Economist*, 9–15 January 1988, it was stated that 90% or more of the output of enterprises was required for state orders.

<sup>12</sup> *Vedomosti Syezda Narodnykh Deputatov SSSR i Verkhovnogo Soveta SSSR* (1990), no. 11, item 164.

<sup>13</sup> First published in *Pravda*, 1 December 1989, p. 1.

<sup>14</sup> *Vedomosti Syezda Narodnykh Deputatov SSSR i Verkhovnogo Soveta SSSR* (1990), no. 10, item 129.

Legislation on the Privatization of State Property and State Enterprises.<sup>15</sup> At about the same time, a legislative package on privatization for the RSFSR was developed by the Committee on Economic Reform of the Russian Republic for presentation to the Supreme Soviet of the Russian Republic.<sup>16</sup>

The Draft Fundamental Principles were general in character and left many questions to be determined by federal and republic legislation. One important question was the privatization of land. Article 2(4) of the Draft Fundamental Principles simply stated that these questions were to be determined “by other legislative acts.” Another important question left open was the role of foreign investors in the privatization process. Although Article 6 of the Draft Fundamental Principles included foreign citizens and foreign firms among those that could acquire state enterprises and state property, no further provisions addressed this issue. Both the question of land and the role of foreign investors were understood as central to make privatization an effective tool of transforming the Soviet economy.

The legislative package prepared for the RSFSR was more comprehensive and detailed. In fact, compared to most Soviet legislation, it was well thought out, well written, and well organized. The proposal consisted of a framework law and four sets of rules covering, respectively, details of the State Committee for the Administration of State Property, provisions covering tender offers for the acquisition of state property, provisions on auctions for the acquisition of state property, and provisions on the transformation of state enterprises into state-owned joint-stock societies.

### The war of laws, *Katastroika*, and dissolution

In parallel with the reform efforts, another development gained speed. It would eventually result in the dissolution of the Soviet Union by the end of 1991. The war of laws, as it was called, initially meant that various union and autonomous republics of the USSR started to adopt their own legislation and claimed that such legislation took precedence over federal USSR legislation. Eventually, all republics asserted independence and sovereignty.

By autumn 1990, all fifteen union republics had proclaimed that their laws, not those of the Soviet Union, governed their territories. In an attempt to restore the priority of USSR laws, on 24 October 1990, the USSR Supreme Soviet enacted a law declaring the primacy of USSR law over union republic law.<sup>17</sup> On the same day, however, the Supreme Soviet of the RSFSR responded with a law claiming that USSR legislation would affect its territory only if ratified by the RSFSR Supreme Soviet. A week later, on 31 October 1990, that body passed a law declaring the economic sovereignty of the RSFSR. On 22 October 1990, Estonia passed the Law on the Economic

<sup>15</sup> *Ekonomika i Zhizn*, no. 7 (February 1991), pp. 18–19.

<sup>16</sup> Simultaneously, two other draft laws on privatization seemed to have been prepared and submitted to the Supreme Soviet of the Russian Republic for consideration.

<sup>17</sup> The USSR Law on Ensuring the Effectiveness of Laws and Other Legislative Acts of the USSR. Text published in *Izvestiya*, 28 October 1990, p. 3.

Border of the Estonian Republic, with the purported object of protecting Estonia's internal market. Other union republics had taken similar measures to prevent the export of goods beyond their borders. This legislative race – the war of laws – played out against the background of the 1977 USSR Constitution. The war of laws soon resulted in a constitutional crisis. What did the Soviet Constitution say about the situation that was unfolding?

### *The 1977 USSR Constitution*

The Soviet State represented an unusual combination of confederate and federal principles. The Union of Soviet Socialist Republics officially came into being on the basis of an international treaty concluded on 30 December 1922 by the RSFSR, Ukrainian, Belorussian, and Transcaucasian Republics (Georgia, Armenia, and Azerbaijan), later joined by the other union republics. Each union republic was regarded as a sovereign socialist State with a constitutional right to secede freely, to have its own Constitution, to enter into relations with foreign States, and to conclude treaties and exchange diplomatic and consular representations. Two union republics, the Belorussian SSR and the Ukrainian SSR, were founding members of the United Nations. The aforementioned elements of confederation, however, were outbalanced by elements of centralized federalism in the USSR and left to the union republics those powers not reserved to all-Union jurisdiction.

In tracing the origins of the constitutional crisis in the Soviet Union, it is instructive to start with claims from the Baltic republics for sovereignty, as they presented the first clear challenge to central authority.

On 16 November 1988, the Estonian Supreme Soviet introduced an amendment to its Constitution declaring all-Union, that is, federal, law valid on Estonian territory only after approval by the Estonian Supreme Soviet.<sup>18</sup> On 18 May 1989, the Lithuanian Supreme Soviet issued a similar declaration of independence and introduced important changes to the Lithuanian Constitution, declaring that laws and other legal acts must be ratified and registered by the Supreme Soviet of Lithuania in order to be valid on Lithuanian territory, and that all land and other natural resources belonged to the republic. A few days later, a Latvian proposal for similar amendments was published.

Moscow vigorously denounced the Baltic initiative, basing its arguments on various provisions of the 1977 USSR Constitution. The Presidium of the Supreme Soviet of the USSR, in a special session on 22 November 1988, refused to recognize the Estonian declaration and claims to natural resources, and proclaimed several amendments to the Estonian Constitution unconstitutional.<sup>19</sup> That body also denied any obligation to register all-Union laws and reaffirmed Article 73 of the 1977 USSR Con-

<sup>18</sup> *Narodniy Kongress, Sbornik Materialov Kongressa Narodnogo Fronta Estonii [People's Front, Collection of Materials of the Congress of the People's Front of Estonia]*, 1 and 2 October 1988, pp. 194, 216.

<sup>19</sup> *Vedomosti Verkhovnogo Soveta SSSR* (1988), no. 48, item 70.

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stitution, which upholds the primacy of Union legislation over republic legislation. The Presidium also said that the question of state property was an all-Union issue and that private ownership was not envisaged by the 1977 Constitution, referring to Articles 10 through 13 and Article 173. Finally, the Presidium pointed out that change in the Constitution required a two-thirds majority (Article 174) and that the sovereignty of the Union extended to the entire territory of the USSR (Articles 74 and 75).

The relationship between the center and the Union republics on the basis of the provisions of the 1977 USSR Constitution was as follows. The starting point was that the Union republics were entitled to legislate in areas that did not fall under Union competence (Article 76, second paragraph). This principle was supplemented by the rule that if the Union did not use its competence, it could be used by the Union republics.

Article 73 outlined the competence of the Union by enumerating in twelve subsections the areas of Union competence. It not only enumerated vast areas of Union competence, including establishing the frontiers of the Soviet Union and ensuring uniformity of legislation on Soviet territory, but added in Section 12 that the Union decided all other questions considered to be of all-Union significance. The Constitution did not draw any clear borderline between the competence of the Union and that of the Union republics, but rather gave general priority to the Union.

This was particularly true in the economic and commercial spheres: centralist elements provided for in the Constitution were even more dominant in practice because economic questions were entrusted primarily to the USSR Council of Ministers and its Presidium.

Union power prevailed over the republics, thanks not only to the 1977 Constitution, but more importantly, also to the far-reaching and arbitrary powers of the top leadership and the Communist Party. What possibilities, then, did the Constitution offer to change the division of power between the center and the Union republics?

The supremacy of the USSR Constitution was laid down in Article 173, which stipulated that "all laws and acts of state agencies shall be issued on the basis of and in accordance with the Constitution of the USSR." Although Article 173 did not explicitly mention the constitutions of the Union republics, it could be argued that it included their constitutional amendments as well, because these were adopted in the form of laws. Consequently, the legality of changes of Union republic constitutions should be judged against the USSR Constitution. This conclusion seemed to follow from Article 173 read together with Article 73 (which gave the Union the right to ensure legislative uniformity), and Article 174 (which stipulated that changes in the USSR Constitution must be made by a two-thirds majority).

Moscow's refusal to accept the Baltic claims thus seemed to have constitutional support. Economic sovereignty of the Union republics did, from a constitutional point of view, require the consent of the relevant all-Union agencies. However, applying this analysis to the Baltic States presupposed acceptance of the occupation of the Baltic republics in 1940 and their inclusion in the Soviet Union. The Baltic initiatives proceeded from the assumption that the occupation of the Baltic States contradicted

international and municipal law and that they should be treated as equal sovereigns in their relations with Moscow.

By the end of 1989, the Baltic initiative for economic sovereignty had gained such momentum and support that the USSR Supreme Soviet, on 27 November, adopted a law on the economic autonomy of the Baltic republics.<sup>20</sup> To inspire economic initiative, the law transferred control over enterprises and economic organizations from central to local agencies; however, it also contained provisions stipulating that the legislative acts of these agencies could not conflict with Union law. The Baltic republics, however, felt the law was too little, too late. Months before the law was enacted, the Baltic republics had adopted laws allowing the establishment of joint-stock societies and foreign private ownership, all of which were more far-reaching than Union law.

### *Katastroika*

During 1990, the Baltic republics continued to adopt their own laws without taking into account Moscow's protests, as did most other republics. The RSFSR had challenged Union law with a number of legislative drafts, for example, the Decree on the Lease, Purchase, and Gratuitous Transfer of State Property.<sup>21</sup> This enactment stipulated, *inter alia*, that all property could be sold or leased, with the exceptions explicitly prohibited by RSFSR legislation.

A further step in this direction was taken on 31 October 1990, when the Law on Ensuring the Economic Foundation of the Sovereignty of the RSFSR was published.<sup>22</sup> The law stipulated in Article 1 that all land, minerals (including gold, diamonds, platinum, and other precious stones, oil and gas), water resources, forests, and other raw materials "constitute the national wealth of the peoples of the RSFSR." It went on to provide that the procedure and conditions governing the ownership of these objects were to be established in legislation adopted by the RSFSR.

All of these legislative enactments by the RSFSR and other republics introduced in the wake of perestroika created katastroika. For example, in November 1990, the central government decided to liberalize prices on "luxury goods" (jewelry, fur, furniture, and radios). The RSFSR vetoed this decree and prohibited the sale of these goods until the dispute had been settled. These and similar measures catapulted the Soviet economy into a state of virtual chaos. On 7 December 1990, directors of 3,000 state enterprises voiced their concerns. The directors, assembled in the Kremlin for a two-day meeting, read the riot act to Soviet politicians. One was reported to have said: "We have four conductors at the moment – Gorbachev, Yeltsin, our regional council, and our city authorities. They are all playing a different tune, but we want one tune: a presidential one."<sup>23</sup>

<sup>20</sup> Text published in *Izvestiya*, 2 December 1989.

<sup>21</sup> *Vedomosti Verkhovnogo Soveta SSSR* (1988), no. 1249, item 385.

<sup>22</sup> An English translation appears in *Soviet Business Law Rapport 1*, no. 8 (December 1990), pp. 8–9.

<sup>23</sup> *Financial Times*, 7 December 1990, p. 20.

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Similar expressions of frustration were often voiced by Western business leaders involved in the Soviet Union or contemplating investments there.

In December 1990, the RSFSR adopted a new tax system in the form of the Law of the RSFSR on the Procedure for the Application within the Territory of the RSFSR in 1991 of the Law of the USSR on Taxes on Enterprises, Associations, and Organizations.<sup>24</sup> The 1990 USSR Law on Taxes on Enterprises, Associations, and Organizations<sup>25</sup> granted only limited taxation powers to the republics. The Russian law, among other changes, offered preferential tax rates for foreign joint enterprises registered in the Russian republic. It also offered a 38% general tax rate, rather than the 45% rate stipulated by USSR tax law.

The most important conflict between USSR and RSFSR laws on enterprise taxation concerned the allocation of revenues. Under Article 4 of the USSR law, 22% of taxable profits would be paid into the Union budget, and each republic could impose an additional 23% tax to be paid into republic and local budgets. The Russian law, however, provided for the inclusion of virtually all enterprise tax revenues within the republic and local budgets, and made no provision for revenues to be included in the Union budget, thereby directly challenging USSR legislation. The rationale underlying the Russian law seemed to be that each Union republic was entitled to its portion of the national income. As a result of this attitude, at the beginning of 1991, *katastroika* was about to break out with respect to central government spending – including defense, law and order, foreign aid, and the environment – as a result of the refusal of the RSFSR to back an economic agreement worked out between President Gorbachev and the republic leaders.

### *The solution – and dissolution*

During 1991, several proposals were made by President Gorbachev – essentially providing for varying degrees of decentralization – with the goal of ending the war of laws and *katastroika*.

Only a new Treaty of the Union could have ended the war of laws and sorted out the relationship between Moscow and the Union republics. Proposals ranged from one end of the constitutional spectrum to the other. Some politicians advocated a new form of “soft” federalism, rather than a confederation, based on the argument that a federation of equals was unrealistic due to the centralized power still in the hands of the Communist Party. At the other end of the spectrum, the Shatalin Plan assumed that the country would become a voluntary economic union of equal sovereign republics.

On 23 April 1991, President Gorbachev and nine of the fifteen republics signed an agreement – the so-called nine-plus-one agreement<sup>26</sup> – that resulted in a truce, at

<sup>24</sup> The law enacted on 1 December 1990 was published in *Ekonomika i Zhizn*, no. 1 (January 1991), pp. 22–23.

<sup>25</sup> “Law on Taxes on Enterprises, Associations, and Organizations,” *Vedomosti Syezda Narodnykh Deputatov SSSR i Verkhovnogo Soveta SSSR* (1990), no. 27, item 522.

<sup>26</sup> The agreement was signed by President Gorbachev and the presidents of the RSFSR, Ukraine, Belar-

least temporarily, in the war of laws. The agreement, which referred to the republics as “sovereign states” could have resulted in a significant enhancement of the role of the republics in government and foresaw an increased responsibility of the republics in developing economic ties at different levels.

The agreement itself, however, would not have been enough to bring about the much-needed peace in the power struggle between Moscow and the republics. Among other things, the agreement called for the adoption of a new Constitution that would incorporate the provisions of a new Treaty of the Union. Although the nine-plus-one agreement acknowledged the right of republics to secede, it left open the crucial questions of the future economic relationship among the republics. Much work remained before the war of laws was over. Minimally, the agreement showed that the nine signing republics were willing to remain part of the Soviet Union, albeit a different Soviet Union, one with greater independence for the republics. Another open question was the role to be played in the future by the republics that did not sign the agreement, i.e., the Baltic three, Armenia, Georgia, and Moldova.

Had a new Treaty of the Union eventually been signed along the lines envisaged in the nine-plus-one agreement, this would have entailed a considerable decentralization of commercial activities, with broad implications for foreign investors. The center of gravity of foreign investment legislation would have shifted from Moscow to the republic level, and republics would have gained more control of commercial and economic activities within their territories.

The nine-plus-one agreement was scheduled for signature on 20 August 1991. With the goal of preventing the agreement from being signed, on the previous day, 19 August 1991, a group of Soviet bureaucrats and politicians – who styled themselves the State Committee on Emergency Rule, and included KGB chief Kryuchkov, Defense Minister Yazov, Vice President Yanayev and parliamentary speaker Lukyanov – attempted a coup d’état while Gorbachev was away on vacation in the Crimea. The coup d’état failed, but it became clear to most observers that this was the beginning of the end of the USSR. Gorbachev and his team made desperate attempts during autumn 1991 to introduce economic reforms. The political death declaration came on 8 December 1991 in the form of the so-called Minsk Declaration, which was subsequently supplemented by the Alma-Ata Declaration and the Alma-Ata Protocol on the creation of the Commonwealth of Independent States.

In the Minsk Agreement, the leaders of the Republic of Belarus, Russian Federation, and Ukraine concluded that the USSR had ceased to exist as a subject of international law and geopolitical reality. Article 11 provided that Soviet law was no longer applicable in the three republics. As per Article 1 of the Minsk Agreement, they formed the Commonwealth of Independent States.<sup>27</sup>

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us, Azerbaijan, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan. The three Baltic Republics, Armenia, Georgia, and Moldova refused to sign the agreement.

<sup>27</sup> The Minsk Agreement on Establishing a Commonwealth of Independent States, signed in Minsk, 8 December 1991.

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On 25 December 1991, at 19:00 hours, Mikhail Gorbachev made his final appearance as President of the Soviet Union. Referring to the current situation with the creation of the Commonwealth of Independent States, he resigned as the President of the USSR. At 19:38 hours, the hammer and sickle flag of the USSR was lowered over the Kremlin and the Russian tricolor was hoisted. The Soviet Union had ceased to exist.

### Privatization

During 1990 and 1991, it became increasingly clear that in order to introduce a market economy, it was necessary to implement some form of privatization of the Russian economy. This realization had its roots in the growing understanding among politicians and experts of the economic distortions created by the planned economy, which in turn had eroded the confidence in the planned economy as a viable economic system for the future. The following distinctive features and consequences of the planned economy caused concern:

*Integration of politics and the economy.* Lack of private ownership led to a politicized decision-making process, that is, non-economic considerations became decisive. The yardstick for enterprises and their management should be the economic performance of the business and not political clout, influence, or other non-economic criteria. Furthermore, under a system of state ownership, there were strong incentives for the state, as owner, to avoid the appearance of mistakes and failures with respect to management of resources, and the state was typically unable, or reluctant, to commit itself to undertake politically painful but economically necessary actions such as liquidating enterprises, enforcing bankruptcy legislation, and laying off employees.

*Lack of financial discipline.* At the macroeconomic level, the necessary financial discipline, that is, the possibility to make credible commitments to so-called hard budget constraints, would only exist if and when enterprise budgets were separated from the state budget. Until such a separation took place, it would always be possible for interest groups of different kinds to put pressure on the government as a result of their political influence, to pay additional funds, to extend further credits, and so on, to an enterprise to prevent it from ultimately becoming insolvent.

*No competition.* In a planned economy with no private ownership and no real markets, there could be no real competition. Generally speaking, only independent enterprises could be expected to compete with one another. The diversity of ownership and the decentralization of decision making resulting from privatization would typically foster the development of real competition. To achieve this, however, it was necessary to de-monopolize enterprises prior to, or in conjunction with, privatization. Because many state enterprises in a planned economy enjoy a *de facto* monopoly status, it would be important to divide such state enterprises into smaller, separate enterprises in connection with the corporatization of state enterprises. To bring about such de-monopolization after privatization was completed could have

proved difficult if not impossible, for the enterprises themselves were not interested in creating a competitive environment once they were independent.

*Lack of entrepreneurship.* Only private ownership was viewed as having the capability to provide the incentives to maximize the values of assets, to enhance the assets, to adapt to changes in the economic environment, to utilize opportunities, and to avoid pitfalls. It was said that the reason for the preeminence of private ownership was simple: true owners care for their assets. Only true owners would be willing to make that extra, unmeasurable effort which made all the difference. Similarly, a true owner would put full attention and effort into monitoring the use of assets in order to make sure that the assets were used and managed in the most cost-effective way.

*State ownership linked with a totalitarian regime.* The control of the economy, seizure of private property, and the prohibition against private ownership deprived individuals and institutions, defined in the broadest terms (except the ruling party), of any real autonomy. Privatization would reintroduce freedom and autonomy by making individuals and institutions independent from the whims of political and governmental authorities, thereby eliminating the basis for a totalitarian political system.

*Nomenclature managers lacked necessary qualifications.* Nomenclature managers presented a problem in that they often lacked the education, training, and experience to manage enterprises in a rapidly changing economic environment. In addition, nomenclature managers as a group were generally distrusted. Consequently, it was important to remove such managers in order to prevent state enterprises from deteriorating further.

## Legal and regulatory framework

### *General*

The benefits of privatization would not come automatically as an unavoidable result of eliminating the distortions discussed above. The economic and other benefits of privatization required that the property rights created during privatization be full, operational, and protected. In other words, the legal and economic environments had to support the effective exercise of property rights.

Although it was understood that a comprehensive legislative package – including privatization legislation proper, as well as supporting legislation (company law, securities regulations, bankruptcy legislation, and others) – was required to implement privatization, the situation was complicated by the fact that President Yeltsin and the Government could not get their proposals through the State Duma from 1992 to 1994. Most normative acts regulating the privatization process were therefore adopted in the form of presidential edicts issued by the President.

The privatization scheme was complex. Its legislative framework consisted of several laws, edicts, decrees, and regulations issued at the end of 1991 and throughout 1992. Stated generally, the privatization of large state-owned enterprises entailed

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a three-stage process: (i) “jointstockization” of state-owned enterprises; (ii) distribution of privatization vouchers; and (iii) selling the stocks of the newly created joint-stock societies, or the assets of state-owned enterprises. Auctions were set to begin on 1 December 1992. The account that follows focuses on the privatization of large state-owned enterprises. In parallel with this privatization process, a program for the privatization of small state-owned enterprises was launched. Small-scale privatization quickly resulted in the privatization of thousands of hairdressers, cafés, restaurants, and bookstores. The Soviet oil industry was privatized in a separate process. Privatization of land was largely left outside the initial privatization programs.

It is important to keep in mind that the privatization of large state-owned enterprises was intended to change the structure of the Russian economy: to create private owners and stockholders in Russia. The primary objective was not to generate revenue for the Russian government and the Russian state. The leading role in the Russian privatization process was played by the State Committee for the Administration of State Property (hereinafter referred to as the “Committee”), also known by its Russian acronym, GKI. The Committee was headed by Anatoly Chubais.

During the spring and summer of 1992, a number of central edicts, decrees, and regulations concerning the privatization of large state enterprises were issued, the most important of which will be discussed below. A key document was the State Program for Privatization of State-Owned and Municipal Enterprises, adopted in June 1992. The adoption of the Program resulted in amendments to the Privatization Law, originally adopted on 3 July 1991, and of edicts, decrees, and regulations to implement the Program. Prior to the adoption of the Program, the legislative framework for Russian privatization was as follows.

The basic legislative act was the Privatization Law, which stipulated that the Program had to be confirmed by the Supreme Soviet. The decree implementing the Privatization Law ordered the Government to submit the Program to the parliament by 1 September 1991. This notwithstanding, the Program was not approved by the parliament until June 1992. However, on 31 December 1991, President Yeltsin had signed the “Basic Provisions of the Russian Federation Program for Privatization of State and Municipal Property in 1992.” In practice, this document served as an interim Privatization Program and caused a number of state-owned enterprises to initiate preparations for privatization. About a month later, on 29 January 1992, President Yeltsin issued a further edict, “On the Acceleration of Privatization of State and Municipal Enterprises.” This edict was accompanied by seven provisional statutes setting forth details of the privatization process:

- The Statute on Establishing Proposals for the Privatization of State and Municipal Enterprises;
- Instruction on the Method of Valuation of Objects Subject to Privatization;
- The Statute on the Transformation of State and Municipal Enterprises into Joint-Stock Societies;
- The Statute on the Privatization of State and Municipal Enterprises through Competitive Bidding;

- The Statute on the Procedure for Use of Economic Stimulation Accounts and of Profits of State and Municipal Enterprises in Connection with Privatization during 1992; and
- The Statute on the Work of Privatization Commissions.

*“Jointstockization” (акционирование)*

The first step in the Russian privatization process was the transformation of state-owned enterprises (already juridical persons) into another form of corporate entity: the joint-stock society. To understand why this was necessary, it is important to understand the starting point: ownership under socialism and the planned economy.

Under the Soviet planned economy, the state owned all the instruments and means of production, including enterprises. This ownership, however, was not particularly revealing. The treasury had some claim on profits or losses of state enterprises. But there was no “state” that in fact had control rights. Instead, these rights were shared by the managers of the enterprise and the bureaucrats in the ministry that oversaw the enterprise. The ministry bureaucrats were probably the more important “owners” in the sense of having most of the power to dictate the decisions of the enterprises. Legally, ministry bureaucrats had the right to choose the top managers, to determine production and investment, to set prices, to allocate inputs and buy outputs, to determine the general growth rate of wages, and so on. Most rights of ministry bureaucrats were enforced through central control, but they also maintained these rights through complete control over the delivery of scarce inputs.

Managers of the enterprise also had some control rights. They had the know-how and the connections to solve the problems of pervasive shortages and breakdowns. This gave them some control over production, investment, and employment decisions, as well as over most micro decisions of enterprises. Their knowledge made them valuable to the bureaucrats. Accordingly, the relevant “owners” were ministry bureaucrats first, and managers second.

To implement an orderly and controlled privatization process, it was decided that the situation in Russia required that all large state enterprises be converted into joint-stock societies, with publicly traded stocks and boards of directors. Initially, all the stocks would be held by the central government, but over time, as the privatization process unfolded, they were to be sold to various stakeholders and investors. The boards of directors would initially consist of the representatives of the government, managers, representatives of the workers, bankers, and perhaps others involved with the company. The idea was to make state enterprises resemble private companies from the start. To maintain control over the privatization process, “jointstockization” was made mandatory.

On 1 July 1992, President Yeltsin adopted Edict 721 containing provisions on the transformation procedure (the “Jointstockization Edict”) with respect to large state-owned enterprises. The Edict itself contained a number of general provisions on the transformation of state enterprises and so-called voluntary associations into

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joint-stock societies. Attached to the Edict was a Statute with detailed provisions on the transformation procedure, including a standard charter for newly formed joint-stock societies.

Through the adoption of the Jointstockization Edict, the functions of the original privatization commission had, to a large extent, been replaced by working groups on privatization that were to be established at each joint-stock society. The working groups had to be established at enterprises that were subject to mandatory jointstockization; that is, large state enterprises, but also medium-sized enterprises.

Under the Edict, the working groups had to submit the following documents to the Committee by 1 October 1992:

- (i) A privatization plan;
- (ii) Valuation of the assets of the enterprise; and
- (iii) A charter for the joint-stock society to be formed.

After receiving the aforementioned documents, the Committee reviewed and approved the privatization plan. The privatization plan had to be completed pursuant to a Standard Privatization Plan adopted by the government on 4 August 1992 (Decree No. 547). The privatization plan had to contain a wealth of information about the company, including, *inter alia*, stockholdings or shareholdings in other juridical persons, the average work force, information on land occupied by the enterprise, the option chosen by the employees, and distribution of stocks among the employees.

Upon approval of the plan, the Committee submitted an application for registration of the joint-stock society. Approval of the plan was deemed to be the decision of the founder to form a joint-stock society. The application for registration had to be accompanied by the standard charter and a copy of the approved privatization plan.

One complicated issue in the jointstockization procedure was the determination of the capital of the joint-stock society. The edict stipulated that the capital was to be determined pursuant to the Provisional Statute (Appendix 2) adopted through Decree 66, with certain exclusions. The proposed charter capital had to be indicated in the privatization plan. The so-called social assets of state enterprises – kindergartens, schools, spas, and so on – represented a special concern from a privatization perspective, because most investors, Russian as well as foreign, had no interest in acquiring such assets or stocks in a society with such assets. The Edict stipulated that such assets would be transferred to the joint-stock society, but not be included in the charter capital. It was for the Committee to determine which social assets should be transferred to the society.

Once the society had been registered – registration was done pursuant to the same rules applicable to all joint-stock societies – it became the legal successor to the state enterprise, and consequently assumed all rights and liabilities of the state enterprise.

As of the registration of the society, the Committee was the sole stockholder of the society and was registered as such in the stock registry of the company within 10 days. Furthermore, as of registration, the society ceased to be part of the ministerial administrative structure and was henceforth governed as any other joint-stock soci-

ety, with the Committee as the sole stockholder. The assets and liabilities transferred to the joint-stock society as the legal successor to state enterprises became the property of the society as a separate juridical person and was no longer state property in the strict legal sense, albeit that the state, represented by the Committee, was the sole stockholder. This was the natural conclusion, proceeding from traditional Western notions of juridical persons. Unfortunately, however, the Russian legislation on ownership made this issue uncertain, at least on the theoretical level. The uncertainty stemmed from two concepts in the law of ownership – both of which were really tips of icebergs – operative management and full economic jurisdiction.

For the jointstockization (and privatization) process, the aforementioned uncertainty crystallized into two succinct questions: (i) did the Committee have the right to “order” the privatization of state enterprises enjoying full economic jurisdiction, and (ii) did a newly-formed joint-stock society – initially wholly owned by the state – continue to be a state enterprise in the sense that the state continued to be the owner of the property of the society as well as of the stocks in the society.

Practical necessities would seem to have resolved these issues in a pro-privatization fashion; in other words, the Committee did exercise the right referred to above in (i) and a joint-stock society itself – and not its stockholder(s) – was deemed to own the property transferred to it by the state enterprise (or rather its owner, the state).

As mentioned earlier, Edict 721 contained a standard charter. As a matter of principle, the joint-stock societies resulting from the jointstockization process were subject to existing legislation on joint-stock societies, that is, the Statute on Joint-Stock Societies, adopted on 25 December 1990 by the RSFSR Council of Ministers (Decree 601). It should be noted, however, that Edict 721 contained provisions deviating from Decree 601 and, more importantly, provided for more details. Edict 721 had been drafted to fit into the different privatization schemes laid down in the 1992 Privatization Program.

### *Privatization vouchers – and auctions*

In an edict issued by President Yeltsin on 2 April 1992, it was stipulated that privatization vouchers would be introduced in the Russian Federation in the last quarter of 1992. The distribution of privatization vouchers started on 1 October 1992. The Russian privatization voucher program was intended to achieve economic and political goals. As far as the economic aspect was concerned, it was believed that privatization vouchers would create demand for stocks in state enterprises being transformed into joint-stock societies. Given that the savings of the Russian population were too low to permit the purchase of more than a fraction of state-owned assets, privatization vouchers were needed to create demand for stocks, thereby preventing the privatization process from slowing down. On the political side, privatization vouchers were intended to ensure fairness in privatization by allowing all Russian citizens – not only employees and managers – to benefit from privatization.

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On 15 July 1992, the Russian government adopted Decree No. 490, on the Procedure for the Application of the System of Privatization Vouchers in Russia. Although the government carefully studied the privatization voucher programs launched in Poland and Czechoslovakia, it was determined that Russia must issue its own privatization voucher program by taking the political and economic situation in the Russian Federation into account. In the aforementioned decree, the government established the procedure for introducing the Russian privatization voucher program. The decree established a timetable for the introduction of privatization vouchers. The decree prescribed territorial commissions to be established for compilation of lists of persons entitled to receive privatization vouchers. The lists were then transferred to offices of the Savings Bank of Russia, which handled the actual distribution of the privatization vouchers. The privatization voucher program was designed to tie in closely with the transformation of state enterprises into joint-stock societies. The legislation was designed to ensure the appearance of a sufficient number of stocks to be exchanged for privatization vouchers.

The actual regulations on issuing and distributing privatization vouchers were introduced by Edict No. 914 of President Yeltsin on 14 August 1992. The basic elements of the Russian privatization voucher program were as follows:

- (1) Every citizen of the Russian Federation, including children, had the right to receive a privatization voucher allowing him or her to acquire state assets under privatization. All citizens, regardless of age, residence, workplace, or income level would receive privatization vouchers of equal value;
- (2) The par value of each privatization voucher issued in 1992 was 10,000 rubles. The privatization vouchers would be issued in tranches, with the first tranche of privatization vouchers to be issued in fall 1992;
- (3) Each privatization voucher would have an expiration date one year after the issuance of the tranche in question. The privatization vouchers of the 1992 tranche had a validity period from 1 December 1992–31 December 1993;
- (4) Privatization agencies were under an obligation to accept privatization vouchers – at their par value – as legal tender for state assets sold in the privatization process. A privatization voucher could only be used once to purchase state assets; upon receipt by the seller, it would be canceled; and
- (5) The privatization voucher was a bearer document and characterized as a security issued by the state. A privatization voucher holder could use his or her privatization voucher in one of the following three ways:
  - (i) To purchase shares of privatized companies (or assets of liquidated State enterprises) in auctions or tenders;
  - (ii) To exchange the privatization voucher for shares in an investment fund; or
  - (iii) To sell the privatization voucher for cash.

A privatization voucher program such as that in Russia had several potential inflationary effects. By far the most dangerous was the so-called monetization effect: that

is, that privatization vouchers could be used as money in transactions. To minimize the potential monetization effect, several precautionary measures were built into the Russian privatization voucher program. First, privatization vouchers could not be accepted by state enterprises as a means of payment. Second, in order to reduce the value of privatization vouchers in transactions, they came only in one denomination (10,000 rubles) and were not divisible. Third, each privatization voucher had limited validity: one year from the date when a tranche was issued. Finally, and perhaps most importantly, measures would be taken to maintain demand for privatization vouchers as a means of payment in privatization transactions. Generally speaking, the best way to do this was to organize auctions (or tenders) as early as possible to show that privatization vouchers could be used efficiently in privatization transactions.

In light of the information above, the Russian government decided to organize a number of early auctions in December 1992. These auctions were held on the basis of two decrees adopted on 4 November 1992 by Chubais in the form of decision No. 701–3. At these auctions, the only means of payment would be privatization vouchers; no cash payments would be accepted. The first decree adopted by the aforementioned decision was the Provisional Statute on the Sale of Stocks in the Privatization Process, and the second, the Statute on Specialized Privatization Voucher Auctions. On 14 October 1992, President Yeltsin issued two further edicts dealing with the privatization voucher program: Edict 1228 and Edict 1229 stipulated that privatization vouchers could be used to acquire land, housing, and stocks in municipal enterprises under privatization. When President Yeltsin's Edict No. 914 of 14 August 1992 was adopted, municipal property was explicitly excluded from the privatization voucher program, which was then launched as a federal program. Pursuant to the aforementioned edicts, 80% of the common and type B-stocks in state enterprises that were federal property had to be sold at privatization voucher auctions and 45% of municipal enterprises.

The Provisional Statute on the Sale of Stocks in the Privatization Process contained provisions on setting up a stock registry and the registration of stocks sold at auctions or tenders. It was the responsibility of the joint-stock society itself to set up and administer the stock registry, which had to be in the form of a book, sewn and sealed. Transfer of ownership to the stocks occurred when the new stockholder had been registered in the stock registry. Thus, it was not necessary physically to transfer any stock certificate. Decree 601, on the other hand, stipulated – in Section 57 – that both registration and transfer of stock certificates was necessary to effect transfer of ownership to stocks.

The aforementioned requirements with respect to the percentage of stocks that had to be offered at privatization voucher auctions would typically diminish the interest of foreign investors in such auctions. Even though there were no provisions in the privatization legislation preventing foreigners from acquiring privatization vouchers, nor from using them in auctions of privatization vouchers, as a practical matter, few foreign investors would go through the trouble of acquiring privatization vouchers. Furthermore, the currency legislation raised further impediments for foreign inves-

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tors, in particular if payment was to be made from abroad, because such payments required a license from the Central Bank.

### *The 1992 Privatization Program*

Russian mass privatization was launched with the 1992 State Privatization Program for 1992. The Program was adopted on 11 June 1992 and was implemented during 1992, 1993, and the first half of 1994.

Russian privatization legislation had, in a short time, become a very detailed and complex discipline of Russian law. In this myriad of laws, edicts, decrees, and regulations, the Privatization Program played a central role. The adoption of a Privatization Program was provided for in Section 3.1 of the Russian Privatization Law. The Law required the government to submit the Program to the Supreme Soviet by 1 September 1991. This was actually done much later. The purpose of the Program, generally speaking, was to determine in a fairly detailed fashion how and when privatization was to take place and what enterprises were to be privatized. The Program was thus essential for practical purposes. Notwithstanding the fact that the first Privatization Program was adopted on June 11, 1992, privatization transactions had already started to take place prior to that date. This was possible partly due to the fact that on 31 December 1991, President Yeltsin issued the "Fundamental Provisions of the Russian Federation for Privatization of State and Municipal Property in 1992," which, in part, served as an interim privatization program.

The 1992 Program provided for various benefits for employees in privatized enterprises. Section 5.4 of the Program set forth three options available to employees when it came to the sale of shares in corporatized state enterprises. The state enterprises had to be transformed into open joint-stock companies to be governed by existing legislation on joint-stock companies. In an open joint-stock company, shares could be freely assigned without the approval of other shareholders.

The three options were:

**Option 1** 25% of the stocks would be allocated free of charge to employees; these stocks would be non-voting. A further 10% of the stocks could be purchased by employees at a price corresponding to the par value less 30% and with the possibility of a three-year installment payment whereby the first installment could be no less than 15% of par value. In addition, the management of the juridical person was entitled to purchase 5% of the stocks at 0.7% of the book value of the stocks, as determined by state auditors. Stocks purchased by employees and management would be common (voting) stocks.

**Option 2** 51 % of the shares would be offered to the employees at 0.7 % of the book value of the shares. Such shares would be common (voting) shares. In this case, no benefits would be granted in connection with the sale of the shares.

**Option 3** Employees and managers could form a group committed to restructuring the company. This group would sign a contract concerning the restructuring; the contract could not be for a period longer than a year. The group would have the right to acquire 20 % of the common shares at their nominal value upon expiration of the con-

tract. During the validity period of the contract, the group was given the right to vote for 20 % of the shares. In addition, all employees, including those who were members of the restructuring group, would have the right to purchase 20 % of the common shares at their nominal value less 30 %, with the possibility of installment payments during a period not exceeding three years; the first installment payment had to be at least 20 % of the nominal value of the shares. It should be noted that this option could only be used if the company in question had more than 200 employees and if the balance sheet value of the assets was not less than 1 million SUR and not more than 50 million SUR.

In preparing the privatization plan for each enterprise, the workers' collective had to vote on which option to choose. Decisions required a 2/3 majority of the total number of employees of the enterprise. If, for some reason the workers' collective had not so voted, Option 1 would be used.

The 1992 Privatization Program contained provisions concerning participation of foreign investors in the privatization process. For the most part, foreigners could participate under the same terms and conditions as Russian citizens. There were a number of restrictions, however, listed in the Program. For example, foreigners could not participate in the privatization of some energy, defense, and precious metals enterprises without the approval of the Russian government, or of governments of republics forming part of the Russian Federation, depending on the nature of the state property in question. In addition, foreigners could not participate in the privatization of small enterprises in the food sector and transport sector.

The Program explicitly stipulated that the list of restrictions was exhaustive, i.e., no further restrictions could be imposed on the participation of foreigners.

### *The 1994 Privatization Program*

On 24 December 1993, President Yeltsin issued Decree No. 2284, thereby adopting a new privatization program for Russia (the "1994 Program"). The first program – the 1992 Privatization Program – adopted on 11 June 1992 was still being implemented at the time. Even though a draft 1993 Program was submitted to the then-Supreme Soviet, ultimately no Program was adopted, primarily due to the political struggles that took place at different levels during the better part of 1992 and 1993.

The 1994 Program was adopted during the interregnum between the December elections and the first session of the newly elected Federal Assembly in the second week of January. Despite the criticism that economic reform had drawn, above all from the former parliament, privatization was often described as one of the few reforms that had been successful and that had affected life in almost every part of Russia.

For example, by the end of 1993, small-scale privatization had been virtually completed in many regions, and some 8,000 large and medium-sized enterprises had been privatized, which was about 3,000 more than the goal set for 1993. All these achievements had been reached under the 1992 Privatization Program and on the basis of a number of edicts, decrees, and regulations adopted during the second half of 1992 and 1993.

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The 1994 Privatization Program reflected the progress of the Russian privatization process, as well as experience gained, and took account of the edicts, decrees, and regulations adopted since the 1992 Program was promulgated. Generally speaking, the 1994 Program continued along the same path as the 1992 Program and did not contain radical changes. However, the 1994 Program was more detailed.

One change introduced by the 1994 Program was that privatization through auctions of privatization vouchers would no longer be possible after 1 July 1994. After this date, all auctions were to be conducted on a cash basis; that is, privatization vouchers could no longer be used to privatize enterprises.

When the Government began issuing privatization vouchers on 1 October 1992, all were set to expire on 1 January 1994. However, on 6 October 1993, President Yeltsin issued Edict No. 1591, which extended the validity of the privatization vouchers until 1 July 1994. As a consequence, the 1994 Program set the completion of privatization with the use of privatization vouchers as one of its goals. Furthermore, the goals of the Program included the completion of small-scale privatization and, in principle, of large and medium-scale privatization, and the development of post-privatization support for enterprises. The general approach taken in the Program, as reflected, for example, in the reference to post-privatization support, was one of considering privatization as a means of implementing economic reform, rather than as a goal in itself.

Section 2 of the 1994 Program divided enterprises into different categories with respect to privatization. Section 2.1 enumerated categories of enterprises that were prohibited from privatization. Even though the list seemed longer than previously, it did not mean that the prohibited areas had in fact increased. Rather, Section 2.1 of the new Program was more detailed and precise than the corresponding list in the old Program; in fact, such important sectors as pipelines and oil and gas enterprises were no longer on the list. A new subsection of Section 2 of the 1994 Program described the procedure to be followed when decisions were to be taken regarding enterprises that could be privatized only by a decision of the government (Section 2.2) and the State Property Committee (Section 2.3), respectively. This detailed section was intended to ensure that these questions were not stuck in the bureaucracy, which had sometimes been the case in the past.

One important section of the 1994 Program was Section 5, which dealt with the different privatization methods. In addition to the privatization methods enumerated in the 1992 Program, the 1994 Program listed three new methods: (i) the sale of assets of operating enterprises either at auctions or in tender procedures; (ii) the sale of unfinished construction projects (auctions or tender processes); and (iii) the sale of stocks held by the state in joint-stock societies at auctions or in tender procedures. The latter method was of concern to foreign investors, for it was not unusual for state enterprises that were joint venture partners to be privatized in such a way that the foreign partner faced a situation where the ownership and/or control of his local partner changed without the foreign partner being able to prevent, or even influence,

the situation. However, the 1994 Program did not contain any details on how such sales were to be conducted.

The three privatization options available to the employees of an enterprise to be privatized, which were introduced by the 1992 Program, remained more or less unaltered in the 1994 Program. In practice, most large state enterprises had been privatized on the basis of Option 2, which enabled employees to acquire 51% of the stocks and thus obtain control of the privatized enterprise. The least popular option until then had been Option 3, which envisioned a group of employees entering into a contract to restructure the enterprise. The employees had the right to purchase 20% of the stocks, with the right to acquire an additional 20% if they succeeded in restructuring the enterprise. During the restructuring period, which could not exceed one year, they also had voting rights for another 20% of the stocks. Previously, this option could only be used for enterprises having more than 200 employees and a book value of fixed assets of between 1 million and 50 million rubles. In an attempt to increase the appeal of Option 3, the 1994 Program had removed this restriction, so that this option could now be used with respect to all enterprises. In addition, the group of employees that concluded the restructuring contract now had the right to acquire 30% of the stocks after the restructuring period and to vote all stocks held by the property fund during the restructuring period.

One novelty introduced by the 1994 Program concerned the privatization of land. Even though privatization of land was not covered by the Privatization Law nor by the 1992 Program, President Yeltsin issued a number of edicts addressing land ownership. This was a sensitive political issue. Despite several attempts at resolution, little had changed. However, within the privatization process, it was possible to acquire land on which a privatized company was standing. In three edicts issued during 1992, President Yeltsin addressed ownership of land in the context of privatization, the last of which stipulated that once the enterprise in question had been completely privatized through the use of privatization vouchers, it could acquire the land on which it was standing, though in practice this would be a lengthy process. The 1994 Program stipulated that if 80% of the stocks had been sold, a privatized enterprise could acquire the land. This was undoubtedly an improvement, but important issues remained unresolved.

Another novelty in the 1994 Program was Section 5.3.6, which prohibited increases of the capital of an enterprise until 90% of the stocks of the company had been sold. This provision was introduced with a view to protecting stockholders – typically minority stockholders – from having their stocks diluted as a result of new issues of stocks. Even though the desire to protect minority stockholders was laudable, this provision sometimes was as a bottleneck for foreign participation in the privatization process because it slowed the pace at which foreign investors could make new investments.

Just as in the 1992 Program, the 1994 Program had a separate section on foreign investments within the privatization process. The 1994 Program introduced three new restrictions on foreign participation: first, it included defense industry enter-

prises in the group of enterprises requiring government approval; second, it prohibited foreign participation when enterprises located in restricted areas were to be privatized; and third, it introduced a requirement that privatization agencies submit reports to the Federal Counterintelligence Service, which would have the right to stop the transaction. It was probably safe to assume that these additional restrictions would not be of significant importance in the future.

One important feature of the 1994 Program was the extent to which it decentralized decision-making during the privatization process, either to specific sectors of the Russian economy, or to the regions.

With respect to specific sectors of the Russian economy, the Government accepted that privatization could not be done in exactly the same way for all state enterprises. The oil and gas sector had been a problem since the breakup of the Soviet Union. To overcome the crisis in this sector, the government had tried to de-monopolize and restructure the industry with a view to creating market economic conditions. Needless to say, privatization was a cornerstone of this process and allowed to take forms differing from the general privatization scheme.

### *The 1995 Privatization Program – loans-for-shares*

On 31 August 1995, President Yeltsin signed Edict No. 889 authorizing so-called loans-for-shares auctions. This turned out to be the last phase of the Russian mass privatization process. The plan was that a consortium of Russian banks would lend the government approximately \$500 million USD in exchange for stocks of leading companies in Russia as security for the loans. The banks would hold the stocks in trust for the government and attempt to structure the companies until the government paid back the loans. If the government did not pay back the loans by September 1996, the banks winning the auctions for the stocks would be allowed to sell the stocks and keep 30% of the proceeds, with the balance being paid to the government.

The auctions would be conducted by Menatep Bank and United Export Import (UnExim) Bank. The chairman and owner of the latter bank – Vladimir Potanin – was the architect of the loans-for-shares plan.

In contrast with the previous privatization programs, the loans-for-shares program was primarily intended to generate revenue for the state. It was generally assumed that such revenue would be used, among other things, to finance the re-election campaign of President Yeltsin in 1996.

The loans-for-shares program was heavily criticized from the beginning. No foreigners were allowed to buy stocks in the companies in question. The two banks authorized to conduct the auctions – Menatep and UnExim – were allowed to participate in the auctions. The risk of insider deals was manifest. Insider deals did, according to most observers, occur on a regular basis.

On 17 November 1995, UnExim Bank won 38% of Norilsk Nickel, the largest nickel producer in the world. On 7 December 1995, UnExim Bank won control of

51% of Sidanko Oil Holding, one of the large Russian oil companies. The following day companies backed by Menatep Bank won control of Yukos Oil Holding.

In January 1996, the newly elected parliament launched an inquiry into the loans-for-shares privatization. As a consequence thereof, Chubais resigned as head of the Committee. On 3 July 1996, Yeltsin was re-elected president. Shortly thereafter, Potanin was brought into the government as First Deputy Prime Minister in charge of the economy. By the second half of 1996, the Russian privatization process had ground to a halt. Once in government, Potanin managed to close the investigation concerning loans-for-shares and ensured that UnExim Bank, Menatep Bank, as well as other groups, having benefitted from the loans-for-shares program, could keep the assets that they had acquired.

In many respects this was the beginning of a new era – that of the Russian oligarchs.

### Concluding observations

In the annals of legal history, the mind-boggling events that took place between 1985 and 1995 in the Soviet Union and then the Russian Federation will go down as the second [fourth?] Russian Revolution. The former Soviet republics struggled with the task of turning an authoritarian system into democracy and of building market-based economies on the ruins of a centrally planned economy. It was a gargantuan task.

The reforms initiated by Gorbachev eventually resulted in the complete transformation of Russia. As far as the Russian economy and the legal regulation thereof are concerned, the watershed was mass privatization, implemented under extreme time pressure and therefore lacking critical elements of implementation and supporting legislation.

The Russian privatization program established a point of no return. At a press conference on 5 July 1996, following President Yeltsin's re-election, Anatoly Chubais said, *inter alia*, the following: "No turn in democracy, in private property, in reform is possible, not in a year, not in ten years or one hundred years, not by anyone. Never."

Even though Russia has experienced many changes since then, economic and political, including the re-emergence of large, dominating state-owned and controlled enterprises, Chubais was right, at least as far as private ownership is concerned. Private ownership, of course, is a *sine qua non* for any form of market economy.



# Ability to What? Criteria for Legal Incapacity in Russian Law

YANA LITINS'KA

## Introduction

One of the most important concepts related to personal status in law is a concept of legal capacity. Exercising legal capacity means that law regards a particular human being as a person whose decisions are legally valid. Deprivation of legal capacity to exercise rights is often categorized as “civil death” and often means that other persons – guardians – will make most of the decisions for a person, and that the will of an incapacitated person might be irrelevant to the law.<sup>1</sup> Due to the fact that deprivation of legal capacity implies significant limitations in the realization of human rights, it is of utmost importance that the criteria for incapacity are foreseeable, and equality before the law is ensured.

In this contribution, I explore the law of the Russian Federation on total legal incapacity to exercise rights due to mental state, and analyze the criteria for legal incapacitation. For ease of language, legal capacity to exercise rights will hereinafter be referred to as “legal capacity.” Legal incapacitation due to other reasons, such as substance abuse, is excluded from the scope of the analysis. The legislative history of legal incapacitation due to mental disorder for the period of the Russian Empire and Soviet Russia will be studied. Further, the modern requirements of constitutional and civil law on legal incapacitation will be analyzed. The main method used in the analysis is legal doctrinal analysis, with a focus on the literal interpretation of statutory law. The contribution will also use examples from actual case practice based on fourteen cases studied. These examples will illustrate problems with formulations of criteria for legal incapacity.

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<sup>1</sup> Background Paper Prepared by the Division for Social Policy and Development of the United Nations Secretariat for the “Informal Consultative Meetings on International Norms and Standards for Persons with Disabilities,” A/AC.265/CRP.2, 9 February 2001.

Parts of this contribution were previously published in the author’s doctoral thesis “*Assessing Capacity to Decide on Medical Treatment: On Human Rights and the Use of Medical Knowledge in the Laws of England, Russia and Sweden*” (Uppsala universitet, 2018, 701 p.) and in blog-post “*Three Hundred Years of Legal Incapacity in Russia*” (Public Disability History, July 2019). The contribution was submitted in May 2019. The author thanks advocates Dmitri Bartenev and Olga Zinoveva for granting access to the case practice necessary for this contribution.

## The legislative history of the Russian empire and Soviet Russia on deprivation of legal capacity

The regulation on deprivation of legal capacity was not codified before the reign of Peter the Great. Peter the Great's concerns were primarily related to building a modern, reliable, and sustainable system of governance. In line with this aim, the reasoning was that if a person was not fit to represent the state, he should not enjoy this function. The Decree on Examination of Fools in the Senate of 1722 was therefore created. This legislation targeted noblemen who had inherited their posts as public servants. The Decree made it possible to deprive noblemen of their right to work as officials or scientists, inherit property, marry another person, and receive an education if they were "fools."<sup>2</sup> In 1723, the legislature took a step further and established a procedure for capacity assessment. The procedure presupposed that members of the Senate would question a person whose capacity was impugned concerning *anything*. The person in question should answer as "a wise man answers," or they would be considered "fools."<sup>3</sup> The criteria for assessment, formulated in terms of being "wise" or a "fool," and the possibility to ask about anything, inherently allowed the Senate to have a broad margin of discretion in making these decisions.

Linguistically, "fools" in the legislation were not necessarily persons with mental disorders. Behavior and intelligence were also emphasized. However, one of the Senate's concerns was delimitations between real and pretend mental disorders. In 1746, the Senate requested that the Medical Board explain scientifically proven methods of recognizing mental disorders. The Medical Board's rapport stated that careful and consistent monitoring of a person, as well as studying medical records and external detriments of mental health, was crucial.<sup>4</sup> These accounts seem to emphasize that, despite the fact that determination of legal incapacity was considered to be a legal procedure in the beginning, the assessors – the Senate – experienced difficulties with the task, and required additional competence that the medical community appeared eager to provide.

In accordance with the Decree on Custody Due to Physical or Mental Disorders of 1809, all acts of mentally disordered persons were considered void.<sup>5</sup> Assessment of mental disorders was then provided by medical boards in the presence of persons who could be trusted by the government, such as governors, prosecutors, or nobility.<sup>6</sup> If the person was determined to be insane, the boards were supposed to send the detailed report to the Senate. The Senate's function was to decide as to whether the person was legally capable or not based on the report. These changes in the legal regulation convey a transition of the Senate's functions to medical professionals, and

<sup>2</sup> *Imennoi Ukaz ot 6 Aprelya 1722 g. No. 3949 "O Svidetelstve v Senate Durakov."*

<sup>3</sup> *Imennoi Ukaz ot 6 Dekabrya 1723 g. No. 4385 "O Svidetelstve v Senate Durakov."*

<sup>4</sup> Vasolii Petrov *et al.* "Prestupnik ili DushevnoBolnoj? – Vechnyj Vopros Proshlogo i Sovremennosti..." *Voennaja medicina*, no. 2 (2014): 120.

<sup>5</sup> *Vysochajshij Rekskript Dannyj Ministru Justicii ot 2 Oktyabrya 1723 g. No. 23888 "Ob Uchrezhdenii Opeki po Prichinam Fizicheskoi i Nravstvennoi Bolezni Vladeľtsa."*

<sup>6</sup> *Senatskii Ukaz ot 8 Iyunya 1815 g. No. 25876 "Ob Osvitelstvovanii Bezumnikh."*

division of the obligation: the Senate remained responsible for legal consequences, but the decision about insanity, which may signify the need for incapacitation, was considered to be a part of medical expertise. The amendments to the legislation also did not focus on the specification of criteria for legal incapacity. Mental disability as such could lead to legal incapacity.

Emperor Nikolai I ordered the systematization of all national laws. In the Complete Collection of Laws of the Russian Empire of 1832, the term *legal capacity* was not defined or explicitly regulated.<sup>7</sup> In his monography of 1879, Slonimskii argued that the Russian courts were able to interpret the laws as requiring the recognition of person's incapacity for a specific transaction, rather than a "civil death" or incapacity in all legal relations. However, practice took a different direction. The courts chose to follow a simpler approach: either a person had a legal capacity for all legal transactions, or was fully legally incapable.<sup>8</sup> The criteria for legal incapacity were, similarly to previous periods, not established in the legislation, which resulted in broad interpretation thereof. The project of the Digest of Laws of the Russian Empire suggested more detailed regulation of legal capacity, but because it never came into legal force, it is possible to assume that the regulation and practice of the courts remained unchanged until the end of the Russian Empire in 1917.

In 1922, the first Civil Code of the Russian Soviet Federative Socialist Republic laid down the provisions on legal capacity. The Code established that legal capacity was the ability to acquire and exercise civil rights, create civil obligations, and execute them. This definition remained unchanged in the modern Civil Code of the Russian Federation. In accordance with Article 8 of the 1922 Civil Code, adults could be deprived of legal capacity because of mental disorders if they were not able to manage their own affairs *wisely*, and only courts could make decisions on incapacity.<sup>9</sup> More detailed clarification of the criteria for incapacity was not provided. The criteria were slightly modernized in the Civil Code of 1964. There, the criteria for incapacity were formulated as the inability to understand the content (significance) of one's own actions or manage them.<sup>10</sup> The same definition is provided in the modern Civil Code of the Russian Federation. After World War II, Soviet legal scholarship intensified discussions on the topic of legal capacity. More theoretical issues caught the attention of Soviet lawyers, such as classification of legal capacity (to have rights and exercise them), or conceptualization of criteria for incapacity as related to intellect (understanding of one's own actions) and will (managing one's own actions) of a person. The discussion also partly concerned the issue of what role the law and medicine had in determining capacity, and whether the function of the court could

<sup>7</sup> *Tom 10 Svod Zakonov Rossiiskoi Imperii ot 1857 g.*

<sup>8</sup> Leonid-Ljudvig Slonimskij, *Umstvennoe rasstrojstvo, ego znachenie v prave grazhdanskom i ugovnom* (Sankt-Peterburg: Obshhestvennaja polza, 1879), 64 ff.

<sup>9</sup> St. 8, *Granzhdanskii Kodeks RSFSR ot 11 Dekabrya 1922 g.*

<sup>10</sup> St. 15, *Granzhdanskii Kodeks RSFSR ot 11 Iyunya 1964 g.* One of the terms is translated in parentheses. The reason for this is that the Russian word *znachenie* may mean either "significance" or "content," but it is unclear what exactly the legislator meant. This problem will be addressed further in the contribution when discussing modern law on incapacitation.

be something more than just to confirm what medical experts stated.<sup>11</sup> Soviet legal scholars did not analyze legal practice as to what exactly was demanded to deprive a person of legal capacity.

To summarize, the overview of legislative history provided in this section indicates that deprivation of legal capacity in Russia has been mostly regulated in broad terms, such as not being a fool, being wise, and having the ability to understand and manage one's own actions. The broad formulations of the criteria for incapacity are likely to be the reason why the deprivation of capacity meant incapacity for all civil transactions. Although deprivation of legal capacity has been considered to be a legal matter, from early legislative history, it is possible to observe a struggle with interpretation of legal requisites. This struggle with the delimitation of the "wise" from "fools," those able to understand from those unable to do so, has led to sharing of expertise about legal incapacitation between law and medicine.

### Legal (in)capacity: General rules

The Civil Code of 1994 (hereinafter referred to as the "CiC") defines legal capacity as the ability to acquire and exercise civil rights, create civil obligations, and execute them. As mentioned above, this definition has remained unchanged from the time of the first Civil Code of the Russian Soviet Federative Socialist Republic of 1922. The procedure for divesting the capacity to act is regulated, *inter alia*, by the CiC and Civil Procedural Code. Only courts may decide on deprivation of legal capacity. In accordance with the CiC, an adult may be completely deprived of legal capacity. Total legal incapacitation is allowed only if, as a result of a mental disorder, a person is unable to understand the significance (content) of one's own actions or manage them.<sup>12</sup> The criteria for legal incapacity, namely, inability to understand the significance (content) of one's own actions or manage them, will be explored in detail later in this contribution.

In accordance with Section 29.3 of the CiC, if a person no longer fulfils the criteria for incapacity outlined above, a court may recognize him or her as legally capable. Thus, incapacity in Russian law is a longstanding status that is established and terminated by a court decision. There is a strong presumption of capacity that is valid before a decision of a court on legal incapacity comes into legal force, and a presumption of incapacity that exists from that moment until a decision on restoration of capacity comes into legal force.

If a court decides to completely divest legal capacity, a guardian must be appointed to act on behalf of that person.<sup>13</sup> As a general rule, total legal incapacity

<sup>11</sup> Olga Borisovna Orlova, *Deesposobnost Fizicheskikh Lits v Rossijskom Grazhdanskom Prave*. (PhD dissertation, Rossijskij Gosudarstvennyj Torgovo-Jekonomicheskij Universitet, 2009), 40–53.

<sup>12</sup> St. 29, *Grazhdanskii Kodeks Rossijskoi Federacii ot 30 Noyabrya 1994 g. No. 51-FZ*.

<sup>13</sup> A court usually appoints either a relative (often, a relative who applied to the court to receive a decision on incapacitation) or a residential care home (or other mental health institution) as a guardian. It was reported that in 2011, approximately 122,000 persons with mental disabilities were completely divested of legal capacity and were under the guardianship of a residential care home; more recent data about

signifies that a person is unable to make any valid decisions. The CiC is the only act that establishes the definition of, consequences, and criteria for divesting legal capacity in Russia. At the same time, other legal acts refer to the same concept. It may be argued that incapacity to act according to the definition put forth in the CiC does not signify incapacity to act for other actions, or in other spheres than civil law. In 2010, the Supreme Court analyzed the question of whether a labor contract between an employer and a totally incapacitated person in accordance with the CiC, “person A,” was valid. A’s guardian applied to a court to recognize the contract as null. The basis of the complaint was the provisions of the CiC that recognized all deals of any legally incapable person as being void. The Supreme Court, however, disagreed with the applicant, and declared that provisions on legal incapacity in the CiC were irrelevant for entering into labor relationships.<sup>14</sup> However, in 2013, the legislature decided to amend the Labor Code, and incapacitation according to the CiC definition now excludes the persons incapacitated under the CiC from entering into labor contracts.<sup>15</sup> These considerations seem to emphasize the desire of the Russian legislature to establish one procedure of legal incapacitation that is applicable in all spheres of legal relations.

### An attempt at constitutional reconstruction

The right to legal capacity is not explicitly recognized as a right protected under the Russian Constitution. Yet, certain protections against deprivation of legal capacity are granted through inviolability of private life under Article 23.1. The right to inviolability of private life is not absolute, but may be limited in accordance with Article 55.3 of the Constitution. Limitations are possible if they are prescribed by a federal act such as the CiC, provisions of which were discussed above. For the limitations to be compliant with the Constitution, they must be also proportional in protecting legitimate aims. The issue of whether total deprivation of legal capacity fulfils the conditions described above in accordance with the Constitution was discussed in the Delova case from 2012.

In 2010, Ms. Delova was deprived of her legal capacity due to an alleged mental disorder and inability to make decisions regarding medical, family, and housing issues. Ms. Delova and her guardian felt that total deprivation of capacity was disproportional in her case, and therefore violated her constitutional rights. The woman considered herself to be capable of managing her financial household needs, including administering her pension. However, at the time, the CiC did not provide for the possibility of partial limitation of capacity to act in a way that would be proportional

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guardianship of residential care homes are unavailable. *Poyasnitelnaya Zapiska k Zakonoproektu ot 24 Oktyabrya 2013*, 1.

<sup>14</sup> Supreme Court of the Russian Federation, *Decision of 23 April 2010 No. 13-B10-2*.

<sup>15</sup> St. 20, *Trudovoi Kodeks Rossiiskoi Federacii ot 30 Dekabrya 2001 g. No. 197-FZ*.

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to the abilities of different persons.<sup>16</sup> Because of this, Ms. Delova applied to the Constitutional Court.

The Constitutional Court determined that the absence of a flexible approach enabling protection of persons with mental disabilities was not a necessary infringement of the right to private life. According to the Court, no person shall be deprived of the power to decide if he or she is *de facto* mentally capable. Therefore, the Constitutional Court found that the right to private life was violated.<sup>17</sup> The Court ruled that full legal incapacitation may pursue a legitimate aim, namely, protection of the rights of citizens unable to understand the significance of their own actions and to manage them, as well as protecting the rights of others who enter into civil relationships with persons with mental disorders. The Court, therefore, decided that full incapacitation could be a necessary means for protecting the rights of particularly vulnerable people, as well as protecting others in civil relationships. However, full legal incapacitation can only be applicable as a last resort, when no other measures would be able to protect the rights at stake.<sup>18</sup> The Constitutional Court also highlighted the opinion that the approach taken by the legislature in the CiC does not consider situations where a person is able to decide about one matter, but not another. For these reasons, the Court was concerned that legal incapacitation could infringe rights outlined in the Constitution and the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>19</sup> According to the Court, legislation that did not provide for differentiation for various conditions violated the Constitution. Therefore, the main conclusion of the Court was that the rule allowing full incapacitation was both “constitutional and unconstitutional” at the same time.

To make the respective legislation compliant with the Constitution, the Constitutional Court ordered that the CiC be amended. Overall, the judgment of the Constitutional Court acknowledged three important issues. First, total or partial civil incapacitation are measures of last resort. Incapacitation is appropriate only where there are legal means for achieving legitimate aims: namely, the protection of rights of a person with a mental disorder or other persons in contract relations. Second, partial (or limited) legal incapacitation is possible only within concrete spheres of social relationships wherein persons are not able to understand and/or manage their own actions. The Constitutional Court thus demanded that the changes of the CiC should enable courts to take into consideration decision-making capacities in different spheres of social relationships.<sup>20</sup> Inability to understand one’s own actions (for instance, in financial matters) must not signify the inability to make other decisions. Third, the Court stressed in particular that changes in the CiC must ensure that mechanisms of support for persons with mental health problems exist and are provided.

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<sup>16</sup> Constitutional Court of the Russian Federation, *Judgment of 27 June 2012 No. 15-P*.

<sup>17</sup> Constitutional Court of the Russian Federation, *Judgment of 27 June 2012 No. 15-P*.

<sup>18</sup> Constitutional Court of the Russian Federation, *Judgment of 27 June 2012 No. 15-P*.

<sup>19</sup> European Court of Human Rights, *Shtukaturov v. Russia*, application number 44009/05, *Judgment of 27 March 2008*, para. 96.

<sup>20</sup> Constitutional Court of the Russian Federation, *Judgment of 27 June 2012 No. 15-P*.

## Amendments of the Civil Code: Toward compliance with the Constitution?

In 2012, the federal act amending the CiC with the aim of complying with the judgment of the Constitutional Court was adopted, and it came into force in 2015. The amended Section 30 of the CiC allows limiting legal capacity to act. Yet, it is hardly possible to conclude that limitation of capacity is *de facto* used as a measure of last resort. The judicial practice shows that in 2018, the courts of the first instances decide to deprive individuals of total legal capacity in 30,770 cases (98.6% of all cases on incapacity), and to partially limit legal capacity in 424 cases only (1.4% of all cases on incapacity; this figure also includes other grounds for limitation of capacity, such as substance abuse).<sup>21</sup> The judicial statistics for 2017 and 2016 indicate similar proportions of cases, which means that deciding on partial legal capacity is rarely exercised in practice. Total deprivation of legal capacity that, in accordance with the decisions of the Constitutional Court, is supposed to be a measure of last resort, remains the dominant form of legal incapacitation.

Amendments allow the limitation of legal capacity if a person, as a result of a mental disorder, cannot understand the significance (content) of his or her own actions or manage such actions without the support of a third person. One of the requirements of the Constitutional Court's judgment in the Delova case establishment of mechanisms for support by law. The amendments to the CiC mean that a need of support justifies limiting legal capacity.<sup>22</sup> The legislature believed that appointing a guardian or custodian would provide access to support in exercising legal capacity; other forms of support are not evident in the CiC.

Before March 2015, guardians of fully incapable persons were authorized to substitute the will of a person under their care and had no obligation to negotiate actions or take the wishes of a fully incapacitated patient into account.<sup>23</sup> After the amend-

<sup>21</sup> Sudebnii Departament pri Verkhovnom Sude RF, *Otchet o Rabote Sudov Obshei Yurisdiktсии po Rassmotrenii Grazhdanskikh, Administrativnikh Del po Pervoi Instantsii za 12 Mesyatsev 2018*, accessed 27 April 2019, [http://www.cdep.ru/userimages/sudebnaya\\_statistika/2019/F3-svod\\_vse\\_sudy-2018.xls](http://www.cdep.ru/userimages/sudebnaya_statistika/2019/F3-svod_vse_sudy-2018.xls); Sudebnii Departament pri Verkhovnom Sude RF, *Otchet o Rabote Sudov Obshei Yurisdiktсии po Rassmotrenii Grazhdanskikh, Administrativnikh Del po Pervoi Instantsii za 12 Mesyatsev 2017*, accessed 27 April 2019, [http://www.cdep.ru/userimages/sudebnaya\\_statistika/2017/F\\_3-svod-2017.xls](http://www.cdep.ru/userimages/sudebnaya_statistika/2017/F_3-svod-2017.xls); Sudebnii Departament pri Verkhovnom Sude RF, "Otchet o Rabote Sudov Obshei Yurisdiktсии po Rassmotrenii Grazhdanskikh, Administrativnikh Del po Pervoi Instantsii za 12 Mesyatsev 2016," accessed 27 April 2019, [http://www.cdep.ru/userimages/sudebnaya\\_statistika/2016/F2-svod-2016.xls](http://www.cdep.ru/userimages/sudebnaya_statistika/2016/F2-svod-2016.xls).

<sup>22</sup> St. 30, 41, *Grazhdanskii Kodeks Rossiiskoi Federacii ot 30 Noyabrya 1994 g. No. 51-FZ*. Unfortunately, there are not many mechanisms of support established in Russian legislation. The CiC provides for the possibility of so-called patronage for persons who need assistance in their daily lives. This form of assistance is provided based on a decision of guardianship authority and with the consent of a person who needs aid and future assistance; this form of support existed before the decision of the Constitutional Court discussed above. However, this form of assistance is not very popular due to an absence of funding; it is also rarely applicable to persons with mental health problems.

<sup>23</sup> Russian law has recently adopted several exceptions. For instance, fully legally incapable persons currently have the possibility of exercising some procedural rights. In order to voluntarily place a legally incapacitated person in a mental health institution the requirement to obtain the (mentally competent) patient's consent has been established. In 2011, healthcare legislation was amended, and

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ments came into force, it is still the guardian who makes decisions for an incapacitated person. However, Section 29.2 of the CiC obligates guardians to take the opinion of the incapacitated person into account. If the opinion of said person is difficult to understand, the guardian must try to investigate his or her preferences based on information from close friends or relatives.<sup>24</sup> The language of Section 29.2 does not clarify what taking wishes and preferences into account actually means, i.e., whether wishes should be heard and considered, or whether any decisions must be based on them.<sup>25</sup> It is the guardians, not the persons themselves, who are responsible for making decisions. A mechanism of controlling whether guardians respect the wishes and preferences of dependent persons has not been suggested to the Russian Parliament so far. A custodian of a person with limited capacity has an obligation to act in accordance with the opinion of said person. The literal interpretation of Section 37.4 of the CiC allows for stating that the decisions of the person under care are mandatory for a custodian, unless the “person’s wishes are impossible to establish.”<sup>26</sup> The legislation does not obligate guardians and custodians to provide support in making decisions.

Persons with partial legal capacity have the right to administer their own income, obtain gratuitous benefits, and enter into petty domestic agreements.<sup>27</sup> All other agreements require the consent of a custodian.<sup>28</sup> The amendments – as opposed to the Constitutional Court’s demands – do not allow for limitation of legal capacity depending on concrete spheres where a person can or cannot make decisions. The Civil Code thus implements a simple approach: either a person is fully capable, is fully incapable with an appointed guardian, or has limited legal capacity and an appointed custodian. This approach is reminiscent of the situation at the end of the nineteenth century that was described by Slonimskii and discussed earlier in this contribution. Back then, the practice could have been changed to a more individualized approach, but was not. In the modern situation, the Constitutional Court demands the individualization of the approach towards legal incapacity, but the legislature opposes this demand.

To summarize, following demands to change the respective legislation in the Delova case, the Parliament amended the CiC. Yet, the amendments do not satisfy the requirements that the Constitutional Court imposed. Although the CiC allows full or partial deprivation of legal capacity of persons with mental disorders, in practice, persons with mental disorders are completely deprived of legal capacity in the vast majority of cases. Partial incapacitation means that persons have the right to

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currently total legal incapacity does not necessarily mean incapacity to decide on healthcare matters.

<sup>24</sup> St. 29 *Grazhdanskii Kodeks Rossiiskoi Federatsii ot 30 noyabrya 1994 g. No. 51-FZ.*

<sup>25</sup> *Bartenev*, for instance, considers that not accepting a person’s will is possible if a guardian has good reasons for this. Dmitrii Gennadievich Bartenev, “Pomosh v realizatsii deesposobnosti lyudei s mentalnoi invalidnostyu v svete novoi redaktsii Grazhdanskogo Kodeksa Rossiiskoi Federatsii,” *Nezavisimii Psichiatricheskii Jurnal*, no. 4 (2014): 55.

<sup>26</sup> St. 29, 37, *Grazhdanskii Kodeks Rossiiskoi Federatsii ot 30 Noyabrya 1994 g. No. 51-FZ.*

<sup>27</sup> St. 26, 28, *Grazhdanskii Kodeks Rossiiskoi Federatsii ot 30 Noyabrya 1994 g. No. 51-FZ.*

<sup>28</sup> St. 30, *Grazhdanskii Kodeks Rossiiskoi Federatsii ot 30 Noyabrya 1994 g. No. 51-FZ.*

administer their own incomes and enter into petty domestic transactions, but need the consent of custodians for other matters. The CiC provides no means for limiting capacity in certain clusters of relations, which was one of the demands of the Constitutional Court. The need for support in understanding information or managing one's own actions under the CiC justifies a limitation of capacity, which is the opposite of what the Constitutional Court considered necessary. The decision of the Court regarding reconceptualizing capacity for certain clusters of relations was not implemented in the legislation. A positive step taken by the legislature in order to meet the requirements of the Constitutional Court's judgment is the inclusion of obligation to find out about and follow the wishes and preferences of a partially incapable person. However, mechanisms for control of custodians and guardians have not yet been established. Other forms of support in exercising legal capacity have not been provided for in the CiC. Therefore, it is possible to conclude that so far, the legislature has not implemented the requirements that the Constitutional Court put forth in Delova case.

### Which abilities shall be assessed?

In this section, the provisions of the CiC concerning the inability to understand information or manage one's own actions will be analyzed. I will start the analysis by citing the provisions of the CiC. After this, the criteria for inability enshrined in the CiC will be examined, one at a time. Section 29.1 of the CiC establishes the following prerequisites for declaring total legal incapacity to act:

“A citizen, who in result of a mental disorder cannot understand the content (significance) of one's own actions or manage them, can be recognized as incapable to act according to the procedure prescribed by civil procedural legislation.”<sup>29</sup>

In my translation, both words ‘*significance*’ and ‘*content*’ with respect to what a person needs to understand are used. This is because in the original text, the word *znachenie* may have at least two of the mentioned meanings.<sup>30</sup> The scope of what a person needs to understand and manage is unclear from the text of the CiC, nor is it explained in legal practice or doctrine.

Section 29.1 of the CiC emphasizes the general character of the incapacities that must be checked to deprive a person of legal capacity. The literal interpretation indicates that the assessment of legal capacity is not supposed to provide answers concerning decision-specific abilities, but is about understanding or managing one's own actions in general (as opposed to the Constitutional Court's decision in the Delova case). The meaning of the term *own actions* can be interpreted in two different ways. It can mean any actions, or those only related to the civil law relations that the CiC regulates. On the one hand, the CiC is supposed to regulate civil relations only. As-

<sup>29</sup> St. 29, *Grazhdanski Kodeks Rossiiskoi Federacii ot 30 Noyabrya 1994 g. No. 51-FZ*.

<sup>30</sup> Sergej Aleksandrovich Kuznetsov, “Znachenie,” *Bol'shoj Tolkovyj Slovar Russkogo Jazyka*, accessed 27 April 2019, <http://www.gramota.ru/slovari/dic/?word=значение/>.

suming this is true, civil relations are numerous and varied.<sup>31</sup> On the other hand, the wording of the CiC does not limit “own actions” to civil deals. The legislative history analyzed earlier in this contribution reminds us that the current formulation of the legislation is a gradual and linguistic transformation, from behaving *not foolishly*, but *wisely* in relation to *anything*. The existing legal sources leave the meaning of “own actions” ambiguous. Would a systematic and contextual interpretation of the wording of the law be helpful?

The language of Section 29.1 of the CiC clearly indicates that the absence of either of the abilities (understanding or managing) may result in incapacitation. Understanding and the managing of one’s own actions are traditionally referred to in the legal and medical academic literature as the legal criteria for incapacity.<sup>32</sup> How should *understanding* and *managing* be interpreted? The verb *understand* has a variety of meanings and signifies different aspects of knowledge. For example, understanding may be envisaged as the basic awareness of a situation or the ability to articulate conceptually, as procedural knowledge or propositional knowledge (in believing that certain information is true).<sup>33</sup> From the wording of the law, it is unclear what level of understanding is required. The expression *managing of one’s own actions* also allows many interpretations. It should be questioned when exactly it can be stated that persons manage their own actions: is it when persons are aware of what they do, when persons conduct certain actions in accordance with certain desires, or when all actions are in accordance with said desires? It is clear that managing all of one’s own actions in accordance with one’s desires is impossible for most humans. The desires of persons may also change when they are exposed to a choice, with or without the expressed notification of others about a deviation from the original plan. However, from the CiC, it is not possible to conclude about whether and when a fault in conjunction with a diagnosed mental disorder would fall within the threshold and justify a declaration of incapacity to act. Moreover, the ability to manage one’s own actions may be perceived as being a potential ability or an achieved outcome. The ambiguity around the ability to manage one’s own actions would signify that the assessors of capacity have full discretion when identifying which actions are managed by a person and which are not. This ambiguity of required abilities may hardly make it clear when limitations on the right to privacy are allowed, for patients or other actors.

The legal analysis of CiC provisions requiring assessment of abilities to understand or manage one’s own actions leaves more questions than answers. From the plain language of the act, it is clear that not possessing at least one of the abilities (to understand or to manage) may lead to incapacity. However, it is not clear what level

<sup>31</sup> See a similar discussion in Bartenev, *Pomosh v Realizatsii Deesposobnosti*, 52.

<sup>32</sup> Ekaterina Andreevna Novikova, “Proverka Deesposobnosti Grazhdan pri Sovershenii Notarialnix Deistvii,” *Teoriya i praktika aktualnikh issledovanii*, no. 14 (2016): 42; Tamara Viktorovna Shepel, *Delikt i Psikhicheskoe Rasstroistvo: Tsivilisticheskii Aspekt* (PhD dissertation, Kemerovskii Gosudarstvennii Universitet, 2006), 33.

<sup>33</sup> James F. Drane, “The Many Faces of Competency,” *The Hastings Center Report*, No. 2 (Vol. 15, 1985): 18; Ruth Faden, and Tom Beauchamp, *A History and Theory of Informed Consent*, (New York Oxford: Oxford University Press USA, 1986), 250.

of knowledge the law requires a patient to demonstrate. The law is ambiguous as to whether the significance of actions to further one's life or the fact that actions take place must be demonstrated. The CiC does not specify in what context – previous actions or future – and spheres (civil law relations or generally) it is to be applicable. This vagueness allows assessors to make any decisions they like at their own discretion and in accordance with their feelings. Russian law regarding required abilities for legal capacity can hardly be regarded as being reliable for citizens or courts.

### Case study: abilities in practice

The analysis in the previous section indicated that Russian law is unclear on how to interpret ability to understand the significance/meaning of one's own actions or to manage them. In this section, I shall illustrate how the ambiguity of law is resolved in practice.

Before starting the analysis, I should point out that none of the available court decisions discussed the application of the ability to understand or manage one's own actions in any detail. The court decisions are mostly two or three-page documents that cite relevant sections of the CiC, the diagnosis, and the conclusions of a forensic psychiatric examination. In all of the analyzed conclusions of forensic psychiatric examinations, the question about the presence of the abilities was addressed by a court and answered, to various degrees, by psychiatrists. This indicates that despite the accepted title of “*legal criterion*,” assessments of the ability to understand or manage are often deemed to be within the special competence of medical experts. According to official judicial statistics in 2018, some 39,584 applications were submitted concerning deprivation of legal capacity.<sup>34</sup> In 80% of all applications, the courts reached decisions based on these merits. In 97% of the cases decided based on merits, the application to divest capacity was accepted and satisfied.<sup>35</sup> Somewhat similar statistics were suggested in a study conducted by Argunova in 2009 (in approximately 98% of the cases decided based on merits, the application to divest capacity was accepted and satisfied). According to the author, the number of satisfied applications was almost equal to the number of forensic psychiatric examinations that acknowledged that a person was not able to understand or manage personal actions. Argunova concluded that in the vast majority of the cases, forensic expertise almost “automatically” became a decision of the courts. However, the picture is even more disturbing in the light of psychiatric examination statistics; in the study of Eltekova et al., the authors claimed that in 93% of forensic medical examinations of issues of legal incapacitation, experts considered that a person was unable to under-

<sup>34</sup> Sudebnii Departament pri Verkhovnom Sude RF, *Otchet za 12 Mesyatsev 2018*.

<sup>35</sup> This corresponds to 30,770 cases of deprivation of capacity in 2018. The figures for 2017–2015 are rather similar. Sudebnii Departament pri Verkhovnom Sude RF, *Otchet za 12 Mesyatsev 2017*; Sudebnii Departament pri Verkhovnom Sude RF, *Otchet za 12 Mesyatsev 2016*; Sudebnii Departament pri Verkhovnom Sude RF, *Otchet o Rabote Sudov Obshei Yurisdiktсии po Rassmotrenii Grazhdanskikh, Administrativnykh Del po Pervoi Instantsii za 12 Mesyatsev 2015*, accessed 27 April 2019, [http://www.cdep.ru/userimages/sudebnaya\\_statistika/2015/F3-gr\\_pr-vo\\_1\\_inst-2015.xls](http://www.cdep.ru/userimages/sudebnaya_statistika/2015/F3-gr_pr-vo_1_inst-2015.xls).

stand and manage personal actions.<sup>36</sup> The data indicates that there are very few cases where a person with a mental disorder whose capacity is disputed is considered to be able to understand or manage her or his own actions by experts, and can therefore preserve their legal capacity in accordance with the court's judgment.

Section 29.1 of the CiC clearly distinguishes between two abilities: understanding versus managing. In the studied practice, a distinction between the abilities is not visible. In the reasoning of both forensic psychiatric examinations and the courts, a distinction between the ability to understand one's own actions and the ability to manage them is drawn, but only rarely. In most of the material analyzed, the formula "unable to understand or manage one's own actions" is found. Because of this, it is often impossible to see the reason for deprivation of capacity: was it the inability to understand, or the inability to manage – or both?

To the best of my knowledge, no guidelines have been issued by either the Russian state or by non-state organizations concerning how to identify whether or not a person understands or can manage one's own actions. In most conclusions studied, references were made to the following methods of expertise: an analysis of medical history, catamnesis, a description of the patient's mental state, an analysis of existing psychiatric symptoms in combination with data analysis of somato-neurological state, and sometimes also a study of laboratory data and instrumental and experimental psychological methods.<sup>37</sup> It is not clear how the aforementioned methods allow for answering the question of whether an actual person is able to understand or manage her or his own actions. It seems that experts in the studied cases view the decision-making process as a cognitive process only; the degree of mental disorder and its description in the medical literature as possibly affecting will and cognition may be considered as being an indicator of inability to understand and manage one's own actions.<sup>38</sup> The reasoning of medical professionals can be comprehended, since there are no guidelines, standards, or other reliable methods of assessing legal capacity to act. Since the law is unclear as to what degree and kind of understanding and management of one's own actions is required to be demonstrated, it appears that judges rely on the opinions of medical experts on qualities of disorder in answering legal questions.

<sup>36</sup> Jemilija Vladimirovna Jeltekova et al., "Osobennosti Sudebno-Psichiatricheskoj Jekspertizy po Delam o Deesposobnosti v Aspekte Postanovlenija Konstitucionnogo Suda ot 27 Fevralja 2009 Goda No. 40P," *Nauchno-Medicinskij Vestnik Tsentralnogo Chernozemja*, No. 39–4 (2010): 40. The threshold for applying to a court or ordering an expert assessment is very low in Russia. This threshold is information about the presence of a mental disorder, which means that in some cases, diagnosis by a psychiatrist is not even required.

<sup>37</sup> These methods were enumerated in the Decree of the Ministry of Health that establishes general rules on how all forensic psychiatric examinations should be provided. Punkt 2.1, *Prikaz Ministersta Zdravoohraneniya Rossijskoi Federatsii ot 12 Avgusta 2013 g. No. 401 "Ob Utverzhenii Otrazlevoj Uchetnoj i Otchetnoj Medicinskoj Dokumentacii po Sudebno-Psichiatricheskoj Ekspertize."*

<sup>38</sup> See e.g. Zaključenje komissii sudebno-psichiatricheskikh ekspertov ot 21 marta 2008 g. No. 217; Zaključenje komissii sudebno-psichiatricheskikh ekspertov ot 12 yanvara 2005 g. No. 327; Orlova, "Deesposobnost fizicheskikh lits v rossijskom grazhdanskom prave," 90–91; Jeltekova et al., "Osobennosti sudebno-psichiatricheskoj jekspertizy," 40; Valentina Anatolievana Polyanskaja, "Kompetentsiya psikhologa v kompleksnoi sudebnoi psikhologo-psichiatricheskoj ekspertize sdelkosposobnosti," *Sibirskii juridicheskii vestnik*, no. 4 (2006): 99–100.

In order to provide the answers for an individual case, rather than a general description of a disorder, forensic psychiatric experts pose a number of questions to patients. The questions I came across in my study of forensic experts' opinions and judicial rulings can be listed in the following blocks:

- Questions about the personality of a patient, and sometimes also about the personality of relatives or guardians – for example, name, age, birthday, place of residence;
- Questions related to orientation in time and place;
- Questions to check whether certain abilities of a person are developed – for example, the ability to read, count, and the extent of a person's vocabulary;
- Socio-political issues, such as who the President is, who the governor of the region is, surnames of politicians, and political parties;
- Issues related to general knowledge about nature or society's design (for example, how one fruit differs from another; how trams differ from trolley-buses);
- The meanings of some sayings or idioms;
- Questions related to psychiatric diagnosis, such as how the disorder has influenced the person's functioning;
- Questions about religion, philosophy, system of beliefs (for example, how many Apostles were there, according to the Bible, who the head of the Orthodox church is, and basic concepts of Kantian philosophy);
- Questions related to independent living (for instance, what ingredients are needed for cooking a certain dish, when one needs to call a doctor, what decisions should be made when a certain medical treatment is offered, where a person resides and how one can get there by public transport, and how often and what type of hygienic procedures are needed);
- Issues related to relationships with relatives, friends, and attitudes towards medical practitioners;
- Questions about finances (such as the amount of monthly income, understanding price levels on the market, and what one will do with money or property);
- Questions related to knowledge of law (for example, what is the difference between a prosecutor and an advocate, a judge and a notary officer, in what way one type of contracts differs from another, who decides on whether a person is incapable of acting, and the purpose of a forensic psychiatric examination).<sup>39</sup>

<sup>39</sup> See, e.g., *Zakljuchenie Komissii Sudebno-Psihiatricheskikh Ekspertov ot 24 Marta 2019 g. No. 697.223.2*; *Zakljuchenie Komissii Sudebno-Psihiatricheskikh Ekspertov ot 12 Noyabrya 2004 g. No. 320/3069*; *Zakljuchenie Komissii Sudebno-Psihiatricheskikh Ekspertov ot 2 Aprelya 2009 g. No. 313*; *Zakljuchenie Komissii Sudebno-Psihiatricheskikh Ekspertov ot 28 Maja 2012 g. No. 89*.

The analyzed practice of providing psychiatric forensic examinations indicates that the list of questions asked during an assessment is not limited to relations regulated by the Civil Code. Both very general and some very specific types of knowledge were tested. The questions asked were also culture-laden (for example, questions about the governor of the region, the President, and the head of the Orthodox Church). Notably, the legislation does not require providing information that a person must understand prior to the assessment of legal capacity to act. The questions asked were not related to understanding one's own specific actions; they were more about hypothetical actions that may or may not happen in the future. However, since there is no approved methodology for conducting an assessment of abilities, it is not really clear which "incorrect" answers would signify an inability to understand information.

Some forensic psychiatric experts have deemed that procedural competence is required for preservation of capacity. For instance, in one of the assessments, a person was questioned on what documents were needed for a real estate contract and to which authorities one should apply in order to receive the documents necessary for the contract. It seems that not every law student and certainly not every layperson would be able to provide exhaustive answers to those questions. The experts agreed that the person concerned could not understand or manage personal actions, though it is not really clear whether "incorrect" answers concerning the aforementioned questions related to understanding the process of concluding contracts or the general image of the patient that was created would render the person concerned incompetent.<sup>40</sup>

Some psychiatrists assessed whether patients believed that certain facts were true. This was especially notable concerning matters of personal hygiene and finances.<sup>41</sup> For example, in some of the cases studied, if persons answered that they did not need a property that may be inherited or their regular income, such answers were treated as an absence of understanding of financial issues. Concerning personal hygiene, not only the answers, but also the way a person looked was considered to be evidence of incapacity. In one of the assessments, the commission of experts stressed that the patient in question "has a pretentious hairdo,"<sup>42</sup> which, according to the experts, was apparently inconsistent with the way a hairstyle is supposed to look in some way. In this case, the person was perceived as being incapable of understanding and managing personal actions, and was deprived by a court of the capacity to act as a result. In most of the assessments studied, the experts evaluated how patients looked, i.e., whether or not they were well-groomed.<sup>43</sup>

<sup>40</sup> In this case, a person who was deprived of capacity gave power of attorney to his trustee. When responding to an expert's question during assessment, this person explained that his trustee would know where to register a real estate contract. *Zakljuchenie Komissii Sudebno-Psihiatricheskikh Ekspertov ot 16 Fevralya 2012 g. No. 17/780025.*

<sup>41</sup> See, e.g., *Zakljuchenie Komissii Sudebno-Psihiatricheskikh Ekspertov ot 24 Marta 2010 g. No. 697.223.2; Zakljuchenie Komissii Sudebno-Psihiatricheskikh Ekspertov ot 16 Fevralya 2012 g. No. 17/780025.*

<sup>42</sup> *Zakljuchenie Komissii Sudebno-Psihiatricheskikh Ekspertov ot 12 Noyabrya 2004 g. No. 320/3069.*

<sup>43</sup> The appearance of the patients was evaluated not only from the perspective of hygiene. For instance, the patient's facial expressions, the way they were sitting, and manner of entering the room (slowly or quickly) were also assessed.

The ability to manage one's own actions can be seen in the conclusions as a hypothetical possibility to live independently. For instance, experts regarded the following inabilities as a defect of volitional criterion: not to be able to count up to 10, not understanding the value of money, as well as being unable to recognize the value of specific banknotes or coins, inability to define what the time was according to a watch or to remember things long enough, inability to fill in an application form or other document without the help of a third party,<sup>44</sup> to read, to use public transport, to control emotions, to resist being influenced by others, and so on.<sup>45</sup> It may be said that the assessed characteristics are rather broadly interpreted in practice. To some extent, the factual ability to live independently and function in society, as well as a need for protection by a third party, becomes a synonym for assessment of the ability to manage one's own actions. The ability to manage one's own actions is often viewed not only as some sort of mental operation, but also as the factual or hypothetical ability to act independently without the assistance of a third party, and a mechanism for divesting capacity as a way of protecting a vulnerable person. This approach does not comply with the legislation, as the CiC requires proof of a causal connection between the inability to manage one's own actions and the presence of a mental disorder. Courts and experts often forget the requirement of the causal link between these elements of the incapacity test. If a person is unable to write or see a particular text due to cerebral palsy and impairment of vision,<sup>46</sup> or live independently because the person in question has never done so,<sup>47</sup> this does not seem to be a legitimate ground for deprivation of legal capacity. Deprivation of the legal capacity to act is often seen in society as a way to reduce the cost of receiving social support and benefits. There are also decisions where courts have provided criticism to the approach described above and have refused to divest the capacity of persons due to available support mechanisms. For instance, in two decisions of the Porkhovskii District Court of the Pskov Region, the judges emphasized that support from a third party – a non-governmental charity organization, which provided support in education and social services free

<sup>44</sup> Including persons with visual impairment or cerebral palsy.

<sup>45</sup> See, e.g., *Zakljuchenie Komissii Sudebno-Psichiatricheskikh Ekspertov ot 24 Marta 2010 g. No. 697.223.2*; *Zakljuchenie Komissii Sudebno-Psichiatricheskikh Ekspertov ot 28 Maja 2012 g. No. 89*; *Zakljuchenie Komissii Sudebno-Psichiatricheskikh Ekspertov ot 16 Fevralya 2012 g. No. 17/780025*; *Zakljuchenie Komissii Sudebno-Psichiatricheskikh Ekspertov ot 14 Oktyabrya 2008 g. No. 966*; *Zakljuchenie Komissii Sudebno-Psichiatricheskikh Ekspertov ot 5 Iyunya 2013 g. No. 78/42*; *Zakljuchenie Komissii Sudebno-Psichiatricheskikh Ekspertov ot 21 Marta 2008 g. No. 217*; *Zakljuchenie Komissii Sudebno-Psichiatricheskikh Ekspertov ot 25 Noyabrya 2008 g. No. 289*; *Decision of the Kirovskii District Court of Samara City of 13 August 2009 in case No. 2-4435/09*; *Judgment of the St. Petersburg Court of Appeal of 28 November 2013 in case No. 2-1078/2013*.

<sup>46</sup> In this case, it was also emphasised that the person concerned was not able to go shopping independently and to use the bathroom without the assistance of a third party. Taking into account that this person was a wheelchair user, and universal accessibility is perceived to be a serious problem in Russia, the environmental barriers that society and the law establish for people with disabilities are very clear. Unfortunately, in this case, the aforementioned barriers led to the legal incapacitation of the person. *Judgment of the St. Petersburg Court of Appeal of 28 November 2013 in Case No. 2-1078/2013*.

<sup>47</sup> *Zakljuchenie Komissii Sudebno-Psichiatricheskikh Ekspertov ot 21 Marta 2008 g. No. 217*; *Zakljuchenie Komissii Sudebno-Psichiatricheskikh Ekspertov ot 28 Maja 2012 g. No. 89*; *Decision of the Nelidovskii City Court of the Tverskaya Region of 25 November 2002 in Case No. 2-1039/2002*.

of charge – empowered persons to manage their own actions. There was therefore no need to divest the capacity to act.<sup>48</sup>

Another notable feature found in some expert conclusions was that assessment concerned the depth of knowledge about philosophy, religious beliefs, the vocabulary used by a person, as well as a general worldview. For instance, on several occasions, it was noted that answers from patients concerning religion and philosophy were at a superficial level only.<sup>49</sup> In one of these cases, a person who was later divested of capacity to act for several years had a conversation with a psychiatrist about Nietzsche, Kant, and Marx, as well about different religious beliefs he was interested in, particularly Buddhism. During the assessment, it was considered that the patient's knowledge of philosophy and religion was not deep enough.<sup>50</sup> In another case, it was determined that the interests of the person were primitive. To clarify, the assessment contained extracts from conversations where the patient asserted that she was interested in studying for a new profession, wanted to become a programmer, liked knitting and sewing, and was thinking of starting a family with someone she had been dating, but only after finding a stable job.<sup>51</sup>

The presence of critique regarding one's own "state" was also part of the test for assessing the ability to understand or manage one's own actions, and was evaluated in almost every case studied.<sup>52</sup> In practice, the critique should be shown both with respect to the present mental disorder and treatment chosen, and to one's own actions. Concerning one's own actions, in some forensic psychiatric examinations, the wordings "correct" and "incorrect" actions were used, which clearly emphasize the value judgments of assessors concerning some actions.<sup>53</sup> For example, in some of the cases studied, it was mentioned that patients were behaving "correctly" or "incorrectly" in the psychiatric facility that provided assessment or at school. "Critique to one's own actions" generally signifies acknowledgment that a patient is not able to do something or had behaved wrongly in the past. It is often unclear to what extent a patient has to critique their own actions to show that this ability is preserved. In one of the cases, experts referred to the patient's inability to criticize her own state, and the following citation was provided to prove the absence thereof: "In school I was

<sup>48</sup> *Decision of the Porkhovskii District Court of the Pskov Region of 26 December 2013 in Case No. 2-538/2013.*

<sup>49</sup> *Zakljuchenie Komissii Sudebno-Psichiatricheskikh Ekspertov ot 12 Noyabrya 2004 g. No. 320/3069; Zakljuchenie Komissii Sudebno-Psichiatricheskikh Ekspertov ot 24 Marta 2010 g. No. 697.223.2; Zakljuchenie Komissii Sudebno-Psichiatricheskikh Ekspertov ot 16 Fevralya 2012 g. No. 17/780025.*

<sup>50</sup> *Zakljuchenie Komissii Sudebno-Psichiatricheskikh Ekspertov ot 12 Noyabrya 2004 g. No. 320/3069.*

<sup>51</sup> *Zakljuchenie Komissii Sudebno-Psichiatricheskikh Ekspertov ot 16 Fevralya 2012 g. No. 17/780025.*

<sup>52</sup> The importance of critique for assessing understanding and preserving capacity was also acknowledged in the medical scientific literature in Russia. Vladimir Aleksandrovich Klimov, *Kliniko-socialnye kriterii dee- nedeosposobnosti lits, nahodjashihhsja pod dispansernym nabljudeniem* (PhD dissertation, Gosudarstvennyj Nauchnyj Centr Socialnoj i Sudebnoj Psihiiatrii Im. Serbskogo, 2007), 20, 28, 30, 32, 85–87, 141.

<sup>53</sup> *Zakljuchenie Komissii Sudebno-Psichiatricheskikh Ekspertov ot 28 Maja 2012 g. No. 89; Zakljuchenie Komissii Sudebno-Psichiatricheskikh Ekspertov ot 24 Marta 2010 g. No. 697.223.2; Zakljuchenie Komissii Sudebno-Psichiatricheskikh Ekspertov ot 16 Fevralya 2012 g. No. 17/780025; Zakljuchenie Komissii Sudebno-Psichiatricheskikh Ekspertov ot 2 Aprelya 2009 g. No. 313.*

behind... not as clever as others... that is why I want to study, so I will develop my intelligence.”<sup>54</sup> It is not clear what kind of answers would be considered by the assessor as evidence of critique to a patient’s own actions: should it be criticism with elements of self-flagellation and acknowledgment that the patient would never be able to develop her skills by studying?<sup>55</sup> Unfortunately, the court in this case did not provide an in-depth analysis of the conclusions – whether conclusions are personal opinions concerning morals, or scientifically based – which led to the deprivation of the rights of a person with mental disorders.

Relationships with relatives or medical personnel were studied in almost every case. Answers given by patients concerning their relations with relatives were usually assessed from the perspective of whether a person was willing to share this information, or if they were too reserved. At the same time, negative relationships with relatives or medical staff were often treated as manifestations of disorders. For example, if patients said they believed their relatives had material or personal interests in their incapacitation or that the doctors did not provide good enough treatment, this was considered to be a paranoid reaction.<sup>56</sup> Bad relationships with relatives or medical staff signified that individuals were too critical or aggressive, or both, and could not control their emotions.<sup>57</sup> Good relationships with relatives or a third party characterized a person as being suggestible.<sup>58</sup> Both types of attitude were considered to impair a person’s ability to control personal actions (either due to suggestibility, or the inability to manage negative emotions).

To summarize, the analysis has shown that the way the provisions on legal incapacity in CiC are formulated allows for multiple interpretations. The examples from the cases studied suggest that almost any type of behavior in conjunction with a diagnosed mental disorder may fall within the ambiguous requirements of the CiC on legal incapacitation. There is no straightforward approach as to what level of

<sup>54</sup> *Zakljuchenie Komissii Sudebno-Psihiatricheskikh Ekspertov ot 28 Maja 2012 g. No. 89.*

<sup>55</sup> There are many similar examples in case practice. For instance, a patient with schizophrenia described his plans in the following way: “I shall master the computer and will write programmes. I shall earn a lot of money.” These plans were considered to be absurd by psychiatrists. In another case, a person who had previously taken drugs acknowledged this fact during the conversation and talked about his past addiction problems, saying that he believed it had led to his mental disorder. However, according to experts, his attitude was not critical enough, as he did not “condemn” it. At the same time, it should be acknowledged that, in the latter case, the experts did not reach a conclusion about the patient’s ability to understand his own actions, since they believed that only inpatient medical expertise would enable them to answer the question about the patient’s ability to understand his own actions. *Zakljuchenie Komissii Sudebno-Psihiatricheskikh Ekspertov ot 5 Iyunya 2013 g. No. 78/42; Soobshenie o Nevozmozhnosti Dat Zaklyuchenie ot 10 Iyunya 2013 g. No. 1621.592.1.*

<sup>56</sup> *Zakljuchenie Komissii Sudebno-Psihiatricheskikh Ekspertov ot 12 Noyabrya 2004 g. No. 320/3069; Zakljuchenie Komissii Sudebno-Psihiatricheskikh Ekspertov ot 5 Iyunya 2013 g. No. 78/42; Zakljuchenie Komissii Sudebno-Psihiatricheskikh Ekspertov ot 16 Fevralya 2012 g. No. 17/780025; Zakljuchenie Komissii Sudebno-Psihiatricheskikh Ekspertov ot 21 Marta 2008 g. No. 217; Soobshenie O Nevozmozhnosti Dat Zaklyuchenie ot 10 Iyunya 2013 g. No. 1621.592.1.*

<sup>57</sup> *Zakljuchenie Komissii Sudebno-Psihiatricheskikh Ekspertov ot 28 Maya 2012 g. No. 89; Zakljuchenie Komissii Sudebno-Psihiatricheskikh Ekspertov ot 12 Noyabrya 2004 g. No. 320/3069; Zakljuchenie Komissii Sudebno-Psihiatricheskikh Ekspertov ot 16 Fevralya 2012 g. No. 17/780025.*

<sup>58</sup> *Zakljuchenie Komissii Sudebno-Psihiatricheskikh Ekspertov ot 16 Fevralya 2012 g. No. 17/780025; Zakljuchenie Komissii Sudebno-Psihiatricheskikh Ekspertov ot 24 Marta 2010 g. No. 697.223.2.*

understanding or managing one's own action one should show. The examination of understanding was not limited to issues that arose or might arise for civil law contracts; the content of the questions concerned all spheres of social and personal life, and sometimes required very detailed information. As for the ability to manage one's own actions, the case practice does not specify exactly which action a person must manage. Sometimes, the ability to manage one's own actions was understood to relate to the possibility of living independently. In some cases, the assessors required concrete answers that could be expected from a person in certain social circumstances (for instance, the question related to conducting certain contracts). A "correct" answer to some of the questions does not guarantee the preservation of capacity, because capacity assessments mostly depend on the general impression of a person than on answering specific questions. The existing case practice also indicates that the courts do not discuss their comprehension of abilities to understand and manage one's own actions. Questions about these abilities are usually readdressed by the courts to forensic psychiatric experts, and this seems to be perceived by the courts as being purely medical. The case study leads one conclude that modern Russian law is not far from the laws of 1723, when the assessors could ask about anything. Even today, a person whose capacity is in question should give "a wise man's answer" in the eyes of assessors, whatever this may mean.

### Concluding remarks

In this contribution I explored the legislative history and modern law on total legal incapacitation due to mental disorders. The analysis indicates that the criteria for legal incapacity in Russia have always been defined in very general terms. It is likely that the broad formulations of criteria for legal incapacity have led to seeing incapacity in the meaning of the civil law as incapacity for all legal relations. This broad approach to seeing legal incapacitation as a long-term status in all spheres of legal relations demands fewer resources from the state, less detailed legislation, and therefore has been considered more practical and convenient. In modern Russian law, just as a century ago, persons who are declared legally incapable are deprived of most rights, with some minor exceptions. In 2012, this broad approach to legal incapacitation was considered unacceptable by the Constitutional Court of the Russian Federation. The Court demanded amending legal regulation in a way that allows the limitation of legal capacity in spheres where a specific person is unable to decide. This demand was not implemented when the CiC was amended. It is currently impossible to limit legal capacity in certain clusters of legal relations. This indicates that the provisions of the current CiC are likely to be considered unconstitutional for the same reasons as in 2012.

The historical analysis indicates that the procedure of incapacitation, originally perceived as a legal assignment, was considered too difficult to fulfil by those who lack medical knowledge. The task to assess legal capacity was gradually transferred to medicine, and currently the function of judges is more related to formal confirma-

tion of medical expertise. The case practice analyzed indicates that judges do not discuss criteria for incapacitation laid down by the CiC, and their role is rather passive.

In this contribution, I showed that the criteria for legal incapacitation in modern law are defined in such a broad manner that they allow for a number of interpretations. Interpretations of the criteria are provided by experts appointed by the courts, and the interpretation is almost never questioned by judges as, in practice, the issue is considered to be a medical one. The law is unclear as to what level of knowledge the law requires a person to demonstrate, it is unpredictable in terms of in what context (previous actions or future) and in which spheres (civil law relations or general) it should be applicable. The language of the CiC indicates that an absence of any of the properties – the ability to understand (whatever it is) *or* manage (whatever it is) – allows for judging a person to be incapable. The study of case practice shows an absence of legal certainty: almost any type of behavior can be viewed as evidence of incapacity. An overly good relationship with relatives or relationships that are overly bad, hairstyle, knowledge of religion or philosophy, or absence thereof have been considered to be components of an inability to understand or manage one's own actions.

Every year, approximately 30,000 persons are deprived of their legal capacity in Russia. The analysis in this contribution indicates that, despite establishing the legal criteria for incapacitation, one cannot even speculate as to which abilities will be assessed in concrete cases. These findings emphasize that interventions in private life in the form of capacity assessment are extremely unpredictable and lack legal certainty. This discussion raises significant concerns as to the compliance of the provisions of the Russian CiC with the Constitution, as well as human rights law in general.



# The Geopolitics of Disputes at the WTO: Russia, National Security and Emergency in International Relations

P. SEAN MORRIS

## *Abstract*

In April 2019, the WTO DSB Panel handed Russia a landmark victory against Ukraine regarding traffic in transit for goods. The WTO's decision arose from a complaint by Ukraine in September 2016 regarding measures imposed by Russia concerning the traffic of goods in transit from Ukraine to Kazakhstan, Kyrgyzstan – and other former Soviet Republics. The decision is important for a number of reasons, but for the purposes of this article, there are two points I want to discuss. First, the notion of an emergency in international relations and, secondly, the concept of national security as it relates to the security exceptions of the GATT 1994 Agreement.

The invocation of the security exceptions in a trade dispute at the WTO is in itself a new development and, as such, will pose some challenges for the future of the international liberal trade order. Yet, at the same time, the ruling also raises the question as to whether nations that have ongoing conflicts should trade on the same terms as the rest of the world where no conflicts are present or, what are the conditions that give rise for an exemption of the trading rules of the WTO.

## Introduction

The WTO DSB, as a way to justify Russia's trade restrictive measures against Ukraine for goods that transit by road and rail through Russia, has given the troubled concept of "national security" in international relations and law a new lease on life.<sup>1</sup> The countries affected by Russia's trade restrictive measures are former Soviet Republics. Two of those affected, Kazakhstan and Kyrgyzstan are both members of the Russian-led Eurasian Economic Union (EUREU).<sup>2</sup> Ironically, after the restrictive measures imposed by Russia, the transit of goods from Ukraine to Kazakhstan and Kyrgyzstan could only be done via another EUREU member – Belarus. In short, Russia effectively tells the world adjudicatory body for trade disputes that Russia has an inherent right based on 'serious national security matters'<sup>3</sup> to impose trade restrictions due to an emergency in international relations. The Panel agreed: 'there

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<sup>1</sup> *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, 5 April 2019.

<sup>2</sup> For a discussion on the EUREU in the context of Russian hegemony see, Alexander Libman and Anastassia V. Obydenkova, 'Regional international organizations as a strategy of autocracy: the Eurasian Economic Union and Russian foreign policy,' *International Affairs* 94:5, 2018, pp. 1037–1058.

<sup>3</sup> *Russia – Traffic in Transit*, para. 7.22.

has existed a situation in Russia's Relations with Ukraine that constitutes an emergency in international relations.<sup>4</sup> This readjustment of the international trade rules in favour of Russia, if not overturned, will no doubt see a shift in the enforcement of global trade rules.

Russia has always presented itself as a fascinating and circuitous example of when international law works and when it fails. For example, with the Annexation of Crimea, international law clearly fails, and Russia exploits the various loopholes to justify the accession of the peninsula to the Russian Federation. And, ironically, born out of that situation, Russia again would demonstrate in *Traffic in Transit* at the WTO when international law clearly works, when it would assert the principle of national security as set out in the GATT 1994 security exceptions to justify restriction on goods in transit.

The construction of contemporary trade rules as manifest in the WTO have been long seen as a project of the liberal international trade order.<sup>5</sup> The liberal international order for the purposes of this article is the period after the collapse of communism and the rise of international economic institutions and free trade agreements post-1991. This period is known mostly as the rise of globalization or global economic system with a strong rule of law to enforce the principles of free trade. One of the strong features of the liberal international trade order is that it has origins in Anglo-American and sometimes Western European literature that explores the boundaries of economics and political science.<sup>6</sup> Thus, for other nations, where western liberalism was not fully embraced, or had to be embraced in order to integrate in the post-Soviet world – there was a natural disadvantage to them regarding the scope and purpose of western liberalism and its teachings.

Western scholars have long argued that multinational corporations are the driving force behind international trading rules.<sup>7</sup> For the most parts, states, or specifically, the US–EU alliance would advance the interests of corporations in international legal instruments.<sup>8</sup> From this point of view, states would, in good faith, avoid invoking the security exceptions of the world trading system. Thus, if multinational corporations were the actual beneficiaries of international trade rules, then, it would be difficult to

<sup>4</sup> Ibid., para. 7.126.

<sup>5</sup> My interpretation of a liberal international trade order is partly based on that of Haberler's construction, posited as: 'By liberal economic order we mean the order of the market or capitalist economy of the modern mixed variety, relying predominantly on private enterprise and competition...' See Gottfried Haberler, 'Less developed countries and the liberal international economic order,' *Zeitschrift für Nationalökonomie* 38:1–2, 1978, pp. 145–160, at p. 145.

<sup>6</sup> Darel E. Paul, 'Liberal perspectives on the global political economy,' *International Studies* 2010. See also, Young Namkoong, 'Contending perspectives of political economy: liberalism and statism,' *International Area Review*, 3:2, 2000, pp. 109–127.

<sup>7</sup> Eg, Susan Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge University Press, 2003).

<sup>8</sup> This claim is still contentious, but I am only hoping to drive home the point, see also, Jonathan Charney, 'Transnational corporations and developing public international law', *Duke Law Journal* 1984: 4, pp. 748–788 (discussing how 'TNCs are eager to influence international decision making', at 767); Sandeep Gopalan, 'New trends in the Making of International Commercial Law', *Journal of Law and Commerce* 23 (2004) pp. 117–168; Julian Arato, 'Corporations as lawmakers,' *Harvard Journal of International Law*, 56:2, 2015, pp. 229–295.

use the language of national security to accuse another state of disobeying the rules that govern modern trade and governance. But what about when the state is the actual beneficiary of trade rules due to its heavy involvement in the economy? Could the security exception be invoked especially if an armed conflict is ongoing? For Russia, they would see the upper hand of invoking security exceptions of the international trading rules in order to maintain economic security and to demonstrate the fact that Ukraine has increasingly been the battleground for Russia's 'great power status'.<sup>9</sup>

The Ukraine – Russia trading spat at the WTO has its roots in the Crimean situation of 2014. This, “war” between Russia and Ukraine over disputed territories such as Crimea or parts of Eastern Ukraine would now involve the litigation of its economic consequences arising from those armed conflicts. The transporting of goods through Russian territory was one such consequence and moved the Ukraine – Russia conflict from the battlefield to the legal (and diplomatic) corridors of the WTO. What this development presented the global adjudicatory body was a chance to address legitimately the question of national security in light of armed conflicts and or emergency international relations. However, to present further these developments in a contextual manner, we need to look back at Russia in the post-soviet liberal international trade order.

During the final moments of the collapse of the Soviet Union, as American prophets of capitalism flooded into Moscow to offer visions of international trade – they missed one particular opportunity: how to integrate properly Russia into the world trading economy. I am not denying that Russia wasn't integrated in the world economy after the collapse of the Soviet Union,<sup>10</sup> rather, what I am positing is that, the job wasn't properly done. That opportunity was a missed one as the western prophets of capitalism operating in Moscow were more interested in the economic gain they could achieve from a narrow self-interest point of view. Moreover, although the language and structure of a global free trade regime was *alien* to the rulers of Moscow, they, however, knew that the global economic institutions such as the IMF and the World Bank, and later the WTO were good for their economy.<sup>11</sup> Thus, by the summer of 1992 Moscow was a member the IMF and World Bank and also sought to accede to the newly established WTO. Furthermore, Moscow aligned its former Soviet republics in the Commonwealth of Independent States (CIS), which included, but was not limited to, a trade regime.

Russia's ambitions in the post-Soviet space were in part to reaffirm and continue traditions, and also, in part, creating avenues for a voice and fair play in the western game of a liberal international trade order. In these circumstances, clearly buoyed

<sup>9</sup> On this latter argument see, Rilka Dragneva and Kataryna Wolczuk, 'Between dependence and integration: Ukraine's relations with Russia,' *Europe-Asia Studies* 68:4, 2016, pp. 678–698.

<sup>10</sup> For general discussions see Jeffrey D. Sachs, Andrew Warner, Anders Aslund and Stanley Fisher, 'Economic reform and the process of global integration,' *Brookings Papers on Economic Activity* 1995: 1, pp. 1–118; Neil Robinson, 'The global economy, reform and crisis in Russia,' *Review of International Political Economy* 6:4, 1999, pp. 531–564.

<sup>11</sup> Robinson, *ibid.* (discussing how Russian economic reformers believed in integration with the global economy).

by what the liberal international order has to offer, Russia undertook a shock and awe internal reform of its laws that offered protection for free market principles and became part of what Susan Strange calls ‘business civilization.’<sup>12</sup> Much would now depend on whether the liberal international trade order would embrace Russia as a trusted partner and integrate it into the world family of civilized trading nations, or extract commitments from Russia that would be dis-advantageous to either its economy or society.

By the end of the 1990s, the major economies of the world, such as the US, shifted the goal post from liberal economic order to that of human rights and democracy and intervened in countries such as Serbia to spread the gospel of human rights and democracy. For Russia, such intervention had crossed a red-line. A cautious Russia became suspicious of international liberalism. For the most part, Russia having started accession talks with the WTO – the Serbian intervention and similar events were tough pills to swallow. At the same time Moscow was being stifled under the Jackson-Vanik Trading Act. At the IMF Russia became a customer as opposed to asserting influence, and realised that the liberal international economic order was not designed in its favour. Realities became delusions<sup>13</sup> and a new vision with Russia in the driving seat<sup>14</sup> was needed to counter the American-led project of international economic liberalism. That vision included remaining part of the established institutions in the international economic order, but also developing a counter-weight such as the Shanghai Cooperation Organization (SCO),<sup>15</sup> the BRICs-lead New Development Bank, the EUREU and its dispute settlement system. For the purpose of this article – I will group these economic integration approaches in the post-Soviet space as “Moscow Governance Mechanisms” or “MGMs”).

These alternative modes of economic governance in the post-Soviet space not only give Russia a say in how global economic governance unfolds, but also, to shape such governance in Moscow’s image, similarly to how the Washington Consensus emerged at the end of World War Two reflecting American hegemony. The advantage for Russia to be at the driving force behind MGMs is that international law can be interpreted ‘as a mask for politics’ and provides ‘for a “functional” domain to circumvent the direct clash of political interests.’<sup>16</sup> The *neofunctionalism* theory of Burley and Mattli where it is the ‘framework for explaining *legal* integration’<sup>17</sup>

<sup>12</sup> Susan Strange, *States and Markets* (New York: Blackwell 1988); see also, Abram Bergson, ‘The big bang in Russia: an overview,’ *Proceedings of the American Philosophical Society* 139:4, 1995, pp. 335–349.

<sup>13</sup> See John J. Mearsheimer, *The Great Delusion: Liberal Dreams and International Realities* (New Haven: Yale University Press, 2018).

<sup>14</sup> See also, Juliet Johnson and Seckin Kostem, ‘Frustrated leadership: Russia’s economic alternative to the West’, *Global Policy* 7:2, 2016, pp. 207–216.

<sup>15</sup> For a discussion on the SCO between Russia and China, see Teemu Naarajarvi, ‘China, Russia and the Shanghai Cooperation Organisation: blessing or curse for new regionalism in Central Asia?’ *Asia Europe Journal* 10:2, 2012, pp. 113–126.

<sup>16</sup> Anne-Marie Burley and Walter Mattli, ‘Europe before the court: A political theory of legal integration’, *International Organization* 47:1, 1993, pp. 41–76, at p. 44.

<sup>17</sup> *Ibid.* Burley and Mattli depended chiefly on Ernst Haas’ own conception, to develop the theory of neofunctionalism, that includes describing neofunctionalism as a process ‘whereby political actors

also fits neatly into how to explain Russia's behaviour in contemporary international economic relations.<sup>18</sup> There are several advantages for a theory of Moscow Governance Mechanisms, but I will briefly discuss how MGM presents the rules of the international liberal order as a pluralistic system, and also how MGM embraces the organization of the world into economic communes.

*Pluralistic rules in the international trade order.* The rise of global economic regulatory structures in the post-cold war era has left the indelible mark of a global system of pluralistic rules.<sup>19</sup> But the origins of such pluralism in the liberal international trade order also has a Russian connection in that the US–EU alliance in a historical context, and their trading relationship with the 'non-market' economies of the then communist East Europe and the Soviet Union.<sup>20</sup> But as the non-market economies gave way to market capitalism in the 1990s the emerging legal rules at the international and regional level began to multiply and on occasion were seen as having a social role for the development of international economic relations. In addition to the WTO rules of 1995, the Maastricht Treaty provided a new opportunity for the EU to reform itself in the 1990s, the CIS Charter of 1993 provides for cooperation in social, economic and legal fields, and the NAFTA Agreement saw the emergence of a new type regional free trade area. These developments shaped the structure and legal obligations of states in the international liberal trade order in the 1990s but significantly, they were also the building blocks of different overlapping economic communes and legal orders.<sup>21</sup> Interestingly, it is within these overlaps of economic communes and legal orders that would help to shape how states such as Russia<sup>22</sup> can assert the principle of national security in international trade disputes to circumvent global legal obligations.

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in several distinct national settings are persuaded to shift their loyalties, expectations, and political activities towards a new and larger center, whose intuitions possess or demand jurisdiction over the pre-existing national states,' *ibid.*, at p. 53, quoting, Ernst Haas, 'International integration: the European and the universal process,' *International Organization* 15:3, 1961, pp. 366–392.

<sup>18</sup> For a similar point see Leonid Grigoryev, 'Russia in the system of global economic relations,' *Russia in Global Affairs* 46:6, 2016, pp. 498–512.

<sup>19</sup> See Francis Snyder, 'The origins of the 'nonmarket economy': ideas, pluralism and power in EC anti-dumping law about China,' *European Law Journal* 7:4, 2001, pp. 369–434.

<sup>20</sup> *Ibid.*, at pp. 374–375.

<sup>21</sup> For discussions on legal pluralism and international trade rules in general see, Francis Snyder, *The EU, the WTO and China: Legal Pluralism and International Trade Regulation* (Hart Publishing, 2010).

<sup>22</sup> For those who are verse in Russian affairs, especially those who live(d) and work(ed) in Russia, then it should not be a surprise if and when Russia uses the language of national security as a result of external economic threats, for a principled discussion in English, by Russian authors, see Olga Mikhailovna Shevchenko *et al.*, 'Economic globalization: challenges and threats of the Russian national security,' *International Journal of Economics and Financial Issues* 6:5, 2016, pp. 20–25. The reader must note that although the Shevchenko *et al* title is editorially misaligned, nevertheless, they present an argument that the European and international model of economic reforms carried out in Russia in the 1990s still have devastating effect on Russian society today, which 'led to the suppression of the national economy', at p. 22, or as I interpret it, the stagnation of the Russian economy, see further at p. 22 citing Russian authors who study the threat of external globalization on the Russian economy. See also, Mikhail Dudin, *et al.*, 'Russia's integration in the world economy and its economic security,' *European Research Studies Journal* 21:1, 2018, pp. 624–635.

*The functions of economic communes in the international trade order.* Economic communes exist in order to develop and defend priorities that are internal to the commune. Whilst an economic commune may consist of several sovereign states such as the EU, CARICOM, or the EUREU, they may also include dependent territories such as in CARICOM. One of the most obvious characteristics of an economic commune is that *all* rules are internal and an economic commune has the capacity to conclude treaties in international law. This is most obvious with the EU's legal personality and capacity to conclude treaties as confirmed in the Lisbon Treaty.<sup>23</sup> The GATS and the TRIPS Agreement are two of the most well-known international instruments that the EU in addition to its member states have concluded – where both parties enjoyed shared competence. Although the EU and the EUREU have similar traits, they do divert, but as economic communes in the liberal trade order, the EUREU's primary goal, when considered in light of neofunctionalism, is to promote integration based on self-interest in the post-Soviet space. Thus, though EUREU states retain their sovereignty, Russia can exercise great control on other member states via MGMs such as the imposition of trade restrictions on goods in transit. Therefore, in all likelihood, it is best to construe the existence of economic communes in the liberal international trade order as a conduit of rational participation of the development of norms that are govern by self-interest, and at the same time, driven by a power centre.

### GATT 1947 Article XXI, the EUREU and national security

Prior to the formation of the WTO in 1995 – there was the GATT – an institution that solved trade disputes via quaint diplomatic and political methods in Geneva. Then came along the WTO with its highly technical and legalistic methods including a binding dispute settlement system. The transition from the GATT to the WTO was largely an affair of the market economies of the world, notably the US and the EU. For former non-market economies there was a need to undergo reforms to meet the standards set by Washington, whilst some of the former participants in the GATT realised that they too need a transition period to meet a number of WTO obligations such as those in the TRIPs and SPS Agreements. The idea of invoking the security exceptions of the GATT 1994 (read national security) in the WTO was not entertained given that there were other sophisticated legal principles in which to argue before the WTO DSB. That said, however, it is crucial to look back at the GATT and its relevant provision for national security – Article XXI – and then juxtapose it against the broader structure of international economic relations.

<sup>23</sup> Treaty on European Union [2008] OJ C115/131, Articles 1(3) and 47; Treaty on the Functioning of the European Union [2008] OJ C115/471, Article 216.

The GATT Agreement (GATT 1947) was incorporated into the WTO Agreements 1994 and therefore remains part of the WTO law (GATT 1994). Article XXI of the GATT provides for ‘security exceptions’<sup>24</sup> and, in “diplomatic terms”, one could argue that the security exception of the GATT is a haven for political manoeuvring as it removes “legality” that the WTO agreements championed and put back “politics” in the hands of diplomats that were frequent purveyors of disputes during GATT 1947 years. Not only is the GATT security exception a political football, it is inscrutable and the possibilities for anomalies are limitless.

As a legal principle – the GATT security exception allows any nation a legal justification to depart from its obligations under the WTO rules by invoking national security for such derogation. There are three conditions that a state must fulfil in order to invoke GATT Article XXI and be exempted from WTO obligations: issues ‘which it considers’ sensitive; general security concerns such ‘during war and an emergency in international relations,’ and situations that would be contrary to ‘obligations under the UN Charter’.<sup>25</sup> States invoking this powerful and puissant provision of the WTO do not need the consent of other nations since it enjoys what in legal circles is referred to as “self-judging,” that is the expectation to ‘act reasonably and in good faith.’<sup>26</sup> The general history of disputes in GATT 1947 suggests that this white elephant in international trade rules has been more or less remained undisturbed. There are only few occasions in the GATT 47 dispute settlement system<sup>27</sup> where the provision was invoked, and in GATT 94 – *Russia Traffic in Transit* is a first where it was seriously considered.<sup>28</sup> Thus, suddenly, the natural order of a club where market states operated by “gentlemen agreements” (good faith) is uprooted by what was essentially

<sup>24</sup> The full provision of GATT 1994 provides:

Nothing in this Agreement shall be construed

- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
  - (i) relating to fissionable materials or the materials from which they are derived;
  - (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purposes of supplying a military establishment;
  - (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

<sup>25</sup> *Ibid.*

<sup>26</sup> Case *Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, (Judgment); ICJ Rep. (4 June 2008), para. 135. See also, Stephan Schill and Robyn Briese, “If the State Considers”: self-judging clauses in international dispute settlement, *Max Planck Yearbook of United Nations Law*, 13, 2009, pp. 61–160, noting that self-judging clauses ‘constitutes a safety valve for reconciling international cooperation and for state’s occasional preference for unilateralism within cooperative regimes,’ at p. 67.

<sup>27</sup> In addition to GATT 1947, *Sweden – Import Restrictions on Certain Footwear*, GATT Doc. L/4250, para. 4 (17 November 1975); two other notable GATT 1947 cases are *Ghana v Portugal* (1961), available in Summary Record of the Twelfth Session Held at the Palais des Nations, Geneva, GATT Doc 5R.19/12, (1961); and *United States – Trade Measures Affecting Nicaragua*, GATT L/6053, 13 October 1986.

<sup>28</sup> *Russia – Traffic in Transit*, para. 7.20: ‘This is the first dispute in which a WTO dispute settlement panel is asked to interpret Article XXI of the GATT 1994 ...’

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a non-market nation. Although, in the context of the Trumpian era,<sup>29</sup> there has been some eager to invoke national security as a defense.<sup>30</sup>

The GATT provisions on security exceptions clearly tells us *when* and or *the conditions* that national security can be invoked. However, what it does not say is how *other circumstances* not mentioned can influence national security and the *meaning* of national security. From the available evidence, it is obvious that Article XXI(b)(iii) is all-encompassing as *anything* can fit the description of an emergency in international relations. Low unemployment and imports that threaten shoe manufacturing<sup>31</sup> for instance can present an emergency in international relations – as Sweden once claimed, but later abandoned. To pin down a precise meaning of national security would be in vain as different nations have different meanings of what constitutes national security and when such situation arises. Take the term “in time of war” in the first part of the clause of Article XXI(b)(iii) – does this mean that whenever war occurs all states should impose trade restrictive measures, should only the belligerent impose trade restrictive measures to protect its own economy, or should trade continue as normal even during hostilities? The responses will clearly depend on whether the states in questions, for example, the belligerent is a form of great power, and those who are advocating the suspension of trade enjoy superpower status or can exercise economic blockades or trade sanctions. Yet, there is a simple rationale for the existence of the national security provision in the GATT – a state can simply argue that *it considers necessary* its actions. In other words – a national security situation arises out of necessity.

Powerful states in one form or the other have legislations and constitutional power to restrict trade based on “national security” and this has been embedded in US domestic law,<sup>32</sup> and similarly the Russia constitution.<sup>33</sup> Similar, Article 29(1)(6) of the Treaty on the Eurasian Economic Union (2014) on the internal market of goods provides: ‘Member States during the mutual trade of goods may apply restrictions (subject to the fact that these measures do not serve as unjustifiable discrimination or covered restriction on trade), if such restrictions are necessary for: ... (6) the defense of security of the member State.’<sup>34</sup> There are several other provisions on national se-

<sup>29</sup> See also, John Petersen, ‘Present at the destruction? The liberal order in the Trump era,’ *The International Spectator: Italian Journal of International Affairs* 53:1, 2018, pp. 28–24.

<sup>30</sup> See Rex J. Zedalis, ‘A Commentary on US “National Security” import restraints: the situation with crude oil’, *Journal of World Trade* 53:1, 2019, pp. 83–93. But see, Raj Bhala, ‘National Security and international trade law: what the GATT says and what the United States does,’ *University of Pennsylvania Journal of International Economic Law*, 19:2, 1998, pp. 263–317, at p. 265 (explaining the historical link between national security and international trade law).

<sup>31</sup> *Sweden – Shoe* (n 27).

<sup>32</sup> See *Trade Expansion Act of 1962* §232, 19 USC §1862 (1964). See also, Jaemin Lee, ‘Commercializing national security? National security exceptions outer parameter under GATT Article XXI,’ *Asian Journal of WTO & International Health Law and Policy* 13:2, 2018, pp. 277–310.

<sup>33</sup> Constitution of the Russian Federation (1993), Article 74(2): ‘Restrictions on the movement of goods and services may be introduced in accordance with Federal law only to ensure security ...’

<sup>34</sup> The EUREU has its origins in the Treaty on the Establishment of the Eurasian Economic Community, 10<sup>th</sup> October 2000 (2212 UNTS 257); Treaty on the Eurasian Economic Union of 29 May 2014.

curity in the EUREU Treaty (2014).<sup>35</sup> Although, the EUREU national security provisions were developed in line with international practice in that they should not derogate from WTO rules, they also reflect a particular concern of the members of the EUREU (or Russia): ‘the structural imbalances of the world economy’.<sup>36</sup> Given that the EUREU, as a form of social actor in the international system<sup>37</sup>, is based on collective identity – any geopolitical tension in Russia’s near abroad would likely have some impact on the EUREU and pose ‘a direct threat to Russian national security.’<sup>38</sup> The challenge was how the WTO would interpret the question of national security matters when Russia invoked that argument. Would the WTO DSB declined jurisdiction or would it interpret the WTO rules according to the norms and practices of international law as set out in Article 3.2 of its founding treaty. The evidence, as discussed further below suggests that, to some degree, the DSB has ‘generate conflict’<sup>39</sup> in the international liberal trading order by addressing this matter.

Trade agreements are often the result of political compromise and political objectives that include national security. Yet, despite the original visions of a legalistic world in which international trade is governed by a system of rules, the question of power-politics is never too far away where national security helps to balance the interests of states in international trade relations. For example, it has been identified in the literature that ‘security externalities of trade’ exists that can lead to an increase in ‘the potential military power of any country.’<sup>40</sup> The argument as Gowa develops it operates in a bipolar and multipolar system where bipolarity enjoys the benefits of free trade as opposed to a multipolar system. Although, Gowa’s argument applied to alliances that preferred trade liberalization in a certain era, that argument has an uncanny irony for the present time, given how Russia employed the national security argument in the WTO. Thus, by imposing trade restrictions, Russia in effect shattered the liberal alliance of the international trading system as Russia had actual justification to assert the security exception even if other great powers would contemplate asserting it in the WTO. Although Russia has embraced the liberal international trade order (perhaps out of strategic reasons for economic development) the security externalities of the international trade regime for Russia is that the sensitive issues that are set out in the GATT security exception, especially that of armed conflict, is more prevalent in Russia when compared to other great powers. Nevertheless,

<sup>35</sup> EUREU Treaty (2014), Article 65(6) of trade in services reflects provisions in the GATS; Article 97(2) provides for restrictions on labor activities based on national security;

<sup>36</sup> Ksenia Kirkham, ‘The formation of the Eurasian Economic Union: how successful is the Russian regional hegemony?’, *Journal of Eurasian Studies* 7:2, 2016, pp. 111–128, at 122. See also, Shevchenko (n 22).

<sup>37</sup> See Peter Katzenstein (ed.), *The Culture of National Security: Norms and Identity in World Politics* (NY: Columbia University Press, 1996) (chapter 1 discussing social actors and regionalism).

<sup>38</sup> Kirkham (n 36).

<sup>39</sup> Karen J. Alter, ‘Resolving or exacerbating disputes? The WTO’s new dispute resolution system,’ *International Affairs* 79:4, 2003, pp. 783–800, at 793: ‘International courts are more likely to generate conflict than their domestic counterparts because international legal texts contain political minefields that international judges especially are poorly placed to navigate successfully.’

<sup>40</sup> Joanne Gowa, ‘Multipolarity, and free trade,’ *American Political Science Review* 83:4, 1989, pp. 1245–1256, at 1246.

the significance of the security externalities of trade argument is that it points to the connection of the national security argument with that of international trade and the need for (political) cooperation.<sup>41</sup>

## Armed conflicts, national security and emergency international relations

War is indisputably an armed conflict.<sup>42</sup> So, under what conditions does the GATT permit a nation to impose restrictive trade measures as a result of war or an emergency in international relations? If the evidence from GATT 1947 is anything to go by then, legally, states have that option, but such matters are solved through political consensus. Sweden, for instance, in 1975 made its intention known that in the event of war or an emergency in international relations it was imposing restrictions on leather shoes.<sup>43</sup> There is however, a difference with Sweden's *intent* and the *possibility* of war in the 1970s compared to Russia and an *actual* armed conflict in the Ukraine starting in 2014. But another case also has some answers – the US – Nicaraguan shadow wars in the 1980s involving paid para-military groups by the US. The US later imposed a trade embargo on Nicaragua and, after a complaint, a GATT Panel examined the provision of Article XXI:(b) (iii) and found it had no jurisdiction to rule on the matter. Although the situation in Nicaragua and Ukraine involved armed conflict, one Panel found it had no jurisdiction, and the other said it has. Russia argues that the WTO Panel could not exercise jurisdiction to examine Russia's invocation of the security exceptions in Article XXI(b)(iii),<sup>44</sup> the Panel rejected that argument,<sup>45</sup> and held that it had jurisdiction to review Russia's invocation of Article XXI(B)(iii).<sup>46</sup>

Now, let us put the context of a judicial ruling from the world trade body as it relates to the three main themes in this article: armed conflicts, national security and an emergency in international relations. First, it should be borne in mind that the WTO DSB interprets the WTO covered agreements 'in accordance with customary

<sup>41</sup> See also, Edward D. Mansfield and Brian M. Pollis (eds.), *Economic Interdependence and International Conflict: New Perspectives on an Enduring Debate* (Ann Arbor: Michigan University Press 2003). For a discussion on the concept of multipolarity in Russia see, Andrey V. Kortunov, 'Between polycentrism and bipolarity: on Russia's world order evolution narratives,' *Russia in Global Affairs* 17:1, 2019, pp. 10–51.

<sup>42</sup> *Russia – Transit in Traffic*, para. 7.72: 'War refers to an armed conflict. Armed conflict may occur between states (international armed conflict), or between governmental forces and private armed groups, or between such groups within the same state (non-international armed conflict).'

<sup>43</sup> GATT 1947, *Sweden – Import Restrictions on Certain Footwear*, GATT Doc. L/4250, para. 4 (17 November 1975): 'The continued decrease in domestic production has become a critical threat to the emergency planning of Sweden's economic defense as an integral part of the country's security policy. This policy necessitates the maintenance of a minimum domestic production capacity in vital industries. Such a capacity is indispensable in order to secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations.'

<sup>44</sup> *Russia – Traffic in Transit*, para. 7.57.

<sup>45</sup> *Ibid.*, para. 7.101.

<sup>46</sup> *Ibid.*, para. 7.102.

rules of interpretation of public international law<sup>47</sup> and as such, situations involving war by very nature requires a fall back on customary rules of international law. This was explicitly acknowledged in *Russia – Traffic in Transit* at the very beginning of the Panel’s assessment as it considered whether it has jurisdiction to review Russia’s invocation of Article XXI(b)(iii) of GATT 1994.<sup>48</sup> To this effect, the customary rules of interpretation in international law also include the interpretation of treaties ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’ as set out under the Vienna Convention on the Law of Treaties.<sup>49</sup> In this regard, given that Article XXI of GATT 1994 covers matters relating to security interests, then, this aspect, must conform to the rules of interpretation under customary international law.<sup>50</sup> Given that the interpretation of treaties forms part of customary international law, and is well established in cases beyond the DSB, such as at the International Court of Justice (ICJ)<sup>51</sup> and taking into consideration that GATT Article XXI is, in my view, *inscrutable and the possibilities for anomalies are limitless*, then under such conditions, when the security exception is invoked – then it is out of necessity. In other words, if Russia says the transit of Ukrainian goods on its territory harms its national security as provided for in GATT 1994 Article XXI, then such a claim is a legitimate one. Ukraine however, begged to differ, and argues that ‘not every security interest will be an “essential” security interest.’<sup>52</sup> Moreover, Ukraine further alleges that Article XXI(b)(iii) applies to Russia’s Accession Protocol.<sup>53</sup> But, it was at this stage, that the Panel had to explain that the WTO DSB had not on any previous occasion ‘considered the applicability of Article XXI(b)(iii) of the GATT 1994 commitments in the Accession Protocol of any acceding Member.’<sup>54</sup> For the Panel, since ‘the architecture of the WTO system confers a single package of rights and obligations upon Russia’<sup>55</sup>

<sup>47</sup> Annex 2 of the WTO Agreement, Understanding on rules and procedures governing the settlement of disputes,

<sup>48</sup> *Russia – Traffic in Transit*, para. 7.59.

<sup>49</sup> VCLT, Article 31(1).

<sup>50</sup> See also, *Russia – Traffic in Transit*, para. 7.34: ‘[I] is for panels rather than for Members to interpret the phrase “for the protection of its essential security interests” and “which it considers necessary” in accordance with customary rules of interpretation of public international law.’

<sup>51</sup> E.g., *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, ICJ Judgment of 3 February 1994, ICJ Rep. 6, para. 41: ‘The Court would recall that, in accordance with Customary International Law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.’ The *Russia – Traffic in Transit* Panel did take into account supplementary rules of treaty interpretation such as the Chapeau of Article XXI(b) of GATT 1994 to determine the scope of customary rules of interpretation in public international law supporting Ukraine’s position. In addition, some third party submissions such as by the EU and Moldova also endorsed Ukraine’s position on the customary rules of interpretation in international law, see *Russia – Traffic in Transit*, para. 7.129, footnote 208.

<sup>52</sup> *Russia – Traffic in Transit*, para. 7.34, footnote 85.

<sup>53</sup> *Ibid.*, para. 7.6.4.

<sup>54</sup> *Ibid.*, para. 7.239.

<sup>55</sup> *Ibid.*, para. 7.232.

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it was necessary for a thorough analysis and the circumstances of each dispute to be considered based on the customary rules of treaty interpretation.<sup>56</sup>

But despite the existence of how to properly interpret and apply international law, including GATT Article XXI, it was the context, use and invocation of hard political concerns that helped to sway the Panel toward a legalistic ruling in favour of Russia. For one, Russia made it abundantly clear on the existence of political and security matters which should not be the purview of the WTO DSB<sup>57</sup> – a point that the US supported: [T]he United States asserts that issues of national security are political matters not susceptible for review or capable of resolution by WTO dispute settlement'.<sup>58</sup> Thus, in explaining the meaning of Article XXI(b)(iii) of GATT 1994, the Panel found itself facing the realities of geopolitics and trade conflicts in war torn regions of two of its members, and had no other option but to offer its own outlook on contemporary international relations. In the end, the world court for global trade disputes gave a dictionary definition of what it considers “international relations”:

‘International relations are defined generally to mean world politics, or global political interaction, primarily among sovereign states.’<sup>59</sup>

The Panel adds further in follow-up footnote:

‘The same concept is used in Article 2(4) of the UN Charter, which provides that “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”’<sup>60</sup>

At first, this explanation by the world trade court of international relations may seem like a first-time trial lawyer slow-walking an argument that he may end up losing. Nevertheless, there is more to the Panel’s take on what constitutes international relations since “war” also determines how states interact with each other. But, perhaps the most relevant observation on how the Panel defines the scope of international relations is the fact that such definitions, and subsequent analyses of the dispute, have uncanny relationships with how the ICJ would, for instance, go about determining territorial or boundary disputes. In other words, *Russia – Transit in Traffic* presents the Panel with a unique opportunity to shape its analysis in a way so that the ICJ would pursue similar questions on jurisdiction, taking into account the consequences a ruling will have for how states interact at the global level.

As for the actual issue of “national security” and an “emergency in international relations”, as invoked by Russia using the language of GATT Article XXI(b)(iii), the Panel eventually concluded that ‘Russia has met the requirement for invoking

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<sup>56</sup> Ibid., para. 7.231.

<sup>57</sup> Ibid., para. 7.22.

<sup>58</sup> Ibid., para. 7.51.

<sup>59</sup> Ibid., para. 7.73.

<sup>60</sup> Ibid.

Article XXI(b)(iii) of the GATT 1994.<sup>61</sup> However, to arrive at this conclusion, the Panel had to frame how it construed what the various parts of Article XXI(b)(iii) essentially convey. Thus, the Panel opined that national security flows from ‘essential security interests’ due to the semantics of how sentences are constructed:

‘The text of the chapeau of Article XXI(b)(iii) can be read in different ways and can thus accommodate more than one interpretation of the adjectival clause “which it considers.” The adjectival clause can be read to qualify only the word “necessary,” i.e. the necessity of the measures for the protection of “its essential security interest”; or to qualify also the determination of these “essential security interests”...’<sup>62</sup>

The second issue that the Panel had to explain is how to link another crucial phrase – “taken in time of” – to an emergency in international relations. The Panel, acutely aware of the geopolitical situation in the former Soviet Union, where Russia and Ukraine are at odds over the annexation of Crimea<sup>63</sup> and the “illegal people’s republics” in Russian speaking eastern Ukraine – the connection to war was obvious. This is so given that ‘the existence of a war’ is only a part ‘of a larger category of emergency in international relations.’<sup>64</sup> As such, the Panel explains that *taken in time of* means measures that are taken during war or other emergency in international relations and thus ‘describes the connection between the action and the events of war or other emergency in international relations.’<sup>65</sup> By way as a reminder, the GATT 1947 originated in the overall package that would have formed the abandoned International Trade Organization (ITO) lead by the United States. The negotiations for an ITO started immediately after the cessation of hostilities of a global conflict in 1945. Thus, at that time, the world was still recovering from World War Two and it was fresh in the minds of the ITO negotiators that an emergency in international relations means an armed conflict. It was a point that the *Russia – Traffic in Transit* Panel also drew a connection to:

‘[A]n emergency in international relations had in mind particularly the situation that existed between 1939 and 1941. During this time, the United States had not yet participated in the Second World War, yet owing to that situation, had still found it necessary to take certain measures for the protection of its essential security interests.’<sup>66</sup>

With this clarification out of the way, the Panel confidently reveals the parameters of an emergency in international relations in contemporary times:

‘An emergency in international relations ... appear to refer generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of

<sup>61</sup> Ibid., para. 7.149.

<sup>62</sup> Ibid., para. 7.63; see also, paras. 7.132–7.135.

<sup>63</sup> The Panel for instance observes: ‘As of 2014, there has existed a situation in Russia’s relations that constitutes an emergency in international relations...’, *ibid.*, para. 7.126(a).

<sup>64</sup> Ibid., para. 7.71

<sup>65</sup> Ibid., para. 7.70.

<sup>66</sup> Ibid., para. 7.76.

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general instability engulfing or surrounding a state. Such situation give rise to particular types of interests for the Member in question, i.e. defence or military interests, or maintenance of law and public order interests.

Therefore, as the existence of an emergency in international relations is an objective of state affairs, the determination of whether the action was “taken in time of” an “emergency in international relations” under subparagraph (iii) of Article XXI(b) is that of an objective fact, subject to objective determination.<sup>67</sup>

The Panel then found that Russia satisfied the conditions of the chapeau of Article XXI(b) of the GATT 1994 and acted in good faith:

‘The obligation of good faith ... applies not only to the Member’s definition of the essential security interests said to arise from the particular emergency in international relations, but also, and most importantly, to their connection with the measures at issue. Thus, as concerns the application of Article XXI(b)(iii), this obligation is crystalized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that that are not implausible as measures protective of these interests.’<sup>68</sup>

In that clear and precise language as articulated by the WTO Panel – Russia scored a victory that puts the entire international liberal trading order on notice. No other traditional market state has previously achieved this feat of accomplishment in the GATT/WTO system, and, one by a former non-market state is clearly an indication that there is a need for a rethinking of international trading rules specifically GATT Article XXI. In the broader legal schema of things, the WTO followed the law to the bone – and interpreted the WTO provisions according to the customary rules of treaty interpretation in international law. The Panel made use of supporting interpretative methods such as the chapeau to Article XXI<sup>69</sup> and other legal principles, which satisfies all the conditions of Article XX(b)(iii) – which is a provision that reinforces the significance of armed conflict and the system of international trade. It was a victory that Russia secured with the help of the United States, and barring any appeal, where parts or all of it can be overturned, then, the ruling represents a tectonic shift in international trading relations.

Yet, perhaps, one of the unintended consequences of the *Russia – Traffic in Transit* ruling by the Panel is that it handed a victory to small states who are members of the WTO and have been calling for various exemptions over the years. Although any state can possibly invoke Article XXI security exemptions, for the most part, some are expected to act in good faith, and secondly, some claims may not stand up to legal scrutiny. But for small states and weak economies who must uphold their WTO obligations, Russia, has in one master stroke at the sanctuary of trade liberalism, eliminated their fear of breaking WTO obligations. It is no secret that civil wars and other forms of armed conflict in places such Africa, the Middle East, Latin America

<sup>67</sup> Ibid., paras: 7.76 – 7.77; also, at para.7.111.

<sup>68</sup> Ibid., para. 7.138.

<sup>69</sup> Ibid., para. 7.138.

or occasionally South East Asia met the qualification of an emergency in international relations. Europe, the US, and Japan cannot make the argument of national security especially as it relates to armed conflicts as things stands now, and hence, a WTO panel could in theory rule against those states. It must also be borne in mind that those states – the US, the EU, Japan (and China) are the major users of the WTO DSB through various complaints or as third parties. Although occasionally some small states would, after consultation make a complaint at the WTO, they are often supported by multinational corporations, online gambling companies<sup>70</sup> or at the behest of another powerful economic state.

### Dispute settlement WTO and the future of the liberal international trade order

For decades since the end of the cold war, states have pursued a liberal international trade order based on the formation of international organizations such as the WTO or regional trading blocs such as the EU and the NAFTA. The organising of the liberal international<sup>71</sup> trade order has been for the most part – driven by the capitalist ideals of the US and the economic integration of the EU. Russia, for its part, played “catching-up” to the project of the liberal trade order as it acceded to the WTO or formed its own regional trade bloc via various incarnations of the Eurasia Economic Union (EUREU) and its dispute settlement system. Moreover, the liberal international trade order is further emboldened by dispute settlement mechanism in other trade-like agreements such as the countless arbitration provisions in bilateral investment treaties and mega-regional free trade agreements. The proliferation of dispute settlements, although important for the recognition and upholding of the rule of law, can also be a catalyst for the demise of an international liberal trade order if they have to interpret similar provisions to GATT Article XXI in favour of countries who invoked them.

The existence of dispute settlement mechanisms in the liberal trading order is buttressed by multilateral and bilateral treaties that exist to enforce the rule of law and the correct interpretation of such law against international law. However, the rule of law in the international trade order has always been based on a singular vision of states with great economic power. Other states that engage in the norm-game, that is, they either coercively embraced international trade rules, or voluntarily participate in them, will often remain at the margins as other powerful states engages in the legal transactions of international dispute settlement. The lack of engagement by

<sup>70</sup> Eg., United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS/285/AB/R, 7 April 2005.

<sup>71</sup> For a discussion of liberal international in a broad context, see G. John Ikenberry, ‘The end of liberal international order?’ *International Affairs* 94:1, 2018, pp. 7–23. Ikenberry points out that America liberal hegemony in the post-war world was, in part, based on a liberal international trade order that involved the GATT and now the WTO, at pp. 15–16. For Ikenberry, the ‘American-led era of liberal internationalism looks increasingly beleaguered’ at p. 22, despite having its foundation in ‘a security community – a sort of mutual protection society’ at p. 19.

some states in the norm-game can signify a belief that there is nothing to gain from a relationship purely on membership. On the other hand, old rivalry between powerful states can also escalate in international dispute settlement when political realities and or an armed conflict helps to justify the trajectory and purpose of trading rules. A convergence of polar opposites: liberalism and armed conflicts in trading relations have led to new political realities. Such realities create a necessity and a desire to invoke security exceptions or, not to invoke based on good faith principles. The necessity to invoke security exceptions based on situations arising from armed conflict leads to a situation in how such legal transactions in international dispute settlement awakes what was always a sleeping giant: the politics of security exceptions to justify trade protectionisms. On the other hand, visions of a liberal trading order will also force states to act in good faith – not to invoke.

Although some studies have suggested that by participating in international dispute settlements, international politics can be tamed ‘in favour an international rule of law’<sup>72</sup> such evidence did not take into consideration the actual determinants of international politics in international trading relations: security exceptions as set out in GATT Article XXI. Thus, for the international liberal trade order, the existence of security exceptions in trade and other economic agreements is a confirmation that the sovereignty of a state is what matters given that security exceptions are tied to the territorial boundaries of a state and not the liberal visions of an international trade order with little role for the state. From this perspective, it is apparent that there is a failure of convergence between international trading rules and the extent sovereignty matters to uphold or delineate from such rules. Or, to put it another way, what good is international trade rules, when there is the existence of provisions that permits a state to derogate to protect its essential security interests if such interests are purely based on power. In many ways, it was part of the dilemma that the Panel in *Russia – Traffic in Transit* had to address, but resorted to lessons in grammar<sup>73</sup> as opposed to conflict of rules clashes with geopolitical norms that are challenging the very existence of the WTO. Part of that challenge stems from what Grewal describes in a different context, how ‘geopolitical and military rivalry between trading powers generates a highly ambiguous security situation as regards international trade.’<sup>74</sup> A further challenge, in my view, stems from the very fact that the liberal international trading order is a

<sup>72</sup> Bernhard Zangl, *et al.*, ‘Between law and politics: explaining international dispute settlement behaviour,’ *European Journal of International Relations*, 18:2, 2011, pp. 369–401, at 390. See also, Daniel S. Sullivan, ‘Effective international dispute settlement mechanisms and the necessary condition of liberal democracy,’ *Georgetown Law Journal* 81:6, 1993, pp. 2369–2412.

<sup>73</sup> *Russia – Traffic in Transit*, para. 7.65: ‘[T]he mere meaning of the words and the grammatical construction of the provision can accommodate an interpretation in which the adjectival clause .... But if one considers the logical structure of the provision ... they qualify and limit the exercise of the discretion accorded to Members .... Does it stand to reason, given their limitative function, to leave their determination exclusively to the discretion of the invoking Member? And what would be the use, or *effet utile*, ...’.

<sup>74</sup> David Grewal, ‘Three theses on the current crisis of international liberalism,’ *Indiana Journal of Global Studies*, 52:2, 2018, pp. 595–621, at 614; G. Richard Shell, ‘Trade legalism and international relations theory: an analysis of the world trade organization,’ *Duke Law Journal* 44:5, 1995, pp. 829–927, at 922 discussing direct political participation in the WTO.

protectionist order, in that it exists only to serve the economic interests of powerful liberal countries and not the actual essential security interests such as economic injustices in poorer nations who must obey international trade rules. But perhaps, the greatest challenge relates to how land-locked countries that are dependent on transit corridors in Central Asia are able to navigate geopolitical tensions of transit countries such as Russia. Another challenge will also emerge between the competition for transit routes with Russia as a transit country and the so-called new silk-route (or belt road) in central Asia that is being championed by China.

## Conclusion

Moving forward, the debate should not focus on whether Russia has turned its back on the international liberal trade order, rather, the debate should address the genuine concern of whether security exceptions fit into the modern conception of the international order. In a sense, the invocation of national security by Russia in the WTO is a reflection of how much involvement the state has in an economy that does not totally function on the grit and grind rules of western market economies. This observation is however, not limited to Russia as other countries can potentially invoke the doctrine of national security to justify protectionism. Moreover, the doctrine of national security is a reminder of how geopolitics helps to determine how economic relations are governed based on how a state sets its national security priorities. But the big takeaway is that Russia has now made the case for the reform of the WTO so that a serious reconsideration of how and when protectionism is allowed for states with weak economies or affected by conflicts and that the one-size fits all rules of the international trade regime does not apply to all countries. Nevertheless, the fundamental policy question that must now be addressed is a proper working definition of national security so that lawmakers can take it into account in international trade and any possible reform of the WTO rule specifically an amendment or revision of GATT Article XXI.



# On Russia's Understanding and Justification of Peacebuilding

JOHANNA OHLSSON<sup>1</sup>

## Introduction

States who are engaged in peacemaking activities in other countries do this for several reasons. State representatives also make use of different approaches and arguments in favor of their decisions of getting involved.<sup>2</sup> This article offers insights from a case study on Russia's understanding of peace and peacebuilding, as well as a typology of what arguments are offered as justificatory attempts of engagement in peacebuilding in official Russian foreign policy discourse.

Russia presents a fascinating case study in the context of external states' involvement in peacemaking activities, based on at least three counts. First, as Russia is one of the five permanent members of the United Nations Security Council (UNSC), it puts the state in a certain position in world politics. These five are the most influential countries when it comes to decision-making in relation to peace engagements, given their veto power. Holding this prominent position on the UNSC entails a specific type and amount of responsibility as well as certain expectations. Second, in what might come as a surprise to some, Russia has a history of contributing to peace missions. This contribution primarily concerns seconding personnel and funding to UN structures, but, to some extent, also to what Russia claims to be peace operations in the post-soviet region. Russian leaders have had to develop an approach toward peacemaking as a direct consequence of the number of regional conflicts that erupted in the wake of the fall of the USSR.<sup>3</sup> Third, Russian peace engagement is often regarded with suspicion due to its continuous use of military strategies as secondary-party responses to different crises. Nonetheless, peacebuilding activities with Russian involvement are also taking place. Even so, this mistrust may provide greater incentives to offer attempts to justify engagement in peace missions. Russian interest in peace missions is, as with most countries, largely a reflection of its foreign poli-

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<sup>2</sup> This article largely builds on sections previously published in my doctoral dissertation; see Johanna Ohlsson, *On the Ethics of External States in Peacebuilding: A Critical Study of Justification* (Uppsala Studies in Social Ethics 50. Uppsala: Acta Universitatis Upsaliensis, 2018), Chapter 6 and parts of Chapter 2, © 2018.

<sup>3</sup> Isabel Facon "Integration or Retrenchment? Russian Approaches to Peacekeeping" in *Major Powers and Peacekeeping: Perspectives, Priorities and the Challenges of Military Intervention* Rachel E. Utley, (ed.). (Abingdon: Ashgate Publishing, Ltd, 2006) 31.

cy priorities and interests, yet has often been portrayed as limited or non-existent. However, a review of Russian foreign policy shows traces of peace operation priorities at several levels. The case selection is further motivated by the limited amount of scholarly attention given to Russia's views of and approaches toward peace and peacebuilding in particular.<sup>4</sup>

The purpose of this article is twofold. The first is descriptive, devoted to mapping and an analysis of the Russian understanding of peace and peacebuilding. The second purpose is explorative, focusing on how the Russian Federation is justifying its engagements in peace initiatives and have the ambition to scrutinize which strategies are drawn upon in the justificatory process. Furthermore, the article will also address toward which audiences the justificatory attempts are directed. Questions governing the analysis of this article are therefore centered on how Russia understands and justifies its engagements in peace missions abroad. What understanding of peace governs the Russian foreign policy discourse? What justification strategies are used, and how? In addition, this study also asks upon which ethical and moral resources Russia draws in the justificatory process. To understand Russian peace engagements in a systematic way, several methods have been applied. The research design is a combination of a qualitative critical analysis and semi-structured expert interviews, applied in order to identify the justification strategies being used in official discourse guiding Russian peace and peacebuilding engagements.

The article is based on a case study, as this is an established way of allowing for theoretical development. It also seems fruitful for addressing in-depth clarifications of a particular social behavior, as well as exploration and understanding of complex issues.<sup>5</sup> This study relies on a reflexive and critical approach to information generation and analysis, creating room for understanding the meaning-making process of justification strategies by Russian state representatives in relation to Russia's peace and peacebuilding efforts. What is central in this study are the ways in which engagement in peacebuilding is understood and justified. This locates the focus in the concepts and arguments provided. These are understood to be constructed in relation to several other political areas and are a part of the general foreign policy discourse.<sup>6</sup>

The study is based on a content analysis built upon close readings and critical analysis of Russia's main foreign policy documents with relevance for peace missions abroad. The textual material consists of seven core documents, analyzed in

<sup>4</sup> Existing research tend to focus on Russia's military strategies (see, for example, Allison 2013, Golts 2017, Golts and Kofman 2013), military contributions to different types of international missions (see, for example, Bratersky and Lukin 2017, Facon 2006, Nikitin 2013), or, more generally, Russia's approach toward world order in relation to peace (see, for example, Toloraya 2018, Wilson Rowe and Torjesen 2008). These are different from this study, as this study primarily focuses on the specific understanding of peace and peacebuilding. Previous research, such as the ones mentioned here, tends to have either a narrower or a broader focus.

<sup>5</sup> Helena Harrison, Melanie Birks, Richard Franklin & Jane Mills "Case Study Research: Foundations and Methodological Orientations" (*Forum: Qualitative Social Research* Volume 18, No. 1, Art. 19 January 2017) 1.

<sup>6</sup> See Ohlsson, *On the ethics of external states in peacebuilding*, 140–167 for a deeper discussion on method.

their official English versions. This proposes a challenge for the results and potentially also the validity of them, as it is solely English versions being analyzed. If the study would include the Russian versions of the documents, this might open the door to other results. A venue for further research could be to compare the rhetoric in different languages in order to explore if there is a difference in tone, content, or strategies used.<sup>7</sup> However, the English versions of the documents provide nuanced insights on the framing and rhetoric utilized.

All of these documents offer an overview of the foreign policy goals and visions but are primarily a way of portraying national interests. These are, first, the *National Security Concept* from 2000. The second document is the *National Security Strategy to 2020* from 2009, which offers both long-term visions and an account of the strategic goals of Russia's foreign policy. This document is devoted to an account of perceived threats to national security in the ten-year period between 2010 and 2020. The third document is the *Concept of the Foreign Policy* from 2013, and the fourth is the updated version of the third, the *Foreign Policy Concept of the Russian Federation* from 2016. These documents provide a systemic vision of the basic principles, priority areas, goals, and objectives of foreign policy of the Russian Federation.

The fifth document is the *Concept on International Development Assistance* from 2007, and the sixth is its updated version, the *Concept of the Russian Federation's State Policy in the Area of International Development Assistance* from 2014. These are relevant because, following their preamble, they address socioeconomic development as well as issues and crises caused by conflicts which, according to the definition of peacebuilding utilized here, are measures included in the concept of peacebuilding. This signals that the Russian Federation tends to define peacebuilding as part of development assistance. However, the word peacebuilding is not commonly used in these documents. The seventh document is the *Military Doctrine* from 2014. This document has been revised numerous times during the post-Soviet era, and the relevance criteria have assisted in selecting only the most recent version. This document functions primarily as a policy guideline on defense issues. It is important to note that there is no white paper on peace missions in the Russian policy document portfolio. However, the policy for international assistance offers something that seems to at least overlap with issues defined as peacebuilding. The documents have been selected on the basis of their relevance in framing the official foreign policy discourse of the Russian Federation. As the main foreign policy documents in the period of study, 1992–2017, they provide an almost complete selection. These documents also provide the framework for Russian engagements in peace missions abroad. All documents accessed in their official English version have been read closely and their

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<sup>7</sup> This demarcation is motivated by reasons of feasibility and accessibility, but I am aware of the potential shortcomings this might imply for the analysis. This is handled in two ways: first, these are the official versions of the texts, so the Russian government approves them and hence they are part of official foreign policy discourse. The second way to address this shortcoming is the supplementary interviews, where it has been possible to ask the participants about the issue of language.

justification strategies have been identified on the basis of the aspirational goals and values expressed therein. They are viewed as the official stance of the Russian state.

Sixteen interviews were conducted (and structured based on an interview guide) with individuals from different institutions. Three participants are active at the Moscow State Institute of International Relations (Московский государственный институт международных отношений, MGIMO), an academic institution run by the Ministry of Foreign Affairs. Two participants are active at the Institute of World Economy and International Relations (Институт мировой экономики и международных отношений, ИМЭМО), an independent research institute. Three participants are active at the Russian Academy of Sciences at departments such as the Institute for African Studies. These include two scholars and one ambassador. One participant is also active at the Gorchakov Foundation, which facilitated further contacts with diplomats and other scholars. In addition, one participant from the Russian International Affairs Council (Российский совет по международным делам) and one from the BRICS Research Centre (Национальный комитет по исследованию БРИКС) took part in the study, as did three participants from the Diplomatic Academy and one from the PIR Center. The selection of participants is based on a snowball sampling strategy, as this has proven to be the most effective way of reaching experts and advisors willing to take part in the study.<sup>8</sup> However, the participants' position or relationship toward the top political leadership needs to be addressed, as the interviewees are not representatives of the Russian state per se. However, the majority of the participants have a function as advisors to the Russian government, providing them with invaluable insights on discussions and discourse on the issue of peacebuilding. The shortcoming of not getting access to the top political leadership is therefore mitigated by focusing on experts in as close proximity as possible.

The textual data, consisting of both official documents and the information generated via interviews, have been analyzed based on a qualitative content analysis. The selected approach is an analysis of ideas, as this allows for a description of the content of the material without assessing the rightness or correctness of the ideas expressed.<sup>9</sup> This also strengthens the intertextuality of the analysis, as the meaning-making expressed in some parts of the material shapes interpretation of other parts of the material. For example, the interviews have proven to be helpful to validate which documents are central for the purpose of this study.

Building on the analysis of the material, I develop a typology of the attempts at justification which Russia makes in their foreign policy discourse.<sup>10</sup> A typology commonly consists of an overarching concept: in this case, justification strategies. It also

<sup>8</sup> Cohen, Nissim, and Tamar Arieli. "Field Research in Conflict Environments: Methodological Challenges and Snowball Sampling." *Journal of Peace Research* 48, no. 4 (July 2011): 423–35. 423; King, Nigel & Christine Horrocks. *Interviews in Qualitative Research*. (London, Thousand Oaks, New Delhi, Singapore: Sage, 2010) 34.

<sup>9</sup> Beckman, Ludvig. *Grundbok i idéanalys*. (Stockholm: Santérus förlag, 2005) 13.

<sup>10</sup> A discourse is here understood as "a particular way of talking about and understanding the world (or an aspect of the world)." Jørgensen, Marianne & Louse Philips. *Discourse Analysis as Theory and Method* (London: Sage Publications Ltd. 2002) 1.

consists of several types, which here are different kinds of justification strategies. These justificatory strategies have different labels, such as, for example, the continuous invoking of multilateralism as a justification strategy by Russia. The types are constructed on the basis of themes found in the material. These themes have been grouped together according to whether they offer similar or different arguments as justification of engagement in peacebuilding. The analysis shows three groups of justification strategies, which I consider as three types of strategies within my typology. Hence, a typology is the result of a systematic grouping process.<sup>11</sup> The guiding rule utilized for constructing a typology is that the characteristics within a type should be as similar as possible, while the characteristics between types should strive to be as different as possible. They should be connected by the overarching concept but remain clearly separable. When processing the material, the analysis is governed by the search for justificatory arguments in relation to peacebuilding. What is found is grouped into different themes and categorized into types. Interestingly, the typology reveals both divisions and overlaps in the moral and political justification strategies and the attempts to justify.

Given the complexities of international relations, many issues are intertwined in different ways. By focusing on the issue of peacebuilding, matters of military and humanitarian interventions are given prominence. This creates a risk of conceptual confusion, which becomes a potential challenge in the Russian case, as Russia seem to adopt a less comprehensive definition of peacebuilding than what is articulated in mainstream UN discourse. However, what is interesting is that this seems to be dependent on the proximity of the alleged peace mission and which structures through which it is implemented. Let us return to potential explanations further on, and instead focus on the potential nuance of the notion and acknowledge that there are different issues (peacebuilding, military, and humanitarian interventions) and logics (war, peace) influencing the discourse on peace missions and peacebuilding. Yet, given that the selected definition for the paper is one of the most established ones within the international community, this also offers interesting insights.

When it comes to the difference between intervention and peacebuilding, timing is key.<sup>12</sup> Interventions usually take place during conflict, while peacebuilding, as previously discussed, typically refers to events after the cessation of hostilities. As well as timing, there are also questions of sequencing and tasks being of relevance. Intervention usually refers to the task of ending atrocities and violence, while peacebuilding is more focused on the prevention of renewed conflict. Peacebuilding seeks to address the root causes of conflict and is aimed at rebuilding of institutional ca-

<sup>11</sup> Kluge, S. "Empirically Grounded Construction of Types and Typologies in Qualitative Social Research" *Forum Qualitative Sozialforschung /Forum: Qualitative Social Research* Volume 1, No. 1, Jan. 2000. 1.

<sup>12</sup> Arnim Langer and Graham K. Brown, (Eds.) *Building Sustainable Peace: Timing and Sequencing of Post-Conflict Reconstruction and Peacebuilding* (Oxford: Oxford University Press, 2016) 2f.

capacity.<sup>13</sup> Military and humanitarian interventions differ primarily in terms of their means and principal focus.<sup>14</sup>

The concept of peacebuilding was first articulated in 1992 in *An Agenda for Peace* where it includes robust operations that combine the regulated use of force with enhanced civilian tasks with a broader mandate than previous generations. In this seminal document, peacebuilding is defined as actions that “identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict.”<sup>15</sup> This is of crucial importance, as it shows that it is the post-conflict period that is central, and in particular the focus on prevention of renewed conflict. *An Agenda for Peace* specifies the definition of peacebuilding as consisting of

[...] comprehensive efforts to identify and support structures which will tend to consolidate peace and advance a sense of confidence and wellbeing among people. Through agreements ending civil strife, these may include disarming the previously warring parties and the restoration of order, the custody and possible destruction of weapons, repatriating refugees, advisory and training support for security personnel, monitoring elections, advancing efforts to protect human rights, reforming or strengthening governmental institutions and promoting formal and informal processes of political participation.<sup>16</sup>

However, based on the findings presented in this study, the Russian case seems to be governed by a militarized discourse to a large extent. This is further strengthened and explored below and is expressed in the material as the notions of military intervention, conflict resolution, and peacebuilding appear to be understood as closely intertwined.<sup>17</sup> This suggests that Russian foreign policy discourse has a different understanding of peace and peacebuilding than the mainstream UN definition.

## Change and continuity in Russian foreign policy

To understand Russia’s contemporary foreign policy and current approaches to peace initiatives, it is necessary take aspects of the development of the Soviet Union into consideration. The larger picture is also needed as background and context in order to identify the most relevant attempts to justify as well as justification strategies for Russia’s engagement in peacemaking and peacebuilding.

The history of the Russian Federation dates from 1 January 1992, but there are several linkages to the Soviet Union (1922–1991). From the perspective of international law, Russia in general is considered a continuator of the Soviet Union given

<sup>13</sup> Ibid. 3–8, 378.

<sup>14</sup> For further discussion see Ohlsson, *On the ethics of external states in peacebuilding*, 47–55.

<sup>15</sup> General Assembly resolution A/47/277, *An Agenda for Peace: Preventive diplomacy, peacemaking and peace-keeping: Report of the Secretary-General*, A/47/277 – S/24111 (17 June 1992), available from [undocs.org/A/47/277](http://undocs.org/A/47/277), paragraph 21.

<sup>16</sup> Ibid. paragraph 55.

<sup>17</sup> Interviews, Moscow, July 2017, A, Professor, diplomat and political advisor on peace issues, B, Professor and political advisor on peace issues; N, Associate professor and expert on security and conflict-settlement.

that Russia, among other things, assumed the Soviet Union's place in the UN Security Council.<sup>18</sup> However, the reaction of other states toward this continuation was not uniform.<sup>19</sup> The Russian Federation seems to see itself as a continuation of the USSR, as exemplified when Russian president, Boris Yeltsin, in a letter dated 24 December 1991

[...] informed the Secretary-General that the membership of the Soviet Union in the Security Council and all other United Nations organs was being continued by the Russian Federation with the support of the 11 member countries of the Commonwealth of Independent States.<sup>20</sup>

In addition, scholars such as Andrei P. Tsygankov has argued that the traditional foreign policy debates survived the fall of the Soviet system and that Russia's post-Communist behavior therefore needs to be understood in its historical context.<sup>21</sup> However, the role of peace missions during the Soviet era was less prominent than during the 1990s or the beginning of the 21st century.

The Soviet legacy of the Russian Federation is evident in many political arenas in Russia today, not least its foreign policy. Much of Russian foreign policy is centered on a quest for Great Power status, which can be understood as a quest for returning to the glory days of the empire when Moscow was recognized as a center of global power. In addition, Russian foreign policy is generally influenced by both change and continuity over the years, which holds for the period of the Soviet Union as well as for the contemporary Russian Federation.

When taking this historical perspective into account, it becomes challenging to distinguish between Russian and Soviet involvement in peace operations. Several contemporary peace engagements were initiated either during the latter years of the Soviet Union or in direct relation to the disintegration thereof. Many of the relationships between the Russian Federation and other countries are very much entangled with the Soviet legacy of Russian politics. One way of separating them analytically is to focus empirically on the period after the fall of the Soviet Union while at the same time remaining mindful of the legacy of contemporary interstate relations.

The change and continuity that shape Soviet and Russian foreign policy can be traced back to the Tsarist period, through the Soviet era, and up to today's post-

<sup>18</sup> Malcolm N. Shaw (ed.) *International Law* (Cambridge: Cambridge University Press, (7th Ed.), 2014) 696, James Crawford (ed.) *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, (8th Ed.), 2012) 427.

<sup>19</sup> However, as Bühler shows, the world community did not take a uniform approach, and four different strategies were applied; the first was explicit recognition, the second was an official "welcoming", the third was to recognize only the Russian government; and the fourth to do nothing. Regardless of which strategy different states chose, most countries continued their diplomatic relations without recrediting their representatives. See Konrad G. Bühler *State Succession and Membership in International Organizations: Legal Theories versus Political Pragmatism* (Leiden: Brill, 2001) 161f.

<sup>20</sup> Member States | United Nations. (2019). Retrieved from <http://www.un.org/en/member-states/index.html#gotoR>.

<sup>21</sup> Andrei P. Tsygankov, *Russia's foreign policy: change and continuity in national identity*. (Lanham: Rowman & Littlefield Publishers (4th Ed.), 2016) 1.

Soviet era.<sup>22</sup> The fall of the Soviet Union makes Russia a young country with a very long and influential history, which also shapes Russian engagement in peace issues. A historical overview shows several key events that have been very influential in the development of Russia's foreign policy. Overall, the main developments during the Cold War, its end, and the break-up of the Soviet Union have all heavily influenced both domestic and international trajectories. Other key events that have had great influence and took place during the period in focus for this study can be thematically summarized as changes in head of state and foreign/defense ministers, events connected to nuclear weapons and arms negotiations, deployments of troops and interventions, and different types of strategic partnerships.<sup>23</sup> This is exemplified by the formation of the Collective Security Treaty Organization by Russia and five other ex-Soviet states in May 2003.<sup>24</sup>

Russian foreign policy in the post-Soviet generated era is a well-researched topic that has sparked much scholarly debate and an extensive body of literature. To name a few influential works, scholars such as Andrei Tsygankov (2016) have explained the shifts and continuities of Russian (and Soviet) foreign policy through a constructivist approach focused on identity formation. Jeffrey Mankoff (2012) explicitly focuses his analysis on the role of Great Power politics in Russian foreign relations. Further, Bobo Lo (2002) has analyzed the driving forces behind Russian foreign policy in the context of national interest. These works take a broadly analytical view on Russian foreign policy, covering the conceptualizations of *near-abroad* and *far-abroad*.

The terminology of near and far-abroad can be considered controversial, given the context in which they were created.<sup>25</sup> Near-abroad refers to the other republics of the former Soviet Union, and far-abroad refers to the rest of the world. The near-abroad has also been called the Russian "sphere of influence."<sup>26</sup> This can take the form of both formal and informal expressions of interest, but usually comprises an asymmetric power relationship in which Russia is the most powerful actor. In this study, post-Soviet space and the world beyond will be used as designations for geographical prioritizing. Much research on Russian foreign policy in the near-abroad can be categorized as either one or several of the following four types of explanations: individual-level, domestic-political, ideational, and geopolitical. However, all types should be taken into consideration in order to better understand and explain Russian foreign policy.<sup>27</sup>

<sup>22</sup> Tsygankov, *Russia's foreign policy*, 9.

<sup>23</sup> *Ibid.* xiii–xxv.

<sup>24</sup> *Ibid.* xix.

<sup>25</sup> These are two controversial concepts, and they are not part of an explicit policy used by the Russian government. Instead, discussion is usually of spheres of interest and strategic homes. The concepts derive from the 1992 Karaganov doctrine, with specific reference to Russian-speaking minorities in the former Soviet states, especially the Baltics.

<sup>26</sup> Bobo Lo, *Russian Foreign Policy in the Post-Soviet Era: Reality, Illusion and Mythmaking* (London: Palgrave Macmillan, 2002) 48.

<sup>27</sup> Elias Götz, *Russia's Quest for Regional Hegemony* (Aarhus: Politica, Aarhus University, 2013).

Despite linkages to the Soviet Union, foreign policy experts argue that today's Russian Federation is neither suited nor aspiring to take on the role held by the Soviet Union as a superpower rival to the United States.<sup>28</sup> However, much of Russia's general foreign policy, as well as its foreign policy on peace issues, is focused on an alternative world order not monopolized by the West. This is also where the BRICS (Brazil, Russia, India, China, and South Africa) collaboration is actualized, and it has been stated that

These five leading ascendant powers could create a world order that will be more just and balanced than what we see now.<sup>29</sup>

This is one of the statements upon which the BRICS countries agree, but this citation comes from a Russian foreign policy expert. Russia seems to be one of the driving forces of this alternative world order, yet it is not stated in the foreign policy documents exactly how this alternative should be organized.<sup>30</sup>

Lo (2002) describes the state of mind that characterizes Russian foreign policy as an "imperial syndrome," one that is shaped by the experience of the previous empire as well as a sense of a potential future sphere of influence. Lo is not saying that contemporary Russian leadership aspires to rebuild the Soviet Union, but rather that it exhibits a state of mind that assumes or predicts influence in the former Soviet republics.<sup>31</sup> This is relevant for an understanding of Russian engagement in peace missions, since much of Russia's engagement has primarily taken place in the post-Soviet sphere.

What often seems to have been the driving force behind Moscow's foreign policy is whether the West accepts Russia as an equal and legitimate member of the world.<sup>32</sup> The quest to be seen as an equal state can to some extent be related to the imperial syndrome, i.e., that the West does not take Russia as seriously as it should or as it did the USSR. As Mankoff puts it, the skepticism goes both ways:

[...] if Russians too often see the United States as an arrogant power that ignores their interests, the United States tends to see the Russian Federation as a country that has not completely broken with its imperial past and refuses to play the role of a responsible stakeholder in the international system.<sup>33</sup>

<sup>28</sup> Jeffrey Mankoff, *Russian Foreign Policy: The Return of Great Power Politics*, (Lanham, MD: Rowman & Littlefield, (2nd Ed.), 2012) 100.

<sup>29</sup> George Toloraya, *BRICS and the World Order Analytics*, (Expert Opinions, Valdai Discussion Club, 2018-07-25, 2018).

<sup>30</sup> This is an area which has been covered in previous research. See for example Elana Wilson Rowe and Stina Torjesen (eds.) *The Multilateral Dimension in Russian Foreign Policy* (Abingdon and New York: Routledge, 2008). In addition, for a more nuanced discussion on the role of BRICS here, see Ohlsson, *On the Ethics of External States in Peacebuilding*, 143–147, 234.

<sup>31</sup> Lo, *Russian Foreign Policy in the Post-Soviet Era*, 48–52.

<sup>32</sup> Tsygankov, *Russia's foreign policy*, 1.

<sup>33</sup> Mankoff, *Russian Foreign Policy*, 97.

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Yet, this is not to say that Russia has any kind of special rights in the international system; instead, it is rather understood that Russia is like any other country.

Russian representatives seem to regard influence in the former Soviet republics as a boost in part to its own power in the international system, and they also believe influence in the post-Soviet space makes them more influential globally, something many Western representatives regards with skepticism and connect with covert interests. One potential interpretation is that this is to a large extent grounded in realist thinking about the world order and that it contributes to the creation of a classical security dilemma. However, if Russia wants to be seen as an equal member of the international system, it needs to respect international law and international treaties. One way that Russia tries to show that it respects these global norms and institutions is by making continuous reference to them in foreign policy documents. However, this is an example of the ambivalence in Russian foreign policy and, in light of the annexation of Crimea and the events in Eastern Ukraine in 2014, should be questioned. Russia argues that it has not violated any norms or laws, but most scholars of international law agree that these events are both violations of international law and norms.<sup>34</sup> This is, however, disputed by the Russian leadership.

Russian scholars and foreign policy experts have argued that Russia took on the role of security and stabilization guarantor in the former Soviet space early on, a move regarded with skepticism in other parts of the world, as a measure to restore control and fulfil its own security objectives. It is important to remember in relation to early Russian peace engagements that the West was pleased to see Russia assuming a leading role in peace issues in the former Soviet republics, given the vast number of other crises around the world.<sup>35</sup> It was simply not possible for the stronger states or the UN to respond to every situation where missions were needed.

Many of Russia's general foreign policy developments have been directly related to its relationship with the West and Europe. Another clear divide in the foreign policy discourse as well as prioritizing is in relation to the post-Soviet space and the world beyond. General Russian foreign policy has long prioritized the post-Soviet sphere, especially in relation to its perceived need for a belt of good neighbors around Russia's borders, something that is almost ritualistically referenced in many of the Russian Foreign Policy Concepts.<sup>36</sup> As Mankoff points out, the 2008 Foreign Policy Concept contrasted with its preceding versions in this regard because it dropped this particular reference, something which could be seen as a confusion of

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<sup>34</sup> Peter Hilpold "Ukraine, Crimea and New International Law: Balancing International Law with Arguments Drawn from History," (*Chinese Journal of International Law*, Volume 14, Issue 2, 1 June 2015, 237–270, 2015) 247.

<sup>35</sup> David Cadier and Margot Light (eds.) *Russia's Foreign Policy Ideas, Domestic Politics and External Relations* (London: Palgrave Macmillan UK, 2015) 190.

<sup>36</sup> Mankoff *Russian Foreign Policy*: 17.

[...] how to prioritize the competing desires for a leading role in the post-Soviet space and a cooperative relationship with major outside powers that have their own interests in the region [...].<sup>37</sup>

This is a debate that intensified during Medvedev's presidency.<sup>38</sup> The competing desires show the importance of the balance between Russia's self-perception and that of others.

The division between priorities in the post-Soviet space and the world beyond in Russian foreign policy is important for analysis of Russian peace engagement, because it provides a framework for dividing Russian foreign policy into two categories of prioritization. Although Russian experience of peacemaking started at a low level of intensity in the far-abroad, mainly through the UN, it has been largely shaped by experiences in the post-Soviet space, where Russia has had to respond to regional conflicts arising in the new post-Soviet states. Soviet involvement in peace processes during the Cold War was limited, partly because the USSR, like the other permanent members, exempted itself from UN missions in order to uphold the neutrality of the organization.<sup>39</sup>

### Foreign policy and peace initiatives

Many of the shifts of strategies and priorities that have taken place in Soviet and Russian foreign policy have been reflected in particular in the understanding of national interests.<sup>40</sup> There are also nuances dependent on who is interpreting events, actions, and statements. For example, between current President Vladimir Putin, Prime Minister Dmitry Medvedev, and Minister of Foreign Affairs Sergey Lavrov, there are naturally variations in their interpretations of certain issues. However, this study focuses on broader topics than specific individuals and tries to expose patterns in Russian foreign policy that are central for Russian engagement in peace missions. National security and peace engagements are often linked, given that the latter is often driven by the implications of the former. Official accounts of Russian national interests are expressed in the policy document "National Security Concept of the Russian Federation," a document that has been revised three times during the period of this study. The first was adopted in December 1997 by Boris Yeltsin, the second was approved on 10 January 2000 by Presidential Decree No. 24, and the third was adopted on 12 July 2008 by Medvedev.

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<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> Philip Cunliffe, *Legions of Peace: UN Peacekeepers from the Global South* (London: Hurst & Company, 2013) 186.

<sup>40</sup> See Tsygankov, *Russia's foreign policy*, 24.

*Russia's peace involvement*

Russia is a potentially influential state as far as peace and security are concerned, primarily due to its role in the UN Security Council, its size, and its historical influence in world affairs. In recent years, Russia has, according to Roy Allison, continuously “acted as a qualified pluralist state in a contested normative environment.”<sup>41</sup> This could be understood in several ways, and taps into the debate on the Russian position that the world needs to be reordered along multiple poles. It also addresses the diversity of influential norms in international relations and the variety of norms that dominate. Allison continues by arguing that Russia’s “view of global norms related to military intervention interact significantly with its conceptions of regional and domestic state order.”<sup>42</sup> A country’s view of global norms arguably influences its approach to engagement in peace missions.

The geographic spread of Russian engagements in peace missions has been vast during the period of study. Russian peacekeepers have been deployed in the post-Soviet space in South Ossetia, Abkhazia, Transnistria/Moldova, and Tajikistan. In the wider geographical space beyond the former Soviet republics, Russian military and police personnel have been deployed via the UN in Bosnia and Herzegovina, Kosovo and Metohija, Haiti, Angola, Chad, Sierra Leone, and South Sudan. Russian peace observers have been sent to UN missions in the Middle East, Western Sahara, the Democratic Republic of Congo, Côte d’Ivoire, Liberia, and Sudan.<sup>43</sup>

In the scholarly literature on Russian involvement in restoring peace in peace operations and peace missions, much attention is paid to military interventions. This is mainly done by focusing either on Russian involvement as such, or in relation to its responses to Western-led interventions.<sup>44</sup> Also, much of the contemporary official Russian discourse around peace missions is centered on the concept of peacekeeping. I would argue, based on a literature review, analysis of the foreign policy documents, and analysis of textual data from expert interviews, that the Russian discourse on engagement in peace missions is highly militarized and securitized. Even so, the interviews reveal an interesting discrepancy. Eight of my respondents made it clear that Russia is not involved in and does not prioritize peacebuilding. At the same time, seven of the interview participants argued that Russia is involved even though peacebuilding is not one of its most prioritized areas.<sup>45</sup> This, too, reveals signs of Russia’s ambivalence toward peace missions in general, and peacebuilding in particular.

<sup>41</sup> Roy Allison, *Russia, the West, and Military Intervention*. (Oxford: Oxford University Press, 2013) 1.

<sup>42</sup> Allison, *Russia, the West, and Military Intervention*, 1.

<sup>43</sup> Ministry of Defence of the Russian Federation | Russia’s Participation in Peacekeeping Operations (2019) Retrieved from [http://eng.mil.ru/en/mission/peacekeeping\\_operations.htm](http://eng.mil.ru/en/mission/peacekeeping_operations.htm).

<sup>44</sup> Allison, *Russia, the West, and Military Intervention*, 1.

<sup>45</sup> Interviews, Moscow, July 2017, A, Professor, diplomat and political advisor on peace issues; B, Professor and political advisor on peace issues; C, Scholar and policy advisor; D, Diplomat and policy advisor; E, Scholar and policy advisor; F, Professor and Ambassador; G, Professor and legal advisor, international affairs; H, Scholar and policy advisor; I, Scholar and policy advisor; J, Scholar and policy advisor; K, Professor and advisor on political issues; L, Professor and advisor on political issues; M, Policy advisor; N, Associate professor and expert on security and conflict-settlement; O, Scholar and policy advisor; P, Policy advisor.

The militarized approach and discourse on peace missions and peacebuilding can be exemplified in several ways. First, the Ministry mainly in charge of peace missions is the Ministry of Defense. Peace missions often generate joint collaborations between different ministries, such as the Ministry of Foreign Affairs, Ministry of Emergencies, Ministry of the Interior, Ministry of Finances, and Ministry of Defense, but it is mostly the latter that takes primary responsibility in tandem with the political leadership.

A second example of why the discourse can be seen as militarized is that the personnel sent to UN missions are mainly military experts/observers or uniformed personnel such as military or police. This indicates that a) these are the spheres in which Russia wants to contribute (i.e., political will), b) these are spheres in which Russia has the capacity to contribute (i.e., capacity), and c) there is a prioritization of seconding personnel with military expertise, as these people will likely have more senior positions within the missions (i.e., strategic measure). This is interesting in relation to an unofficial policy to which, according to Bratersky and Lukin, Russia has traditionally adhered: namely, non-participation in peace missions of military contingents from the Great Powers.<sup>46</sup> In light of this informal guideline, sending military observers can be interpreted as a substitute for military contingents. Bratersky and Lukin argue that Russia has followed this policy and prefers that peace missions be staffed by third countries, which is also a common stance among the five permanent UNSC members. There may also be other explanations for this preference: for example, that it might pose a challenge to secure domestic political support for seconding personnel to faraway places, or that there might be a weaker connection to Russia's national interests given the geographical distance.

A third example of why Russian discourse on peace missions can be interpreted as a militarized discourse is the focus on halting violence and not becoming engaged in institutional post-conflict reconstruction. This can also be analyzed in the terminology of negative and positive peace, in which Russia seems to focus primarily on negative peace: that is, ending violence, rather than long-term sustainability or positive peace. Experts on Russian involvement in peace missions point out that Moscow stresses the importance of not being involved in regime change in conflict or post-conflict contexts. This stance is in line with the prioritizing of principles of non-intervention and non-interference that are often referenced in Russian foreign policy. However, this stance seems to be more clearly visible in the documents than in actual implementation of decisions and actions, because once the fighting has stopped, Russia often strongly promotes a status quo solution with limited involvement by external actors; at least, if the conflict is geographically located outside the post-Soviet space.<sup>47</sup> Involvement of the Russian state is often more extensive and intense

<sup>46</sup> Maxim Bratersky and Alexander Lukin, "The Russian Perspective on UN Peacekeeping: Today and Tomorrow," in *UN Peacekeeping Doctrine in a New Era: Adapting to Stabilisation, Protection and New Threats* by Cederic de Coning, Chiyuki Aoi, and John Karlsrud, (eds.) (London: Routledge, 2017) 139.

<sup>47</sup> Interviews, Moscow, July 2017, B, Professor and political advisor on peace issues; D, Diplomat and policy advisor, L, Professor and advisor on political issues.

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when it comes to contexts within the post-Soviet sphere and the Russian sphere of interest. To some extent this is unsurprising, as national interest makes geographical proximity an important factor. Russian involvement in the post-Soviet sphere is often politically very loaded and tense. Yet, another sign of the militarized priorities of the Russian Federation is its proposal to put together and activate a military staff committee, something that would only be possible to activate through the participation of all five permanent members of the UNSC.<sup>48</sup>

The Russian military, the most common category of personnel seconded to its international peace missions, is seen by several scholars as diverse and in transition. Diverse in the sense that a large majority is relatively untrained, employed on short-term contracts, and still in a traditional mindset when it comes to warfare, while a small part is well-trained, modernized, and adapted to more contemporary forms of warfare.<sup>49</sup> This could to a large extent be seen a strategic measure, using financial resources to develop parts of the forces while the main part merely keeps turning over. This is also a consequence of the previous employment of Russian personnel in international peace missions, since these people have acquired training from the UN that may differ from Russian military training. This capacity-building outcome can be an attractive feature of seconding personnel to UN missions and can also be seen as a strategy for attracting personnel seconded from other countries.

In the interview material, there is support for Russia's critical stance toward regime change in war and post-conflict situations. It seems possible that this fear of getting politically involved in other countries can be interpreted in different ways. One potential interpretation is based on principal grounds while another is connected to political explanations. On the principal level, one potential stance that can be interpreted from the Russian government is the importance of legitimacy under international law and that illegitimate means should not lead to regime change. It may also be a question of protecting one's own stance on non-intervention and the importance of sovereignty.

Another potential interpretation may be that this is a stance about responsibility, in that if regime change takes place on the basis on initiatives taken by external states, it comes with responsibilities. This could also reflect a view that if a state is unprepared to take the necessary responsibility, it should not act to change the status quo. Peacebuilding is extremely challenging by nature, and skepticism toward regime change can be understood as a way of recognizing this challenging complexity, as intrastate post-conflict societies often confront fragile states following regime change. This is one potential interpretation, but it could also be a question of lack of capacity or, again, a sign of Russian ambivalence.

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<sup>48</sup> Bratersky and Lukin "The Russian Perspective on UN Peacekeeping," 138.

<sup>49</sup> Alexander Golts and Michael Kofman, *Russia's Military Assessment, Strategy, and Threat* (Washington DC: Center on Global Interests, 2016) 3, 7–10, 14.

*Two strands of engagement*

Two strands of peace engagements can be identified when studying Russian foreign policy discourse. The first is concentrated on a regional level, where the main actors are organizations such as the Collective Security Treaty Organization (CSTO),<sup>50</sup> the Commonwealth of Independent States (CIS),<sup>51</sup> and, to some extent, the Organization for Security and Co-operation in Europe (OSCE) and the Shanghai Cooperation Organization (SCO).<sup>52</sup> The second strand is the engagements that are taking place within the UN system. These strands differ on three different points, namely, in relation to: 1) geographical and political priorities; 2) organizational structure; and 3) terminology.

First, Russian involvement in peacekeeping and peacebuilding is geographically and politically divided. Russian engagement in peace missions tends to be implemented either (a) through regional organizations such as the CSTO and bilateral agreements with another government, or (b) through the multilateral structures of the UN.<sup>53</sup>

There is a division regarding approaches depending on whether it is the structure of the UN or regional organizations, and there seems to be a geographical division governing the choice of path. Crises and post-conflict reconstruction efforts in countries in the post-Soviet space, which often happen to be countries neighboring the Russian Federation, have been more likely to see regional or bilateral solutions, while for crises or efforts that take place in countries further afield, the approach prioritized has instead been via UN multilateral cooperation and missions. The two strands cannot be completely separated, but it becomes clear when analyzing the foreign policy

<sup>50</sup> The CSTO was established in April in 2003 by representatives of Russia, Belarus, Kazakhstan, Kyrgyzstan, Tajikistan, and Armenia, with the main objective to be able to provide a joint response toward terrorism in the area. See Tsygankov, *Russia's foreign policy*, 159. It is frequently overshadowed by other organizations operating fully or partly in the post-Soviet space, such as the Shanghai Cooperation Organisation (SCO) or the Eurasian Union, and it has proved to be an important, if limited, vehicle for Russian foreign and security policy. For a more detailed discussion, see Ruth Deyermond, "The Collective Treaty Organization," in *Routledge Handbook of Russian Foreign Policy* Andrei P. Tsygankov (ed.) (London: Routledge, 2018) 421.

<sup>51</sup> The CIS was established as a sort of successor of the Soviet Union by Russia, Ukraine, and Belarus in Minsk in December 1991, in relation to when Gorbachev resigned as president of the USSR. For a more detailed discussion on this, see Tsygankov, *Russia's foreign policy*, xv. The first years of the CIS were not a straight course, and the first public acknowledgement from the Kremlin came in 1995, when the strategic significance of the CIS as one of the Russian national interests was officially declared. See Tsygankov, *Russia's foreign policy*, 118. It now consists of ten member states: Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. See Olga Abilova, "Peacekeeping Contribution Profile: Russia" (Providing for Peacekeeping, retrieved 2017-05-25 from <https://www.providingforpeacekeeping.org/2016/10/31/peacekeepingcontribution-%20profile-russia/>, 2016) 2.

<sup>52</sup> SCO was largely evolved from confidence-building measures around border talks between Central Asian states, Russia, and China, bringing the Eurasian region into sharper focus. For a more detailed discussion on this, see Natasha C. Kuhrt "Asia-Pacific and China," in *Routledge Handbook of Russian Foreign Policy* by Andrei P. Tsygankov (London: Routledge, 2018) 255.

<sup>53</sup> Interview, Moscow, July 2017 A, Professor, diplomat and political advisor on peace issues; N, Associate professor and expert on security and conflict-settlement.

documents and interview material that there are different approaches toward the two different strands.

Second, Russian engagement in peace missions is primarily understood as traditional and status quo oriented, with continuous reference being made to the early, traditional, and more limited generations of peace missions.<sup>54</sup> These were characterized by measures focusing on negative peace (i.e., the absence of violence), such as buffer zones and ceasefires.<sup>55</sup> Russian experts stress heavily that Russia is a strong supporter of the UN and the procedures within the organization, such as the role of the UN Security Council, when it comes to issues of global peace and security. The Russian view of the procedures in the UNSC is that the veto is used to maintain order and stability between the different global powers, often to stop illegitimate actions.<sup>56</sup> The procedures and mandates are of great importance to the representatives of the Russian Federation, as is the maintenance of balance between different countries and their respective interests. Russia has taken an active role in shaping the UN mandates.<sup>57</sup>

Third, terminology around peace engagements seems to be unclear and partially overlaps. It is unclear, as the terminology used within the Russian administration as well as the scholarly community is instead framed as conflict resolution, conflict settlement, or peacemaking. Russian decisions makers tend not use the terminology of peacebuilding: conflict settlement is the most commonly used term when referring to all forms of peace engagements.<sup>58</sup> On the other hand, peacemaking can refer to the larger spectrum of peace initiatives, but the material from the interviews indicates that it is then rather a question of peacekeeping. In addition, peacekeeping is understood as a specific type of action. According to Professor Yulia Nikitina, it is not completely clear what the Russian approach to peacebuilding is, but

[...] as for peacekeeping ... Russia prefers classical peacekeeping according to chapter six, over peace enforcement according to chapter seven.<sup>59</sup>

I interpret this in accordance with other statements from Russian leaders in that the principles of non-intervention and sovereignty are of primary importance in interna-

<sup>54</sup> Interview, Moscow, June 2017, A, Professor, diplomat and political advisor on peace issues; B, Professor and political advisor on peace issues; E, scholar and policy advisor; F, Professor and Ambassador; N, Associate professor and expert on security and conflict settlement.

<sup>55</sup> Kai Michael Kenkel, "Five generations of peace operations: from the 'thin blue line' to 'painting a country blue,'" (Revista Brasileira Política Internacional 56 (1): 122–143, 2013) 122ff.

<sup>56</sup> Interviews, Moscow, June 2017, F, Professor and Ambassador; G, Professor and legal advisor, international affairs.

<sup>57</sup> Alexander Nikitin, "The Russian Federation," in *Providing Peacekeepers: The Politics, Challenges, and Future of United Nations Peacekeeping Contributions* by Alex J. Bellamy and Paul D. Williams, (eds.) (New York: Oxford University Press/Oxford Scholarship Online, 2013), N, Associate professor and expert on security and conflict-settlement.

<sup>58</sup> Interview, Moscow, 6 July 2017, N, Associate professor and expert on security and conflict settlement; A, Professor, diplomat and political advisor on peace issues; B, Professor and political advisor on peace issues; H, Scholar and policy advisor.

<sup>59</sup> Interview, Moscow, 6 July 2017, N, Associate professor and expert on security and conflict settlement.

tional law. In the preceding citation, there is an explicit reference to Chapters Six and Seven of the UN Charter, which govern mandates of interventions and peace missions.<sup>60</sup> Peace enforcement is stretching the limits of international law and, according to some Russian decision-makers, is in fact a violation of it.<sup>61</sup>

In several interviews, it was emphasized that Russian approaches toward peacebuilding are an understudied area as well as an area under development. All respondents stressed the central need for peace missions and operations to be in accordance with international law. This is stressed as important for moral, political, and legal reasons.<sup>62</sup> This was further explained, particularly in one interview, as based on a quest for global justice and the necessity for all states to be taken seriously, something that I interpret as an issue of morality. The same participant stressed that legal reasons were of crucial importance for the Russian leadership, because this is a question of legitimacy.<sup>63</sup> It seemed as though the participant was also emphasizing the aspects of legitimacy and legitimization as a political reason.

I interpret avoidance of the terminology of peacebuilding as an indication of a short-term perspective toward peace missions and peacebuilding, which is again mainly directed toward negative peace in that it focuses on the absence of violence. However, a few of the participants stressed that there are also initiatives, engagements, and projects that are directed more toward positive peace and long-term reconstruction, but they are few. In addition, they are to be found in other ministries and under different headings.<sup>64</sup> By other ministries, respondents meant ministries other than the Ministry of Defense and Ministry of Foreign Affairs. One example that was mentioned is the Ministry of Finance. Again, these are not very common and, according to the respondent, tend to be less political in character and focus more on allocation of aid, depreciation of debts and loans, and business exchange.<sup>65</sup>

### *Change and continuity in Russian peace approaches*

All peace missions are unique in their local conditions and contexts, but a few similarities or overarching trends can be identified. The uniqueness of a context makes the external response to some extent unique as well, even though there are also simi-

<sup>60</sup> However, the UN Charter does not provide an explicit legal basis for either peacekeeping or peacebuilding. However, such actions are often associated with Chapter 6 and Chapter 7 (and occasionally Chapter 8). Due to their complex nature, more recent peacekeeping missions would be authorized as “peace enforcement” under Chapter 7, but this is separate from peacebuilding.

<sup>61</sup> Interviews, Moscow, June and July 2017, G, Professor and legal advisor, international affairs; O, Scholar and policy advisor; P, Policy advisor.

<sup>62</sup> Interviews, Moscow, June and July 2017, N, Associate professor and expert on security and conflict-settlement; A, Professor, diplomat and political advisor on peace issues; B, Professor and political advisor on peace issues; H, Scholar and policy advisor; H, Scholar and policy advisor; I, Scholar and policy advisor.

<sup>63</sup> Interview, Moscow, July 2017; G, Professor and legal advisor, international affairs.

<sup>64</sup> Interviews, Moscow, June and July 2017, D, Diplomat and policy advisor; J, Scholar and policy advisor.

<sup>65</sup> Interviews, Moscow, June and July 2017, D, Diplomat and policy advisor; J, Scholar and policy advisor.

larities in approaches. Scholars such as John Mackinlay and Peter Cross (2003) have argued that it is difficult to generalize about “Russian peacekeeping” as such and that Russia’s responses are often contextually bound. One notion that has been advanced in relation to Russian peace initiatives is that Russian peace involvement has been a “Russian answer to a Russian problem,”<sup>66</sup> something that might be seen as paralleling the notion of “African solutions to African problems” that is often referred to in African contexts.

Russian (or Soviet) engagements in peace and security were initiated early on as a result of their role in creating the UN. This contributes to the continuous engagement though UN peace missions over time. However, even though Russia has been involved, its approach has evolved from total rejection to moderate tolerance, followed by reasonably active support of many operations.<sup>67</sup>

The analysis of the interviews indicates that Russian initiatives in the post-Soviet space and its Western sceptics exhibit several features. First, it shows the ambivalence of the West being satisfied with Russia taking on actions while at the same time not being sufficiently satisfied. Russia’s early peace operations in the former Soviet space were criticized for lacking impartiality and neutrality and often failed to obtain UN legal endorsement and international financial support.<sup>68</sup> This has several potential explanations: for example, that there was ambivalence insofar as the West was both satisfied and dissatisfied. Or, alternatively, that they were initially satisfied by Russia taking action, but then dissatisfied by the outcome. Third, it could be related to ambivalence in communications from the Western countries in terms of double commands. This is relevant for the justification of these particular initiatives for several reasons: for example, due to the expectations of capacity to act and to deliver on what has been agreed upon.

In addition to the UN, Russia has also been involved in peace missions, or rather operations, in the post-Soviet sphere. These operations were initiated in the early 1990s; over time, they have either turned into frozen conflicts or changed into bilateral collaboration on matters such as security, trade, and debt reduction. Russian military personnel have had several significant deployments in the post-Soviet space.<sup>69</sup> However, given that the character of the Russian presence is military, this is not a question of peacebuilding according to the definition utilized in this article.

The four initial operations in which the Russian Federation was the leading state took place in Moldova’s Transnistria in 1992, Tajikistan in 1992, and Georgia’s South Ossetia and Abkhazia, which turned violent in 2008 but where the Russian involvement was initiated much earlier. The conflict between Georgia, Russia, and the Russian-backed self-proclaimed republics of South Ossetia and Abkhazia, arguably located within Georgia’s borders, escalated swiftly in 2008. The conflict in Abkhazia

<sup>66</sup> John Mackinlay and Peter Cross, *Regional peacekeepers: the paradox of Russian peacekeeping* (Tokyo: UN University Press, 2003) 203.

<sup>67</sup> Nikitin, “The Russian Federation,” 158.

<sup>68</sup> Mackinlay and Cross, *Regional peacekeepers*, 14.

<sup>69</sup> Abilova, “Peacekeeping Contribution Profile,” 1, 9, Interview, Moscow, July 2017.

had been frozen since 1993, but in 2008, Russia intervened in Georgia, triggered by an attack by the Georgian military on South Ossetia. Russia was heavily involved and was officially seen as a third party to the conflict between the Georgian government and South Ossetia, a conflict that was more active than the conflict in Abkhazia even though the Abkhazian conflict was more intense in terms of battle-related deaths.<sup>70</sup>

Scholars have analyzed these four initial missions in different lights. Some have been highly critical, arguing that Russia was applying illegitimate measures, while others have viewed them as promising initiatives for cooperation in the region. David Lynch elegantly framed this as

[...] the evolution of Russian ‘peacekeeping’ policy since 1992 is a prism through which to view the wider evolution of Russia’s approach to the CIS.<sup>71</sup>

Some Russian experts tend to distinguish between the operations and missions in Transnistria, Tajikistan, South Ossetia, and Abkhazia on the one hand, and events in Ukraine and Syria on the other. The latter two are understood as being of a different character in relation to international law and circumstances on the ground.<sup>72</sup> Transnistria, Georgia’s South Ossetia, and Abkhazia are sometimes characterized as “frozen conflicts” defined by unresolved incompatibilities. Russia and the CIS jointly carried out the operations and missions there, with Russia functioning as the lead nation and backbone structure provider. However,

After the war in Georgia, Russia was keen to demonstrate that drawing new borders around Abkhazia and South Ossetia was a special case and that it was serious about its responsibility as a peacekeeper in the contested enclaves of Nagorno-Karabakh and Transnistria.<sup>73</sup>

The main aim of the missions was to stabilize the area and end the violence. Yet, in the words of Dmitri Trenin, there has been no breakthrough in any of these conflicts, and it has become clear that Moscow is unable to single-handedly broker any peace settlement.<sup>74</sup> These “peace experiences” have shown to be very different in all four contexts, but at the same time setting a precedent for Russia’s engagement in future peace endeavors.<sup>75</sup>

<sup>70</sup> UCDP – Uppsala Conflict Data Program *Government of Georgia – Republic of Abkhazia* (2016). Retrieved from <http://www.ucdp.uu.se/#/statebased/839>, Uppsala University, Department of Peace and Conflict Research, accessed 2016-11-28; UCDP – Uppsala Conflict Data Program *Government of Georgia – Republic of South Ossetia* (2016). Retrieved from: <http://www.ucdp.uu.se/#/statebased/840>, Uppsala University, Department of Peace and Conflict Research, accessed 2016-11-28.

<sup>71</sup> Dov Lynch, *Russian Peacekeeping Strategies in the CIS: The Cases of Moldova, Georgia and Tajikistan* (London: Macmillan Press LTD, 2000) 2.

<sup>72</sup> Interviews, Moscow June and July 2017, G, Professor and legal advisor, international affairs; C, Scholar and policy advisor.

<sup>73</sup> Dmitri Trenin, “Russia Reborn: Reimagining Moscow’s Foreign Policy” (Foreign Affairs Nov/Dec 2009 Issue, 88:64, 2009) 67.

<sup>74</sup> Trenin, “Russia Reborn,” 67.

<sup>75</sup> Mackinlay and Cross, *Regional peacekeepers*, 4.

Russian foreign policy experts often portray Tajikistan as a success story, primarily based on the positive outcome in that the Russian-driven mission was able to assist in stabilizing the situation.<sup>76</sup> Also, this is the one mission in the post-Soviet space that has not resulted in a frozen conflict.

### *The priority of peacebuilding*

In official Russian foreign policy documents, it is stated that supporting post-conflict peacebuilding efforts is one of the fourteen priority areas of their international development assistance.<sup>77</sup> This can be interpreted in several ways. Firstly, that peacebuilding is one prioritized area among several others, which could imply that it is not a high priority. On the other hand, it is one of fourteen prioritized areas, which on the contrary could be understood as an area of prioritization. The most reasonable interpretation, based on the other documents as well as the literature review, is that it is not a highly prioritized area in Russian foreign policy. Peacebuilding is instead referred to via the UN system, primarily through UN Peacebuilding Commission architecture.<sup>78</sup>

Secondly, this could suggest that the Russian understanding of peacebuilding, as in long-term post-conflict reconstruction, is closer to an understanding of development assistance than to peacekeeping, which is seen as a more military endeavor. Another possible interpretation is that the practice of supporting post-conflict peacebuilding is a prioritized area precisely because it is mentioned in the document. It is stated in the *Concept of Russia's Participation in International Development Assistance* from 2007 that Russia intends to provide assistance to

[...] Supporting activities aimed at the speedy resolution of military conflicts in all regions of the world, post-conflict peacebuilding, progressive socioeconomic development of post-conflict countries and prevention of the renewal of military standoff, inter alia, through Russia's increased participation in international peace support operations and in the context of Russia's activities in the UN Peacebuilding Commission;<sup>79</sup>

The citation indicates a prioritizing of efficient conflict resolution, peacebuilding, socioeconomic development, and conflict prevention. It is not further specified what peacebuilding entails but indicates that peacebuilding is understood as socioeconomic development and the prevention of a relapse into conflict. This goes in line with the definition of peacebuilding utilized in this article. Even if the overarching

<sup>76</sup> Interview, Moscow, June 2017 C, Scholar and policy advisor.

<sup>77</sup> The Russian Federation *Concept of the Russian Federation's State Policy in the Area of International Development Assistance*, Moscow, Approved by Decree No. 259 of the President of the Russian Federation of 20 April 2014, available from [http://www.mid.ru/en/foreign\\_policy/official\\_documents/-/asset\\_publisher/CptICk6BZ29/content/id/64542](http://www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/CptICk6BZ29/content/id/64542).

<sup>78</sup> Interview, Moscow, 6 July 2017, A, Professor, diplomat and political advisor on peace issues; B, Professor and political advisor on peace issues.

<sup>79</sup> The Russian Federation *Russia's Participation in International Development Assistance, Concept* Approved by the President of the Russian Federation 14 June, Moscow, 2007, available from [https://www.minfin.ru/common/img/uploaded/library/2007/06/concept\\_eng.pdf](https://www.minfin.ru/common/img/uploaded/library/2007/06/concept_eng.pdf), 8.

trend seems to lean toward prioritizing of peacekeeping and to have been influenced by an understanding of negative peace, this passage does indicate an understanding of positive peace. However, when I interpret the foreign policy documents and the material generated from my interviews, I would argue that the Russian approaches to peacebuilding are primarily characterized by negative peace. In several of my interviews, the experts mainly refer to stability rather than prosperous development. This is one of the indications I interpret as a sign of an understanding of negative peace. In addition, the analysis of the complete set of foreign policy documents makes continuous references to peace missions as being a question of stability but also to finding solutions to incompatibilities by military means.

The preceding citation also supports the conclusion that Russian peace and peacebuilding discourse is militarized, as it emphasizes Russia's involvement in peace *operations*. This is further exemplified by the *Military Doctrine*, which states that the main tasks of the Armed Forces, in peacetime or during the immediate threat of aggression and war, is to contribute to both regional (CSTO, CIS) and global (UN) architectures:

[...] 29. The Russian Federation shall provide military contingents for the CSTO peacekeeping forces to participate in peacekeeping operations as decided upon by the CSTO Collective Security Council. The Russian Federation shall also provide military contingents for the CSTO Collective Rapid Reaction Forces and the Collective Rapid Deployment Forces of the Central Asia Collective Security Region to promptly respond to military threats to CSTO member states and accomplish other tasks assigned by the CSTO Collective Security Council.

30. The Russian Federation shall provide military contingents for peacekeeping operations mandated by the UN or the CIS in accordance with the procedure established by the federal legislation and international treaties of the Russian Federation.<sup>80</sup>

This citation is found in the *Military Doctrine* and is an example of the peacekeeping focus. On the other hand, since this is the *Military Doctrine*, the language can be expected to be focused on defense. There is no mentioning of the word “peacebuilding” in this document. However, what is mentioned, and what could be interpreted as a sign of peacebuilding, is a reference to recovery.<sup>81</sup> This could also be interpreted differently but since the aim here is to address attempts to justify peacebuilding, which is what is searched for.<sup>82</sup>

When looking at Russian peace engagement over time, the four missions in the post-Soviet sphere during the early 1990s can to some extent be understood as a sin-

<sup>80</sup> The Russian Federation *Concept of the Russian Federation's State Policy in the Area of International Development Assistance* paragraph 29–30 (p. 10).

<sup>81</sup> Ibid.

<sup>82</sup> This could also be interpreted as implying that the doctrine offers a codification for the precept that military violence, if used wisely, can be employed strategically to enhance foreign policy goals and interests. However, this lies beyond the scope of both this article as well as the dissertation.

gle cluster of initiatives or engagements.<sup>83</sup> These were managed under the auspices of the CIS and CSTO with Russia as the main actor, hence they had multilateral characteristics but were largely driven by Russia. These are characterized by issues of defense and security. Another cluster of missions are those that take place via the UN. These are wider in scope and include all generations of peace missions, from narrow ceasefires to broad and multidimensional peacebuilding. This accords with the two strands in Russia's peace engagements discussed above.

Even if peacebuilding does not seem to be a top priority, it clearly figures in the foreign policy documents. In the Concept of the Foreign Policy of the Russian Federation of February 2013, it is stated that Russia has an

[...] intent to participate in international peacemaking activities under the UN auspices and within the framework of collaboration with regional and international organizations, regarding international peacemaking as an effective instrument for settling armed conflicts and fulfilling post-crisis nation-building tasks.<sup>84</sup>

The citation indicates support for the UN as the main venue for Russian peace engagement even as it also references the full spectrum of peace endeavors in its mention of post-conflict tasks.

### *Engagement through the UN*

Russia's main peace engagements are taking place within the UN system; this is stated in several documents and is one of the official positions of the Russian Foreign Ministry. The main decision to deploy a peace mission is taken by the UN Security Council, of which Russia is a permanent member. The UN Military Staff Committee then have strategic control of UN seconded forces.<sup>85</sup> In addition, the UN has agreements with the CSTO, the SCO, and the CIS on the issue of maintaining international peace and security.<sup>86</sup> For example, a Memorandum of Understanding between the CSTO and the Department of UN Peacekeeping was signed in September 2012 on the initiative of the Belarusian presidency of the CSTO.<sup>87</sup>

Since the establishment of peacekeeping operations within the UN system, the Soviet Union and, later, Russia have contributed with seconded personnel. In addition, Russia is the seventh-largest funder of UN peace operations and contributed 4.01%

<sup>83</sup> All missions are unique in their character and conditions varies between contexts, yet, the more formal way of organizing these four missions indicate an overlap which could motivate them being clustered together.

<sup>84</sup> The Russian Federation, Ministry of Foreign Affairs, *Concept of the Foreign Policy*, 12 February 2013, Retrieved from [http://www.mid.ru/en/foreign\\_policy/official\\_documents/-/asset\\_publisher/Cp-tICkB6BZ29/content/id/122186](http://www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/Cp-tICkB6BZ29/content/id/122186) Moscow, (2019-06-19) paragraph 32(1).

<sup>85</sup> Golts and Kofman, *Russia's Military Assessment, Strategy, and Threat*, 3, 7–10, 14.

<sup>86</sup> United Nations Security Council 7796th meeting, *Cooperation between the United Nations and regional and subregional organizations*, S/PV.7796 (28 October 2016) available from <https://undocs.org/S/PV.7796>.

<sup>87</sup> The Republic of Belarus, Ministry of Foreign Affairs *Collective Security Treaty Organization* Retrieved from <http://mfa.gov.by/en/organizations/membership/list/cddd96a3f70190b1.html> (2019-06-19).

of its yearly budget for 2016, which is the lowest percentage of the five permanent members of the Security Council.<sup>88</sup> As a permanent member of the Security Council, Russia has also been in a position to influence the definition of the key principles that oversee the establishment of peace missions. Certain obligations follow on that position on the UNSC, and representatives are in charge of making sure that issues of staff recruitment, planning and implementing of missions, obtaining sufficient funding from the member countries, and various logistical matters are all covered.<sup>89</sup> The budget and resources are subject to General Assembly approval, but it is the UNSC that authorizes a mission through a Security Council resolution and the Department of Peacekeeping Operations (DPKO) that leads the peacekeeping operation.

Representatives of the Russian Federation are continually arguing that Russia takes a great interest in questions of global peace and security, and peace missions by extension. Bratersky and Lukin highlight in particular the statement made in 2013 by Russian Minister of Foreign Affairs Sergei Lavrov that “Russia consistently places huge importance on peacekeeping.”<sup>90</sup>

Deciding what this means is an intriguing task. Russia contributes in several ways, with contributions ranging from uniformed personnel such as military experts and police officers to funding and drafting of mandates. Russia also hosts several training sessions for military and policy personnel as preparation before they join a peace mission. The training sessions are also directed toward capacity-building measures for uniformed personnel in the post-conflict environments.<sup>91</sup>

Even though Russia contributes in various ways, the contribution needs to be understood in relation to other states. An expert on Russian UN peace engagements stated that “Russia is contributing enough to have a say.” Russia is contributing with both funds and personnel but arguably mainly in a symbolic way and mainly in order to always have a voice at the table. It was also stressed that Russia should contribute more than it does today.<sup>92</sup> This view, on the need for increased involvement, is also reflected in the literature, as when Alexander Nikitin states that

[...] Moscow’s significant political involvement is not adequately reflected in the level of its contributions of personnel and finances to UN peacekeeping.<sup>93</sup>

<sup>88</sup> United Nations “Financing Peacekeeping”. (2014, Accessed 2014-11-10, Retrieved from <http://www.un.org/en/peacekeeping/operations/financing.shtml>)

<sup>89</sup> Aslan Abashidze and Denis Vidineyev, *Who Sends Peacekeepers and How?* (Analytical article, RIAC, published 2 June 2014, accessed 2018-10-05, 2014).

<sup>90</sup> Bratersky and Lukin “The Russian Perspective on UN Peacekeeping,” 133; TASS Russian News Agency “Лавров: Россия продолжит активно участвовать в миротворческой деятельности ООН” [Lavrov: Russia will continue to actively participate in UN peacekeeping activities], published 2013-11-14, Retrieved from <http://tass.ru/politika/750107>, accessed 2017-09-04.

<sup>91</sup> Interview, Moscow, June 2017, G, Professor and legal advisor, international affairs.

<sup>92</sup> Interview, Moscow, July 2017, G, Professor and legal advisor, international affairs.

<sup>93</sup> Nikitin, “The Russian Federation,” 158.

The Russian Federation's contribution of uniformed personnel to UN peacekeeping activities can be seen as relatively active: as of 30 June 2016, Russia holds 68th<sup>94</sup> place out of 173 countries by contributing a total of 95 seconded personnel, including 52 UN military experts, 38 police officers, and 5 troops.<sup>95</sup> In relation to the other BRICS countries, Russia's position as 68 is modest: India is ranked as number 2, China as 12, South Africa as 16, and Brazil as 19. The United States is ranked as 74, United Kingdom as 37 and France as 33.<sup>96</sup>

The Russian contribution to UN missions peaked in the years 1993–1996, largely due to Russian contributions to UN missions in the Balkans and former Yugoslavia, although about 20% of Russian peacekeepers at this time were sent to Angola, Cambodia, and the Golan Heights.<sup>97</sup> However, there has been a small but steady decline in Russian military and police secondment in recent years.

As of 31 August 2016, Russia had seconded personnel in ten out of twenty ongoing UN peace missions; Western Sahara (MINURSO), Haiti (MINUSTAH), the Democratic Republic of the Congo (MONUSCO), Cyprus (UNFICYP), Sudan and Abyei (UNISFA), Kosovo (UNMIK), Liberia (UNMIL), South Sudan (UNMISS), Côte d'Ivoire (UNOCI) and the Middle East (UNTSO). The mandates differ between the different missions, which illustrates that Russia is involved in several types of missions, ranging from monitoring missions (referenda in Western Sahara, ceasefire in Cyprus, truce supervision in the Middle East), stabilizing missions (Haiti, DRC), interim security or administration missions (Sudan and the Abyei region, Kosovo) to peacebuilding missions (Liberia, South Sudan, Côte d'Ivoire).<sup>98</sup>

The Russian view of the UN has been somewhat skeptical, however, particularly after the end of the 1990s. Russian representatives ceaselessly raise objections to drafted mandates that include any actions or parameters that might be perceived as encroaching upon the national interest of the host state, arguing that it often tends to be too much in line with Western interests.<sup>99</sup>

Olga Abilova describes the contemporary deployment of Russians in UN missions as below:

[...] Today, a typical Russian deployment to a UN peacekeeping operation is a small and specialized unit, sometimes only a limited number of military experts. Those teams are spread across multiple locations in order to retain a presence but with few overall contributions. Nevertheless, the government's annual report on peacekeeping from March 2014 along with other official declarations consistently underscores the

<sup>94</sup> Abilova, "Peacekeeping Contribution Profile," 1.

<sup>95</sup> UN *Summary of Troop Contributing Countries by Ranking: Police, UN Military Experts on Mission, Staff Officers and Troops*. Retrieved from [http://www.un.org/en/peacekeeping/contributors/2017/jun17\\_2.pdf](http://www.un.org/en/peacekeeping/contributors/2017/jun17_2.pdf) (2017, Accessed 2017-09-01).

<sup>96</sup> Abilova, "Peacekeeping Contribution Profile," 1.

<sup>97</sup> Ibid. 1.

<sup>98</sup> Current Peacekeeping Operations. Retrieved from <http://www.un.org/en/peacekeeping/operations/current.shtml> (2017 Accessed 2017-06-02); UN *Where we operate*. Retrieved from <https://peacekeeping.un.org/en/where-we-operate> (2018 accessed 2018-04-07).

<sup>99</sup> Abilova, "Peacekeeping Contribution Profile," 1.

importance of increasing Russia's role in peacekeeping as a way of strengthening its authority on the world stage.<sup>100</sup>

I would argue that this quotation captures the Russian ambivalence toward UN peace missions: the Russian leadership wants to participate but is not completely satisfied with the setup. Russia's position is that the UN peace mission system needs to be reformed. My analysis of the interview material indicates that there are two main reasons for Russia's skepticism toward the current system: Moscow is worried by 1) the domination of the US and its Western allies and 2) the proven inefficiency of the UN peace missions. This is stressed in the majority of the interviews. Three events are crucial to understand Russia's skepticism: events in former Yugoslavia as a whole; events in Kosovo in particular; and UN Security Council Resolution 1973 on Libya.

In former Yugoslavia, Russia was involved in seconding personnel through the UN, and its stand on the conflicts in former Yugoslavia should be understood in light of Moscow's historical role and interests in South-Eastern Europe, which in this case were also bordering states. Additionally, the Balkans resumed a central position in Russian politics and Russia's efforts to redefine its national interests and relations with the West after the end of the Cold War and the fall of the Soviet Union.<sup>101</sup> The skepticism that arose in relation to this was largely governed by the UN's reaction to the North Atlantic Treaty Organization (NATO) as well as NATO's eastward expansion.<sup>102</sup> In addition, Russian leadership has had difficulties in accepting Kosovo's independence from Serbia and the way in which this was supported by NATO.

The skepticism that arose after Kosovo was largely related to the NATO intervention which was afterwards seen as legitimate but illegal. Russian approaches to NATO are always skeptical, and actions without support in international law are from a Russian perspective regarded as unjustified. This was very serious, and the Kosovo crisis brought Russia and NATO to the brink of open conflict.<sup>103</sup>

The skepticism toward the current UN system which developed as a response toward the UNSCR 1973 on Libya was largely based on the disappointment of events following the Resolution 1973. Russia interprets the situation as showing that Western powers utilized the mandate in the resolution in a way that did not respect the agreement in the UN Security Council. In the voting, Russia and China abstained, which in practice was identical with allowing a military intervention to force an immediate ceasefire. Russian leaders and diplomats have argued that the mandate initiated by the resolution was interpreted more broadly and exceeded its actual purpose.<sup>104</sup>

<sup>100</sup> Abilova, "Peacekeeping Contribution Profile," 2.

<sup>101</sup> Predrag Simic "Russia and the conflicts in the former Yugoslavia," (*Southeast European and Black Sea Studies*, 1:3, 95–114, 2001) 95.

<sup>102</sup> *Ibid.* 106.

<sup>103</sup> *Ibid.* 106.

<sup>104</sup> Interviews Moscow June and July 2017. D, Diplomat and policy advisor; F, Professor and Ambassador; L, Professor and advisor on political issues. Yet, this confusion is rather about intervention than peacebuilding, however, as the different activities to some extent are intertwined, also other global events needs to be taken into consideration.

## Justification strategies of Russian peace engagements

Several countries have distinguished themselves as advocates for certain legal, political, and normative stances in the development of international relations. This can be exemplified by different approaches to different policy issues, such as peace initiatives. Without doubt, some countries have more influential positions than others, both in world politics in general and in relation to peace initiatives in particular. The discursively and politically dominant group of states consists of liberal democracies, located for the most part in Europe and northern America, which have traditionally often set the agenda and had a monopoly on interpretations of events in world affairs. These countries have also been the most internally stable and had the greatest capacity to act, financially and politically. This domination has been challenged in different ways and dimensions by other influential countries, which do not necessarily share the same political values. Also, less influential countries, which do not have the same leverage in international politics, may still wish to challenge the political hegemony. For example, the paradigm of liberal peacebuilding has received a lot of criticism for being neo-colonial, neo-imperialistic, and focusing mainly on profit-generation and marketization.<sup>105</sup>

The military interventions in Kosovo in 1999, Afghanistan in 2001, Iraq in 2003, Georgia in 2008, and Libya in 2011 show that since the end of the Cold War major powers have repeatedly become involved in other states.<sup>106</sup> This applies not only for the Soviet Union or Russia but also for other major powers such as the United States and others. The legacy of Cold War dynamics is present in both domestic and foreign Russian politics, and Russia has distinguished itself as a consistent critic of Western-led interventions in the name of world peace. Russia is among those countries that on a general level have positioned themselves as challengers of the US-led West. This is to a large extent a product of history and is exemplified by Russia's involvement in the BRICS collaboration and the SCO.

In the analysis of Russian foreign policy in relation to peace initiatives, I have been able to identify three types of justification strategies. The themes I have found in the documents and from the interviews have been clustered into different types of strategies to show the nuances in the types of arguments that have been applied by Russian politicians, policymakers and experts. My analysis of official Russian foreign policy discourse on engagement in peace missions abroad shows that there are several ethically grounded premises which are influential as justification strategies for external peace engagements, but also arguments that lack a clear ethical premise. This will be further discussed below.

The overall foreign policy discourse is kept on a general level, without addressing particular cases, which implies that the overarching documents need to be interpreted in relation to each occasion when they are supposed to be implemented. In

<sup>105</sup> Oliver P. Richmond, "The problem of peace: understanding the 'liberal peace,'" (*Conflict, Security & Development*, 6:3, 291–314, 2006) 292.

<sup>106</sup> Allison, *Russia, the West, and Military Intervention*, 2

general, what is clear from the analysis of the documents is that all foreign policy measures are supposed to contribute to promoting a positive picture of the Russian Federation and the actions should contribute to bilateral cooperation. This is explicitly expressed in the documents, not as a justification strategy but as a way of strategic nation-branding and framing, and as one of the general approaches of Russian foreign policy.

### *Five guiding principles for Russian peace engagement*

In a study of Russian contributions to peacekeeping missions, Olga Abilova explains that the Russian engagements in peace missions can be understood in terms of five different rationales: political; economic; security; institutional; and normative.<sup>107</sup>

On the topic of terminology, Abilova uses the terminology of *peacekeeping missions*, which I take to mean peace initiatives which have a military component. For the reason of consistency with the definitions I utilize, this is what I would call a peace operation. However, Abilova seems to use the terms in a broader sense since some of the issues she covers could be understood as peacebuilding.

The first principle, the political, is connected to Russia's self-image of being a Great Power. This has not been apparent in the contribution of peacekeepers since Russia does not contribute any substantial number of uniformed personnel or advisors. As one of the respondents put it, it is about showing the flag. On the other hand, Russia has been taking on an active role in shaping policies of the UNSC toward international conflict resolution. Russia's representatives at the UN are keen to keep track of the wording of peace engagement in UN documents such as mandates.<sup>108</sup> In several of the interviews, Russian experts raised the possibility of increasing the Russian commitment to sending personnel to UN missions, but the first steps toward this have not yet been taken. A sceptic might raise a question here, namely whether Russian engagement only materializes when it is in line with the national interests of the current president and government.

A second principle could be seen as that economic reasons are crucial given that Russia for years has been the second largest supplier of contractor services to the UN. Russia does not make a lot of money on seconding personnel as there are few Russians deployed in UN missions, but in combination with supplying contractors, Russia is the main supplier of air transportation.<sup>109</sup> Experts on Russian engagements in the UN point out that there are monetary incentives on both a national and an individual level.<sup>110</sup>

<sup>107</sup> I regard these rationales as similar to the guiding principles which I identified in the South African case, for further discussion on this see Ohlsson, *On the ethics of external states in peacebuilding*. I will for the sake of consistency use the terminology of this study rather than Abilova's.

<sup>108</sup> Interview, Moscow, July 2017 G, Professor and legal advisor, international affairs.

<sup>109</sup> Abilova, "Peacekeeping Contribution Profile," 4.

<sup>110</sup> Interviews, Moscow July 2017, A, Professor, diplomat and political advisor on peace issues; B, Professor and political advisor on peace issues.

The third principle is portrayed as a security priority. It is argued that Russian priorities are mainly located in the post-Soviet space, in other words the former Soviet republics.<sup>111</sup> This principle can also be interpreted as a question of geopolitics and an expression of the prioritizing of geographical proximity. This would explain the relatively heavy Russian troop deployments in the CIS-region, as compared to Russia's comparatively low participation in UN peacekeeping operations.<sup>112</sup> Furthermore, it can also be understood as a stance that peace involvement is aligned with political and strategic interests.

The fourth principle is the institutional, and here Abilova stresses the potential of accessing operational experience for Russian military personnel, an aspect that is not really addressed by the Russian government's official documents during the period of study. The prestige of the military is seen as one of the potential obstacles for this type of strategic use of UN secondment.<sup>113</sup>

The fifth principle is the normative, which for this article is the most important. Abilova argues that the normative rationale for Russian peace engagements is grounded in the idea that being a permanent member of the UNSC entails responsibility for questions of global peace and security.<sup>114</sup> This may sound counterintuitive since Russia has used its veto more often than the other permanent members. However, this is to some extent dependent on the context. From the Russian perspective, using a veto can be a way of taking responsibility.<sup>115</sup> Having the opportunity to using the veto power is exclusive to the five permanent members of the Security Council, and the US, China, and Russia have exercised this right continuously over the years. These five principles are supplementary to each other in that they seem to be interpreted as different pieces of a puzzle.

Most recently, Russia has consistently vetoed on resolutions suggesting different actions in Syria and on events related to Ukraine,<sup>116</sup> indicating that the Russian understanding of responsibility differs from a Western understanding. It is important to remember, however, that these discussions are more heavily directed toward intervention, military force, and, arguably, a breach of the principle of sovereignty. However, in much of the Russian engagement in peace missions, there is a clear military aspect. Peacebuilding is discussed in military discourses and military structures, indicating a securitization of more long-term peace engagements.

<sup>111</sup> Abilova, "Peacekeeping Contribution Profile," 5.

<sup>112</sup> *Ibid.* 5.

<sup>113</sup> *Ibid.* 6.

<sup>114</sup> *Ibid.* 6.

<sup>115</sup> Interview, Moscow June 2017, H, Scholar and policy advisor.

<sup>116</sup> Abilova, "Peacekeeping Contribution Profile." This additionally indicates a more distinct interest in the UNSC resolutions regarding these situations.

## A typology of Russian justification strategies

The justification strategies identified in the documents and in the interview material are clustered into themes, the first being the reference to international legal doctrines and international principles. These are the arguments identified which Russian representatives are using. The second cluster is framed as continuous references to international peace and security, most often through multilateral organizations and cooperation. The third cluster is related to the second, but with a clearer emphasis on the expectation of addressing and handling humanitarian crises or disasters, regardless of whether they are man-made or natural. The second and third cluster of justification strategies are connected to the self-image of being a guarantor of peace and security, and that there is an external expectation to react and act.

### *A. International legal doctrines and principles*

One of the most prominent attempts to justify engagement in peace initiatives is the continuous reference to international law. This sometimes explicitly includes international humanitarian law and human rights law, sometimes not, which might be a nuance which offers room for interpretation. However, the maintenance and strengthening of the international rule of law is among one of Russia's priorities in the international arena, and this is also used in order to try to justify different foreign policy actions.

In the Russian Federal Law No 93-FZ, dated 23 June 1995, titled *On Procedure of Providing Civil and Military Personnel for Participation in the Activity of Maintenance or Restoration of the International Peace and Security by the Russian Federation*, it is stated in Article Two that

In the present Federal Law the activity of maintenance or restoration of the international peace and security with involvement of the Russian Federation shall imply operations of maintenance of peace and other measures undertaken by the Security Council of the United Nations Organization in compliance with the UN Charter, by regional bodies or within the framework of the regional bodies or agreements of the Russian Federation, or on the basis of the bilateral or multilateral international treaties of the Russian Federation, which are not enforced actions in accordance with the UN Charter (hereinafter referred to as peacemaking activity), as well as the international forced actions with use of armed forces, realized by the resolution of the UN Security Council, adopted in compliance with the UN Charter, for elimination of a threat to peace, violations of peace, or an act of aggression.<sup>117</sup>

In this example, both the first and the second type of justification strategies are present, as the text explicitly emphasizes the role of international treaties and the UN charter. It also emphasizes the role of cooperation through multilateral organizations.

<sup>117</sup> The Russian Federation, *Russian Federal Law No 93-FZ, On Procedure of Providing Civil and Military Personnel for Participation in the Activity of Maintenance or Restoration of the International Peace and Security by the Russian Federation*, Moscow, 23 June 1995.

In the 2013 *Concept of the Foreign Policy*, it is asserted that unilateral sanctions and other coercive measures, including armed aggression, outside the framework of the UN Security Council constitute a risk for world peace.<sup>118</sup> This can be understood as indicating an argument in support of respect for international law.<sup>119</sup> In addition to international law, both Russian foreign policy documents and the respondents refer continuously to the importance of respecting internationally recognized principles, particularly the principle of sovereignty. As previously mentioned, this is particularly interesting in relation to the events in Crimea, where Russia's controversial presence prior to the referendum would constitute a breach of that principle.

Russian arguments place great importance on mandates and international law and therefore regard the UN as the only legitimate global actor within peace and security. However, as Bratersky and Lukin note, Russia supports expansion of the partnership between the UN and regional actors only when it falls under Chapter VIII of the UN Charter. My analysis of Russian engagement in peace missions shows that this fits well with Russia's strategic interests: in its own neighborhood, Russia prefers to remain influential (via the CIS and CSTO) but prefers that someone else take the lead in places that are geographically removed. What is crucial is that the UN remains the main actor and that all measures are taken with consideration to the UN Charter. However, as an actor who pays close attention to mandates, it is striking that the regional examples of Russian peace missions all tend to have unclear situations regarding mandates. Contexts such as Transnistria, South Ossetia, and Tajikistan all have slightly *ad hoc* solutions, even though they were legitimate and legal from a Russian perspective.

Scholars and experts on Russian engagement in peace missions continuously refer to treaties and agreements on military and other types of cooperation.<sup>120</sup> This reflects the militarized discourse as well as the perceived weight of international agreements and treaties. Scholars such as Alexander Nikitin argue that peace operations with this type of legal grounds are exemplified by the treaties between Russia and Tajikistan (1993), Russia and South Ossetia (2008), and Russia and Abkhazia (2008). Nikitin also emphasizes that "formal documented request for military aid by the legitimate authorities of one state addressed to the authorities of another state" is a legal basis for stretching the principle of sovereignty. These types of operations are exemplified by South Ossetia (1992–2008), Transnistria (1992–present), and Syria (2015–present). The responsibility to protect civilians is mentioned, but only as an emerging doctrine yet to be universally recognized.<sup>121</sup>

<sup>118</sup> The Russian Federation, *Concept of the Foreign Policy* (18 February 2013).

<sup>119</sup> On the other hand, this is questioned by several legal scholars who argue that Russia's understanding of international law tends to be pragmatic and only followed when it is in tandem with Russia's national interest. See, for example, Lauri Mälksoo, *Russian Approaches to International Law* (Oxford: Oxford University Press, 2015) 100.

<sup>120</sup> Alexander Nikitin, *International Intervention in Conflicts*. UN, OSCE, EU, NATO, CSTO Peace-keeping Policies, (Valdai Discussion Club Reports, 2017) 5; Interviews, Moscow, June and July 2017.

<sup>121</sup> Nikitin, "International Intervention in Conflicts," 5.

The importance of international law for the Russian view of peace missions is also emphasized by Bratersky and Lukin, who note that Russia has introduced a proposal to the UN concerning a collective clarification of the legal aspects of the use of force in international law. Russia's position is clearly dominated by the principles of sovereignty and territorial integrity, and it views initiatives such as "limited sovereignty," "humanitarian intervention," and "responsibility to protect" as contradictions of territorial integrity.<sup>122</sup> These notions are also viewed as Western initiatives aimed at undermining the cornerstones of the current world order as seen from a Russian perspective.

This type of justification strategy is most commonly directed toward an international audience, and often used in relation to the argument that the Russian Federation respects international law and takes it seriously. This can be understood as a reciprocal kind of argument, that Russia expects others to do the same. Reciprocal respect is often what international cooperation is about.

Important to note, as this is based on the analysis of the documents and the interviews, it shows the official Russian stance. Scholars of international law, such as Lauri Mälksoo, have argued that this continuous referencing to international law is peculiar in the case of Russia, in that Russia "often give a specific illiberal meaning to the concept of sovereignty."<sup>123</sup> This portrays the tension of Russia as a global actor.

### *B. Multilateral cooperation*

A second type of argument that is used as a justification strategy emphasizes the need for formal global institutions. In the Russian case, this means that the prioritized institutions are those where Russia has an opportunity to exert influence. Russia is one of the permanent members of the UNSC and one of the most powerful of the members of BRICS (even if the collaboration is supposed to be on equal grounds, Russia and China still have some privileges the others do not), and Russia is the driving country behind the CIS and the CSTO. In this sense, Russia is a strong proponent for multilateralism in peace missions, albeit to some extent on its own terms.

Within foreign policy activities, and in particular peace missions, Russian policymakers and experts frequently refer to the UN. This chimes with the previous reflection that the UN can be seen as a venue where Russia has influence. However, this could also be a legitimacy-creating measure: a UNSC resolution is in a way legitimized by UN procedure, and peace initiatives that are multilateral are generally seen as more legitimate than unilateral or bilateral ones.

Within the Concept of the Foreign Policy of the Russian Federation, dated 18 February 2013, it is stated that the Russian Federation, in accordance with national security, is supposed to focus on

<sup>122</sup> Bratersky and Lukin, "The Russian Perspective on UN Peacekeeping: Today and Tomorrow," 138.

<sup>123</sup> Mälksoo, *Russian Approaches to International Law*, 100.

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[...] active promoting of international peace and universal security and stability for the purpose of establishing a just and democratic system of international relations based on collective decision-making in addressing global issues, on the primacy of international law, including, first of all, the UN Charter, as well as on equal, partnership relations among nations with the central coordinating role of the UN as the principal organization regulating international relations.<sup>124</sup>

This could be interpreted as a preference for international collaboration on equal grounds. As expressed in several of the interviews, representatives of the Russian state prefer to act in a multilateral fashion. However, as it also states, when multilateral solutions are inefficient or impossible, regional or bilateral solutions are seen as viable alternatives. This implies a context-sensitive pragmatism, which can be governed by several different factors.

The *Military Doctrine* of the Russian Federation from 2014 states that one of the goals is to contribute to international peace and security. It is explicitly stated that Russia should contribute troops to CSTO, CIS, and UN-mandated missions. When it comes to what kind of contribution the Russian military could contribute, it is stated that one of the main tasks of the Armed Forces, other troops, and authorities in peacetime is

[...] participation in peacekeeping operations (recovery) international peace and security, taking measures to prevention (elimination) of threats to the peace, the suppression of acts aggression (breach of the peace) on the basis of the Council's decisions UN Security Council or other bodies authorized to take such decisions in accordance with international law.<sup>125</sup>

Here, peacekeeping seems to indicate that it is a question of recovery. This blurs the distinction between peacekeeping and peacebuilding in the Russian discourse since a focus on recovery could be interpreted as peacebuilding. In this document, it seems to be that there is a difference in priorities depending on whether it is peacetime or wartime, and this is explicitly mentioned in the text at several occasions.

When it comes to justification strategies, it becomes clear that Russian approaches differ in the post-Soviet space and in the global arena, even though there also are a few overlaps. One of the general approaches seems to be that there is an interest in being involved in various regions. However, the document does not identify prioritized regions, but is instead vaguely worded to leave itself open to interpretation. In the *Military Doctrine*, it is stated that the tasks of military-political cooperation include:

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<sup>124</sup> The Russian Federation, *Concept of the Foreign Policy* (18 February 2013) article 4 c.

<sup>125</sup> The Russian Federation, *Concept of the Russian Federation's State Policy in the Area of International Development Assistance*, 2014, paragraph 32, p. 11.

[...] the development of relations with international organizations prevention (of) conflict situations, Conservation and consolidation of peace in various regions, including those involving Russian troops in peacekeeping operations.<sup>126</sup>

This suggests a global approach given the record of where Russian peacekeeping personnel have been deployed in recent years.

This type of justification strategy is most often directed toward an international as well as regional audience. In this case, this means that it is directed toward both a global far-abroad audience and regional, near-abroad audience.

### *C. Responsibility and expectations*

The third cluster of justification strategies are connected to Russia's self-image as one of the powerful countries that have to respond to man-made or natural humanitarian crises. This reflects both its own self-image and what Russian representatives imagine to be the world's image of Russia. This was expressed by an expert on Russian peace engagement as being part of Russia's role as one of the permanent members in the UNSC. Critics toward the Russian Federation would question this image, and as others has been highlighting, Russia's main weakness is its reputation and image.<sup>127</sup> Contributions to peace and security are necessary for countries that are one of the Permanent Five. Related to the perceived expectations to act, the same expert claimed that Russian presence in several peace operations was a way of "showing the flag," which could be interpreted as a way of showing that the Russians are taking part in peace missions. Another interpretation could be that this is part of a larger scheme of nation-branding.

The Russian view of being a responsible actor seems to have been very much colored by their conviction of the crucial need to respect the principle of sovereignty as well as to avoid a unilateral world order with US domination. This could be understood as a moral argument about the kind of world aspired to. Here, I interpret the argument to be based on a quest for equality amongst states in which the principle of sovereignty is of crucial importance. This could also be an assumption of a normative order, i.e., an order where reciprocal and general arguments are possible to exchange.

This third type of justification strategy is grounded in an expectation to react, which also relates to being a responsible actor. The Russian approach to international relations and international law, according to experts, is driven by a striving toward a more equal and responsible world order. This is commonly translated as a multipolar order rather than the unipolarity that has long governed international relations. Being responsible is here understood as adhering to and respecting international law and treaties and abiding by agreements. This is understood as a requirement for other actors to know that you are meeting your responsibilities and that they can count on you to follow the agreed-upon solution. A clear trend in the interviews is that Russia

<sup>126</sup> Ibid. paragraph 55.

<sup>127</sup> Greg Simons, "Media and public diplomacy," in *Routledge Handbook of Russian Foreign Policy* A. P Tsygankov (ed.). (London: Routledge, 2018) 201.

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views respect for the principles of non-intervention and sovereignty as a condition for being a responsible actor.<sup>128</sup>

The types of engagements that are envisioned are defined as follows:

Participation of the military and civil personnel in the activity of maintenance or restoration of the international peace and security may include monitoring and control over observance of the agreements on cease-fire and other hostile actions, separation of the conflicting Parties, disarmament and breaking up of their subunits, carrying-out of the engineering and other operations, assistance in settling the problems of refugees, rendering of medical and other humanitarian assistance, fulfilment of militia (police) and other functions on providing security of the population and compliance with the human rights, as well as carrying-out of the international forced actions in compliance with the UN Charter.

The Russian Federation may participate in the peacemaking activity also by providing foodstuff, medications, other humanitarian assistance, and means of communication, transport vehicles and other material-technical resources.<sup>129</sup>

These definitions leave open the possibility of engagements that are not only military, which is otherwise the most commonly recognized state employed category in relation to peace missions. Russian experts have expressed the importance of expanding Russian engagement via personnel seconded to the UN, including both uniformed and civilian personnel.<sup>130</sup>

This third type of justification strategy seems to be used somewhat differently, depending on which audience it addresses. It has been used for an international audience as well as for regional and national audiences. Generally, a foreign policy discourse is directed toward several different actors, as becomes clear also in relation to peacebuilding engagements. In this case, it seems as though, to some extent, domestic and foreign policy have become intertwined.

### *Summary of the typology*

To summarize the typology based on the case study on Russian engagement in peacebuilding, a methodological or terminological question is of primary importance. Since peacebuilding is understood here to not be a highly prioritized practice in Russian foreign policy, this is more of a typology of Russian attempts to justify engagement in peace missions in broader terms. The typology consists of three parts: 1) international legal doctrines and principles; 2) multilateral cooperation; and 3) responsibility and expectations. These are all related to each other but are different enough to be regarded as distinct justificatory strategies. The connection proposed is that international law governs multilateral cooperation and that both international

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<sup>128</sup> Interviews, Moscow, June and July 2017, H, Scholar and policy advisor; H, Scholar and policy advisor.

<sup>129</sup> The Russian Federation, *Russian Federal Law No 93-FZ*, 23 June 1995.

<sup>130</sup> Interview, Moscow, July 2017, H, Scholar and policy advisor; A, Professor, diplomat and political advisor on peace issues; B, Professor and political advisor on peace issues.

law and multilateral cooperation build upon an expectation that states will meet their international responsibilities.

Multilateral cooperation seems to Russian experts to be a way of creating greater legitimacy for political action, but this, too, rests upon an agreement about cooperation and responsibility. Responsibility can, to some extent, be understood as related to reciprocity in the sense of predictability. Rainer Forst, upon whose reasoning the theoretical approach to justification is based, understands reciprocity as meaning that claimants may not demand any rights or privileges that it denies its addressee.<sup>131</sup> I would argue that Russia sees itself as coming from a challenger's perspective and that their role in international relations is not respected, but that their foreign policy is concerned with respecting others. However, and importantly also depending on perspective, to argue that Russia is a responsible actor in international affairs can be a sensitive statement, perhaps less for Russia itself than for other former Soviet republics, in view of the destabilizing of Crimea.

In the analysis of the role of peacebuilding in Russian foreign policy, I have found that this is instead framed as peacemaking, but that there are different types of justificatory attempts. As suspected, political justificatory attempts dominate the discourse, but moral and ethical attempts to justify are also present and play an important role. This leaves open the possibility for an analysis of the kind of justificatory attempts that have been offered.

## Dimensions of justification

The type of justificatory attempts offered in the Russian case are primarily political, but there are also justificatory attempts based in morality.<sup>132</sup> The Russian discourse is a realist and militarized discourse, which seems to be centered on issues of defense and security, but here, too, arguments about moral character are put forward. There are several references to responsibility, equality amongst states, and the normative aspiration toward stability. This indicates that even militarized discourses have room for moral argumentation.

### *Reciprocity and generality*

The baseline for assessing generality and reciprocity is that the arguments are accessible and relevant.<sup>133</sup> In the Russian case, the arguments are not very accessible or transparent, but arguments are nonetheless provided, and they are relevant.<sup>134</sup> This

<sup>131</sup> Rainer Forst, *Justification and Critique: Towards a Critical Theory of Politics* (Cambridge, UK: Polity Press 2014) 214.

<sup>132</sup> For a more nuanced discussion on different types of justification, see Ohlsson, *On the Ethics of External States in Peacebuilding*, 126–130.

<sup>133</sup> For a more nuanced theoretical discussion on justification, see Ohlsson, *On the ethics of external states in peacebuilding*, 97–139.

<sup>134</sup> However, the justificatory attempts provided in the Russian case require more interpretational work than the justificatory attempts in the other (South African) case study I address in the dissertation. This implies that the interviews have been of crucial importance in the Russian case. In comparison

implies that more interpretational work is needed. This puts further emphasis on the interviews conducted for this case study. Yet, as might be important to mention, a document on Russian participation in peacekeeping has been initiated but was never finalized due to budgetary constraints.<sup>135</sup> This also indicates the level of priority of the issue. There is a document on *Russia's Participation in International Development Assistance* but, according to the definitions I utilize, developmental work and peacebuilding are separate areas. In addition, this document only briefly mentions peacebuilding. A related note on the material is therefore that the interviews are of crucial importance, since the documents do not provide the optimal level of detail.

On the other hand, the possibility of carrying out this study indicates that there is also some level of reciprocity and generality in Russian foreign policy on engagements in peace missions and peacebuilding. This seems to open up the possibility of a discussion of audience in so far as the arguments seem to be provided for different types of audiences.

The arguments upon which the typology is based can be seen as reciprocal in that the arguments that Russian representatives presents do not demand any rights or privileges that they deny to its recipient. As mentioned earlier, it is rather a question of emphasizing normative stances that Russia argues it is itself being denied by others. When it comes to generality, these arguments, i.e., international law and principles, multilateral cooperation, and responsibility, also seem to reach the standard. This would imply that the arguments are justified according to Forst. However, this needs more nuancing, as it does not seem adequate to use the formal criteria of reciprocity and generality in order to assess the justificatory attempts of external states in peacebuilding engagements.

### *Russia's position of power*

Russia's view of its own role in world politics in general seems to be based on a challenger's perspective. Russia often portrays itself as a sound and responsible actor which respects and promotes international law where others undermining international laws and treaties. This is connected to Russia's position of power. Russia seems to have both defensive and offensive elements in its foreign policy, but the self-perceived role seems to be primarily defensive.

Russia's position of power differs depending on the geographical scope. As has been stated earlier in this article, Russia clearly prioritizes the post-Soviet space in its foreign policy. This is explained both by geographical proximity and a striving for protection of national interests and national security. This does not mean that Russian leadership does not care about what happens in the rest of the world, just that there are other mechanisms which governs the different spaces.

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to the South African case, Russia's foreign policy documents are less available and accessible. In addition, South Africa has a white paper specifically focusing on engagement in peace missions; in the Russian case, the equivalent does not exist or has not been found.

<sup>135</sup> Abilova, "Peacekeeping Contribution Profile," 3.

Russian global aspirations are to some extent a balancing act between Russian imperialistic tendencies on the one hand, and on the other hand a question of legitimate claims to equality within the international system. However, it is important to remember here that even though they are linked, these are two different questions. The first question considers Russian policies and actions in a limited geographical area to which there are previous connections, while the other question is about a wider, global perspective. These cannot be completely separated, but there is a nuance when it comes to audience, since the first is directed toward a closer, more clearly defined audience, while the second is directed toward a broad, global (but often seen as Western-dominated) audience. Tsygankov argues that Russia, throughout history, either has tried to imitate or compete with the West.<sup>136</sup> In addition, much of Russia's foreign policy is dominated by the power balance with the US.

Western hegemony inherits an asymmetry built into the global system, which Russia is not alone in questioning. Several voices have been raised in relation to the inequality that governs the international system, both in material and representational terms. The principle of sovereignty is the functioning mechanism to ensure the equality among countries, but in the first place, this is not always respected, and in the second, the principle of sovereignty does not capture the discursive asymmetry in international relations in questions of room for interpretation and agenda setting.

If Russia's understanding of power is to be analyzed in Forstian terms, it would seem like a challenge to do this at the level of noumenal power. Much of Russia's understanding of power seems to be governed by a classical international relations realist account in which power is equivalent to military strength. Yet, Russia's own military power is not as developed as it once was and even if major military reforms have been enacted lately, Russia is no longer one of the most powerful countries in terms of military power. However, it retains nuclear weapons, which has greatly influenced this equation.

### *An understanding of peace and peacebuilding*

The analysis of Russian foreign policy on peacebuilding shows that much of Russia's involvement with peace issues is in relation to peacekeeping rather than peacebuilding. As noted above, this accords with the conclusion that Russia's foreign policy on peace issues is a militarized discourse that seems to be governed by an understanding of peace as negative peace. From this perspective, the absence of violence is the primary goal, and there is an explicit cautiousness about engaging with political issues in other countries. The Russian understanding of peace also seems to be characterized by peace as stability, which also reflects the model of negative peace.

Another finding is that Russian approaches to peacebuilding seem to be either a question of conflict resolution or an issue connected to development aid. This follows from the limited focus on peacebuilding in Russian foreign policy discourse, since this is an underdeveloped area. The Russian approach to conflict resolution is held to

<sup>136</sup> Tsygankov, *Russia's foreign policy*, 2ff.

address the core issue of the conflict, which to some extent can also be related to the prevention of reoccurring conflict. But if the understanding of positive or qualitative peace is long-term prosperity in combination with sustainability, perhaps the Russian approach to and understanding of peacebuilding is closer to development assistance. This could be seen as supported by the way that peacebuilding is discussed in the Concept from 2007, *Russia's Participation in International Development Assistance*, rather than the other documents. However, the discussion is brief. The other documents include Russian approaches to peacekeeping, but primarily in military settings such as the *Military Doctrine* and the *Concept of National Security*. In the *Military Doctrine*, an area covers political-military and military-technical cooperation of the Russian Federation and foreign states. While this could be interpreted in terms of peace engagements, it is primarily in militarized terms. Again, this is exemplified in the following prioritizing

[...] d) the development of relations with international organizations Prevention conflict situations, Conservation and consolidation of peace in various regions, including those involving Russian troops in peacekeeping operations.<sup>137</sup>

This indicates activities which could be interpreted as peacebuilding, such as prevention and consolidation. However, this is not further explicated in the document and several of the interviewees have stressed that Russian involvement in peace issues is primarily via military structures.

## Conclusions

Let us now sum up how Russia justifies and understands its engagement in peace missions abroad. Russia, like most countries, constructs arguments within its foreign policy discourse that aim to create legitimacy and justification for its actions. This practice takes place at several levels and is made by several people. The justification strategies used have been portrayed as a threefold typology where the first strategy consists of clear referencing to international law, the second consists of an emphasis on multilateral collaboration, and the third is constructed on the basis of external and internal expectations about action. These are directed toward different audiences, such as international, regional, and national, and there are often overlaps with the audience toward which the strategies are directed.

Several of the strategies identified are connected to the ambition of emphasizing Russia's ability to be an important state that takes responsibility for global peace and security. This quest for responsibility is also visible in the many other cases, but is here expressed from a different position, indicating that the understanding of notions such as security differs between different states. An important text step is to connect

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<sup>137</sup> The Russian Federation, Concept of the Russian Federation's State Policy in the Area of International Development Assistance, 2014, paragraph 55.

this analysis of the rhetorical level to implementation, in order to analyze to what extent these strategies are acknowledged, emphasized, and adhered to.

One conclusion that could be drawn from this case study is that the criteria of reciprocity and generality need modification and supplementing in order to fully capture the political action of trying to justify engagement in peacebuilding. The case study have therefore contributed by showing that the Forstian theory of justification based on reciprocity and generality is insufficient for capturing the attempts to justify states' engagement in peacebuilding. A more nuanced discussion and modification of Forst's theory is developed in Ohlsson 2018.<sup>138</sup>

Another important finding in this case study on Russia is what could be interpreted as an ambivalence characterizing Russia's approach to peace missions in general and peacebuilding in particular. This ambivalence is also present in the attempts to justify engagement in peace missions. This could be exemplified by the prominent role of international law in Russia's foreign policy, which was at the same time violated during the events in Crimea and Eastern Ukraine. The analysis of the foreign policy documents together with the interviews shows that Russia's approach to peace missions as well as their justification thereof is not very consistent. Based on the material I am analyzing in this study, the attempts to justify Russian engagement in peacebuilding do not seem to be systematized. However, in this case, it seems possible to argue that Russian decision and policy-makers are seeking respect from other countries to a large extent, and that this is governing the approaches toward providing arguments in foreign policy.

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<sup>138</sup> Ohlsson, *On the ethics of external states in peacebuilding*, 97–138, 254–284.



# The Limits of Non-Compliance: Infringement Proceedings under Article 46 (4–5) Concerning Azerbaijan’s Refusal to Abide by the *Ilgar Mammadov* *v. Azerbaijan* Judgment

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## Introduction

On 29 May 2019, the Grand Chamber of the European Court of Human Rights (the ECtHR or the Court) issued a landmark ruling<sup>2</sup> in the first-ever case brought under Article 46(4) of the European Convention on Human Rights (the ECHR or the Convention) concerning the failure of Azerbaijan to comply with *Ilgar Mammadov v. Azerbaijan*<sup>3</sup> judgment. Although the mechanism was added to the Convention system in 2010, it was not until 2017 that the Committee of Ministers (the CoM) decided to use it against a member state of the Council of Europe (the CoE) that was considered to be refusing to abide by the Court’s judgment.

The obligation of the state parties to the Convention to comply with final judgments against them arises from Article 46(1)<sup>4</sup> and the supervision of the execution of judgments pursuant to Article 46(2)<sup>5</sup> is performed by the Committee of Ministers (the CoM) – the executive body of the CoE comprised of member states’ Foreign Affairs Ministers,<sup>6</sup> which decides whether the state has complied with the

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<sup>1</sup> I am grateful to Anne-Katrin Speck for her helpful comments.

<sup>2</sup> ECtHR (GC), *Proceedings under Article 46(4) in the Case of Ilgar Mammadov v. Azerbaijan* (Application No. 15172/14), 29 May 2019.

<sup>3</sup> ECtHR, *Ilgar Mammadov v. Azerbaijan* (Application No. 15172/13), 22 May 2014 (final on 13 October 2014).

<sup>4</sup> Article 46(1) of the ECHR: “The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.”

<sup>5</sup> Article 46(2) of the ECHR: “The final judgments of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.”

<sup>6</sup> The supervision of the execution of judgments of the ECtHR is performed by the Ministers’ Deputies – Permanent Representatives (Ambassadors) to the CoE and their Deputy Permanent Representatives – career diplomats who act “on instructions from their capitals.” Peter Leuprecht, “The Protection of Human Rights by Political Bodies – The Example of the Committee of Ministers of the Council of Europe,” in M. Nowak, D. Steurer and H. Tretter (eds.), *Festschrift für Felix Ermacora*, N. P. Engel Verlag: Kehl am Rhein (1988), p. 98.

judgment.<sup>7</sup> In 2010, Protocol No. 14 amending the Convention, among other things, introduced changes to Article 46. Even though the Protocol's Explanatory Report described the execution of judgments as "satisfactory", it noted that in order to "maintain the system's effectiveness" the process had to be improved.<sup>8</sup> One of the Protocol's innovations was the possibility for the CoM to request the ECtHR for the interpretation of a judgment when the CoM considered that judgment execution difficulties were related to the interpretation of the judgment (Article 46(3)). So far, the CoM has not exercised this competence. Second, the Protocol introduced a new mechanism – known as the infringement proceedings<sup>9</sup> – to deal with situations when a country was failing to comply with a judgment of the ECtHR. As a result, the CoM was empowered to refer cases of non-compliance to the ECtHR's Grand Chamber.

This article provides an overview of the first infringement proceedings against Azerbaijan that formally commenced in September 2020, and aims to assess their effectiveness. It also examines the ECtHR's rare take on the issue of judgment compliance, which it normally considers to be "outside its jurisdiction."<sup>10</sup> Finally, the article discusses the possibilities of applying the proceedings to other judgments pending execution including the case of Alexei Navalny.

## Obligation to abide by judgments of the ECtHR

The ECHR system differs from the majority of other international human rights treaties in that it not only has a court, which monitors treaty compliance but also provides for a judgment compliance control mechanism. Whereas the former is judicial, the latter is essentially political.

Although the ECtHR's judgments are binding under Article 46, unlike rulings of national constitutional courts, which can invalidate unconstitutional legislation, the ECtHR's judgments do not have a direct immediate effect on the national legal systems. In the 1980s, the ECtHR pronounced that its rulings were "essentially declaratory," meaning that they dealt with the question of whether the state violated the Convention, but did not dictate specific remedial measures. In *Papamichalopoulos and Others v. Greece* the ECtHR stated: "This discretion as to the manner

<sup>7</sup> The supervision of execution ends when the CoM considers that the state has "taken all the necessary measures to abide by the judgment" and adopts a final resolution. Rule 17, Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies and amended on 18 January 2017 at the 1275<sup>th</sup> meeting of the Ministers' Deputies.

<sup>8</sup> Paras 16–17, Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, 13 May 2004, at: <https://rm.coe.int/16800d380f>.

<sup>9</sup> See, Rule 11 (Infringement proceedings), Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies and amended on 18 January 2017 at the 1275<sup>th</sup> meeting of the Ministers' Deputies.

<sup>10</sup> Para 102, ECtHR (GC), *Moreira Ferreira v. Portugal* (no. 2) (Application no. 19867/12), 11 July 2017.

of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed.”<sup>11</sup> Moreover, according to the Court: “...it is in principle not for the Court to determine what remedial measures may be appropriate to satisfy the respondent State’s obligations under Article 46 of the Convention.”<sup>12</sup> Thus, as some authors have argued “the states generally must reason backwards from the violation to understand the appropriate remedy in a specific case, and the actions required to avoid similar future violations.”<sup>13</sup> This is, however, is done under the supervision of the CoM.

It follows from the Court’s case-law that the legal obligation arising from Article 46(1) consists of a) payment of “just satisfaction” awarded by the Court under Article 41 b) individual measures and c) general measures.<sup>14</sup> Whereas pursuant to Article 41 the ECtHR awards monetary compensation for pecuniary and non-pecuniary damages and legal costs, the exact type and scope of the remaining measures are determined during the judgment execution stage.<sup>15</sup> In recent years, however, the ECtHR has started to issue more prescriptive judgments which, in the motivational or even the operative part of the judgment, provide indications of the remedial measures and occasionally even concrete steps the states must take in order to execute the judgment.<sup>16</sup> According to the Court’s Guide on Article 46, “sometimes the nature of the violation found may be such as to leave no real choice as to the individual measures required.”<sup>17</sup> For example, in *Assanidze v. Georgia*, the Court in the operative part of the ruling instructed the Georgian authorities to “secure the applicant’s release at the earliest possible date.”<sup>18</sup>

<sup>11</sup> Para 34, ECtHR, *Papamichalopoulos and Others v. Greece* (Application No. 14556/89), 24 June 1993.

<sup>12</sup> Para 193, ECtHR (GC), *Broniowski v. Poland* (Application No. 31443/96), 22 June 2004.

<sup>13</sup> Darren Hawkins and Wade Jacoby, “Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights,” *Journal of International Law and International Relations*, vol. 6, no. 1, (2010), pp. 51–52.

<sup>14</sup> Para 249, ECtHR (GC), *Scozzari and Giunta v. Italy* (Application Nos. 39221/98 and 41963/98), 13 July 2000.

<sup>15</sup> Whereas individual measures aim to erase, as far as possible, the consequences of the violations for the applicant, general measures are needed to address structural problems, to prevent similar violations and to put an end to continuing violations. CoM, 12<sup>th</sup> Annual Report of the Committee of Ministers, *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 2018*, at: <https://rm.coe.int/annual-report-2018/168093f3da>.

<sup>16</sup> See, Helen Keller and Cedric Marti, “Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights’ Judgments,” *The European Journal of International Law* Vol. 26, No. 4 (2015): 829–850; Alice Donald and Anne-Katrin Speck, “The European Court of Human Rights’ Remedial Practice and its Impact on the Execution of Judgments,” *Human Rights Law Review* Vol. 19, No. 1 (2019): 83–117.

<sup>17</sup> ECtHR, Guide on Article 46 of the European Convention on Human Rights, 31 January 2020 (first edition).

<sup>18</sup> ECtHR (GC), *Assanidze v. Georgia* (Application no. 71503/01), 8 April 2004.

## The infringement proceedings under Article 46(4–5)

The CoM performs the supervision of the execution of judgments during closed quarterly three-day long Human Rights meetings (known as “DH meetings”).<sup>19</sup> However, only a small number of the most problematic cases are debated during the DH meetings,<sup>20</sup> and the remaining cases are dealt with bilaterally by the Department for the Execution of Judgments of the ECtHR (also known as the Secretariat) within the CoE’s Directorate General “Human Rights and Rule of Law” and the state concerned. The Department, which mainly consists of national legal experts, advises and assists the CoM by assessing the quality and the scope of the execution measures proposed or adopted by the state.<sup>21</sup> Although the CoM is not formally obliged to follow the DEJ’s recommendations, it seems that in practice its assessment plays an important role in the CoM’s decision-making. The CoM can put pressure on the state by adding the case to the DH meeting agenda, adopting a decision or even an interim resolution,<sup>22</sup> but is not empowered to impose material sanctions. This means that the CoM’s supervision essentially relies on non-coercive means of enforcement such as peer pressure and naming and shaming. The biggest concerns regarding this type of mechanism are related to its (in)effectiveness and the politicization of the monitoring process. Existing data shows that the total number of pending (non-executed) judgments by all member states has increased from 4,322 in 2005 to 9,899 in 2010.<sup>23</sup> At the end of 2020, there were 5,233 pending judgments at different execution stages concerning all 47 member states.<sup>24</sup> In 2017, Alice Donald described the problem of judgment non-execution, partial execution, and delayed execution as the “Achilles heel” of the ECHR system.<sup>25</sup> Even though concerns have been raised regarding the supervision of some cases,<sup>26</sup> scholars have argued that the involvement of a “techni-

<sup>19</sup> In exceptional cases, the deputies might decide to perform the supervision of the execution of a case during the CoM’s regular weekly meetings. DH meetings are not open to the public, including NGOs and victims of violations. The adopted decisions and resolutions as well as many other documents are made public, but the discussions between the deputies are confidential.

<sup>20</sup> DH meetings are dedicated “for the examination of a minority of the cases pending which are classified under the enhanced procedure and which may require more active intervention by the Committee such as the adoption of decisions and/or interim resolutions, in the latter case usually following debate and sometimes a vote.” Para 100, *Proceedings under Article 46(4)*.

<sup>21</sup> For example, the Department’s staff prepares “Notes on the Agenda” – a document, which describes the status of execution of the cases placed on the agenda of the DH meeting.

<sup>22</sup> An interim resolution is “a form of decision adopted by the Committee of Ministers aimed at overcoming more complex situations requiring special attention.” CoM, 12<sup>th</sup> Annual Report of the Committee of Ministers, *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 2018* (2019).

<sup>23</sup> The number of new judgments requiring execution measures also has increased from 813 in 2005 to 1,710 in 2010.

<sup>24</sup> A decrease from 11,099 in 2012. CoM, 14<sup>th</sup> Annual Report of the Committee of Ministers, *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 2020*.

<sup>25</sup> Alice Donald, “Tackling Non-Implementation in the Strasbourg System: The Art of the Impossible?” 28 April 2017, *EJIL: Talk!*, at: <https://www.ejiltalk.org/tackling-non-implementation-in-the-strasbourg-system-the-art-of-the-possible/>.

<sup>26</sup> See, for example, Andreas von Staden, “Minimalist Compliance in the UK Prisoner Voting Rights Cases”, *ECHR Blog*, 16 November 2018, <https://www.echrblog.com/2018/11/guest-blog-minimalist-compliance-in-uk.html>; Gleb Bogush and Ausra Padskocimaite, “Case Closed but what about the

cal expert body” as well as the “robustness of established procedures for peer review” helped to prevent the process from “falling into the cycle of unreliability.”<sup>27</sup>

The Explanatory Report to Protocol No. 14 highlighted the connection between the effectiveness of the execution process on one hand and the authority of the Court and the credibility of the ECHR system on the other. Scholars have also suggested that judgment compliance might be central to the authority and legitimacy of international courts. According to Constanze Schulte, “cases of open defiance constitute an institutional challenge, whereas instances of successful implementation strengthen the Court’s position and prestige.”<sup>28</sup> In the view of Taylor and Kapiszewski: “The only way to know how much power a court actually has is to look at whether its rulings were obeyed, to assess to what degree the behavioral or policy changes it mandated occurred.”<sup>29</sup> This proposition is complicated by the fact that the exact rates of compliance are not always available and vary depending on the country and the issue in question. Moreover, the complexity of the required remedies should also be taken into account as the court which issues undemanding judgments is likely to have better judgment compliance, but not necessarily boast more legitimacy. In addition, according to the Explanatory Report, one of the negative consequences of poor judgment execution is the influx of new, repetitive cases arising from the same unresolved structural problem at the national level.<sup>30</sup> Such a situation arises when the state does not amend legislation that the Court found to be contrary to the Convention, or does not address another systemic problem capable of giving rise to a large number of applications. Timely and full execution of judgments prescribing individual measures is also indispensable for individual justice.

The Explanatory Report states that the refusal to abide by a judgment could be “express” or “through its conduct.”<sup>31</sup> Pursuant to the CoM’s Judgment Execution Supervision Rules, the proceedings should be initiated only in “exceptional circumstances” and require the support of two-thirds of all the representatives entitled to sit in the CoM (thirty-one states).<sup>32</sup> The rules do not provide an explanation or an example of what might constitute such exceptional circumstances. Pursuant to Article 46(4), the CoM asks the ECtHR whether the state party has failed to fulfill its obligations under Article 46(1). Such a referral is made in the form of a “reasoned”

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Execution of the Judgment? The Closure of Anchugov and Gladkov v. Russia,” *EJIL: Talk!* 30 October 2019.

<sup>27</sup> Başak Çali and Anne Koch, “Foxes Guarding the Foxes? The Peer Review of Human Rights Judgments by the Committee of Ministers of the Council of Europe,” *Human Rights Law Review Vol. 14* (2014): 303–304.

<sup>28</sup> Constanze Schulte, *Compliance with Decisions of the International Court of Justice*, Oxford: Oxford University Press (2004), p. 3.

<sup>29</sup> Matthew M. Taylor and Diana Kapiszewski, “Compliance: Conceptualizing and Theorizing Public Authorities’ Adherence to Judicial Rulings,” APSA 2010 Annual Meeting Paper (2010), p. 42. At: <https://ssrn.com/abstract=1644462>.

<sup>30</sup> Explanatory Report to Protocol No. 14.

<sup>31</sup> *Ibid.*

<sup>32</sup> Rule 11(2), Rules on the supervision of the execution of judgments.

interim resolution, which also must include the views of the state concerned.<sup>33</sup> Despite growing concern about delays and sometimes even failure of some states to execute the ECtHR's judgments, some legal scholars criticized the proceedings for being an ill-suited (legal) solution to a political problem.<sup>34</sup> Although on the surface the proceedings resemble the infringement procedure of the European Union (the EU),<sup>35</sup> unlike the European Commission's action, the ECHR does not explicitly mention material sanctions that could be imposed on the non-compliance state. According to Article 46(5), if the ECtHR establishes a violation, the Court refers the case back to the CoM "for consideration of the measures to be taken."<sup>36</sup> Alternatively, if no violation is established, the CoM "shall close its examination of the case." The Convention left the question open whether the infringement proceedings, which resulted in the finding of non-compliance, could constitute a precondition for suspending a country's voting rights in the CoM or even expelling it from the CoE. This seems unlikely given that more serious breaches of the Convention's values such as Russia's annexation of Crimea did not trigger such sanctions. Moreover, the issue of expulsion is controversial, especially concerning non-democratic countries such as Russia or Azerbaijan, where the Court represents the last and only venue for justice. Perhaps the Court's finding could be taken into account should the question of the state's continued membership in the organization arise.

The Explanatory Report to Protocol No. 14 described the proceedings as a "means of pressure" to secure the execution of the initial judgment: "The procedure's mere existence, and the threat of using it, should act as an effective new incentive to execute the Court's judgments."<sup>37</sup> According to the document, additional sanctions would not be necessary, given that "the political pressure exerted by the proceedings for noncompliance in the Grand Chamber and by the latter's judgment should suffice to secure execution of the Court's initial judgment by the state concerned."<sup>38</sup> However, one wonders about the effectiveness of this approach given that the state in question has already refused to comply with one judgment. Would another judgment even if issued by the Grand Chamber make a difference? According to Jonas Tallberg, the success of the EU in securing legal compliance depended on the combination of both enforcement and managerial mechanisms. Tallberg notes that: "Member states back down before judgment, after a court decision, when charged with the non-implementation of a judgment, or, ultimately, when confronted with the

<sup>33</sup> Rule 11(3), Rules on the supervision of the execution of judgments.

<sup>34</sup> According to Fiona De Londras and Kanstantsin Dzehtsiarou, it would be difficult to fulfill the criteria for the proceedings, the proceedings might overburden the Grand Chamber, and might even cause a backlash against the Court. Fiona De Londras and Kanstantsin Dzehtsiarou, "Mission Impossible? Addressing Non-Execution Through Infringement Proceedings in the European Court of Human Rights," *International and Comparative Law Quarterly*, Vol. 66, Issue 2 (2017): 467–490.

<sup>35</sup> Articles 258 and 260, Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. See, also: [https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure\\_en](https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en).

<sup>36</sup> Neither the Convention nor the Explanatory Report specifies such measures.

<sup>37</sup> Explanatory Report to Protocol No. 14.

<sup>38</sup> *Ibid.*

threat of sanctions.”<sup>39</sup> In Tallberg’s view, the introduction of financial sanctions in the early 1990s played an important role in improving compliance with the judgments of the EU’s Court of Justice. Thus, “by adding the threat of sanctions as a final step in the management-enforcement ladder, the effectiveness of the entire compliance system was enhanced.”<sup>40</sup> The effectiveness of Article 46(4–5) proceedings, however, is largely dependent on the success of non-material “sanctions” such as the state’s loss of its reputation. According to Rachel Brewster, “reputational concerns make governments more likely to comply with international law because a bad reputation leads to less cooperative opportunities in the future.”<sup>41</sup> However, it is not certain to what extent this proposition holds for human rights law where reciprocity does not apply in the same way as in other areas such as trade, unless compliance is specifically tied to some benefits. Moreover, whereas reputational concerns can influence the behavior of some states, the effects might vary depending on how much the state values its reputation, how powerful it is and other factors.<sup>42</sup>

### Background to the two Mammadov judgments

Azerbaijan joined the CoE in 2001 and ratified the Convention in 2002.<sup>43</sup> Since then, the ECtHR has delivered 215 judgments with respect to Azerbaijan establishing at least one violation of the Convention in the majority of them.<sup>44</sup> The latest “Freedom in the World” report by Freedom House described the political situation in Azerbaijan in the following way: “The authorities have carried out an extensive crackdown on civil liberties in recent years, leaving little room for independent expression or activism.”<sup>45</sup> This authoritarian trend is reflected in the fact that the ECtHR has found Azerbaijan in violation of the ECHR’s Article 18<sup>46</sup> in as many as 10 judgments out of the total of 21 such judgments issued against all 47 states.<sup>47</sup> In *Aliyev v. Azerbaijan*, the ECtHR noted that the measures taken against the applicant, an Azerbaijani hu-

<sup>39</sup> Jonas Tallberg, “Paths to Compliance: Enforcement, Management, and the European Union,” *International Organization* 56:3 (2002): 620.

<sup>40</sup> *Ibid.*, 633.

<sup>41</sup> Rachel Brewster, “Reputation in International Relations and International Law,” in Jeffrey L. Dunoff and Mark A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, New York: Cambridge University Press (2013), pp. 540–541.

<sup>42</sup> See, Rachel Brewster, “Reputation in International Relations and International Law,” pp. 524–543.

<sup>43</sup> Azerbaijan’s CoE membership has not been without controversy. In 2017, information about Azerbaijan’s engagement in so-called “caviar diplomacy” became publicly known. *The Guardian*, “Council of Europe urged to investigate Azerbaijan bribery allegations,” 1 February 2017, at: <https://www.theguardian.com/law/2017/feb/01/council-of-europe-urged-investigate-azerbaijan-bribery-allegations>.

<sup>44</sup> [https://www.echr.coe.int/Documents/Stats\\_violation\\_1959\\_2020\\_ENG.pdf](https://www.echr.coe.int/Documents/Stats_violation_1959_2020_ENG.pdf).

<sup>45</sup> <https://freedomhouse.org/country/azerbaijan/freedom-world/2021>.

<sup>46</sup> Article 18 (Limitation on use of restrictions on rights): “The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any other purpose other than those for which they have been prescribed.” Article 18, which is not an autonomous provision, but is applied together with other articles, aims to prevent the misuse of power by the authorities acting in bad faith.

<sup>47</sup> Other states with judgments finding a violation of Article 18 are Russia (3), Turkey (3), Ukraine (2), Georgia (2), Republic of Moldova (1).

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man rights lawyer, “were part of a larger campaign to ‘crack down on human-rights defenders in Azerbaijan, which had intensified over the summer of 2014’.”<sup>48</sup> According to available statistics, as of June 2021, out of 254 cases concerning Azerbaijan, the CoM closed the supervision of the execution of 20 cases (8%) and the remaining 234 cases (91%) were pending execution. The equivalent numbers for leading cases were 5 (10%) and 46 (90%).<sup>49</sup> At the end of 2020, Azerbaijan had 6% of leading cases under the enhanced supervision track.<sup>50</sup>

In 2013, Ilgar Mammadov, a well-known Azerbaijani opposition politician and critic of the Government, petitioned the ECtHR complaining that his arrest and pre-trial detention following the riots in Ismayilli town had been in breach of the Convention. In addition, Mr. Mammadov alleged that the criminal charges against him were politically motivated and contrary to Article 18 of the ECHR. On 22 May 2014, the ECtHR unanimously held in *Ilgar Mammadov v. Azerbaijan* that the Azerbaijani authorities violated Articles 5(1)c), 5(4), and 6(2) of the ECHR on the grounds that the applicant’s arrest was not based on “reasonable suspicion” as required by the Convention, that there was a lack of genuine review of detention by domestic courts, and that Mr. Mammadov’s right to the presumption of innocence was infringed. The Court found that the restrictions on Mr. Mammadov’s liberty were placed for other purposes than those foreseen in Article 5, namely, to silence and punish him for criticizing the Government. As a result, the ECtHR established a violation of Article 18 taken together with Article 5. Although the Court noted that on 17 March 2014, a first instance court found the applicant guilty of mass disorder and violence against public officials and convicted him to a prison sentence of seven years, it noted that no further extension decisions were provided in the case and limited the legal assessment to 20 August 2013 – the date on which the extension of the applicant’s pre-trial detention was upheld. The ECtHR awarded Mr. Mammadov 22,000 EUR for non-pecuniary damage and legal costs related to the case. Neither the motivational nor the operative parts of the ruling mentioned any concrete measures required to execute the judgment.<sup>51</sup>

On 16 November 2017, the ECtHR delivered a second judgment with respect to Mr. Mammadov, who by then was convicted by the Azerbaijani courts and was

<sup>48</sup> Para 214, *Aliyev v. Azerbaijan* (Applications Nos. 68762/14 and 71200/14), 20 September 2018 (final on 4 February 2019).

<sup>49</sup> Numbers are taken from the HUDOC-EXEC database taking into account a three-month period after the judgment becoming final that the states have to comply with the awarded just satisfaction.

<sup>50</sup> A leading case is a case “which has been identified as revealing new structural and/or systemic problems, either by the Court directly in its judgment, or by the Committee of Ministers in the course of its supervision of execution.” CoM, 14<sup>th</sup> Annual Report of the Committee of Ministers, *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 2020*.

<sup>51</sup> For comparison, in the case of *Ilaşcu and Others v. Moldova and Russia*, where the ECtHR found a violation of Article 5, in the operative part the judgment it was stated that “the respondent States are to take all necessary measures to put an end to the arbitrary detention of the applicants still imprisoned and secure their immediate release.” ECtHR (GC), *Ilaşcu and Others v. Moldova and Russia* (Application No. 48787/99), 8 July 2004.

serving his sentence.<sup>52</sup> The main legal issue in this case was whether the criminal proceedings based on the charges addressed in the first judgment met the requirements of Article 6 (the right to a fair trial).<sup>53</sup> Although the applicant also invoked violations of other articles, including Articles 17 and 18, the judges decided not to address these aspects. Thus, after having assessed Mr. Mammadov's criminal trial, which lasted until 18 November 2016, the judges held that the proceedings displayed serious shortcomings such as the use of questionable evidence, and did not comply with the requirements of Article 6(1). The judgment awarded Mr. Mammadov 10,000 EUR as just satisfaction but did not mention other execution measures.

### The supervision of the execution of the Mammadov judgments

The first Mammadov judgment became final on 13 October 2014 and, according to the action plan – a document describing the measures envisaged by the state in order to execute the judgment – submitted by Azerbaijan to the CoM at the end of November 2014, the measures that the authorities intended to take included the distribution of the judgment to the Supreme Court “to be taken into account” during Mr. Mammadov's forthcoming trial, trainings of judges regarding the implementation of the Supreme Court Plenum's 2009 ruling on pre-trial detention, and trainings of prosecutors.<sup>54</sup>

During the very first examination of the case, which was assigned to the enhanced supervision track<sup>55</sup> due to the perceived need for “urgent individual measures,” at the 1214<sup>th</sup> DH meeting in December 2014, the CoM asked for Mr. Mammadov's release “without delay” as the “first important measure,” as well as for the information about other measures necessary to erase as far as possible the “remaining consequences for the applicant of the serious violations established.”<sup>56</sup> In this case, the CoM was tasked with supervision of the execution of a judgment, which no longer corresponded to the applicant's factual situation, namely, Mr. Mammadov was no longer in pre-trial detention as discussed in the first Mammadov judgment, but was imprisoned following the first instance court's ruling, and the appellate proceedings were pending. Whereas the Court has found Mr. Mammadov's arrest and pre-trial detention to be contrary to the Convention, there was no such decision concerning the ongoing trial. However, in the view of the DEJ and the CoM, the violations established in the first

<sup>52</sup> ECtHR, *Ilgar Mammadov v. Azerbaijan (No. 2)* (Application No. 919/15), 16 November 2017 (final on 5 March 2018).

<sup>53</sup> The ECtHR noted that although the present case dealt with different legal issues, it concerned “the same criminal proceedings against the applicant involving the same charges stemming from the same events.” Para 203, *Ilgar Mammadov v. Azerbaijan (No. 2)*.

<sup>54</sup> Communication from Azerbaijan concerning the case of Ilgar Mammadov against Azerbaijan, Action Plan DH-DD(2014)1450, 26 November 2014.

<sup>55</sup> Enhanced supervision is applied to cases “requiring urgent individual measures, pilot judgments, judgments revealing important structural and/or complex problems as identified by the Court and/or by the Committee of Ministers, and interstate cases.” CoM, 12<sup>th</sup> Annual Report.

<sup>56</sup> CoM, Decision CM/Del/Dec(2014)1214, 4 December 2014.

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judgment “cast doubt on the merit of the criminal proceedings instituted against the applicant.”<sup>57</sup> Based on this rationale, the CoM concluded that the required individual measures consisted of the release of the applicant from detention as well as of other unspecified individual measures that would ensure *restitutio in integrum*. In terms of general measures, the CoM requested measures to ensure that criminal proceedings are not instituted without a legitimate basis and that an effective remedy is provided against such attempts. In addition, Azerbaijan was asked to adopt measures capable of preventing violations of the presumption of innocence. Finally, the CoM noted that the execution of measures necessary to address violations of Article 5 concerning the arrest and pre-trial detention were being examined together with another case.

Given the authorities slow response, the CoM started to increase pressure by expressing “very serious concern” in June 2015,<sup>58</sup> invoking Article 3 of the CoE’s Statute<sup>59</sup> in September 2015,<sup>60</sup> and explicitly mentioning the possibility of the infringement proceedings in December 2016.<sup>61</sup> The call for Mr. Mammadov’s release was supported by various NGOs, which described him as a “prisoner of conscience” and strongly encouraged the CoM to launch the infringement proceedings against Azerbaijan.<sup>62</sup> At the end of 2015, Thorbjørn Jagland, then Secretary-General of the CoE, used his exclusive powers under Article 52 to initiate a formal inquiry into Azerbaijan’s response to the Mammadov judgment.<sup>63</sup> In June 2016, the CoM started to discuss the case not only during DH meetings, but also during the CoM’s regular meetings. In total, the CoM adopted 13 decisions and 5 interim resolutions concerning the case. In March 2017, the CoM was informed that Azerbaijan had paid the awarded just satisfaction of 22,000 EUR (the payment was made in 2014). Additionally, the Azerbaijani authorities noted that the President adopted an Executive Order

<sup>57</sup> CoM, Interim Resolution CM/ResDH(2015)43, 12 March 2015; Notes on the Agenda, CM/Notes/1243/H46-4, 10 December 2015.

<sup>58</sup> CoM, Decision CM/Del/Dec(2015)1230/5, 11 June 2015.

<sup>59</sup> Article 3, Statute of the CoE: “Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.”

<sup>60</sup> CoM, Interim Resolution CM/ResDH(2015)156, 24 September 2015.

<sup>61</sup> CoM, Decision CM/Del/Dec(2016)1273/H46-3, 8 December 2016.

<sup>62</sup> For example, Amnesty International, “Azerbaijan’s Supreme Court decision to leave Ilgar Mammadov in jail is an affront to human rights and the Council of Europe,” 21 November 2016, at: <https://www.amnesty.org/download/Documents/EUR5551872016ENGLISH.pdf>; Amnesty International and Human Rights Watch, “Letter in Support of the Infringement Procedure Under Article 46(4) on Ilgar Mammadov v. Azerbaijan,” 20 October 2017, at: <https://www.amnesty.eu/news/support-infringement-procedure-under-article-46-4-echr-on-ilgar-mammadov-v-azerbaijan/>; International Partnership for Human Rights (IPHR), “Azerbaijan: Time for Justice for Ilgar Mammadov (signed by 44 NGOs),” 22 May 2017, at: <https://www.iphronline.org/azerbaijan-time-justice-ilgar-mammadov.html>; International Partnership for Human Rights (IPHR), “Open letter: President Macron should urge release of prisoners of conscience at 20 July meeting with Azerbaijani President Aliyev,” 18 July 2018, at: <https://www.iphronline.org/open-letter-president-macron-should-urge-release-of-prisoners-of-conscience-at-20-july-meeting-with-azerbaijani-president-aliyev.html>.

<sup>63</sup> Article 52 (Inquiries by the Secretary General): “On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention.” The article has been used only a handful of times.

that might address some of the problems that led to the violations found in the first *Mammadov* judgment. However, given that Mr. Mammadov remained imprisoned, on 25 October 2017, the CoM adopted an interim resolution, which constituted a formal notice to Azerbaijan regarding the intention to initiate infringement proceedings under Article 46(4).<sup>64</sup> Finally, in an interim resolution dated 5 December 2017, the CoM asked the ECtHR whether, by failing to ensure Ilgar Mammadov's release from detention, Azerbaijan "refused to abide" by the *Ilgar Mammadov v. Azerbaijan* judgment.<sup>65</sup> According to the CoM's submission to the Grand Chamber, the failure of Azerbaijani authorities to release Mr. Mammadov "could no longer be characterized as a delay in execution but instead had to be recognized as a refusal to execute."<sup>66</sup> In addition, the CoM pointed out the disagreement with the Government of Azerbaijan regarding the scope of the required execution measures with the latter arguing that given a lack of an explicit reference to Mammadov's release in the ECtHR's judgment, the adopted measures were sufficient to achieve compliance.<sup>67</sup>

The second *Mammadov* judgment became final on 5 March 2018. By then, Mr. Mammadov had not been free for around four years, including the period of his pre-trial detention. After the judgment, the applicant asked the domestic courts to reopen the case and on 13 August 2018, the Shaki Court of Appeal commuted Mr. Mammadov's sentence and granted him conditional release from prison with a two-year probation period. On 28 March 2019, the Supreme Court of Azerbaijan upheld the conviction but reduced the sentence to the time already served and removed the conditions set by the Shaki Court of Appeal. In December of 2019, the applicant's lawyer informed the CoM that Azerbaijan finally paid the awarded just satisfaction, but not the interest rate.<sup>68</sup>

### The Grand Chamber's judgment of 29 May 2019

In a ruling of more than sixty pages, the Grand Chamber tackled the question of whether Azerbaijan had failed to fulfill its obligation under Article 46(1) to comply with the first *Mammadov* judgment. In the judges' own words, their task consisted of

<sup>64</sup> CoM, Interim Resolution CM/ResDH(2017)379, 25 October 2017.

<sup>65</sup> CoM, Interim Resolution CM/ResDH(2017)429, 5 December 2017.

<sup>66</sup> Para 122, *Proceedings under Article 46(4)*.

<sup>67</sup> The authorities noted that Azerbaijan has paid just satisfaction and that the final decision of the appeal court finding the applicant guilty had been quashed by a higher court. According to the Government, the findings of the ECtHR's judgment were "taken into account" by the domestic courts, which regardless reached the same conclusion as the lower courts. In terms of general measures, the Government referred to the Executive Order of the President of 2017 "On improvement of operation of penitentiary humanization of penal policies and extension of application of alternative sanctions and non-custodial procedural measures of restraint." According to the Government, the document addressed several issues raised by the Mammadov judgment, such as the use of alternative measures of restraint, humanization of penal policies, and others. In addition, the Azerbaijani Parliament has adopted a law introducing amendments to criminal law and procedure, such as alternative sanctions to imprisonment and simplified rules for early release.

<sup>68</sup> Communication from the applicant (02/12/2019) in the ILGAR MAMMADOV group v. Azerbaijan (Applications No. 15172/13, 919/15), DH-DD(2019)1439, 2 December 2019.

making “a definite legal assessment of the question of compliance.”<sup>69</sup> The ruling explained that in order not to upset the “fundamental institutional balance” between the CoM and the Court, the judges would make their assessment giving “due regard” to the CoM’s conclusions as well as taking into account the position of Azerbaijan and the views of Mr. Mammadov. The CoM argued that the finding of Article 18 violation “challenged the foundation of the criminal proceedings against the applicant”<sup>70</sup> and that in over 3 years the Azerbaijani authorities did not demonstrate “the intention of taking the necessary action.”<sup>71</sup> Mr. Mammadov’s position was similar to that of the CoM, but in his view, the Government also should “unequivocally recognize” that his detention was contrary to both the Convention and the laws of Azerbaijan.<sup>72</sup>

The Grand Chamber’s ruling reiterated well-established principles related to judgment execution, such as the declaratory nature of the Court’s judgments and the states’ margin of appreciation in choosing the execution measures. It also noted that while restitution was the preferred individual measure, under certain circumstances the state was exempted from this obligation, “provided that it can show that such circumstances obtain.”<sup>73</sup> The judgment emphasized that states had to execute judgments effectively, “in good faith” and “in a manner compatible with their conclusions and spirit.”<sup>74</sup> According to the judges: “A total or partial failure to execute a judgment of the Court can engage the State Party’s international responsibility.”<sup>75</sup>

Before assessing Azerbaijan’s behaviour, the judges addressed several procedural aspects of the case. First, they explained that Article 46 did not exclude the possibility for the CoM to withdraw its referral and noted that the CoM chose not to do so in the present case. Second, the judges decided to limit the temporal scope of the analysis to the date of the CoM’s referral, which, in their view, was “the date by which [the CoM] has deemed that the State in question has refused to abide by a final judgment within the meaning of Article 46(4) because it could not consider the State’s actions to be ‘timely, adequate and sufficient’.”<sup>76</sup> According to Azerbaijan, given Mr. Mammadov’s release in 2018, the case was “resolved” and there was no need for further examination of the question under Article 46(4).<sup>77</sup> The Grand Chamber, however, decided to remain “seised of the case referred to it.”<sup>78</sup> Furthermore, the judges decided to focus only on individual measures, namely, “whether there has been a failure by the Republic of Azerbaijan to adopt the individual measures required to abide by the Court’s judgment regarding the violation of Article 18 taken in conjunction with

<sup>69</sup> Para 168, *Proceedings under Article 46(4)*.

<sup>70</sup> Para 120, *Proceedings under Article 46(4)*.

<sup>71</sup> Para 122, *Proceedings under Article 46(4)*.

<sup>72</sup> Para 135, *Proceedings under Article 46(4)*.

<sup>73</sup> Para 151, *Proceedings under Article 46(4)*.

<sup>74</sup> Para 149, *Proceedings under Article 46(4)*.

<sup>75</sup> Para 150, *Proceedings under Article 46(4)*.

<sup>76</sup> Para 170, *Proceedings under Article 46(4)*.

<sup>77</sup> Paras 143 and 146, *Proceedings under Article 46(4)*.

<sup>78</sup> Para 146, *Proceedings under Article 46(4)*.

Article 5.”<sup>79</sup> According to the judgment, the questions of just satisfaction and general measures that were being supervised together with other cases “[did] not require detailed examination.”<sup>80</sup>

In order to assess Azerbaijan’s compliance, the Grand Chamber determined the legal obligations arising from the first *Mammadov* judgment and compared them to the measures adopted by Azerbaijan. However, as mentioned earlier, instead of assessing Azerbaijan’s compliance with *all* the measures, it narrowed down the scope of the proceedings to individual measures arising from the violation of Article 18 together with Article 5. It also did not take into account the developments after that date. The judgment established that a lack of indication of concrete execution measures in the text of the judgment was not decisive for the assessment of compliance.<sup>81</sup> Thus, the Court rejected one of Azerbaijan’s main arguments. Furthermore, the Grand Chamber held that the first *Mammadov* judgment required Azerbaijan to “eliminate the negative consequences of the imposition of charges which the Court found to be abusive.”<sup>82</sup> More specifically, the judgment required Azerbaijan to lift or annul criminal charges as well as to end Mr. Mammadov’s pre-trial detention.<sup>83</sup> Like the CoM, the judges argued that any subsequent criminal proceedings were “vitiated” by bad faith charges.<sup>84</sup> Taking into account that Mr. Mammadov’s pre-trial detention has ended with his conviction, the judgment noted that: “The primary obligation of *restitutio in integrum* therefore still required that the negative consequences of the imposition of the impugned criminal charges be eliminated, including by his release from detention.”<sup>85</sup> The judges mentioned that Azerbaijan took “some steps” toward executing the judgment, such as paying the monetary compensation to Mr. Mammadov and submitting an action plan envisaging other execution measures, but that these “limited steps” could not demonstrate that it has acted “‘in good faith’ in a manner compatible with the ‘conclusions and spirit’ of the first Mammadov judgment, or in a way that would make practical and effective the protection of the Convention rights which the Court found to have been violated in that judgment.”<sup>86</sup> As a result, by failing to abide by the first *Mammadov* judgment, Azerbaijan violated Article 46(1). The judgment did not award any compensation or ordered other remedies.

Although the ruling was unanimous, seven judges issued separate (concurring) opinions.<sup>87</sup> In a joint opinion, seven judges disagreed with the majority’s interpreta-

<sup>79</sup> Para 176, *Proceedings under Article 46(4)*.

<sup>80</sup> Para 177, *Proceedings under Article 46(4)*.

<sup>81</sup> Para 186, *Proceedings under Article 46(4)*.

<sup>82</sup> Para 190, *Proceedings under Article 46(4)*.

<sup>83</sup> Para 192, *Proceedings under Article 46(4)*.

<sup>84</sup> The judgment is not entirely clear on this point. For example, in paragraph 208, the judges note that the criminal proceedings failed “to redress” the problems found in the first judgment. However, if the proceedings as such were “vitiated”, how could they possibly redress the initial violations?

<sup>85</sup> Para 192, *Proceedings under Article 46(4)*.

<sup>86</sup> Para 217, *Proceedings under Article 46(4)*.

<sup>87</sup> Joint concurring opinion of Judges Judkivska (Ukraine), Pinto de Albuquerque (Portugal), Wojtyczek (Poland), Dedov (Russia), Motoc (Romania), Poláčková (Slovakia) and Hüseynov (Azerbaijan); Concurring Opinion of Judge Wojtyczek and Concurring Opinion of Judge Motoc.

tion of the legal obligation arising from the first *Mammadov* judgment.<sup>88</sup> Based on the second *Mammadov* judgment, which mentioned the possibility “to compensate the deficiencies” of the first *Mammadov* judgment during the subsequent trial,<sup>89</sup> the judges argued that the CoM “could not indicate that the only means of executing that judgment was Mr. Mammadov’s immediate (unconditional) release.”<sup>90</sup> In their view, the Court’s silence on the execution measures in the first judgment could be interpreted as giving Azerbaijan the option of redressing the violation by other means: “The national authorities could still remedy the situation and the deficiencies identified could still be compensated for by the domestic courts.”<sup>91</sup> Thus, given that the trial, which ended on 18 November 2016, failed to achieve this, Azerbaijan was in breach of Article 46(1). The judges expressed a critical view of the CoM’s supervising role in the case and went as far as to describe the CoM’s request for Mr. Mammadov’s release before the end of the domestic proceedings as “an interference” with justice.<sup>92</sup> In an individual concurring opinion, Poland’s Judge Wojtyczek questioned the CoM’s competence to decide on the scope of the execution measures as, in his view, the determination of the legal consequences of the violation “goes to the core of the judicial function.”<sup>93</sup>

### The developments after the Grand Chamber’s judgment

In the Action Plan submitted ahead of the CoM’s September DH meeting, the Azerbaijani authorities noted that on 13 August 2018 Ilgar Mammadov was released from detention, that the awarded just satisfaction has been paid, and that the ECtHR’s May 29<sup>th</sup> judgment was forwarded to the Supreme Court “for examination.”<sup>94</sup> The document vowed to inform the CoM about further developments in the case “in due course.”<sup>95</sup> In addition, the submission discussed a long list of general measures aimed at the humanization of the penal policy, improving the independence of the judiciary, and elimination of corruption. More specifically, it mentioned such measures as the

<sup>88</sup> In the view of Kanstantsin Dzehtsiarou, the opinion was concurring “in name only,” given that the judges disagreed on the main aspect of the case. In his view, the concurring vote was made “using the interests of fairness and humanity rather than reasoning based on law.” Kanstantsin Dzehtsiarou, “How many judgments does one need to enforce a judgment? The first ever infringement proceedings at the European Court of Human Rights,” *Strasbourg Observers*, 4 June 2019, at: <https://strasbourgobservers.com/2019/06/04/how-many-judgments-does-one-need-to-enforce-a-judgment-the-first-ever-infringement-proceedings-at-the-european-court-of-human-rights/>.

<sup>89</sup> Para 203, *Ilgar Mammadov v. Azerbaijan* (No. 2).

<sup>90</sup> Para 20, Joint Concurring Opinion, *Proceedings under Article 46(4)*.

<sup>91</sup> Para 9, Joint Concurring Opinion, *Proceedings under Article 46(4)*.

<sup>92</sup> Paras 17–19, Joint Concurring Opinion, *Proceedings under Article 46(4)*.

<sup>93</sup> Para 8, Concurring Opinion of Judge Wojtyczek, *Proceedings under Article 46(4)*. See, also, a book chapter by Judge Wojtyczek discussing the Court’s role in the enforcement of its judgments. Krzysztof Wojtyczek, “Judicial and Non-Judicial Elements in the Enforcement Mechanism of the European Convention on Human Rights” in Paulo Pinto de Albuquerque and Krzysztof Wojtyczek (eds.), *Judicial Power in a Globalized World Liber Amicorum Vincent De Gaetano*, Springer (2019), pp. 653–672.

<sup>94</sup> Communication from Azerbaijan concerning the ILGAR MAMMADOV group of cases v. Azerbaijan (Application No. 15172/13), DH-DD(2019)1033, 20 September 2019.

<sup>95</sup> *Ibid.*

President's Executive Order "On improvement of operation of penitentiary, humanization of penal policies and extension of application of alternative sanctions and non-custodial procedural measures of restraint," amendments to the Criminal Procedure Code, increased powers of the Judicial Legal Council, an increase in the number of judges etc. Whereas some of these reforms pre-dated the *Mammadov* judgment raising questions about their relevance, the document also did not discuss the practical impact of these measures.<sup>96</sup>

Ilgar Mammadov's lawyer also made several submissions to the CoM ahead of both September and December DH meetings. The communication dated 8 August 2019 noted that in accordance with domestic legislation, the ECtHR's judgments had to be executed by the Supreme Court of Azerbaijan, which was obliged to conduct a hearing of the case within three months after receiving the ECtHR's judgment.<sup>97</sup> With the reference to the May 29<sup>th</sup> judgment, the submission maintained that the fact that the charges against the applicant have not been lifted or annulled constituted a "failure to take all the necessary individual measures required for the execution of the 2014 judgment of the Court."<sup>98</sup> The document also pointed out bad faith on behalf of the Azerbaijani authorities and encouraged the CoM to "resolutely discourage any further time-buying manipulations."<sup>99</sup> Another communication highlighted Azerbaijan's failure to execute both judgments, including the Grand Chamber's Article 46 ruling, which was only sent to the Supreme Court on September 12<sup>th</sup>, leaving "almost no chance" that the Supreme Court would issue a judgment before the CoM's DH meeting in December.<sup>100</sup> In addition, Mr. Mammadov's lawyer requested the CoM to resume the examination of the case in its regular meetings "in order to resolutely discourage any further time-buying manipulations by the authorities willing to deprive the Grand Chamber judgment of its non-theoretical value."<sup>101</sup>

During the examination of the case in the September DH meeting, the CoM invoked Article 46(5), but noted that the measures "to be taken" were "individual and general measures"<sup>102</sup> and in this way avoided directly addressing the question of po-

<sup>96</sup> For example, in 2020, Freedom House described Azerbaijan's judicial system in the following way: "The judiciary is corrupt, inefficient, and subservient to the executive. Although nominally independent, the Bar Association acts on the orders of the Ministry of Justice, and is complicit in the harassment of human rights lawyers." Freedom House, *Freedom in the World 2019*. At: <https://freedomhouse.org/report/freedom-world/2019/azerbaijan>.

<sup>97</sup> Communication from the applicant (08/08/2019) in the cases of ILGAR MAMMADOV and ILGAR MAMMADOV (No. 2) v. Azerbaijan (Applications No. 15172/13, 919/15), 8 August 2019.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> Communication from the applicant (08/08/2019) in the cases of ILGAR MAMMADOV and ILGAR MAMMADOV (No. 2) v. Azerbaijan (Applications No. 15172/13, 919/15), DH-DD(2019)865, 14 November 2019.

<sup>101</sup> *Ibid.*

<sup>102</sup> According to the "Notes on the Agenda" for the September DH meeting: "The word 'measures' here can be taken as referring both to the measures to be taken by the respondent State and the measures to be taken by the Committee in response to the finding of infringement. It is proposed at this first examination following the Article 46 § 4 judgment that the Committee should consider the measures that should be taken by Azerbaijan to execute the Ilgar Mammadov judgment." Notes on the Agenda, CM/Notes/1355/H46-2, 25 September 2019.

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litical consequences of the Court's finding of the violation of Article 46(1).<sup>103</sup> Moreover, referring to the Grand Chamber's ruling, the decision stated that it "made it clear" that Azerbaijan was required to "rapidly eliminate all the remaining negative consequences of the criminal charges brought against each of the applicants, principally by ensuring that the convictions are quashed and deleted from the criminal record."<sup>104</sup> Moreover, the decision "strongly encouraged" the Azerbaijani authorities to "continue with the adoption of effective and comprehensive measures to further enhance the independence of the judiciary and the Prosecutor's Office" as well as to ensure that there "are no further retaliatory prosecutions, arbitrarily arrests and detention or other misuse of criminal law against government critics, civil society and human-rights defenders."<sup>105</sup>

A decision adopted at the CoM's December DH meeting pointed out a "troubling pattern of arbitrary arrest and detention of government critics, civil society activists and human rights defenders through retaliatory prosecutions and misuse of criminal law in defiance of the rule of law", and reiterated the request to adopt individual measures indicated earlier.<sup>106</sup> On 5 March 2020 the deputies adopted an interim resolution requesting the authorities to take "all the necessary individual measures... without further delay and to report to the Committee by 30 April 2020 at the latest."<sup>107</sup> The CoM's 2020 Annual Report described the *Mammadov* case as an example of "resistance to execution" and hinted that the application of more serious measures under Article 46(5) to address the "situation of unprecedented gravity" should not be ruled out.<sup>108</sup>

However, on 23 April 2020, the Supreme Court of Azerbaijan having taken into account "new facts related to the violation of rights and freedoms, as clarified in the Judgment of the Grand Chamber" in a one-page ruling quashed Ilgar Mammadov's previous convictions and awarded him 127,000 EUR for non-pecuniary damage.<sup>109</sup> Whereas the CoE's Secretary-General welcomed the ruling that "eliminated all the consequences" of the criminal charges brought against the applicant,<sup>110</sup> the domestic reactions were less jubilant. According to some experts, the acquittals might have depended on some type of "dialogue" between the Government and Mr. Mammadov's REAL party that has for the first time won a seat in the Azerbaijani parlia-

<sup>103</sup> CoM, Decision CM/Del/Dec(2019)1355/H46-2, 25 September 2019.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> CoM, Decision CM/Del/Dec(2019)1362/H46-2, 5 December 2019.

<sup>107</sup> CoM, Interim Resolution CM/ResDH(2020)47, 5 March 2020.

<sup>108</sup> CoM, 13<sup>th</sup> Annual Report, p. 9.

<sup>109</sup> The same ruling also acquitted Rasul Jafarov – a human rights defender who won his case before the ECtHR in 2016. See, Communication from Azerbaijan concerning the cases of ILGAR MAMMADOV v. Azerbaijan (Application No. 15172/13) and RASUL JAFAROV v. Azerbaijan (Application No. 69981/14), DH-DD(2020)365, 27 April 2020.

<sup>110</sup> CoE, "Secretary General: acquittal of Ilgar Mammadov and Rasul Jafarov is to be welcomed," 23 April 2020, at: <https://www.coe.int/en/web/portal/-/secretary-general-welcomes-acquittal-of-ilgar-mammadov-and-rasul-jafarov>.

ment.<sup>111</sup> In June, Mr. Mammadov communicated to the CoM that he was satisfied with the Supreme Court's ruling and expressed his gratitude for making "this success possible."<sup>112</sup> On 3 September 2020, the CoM adopted a final resolution, which noted that the applicant's release and the Supreme Court's ruling resolved the question of individual measures, and closed the supervision of the case while continuing to supervise the implementation of general measures together with other cases.<sup>113</sup>

## Concluding remarks

In its May 29<sup>th</sup> ruling, the ECtHR had for the first time to formally assess a state's judgment (non)compliance as part of the infringement proceedings under Article 46(4) and found that Azerbaijan was the first country ever to have violated Article 46(1) of the Convention. What should one make of this process, and have the infringement proceedings fulfilled their *raison d'être*?

To begin with, although the mobilization of the political will to launch the proceedings should be assessed positively, by providing better and more transparent reasoning for the choice of the case, the CoM could have strengthened the perceived legitimacy of the proceedings given that Azerbaijan is not the only country that could be seen as "refusing" to abide by the judgment of the ECtHR.<sup>114</sup> While many countries have judgments that have not been executed for some time,<sup>115</sup> Russia has *openly* declared two judgments of the ECtHR as "impossible" to execute<sup>116</sup> and has failed to fully execute numerous other judgments.<sup>117</sup> One of such judgments concerns Alexei Navalny, an opposition leader and a prominent critic of President Putin who together with his brother Oleg in 2014 was convicted for money laundering and fraud, and

<sup>111</sup> OC Media, "Azerbaijani activists react with scepticism to ReAl party acquittals," 25 April 2020, at: <https://oc-media.org/azerbaijani-activists-react-with-scepticism-to-real-party-acquittals/>.

<sup>112</sup> Communication from the applicant (03/06/2020) in the cases of ILGAR MAMMADOV and Ilgar Mammadov (No. 2) v. Azerbaijan (Applications No. 15172/13, 919/15), DH-DD(2020)486, 5 June 2020.

<sup>113</sup> CoM, Final Resolution CM/ResDH(2020)178, 3 September 2020.

<sup>114</sup> Dzehtsiarou notes that other cases of political imprisonment did not trigger the infringement proceedings. Kanstantsin Dzehtsiarou, "Mammadov v. Azerbaijan: It Is about Effectiveness of the Strasbourg System," *Strasbourg Observers*, 15 June 2018, at: <https://strasbourgobservers.com/2018/06/15/mammadov-v-azerbaijan-it-is-about-effectiveness-of-the-strasbourg-system/>.

<sup>115</sup> According to the latest data, in 2020, 634 leading cases have been pending for longer than 5 years. CoM, 14<sup>th</sup> Annual Report.

<sup>116</sup> See Kanstantsin Dzehtsiarou, Sergey Golubok, and Maxim Timofeev, "The Russian Response to the Prisoner Voting Judgment," *ECHR Blog*, 29 April 2019, at: <http://echrblog.blogspot.com/2016/04/the-russian-response-to-prisoner-voting.html>; Maxim Timofeyev, "Money Makes the Court Go Round: The Russian Constitutional Court's Yukos Judgment," *Verfassungsblog*, 26 January 2017, at: <https://verfassungsblog.de/money-makes-the-court-go-round-the-russian-constitutional-courts-yukos-judgment/>.

<sup>117</sup> See, for example, a submission to the CoM by the European Human Rights Advocacy Centre asking the CoM to launch the infringement proceedings against Russia on the basis of its non-compliance with the *Isayeva v. Russia* judgment, which has been pending execution since 2005. Communication from an NGO (EHRAC – European Human Rights Advocacy Centre) (30/07/12) in the case of Zara Isayeva against the Russian Federation (Application No. 57950/00), 22 August 2012.

received a suspended conditional sentence.<sup>118</sup> In 2017, in *Navalnyye v. Russia*<sup>119</sup> the ECtHR found that the domestic proceedings were unfair and in breach of *nullum crimen sine lege* principle enshrined in Article 7. Following the ECtHR's ruling Russia's Supreme Court reopened the impugned proceedings, but upheld the applicants' convictions.<sup>120</sup> According to the information on HUDOC-EXEC, the Supreme Court "reiterated the findings of the trial court."<sup>121</sup> On 2 February 2021 upon his return from Germany Mr. Navalny's sentence was converted to real imprisonment. In March 2021, his lawyer asked the CoM to launch the infringement proceedings against Russia on the basis of Russia's "absolute disrespect" towards its obligations and a "constant refusal" to abide by the ECtHR's judgments.<sup>122</sup> In its 11 March 2021 decision the CoM expressed "grave concern" about the Supreme Court's ruling as well as "profound concern" about Navalny's imprisonment.<sup>123</sup> The decision noted that the punishment was against the "conclusions and spirit" of the Court's judgment and asked the Russian authorities to "take all possible measures" to reverse the convictions and to release Mr. Navalny "without delay."<sup>124</sup> On 9 June 2021, the CoM adopted an interim resolution expressing "grave concern" about continued detention of Mr. Navalny and "strongly urged" the Russian authorities to secure his "immediate release", to quash the convictions of both applicants, and to issue a reimbursement for the fines and damages they have paid.<sup>125</sup>

Even though Article 18 violation was not established in *Navalnyye* case<sup>126</sup> (the Court has, however, established Article 18 violation in two other cases concerning Mr. Navalny), like the *Mammadov* case, it deals with an unlawful deprivation of freedom of an opposition activist – hence, the case contains a similar humanitarian aspect. Moreover, the *Navalnyye* case has been pending execution for a similar amount of time (around 3 years) as the *Mammadov* ruling when the CoM decided to make a formal referral to the Court. Although Alexei Navalny has been free until this February, the actions of the Russian authorities could hardly be seen as compatible with the principles laid down by the Grand Chamber in its May 29<sup>th</sup> ruling. It remains to be seen, however, whether the CoM will be able to find sufficient political will

<sup>118</sup> To date, the ECtHR has issued 7 judgments in favour of Alexei Navalny. The supervision of the execution of all 7 judgments is ongoing meaning that Russia has not complied with them.

<sup>119</sup> ECtHR, *Navalnyye v. Russia* (Application no. 101/15), 17 October 2017 (final on 5 March 2018).

<sup>120</sup> Communication from the Secretariat (04/06/2018) – English translation of the Judgment of the Presidium of the Supreme Court of the Russian Federation on the reopening of proceedings in a criminal case in *Navalnyye v. Russian Federation* (Application No. 101/15), DH-DD(2018)563, 4 June 2018, at: [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD\(2018\)563E%22%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD(2018)563E%22%7D).

<sup>121</sup> CoM, Notes on the Agenda, CM/Notes/1398/H46-39, 11 March 2021.

<sup>122</sup> Communication from the applicant (05/02/2021) in the cases of *Navalnyye* and *Navalnyy v. Russian Federation* (Applications No. 101/15, 29580/12) (appendices in Russian are available at the Secretariat upon request), DH-DD(2021)15, 8 February 2021.

<sup>123</sup> CoM, Decision CM/Del/Dec(2021)1398/H46-39, 11 March 2021.

<sup>124</sup> *Ibid.*

<sup>125</sup> CoM, Interim Resolution CM/ResDH(2021)107, 9 June 2021.

<sup>126</sup> See, joint partly dissenting opinion of Judges Keller and Dedov arguing that the proceedings against Navalny were "abusive" and "may have served an illegitimate and undemocratic purpose." *Navalnyye v. Russia*.

to launch the infringement proceedings against Russia. Such action, without doubt, would strengthen the authority of the CoM and the legitimacy of the proceedings.

Turning to the question of effectiveness, while the proceedings *might* have contributed to the eventual execution of individual measures more than 2 years after their formal start, Azerbaijan still has not complied fully with the judgment's general measures. Thus, contrary to the expectations of the drafters of Protocol No. 14, the proceedings did not lead to the full execution of the ECtHR's initial judgment. This is partly due to the CoM's and the Court's choice to keep the focus of the proceedings on individual measures. On the one hand, Article 46 does not specify the measures that could be taken against the state found in breach of Article 46(1) and, in theory, even the most serious measures could not have been excluded. Given that the proceedings have never been applied before, the uncertainty regarding the possible consequences might have nudged Azerbaijan towards compliance. On the other hand, given Mr. Mammadov's high profile, the amount of publicity the case received, and the fact that other channels of pressure were also used, it is not certain to what extent Mr. Mammadov's release and acquittal resulted from the proceedings alone.<sup>127</sup> Besides, as noted in a communication to the CoM by Mr. Mammadov's lawyer, the cost of non-compliance included "5.5 years of suffering in prison and deprivation of election rights since 2013..."<sup>128</sup>

Lastly, despite the finding of the violation of Article 46(1) that according to some commentators was the "only politically plausible decision,"<sup>129</sup> the ECtHR's approach can be described as cautious.<sup>130</sup> The ruling's positive contribution was addressed by Başak Çali who highlighted, among other things, the potential of the ruling in "preventing states from hiding behind judgments that are silent on individual remedies."<sup>131</sup> At the same time, she criticized the judgment for its narrow scope.<sup>132</sup> While such fo-

<sup>127</sup> Elizabeth Lambert discussed extensive efforts to secure Mr. Mammadov's release, such as the requests from various NGOs, a bill by the US Congress, and the discussion before the UK Parliament. Elizabeth Lambert, "The First Infringements Proceedings within the European System of Human Rights: Using the Court as the Last Bastion for the Credibility of the Council of Europe," *European Human Rights Review* Issue 4 (2018): 325–335. Elizabeth Lambert, "The First Infringements Proceedings within the European System of Human Rights: Using the Court as the Last Bastion for the Credibility of the Council of Europe," *European Human Rights Review* Issue 4 (2018): 325–335.

<sup>128</sup> Communication from the applicant (08/08/2019) in the cases of ILGAR MAMMADOV and ILGAR MAMMADOV (No. 2) v. Azerbaijan (Applications No. 15172/13, 919/15), 14 November 2019.

<sup>129</sup> Kanstantsin Dzehtsiarou, "How many judgments does one need to enforce a judgment? The first ever infringement proceedings at the European Court of Human Rights," *Strasbourg Observers*, 4 June 2019, at: <https://strasbourgobservers.com/2019/06/04/how-many-judgments-does-one-need-to-enforce-a-judgment-the-first-ever-infringement-proceedings-at-the-european-court-of-human-rights/>.

<sup>130</sup> In 2017, Elizabeth Lambert questioned whether, given the judges' reluctance in having the infringement proceedings in the first place, the ECtHR would be willing "to take a clear and strong view on the implementation of its previous judgment." Elizabeth Lambert, "The First Infringements Proceedings within the European System of Human Rights." Also, see, S. Flogaitis, T. Zwart, and J. Fraser, *The European Court of Human Rights and Its Discontents: Turning Criticism into Strength*, Cheltenham: Edward Elgar (2013).

<sup>131</sup> Başak Çali, "No Going Nuclear in Strasbourg: The Infringement Decision in Ilgar Mammadov v. Azerbaijan by the European Court of Human Rights," *Verfassungsblog*, 30 May 2019, at: <https://verfassungsblog.de/no-going-nuclear-in-strasbourg/>, DOI: 10.17176/20190531-001842-0.

<sup>132</sup> *Ibid.*

cus might make sense when a country is acting in good faith, it is more questionable in cases like that of Azerbaijan, where progress in adopting general measures has been slow. Faced with Azerbaijan's poor compliance record,<sup>133</sup> including its failure to adopt effective general measures in the *Mammadov* case<sup>134</sup> and the seriousness of Article 18 violations, the CoM and the ECtHR could have used the infringement proceedings to put pressure on Azerbaijan to comply with the entire *Mammadov* judgment, not just one of its aspects. The Grand Chamber's "praise" of Azerbaijan for taking "limited steps" that were excluded from the scope of the legal analysis and in light of its bad faith behavior seems uncalled for. It is understandable that countries deserve credit for their efforts to comply with the Court's judgments, but Azerbaijan has hardly done anything to implement the measures under consideration. On the contrary, as noted in the ruling, Mr. Mammadov's conviction and the rejection of the ECtHR's findings were confirmed at the highest judicial level.<sup>135</sup> Finally, the judges' disagreement about the required individual measure demonstrates that the "reading" of the Court's judgments for their legal obligations is not always straightforward, and might benefit from the Court's guidance in such cases.

To conclude, the limited success of the first infringement proceedings might have depended on the inherent limitations of the mechanism, which is not likely to have the same effect on all countries and judgments. The proceedings demonstrated that as long as states eventually comply (even after a substantial and bad faith delay), they will not face any consequences. However, the question about the consequences in case of persistent non-compliance even after the Grand Chamber's ruling remains open. Thus, it is of utmost importance that the future cases are selected in a transparent manner and on objective grounds, and send an unequivocal message to the member states that there are red lines and that crossing them will not be without consequences.

<sup>133</sup> Elizabeth Lambert has estimated that in 2017 Azerbaijan's rate of judgment compliance was just 1.5 percent – the lowest of all the CoE states. Elizabeth Lambert, "The First Infringements Proceedings within the European System of Human Rights."

<sup>134</sup> On 7 November 2019, in *Natig Jafarov v. Azerbaijan*, the ECtHR again found Azerbaijan in breach of Article 18 together with Article 5.

<sup>135</sup> In para 212, the judgment noted that despite the ECtHR's two judgments, the 2019 ruling of the Supreme Court of Azerbaijan "confirmed Mr. Mammadov's conviction at the highest judicial level" while rejecting the findings of the ECtHR. *Proceedings under Article 46(4)*.

# *Do They Feel Welcome when Returning Home?* Intuitive Law of Internationally Mobile Students: the Case of the Russian Global Education Program

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## *Abstract*

By exploring the Russian Global Education Program as a case of outward student mobility policy created through and backed by law, the article analyzes the impact of the legal dimension of said program on students' return and employment decisions from the viewpoint of the socio-legal theory and methodology developed by Leon Petrazycki (1867–1931).

Based on the analysis conducted herein, the article argues that besides traditionally identified economic, political and social conditions that are known to affect highly skilled migrants' (including students') return and employment plans, there are also often overlooked legal factors existing in their countries of origin that can influence their (un)willingness to return and work at home. The latter factors are revealed and explained on the grounds of internationally mobile students' intuitive law (understanding of justice).

## Introduction

Increasing the international mobility of highly skilled specialists and students is regarded as one of the main modern migration trends determined by globalisation<sup>1</sup>. Among the growing migratory population, the numbers of international students<sup>2</sup> crossing borders in search of educational opportunities have risen exponentially. According to the UNESCO Institute for Statistics, in 2013, over 4.1 million students travelled abroad to study, a figure up from 2 million in 2000<sup>3</sup>. Therefore, this relatively new form of mass mobility attracts increasing policy and research attention in both sending and receiving countries.

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<sup>1</sup> Castles, S., De Haas, H. and Miller, M.J., 2014. *The Age of Migration: International Population Movements in the Modern World*. Basingstoke: Palgrave Macmillan, p. 112.

<sup>2</sup> The UNESCO Institute for Statistics and the OECD define as *international (or internationally mobile) students* those “who have crossed a national or territorial border for the purpose of education and are currently enrolled outside their country of origin” (Source: UNESCO Institute for Statistics Glossary available at <http://uis.unesco.org/en/glossary-term/international-or-internationally-mobile-students> [accessed on the 6th of May, 2017]; OECD, 2011).

<sup>3</sup> <http://glossary.uis.unesco.org/Education/Pages/international-student-flow-viz.aspx> [accessed on the 6th of May, 2017].

While receiving governments seek to attract foreign students, as their countries are known to benefit from international student migration, sending countries find themselves in a less favorable position, as the departure of highly skilled specialists and students is associated with ‘brain drain’ processes and corresponding loss of human capital<sup>4</sup>.

In the demanding circumstances of global competition for “the best and brightest,” governments experiencing high numbers of skilled professionals leaving their countries, in search of better places abroad, make significant efforts to implement policies aimed at strengthening their human resource capacity and encouraging highly skilled professional and international student return migration<sup>5</sup>.

In modern Russia, these intellectual migration trends are firmly associated with the aforementioned brain drain concept, supported nowadays by strong media opinion that the country is losing its human capital due to a new wave of emigration caused by a deep economic recession and governance shortcomings<sup>67</sup>. Some authors argue that this process may have long-term negative consequences on the country’s development, as the social group currently leaving Russia consists mainly of scientists, students, teachers, doctors, engineers and entrepreneurs<sup>8</sup>, or the so-called “creative class”<sup>9</sup>.

As one of the measures aimed at alleviating the above described problems of human capital depletion and the lack of qualified personnel for its economy, in 2013, Russia launched the Global Education Program<sup>10</sup> (hereinafter referred to as ‘the

<sup>4</sup> Castles, S., De Haas, H. and Miller, M.J., 2014. Footnote 1, p. 71; Gribble, C., 2008. Policy options for managing international student migration: the sending country’s perspective. *Journal of Higher Education Policy and Management*, 30(1), pp. 25–39; Kapur, D. and McHale, J., 2005. *Give us your best and brightest: The global hunt for talent and its impact on the developing world*. Washington, DC: Center for Global Development.

<sup>5</sup> Castles, S. and Miller, M. J., 2009. *The Age of Migration: International Population Movements in the Modern World*, 3rd Edition, Basingstoke: Palgrave Macmillan, p. 77; Kapur, D. and McHale, J., 2005. Footnote 4; Tejada et al. (eds.), 2014. *Indian Skilled Migration and Development, Dynamics of Asian Development*, DOI: 10.1007/978-81-322-1810-4\_1.

<sup>6</sup> <http://nationalinterest.org/feature/russia-losing-its-best-brightest-16572> [accessed on the 6th of May, 2017]; <https://themoscowtimes.com/articles/will-russias-brain-drain-dry-up-op-ed-48748> [accessed on the 6th of May, 2017]; <http://www.reuters.com/article/russia-putin-emigration-idUSL6N0PI4TH20140724> [accessed on the 6th of May, 2017].

<sup>7</sup> Ushkalov, I. & Malakha, I., 2001. The ‘Brain Drain’ as a Global Phenomenon and Its Characteristics in Russia, *Russian Social Science Review*, 42, 5, p. 79; Ganguli, I., 2014. Scientific Brain Drain and Human Capital Formation After the End of the Soviet Union, *International Migration*, 52, 5, pp. 95–110; Iontsev, V., Ryazantsev, S., & Iontseva, S., 2016. Emigration from Russia: New Trends and Forms, *Economy of Region / Ekonomika Regiona*, pp. 499–509; Iontsev, V., Magovedova A., 2015. Demographic Aspects of Human Capital Development in Russia and Its Regions. *Economy Of Region / Ekonomika Regiona* 43, no. 3: 89–102.

<sup>8</sup> Iontsev, Ryazantsev and Iontseva, 2016. Footnote 7.

<sup>9</sup> <http://imrussia.org/en/analysis/nation/2224-a-new-emigration-the-best-are-leaving-part-1> [accessed on the 6th of May, 2017].

<sup>10</sup> ‘Global Education’ is the short, unofficial name of the program. According to Decree No. 568 of the Government of the Russian Federation dated June 20, 2014, the program is officially named “The social support program for nationals of the Russian Federation who have independently enrolled and study at leading foreign educational institutions in specialties and fields of study, the quality of education in which meets the highest world standards, and providing their employment relevant to their qualification with organizations registered in the Russian Federation”. The title ‘Global Educa-

GEP' or 'the Program'),<sup>11</sup> regulated by Decree No. 967 of the President of the Russian Federation dated December 28, 2013, "On Measures to Enhance the Human Resource Capacity of the Russian Federation," and Decree No.568 of the Government of the Russian Federation dated June 20, 2014 (with subsequent amendments dated June 26, 2015 and March 15, 2017) under the order of the Ministry of Education and Science of the Russian Federation (the State Customer of the Program)<sup>12</sup>.

The GEP funds Russian citizens' full-time post-graduate studies abroad in the areas of science, engineering, medicine, education and social sphere management. GEP participants are expected to return to Russia upon completion of their studies and obtain employment in accordance with the qualification gained over a period of 3 years<sup>13</sup>. If the participants break certain GEP rules (e.g. evade return or employment), they will have to pay penalties to Russia, including all the money spent on their education and a fine twice again of this amount<sup>14</sup>.

Under such conditions the GEP aims "to build the highly-qualified human resources for Russian employers [included in the GEP approved list], especially those located in Siberian and Far Eastern Federal Regions, in order to facilitate modernization and implementation of innovative technologies and to realize the potential for future growth in social and economic spheres"<sup>15</sup> (in development).

By exploring the GEP as a case of outward student mobility policy created through and backed by law, the author claims that besides traditionally identified economic, political and social conditions of the countries of origin and destination that are known to affect highly skilled migrants' (including students') return and employment plans<sup>16</sup>, there are also often overlooked legal factors existing in the countries of origin that may strongly influence their (un)willingness to return and work at home.

Following a legal policy research approach concerned with "how law affects social behaviour and social conditions" and "policy regulation, enforcement and implementation issues"<sup>17</sup>, the study explores the impact of the legal dimension of the program on students' return and employment decisions from the viewpoints of the socio-legal theory and methodology developed by Leon Petrazycki (1867–1931) and his followers. Based on the GEP case, it seeks to understand what determines stu-

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tion' comes from earlier drafts of program documents developed in 2012 and later replaced by the President's Decree No. 967 and the Government's Decree No.568 (Source the Ministry of Education and Science of Russia: <http://минобрнауки.рф>).

<sup>11</sup> The GEP's key characteristics and detailed legal framework can be found in Appendix 1 and Appendix 2 to the present thesis.

<sup>12</sup> <http://educationglobal.ru/en/ns/overview/officialdocuments/> [accessed on the 6th of May, 2017].

<sup>13</sup> <http://educationglobal.ru/en/ns/overview/> [accessed on the 6th of May, 2017].

<sup>14</sup> <http://educationglobal.ru> [accessed on the 6th of May, 2017].

<sup>15</sup> [http://educationglobal.ru/fileadmin/downloads/Leaflet\\_Program\\_july15\\_eng.pdf](http://educationglobal.ru/fileadmin/downloads/Leaflet_Program_july15_eng.pdf) [accessed on the 6th of May, 2017].

<sup>16</sup> Economic, political and social conditions of sending countries influencing students' return migration will be discussed further in the Literature Review section of the thesis.

<sup>17</sup> Banakar, R., 2015. *Normativity in Legal Sociology. Methodological Reflections on Law and Regulation in Late Modernity*, n.p.: Cham : Springer International Publishing : Imprint: Springer, 2015, pp. 48–49.

dents' return migration and employment decisions and if the sending country's laws (policies) influence location choices.

More specifically, the study aims at analyzing whether legal factors affect Russian students' decisions to return to Russia and work in their country of origin and exploring the actual and potential conflicts resulting from discrepancies between program regulations (as interpreted and enforced by officials). Furthermore, it seeks to understand program participants' comprehension of GEP rules and highlight policies seeking to alleviate the brain drain problem and bring positive social change (development)<sup>18 19</sup>.

To sum up, using the GEP case, this study aims at achieving the following objectives:

1. To examine the interplay between the law as a system of legal rules aiming at regulating student return migration in a sending country context, on the one hand, and as a form of people's experiences, on the other.
2. To identify the discrepancies existing between legal rules (positive law, GEP employment regulations) and the reality of their interpretation and implementation by GEP officials and participants.
3. To reveal the underlying causes of the abovenamed discrepancies and what they mean in relation to GEP participants' return and employment plans (behaviours) after graduation.
4. To inform sending country policies aimed at bringing positive social change and mediating the conflicts caused by the abovenamed discrepancies.

The study answers the following research questions:

1. What discrepancies exist between GEP employment regulations (positive law) and the reality of their comprehension and interpretation by GEP participants (intuitive law)? What are the underlying reasons behind these discrepancies?
2. What discrepancies exist between GEP employment regulations (positive law) and the reality of their interpretation and enforcement by GEP officials?
3. How do GEP officials condition the ways in which GEP employment regulations are communicated to GEP participants, and what are the underlying reasons behind their actions? How does GEP officials' interpretation of GEP employment regulations influence GEP participants' attitudes at a discursive

<sup>18</sup> Ibid. p. 49; Banakar, R., & Travers, M., 2002. *An Introduction to Law and Social Theory*, n.p.: Oxford : Hart Publishing, 2002, p. 38; Petrazhitsky [Petrazycki], L.I., 1955. *Law And Morality: Leon Petrazycki*, n.p.: Cambridge, Mass. : Harvard Univ. Press; Petrazhitsky L.I., 2000. *Theory of Law and the State in Connection with a Theory of Morals*. Saint Petersburg, Lan', 608p /Петражицкий Л.И. Теория права и государства в связи с теорией нравственности.— СПб.: Издательство 'Лань', 2000. – 608 с.; Ralko, V. V., 2011. *The concept of intuitive law of L.I. Petrazhitsky: historical and theoretical aspects*. PhD dissertation, Moscow Academy of Advocacy and Notariate; Timoshina, E. V., 2013. *Theory and Sociology of L.I. Petrazhitsky in Context of Classical and Postclassical Legal Knowledge*. Doctoral dissertation, University of St. Petersburg.

<sup>19</sup> "Petrazhitsky's *opus magnum* emerged, consisting of two closely related works: *Introduction to the Study of Law and Morals* (1905) and *Theory of Law and the State in Connection with a Theory of Morals* (2 vols., 1907)" Timasheff, 1955:xxvi. For more details see Translator's Note (ibid: x1).

level and shape the way they think about and experience GEP employment regulations?

4. How do GEP participants use law to organise employment plans after graduation? Do legal factors influence their decisions to return and seek employment at home? And, if yes, how? What policy lessons can be learnt from GEP experiences?

### *Limitations of the Present Study*

Before I proceed to the main chapters of this study, several remarks deserve to be made concerning its limitations.

#### *a) Personal participation in the GEP*

The author acknowledges the potential influence of her personal participation in the GEP on the processes and outcomes of the present research and states that the following methodological measures were taken, in order to avoid a conflict of interests and subjectivity<sup>20</sup>. The interviewees for the study were chosen from a GEP participant cohort on the basis that they had no personal communication with the researcher before the study. Other GEP participants who also expressed their interest in participating in the study were given the chance to answer questions in writing, and the GEP operator was invited to participate in the study. The results of the present study, whenever possible, were verified through other sources.

#### *b. The Impact of Economic Recession in Russia on the GEP Employment Process*

The potential impact of the economic (currency) crisis in Russia in 2014–2015 on the GEP implementation process is acknowledged, the present study does not provide mechanisms necessary to clarify how the recession influenced GEP stakeholders' behaviours, in particular if the recession led to low activity among GEP employer organizations. The author of this thesis uses only secondary data when discussing the reasons why employers are not motivated to hire program graduates. Further research in this area may be beneficial for GEP development.

#### *c. Pilot Study*

The majority of the GEP participants at the time of the study still had a good amount of time to elapse before returning to Russia, therefore making it difficult to explore the influence of legal factors on their actual return and employment behaviours (rather, their return and employment attitudes were explored), as well as observe results which can be generalised. Nevertheless, the research showed that two out of four interviewed participants, who had already returned, were not employed; one of the cases demonstrated the actual use of a covert employment avoidance strategy, discussed in some detail in the Analysis section of the article.

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<sup>20</sup> Weiss, CH 1998, *Evaluation: Methods for Studying Programs and Policies*, n.p.: Upper Saddle River, N.J.: Prentice Hall, cop. 1998, pp. 108–112.

To further investigate the relevance of the claims made in this article, I analyzed the studies of two other student return mobility schemes: Master and Back Program (Sardinia, Italy) and the Program of Training High-Caliber Backbone Personnel from the Ethnic Minorities (China), to illustrate the influence of legal factors (students' understanding of justice) on the participants' actual return and employment behaviours.

Although the above listed findings do not allow generalisation, they can be seen as a starting point for further research into GEP participants' employment behaviours. Therefore, this study can be regarded as a pilot.

## Background, research design, methodology and methods

### *Background*

As noted by Marina Kurkchian, in her study of legal culture in Russia, the initial research questions are often formed at a crossroads where intuition, direct observation and the researcher's experience intersect<sup>21</sup>. This is exactly the case for this study of student return migration and the legal factors which influence the decisions of highly skilled migrants (including students) to return and seek employment in their country of origin.

Being a lawyer interested in how law actually operates in society, as well as its potential to improve people's living conditions, I decided to continue education as an international student in Sweden by taking the Master Program in Development Studies and majoring in Sociology of Law at the University of Lund. At that time, my studies were sponsored by the Global Education Program (2015–2017) and the Swedish Institute Visby Program (2015–2017).

Feeling excited to be a part of two high-profile student mobility programs in July 2016, I was surprised to learn how many concerns GEP participants expressed regarding the program's employment conditions. Reading their posts on the official Facebook page of the program<sup>22</sup>, written long before the participants' expected studies finished and they returned to Russia, I could not explain the grounds for their anxiety and corresponding pessimistic attitude towards prospective employment within the program.

The GEP implies that participants are given generous scholarships to finance their studies at the world's leading educational institutions and an opportunity to apply their knowledge in Russia after graduation at workplaces matching their qualifications. They are also given the chance to change employer and choose a new one two more times within three years, in case of any unforeseen circumstances (including employment contract termination due to an employee's fault). Therefore, employ-

<sup>21</sup> Kurkchian, M., 2005. Researching Legal Culture in Russia: From Asking the Question to Gathering the Evidence. In: Banakar, R., & Travers, M 2005, *Theory and Method in Socio-Legal Research*, n.p.: Portland, Or. : Hart Publishing, 2005, pp. 259–277, p. 260.

<sup>22</sup> <https://www.facebook.com/groups/875255145861397/>

ment matching participants' qualifications is ensured, and even reinsured, by the program's regulations. What is the nature of the participants' concerns?

Taking into account that, according to GEP rules, participants are only requested to complete their education successfully, return to Russia after graduation and "within no more than three months after the arrival in the Russian Federation, select an employer organization from the list of organizations providing employment to Program Participants as approved by the Program Supervisory Board and get employed with the employer organization,"<sup>23</sup> their employment concerns seemed unclear.

The more I read the Facebook posts, the more I could not understand why, under such humane program conditions, they should wish to discuss prospective employment in terms of "slavery", "conscription", "retribution", "compulsory community service", etc. Why should they be so concerned about employment details, when it is the program operator (and not GEP participants) who "establishes mechanisms providing employment of Program participants with employer organizations" and "arranges for interactions between Program participants and employer organizations during the periods of studying and employment"?<sup>24</sup>

Furthermore, why should they be worried whether the procedure for adding new employers to the program list is too complicated, whether the possibilities of part-time employment exist, whether three months to find a first job after graduation is too short, whether quotas on employment in Moscow and Saint Petersburg are adequate or if the program operator<sup>25</sup> can prosecute participants and claim the scholarship fee and penalties back, in case they do not find a job within 3 months? None of the issues raised was the legal responsibility of the GEP participants, as stipulated by the program rules, and yet they still continued to discuss them, expressing increasingly more distressed opinions regarding their prospective employment.

Realising the existence of the 'gap' between program policy regulations and the participants' attitudes towards employment, and having no reasonable explanation for such attitudes, I was even more surprised to learn the opinions of the program operator's representatives, who reinforced these employment concerns. They declared that it was the participants' responsibility to solicit employers, that they would be regarded as program rules violators if they did not find jobs for themselves on time, that part-time employment was not allowed and would be regarded as a breach of their agreement, etc. (the official Facebook group: GEP Webinar Transcript, 20th July, 2016<sup>26</sup>). Simultaneously, most of the participants' attempts to refer to the program's governmental regulations, questioning the operator's 'additional' employ-

<sup>23</sup> Decree No.568 of the Government of the Russian Federation dated June 20, 2014/Regulations on Employment, article 4.

<sup>24</sup> Decree No.568 of the Government of the Russian Federation dated June 20, 2014/ Functions of the State Customer, the Non-commercial Organization of the Program, and the program operator. Program Progress Monitoring.

<sup>25</sup> An organization selected in an open tender in accordance with the laws of the Russian Federation to provide organizational, technical, information and analytical support to the program.

<sup>26</sup> A video of the webinar is available at <https://www.youtube.com/watch?v=pXJD4xEQcgQ&feature=youtu.be&t=4481> [accessed on the 6th of May, 2017].

ment requirements, were either ignored or rejected by the program operator's representatives without any sufficient legal grounds, causing even more dissatisfaction and pessimistic discussions among the program participants.

This sort of interpretation was clearly a factor contributing to the 'gap', but how does this factor contribute exactly? Why does the operator increase the participants' employment anxiety by discursively tightening program rules and adding conditions that do not exist in the official regulations? What do they want to achieve by limiting employment opportunities within the program, when it is a well-known fact that the availability of work in the country of origin is one of the key factors promoting return migration<sup>27</sup>? Moreover, to what extent is this practice consistent with the program's goals?

All of these questions made me start exploring the existing 'gap' between program regulations and their interpretation by the program operator. I focused on employment aspects, with the main goals being to understand how the participants experience program employment regulations, what role the operator's interpretations play in their experiences and how these experiences affect their employment attitudes and behaviours.

### *Research Design and Methodology*

As noted by Banakar<sup>28</sup>, studies of the 'gap', aimed at exploring inconsistencies between the law in theory and law in practice, have a long history (e.g. Eugen Ehrlich's living law, Roscoe Pound's law in action, Leon Petrażycki's intuitive law) and have played a significant role in the development of sociology of law as a scientific discipline. Nowadays, socio-legal scholars, although acknowledging that the 'gap' between formal and informal law is part of the modern legal reality and almost inevitable, continue to address this problem, including from new perspectives (e.g. alternatives to the 'gap') and areas of inquiry (e.g. public policy measures and different aspects of the information society and globalisation) in their studies<sup>29</sup>.

Discussing the various forms of the 'gap', Banakar argues that at least four factors define how scholars study this problem, namely 1) their understanding of law in its broader or narrower meaning 2) their vision of the major forces constituting society (conflict or consensus) 3) their conceptualisation of relations between law and soci-

<sup>27</sup> Castles, de Haas, Miller, 2014. Footnote 1; Massey, D.S., Arango, J., Hugo, G., Kouaouci, A. and Pellegrino, A., 2009. *Worlds in Motion: Understanding International Migration at the End of the Millennium*. Clarendon Press; Cassarino, Jean-Pierre, 2004. Theorising return migration: The conceptual approach to return migrants revisited. *International Journal on Multicultural Societies (IJMS)*, Vol. 6, No. 2, pp. 253–279. Available at SSRN: <https://ssrn.com/abstract=1730637>; Alberts, H.C. and Hazen, H.D., 2005. "There are always two voices...": International Students' Intentions to Stay in the United States or Return to their Home Countries. *International Migration*, 43(3), pp. 131–154; Bratsberg, B., 1995. The incidence of non-return among foreign students in the United States. *Economics of Education Review*, 14(4), pp. 373–384.

<sup>28</sup> Banakar 2015. Footnote 17, pp. 52–53.

<sup>29</sup> *Ibid.*, pp. 53–54.

ety and 4) a methodological approach (e.g. top-down or bottom-up) and the methods (e.g. qualitative, quantitative or mixed) they choose<sup>30</sup>.

After careful consideration of the above factors, and taking into account that within this study I seek to explore how law is interpreted and experienced by particular social groups (e.g. internationally mobile GEP students and GEP officials), in order to form an idea of whether legal factors affect students' prospective return and employment plans, I have chosen a bottom-up perspective as a point of departure for the present qualitative research<sup>31</sup>.

### *Methods*

According to the initial data collection plan, I aimed to conduct at least 20 in-depth, semi-structured, on-line interviews with GEP participants and at least three semi-structured interviews with GEP officials (the GEP operator's representatives) in an effort to explore how they interpret and experience GEP regulations.

However, two incidents that occurred during the study made me change the initial plan. First, on March 15<sup>th</sup>, 2017, the Russian government adopted new GEP regulations, extending possibilities for current participants seeking employment in Moscow and St. Petersburg (the most developed regions of Russia<sup>32</sup>). Therefore, following the chosen theoretical framework assumptions, I decided to contact again all of those I had already interviewed (18 participants) and ask if their attitudes towards prospective employment and/or employment plans had been affected by this change in the regulations (second cycle of interviews).

The second change was dictated by the refusal of GEP officials to participate in the study, which meant I had to use written materials and secondary data (video records of the seminars, presentation materials, etc.) for analysis.

The choice of a qualitative method allowed me to be flexible and stay open to these unplanned events and continue the research without preconceptions, in order to learn what was actually happening<sup>33</sup>.

### *Semi-structured interviews with GEP participants*

To explore GEP participants' attitudes towards the program's employment conditions, and their employment plans and behaviours, I conducted two cycles of semi-structured interviews with 18 contributors (nine male and nine female, aged 22 to 36 years old) currently studying or having completed their studies in the UK, Australia, Sweden, China, France and Italy. The interviews were conducted via means of online telecommunication (Skype, WhatsApp, Viber).

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<sup>30</sup> Ibid., p. 53.

<sup>31</sup> Ibid., pp. 51–52.

<sup>32</sup> The quality of life in Russian regions – rating 2016 <http://riarating.ru/infografika/20170220/630056099.html> [accessed on the 6th of May, 2017].

<sup>33</sup> Weiss, 1998. Footnote 20, p. 253.

Informed consent to participate in the study was obtained at all times, after careful explanation of the present study's goals and methods.

Of the four who had completed their studies and had returned to Russia, two of them said they were employed. All of the interviews lasted for 30–45 minutes each and were conducted in Russian, the mother tongue of all GEP participants and the researcher (i.e. the most natural way of communicating).

As mentioned earlier, in the middle of March 2017, the Government of the Russian Federation adopted Decree No. 298, dated March 15, 2017, amending the GEP employment regulations. In order to explore whether this change in regulations had influenced the participants' employment attitudes, at the end of March I contacted each of them again (second-cycle interviews) and asked how they perceived the introduced amendments. Second cycle interviews were also conducted in Russian and lasted from 5 to 15 minutes.

### *Data Analysis*

To analyze the gathered data, I used a framework approach to qualitative content analysis<sup>34</sup>. This approach implies a search for themes with theoretical significance within the collected data. This aim was achieved using coding procedures, whereby data are broken down into smaller components, processed and reassembled in accordance with theoretically significant categories<sup>35</sup>. The analysis within this research consisted of a closer investigation of the notes from the interviews, received questionnaires, GEP-related documents and video records made available to me during the study.

Consequently, by analyzing the above sources, I identified recurring themes that could be interpreted through the assumptions of the theoretical framework. I cross-checked information obtained through different modes of inquiry (“triangulated data” from the interviews, the GEP web page and legal documents) and conducted further investigations (e.g. through the state registers) when discrepancies were found<sup>36</sup>.

## Theoretical framework

The psychological theory of law developed by Leon Petrazycki (1867–1931), who, according to Nicholas Timasheff, “was the most eminent of the Russian legal philosophers of the early twentieth century”<sup>37</sup> and, according to Pitirim Sorokin, “probably the greatest scientist in the sphere of ethics and law of the 20<sup>th</sup> century”<sup>38</sup>, continues to attract attention of researchers in different fields of social sciences and law<sup>39</sup>.

<sup>34</sup> Bryman, A., 2008. *Social Research Methods*, Oxford: Oxford University Press, p. 568.

<sup>35</sup> *Ibid.*, p. 557–579; Weiss 1998. Footnote 20, pp. 168–169.

<sup>36</sup> *Ibid.*, pp. 263–264.

<sup>37</sup> Petrazycki, 1955, Footnote 18, p. xvii.

<sup>38</sup> Sorokin, 1992 p. 30, as cited in Timoshina, 2013. Footnote 18, p. 6.

<sup>39</sup> Treviño, A. J., 2013. Sociological Jurisprudence, in: Banakar, R., & Travers, M 2013, *Law And Social*

Many aspects of the theory developed by Petrazycki, such as the scientific definition of ethical prospects for the development of law, acknowledgement of the “social-ancillary” nature of public authority as its fundamental trait, justification of the role of intuitive law in the evolution of law and other concepts, have gained more and more importance over a century after they were justified<sup>40</sup>.

For this thesis, seeking to explore discrepancies existing between legal rules and the reality of their interpretation and implementation by different social groups, and revealing the underlying causes of the abovementioned discrepancies, the most significant are scientists’ findings on the correlation between intuitive and positive law and their influence on the existing social order (e.g. on the probability of social conflicts as well as positive social changes resulting from these discrepancies)<sup>41</sup>.

As Timasheff noted, instead of the “vague” and “loose” terms in which justice had been discussed before Petrazycki, the scientist’s idea of intuitive law<sup>42</sup> “opens new horizons for the scientific interpretation of justice”<sup>43</sup>. Furthermore, according to Timasheff, a scientific analysis of intuitive law or justice as an area of legal culture is “a prerequisite to the discovery of uniformities in the process of legal change, prediction of the probable consequences of enactment or repeal of a statute, better understanding of the process through which judicial decisions are arrived at, and solutions to many other important problems”<sup>44</sup>.

Petrazycki considers justice as a special type of “psychic phenomenon”. Outlining two “classes” of ethical experience (‘purely imperative’ – moral, and ‘imperative-attributive’ – legal), the scientist refers the experience of justice to the second “class”, as “the corresponding consciousness is consciousness of what is due from some and owing to others, and not of a unilateral and purely imperative duty”<sup>45</sup>. Therefore, Petrazycki considers justice as a legal phenomenon that must be withdrawn from the jurisdiction of moral philosophy and should be studied within the framework of the general theory of law as one of the types thereof<sup>46</sup>.

Differentiating between positive and intuitive law, Petrazycki attributes the experiences of justice to the latter. In this regard, positive law, according to the theory, constitutes imperative-attributive experiences based on normative facts (e.g. one’s perception of statutes, customs, courts’ decisions, orders, etc.) as grounds for obliga-

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*Theory*, n.p.: Oxford : Hart publ., 2013, pp. 35–51, p. 51); Cotterrell, R., 2015. ‘Leon Petrazycki and contemporary socio-legal studies’, *International Journal of Law in Context*, 11, 1, pp. 1–16.

<sup>40</sup> Petrazycki, 1955. Footnote 18, pp. 221, 312, 327; Timoshina, 2013. Footnote 18, p. 7; Deflem, M., 2008. *Sociology of Law : Visions of a Scholarly Tradition*, n.p.: Cambridge : Cambridge University Press, 2008, p. 81; Ralko, 2011. Footnote 18; Treviño, A. J., 2011. Introduction, in Petrazycki, L.I., 2011. *Law And Morality: Leon Petrazycki*. Transaction Publishers, p. ix.

<sup>41</sup> Timasheff, N., 1955, Introduction to Law and Morality: Leon Petrazycki (1955), in Petrazhitsky, L.I., 1955. *Law And Morality: Leon Petrazycki*, n.p.: Cambridge, Mass. : Harvard Univ. Press, 1955, p. xxxviii.

<sup>42</sup> According to Petrazycki, justice “is nothing but intuitive law in our sense” (Petrazycki, 1955. Footnote 18, p. 241).

<sup>43</sup> Timasheff, 1955. Footnote 41, p. xxxvii.

<sup>44</sup> Ibid.

<sup>45</sup> Petrazycki, 1955. Footnote 18, pp. 241–242.

<sup>46</sup> Timoshina, 2013. Footnote 18, pp. 458–459; Trevino, 2011. Footnote 40, p. xii.

tion<sup>47 48</sup>. Compared to positive law, intuitive law features autonomous legal emotions arising in the mentality of a subject, without mediation by any normative facts<sup>49</sup>. Speaking in favor of identifying justice with intuitive law, Petrazycki writes that “we are here concerned not with phenomena of positive law but with those of intuitive law, not with judgments as to what is supposed to be done according to statutes and the like but what is due to another and so forth in ‘conscience’, according to our independent convictions without reference to any external authorities”<sup>50</sup>.

Intuitive law or justice, as an individual psychic phenomenon, has a set of features<sup>51</sup>. Due to the independence of intuitive legal consciousness from any normative facts, intuitive law has a changeable nature, determined by the inner world of a person. However, taking into account that certain conditions and development factors of the intuitive legal consciousness of individuals within social groups are commonplace, we can talk about the existence of group intuitive law. For example, according to Petrazycki, we can talk about the intuitive law of a society, of class groups (e.g. workers, manufacturers, peasants, landowners) or groups within society, about intuitive law of families, children, females, males, etc., as long as we point out “a certain common content of the relevant intuitive law”<sup>52</sup>.

The sphere of justice, according to Petrazycki, is *distributio bonorum atque malorum*, i.e. “the distribution of benefits and ills”, and within which intuitive law and positive law coexist. The intuitive legal conscience, however, does not respond to matters that are beyond ‘good and evil’, e.g. formal and technical arrangements, so the latter

<sup>47</sup> Petrazycki, 1955. Footnote 18, p. 253.

<sup>48</sup> Discussing the nature of normative facts as “sources of positive law”, Petrazycki points out that “the bases of obligations and determinants of conduct are not the corresponding objective events (commands of legislators and so forth), but the ideas of them as present or past events. Accordingly, if the idea of a corresponding fact is present... it is then immaterial... whether or not this fact actually occurred” (Petrazycki, 1955. Footnote 18, pp. 248–249) as a fact “of a definite category with definite objective attributes (such as statutes published in proper form, customs of a certain species as such, court practice as such and so forth” (ibid., p. 252). It is more important that corresponding facts are perceived as normative by individuals, while their forms can vary.

Describing the processes of the evolution of positive law sources, Petrazycki states that “the capacity of the human mind for legal reactions to legislative orders is a product of culture” (ibid., p. 250) and that only “facts which actually do operate normatively, arousing the corresponding positive law experiences” (ibid., p. 252) within the given society at the contemporary stage of development of the legal culture can be regarded as positive law sources. Therefore, according to Petrazycki, in the theory of positive law, it is not important if legal acts “are published in accordance with all the corresponding rules and possess all the attributes required or advanced by contemporary science for their legal validity” – they “are not *per se* positive law” in the sense that “they can be and are – ordinarily or sometimes – normative facts, and sometimes they are not” (Petrazycki, ibid., p. 252). Following this line of reasoning, it is more important how particular facts (legal acts, the demands of those in power, customs, etc.) are perceived by individuals, and therefore informal rules, customs and practices (Ledeneva, 2013. Footnote 24; Ledeneva, 2017. Footnote 124; Galligan and Kurkchian, 2003. Footnote 124) can be regarded – from the point of view of the psychological theory of law – as sources of positive law, if they are accepted as normative facts within the given society or social group (Petrazycki, 1955. Footnote 18, p. 252).

In this thesis, examples of such informal practices (operator’s interpretation of the GEP rules) regarded as normative facts by a social group (GEP participants) can be found in section 5.3. ‘Operator’s Interpretation of the GEP Employment Regulations and its Meaning in relation to the “Gap” Problem’.

<sup>49</sup> Timoshina, 2013. Footnote 18, pp. 459; Trevino, 2011. Footnote 40, pp. xiii, xvi.

<sup>50</sup> Petrazycki, 1955. Footnote 18, p. 242.

<sup>51</sup> Trevino, 2011. Footnote 40, p. xii.

<sup>52</sup> Petrazycki, 1955. Footnote 18, pp. 225–226; Timoshina, 2013. Footnote 18, p. 459.

ones frequently constitute a subject of positive law regulation. Alongside this notion, the experiences of justice have a great influence on the interpretation, application and scientific understanding of positive law, and they constitute a factor in its creation, change or abolishment<sup>53</sup>.

Thus, according to Ralko, Petrazycki discovered a new “real” object for study (which is scientific and not abstract-philosophical) within the subject (an individual). Peering deep into the individual psyche, Petrazycki discovered objective laws under which individuals experience legal emotions. In spite of the fact that, according to Petrazycki, intuitive law is experienced by the subject as their “own one”, i.e. irrespective of any external normative facts, it is also governed by common objective psychological laws, thereby lending itself to scientific research. Psychological processes are objective and function in accordance with certain regularities; however, the level of psychological science development reached during Petrazycki’s time was unable to define these regularities clearly<sup>54</sup>.

Besides the already described significance of the ‘intuitive law’ concept developed by Petrazycki, it also provides a legal explanation for the nature of social conflicts (including the highest degree of a social conflict, which Petrazycki compares with “an explosion” and names “a revolution”)<sup>55</sup>. Petrazycki’s legal theory does not simply capture a shift of legal frameworks in the case of a social upheaval, explaining it through non-legal (social, economic, etc.) reasons – it gives a legal explanation for the social phenomenon<sup>56</sup>.

According to Petrazycki, consistency between positive law and intuitive law consciousness is a necessary base for any social order: “corresponding mutual support and reciprocal reinforcement of intuitive law consciousness and positive law consciousness, constitute the foundations of the actual legal order and the corresponding social order: political, economic, and so forth”<sup>57</sup>. Thus, processes involved in the legitimization of the existing social order occur in the intuitive law consciousness rather than anywhere else. Inconsistencies between positive law and intuitive law (one’s understanding of justice) can take the form of a conflict (class, individual, evolutionary, etc.)<sup>58</sup> but also create a reciprocal relationship between them through which they influence each other, thus making “legal policy”,<sup>59</sup> or social engineering, possible<sup>60</sup>.

Discussing the grounds for the ‘gap’ between positive and intuitive law, the scientist points out that its existence is inevitable, due to “the nature of things”, and no

<sup>53</sup> Petrazycki, 1955. Footnote 18, pp. 235, 242, 245; Timoshina, 2013. Footnote 18, p. 460; Trevino, 2011. Footnote 40, p. xiii.

<sup>54</sup> Ralko, 2011. Footnote 19, p. 17.

<sup>55</sup> Petrazycki, 1955. Footnote 18, pp. 236; Ralko, 2011. Footnote 19, p. 4.

<sup>56</sup> Timoshina, 2013. Footnote 18, p. 460.

<sup>57</sup> Petrazycki, 1955. Footnote 18, p. 232.

<sup>58</sup> Timoshina, 2013. Footnote 18, p. 460.

<sup>59</sup> Petrazycki calls the scientific approach seeking to influence people’s attitudes and behaviors through law and guided by “active, rational love” the science of “legal policy”, which he sees as a way to bring about positive social change or development (Deflem, 2008. Footnote 40, p. 81).

<sup>60</sup> Deflem, 2008. Footnote 40, p. 81; Banakar and Travers, 2002. Footnote 18, p. 40; Trevino, 2011. Footnote 40, p. xviii.

positive law can completely correspond to the intuitive law in any society, because: 1) extreme diversity of intuitive law of different social groups and individuals (“satisfying the intuitive law demands of some, positive law thereby fails to satisfy the intuitive law demands of others” causing “class and individual conflicts”), 2) lower responsiveness of positive law to social changes when compared to intuitive law (“historical or evolutionary conflicts”), 3) unifying the nature of positive law (“legal standartisation”) as opposed to the diversity of specific life circumstances, causing “casuistical” conflicts between positive law and intuitive law of certain groups<sup>61</sup>.

Acknowledging the inevitability of the ‘gap’ between two types of law, Petrazycki, however, points out that the better positive law correlates with intuitive law, the more legitimacy it secures and the better it functions in society: “the greater the accord within these limits at a given moment, the better and the more correctly *ceteris paribus* does the law function in general in a given nation... the greater are the respect and sympathy for and with the existing positive law and the satisfaction with the existing social order, and the stronger this order is”<sup>62</sup>.

Petrazycki underlines that only “rational law represents a complex and mighty school which aims at socializing a national character”. And, quite oppositely, “unsuccessful law may spread demoralization and poison the national spirit – or at least counteract the healthy psychic process and retard the development and flowering of the valuable elements of the individual and mass character”<sup>63</sup>.

Therefore, the scientist believes that the interplay between intuitive and positive law is characterised in different periods of history by fluctuations between the minimum and the maximum limits of agreement (or disagreement), namely the “lower and upper limits of accord (or discord)”<sup>64</sup>. Petrazycki goes on to say that when ‘discord’ goes beyond the limits, “positive law must inevitably break down – and in case of resistance, the debacle will be in the form of a social revolution”<sup>65</sup>. The latter outcome can be further intensified by the position of the ruling circles: “the coming of the revolution is ordinarily accelerated and facilitated by the fact that those who take advantages of the existing legal order, extracting therefore material benefits..., or sustaining it upon any other inducement or consideration without the ethical sanction of their intuitive law conscience and without faith in the sanctity and justice of their conduct”<sup>66</sup>.

Following Petrazycki’s reasoning, the careless approach of authorities ignoring the intuitive legal experiences and expectations of their people in interests “associated with the existing [positive] law” (and therefore stimulating “growing pressure of intuitive law”) could lead to the extreme aggravation of social contradictions in the given context and cause “a revolution”<sup>67</sup>. In this respect, despite providing concrete

<sup>61</sup> Petrazycki, 1955. Footnote 18, pp. 231, 233–234.

<sup>62</sup> *Ibid.*, p. 234.

<sup>63</sup> *Ibid.*, p. 301.

<sup>64</sup> *Ibid.*, p. 234; Timoshina, 2013. Footnote 18, p. 463.

<sup>65</sup> Petrazycki, 1955. Footnote 18, p. 233.

<sup>66</sup> *Ibid.*; Timoshina, 2013. Footnote 18, p. 464.

<sup>67</sup> Petrazycki, 1955. Footnote 18, pp. 233, 236; Timoshina, 2013. Footnote 18, p. 464.

examples of historical social upheavals discussing ‘revolution’ (American Civil War and French Revolution)<sup>68</sup>, the author of this thesis thinks that Petrazycki’s idea can be understood better and applied to more diverse social phenomena.

The term ‘social revolution’ in this context can be seen as a fundamental change happening in people’s consciousness in relation to positive law. Through this change, people regard the legal facts defining positive law as completely illegitimate and refuse to follow their provisions<sup>69</sup>; hence, when the scholar talks about “an explosion” or “a revolution”, he means the occurrence of the most adverse or unwanted in the given context consequences, going beyond the “limits of accord” in the given society or a social group<sup>70</sup>.

In the case of state policies aiming at promoting highly skilled migrants returning to their countries of origin, for example, such consequences can appear in the form of those potentially prepared to return refusing to go back and work in their home country, as well as the corresponding failure of incentivized state programs. Therefore, lawmakers and law enforcers can play positive or negative roles in promoting “accord (or discord)” between highly skilled migrants’ intuitive law and the positive law of their countries of origin, thus, facilitating or discouraging any return plans.

To achieve positive results, the authorities, according to Petrazycki, should act in good faith by understanding their “social-ancillary” role (“to be concerned about the welfare of subordinates or the common welfare of a certain social group”)<sup>71</sup>, paying attention to the experiences and expectations of the targeted social groups and engaging themselves in prior research on the impacts that their lawmaking and law enforcement activities can have on people, in order to ensure that proposed measures have enough potential to bring about the desirable change in attitudes<sup>72</sup>.

Quite conversely, those occupying positions of power but exercising their duties negligently, or in order “to take advantage of the existing legal order, extracting therefore material benefits”, are more likely to “accelerate and facilitate” additional discrepancies<sup>73</sup>, increase ‘the gap’ between intuitive law and positive law in question and thus discourage the desirable return and employment.

Based on Petrazycki’s theoretical findings, the present author aims to confirm or refute the following hypotheses. The roots of the GEP participants’ dissatisfaction with program rules, and more specifically with its employment regulations, hardly reflecting the current economic and social realities of Russia, can be found in the divergence between their intuitive law and the positive law of the program. This divergence is aggravated further by lawmakers’ general failure to see the discrepancies between the program’s employment regulations (positive law) and significantly changed social and economic conditions in Russia, as well as their interpretation of

<sup>68</sup> Petrazycki, 1955. Footnote 18, p. 236.

<sup>69</sup> Timoshina, 2013. Footnote 18, p. 464.

<sup>70</sup> Petrazycki, 1955. Footnote 18, p. 234; Timoshina, 2013. Footnote 18, p. 458.

<sup>71</sup> Petrazycki, 1955. Footnote 18, p. 313.

<sup>72</sup> Deflem, 2008. Footnote 40, p. 81.

<sup>73</sup> Petrazycki, 1955. Footnote 18, p. 236.

these employment regulations in the direction of their own interests, not consistent with the GEP participants' intuitive law consciousness.

## Literature review

### *Student Return Migration: Global Perspectives*

Academia regards international migration as a multidimensional social phenomenon, and research on migration as multidisciplinary, and so it is widely accepted that contributions of sociology, history, geography, economics, cultural studies, demography, psychology and law are all relevant in studying the subject. Each discipline, using a variety of approaches based on different theories and methods, is capable of highlighting complementary aspects of migration and enhancing one's understanding of its processes, including those guiding international return migration<sup>74</sup>.

As a sub-process of international migration, return migration has been subject to explanation from different theoretical standpoints, including but not limited to 'push-pull' models<sup>75</sup>; the neoclassical economic theory<sup>76</sup>; the human capital theory<sup>77</sup>; structuralism<sup>78</sup>; globalisation theory<sup>79</sup>; segmented labour market theory<sup>80</sup>; the new economics of labour migration<sup>81</sup>; social network theory<sup>82</sup>; transnationalism<sup>83</sup>; etc.<sup>84</sup>

Research on return migration is abundant. However, the word limit for this dissertation makes it impossible to include all the contributions of the above disciplines and theories and requires the author to focus on a sending country perspec-

<sup>74</sup> Castles et al, 2014. Footnote 1, pp. 27, 71; Massey et al., 2009. Footnote 27, p. viii).

<sup>75</sup> Passaris, C., 1989. *Immigration and the Evolution of Economic Theory*. International migration, 27(4), pp. 525–542; Bauer, T. and Zimmermann, K.F., 1998. Causes of international migration: a survey. *Crossing Borders: Regional and Urban Perspectives on International Migration*, pp. 95–127.

<sup>76</sup> Lewis, J.R., 1986. International labour migration and uneven regional development in labour exporting countries. *Tijdschrift voor Economische en Sociale Geografie*, 77(1), pp. 27–41; Todaro, M.P., 1969. A model of labor migration and urban unemployment in less developed countries. *The American Economic Review*, 59(1), pp. 138–148.

<sup>77</sup> Sjaastad, L., 1962. The Costs and Returns of Human Migration. In: T. W. Schultz (Ed.), *Investment in Human Beings. Supplement to the Journal of Political Economy*, 70(5), 2.

<sup>78</sup> Massey et al., 2009. Footnote 27.

<sup>79</sup> Held, D., McGrew, A., Goldblatt, D. and Perraton, J., 2000. Global transformations: Politics, economics and culture. In *Politics at the Edge*. Palgrave Macmillan UK, pp. 14–28; Castles et al, 2014. Footnote 1, pp. 33–34.

<sup>80</sup> Piore, M.J., 1979. *Birds of Passage: Migrant Labor and Industrial Societies*. Cambridge University Press.

<sup>81</sup> Stark, O., 1978. Economic-demographic interactions in agricultural development: the case of rural-to-urban migration. *Food & Agriculture Org.* (Vol. 6).

<sup>82</sup> Massey et al., 2009. Footnote 27.

<sup>83</sup> Basch, L., Schiller, N.G. and Blanc, C.S., 1994. *Nations unbound: Transnational projects. Postcolonial Predicaments, and Deterritorialized Nation-states*. Gordon and Breach, Amsterdam.

<sup>84</sup> For a detailed overview of theoretical approaches to migration, see, for example, Castles, de Haas, Miller (Footnote 1, pp. 25–53), Massey et al. (Footnote 27, pp. 1–60). A concise and informative overview of return migration theories can be found in Cassarino (Footnote 27).

tive<sup>85</sup> and follow the chosen legal policy research approach<sup>86</sup>. Therefore, in this section, I will present literature relevant to the following question: ‘How do sending countries’ policies and their implementation affect students’ decisions to return home and seek employment?’

As it’s already noted, rapidly growing international migration of highly skilled specialists and students, both temporary and permanent, has attracted increasing policy and research attention in both sending and receiving countries. An analysis of the literature surrounding high-skilled migration suggests that there are at least two major perspectives from which to view its impact on sending countries and examine the policies sending countries’ governments develop in response to the migration processes with which they have to deal.

The first perspective is largely negative and assumes that while receiving countries benefit considerably from international student migration, mostly through income generated by high tuition fees, the availability of locally trained skilled workers after graduation, and their subsequent contribution to the receiving countries’ development, sending countries traditionally find themselves in a less favorable position, as the departure of students is believed to go along with ‘brain drain’ and can have a detrimental impact on human capital<sup>87</sup>.

According to the first approach, receiving states seek to attract and encourage the settlement of highly skilled migrants, including talented foreign graduates, while countries of origin, concerned by the actual and potential loss of talent and skills, develop policies which enable them (with a varying but usually low level of success) to manage the flows of intellectual migration, limiting negative consequences and allowing their societies to at least partially benefit from increased international student and academic mobility<sup>88</sup>.

The second perspective, examining high-skilled migration, however, suggests that sending countries can actually benefit from educating their citizens abroad. An analysis of the development discourse on migration suggests that countries of origin can receive gains from academic migration through financial and social remittances, links with diasporas abroad and return migration<sup>89</sup>.

<sup>85</sup> Despite it being a well-known fact that migrants’ willingness and preparedness to return are shaped by circumstances in both host and home countries (Cassarino, Footnote 27, p. 272), in this thesis I focus mainly on the factors that can be influenced by the source countries’ policies, only briefly mentioning the conditions in destination countries, as the latter ones are beyond sending countries’ control.

<sup>86</sup> Banakar, 2015. Footnote 17, p. 48.

<sup>87</sup> Castles et al. 2014. Footnote 1, p. 71; Gribble, 2008. Footnote 4, p. 29; Kapur and McHale, 2005. Footnote 4.

<sup>88</sup> Castles and Miller, 2009. Footnote 5, p. 77; Gribble, 2008. Footnote 4, p. 29; Kapur and McHale, 2005. Footnote 4.

<sup>89</sup> OECD, 2016. *Perspectives on Global Development 2017. International Migration in a Shifting World*, OECD Publishing Paris DOI:10.1787/persp\_glob\_dev-2017-en; Tejada et al., 2014. Footnote 5; Castles and Miller, 2009. Footnote 5, p. 65.

Describing the role of diasporas<sup>90</sup>, this approach assumes that they can have significant development potential for countries of origin through financial, professional and socio-cultural links maintained in the forms of remittances, philanthropy, micro-finance, long-distance entrepreneurs, cultural associations, hometown associations, professional and scientific networks, etc.<sup>91</sup>.

As for the return migration, proponents of the approach argue that by being equipped with technological, scientific and managerial competencies, returning migrants are better educated than non-migrants and more likely to engage in entrepreneurial activities, establish new businesses and increase local knowledge than those who never migrated<sup>92</sup>. Returning migrants are also represented as capable of influencing social norms transformation in their home communities via, for example, democratic values and corruption resistance practice transfer, tolerance enhancing, etc. In migration discourse, this contribution of return migration is regarded as a form of social remittance<sup>93</sup>.

Despite the growing body of research supporting the second perspective<sup>94</sup>, it is rightfully noted by Castles, de Haas and Miller<sup>95</sup> that state policies at facilitating remittances, in order to engage diasporas and to encourage return migration, will have very little or no positive effect if not accompanied by more general reforms in the sending countries. The authors underline that “*policies that improve infrastructure, legal security, governmental accountability and macro-economic stability while countering corruption and improving access to public education, health and credit, are crucial not only for creating positive conditions for development, but also for encouraging migrants to return and invest*”<sup>96</sup>.

The validity of the above-quoted statement, emphasising the need to improve general conditions in origin countries in order to influence highly skilled migrants’ (including students’) decisions to return home, is well illustrated by a study conducted among Indian students in the USA, and several EU countries in 2012–2013<sup>97</sup>. The research found that the interviewed students would be willing to return to India if

<sup>90</sup> In the migration and development literature, the term ‘diaspora’ applies to a group of migrants and their ongoing relationship with their community of origin and home country (OECD, 2016. Footnote 89, p. 190).

<sup>91</sup> OECD, 2016. Footnote 89; Safran, W., 1991. Diasporas in modern societies: Myths of homeland and return. *Diaspora: A Journal of Transnational Studies*, 1(1), pp. 83–99; Darieva, T., 2011. Rethinking homecoming: diasporic cosmopolitanism in post-Soviet Armenia. *Ethnic and Racial Studies*, 34(3), pp. 490–508; Brubaker, R., 2005. The ‘diaspora’ diaspora. *Ethnic and Racial Studies*, 28(1), pp. 1–19; Castles et al. 2014. Footnote 1, pp. 162–163; Hugo, G., 2005. *Migration in the Asia-Pacific Region*. Geneva: Global Commission on International Migration, pp. 35–37; Kuznetsov, Y. ed., 2006. *Diaspora Networks and the International Migration of Skills: How Countries Can Draw on their Talent Abroad*. World Bank Publications.

<sup>92</sup> OECD, 2016. Footnote 89; Tejada et al., 2014. Footnote 5.

<sup>93</sup> OECD, 2016. Footnote 89; Kubal A., 2015, ‘Legal consciousness as a form of social remittance? Studying return migrants’ everyday practices of legality in Ukraine’, *Migration Studies*, 3, 1, p. 68.

<sup>94</sup> Gribble, 2008. Footnote 4, p. 27.

<sup>95</sup> Castles et al. 2014. Footnote 1.

<sup>96</sup> Ibid., p. 80.

<sup>97</sup> Tejada et al., 2014. Footnote 5.

they could be guaranteed a good career and a good quality of life, for example good research opportunities and lower levels of corruption and bureaucracy<sup>98</sup>.

The study also shows that former highly skilled migrants, who have returned to India, had been pulled back home by the economic, career, entrepreneurial and business opportunities that they experienced in India, as well as by family ties and a feeling of patriotism. Economic slowdown and job insecurity in host countries, the end of temporary contracts and the inability to extend visas or residence permits in the destination countries also played a role in some of the returns; however, these factors are beyond the scope of the current study, as they cannot be influenced by sending countries' policies<sup>99</sup>.

From a source country policy perspective, Gribble<sup>100</sup> identifies three main approaches aiming at harnessing student mobility. The first implies that governments can ensure that students do the major part of their studies in their home country, thus reducing the chances of student migration. The second option is to permit or even promote studies abroad and then encourage a return home (student return migration approach). And the third option is to accept that many students may stay in destination countries and introduce policies that will allow student migrants to contribute to their home country from abroad<sup>101</sup>.

Examining the student return migration approach in detail, Gribble provides examples of several return policies and their impacts. The researcher points out that so-called "bonding arrangements", implying that sending countries provide support to students in exchange for their obligation to return home after graduation, can be difficult to enforce and counterproductive, since they may lead to intentional isolation from the country of origin. Another policy example is the 'sandwich training' model, encouraging students to take a second year of their postgraduate studies abroad and then return home for a final project or dissertation. Taking this approach allows students to obtain knowledge abroad while focusing on national interests and decreases the chances of their non-return or departure from their home country after graduation<sup>102</sup>.

Gribble also points out that sending countries may encourage students to return home after graduation by "fostering a robust research and development sector, and by providing conditions and incentives that will encourage both transnational investment and entrepreneurship", specifically underlining the importance of taking appropriate approaches to managing international student migration, depending on the individual conditions of each country<sup>103</sup>.

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<sup>98</sup> Ibid., p. 16.

<sup>99</sup> Ibid., p. 15.

<sup>100</sup> Gribble, 2008. Footnote 4.

<sup>101</sup> Ibid., p. 29.

<sup>102</sup> Ibid., p. 29.

<sup>103</sup> Ibid., p. 35.

*Student Return Migration: Russian Perspective*

In Russian academic discourse, intellectual migration trends are firmly associated with the ‘brain drain’ concept<sup>104</sup>. Analysing modern emigration statistics, researchers observe that they have been growing sharply since 1987. According to the Russian Federal State Statistics Service (Rosstat), about 373,000 people left Russia from 1987 to 1992, from 1993 to 2005 it rose to 1.05 million people and from 2006 to 2014 the figure increased further to 1.1 million. Therefore, according to the data, the total number of people who emigrated from Russia from 1987 to 2014 was over 2.4 million<sup>105</sup>.

Among these millions of migrants leaving Russia, a special place is occupied by the so-called ‘intellectual’ migration of scientists, graduate students, engineers, doctors and other highly skilled individuals<sup>106</sup>. According to Rosstat, the share of intellectual migration increased from 4% in 1992 to 31% in 1999, and to 47% in 2012<sup>107</sup>. The number of scientists who emigrated from Russia over these years reached 42,000. To illustrate the picture further, Iontsev, Ryazantsev and Iontseva compare the numbers of candidates (equivalent to PhD level) and doctors of sciences who left Russia in 2003 and 2012 and report that in 2003 there were 63 persons in this group, while in 2012 their number reached 234 individuals<sup>108</sup>.

As for Russian students studying abroad, in 2006 about 35,000 already studied in OECD countries, and Rosstat reports that over the following decade this figure increased by 30%<sup>109</sup>. Iontsev and Magovedova express concerns that there is a growing number of potential emigrants among students, i.e. those expressing a wish to emigrate and already taking certain actions to organise their departure<sup>110</sup>.

The recent sociological study of the value preferences of modern Russian students<sup>111</sup> revealed that almost two-thirds (65.62%) of 576 respondents (students from different educational backgrounds and of geographical origins, currently studying at Moscow higher educational institutions) expressed readiness to leave Russia if there was an opportunity to be employed abroad<sup>112</sup>.

In respect to this finding, Korablin suggests the need for an additional study aiming at clarifying the reasons for the above emigration plans and puts forward the following tentative hypotheses. Plans to work abroad after graduation can be explained

<sup>104</sup> Ushkalov and Malakha, 2001. Footnote 7; Ganguli, 2014. Footnote 7; Iontsev et al., 2016. Footnote 7; Iontsev and Magovedova, 2015. Footnote 7; Ledeneva, V 2014. Intellectual migration: Global and Russian Tendencies. *Higher Education in Russia*, 2014 (2), pp. 106–113.

<sup>105</sup> Iontsev et al., 2016. Footnote 7, p. 504; Iontsev and Magovedova, 2015. Footnote 7, p. 98.

<sup>106</sup> Ledeneva, 2014. Footnote 104.

<sup>107</sup> Iontsev and Magovedova, 2015. Footnote 7, p. 98.

<sup>108</sup> Iontsev et al., 2016. Footnote 7, p. 504.

<sup>109</sup> Ibid.

<sup>110</sup> Iontsev and Magovedova, 2015. Footnote 7, p. 98.

<sup>111</sup> Korablin Y.A., 2016. Personal Potential and Labor Migration Behaviors of a Moscow Students, in *New guidelines of demographic policy of the Russian Federation in the conditions of the economic crisis: The Materials of the II International Scientific and Practical Conference (Moscow, December 8, 2016)*. – Moscow: Econ-Inform.

<sup>112</sup> Ibid., p. 308.

by graduates' views on better personal, professional and welfare opportunities available in the Western world, as well as by views on better career perspectives and a higher demand for their professional skills abroad. The researcher also sees one possible reason for students advancing their professional competencies as obtaining international experience. Feelings of better legal security and non-discrimination can be also seen as important factors. Some of the students, according to the research, may look for better climate conditions or availability of better medical services. Among the strong arguments may be a desire to travel, learn a foreign language in a corresponding language environment, become acquainted with new people and cultures and see the world<sup>113</sup>.

Despite the above aspirations of Russian students being not significantly different to those of their European counterparts<sup>114</sup>, what raises the Russian researchers' concerns is the growing number of young people who do not return to Russia after completing their studies abroad, or, in the case of working youth, after their temporary contracts expire. For example, in the Novosibirsk region, the share of people who did not return after completing their studies abroad was approximately 70% over the period 2001 to 2005<sup>115</sup>.

Numbers of educational emigration rose over the period 2000-2010, when it became popular among wealthy Russian families to send their children to study abroad. The trend was also stimulated by US and European programs supporting talented Russian students' studies. The main countries of study for Russian students are the USA, the UK, Germany, Australia and France. Educational migration often takes the form of labour migration – many Russian students stay to work in the hosting countries. Moreover, there is the phenomenon of “constantly circulating” educational migrants from Russia. Some young people extend their staying abroad, by applying for different grants in order not to return to Russia<sup>116</sup>, and so what was initially meant to be a temporary migration for a period of studies results in long-term or permanent emigration, inevitably raising concerns about ‘brain drain’.

The above processes are difficult to manage at the level of the sending country's state policy. The legal regulation of emigration issues is considered to be a rather complicated task for any state, since it is necessary to keep a balance between basic human rights (freedom of movement, right to choose the place of residence, etc.) and state interests in preventing the outflow of its citizens<sup>117</sup>.

In practice, migration issues are regulated more by receiving countries than by sending countries, as governments pay special attention to those entering their territories. As for legal regulations surrounding emigration from the Russian Federation, the main document is the Federal Law of the Russian Federation “Concerning the

<sup>113</sup> Ibid., p. 311.

<sup>114</sup> Orrù, E., 2014. *Student Mobility Policies in the European Union: The Case of the Master and Back Programme: Private Returns, Job Matching and Determinants of Return Migration*. Doctoral dissertation, The London School of Economics and Political Science (LSE).

<sup>115</sup> Iontsev and Magovedova, 2015. Footnote 7, p. 98.

<sup>116</sup> Iontsev et al., 2016. Footnote 7, p. 505; Ledeneva, 2014. Footnote 104, p. 111.

<sup>117</sup> Iontsev et al., 2016. Footnote 7, p. 503.

Procedure for Exit from the Russian Federation and Entry into the Russian Federation”, № 114-FZ, dated 15.08.1996 (with subsequent amendments). Article 15 of the law imposes several restrictions to exiting the Russian Federation. The right of an individual to exit may be temporarily restricted, if the individual has access to secret data or state secrets, or is a suspect or an accused, or avoids obligations imposed by the court thereon, etc. Thus, the main legal factor impeding the exit of citizens is the presence of obligations to the state<sup>118</sup>.

In this regard, the researchers note that the regulation of emigration cannot be merely restrictive. A comprehensive political approach, introducing economic, legal and social measures aiming at preventing high emigration flows and ‘brain drain’ at a sending country level, is to be taken<sup>119</sup>. Some authors also underline the importance of socio-psychological and motivational aspects (e.g. the desire to contribute to your home country) in this approach<sup>120</sup>.

However, the adoption of this comprehensive strategy can be postponed or hindered by the position of some Russian political leaders denying or underestimating the problem of brain drain in the country,<sup>121</sup> and the role that inefficient official policy can play in highly skilled migrants emigration and return decisions<sup>122</sup>.

Describing “clumsy” policies currently existing in the academic research field in Russia supporting a few institutions currently favored by state authorities while the majority of scientists who are not part of those institutions struggle for their economic survival, Iontsev, Ryazantsev and Iontseva underline that such policies mostly create an illusion of increasing state financial support of scientific research in Russia, while in fact they actually lead to the further polarisation of scientists and aggravate the problem of degrading scientific schools and the loss of academic qualifications, thence stimulating a new wave of intellectual emigration from Russia (brain drain)<sup>123</sup>.

The example above is of particular interest for the present study, as it not only illustrates the influence of official state policies on Russian intellectual emigration flows, but it also reveals another significant aspect of modern socio-political reality affecting the migration process, namely the role informal powers and practices existing in Russian society play in highly skilled specialist and scientists’ migration and employment decisions<sup>124</sup>.

<sup>118</sup> Ibid.

<sup>119</sup> Ushkalov and Malakha, 2001. Footnote 7; Ganguli, 2014. Footnote 7; Iontsev et al., 2016. Footnote 7; Iontsev and Magovedova, 2015. Footnote 7; Ledeneva, 2014. Footnote 104, pp. 111-113.

<sup>120</sup> Iontsev et al., 2016, p. 503.

<sup>121</sup> <https://www.stratfor.com/analysis/problem-russias-best-and-brightest> [accessed on the 6th of May, 2017]. <http://resolver.ebscohost.com.ludwig.lub.lu.se/openurl?sid=EBSCO%3aedb&genre=article&issn=00280836&isbn=&volume=516&issue=7531&date=20141218&spage=298&pages=298-299&title=Nature&atitle=Putin%27s+Russia+divides+and+enrages+scientists.&btile=Nature&jtitle=Nature&series=&aulast=Schiermeier%2c+Quirin&id=DOI%3a10.1038%2f516298a&site=ftf-live> [accessed on the 6th of May, 2017].

<sup>122</sup> Iontsev and Magovedova, 2015. Footnote 7, pp. 99–100; Iontsev et al., 2016, pp. 506–507.

<sup>123</sup> Ibid., p. 506.

<sup>124</sup> Gelman, V 2011, State Power, Governance, and Local Regimes in Russia, *Russian Politics & Law*, 49, 4, pp. 42–52; Galligan, D, & Kurkchian, M 2003, *Law and Informal Practices : The Post-Communist*

The example of state favoritism towards particular academic institutions and projects at the expense of the rest of Russian academia increases inequality among scientists and forces those with no access to state goodwill and resources to search for better living and working conditions abroad. In this regard, researchers point to “the paradoxical fact” that such practices encourage Russian scholars to emigrate first, in order to be invited to return and work in Russia later as “outstanding scientists” of Russian origin<sup>125</sup>, literally pushing academics out of the country.

Such informal practices of state-guided nepotism are conceptualized by Alena Ledeneva in terms of “sistema”, “informal power networks” (e.g. “inner circle”, “useful friends”, “core contacts”), “telefonnoe pravo”, “krugovaia poruka”, etc.<sup>126</sup> and imply that “*power networks operate without those constraints and extract multiple benefits from the post-Soviet reforms, while undermining the key principles of market competition (equality of economic subjects and security of property rights) and the key principle of the rule of law (equality before the law)*”, and “sistema” based on such networks, “undermines competition, excludes outsiders, and rewards insiders through network-based allocation and mobilization [of resources]”<sup>127</sup>.

From the viewpoint of the psychological theory of law, the involvement of ruling circles in such informal practices can be regarded as duties exercised by the authorities “without the ethical sanction... and without faith in the sanctity and justice of their conduct”, or in order “to take advantage of the existing legal order, extracting therefore material benefits”, which are more likely to “accelerate and facilitate” additional discrepancies<sup>128</sup> and increase the ‘gap’ between the intuitive law of academics and the positive law of their countries of origin, thus causing scholarly dissatisfaction with the existing social order. As Petrazycki points out, “the greater the accord between intuitive law and positive law [in a given nation]... the greater... the satisfaction with the existing social order... and vice versa”<sup>129</sup>.

Therefore, from the theoretical perspective, it is not surprising that such informal practices propel scholars’ decisions to avoid living and working in their home country through the means of emigration and non-return. Therefore, informal powers and rules can significantly influence highly skilled migrants’ (including students’) return and employment decisions and require the special attention of researchers and policymakers.

To understand further the roots of informalities and their meaning in relation to the socio-political reality of modern Russia, it is beneficial to refer to studies of le-

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*Experience*, n.p.: Oxford : Oxford University Press, 2003; Ledeneva, AV. 2006. *How Russia Really Works: The Informal Practices That Shaped Post-Soviet Politics and Business*. Ithaca, NY: Cornell University Press; Ledeneva, AV 2013, *Can Russia Modernise? : Sistema, Power Networks And Informal Governance*, n.p.: Cambridge : Cambridge University Press, 2013; Ledeneva, A 2017, *The Ambivalence of Favor: Paradoxes of Russia's Economy of Favors*, n.p.: Oxford University Press.

<sup>125</sup> Iontsev et al., 2016, p. 507.

<sup>126</sup> Ledeneva, 2013. Footnote 124, pp. 273–280; Ledeneva, 2017. Footnote 124.

<sup>127</sup> Ledeneva, 2017. Footnote 124, p. 5.

<sup>128</sup> Petrazycki, 1955. Footnote 18, p. 236.

<sup>129</sup> *Ibid.*, p. 234.

gal culture exploring “the interplay between law, social norms, human values and informal practices” in the Russian context<sup>130</sup>. Discussing socio-legal changes characterizing post-Soviet Russia, Kurkchiyan notes that Russian legal culture, replete with its Byzantine traditions, still implies that the rule of law plays a less important role in maintaining political stability and organizing the everyday life of society than political forces, power hierarchies and the positions of persons giving the instructions. In this respect, Kurkchiyan suggests that despite significant social transformation in post-Soviet life, “Russia is not on the way to a rule of law” and “informal dealings benefit not only bureaucrats and politicians, but also the corporate owners and managers”<sup>131</sup>.

Following this line of reasoning, it is tempting to claim that the Russian legal culture of informal rules and practices is the key factor shaping diverse socio-legal processes, not excepting the international migration of highly skilled specialists and students. However, Banakar points out that it is not correct to suggest that all aspects of law and legally meaningful action are culturally embedded, and “what is often taken as cultural behavior” can also be explained by other factors, for example by “institutional infrastructures of the legal system in different countries”. To justify this claim, Banakar analyzes Nelken’s example of how the Japanese use the court system, agreeing that they “make relatively little use of the courts”, not only due to their “Confucian-shaped culture that emphasizes harmonious and hierarchical relations”, but arguably because “the limited number of legal professionals and courts represents institutional barriers maintained by government bureaucracies and business elite”<sup>132</sup>.

Developing his argument further, Banakar explains that “admittedly, all manifestations of law are – if not directly at least indirectly – connected with collective social psychological mechanisms and taken for granted patterns of thought and action. This cannot be a sufficient basis for treating all aspects of law as culturally *embedded*, for we can use the same type of reasoning to argue that all aspects of law are also historically, politically, linguistically and even perhaps economically embedded”.

In this respect, taking into account the aims and limitations of the present study, the present author suggests the need for more extensive future research on the influence of informal practices on highly skilled Russian migrants’ return and employment in their correlation with other significant factors.

<sup>130</sup> e.g. Galligan and Kurkchiyan, 2003. Footnote 124; Kurkchiyan, 2005. Footnote 21.

<sup>131</sup> Kurkchiyan, 2005. Footnote 21, pp. 263–267.

<sup>132</sup> Nelken, cited in Banakar, R., 2009. Power, Culture and Method in Comparative Law (February 17, 2009). *International Journal of Law in Context; A Review Essay of Comparative Law: A Handbook*, Esin Orucu & David Nelken, eds., Hart Publishing, 2007. Available at SSRN: <https://ssrn.com/abstract=1345100>, p. 13.

## Determinants of Student Return Migration

In the next part of this chapter, I will provide an analysis of recent studies exploring student return migration policies in different countries, with the aim of identifying internal factors influencing their decisions.

### *Master and Back Program (Sardinia, Italy)*

An example of recent research enquiring into the determinants of student return migration from a sending country perspective is a case study on the Master and Back program, conducted by Enrico Orrù (The London School of Economics and Political Science, UK) in 2014<sup>133</sup>.

The Master and Back program was implemented in 2005 by the Italian region of Sardinia. It provides exceptional Sardinian students with substantial scholarships to pursue their second- and third-cycle studies (Master's and doctoral degrees) in the world's leading universities, and then additional financial support to those who return to work in Sardinia (the "Back").

Nowadays, the program is regarded as a "success story" by other Italian regions<sup>134</sup> despite demonstrating mixed results when it comes to the "Back" part, as the majority of graduates (55%) choose to work outside Sardinia and the economic incentives offered to returnees do not help to improve the situation<sup>135</sup>. Therefore, the study assessed the impact of the program on the participants' employment opportunities after graduation (including monthly income and job matching) and analyzed the underlying decision-making process based on their experiences<sup>136</sup>.

The study consisted of both quantitative and qualitative phases. The researchers used a mixed method approach and analyzed the program's administrative data, using a quantitative statistical method, and later verified their findings using qualitative methods, namely interviews with Master and Back Program participants<sup>137</sup>.

Taking a 'jobs vs. amenities' discourse<sup>138</sup> as a starting point of their analysis of the key factors determining students' return and employment decisions, Orrù and colleagues initially found that highly skilled migrants' return patterns are linked to job opportunities, amenities (e.g. quality of life, cultural diversity, tolerance and other

<sup>133</sup> Orrù, 2015. Footnote 114.

<sup>134</sup> *Ibid.*, p. 31.

<sup>135</sup> *Ibid.*, p. 251.

<sup>136</sup> *Ibid.*, p. 4.

<sup>137</sup> *Ibid.*, p. 260.

<sup>138</sup> The discourse is inspired by the works of Richard Florida (2002. Footnote 152) and his supporters, who argue that highly skilled migrants ('the creative class') tend to migrate to places with more developed "cultural industries", tolerance and so on, almost neglecting the role of employment opportunities, as the theory assumes highly skilled individuals will be easily employable anywhere they choose to move. Thus, following Florida's reasoning, the migration decisions of the creative class are only dependent on personal preferences for particular amenities. Florida's theory is criticized "on the grounds that jobs do not follow people – rather, the opposite is true" (Orrù, 2015. Footnote 114, pp. 299–300).

soft factors) and social networks in the places of destination and origin<sup>139</sup>. Further exploring the correlation between and significance of each of these factors in the decision-making process, Orrù noted that those participants who self-reported job opportunities and amenities as important were less likely to return to Sardinia (one of the Italian “lagging” regions)<sup>140</sup>.

Simultaneously, social networks in the home region play a significant role when it comes to return decisions, in the sense that the stronger social networks (family ties, friendships, acquaintances, sentimental relationships) in the home region, the greater the chance students will return, provided, however, their social networks in receiving places are weaker and do not allow their successful integration into the chosen country of destination. The latter correlation is due to social networks’ “key role in shaping access to opportunities, both in the sending and in the receiving countries”<sup>141</sup>.

According to Orrù, almost all study participants stated that professional and work opportunities, as well as family and relationship ties, are crucial for making their migration decisions, while geographical location plays a less important role. Therefore, Orrù continues, the choice of location is determined by migrants’ personal preferences, prior migration experiences and their own perceptions of migration opportunities, but professional reasons, family ties and cultural elements (“feeling at home”, “where one can speak his/her mother tongue”) are the most important factors of all<sup>142</sup>.

In the case of economically ‘lagging’ regions (like Sardinia), the lack of professional and employment opportunities is the most important non-return motivational factor revealed within the study discussed here. Interviewed graduates stated that the local labor market, which they described as “poor and inefficient” is less likely to meet their needs and expectations than labor markets in more developed areas (job instability, poor or no professional prospects, etc.). The students also said that they were unwilling to return, as their knowledge and skills obtained during the Master and Back studies could not be applied in Sardinia, simply because there were no employers that needed them<sup>143</sup>.

Other negative factors existing in the Sardinian labor market and discouraging students’ return included: extremely low salaries or unpaid work (internships) frequently offered to graduates or inexperienced employees, a lack of meritocracy and the prevalence of favoritism – i.e. employers did not value the employees’ talents, abilities and skills and instead would offer promotions to those whom they favored. In the case of Sardinia, the latter reasons are reported to be especially relevant to the academic field. Coupled with the absence of innovative research areas and good universities, the above-listed factors hinder students returning home<sup>144</sup>.

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<sup>139</sup> Ibid., p. 260.

<sup>140</sup> Ibid., p. 261.

<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid., pp. 262–265.

<sup>144</sup> Ibid.

Interestingly enough, when the interviewees and Orrù talk about the perceived lack of meritocracy and their attitudes towards this phenomenon, they literally talk about the lack of justice, reflected in Petrazycki's interpretation of the concept<sup>145 146</sup>.

"It must be said that this critique can be extended to the Italian academic system as a whole, which has also been defined as a 'baron system', i.e. an academic system that is a legacy of the past and 'based on a feudal-like system where a professor uses his power to foster or stop a young scientist in his/her career'<sup>147</sup>. Commenting on this situation, one interviewee – a female researcher, based in Sardinia – stated that "*ineptitude, corruption and clientelism result in lack of meritocracy: this is why I am planning to leave again*"<sup>148</sup>.

Another interviewee – a male researcher, based in Sardinia – declared "*what I do not like about the academic career, at least here in Italy, is that it's not the best who advances, but the ones supported by the most powerful patronization or the ones with the right sponsors that let them work and appear in many publications in a short time compared to other who do not have the same opportunity. [Working in academia in Italy] is a very precarious condition which can last for many, many years, so it's a very risky path. [...] I don't feel like waiting anymore; if you do not give me a chance to work now, I'll go somewhere else!*"<sup>149</sup>.

In the above examples, both graduates say that the 'injustice' they witness in their home region stimulates their departure plans. Orrù confirms that "various interviewees currently working outside Sardinia state that meritocracy is a value in their current working environment and that this is one of the reasons why they have decided not to come back"<sup>150</sup>. Therefore, the Russian context is not unique when it comes to the influence of informal rules and practices on students' return and employment decisions; hence, informal factors require the special attention of researchers and policymakers.

Further discussing the migration determinants of the program participants, Orrù identifies social networks as "drivers" and "facilitators" when it comes to location choices. The researcher acknowledges the particular importance of family and stable relationship ties, as they play not only an emotional, but also an economic role (e.g. financial and other kinds of support in case of job loss or other unforeseen circumstances) in serving an important return factor. Having a family of one's own can significantly affect the location decision, since the goal of the good of the family becomes more important than individual ambitions<sup>151</sup>.

<sup>145</sup> Petrazycki, 1955. Footnote 18, pp. 243–244.

<sup>146</sup> "The expressions justice, injustice, and so forth are accordingly applied chiefly when the concern is with the conduct or the character of those who are standing higher and are dominant as regards those who are standing lower and are subordinate or dependent, and not vice versa" (Petrazycki, 1955. Footnote 18, p. 243).

<sup>147</sup> Foadi, 2006, p. 217 cited in Orrù, 2015. Footnote 114, p. 264.

<sup>148</sup> Ibid.

<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid., pp. 265–269.

The role of amenities, however, according to Orrù's study, appeared to be less important in the students' location decisions than emphasized by Richard Florida<sup>152</sup>. In fact, the studies conducted by Murphy and Redmond<sup>153</sup> in Dublin and by Martin-Brelot et al.<sup>154</sup> in another 11 European cities demonstrate similar findings, in that the meaning of amenities or 'soft factors' in highly skilled migrants' location choices is rather exaggerated and that this group of migrants chooses their places of living on the basis of traditional factors, namely job availability, family ties and emotional links with their places of birth, etc. So-called 'soft factors' do not play an important role in the decision-making process of the absolute majority of the respondents<sup>155</sup>.

The findings of Master and Back program analysis can have specific policy implications for sending governments trying to reap the gains from their investment in student mobility and favor return migration. The study provides evidence that economic motivators are not the only factors that define students' return decisions, and so other factors of relevance (e.g. family ties, social networks and emotional attachment to the home countries) should be taken into account<sup>156</sup>.

### *Program of Training High-Caliber Backbone Personnel from the Ethnic Minorities (China)*

Another example of recent research exploring student mobility policy from a sending country perspective is a case study of the Chinese Program of Training High-Caliber Backbone Personnel from the Ethnic Minorities, conducted by Zhiyong Zhu and Si Xiang (Beijing Normal University, China)<sup>157</sup>.

The program was launched in 2005 by the Chinese government as a supportive measure for human resources development in western regions of the country (one of the least developed areas) and empowering vulnerable ethnic groups. Under the program, participants are given financial means and preferential access to Masters or doctoral degree programs and expected to return and contribute to their home region development after graduation. However, the numbers of graduates who are unwilling to return to their home towns and intend to break away or have already breached their employment contracts continue to grow<sup>158</sup>.

<sup>152</sup> Florida, R., 2002. *The Rise of the Creative Class : And How It's Transforming Work, Leisure, Community and Everyday Life*, New York, USA, Basic Books.

<sup>153</sup> Murphy, E. & Redmond, D. 2009. *The Role of 'Hard' and 'Soft' factors for Accommodating Creative Knowledge: Insights from Dublin's 'Creative Class'*.

<sup>154</sup> Martin-Brelot, H., Grossetti, M., Eckert, D., Gritsai, O. & Kovács, Z. 2010. The Spatial Mobility of the 'Creative Class': A European Perspective. *International Journal of Urban and Regional Research*, 34(4), pp. 854–870.

<sup>155</sup> Orrù, 2015. Footnote 114., p. 270; Murphy and Redmond, 2009. Footnote 153.

<sup>156</sup> Orrù, 2015. Footnote 114., p. 279.

<sup>157</sup> Zhu, Z., Xiang, S. 2014. Why won't talents return home? A case study of contract breach by graduates of the program of training high-caliber backbone personnel from the ethnic minorities/¿ Por qué el talento no vuelve a casa? Un estudio de caso sobre la brecha contractual entre graduados de grupos minoritarios del programa para la formación de alto nivel de personal backbone. *Revista Española de Educación Comparada*, (23), pp. 19–52, p. 19.

<sup>158</sup> *Ibid.*, p. 22.

Through the means of in-depth interviews, this case study explores the experiences of three program graduates who had violated their employment contracts and traces the reasons of their non-return<sup>159</sup>.

The research shows that due to social and economic changes in China, policies surrounding the Program had become largely irrelevant, thereby making it impossible for regional officials to ensure the fulfillment of employment contracts under the socialistic market economy system. As for individuals' motivation behind contract breaches, the study found that family pressure (return to poor regions after graduation is often regarded as a student's failure to find a better job, due to a lack of skills), major differences in the level of development between western and eastern parts of China, weakened by a sense of ethnic identities as well as increased employment expectations and a lack or absence of adequate placements in home towns, coupled with generally ineffective program's supervision and assessment mechanisms, contribute to contract violation choices<sup>160</sup>.

The findings of this study reveal many implementation problems of the program, and despite Zhu and Xiang not regarding it as a complete failure, they do readily admit that "there is much room to improve this policy", suggesting that government at all levels should carefully examine graduates' employment opportunities both in their home towns and in major cities<sup>161</sup>.

In this study, as well as in the previous one, we can trace a correlation between students' perceptions of circumstances in home places as 'unjust' and their motivation to violate contracts and not return to their regions. One of the interviewees, Li Ming, who used to work as a court secretary in his hometown before the program, studied and then made the decision to stay in Beijing.

From an interview with Li Ming:

*"Hmm. I had never expected to work as a secretary for so many years. With high marks I could have chosen to work in more promising organizations. At that time I was too naive, thinking that so long as I could perform well I could get promoted. In fact, that's not the case. To be on good terms with leaders is the priority. When other colleagues got promotion one by one, I remained a secretary writing articles for leaders and managing daily routines of the office. Didn't I rank the highest in the exam? Then why it was others that got promoted? I couldn't accept it. So I was determined to prepare for the national graduate entrance exam. I wanted to prove that I am abler than others"*<sup>162</sup>.

*"That's the case. Aren't I mad if I go back at the very thought that there will be no change in my work? Then why should I waste four years in pursuing graduate education?"*<sup>163</sup>.

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<sup>159</sup> Ibid.

<sup>160</sup> Ibid., p. 42.

<sup>161</sup> Ibid., p. 48.

<sup>162</sup> Ibid., p. 39.

<sup>163</sup> Ibid.

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*“Beijing is after all the capital of China. Here, of course, there are those who get promotion through nepotism, but there are also some who are appointed on their own merit. At least, here are more chances for me to develop”*<sup>164</sup>.

Another interview with a program participant, Zhang Yike, who was initially very determined to return and work in her hometown after graduation despite her mother being against her return, explains how inadequate program regulations, forcing specialists with Masters and doctors degrees to take grass roots positions in local organizations not requiring any of these qualifications, discouraged her plans to return<sup>165</sup>.

*“Very soon, the document was transmitted from one to another in our QQ group. Almost everyone was mad, discussing what to do next. Some said we were like kids under no custody, and we had to make a living for ourselves. Others said it was a waste of talents if we were to be treated like bachelor degree graduates. I found it both funny and annoying. For one thing, we had never been in such a heated discussion of an issue. Normally we were silent and invisible. Now when it concerned our interests, we could not keep silent any longer. For another, words failed me when I learned what arrangement the provincial government had made for us. I was capable of those things when I graduated with a bachelor degree. If I were to be treated like a bachelor degree graduate, why should I have spent four precious years studying for a master degree? It is totally a waste”*<sup>166</sup>.

This example clearly shows some form of ‘discord’ or conflict between the ‘positive law’ of the program and the student’s understanding of justice (‘intuitive law’), which eventually resulted in her non-return and a breach of her contract with the program, regardless of the risks of significant financial penalties, diploma withdrawal and an inability to return home and see her family<sup>167</sup>.

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<sup>164</sup> Ibid., p. 40.

<sup>165</sup> Ibid., p. 36.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid., p. 37.

*Global Education Program (Russia) – Previous Studies*

In this section, I will provide a review of two recent studies of the Global Education Program, conducted by Marina Kovalenko (National Research University “Higher School of Economics”, Moscow, Russia) and Polina Sarafanova (University of Hong Kong, Hong Kong, China).

*“The Global Education Programme in the Era of the Knowledge Based Economy: Context and Implications”*

by Marina Kovalenko

In the article “The Global Education Programme in the Era of the Knowledge Based Economy: Context and Implications”, Kovalenko explores the GEP as a policy initiative for economic modernization in a political and cultural context and from the standpoints of theories of internationalization<sup>168</sup>, seeking to identify existing mismatches between the program’s aims and the realities of its implementation<sup>169</sup>.

In her analysis, Kovalenko positively assesses the program’s humanistic goals to provide access to high-quality education to Russian citizens and significant financial incentives made available to program participants. Nonetheless, she also identifies the following areas of concern influencing the program’s realisation: 1) low competition among program applicants, 2) an ineffective informational campaign introducing the program to the general public, 3) difficulties experienced in the funding process due to Russian currency instability, 4) mismatches between knowledge/skills obtained abroad and participants’ expected work duties in Russia, 5) discrepancies between work availability in the most developed regions of Russia (Moscow and Saint-Petersburg) and existing limitations of employment in these cities (employment quota) and 6) potential ‘brain drain’ risks associated with economic “(in)stability” in the country<sup>170</sup>.

Kovalenko also points out that the major disadvantage of the program is the limited employment opportunities for participants: “*all such answers [offered by the respondents] look similar and describe the issue of quotas for Moscow and Saint-Petersburg, low payments, bureaucracy and time restrictions*”<sup>171</sup>.

The researcher also provides interesting data on GEP participants’ plans to stay in Russia or leave the country after three years of compulsory employment, pointing to factors that may encourage their long-term careers in the country. According to Kovalenko, all the respondents (26 persons) indicated that they would be pleased to stay and continue working in GEP-approved companies, if they allowed them to “apply their skills, provide decent working conditions, career development opportunities

<sup>168</sup> Knight, J., 2004. Internationalization remodelled: Definition, approaches, and Rationales. *Journal of Studies in International Education*, 8(1), pp. 5–31. doi: 10.1177/1028315303260832.

<sup>169</sup> Kovalenko M., 2017, *The Global Education Programme in the Era of the Knowledge Based Economy: Context and Implications*. Mir Rossii, vol. 26, no 3.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

and a competitive salary”. More than 40% of the participants, nevertheless, said that they might leave Russia if better opportunities were offered. The UK, Canada, the USA, Australia, New Zealand as well as the UAE and Singapore were mentioned as potential destination countries<sup>172</sup>.

Based on her analysis, Kovalenko concludes that the program is currently showing mixed results, due to the unpredictability of participants’ educational and employment choices, high career expectations, Russian currency instability, etc.<sup>173</sup>. Nevertheless, the researcher remains optimistic about the program’s potential for international knowledge and experience exchange, establishing scientific and educational networks and bringing to Russia innovative research methodologies, albeit emphasizing the need to reassess the program and further monitor its practices<sup>174</sup>.

*“State Regulation and Market Coordination in the Context of Government-Funded Scholarships of Outward Mobility: A Case of the “Global Education”*

by Polina Sarafanova

Similar concerns were expressed earlier by Polina Sarafanova in her Master dissertation titled “State Regulation and Market Coordination in the Context of Government-Funded Scholarships of Outward Mobility: A Case of the “Global Education” Program in the Russian Federation”, in which the author examines interactions between state and market forces in the framework of international government-funded assistance schemes for external student mobility. Taking Russia’s “Global Education” Program as a case study the researcher seeks to determine the aspects that facilitate or hinder successful implementation of the Program 175.

Sarafanova claims that the success of international scholarship schemes depends on how efficient the national government is in directing individual motivation (“interest”) in the desired direction (“satisfaction of public goals”)<sup>176</sup>. In order to justify the claim, in spring 2016, the researcher conducted 15 interviews with program participants and analyzed program documents available on GEP’s official webpage at that time.

The collected data allowed Sarafanova to conclude that despite the program still being in its initial stage, and the fact that it was rather difficult to identify its strengths or shortcomings with certainty, some of the factors revealed raised concerns about its implementation practices. In this respect, Sarafanova points out that the program was designed without the careful analysis of Russian labor market demands (“local needs”), and thus currently enrolled students could be studying fields and/or levels of education that would not be relevant to potential employers.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid., p. 19.

<sup>174</sup> Kovalenko, 2017. Footnote 169.

<sup>175</sup> Sarafanova, P., 2016. *State Regulation and Market Coordination in the Context of Government-Funded Scholarships of Outward Mobility: A Case of the “Global Education”*. Master dissertation, University of Hong Kong, p. 2.

<sup>176</sup> Ibid., p. 7.

The lack of job opportunities, which Sarafanova associates with the skills/jobs mismatch (“already evident in the program”), can, according to the researcher, discourage returning participants and “signal about the irrelevance of their personal investment”. Employers’ low interest and the lack of transparent procedures in the program, in combination with participants’ obligation to gain employment after graduation within three months, “put returnees in a situation of uncertainty about their future and weaken their negotiation position in the labor market leading either to passivity or opportunistic behavior”<sup>177</sup>.

Sarafanova criticizes the state response to this situation, pointing out that emerging difficulties have not been addressed properly, and instead of facilitating the employment process, the state (the Ministry of Education and Science of the Russian Federation) has actually limited further returnees’ opportunities by imposing additional requirements (for example, accepting full-time employment only and becoming part of the staff) and disregarding the present economic situation and labor market demands, thus increasing uncertainty and producing even more mistrust and opportunism among program participants<sup>178</sup>.

Describing their attitudes towards the program, Sarafanova says that based on the interviews “the participants feel the unfairness of the whole situation, where they are the only party to bear direct responsibility not only for non-return but also for non-employment, which was guaranteed by the decree. This feeling leads to frustration and enhances mistrust in the actions and intentions of the State”<sup>179</sup>.

Furthermore, “Participants find themselves in a situation of misalignment of expectations. The drafted framework [official program regulations] is not working as expected: employers from the list are not ready to compete and to offer attractive working conditions, the operator facilitates but does not guarantee employment, and participants are the only party who faces with both the obligation and the possible punishment”<sup>180</sup>.

In the above-quoted examples, Sarafanova, though using the word ‘unfairness’ instead of ‘injustice’, talks about the participants’ perceptions of the program rules as being unjust, by explaining the core factor influencing these attitudes: “the drafted framework is not working as expected”, thus pointing to the ‘gap’ between ‘official law’ and the ‘intuitive law’ of the participants. Furthermore, the researcher explains how the position of the authorities contributes to the deterioration of the situation and increases this gap.

“The Ministry treats the activity of participants [individual and collective petitions pointing at the Program shortcomings] as a means to avoid responsibility or as a possible source of opportunistic behavior. Thus, instead of changing the inefficient and destabilizing elements of the program, the state intervention targets the activity of participants. The situation is worsened by the lack of a mechanism that will pro-

<sup>177</sup> Ibid., pp. 38–39.

<sup>178</sup> Ibid.

<sup>179</sup> Ibid.

<sup>180</sup> Ibid., p. 43.

*vide participants with an opportunity to influence the management of the program. Such a reaction from the part of the State leads to mistrust from the part of Participants and has the potential to encourage individuals to behave in the postulated opportunistic fashion.*<sup>181</sup>

In this quote, we see how the intuitive law of the program participants “exerts pressure upon the interpretation and application of positive law in the securing the decisions in accord with (or as little as possible divergent from) the directives of the intuitive law consciousness”<sup>182</sup> and how these efforts of intuitive law are being resisted by those in positions of power seeking to preserve existing ‘positive law’, regardless of its poor enforceability. The potential link between this ‘gap’ (stimulated by program officials) and the occurrence of unwanted consequences in the form of participants’ “opportunistic behaviour”<sup>183</sup> is also well illustrated by the above example.

Sarafanova’s study provides valuable insights into the program’s early-stage implementation processes and its existing shortcomings (associated with a designated employers’ list, quotas on employment in Moscow and St. Petersburg, jobs/skills mismatches, shifting program risks on the participants, etc.), with which I mostly agree. However, one of her conclusions I cannot support, namely the role that Sarafanova assigns to the program operator in the GEP implementation process.

Depicting the program operator as the party acting in the participants’ interests, who therefore “functions as a buffer” between the participants and the state “trying to reduce tensions, mitigate clash of interests”, but having no “decision-making powers” and being unable “to resolve arising issues independently without a prior consent of the Ministry of Education”, Sarafanova misinterprets the role and responsibilities, which are described in detail in Decree No. 568 of the Government of the Russian Federation and will be discussed further in the next section.

## Analysis

This chapter contains an analysis of the discrepancies existing between GEP employment regulations (positive law) and the reality of their interpretation and implementation by GEP officials and participants. It explores the underlying causes of the above-named discrepancies and their meaning to GEP participants’ return and employment plans (behaviors) after graduation.

### *Positive Law: GEP Employment Regulations*

According to the hierarchy of legal acts of the Russian Federation, decrees of the Government of the Russian Federation shall be issued on the basis and for the sake of implementation of the Constitution of the Russian Federation, federal laws and normative decrees of the President of the Russian Federation. Government of the

<sup>181</sup> Ibid., pp. 43–44.

<sup>182</sup> Petrazycki, 1955. Footnote 18, p. 234.

<sup>183</sup> Sarafanova, 2016. Footnote 175, p. 44.

Russian Federation decrees shall be obligatory for fulfillment in the Russian Federation. Other normative and non-normative acts of the executive power bodies of the Russian Federation are to be consistent with the provisions of the decrees of the government (Article 115 of the Constitution of the Russian Federation).

The regulations below define procedures for the employment of the program participants as stipulated in Decree No. 568 of the Government of the Russian Federation, dated June 20, 2014 (with amendments made by Decree No. 635 of the Government of the Russian Federation, dated June 26, 2015, and Decree No. 298 of the Government of the Russian Federation, dated March 15, 2017) (article 1)<sup>184</sup>:

*“A Program Participant who has graduated from a leading foreign educational institution and obtained a relevant degree certificate shall return to the Russian Federation within 30 calendar days for further employment with an Employer Organization (article 2).*

*A Program Participant shall, within 30 calendar days after the arrival in the Russian Federation upon the completion of the full training at a leading foreign educational institution, furnish the Program Operator with the original certificate of education granted by the leading foreign educational institution (article 3).*

*A Program Participant shall, within no more than 3 months after the arrival in the Russian Federation, select an Employer Organization from the list of organizations providing employment to Program Participants as approved by the Program Supervisory Board and get employed with the Employer Organization.*

*With respect to employment in companies and/or entities that are subject, under the laws of the Russian Federation, to special arrangements for security and protection of state secrets, including special conditions of residence, the employment period shall not exceed 6 months (article 4).*

*The Program Participant may change the Employer Organization no more than 2 times during the period of his/her participation in the Program; provided that the Program Participant shall work at Employer Organizations according to his/her qualification for at least 3 years.*

*In case of change of the Employer Organization, the Program Participant shall choose and get employed with a new Employer Organization within no more than 2 months or, in case of employment in businesses and/or entities that are subject, under the laws of the Russian Federation, to special arrangements for security and protection of state secrets, including special conditions of residence, within no more than 6 months.*

*The number of Program Participants who are domiciled in Moscow and St. Petersburg, employed by Employer Organizations and whose actual place of work is an Employer Organization located in Moscow and St. Petersburg shall not exceed 10*

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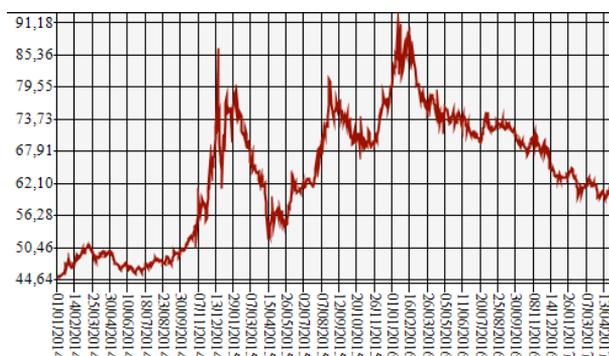
<sup>184</sup> To verify that the regulations below constitute the positive law of the program from the view of the psychological theory of law (i.e. they are perceived as normative fact by GEP participants and officials), the corresponding questions were asked by the researcher during the interviews with GEP participants. Their answers, as well as the GEP operator's interpretations, were analyzed in due course.

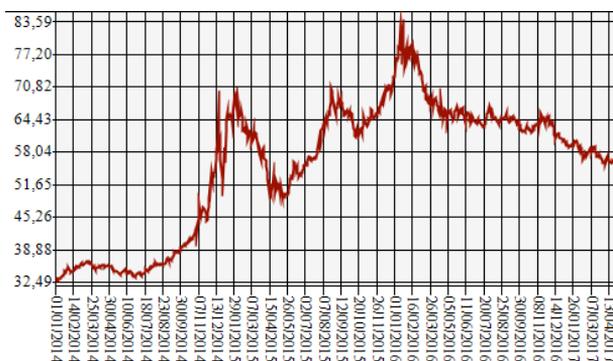
percent of the total number of the Program Participants employed (valid before the 15<sup>th</sup> of March, 2017)<sup>185</sup> (article 5).

The Program Participant shall, within 10 calendar days after the date of employment with an Employer Organization or the date of re-employment in case of change of the Employer Organization, notify the Program Operator accordingly and provide supporting documents and information about the full name of the Employer Organization, his/her job title, and the employment commencement date (article 6)<sup>186</sup>.

It is necessary to note that the present regulations had been developed and adopted by the government in 2013–2014, before the so-called ‘2014–2015 Currency Crisis in Russia’ broke out. The crisis was caused, according to the Ministry of Economic Development of Russia, by low global oil prices, conflict escalation in Ukraine, international sanctions and Russian countersanctions. It resulted in high inflation, income reduction and a sharp decline of business confidence and economic activity in Russia by the end of 2014–2015<sup>186</sup>.

Therefore, the basic assumption of the employment regulations – that GEP graduates and their skills will be in high demand among designated employers (so the participants will be able to “select an Employer Organization from the list of organizations providing employment to Program Participants”) – might have been affected by the economic crisis and the corresponding labor market slowdown, and thus might have lost its relevance.





Development of the USD-Ruble exchange rate January 1, 2014–May 1, 2017.

Source: Central Bank of Russia<sup>188</sup>

### *The ‘Gap’ between GEP’s Positive Law and the Intuitive Law of its Participants*

To explore GEP participants’ attitudes towards the program’s employment conditions, and their employment plans and behaviors, I conducted two cycles of semi-structured interviews with 18 GEP participants currently studying or having completed their studies in the UK, Australia, Sweden, China, France and Italy. Four of the participants who had completed their studies had returned to Russia, two of which said they were employed.

During the first cycle of interviews, the following three aspects of GEP employment regulations were actively discussed by the study participants: 1) the 10% quota on employment in Moscow and St. Petersburg, 2) the existence of a list of employer organizations providing employment to GEP participants and 3) the three-month timeframe given to search for first employment after graduation.

These recurring topics are mainly mentioned by the interviewees as program disadvantages, due to the inconsistency of corresponding GEP employment conditions with the current labor market situation, the level of development and economic realities of Russia as well as with the participants’ personal circumstances (e.g. absence of certain professions and academic fields in cities other than Moscow and St. Petersburg, as well as the need for Moscow and St. Petersburg residents to leave their home cities, etc.). These topics constitute areas of concern, revealing discrepancies or gaps between GEP employment regulations and the perceptions of participants.

Anna (name changed), 26, female:

*“Who needs the list [of employers], if the employers do not need us? Let us return and find work in Russia like other people do... It seems very strange that we can’t*

<sup>188</sup> [https://www.cbr.ru/eng/currency\\_base/dynamics.aspx?VAL\\_NM\\_RQ=R01235&date\\_req1=01.01.2014&date\\_req2=01.05.2017&rt=2&mode=2](https://www.cbr.ru/eng/currency_base/dynamics.aspx?VAL_NM_RQ=R01235&date_req1=01.01.2014&date_req2=01.05.2017&rt=2&mode=2) [viewed on the 10<sup>th</sup> of May, 2017].

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*work in Russian companies which want to hire us, but instead have to struggle in order to get employed by GEP-authorized organizations which are not interested.”*

Alexandra (name changed), 27, female:

*“What can be done to facilitate employment within the Program? Get rid of the list [of the employers] and quotas [for Moscow and St. Petersburg], or at least give the participants more time [to search for work] without chasing them.”*

The recurring issues associated with the list of employers (showing low interest in hiring GEP graduates), existing quota conditions and the inflexibility of the initial employment timeframe constitute the basis for conflicts between the positive law of the program and the intuitive law of its participants, subsequently influencing the latter group’s employment plans and behaviors.

Konstantin (name changed), 30, male, says:

*“(1) No, initially I did not have any worries about the ‘penalties’ condition of the Program, because I knew I was able to complete the studies and I wanted to work in Russia – and I still want, but it seems almost impossible now. There are only two institutions in Russia... [gives their names], where my theme [field of research] exists...  
.....*

*(2) No, I do not mean any workplace where I can apply my ‘side skills’ like computer programming or data analysis, I mean my research in [states the field of his research]... So, I cannot work outside the equipped laboratory, and both of the institutions having these laboratories are located in Moscow....  
.....*

*(3) Yes, the organizations are included in the GEP list [of employers], but it does not mean anything as they clearly indicate that they did not ask to be part of the list and there will be no preferences for GEP participants. But this is not a major problem. I’m prepared to compete for work there.*

*Will I get ‘the quota’ to work in Moscow when I still have more than 18 months of studies plus dissertation? That’s the problem. They [GEP officials] want me to find work in accordance with my ‘qualification’, but how am I supposed to do that, if I’m not able even to consider the relevant institutions, not to mention if they have any open vacancies in almost two years’ time, etc?  
.....*

*(4) No, I do not know any other places in Russia [with the necessary facilities]...  
Well, in principle, I can work in any university teaching the basics to undergraduates, but I could do that without going abroad and leaving my family in Russia... Working as a lecturer after graduation? No, for two reasons: first, I’m not good at teaching, second, my family needs my salary to live on, and with those salaries it would not be possible.  
.....*

(5) *Can you imagine what I feel when my professor here in... [the university of studies] talks about our research program extension opportunities, saying that I could be a part of it? Or when the colleagues discuss new campus facilities for families with children? So, it is not even the money that attracts, it's the attitude. I won't be able to earn a fortune here either, at least while I'm a junior researcher, but our project is developing, my work is valued and the promotion is a matter of time and my own efforts.*

.....

(6) *Well, even if I'm not able to continue working in my university here in [the country of studies] .... which is unlikely, I will certainly get a similar position in Germany, Switzerland or the USA... but ironically not in Russia, where GEP 'quotas' won't allow me to do that and where I most likely will have to take any formally 'suitable' work not necessarily in my field of studies.*

.....

(7) *... that's when one really understands what the [GEP] 'penalties' condition is about... It is designed to force you to return and seek employment in Russia, even if it is against common sense... because your work is not really needed there.*

.....

(8) *Yes, I think I'm returning... I have my family there.... But I will do my best in order to stay or at least work abroad".*

The above interview with Konstantin is an illustration of a conflict between the positive law of the program and the intuitive law of its participants, potentially resulting in intentional non-return or non-employment (GEP rule violation). It shows the process of change happening in the participant's consciousness in relation to program regulations, from the initial preparedness to comply fully with requirements, (1) to the emerging plan to violate program conditions (7,8). It also highlights the reason behind such a change, namely the inconsistency of the program regulations, with the participant economic and labor market realities of Russia, further aggravated by the lack of mechanisms for employment provision (which will be discussed in detail in the next section of the present chapter).

The situation caused by 'quota' conditions (3), and the fact that both of the relevant employers in Konstantin's case are located in Moscow, is further escalated by the lack of attractive vacancies in other regions of Russia (low salaries (4), jobs/skills mismatch (2)) and the availability of such vacancies abroad (5,6).

Despite the latter condition related to foreign countries being outside the Russian government's control, issues associated with program regulations, such as 'quota' conditions and the existence of the list of GEP designated employers showing low or no interest in graduates (3), could be resolved at Russia's own discretion, before any unwanted consequences (GEP rule violations) occur.

The need to change these two GEP conditions was indicated in nearly every interview conducted within the present research and is supported by the findings of

Sarafanova<sup>189</sup> and Kovalenko<sup>190</sup> in their studies. The above unanimity, however, is not surprising, because for GEP participants, both of these conditions are part of *distributio bonorum atque malorum* and thus lie in the sphere of intuitive law or justice. Therefore, the experiences of justice (or injustice) with regards to these areas have great influence over the participants' interpretation, fulfillment or violation of their GEP obligations<sup>191</sup>.

In this respect, the following GEP policy amendments, aimed at the participants' employment facilitation, seem necessary:

Increase or eliminate quota conditions for program participants' employment in organizations registered in Moscow and St. Petersburg;

Eliminate the list of organizations providing employment to program participants, or change the procedure for adding new organizations to the list.

### *The Operator's Interpretation of GEP Employment Regulations and its Meaning in relation to the 'Gap' Problem*

As noted, earlier I did not receive the GEP operator's consent to interview their staff within the present study, and so in this section I shall analyze a transcribed video record from the GEP webinar (internet conference) conducted by the program operator on 20<sup>th</sup> July, 2016<sup>192</sup> as well as materials available on the GEP's official webpage ([www.educationglobal.ru](http://www.educationglobal.ru)).

An analysis illustrates how GEP officials condition the way GEP employment regulations are communicated to participants and explores the underlying reasons behind their actions. In addition, it traces how GEP officials' interpretations of GEP employment regulations impact upon GEP participants' attitudes at a discursive level and influence the way they think about and experience employment regulations.

GEP Webinar, 20th July, 2016:

GEP participant's question: "*If a participant cannot find a job for himself [after graduation], can GEP provide it?*" (0:50).

Operator's reply: "*There is such a moment here. The employment obligation lies with the participant. This is stated in the agreement that you [participants] sign after the Supervisory Board approves you as a winner of the program, before receiving the grant. Consequently, the operator of the Global Education Program provides maximum assistance in many matters, but this is not a Soviet system of 'raspredele-nie'<sup>193</sup> [distribution]. Ready-made [work] places that will be assigned to individual participants... those the program does not provide*" (0:50–51).

<sup>189</sup> Sarafanova, 2016. Footnote 175.

<sup>190</sup> Kovalenko, 2017. Footnote 169.

<sup>191</sup> Petrazycki, 1955. Footnote 18, pp. 235, 242, 245.

<sup>192</sup> Video of the webinar (in Russian) is available at <https://www.youtube.com/watch?v=pXJD4xEQcgQ&feature=youtu.be&t=4481> [accessed on the 6th of May, 2017].

<sup>193</sup> Nowadays, a discredited Soviet system of mandatory job allocations for university and institute graduates (White, A., 2007. Internal migration trends in Soviet and post-Soviet European Russia.

In this example, in answering the question, the operator's representative refers to the GEP participation agreement which stipulates that participants are to be employed in accordance with the GEP employment regulations (Decree No.568 of the Government of the Russian Federation dated June 20, 2014) explicitly described in the previous section of this chapter. These state that "a program participant shall select an employer organization from the list of organizations providing employment to program participants... and be employed with the employer organization" (article 4 of the employment regulations).

However, the operator discursively shifts employment responsibility and corresponding risks to the participants replacing the concept of employment 'provision' ['obespecheniye'], stipulated in Government Decree No. 568, via vague employment 'assistance' ['sodeistvie'] not included in GEP employment regulations. Furthermore, the operator intentionally avoids using the word 'provision' ['obespecheniye'] when it comes to GEP participants' employment and instead states that the program does not use "a Soviet system of *raspredelenie*<sup>194</sup> ['distribution']", groundlessly linking work 'provision' within GEP to the currently discredited Soviet postgraduate work assignment system.

Taking into account that, according to program regulations, it is the GEP operator (and not the participants) who is responsible "for the Program employment mechanisms provision, communication with the employers and overall Program effective implementation" (Decree No. 568 of the Government of the Russian Federation, dated June 20, 2014), the above 'juggling with words' gets a pretty obvious legal meaning, namely that the operator discursively shifts its duties on GEP participants simultaneously limiting its own role to the participants' actions monitoring and increasing the liabilities of the latter ones without any sufficient legal grounds.

I will provide several other examples from the 20<sup>th</sup> July, 2016, GEP webinar to illustrate further this discursive 'risk-shifting' practice.

GEP participant question: "*If a participant cannot find a job, is it possible to somehow extend the period of time [three months after graduation] by writing an explanatory letter?*" (0:52–54)

Operator's reply: "*Explanatory letters, fortunately or unfortunately, do not constitute grounds for extending the period of three months... Again, I advise you to carefully read the [Government's] Decree, its employment clauses. It stipulates that you are obliged to return to Russia within 30 days, starting from the date of completion of your [study] program, not the receipt of a diploma... So, after 30 calendar days, we are waiting for you in Russia. You have the next three months as a period to find a job. The exception is made for regime enterprises... where additional actions are required [for those seeking employment there], there is a period of up to six months...*

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*Europe-Asia Studies*, 59(6), pp. 887–911).

<sup>194</sup> Nowadays, discredited Soviet system of mandatory job allocations for university and institute graduates (White, 2007. Footnote 193).

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*If, within three months, no matter what the reasons, there is no employment and you do not provide us with the relevant documents (an employment confirmation or a copy of employment contract), then, within ten days, we will notify you as a participant of the Program that you are violating the terms of the program. And we remind you that you are obliged within 60 days either to correct this situation, or to reimburse the amount of the grant together with penalties. If, within 60 days, neither the first nor the second variant occurs, then we transfer your case to the court” (0:52–54).*

GEP participant question: *“Does the employer’s refusal to offer employment [to a GEP participant] lead to the imposition of penalties [on the participant] after 3 months?”(0:55)*

Operator’s reply: *“There is a wrong emphasis made in this question. The employment obligation lies with the participant. Employers included in the list approved by the Supervisory Board..., again according to the principles of the program, are not required. (pause) I will say it differently... They may be interested in you, and may not be interested [in you], based on their personnel policy and the availability of open vacancies. The principle of the Global Education Program implies that employment takes place in accordance with the Labour Code of the Russian Federation, i.e. the employer should be interested in you, and you as a specialist should be interested in working in a particular company. Thus, you cannot force the employer to hire you, nor can the operator force you to work in a certain city or for a certain company” (0:55–56).*

GEP participant’s question: *“Will it be regarded as an evasion of employment if I [a GEP participant] cannot find a job?” (1:13)*

Operator’s reply: *“Yes!” (1:13)*

Thus, the operator discursively removes the responsibility for GEP participant employment, not only from itself, but also from employer organizations included on the GEP-approved list<sup>195</sup> and shifts it to GEP participants. Therefore, it is understandable why *“the participants feel the unfairness of the whole situation, where they are the only party to bear direct responsibility not only for non-return but also for non-*

<sup>195</sup> According to Decree No. 568 of the Government of the Russian Federation, dated June 20, 2014, “The Employer Organization shall, throughout the Program period:  
Be registered on the Program Website for posting a list of vacancies for Program Participants;  
Participate in activities organized by the Program Operator to provide employment of Program Participants;  
Post a list of available vacancies for Program Participants indicating the applicable conditions of remuneration and social security (if any) on the Program Website and update it on a monthly basis;  
Employ Program Participants in accordance with the laws of the Russian Federation and on the basis of the list of vacancies posted on the Program Website  
Enable the Program Operator, according to the procedure provided by the laws of the Russian Federation, to receive, with consent of the Program Participant, information regarding the Program Participant’s work at the Employer Organization, including personal data of the Program Participant.”

*employment, which was guaranteed by the decree. This feeling leads to frustration and enhances mistrust in the actions and intentions of the State*<sup>196</sup>.

Lyudmila (name changed), 24, female, says:

*“It does not matter what’s written in the Program documents, as nothing will be done to facilitate the employment within the Program. The operator and the Ministry [of Education and Science of Russia] are more interested in bureaucratic formalities than in actual outcomes... I mean, they make the participants feel like scapegoats and do not even care that many companies [included on the GEP list of employers] do not know about the existence of the program, and those which know are not in a hurry to hire the participants... I guess the employers are not interested in employees whose careers will be monitored by the state... due to additional reporting and supervision, I guess. At least one of my applications was declined [by an employer] on the basis that they did not understand the program requirements... and I noticed that I got more positive replies from companies when I did not mention the program in a cover letter and/or my resume...*

*“Of course, one can choose not to be a ‘scapegoat’, disagree with their [the operator’s] opinion and demand the guaranteed work in accordance with the qualifications obtained, but then he/she should be prepared to be treated like a ‘black sheep’, incapable of finding a job or as someone intentionally avoiding employment.”*

Andrei (name changed), 28, male, says:

*“I understand the program requirements [rules] in a way that they anyhow will not be interpreted in our favor [in favor of the program participants], so I see no point in arguing or proving anything to the officials; instead, I’ve already found a place to formally put my employment record and get necessary work confirmations. Now I can do what I want”.*

Similar considerations are expressed by Igor (name changed), 23, male:

*“No, I can’t say that I’m well informed about the program rules, especially those on employment, because the explanations I get from the operator often contradict what I have read in the documents before, so I’m not sure if my understanding is correct. It is hard for me to justify my views, so I prefer to accept the official position and then see what can be done to get what I need. There is always a way around. And even if I can’t find it, 3 years is not so long”.*

Indeed, it is not often the operator’s interpretations of GEP employment regulations are openly questioned by the participants, but when such cases occur, the operator tends to speak by referring to the Ministry of Education and Science [the state customer of the program] and its ‘legal partners’, using *argumentum ad verecundiam* to back up their opinions.

<sup>196</sup> Sarafanova, 2016, Footnote 174, pp. 38–39.

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GEP Webinar, 20th July, 2016.

GEP participant's question: "*Can I [a Program participant] work part-time [with- in the GEP's mandatory employment period]?*" (1:14)

Operator's reply: "*Dear participants, we have repeatedly consulted with our legal partner and the [state] customer of the program, and they unanimously interpret the existing regulatory documents in a way that full-time employment is mandatory. This clarification will be very soon included in the [GEP] normative documents*" (1:15).

The announced change to the normative documents of the program has not yet occurred (as of 9<sup>th</sup> May, 2017) despite the operator presenting this information regarding 'full-time employment' to the program participants as a *fait accompli* in July, 2016. Nevertheless, this interpretation affects the participants' employment plans.

Anna (name changed), 26, female, says:

*"I understand that what they [the program operator] say about full-time employment is not what is written in the government's regulations, but I have no way of attending the court hearings or hiring a professional representative in case they [the program operator] decide to sue me; therefore, I'm prepared to decline an hourly-based Tomsk University offer and take whatever position is available that fits the formal criteria. At the end of the day, it's just for three years. Then I'm free to go wherever I want."*

To explore why the GEP operator disregards the employment provision clauses and discursively tightens GEP rules for participants it is worth to note how GEP operator presents itself to general public. The GEP official website ([www.education-global.ru](http://www.education-global.ru)) states that "Moscow School of Management 'Skolkovo' – one of the leading private business schools of Russia and CIS, established in 2006 – is the official operator of the Global Education Program"<sup>197</sup>. In communication with GEP participants, the operator compares itself with a university career service or an educational agency providing consultations to GEP participants.

GEP Webinar, 20th July, 2016.

Operator's comment: "*Please do not understand our assistance, as if you send us your resume and a questionnaire, and then sit with your hands folded and wait for offers from the best companies of Russia, seeking to invite you for interviews and in the future provide you with jobs... Without your efforts, finding quality work will be extremely difficult... Who helped you to apply and get enrolled in the best universities? You did it yourself... Maybe, educational agencies helped you to fill in the forms... but most of the work you did yourself*" (1:04).

However, the Protocol of Opening of the Envelopes with Applications for the Program Operator's Position №AK-151/05pr dated 03.09.2014 (available at the Ministry

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<sup>197</sup> <http://educationglobal.ru/ns/overview/partners/> [accessed on the 6th of May, 2017].

of Education and Science web-page)<sup>198</sup> states that it is not the educational organization Moscow School of Management “Skolkovo” (established in accordance with the legislation of Russia for non-profit organizations<sup>199</sup>), but the Limited Liability Company “UK Skolkovo Management” that applied and was chosen to be GEP operator.

Taking into account that the latter is a commercial organization pursuing profit-making as the main goal of its activity (Article 50 of the Civil Code of Russia), it is reasonable to suggest that the commercial interests of the operator<sup>200</sup> play the major role in the above-described program rules, interpretations and employment practices, as ‘career assistance’ and ‘consultations’ are arguably less labor-intensive and, hence, less expensive activities compared to employment mechanism ‘provision’ or ‘guarantee’.

The above said, of course, does not mean that the operator’s commercial interest is the only factor explaining the ways in which it interprets GEP rules. The author of this thesis assumes that there are many other internal and external factors that can affect the operator’s vision of program implementation<sup>201</sup>. These potential factors include changes in the economic and political situation in Russia (e.g. the recent recession, labour market slowdown, international sanctions and countersanctions with a corresponding decrease in employer interest in specialists with foreign education, etc.), existing power and institutional structures, formal and informal practices within which the operator has to work (e.g. the relationships with the state customer, cooperation with other state bodies reluctant to support program activities, by giving recommendations to prospective employers), GEP ‘positive law’ provisions not consistent with the current uneven development and labour market realities in Russia (e.g. employment quotas for Moscow and St. Petersburg, list of ‘disinterested’ employers).

Furthermore, the operator’s practices can possibly be explained in terms of legal culture reflecting the role that law plays in the society. As previously noted, Russian legal culture still implies that the rule of law plays a less important role in organising the everyday life of society than informal rules and practices, political forces, power hierarchies and the positions of persons giving out instructions<sup>202</sup>.

All of the above factors, when carefully examined, may shed a different light on the rationale of the GEP operator’s activities; however, the unwillingness of officials to participate in the interviews made it impossible to explore these factors within the present study. Such reluctance to cooperate constitutes a specific area of concern and requires additional research to be conducted.

<sup>198</sup> [http://минобрнауки.рф/%D0%BD%D0%BE%D0%B2%D0%BE%D1%81%D1%82%D0%B8/4421/%D1%84%D0%B0%D0%B9%D0%BB/3397/Protokol\\_vskrytiya%2C\\_AK-151-05pr.pdf](http://минобрнауки.рф/%D0%BD%D0%BE%D0%B2%D0%BE%D1%81%D1%82%D0%B8/4421/%D1%84%D0%B0%D0%B9%D0%BB/3397/Protokol_vskrytiya%2C_AK-151-05pr.pdf) [accessed on the 6th of May, 2017].

<sup>199</sup> Article 22 of the Federal Law № 273-FZ dated 29.12.2012.

<sup>200</sup> The Program Operator is allocated 260 million rubles (approx. SEK 40 million) to execute its duties within the program (Decree No. 298 of the Government of the Russian Federation dated March 15, 2017).

<sup>201</sup> Weiss, 1998. Footnote 20, pp. 46–72.

<sup>202</sup> Kurkchiyan, 2005. Footnote 21, pp. 263–267.

Nevertheless, the aim of this research to examine whether the operator's interpretation of GEP employment regulations influences the way GEP participants think about and experience GEP employment regulations, and if the operator's interpretation affects participants' employment plans being achieved.

Data collected within the study show that despite the program operator being responsible for program employment mechanism provision, communication with employers and overall program implementation, it seeks through GEP rule interpretation to shift the above responsibilities and corresponding risks of their non-fulfillment to program participants, thus increasing pessimistic employment attitudes and anxiety among the latter cohort.

In response to the operator's interpretation, GEP participants tend to either search for so-called 'ways around' program rules, and develop strategies only formally complying with requirements, but aiming at covert avoidance of the employment (e.g. "*to formally put an employment record and get necessary work confirmations*"), or they choose to endure temporary difficulties ("*it is just for three years*"), hoping to escape the situation as soon as practically possible.

Arguably, none of the above scenarios corresponds to the program goals to "preserve and enhance scientific, teaching, medical, engineering and social management workforce, and provide support and subsequent employment to nationals of the Russian Federation who have independently enrolled in leading foreign educational institutions" or expected program outcomes "to staff employer organizations, including those registered in the areas of advanced social and economic development in the Far East and Eastern Siberia, with highly skilled professionals in order to accelerate the modernisation processes and introduce the latest technologies for social sector reforms" (Decree No.568 of the Government of the Russian Federation, dated June 20, 2014).

Therefore, it is reasonable to conclude that changes happening in the participants' consciousness, as a result of the operator's interpretation of the program rules (positive law), further extend the 'gap' between the intuitive law of the participants and the program's positive law, decreases the legitimacy of the program's employment regulations and leads, in the form of covert employment avoidance, to the participants' refusal to follow program rules<sup>203</sup>.

### *Decreasing the Gap: Improving Employment Attitudes*

In the middle of March, 2017, the Government of the Russian Federation adopted Decree No. 298, dated March 15, 2017, amending GEP employment regulations. According to this new Act, the quota size for Moscow and St. Petersburg was increased to 25% of the total number of program participants.

To explore if this change in regulations influenced the participants' employment attitudes, I contacted each of the interviewees again (second-cycle interviews) and asked how they perceived the introduced amendments to GEP regulations.

<sup>203</sup> Petrazycki, 1955. Footnote 18, p. 234.

Alexandra (name changed), 27, female:

*“It is fantastic – at least now I have a chance to return and work in my home city [Moscow]”*

Anna (name changed), 26, female, says:

*“I did not plan to work in the capitals [Moscow and St. Petersburg], but still I think it’s a good decision. It means that our [participants’] opinions can be heard.”*

Konstantin (name changed), 30, male, says:

*“It [the increased quota] gives a little more hope, of course... Besides that, the Operator says that it’s possible to get a quota before the completion of the studies and return... it will be possible if an employer makes a formal work offer to a participant and they are prepared to sign necessary documents. So, I contacted someone I know in... [states the name of the prospective employer (institution in Moscow)] and they promised to see what can be done to secure a work place for me.”*

The above quotes illustrate the change in the employment attitudes and plans of GEP participants after the adoption of Decree No. 298, dated March 15, 2017. Based on posts on the GEP Facebook group, the majority of the participants regard these amendments as a positive move. The interviewees also expressed a more optimistic vision of their prospective employment: those who initially planned to work in Moscow or St. Petersburg said the increase in the quota made them feel more comfortable and they were now more positive about their prospective employment.

Interestingly enough, though, those interviewees who did not plan to seek employment in Moscow or St. Petersburg, and hence were not directly affected by the quota conditions, also expressed more optimistic views regarding their employment when compared to their first-cycle interviews. These participants indicated that they appreciated newly introduced regulations, because they better correspond to the economic and labour market situation in Russia, allow participants more flexibility when choosing an employer and a prospective location and, in general, demonstrate the responsive attitude and ‘goodwill’ of the authorities.

From the viewpoint of the socio-legal theory developed by Petrazycki, this example can be regarded as a correct step towards the ‘greater accord’ between students’ intuitive law and the GEP’s positive law, resulting in “greater... satisfaction with the existing social order”<sup>204</sup>.

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<sup>204</sup> Ibid.

## Conclusion

Following Leon Petrazycki's theoretical framework, I argued that legal factors influencing internationally mobile students' return and employment plans could be revealed. In addition, I explained that discrepancies between their intuitive law and the positive law of their country of origin were the most influential factors defining their (highly skilled migrants') desire to return and seek employment at home.

By examining the GEP as a student outward mobility program initiated by Russia (a source country) and created through and backed by law, I explored the impact of the legal dimension of this program on students' return and employment attitudes and behaviours. The data collected and analyzed within this study allowed the author to conclude that the greater the divergence between the intuitive law of internationally mobile students, on the one hand, and the positive law of their home country, on the other, the weaker their intention to return and work in their country of origin, and vice versa: "The greater the accord between intuitive law and positive law [in a given nation]... the greater... the satisfaction with the existing social order"<sup>205</sup>, and therefore more positive attitudes towards prospective return and employment in the home country.

However, the present study leaves many questions to be explored by future research. For instance, how do informal rules and practices existing in Russian society affect students' return and employment decisions? To what extent can "the limits of accord (or discord) between the intuitive and positive law"<sup>206</sup>, with reference to the particular case of the Global Education Program, be pushed? How will the interplay between intuitive and positive law in the studied case unfold in the future? Furthermore, will the "growing pressure of intuitive law" eventually cause "an explosion", resulting in program failure due to mass contract breaches, non-return or intentional false (un)employment? Alternatively, will the participants' opinions be heard and all parties remain satisfied by the fulfillment of GEP obligations? All of the above questions and many others can be explored and answered by future studies.

Nowadays, trying to answer the above questions based on the data available and collected within this study is a matter of speculation or unjustified generalisation, and therefore the author of this thesis will not do it, as the fact that GEP participants currently express certain opinions or beliefs does not mean that they will necessarily act in accordance with their opinions. However, as Banakar points out, "there is undoubtedly a link between perceptions (attitudes, opinions, beliefs) and actions (behaviour and conduct)"<sup>207</sup>, and despite the impossibility of describing the link between attitudes and actions in the form of an explicit causal relationship, it cannot be simply ignored.

Taking into account that it is problematic to trace GEP participants' actual employment behaviours within this study, as the majority of the students are currently

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<sup>205</sup> Ibid.

<sup>206</sup> Ibid.

<sup>207</sup> Banakar and Travers, 2002. Footnote 18, p. 41.

still studying and are expected to return to Russia in the coming years, in order to investigate closer the link between internationally mobile students' attitudes and return and employment actions, I analyzed the studies of two other student return mobility schemes: Master and Back Program (Sardinia, Italy) and Program of Training High-Calibre Backbone Personnel from the Ethnic Minorities (China) – where the correlation between students' opinions and their subsequent actions becomes more visible.

Both programs demonstrate mixed results in terms of facilitating student return migration, and the studies provide evidence that economic and political motivators are not the only factors that define these decisions. As a result, other factors of relevance (e.g. cultural factors, family ties, social networks, emotional attachment to home countries and towns, etc.) need to be taken into account<sup>208</sup>. Furthermore, the studies illustrate that Chinese and Italian students choose to re-emigrate as soon as possible or not go back, regardless of penalties, if they perceive circumstances in their home country or towns as 'unjust' or, in Petrazicki's terms, not reflecting their intuitive law.

Hence, the roots of GEP participant dissatisfaction with program rules, and more specifically with employment regulations, hardly reflecting the current economic and social realities of Russia, can be found in divergence between their intuitive law and the positive law of the program. This disagreement is further aggravated by lawmakers' general failure to identify these issues between program employment regulations (positive law) and significantly changed social and economic conditions in Russia, as well as their interpretation and application of the program's employment regulations in a direction inconsistent with GEP participants' intuitive law consciousness.

To conclude, an analysis of the academic literature and data collected within the study suggests that countries evidencing significant emigration flows of highly skilled nationals, including students, should apply comprehensive policies aimed at limiting the negative consequences of increased international student, academic and skilled labour mobility. The above policies, often seeking to facilitate economic and social remittances (including scientific and professional networking), engage diasporas and encourage return migration, will be more effective if sending countries' governments regard high emigration numbers as a signal for the need to improve governance and introduce more general reforms seeking to enhance the quality of life of their people ("policies that improve infrastructure, legal security, governmental accountability and macro-economic stability while countering corruption and improving access to public education, health and credit"<sup>209</sup>).

In this respect, when designing 'brain drain' prevention schemes, policymakers should first of all address the causes behind the problem and refer to migration research, in an effort to understand the innermost reasons for emigration and non-

<sup>208</sup> Orrù, 2015, Footnote 114, p. 279.

<sup>209</sup> Castles et al., 2014, Footnote 1, p. 80.

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return decisions, which are much more diverse than traditionally identified economic and political factors.

Almost completely neglected in the present academic discourse, socio-legal factors existing in the countries of origin (e.g. highly skilled migrants' perceptions of their conditions in home countries, including economic and employment conditions, as unjust) can become strong emigration motivators, and vice versa. The better sending governments justify their political and economic decisions, and the more legitimacy they can secure in the eyes of their citizens, the less chance their people will search for a better place abroad.

Therefore, student return migration policies cannot rely on pure economic incentives, restrictions or penalties. To increase policies' efficiency and secure long-term advantages, more factors should be analyzed and taken into account – students' understanding of justice in Leon Petrazycki's interpretation of this concept is certainly one of them.

# Political Connections of Russian Corporations: Blessing or Curse?

DMITRI TRIFONOV

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# How the Political Regime Endures in Azerbaijan

RAIL SAFIYEV

## *Abstract*

Over the decades, the government of Azerbaijan shows a remarkable durability in varying contingent contexts. In contrast to relate this fact to the legitimization strategies by authoritarian governments, the article puts authoritarian politics, its social inclusiveness, mundane inventions and regulatory practices under inspection, to tease out how they were conducive to the incumbent to sustain its rule in situations when the country and its direct neighborhood were fraught with political uncertainties. Within a historical perspective, the article sketches controlling measures operated by the government to censor the civil society, the media, the opposition, as well as restraints it put on to reach a general dissuasion from political contestation. The article touches upon the timespan in a decade from now until the country was heavily hit by economic crisis and reviews the government's steps to bear down economic regression. Being rather loosely connected with each other, the regime performances do not originate from a centralized strategy<sup>1</sup>.

## Authoritarianism in practice

The regime in Azerbaijan fetishizes a secular and stylish modernizing agenda, which is supposed to earn it international sympathy and make up for its faultiness in providing a democratic order. It manages to interact well with advanced democracies and maneuver within the boundaries of democracy and authoritarianism. All the same, authoritarianism as a type of governance and culture reached its highly uncontested and hegemonic type<sup>2</sup>. Fundamental setbacks include how the formal institutions of democracy were recast in authoritarian shape in Azerbaijan, the impacted regime's rubber-stamp parliament, the vastly subordinated and corrupt courts, loyal non-state actors and state officialdom's arbitrariness towards economic actors. The overt manipulation is aligned with a window-dressing approach to democratic rules and goes hand in hand with cooptative tactics on a personal level<sup>3</sup>.

The regime sees a danger in any improvement to democratic practices and ignored the Council of Europe's bid (the Congress of Local and Regional Authorities) to hold

<sup>1</sup> Laszczkowski, Mateusz (2016). Shrek Meets the President: Magical Authoritarianism in a "Fairy-Tale" City, in: Laruelle, Marlene (ed.) *Kazakhstan in Making*. Lexington Books: London, pp. 63–89, p. 66.

<sup>2</sup> Filetti, Andrea (2012). Democratization or Authoritarian Stability? The Different Paths of Georgia and Azerbaijan, *Orta Asya ve Kafkasya Araştırmaları*, 7 (14), pp. 66–92, p. 83; La Porte, Jody (2015). Hidden in plain sight: political opposition and hegemonic authoritarianism in Azerbaijan, *Post-Soviet Affairs*, 3 (4), pp. 339–366.

<sup>3</sup> Gerschewski, Johannes (2013). The three pillars of stability: legitimization, repression, and co-optation in autocratic regimes, *Democratization*, 20 (1), pp. 13–38, p. 16.

mayoral elections<sup>4</sup>. Even the wisdom that via the imitation of the language of democracy, and by adopting democratic attributes, authoritarian incumbents may put their life at risk<sup>5</sup>, is taken at face value in Azerbaijan. Thus, common sense suggests that an electoral process may add extra work to orchestrate politics without excesses. The plain abuse of formal regulations demonstrates why compliance is often chosen when an open discontent meets fierce reaction and no mercy by the regime. A nominally democratic order is conducive to repulsing the threats forged by internal alliances, defuse risky activity by civil society actors, while the formal procedures maintain some sort of legitimacy and make the public space controllable and help to evaluate the chances of autonomous forces growing inside of the country<sup>6</sup>. Publicly expressed verbal dissidences can be elevated in a legal way to the subject of high treason and followers more than others are brought to undue loyalty that constrain the terrain of articulating alternatives to the regime and risks for covert collaboration. In line with North and his co-authors, political stability in Azerbaijan appears to be predominantly supported by rent creation, a factor that provides shared grounds for regime and economic networks in producing “exclusive privileges”<sup>7</sup>. As shown in examples from *Limited Access Orders*, elites are granted “privileged control over parts of the economy, each getting (...) share of rents”<sup>8</sup>. Here, the stability of the regime is ensured since every participating actor avoids the use of violence due to their costs. Elites in Azerbaijan like under the LAO regime are bound to state sanctions and do not have enough resources to influence political and economic agendas.<sup>9</sup>

Scholarship identifies “soft” authoritarian regime’s effectiveness in persuading societies of its rectitude of rule instead of resorting to brute force, which generates a minimum compliance that ensures regime survival<sup>10</sup>. It demonstrates that authoritarian strategies are worked out, re-formulated and put in constant communication with social forces. Schmidt sees that it is in the abstract interest of autocracies to stock up with large population support<sup>11</sup>. A regime’s reactionary capacity is bolstered after each rehearsal with institutional reforms that rebuild communication networks,

<sup>4</sup> Council of Europe (2012). *Local and Regional Democracy in Azerbaijan 23<sup>rd</sup> Session of Congress of Local and Regional Authorities*. Strasbourg, 16–18.10.2012.

<sup>5</sup> Krastev, Ivan (2011). Paradoxes of the New Authoritarianism, *Journal of Democracy* 22 (2), pp. 5–16.

<sup>6</sup> Gandhi, Jennifer and Przeworski, Adam (2007). Authoritarian Institutions and the Survival of Autocrats, *Comparative Political Studies*, 40 (1), pp. 1279–1301, p. 1280.

<sup>7</sup> North, Douglass et al. (2011). Limited Access Orders: Rethinking the Problems of Development and Violence [https://web.stanford.edu/group/mcnollgast/cgi-bin/wordpress/wp-content/uploads/2013/10/Limited\\_Access\\_Orders\\_in\\_DW\\_-II\\_-2011.0125.submission-version.pdf](https://web.stanford.edu/group/mcnollgast/cgi-bin/wordpress/wp-content/uploads/2013/10/Limited_Access_Orders_in_DW_-II_-2011.0125.submission-version.pdf) (15.11.2017), p. 5; Yakovlev, Andrei (2014) Russian modernization: Between the need for new players and the fear of losing control of rent sources, *Journal of Eurasian Studies* 5, pp. 10–20, p. 12.

<sup>8</sup> North et al., 2011. Footnote 7.

<sup>9</sup> Yakovlev, 2014. Footnote 7, p. 18.

<sup>10</sup> Schatz, Edward (2009). The Soft Authoritarian Tool Kit: Agenda-Setting Power in Kazakhstan and Kyrgyzstan, *Comparative Politics*, 41(2), pp. 203–222; Schatz, Edward and Maltseva, Elena (2012). Kazakhstan’s Authoritarian “Persuasion”, *Post-Soviet Affairs* 28 (1), pp. 45–65, p. 47.

<sup>11</sup> Schmidt, Manfred (2012). Legitimation durch Performanz? Zur Output-Legitimität in Autokratien, *Totalitarismus und Demokratie*, 9 (1), pp. 83–100.

change or create social preferences and selectively import democratic institutions<sup>12</sup>. Informational asymmetry in such case is a lever to steer the political discourse in realms of its own<sup>13</sup>.

To explain the practical assertion of authoritarian power, one may take the reference to authoritarian practices as an explanatory framework. Glasius defines them as forms of disrupting and sabotaging accountability to the people<sup>14</sup>. Similarly, her study acknowledges the fact that public votes do not necessarily matter if authoritarianism poaches on its daily tactics<sup>15</sup>. Tracking the genuine functional logic of autocracies hinges on the question of how power and domination is anchored in societies correspondingly. The point at issue is the double perspective of the system and subject, which patterns interaction, providing samples about how the power reproduces the *modus operandi* of the regime<sup>16</sup>. Autocracies, which develop embedded functionality in the social, cultural and economic spheres, are distinguished by their plenitude of power exertion capacity. The way political games are played out at the level of personal relationships may bring out the impact of the contingency of social interactions and incentives bred to comply with the dominant rule.

Put retrospectively, there is a certain sequence to be reckoned how the regime in Azerbaijan has neutralized the dissent and deprived oppositional politics of its financial and public support and turned the honeymoon era of Azerbaijani economy to its advantage while the amount of resources were leveraged to patronage networks and consolidate the grip over power (International Crisis Group 2010). Ilham Aliyevs strategy has also built on reducing the “playing field”<sup>17</sup>, while using informal mechanisms for it<sup>18</sup>. These are concluded in this article as managerial strategies of authoritarianism, also referring to its practical effects, which is rather mis-researched.

## Concentrated personal power

A transfer of power 2003 in Azerbaijan set a precedent of dynasticism showing the regime’s negligence about formal legal rules having been misappropriated. A local based observer reminds us, that there has been a characteristic alteration during Aliyevs’ reign, as succession from Aliyev to Aliyev marked hitherto the change from authoritarian into an “authoritarian oligarchic system” while the presidents’ role had been reduced to “first among equals”<sup>19</sup>. In their wish to elevate the dynasticism into

<sup>12</sup> Lambach, Daniel and Göbel, Christian (2010). Die Responsivität autoritärer Regime, in: Albrecht, Holger/Frankenberger, Rolf (ed.), *Autoritarismus Reloaded. Neuere Ansätze und Erkenntnisse der Autokra-tieforschung*, Nomos: Baden-Baden, pp. 79–93, p. 89.

<sup>13</sup> Ibid., 90.

<sup>14</sup> Glasius, 2018, p. 517.

<sup>15</sup> Ibid., p. 532.

<sup>16</sup> Isaacs, Rico (2014). Neopatrimonialism and beyond: reassessing the formal and informal in the study of Central Asian politics, *Comparative Politics*, 20 (2), pp. 229–245.

<sup>17</sup> Lucan and Way, 2010.

<sup>18</sup> Pleines, 2016.

<sup>19</sup> Shirinov Rashad (2013). Stepping into the Unlimited Phase: Ilham Aliyev’s Third Term, *Caucasus Analytical Digest*, No. 55, 24 October 2013, pp. 2–4, p. 2.

a core principle of order, constitutions have been twisted in 2009 and 2016. As the global financial crisis in 2008 created uncertainties, it fueled the consequential firmness in the institutional re-fashioning of presidential rule again and again<sup>20</sup>. Guliyev refers to this weak spot of the Azerbaijani regime as “while elections are an important arena of contestation, it is economic crisis as well as other exogenous shocks and changes in the power elites that [...] open a window of opportunity for change”<sup>21</sup>. An observation of Ilham Aliyev’s presidential tenure shows that the elite was plagued by its inability to plot a coup, but also condoned the president’s choices<sup>22</sup>.

The last referendum in 2016, which endorsed the extension of presidential terms from 5 to 7 years and established the office of vice presidency, conveyed the message behind the masquerade that the presidency has to be kept under auspices of the first family by all means. Given a situation in which the incumbent is incapacitated, it is the care of president’s wife to transmit the mandate to her favored future president<sup>23</sup>. The regime under Ilham Aliyevs’ reign fits into the conceptual frame of “imposed consensus”, which basically essentializes the coordination of the elite by a dominant actor. Within this type of rule, the elite remains not by its own choice, due to its strategic behavior, if the dominant power is restored in its coercive and distributive capacity and punishes any disloyalty, by remaining insurmountable<sup>24</sup>. The huge oil revenues of the 2000s furthered the informalization of official capabilities, while the authority of the president as an actor who can put trigger on dismissals from offices gained foremost in importance. This policy made the bureaucracy pretend to become the main foundation and operating principle of the regime<sup>25</sup>.

The regime’s management of authoritarianism spread over the national borders as well. It followed the general suit and avoided the impending outcome of colored revolutions. Preventive strategies worked to insulate from “color virus”, while it sufficed to ban foreign sponsored NGOs, tumbling their relations with domestic actors, manufacturing their own NGO’s and putting civil society under strict regulation<sup>26</sup>. The regime marginalized and split the opposition, hampering their mediating

<sup>20</sup> Gahramanova, Aytan (2009). Internal and External Factors in the Democratization of Azerbaijan, *Democratization*, 16(4), pp. 777–803, p. 795.

<sup>21</sup> Guliyev, Farid (2013). Different Meanings of the October 2013 Presidential Elections in Azerbaijan: Elites, Opposition, and Citizens, *Caucasus Analytical Diges*, No. 55, 24 October 2013, pp. 8–11, p. 11.

<sup>22</sup> Guliyev, Farid, (2012). Political Elites in Azerbaijan, in: Andreas Heinrich and Heiko Pleines (eds.) *Challenges of the Caspian Resource Boom. Domestic Elites and Policy Making Houndmills*: Palgrave Macmillan, pp. 117–130.

<sup>23</sup> Rummyantsev, Sergey (2017): Behind Azerbaijan’s facades, *Open Democracy*, 21.03.2017 <https://www.opendemocracy.net/od-russia/sergey-rummyantsev/behind-azerbaijan-s-facades>

<sup>24</sup> Gel’man, Vladimir (2015). *Authoritarian Russia: Analyzing Post-Soviet Regime Changes*. Pittsburgh, Pa.: University of Pittsburgh Press, p. 74.

<sup>25</sup> Hale, Henry (2016). *Patronal Politics: Eurasian Regime Dynamics in Comparative Perspective (Problems of International Politics)*. Cambridge: Cambridge University Press; Yakovlev, 2014. Footnote 7, p. 11.

<sup>26</sup> Finkel Evgeny and Brudny Yitzhak (2013) No more colour! Authoritarian regimes and colour revolutions in Eurasia, in: Finkel Evgeny/Brudny Yitzhak M. (ed.), *Coloured Revolutions and Authoritarian Reactions*, Routledge: London, pp. 1–15, p. 6; Polese, Abel and Beacháin, Donnacha Ó, (2011). The Color Revolution Virus and Authoritarian Antidotes, *Demokratizatsiya*; Spring, Vol. 19 Issue 2,

presence, casting unpatriotic aspersions on oppositional politicians, shrinking their links to the economic elite within the regime<sup>27</sup>. Finally, it used counter-methods to confound democratic ideals as being fomented to destabilize or traitorous to the national interests of Azerbaijan<sup>28</sup>. Alongside the internal reactive measures to contain the political sphere, the regime widely explored international alliances to foster and broaden its associates. The more oppression the regime performed toward the threat of democratization, the more chances it yielded to finalize these dynamics into an authoritarian convergence<sup>29</sup>.

Authoritarian management bore its fruits, when the surveys done by Caucasus Barometer revealed the high trust of the presidential institution in Azerbaijan<sup>30</sup>. In the factual absence of free and fair elections in Azerbaijan that serves as non-democracy, they portray a public approval of the president, bearing him a high reputation and trust. One has to note that, in fact, the presidency remains the only institution perceived functional and the ultimate decision-making venue, as most of other institutions are not responsive to citizen's needs. This said, it is highly valuable to scrutinize public support beyond electoral choices as being effective in the regime's legitimization efforts<sup>31</sup>.

## Marginalizing the dissent

Ilham Aliyev charted a radical course against his opponents. His policy consisted of the elimination of the opposition from public space, repeatedly heaping reproaches on their incompetence. It served the regime well to wipe up libelous and socially demeaning emotions on the opposition. An affiliation with opposition of any kind was associated with attempts to overthrow the regime. In this way, a spurious “us” and “them” dichotomy was created which permeated all sectors of society and bolstered the extensive scope of authoritarian claims<sup>32</sup>. If the opposition had any chance for

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pp. 111–132, p. 132; Ismayil, Zohrab and Remezait, Ramute (2016). Shrinking Space for Civil Society in Azerbaijan, *Caucasus Civil Initiatives Center Report*, <https://www.irfs.org/wp-content/uploads/2016/07/Shrinking-Space-for-Civil-Society-in-Azerbaijan.pdf>.

<sup>27</sup> Finkel and Brudny, 2013. Footnote 26; Radnitz Scott (2012). Oil in the family: managing presidential succession in Azerbaijan, *Democratization*, 19:1, pp. 60–77, p. 67.

<sup>28</sup> Goyushov, Altay (2014). The Two Faces of Azerbaijan's Government. Azerbaijan's leaders like to pretend that they're friends of the West. <https://foreignpolicy.com/2014/12/06/the-two-faces-of-azerbaijans-government/> (06.12. 2014).

<sup>29</sup> Silitski, Vitali (2010). “Survival of the fittest:” Domestic and international dimensions of the authoritarian reaction in the former Soviet Union following the colored revolutions, *Communist and Post-Communist Studies* 43 (4), pp. 339–350, p. 340.

<sup>30</sup> Valiyev, Anar et. al (2017). Do citizens of the former Soviet Union trust state institutions and why: The case of Azerbaijan, *Communist and Post-Communist Studies* 50, (3), pp. 221–231.

<sup>31</sup> Gerschewski, 2013. Footnote 3.

<sup>32</sup> Pearce, Katy/Guliyev, Farid (2015). Digital Knives are Still Knives: The Affordances of Social Media for a Repressed Opposition Against an Entrenched Authoritarian Regime in Azerbaijan (2015). in: Axel Bruns et al. (eds). *The Routledge Companion to Social Media and Politics*, Routledge, pp. 235–247, p. 237; Bedford, Sofie (2014). Political Mobilization in Azerbaijan : The January 2013 Protests and Beyond, *Demokratizatsiya*, 22(1), pp. 3–14.

existence until 2005, and received some percentages of ballots in parliamentary elections, 2010 was a year to reverse this tradition<sup>33</sup>.

In the run-up to the presidential elections in 2013, as a single candidate was the pressing issue –Azerbaijani opposition received constant rebukes on this issue – the government caught the opposition on the hop by abolishing candidates' registry. A novelty was that the candidate for the presidency represented a person of clean reputation, as this blocks spin-doctors who employ black PRs against oppositional candidates<sup>34</sup>. The protest mobilization of 2013 rode on the waves of the merger of the old and new generations of oppositional activists, which added a certain dynamism, while before the oppositional movements had been exposed to total sloppiness<sup>35</sup>. But, in 2013, the heavy fines for unsanctioned rallies had a huge impact on dissuading people from actively supporting oppositional rallies<sup>36</sup>. The regime learned how to dodge criminal acts of opposition in the eyes of international organizations, as not to be held in low repute. Arrested and kept behind bars, activists, bloggers and NGO activists were incriminated of negligible crimes such as drug-possession or keeping secret weapons. Their guilt was construed in criminal texts as “attempts to overthrow the state order” and turned into the meaningful organizational and practical logics of many security force institutions. In this way, the public image of the police – held to be abusive and involved in the orchestration of crimes –fit into dissemination of fear.

Azerbaijan is one of those authoritarian countries which do not greatly filter the internet. The studies on Azerbaijan portrayed glaringly how the effect of informational spread, which is supposed to raise citizens' awareness and open the perspective for window-opening by duplicating and learning from similar success stories, became, on the contrary, manipulative tools to distract the population from dissenting activities<sup>37</sup>. Privatization of intelligence and secret services enabled the regime to employ surveillance and employ compromising and libelous materials against opposition politicians, as this also created doubt as to the benefit of the internet to contest the regime<sup>38</sup>.

To deflect from international criticism, another legitimizing choice has been made to secure an image based on premises of international challenges, while the regime was engaged in polishing its image, using such means as payments to lobbyists, bribes to parliamentarians, expansive gifts, carpets, caviar, and money, sweet-talking them into the friendly monitoring of elections known as “caviar diplomacy”.<sup>39</sup> In most of the delivered reports on Azerbaijan, the assessment hid human rights violations and

<sup>33</sup> Gahramanova, Aytan (2009). Internal and External Factors in the Democratization of Azerbaijan, *Democratization*, 16(4), pp. 777–803, p. 786.

<sup>34</sup> Abbasov, 2013, p. 6.

<sup>35</sup> Bedford, 2014. Footnote 32, p. 14.

<sup>36</sup> *Ibid.*, p. 9.

<sup>37</sup> Pearce, Katy. E. (2015). Democratizing Kompromat: The Affordances of Social Media for State-sponsored Harassment, *Information, Communication & Society*, 18(10), pp. 1158–1174.

<sup>38</sup> *Ibid.*, p. 1169.

<sup>39</sup> Azerbaijani Laundromat OCCRP <https://www.occrp.org/en/azerbaijanilaundromat/> (30.11.2017).

used “newspeak” to cover deficiencies<sup>40</sup>. In January 2013, when the situation of political prisoners and the report by the German MP Strasser was on the agenda of the Parliamentary Assembly of the Council of Europe, the vote was rigged by lobbied parliamentarians while months later the regime felt no reluctance to imprison up to 100 political activists<sup>41</sup>. Remember here that Azerbaijan committed itself to release all political prisoners as a prerequisite of its CoE membership.

## Crisis management

Autocracies in the new age incorporate economic performance to maintain a substantial degree of mass support<sup>42</sup>. The regime in Azerbaijan ties its legitimacy to economic performance. It came off well during the world financial crisis in 2009 due to the high production of oil and skyrocketing oil prices. However, the general decline of oil production has not been reversed since 2010<sup>43</sup>. As some analysts observed, the country must have prepared itself for a double fall of oil production, as in 2004 the IMF issued a report advising about the short-term horizons of petro-gas revenues, while the country’s budget had not been adapted to the sharp drops of oil production (IMF Report “Managing Oil Wealth: The Case of Azerbaijan” 2004). A big demographic change happened in these years, as the rural population of the country moved to the capital for work and agriculture suffered a lot of damage. Although promised many times, the share of the non-oil sector has never tried to be competitive for foreign markets. If we compare the total exports Azerbaijan had in 2015, we clearly see that from the total exports in 2011, of 4 billion dollars, 9,9 billion came from energy sales, meaning that non-energy exports consisted only 1,4 billion dollars.<sup>44</sup> Guliyev’s critique of oil expenditure management is that the ruling elite’s interest was vested in the control of petro-dollars rather than recycling them. This is the reason why it was reluctant to invest in human-capital intensive projects, as it also feared losing control over expenditures<sup>45</sup>. From another point of view, it is also known that construction businesses and labor-intensive projects assumed big gains in a short time.

The strategy on the Azerbaijani State Oil Fund, which was a tool to reserve about 27% of whole revenues, while 73% of production revenues had to be allocated to budget for actual needs, could only be implemented until 2009, afterwards the trans-

<sup>40</sup> Knaus, Gerald (2015). Europe and Azerbaijan: The End of Shame, *Journal of Democracy*, 26 (3), pp. 5–18, p. 5.

<sup>41</sup> Ibid.

<sup>42</sup> Krastev, 2011. Footnote 5.

<sup>43</sup> Zotin, Alexander (2017). Azerbaijan: A Thirty-Year Fairy Tale, in: Andrey Movchan (ed.), *Managing the Resource Curse Strategies of Oil-Dependent Economies in the Modern Era*, Carnegie Moscow Center [http://carnegieendowment.org/files/Movchan\\_Report\\_Final\\_Print.pdf](http://carnegieendowment.org/files/Movchan_Report_Final_Print.pdf), pp. 36–47, p. 41.

<sup>44</sup> State revenues slide further as Azerbaijan’s economy teeters on the brink of recession <https://pulseofeconomy.wordpress.com/2016/08/15/august-13-2016-azerbajians-budget-revenues-in-free-fall/> August 13, 2016 (15.11.2017).

<sup>45</sup> Guliyev, Farid (2017). Azerbaijan’s Uneasy Transition to a Post-Oil Era, *PONARS Eurasia Policy Memo*, No. 475, pp. 1–6, p. 2.

fers to the budget exceeded 90% expenditures of the fund<sup>46</sup>. A special decree of the president from September 23, 2004 regulated those savings under 25% margin of total oil and gas incomes, in order to waver the over expenditure (44–45). In fact, the main prerogative of establishing a reserve fund, providing the management of revenues, was ingrained into the regime's legitimization efforts<sup>47</sup>. Again in 2015, Azerbaijan has shown that it is unprepared for crises, after the oil production slackened and the investment capacity of the state decreased considerably. The first indications of it had been appearing, when the national currency collapsed and the projects which would have been financed by oil revenues were delayed due to cost-cutting measures by the government.

After the slowdown of the economy, the government has sought to ensure that there were no sizable conflicts emerging between elite groups. Instead of reforms, the government toyed with reforms to halt investments outflow. It gave the pretence of negotiations with the global market institutions, including inviting audit companies to help normalize the financial imbalances<sup>48</sup>. One of the wisdoms gained during these critical years was expressed in the presidents' remarks when he proclaimed a new and challengeable period for the country's economy, speaking about the need "to stretch the legs according to the size of clothes".<sup>49</sup>

Ilham Aliyev's rhetoric was very explicit when briefing the government members of Azerbaijan's external financial situation. It was interpreted as a confession by the president that the financial window is stricter now in contrast to previous years when the government's expense priorities had been rather loose. It is also remarkable to see the example of the president's addressal of problem which in the authoritarianism literature is explained as a vulnerable situation for a dictator who lacks charisma. The president is thus identified with his exclusive role of "fundraiser" and finding and steering resource extraction and sources<sup>50</sup>.

Unlike Russia, where we witnessed attempts to stitch different views inside the government together, as there is also a liberal-oriented faction in the elite of Russia, which indicates the existence of some adequate anti-crisis models<sup>51</sup>, in Azerbaijan the government favored the simple way-out such as the dismissal of budget-greedy ministers and the abolishment of large state institutions. It goes without much reasoning that the power holders are pushed into a situation of supervising economic transactions, including shadowy schemes. In this way, how the power relations are

<sup>46</sup> Zotin, 2017. Footnote 43, p. 42.

<sup>47</sup> Ahmadov Anar (2008). Shackles into Scepter: Why Would an Autocrat Adopt a Natural Resource Fund? *PONARS Eurasia Workshop "Central Asia and the Caucasus in a Transnational Context"*, June 2008.

<sup>48</sup> Financial Times (2016). Azerbaijan resorts to capital controls as oil crunch worsens, 19.01.2016.

<sup>49</sup> *Ilham Əliyevin sədrliyi ilə Nazirlər Kabinetinin 2015-ci ilin doqquz ayının sosial-iqtisadi inkişafının yekunlarına və qarşıda duran vəzifələrə həsr olunmuş iclası keçirilib*. 12 oktyabr 2015 (<http://www.president.az/articles/16373>).

<sup>50</sup> Xavier, 2017, p. 79.

<sup>51</sup> Yakovlev, 2014. Footnote 7, p. 11.

constituted serve as an effective surveillance, as the power works with the help of manual steering – by means of illicit networks.

### Scaling mega-events and learned PR craft

As Laszckowski inferred from the Kazakh authoritarian cult in the city of Astana, authoritarian governments' symbolic-ideological moves are based on creating "interactive moments, in which specific vision of the state, development and the relationship linking citizens and regime are produced"<sup>52</sup>. The mega-events create symbolic and an extraordinary image of the state, the object of which is the fulfilment of popular and individuals' wishes to reach modernization.

In the period of İlham Aliyevs presidency, Azerbaijan has launched international marketing and advertisings strategies to promote the country's image in the world, spending money on extravaganzas, such as the Eurovision Song Contest, the European Games of 2015, the latter having cost over 4 billion dollars. While there have been different material aspects behind it, it is essential that the government aimed to demonstrate Azerbaijan's "achievements" as a nation embracing modern symbolic commodity production<sup>53</sup>. The promised increase in tourists' numbers did not happen however<sup>54</sup>. As Militz and Schurr analyze, this goes along with the nationalism that augments the representativeness and commonness among Azerbaijanis during ceremonies and public holidays<sup>55</sup>.

As matter of fact, big events marked hegemonic national discourses and were associated with the incumbent regime. In words of Adams, similar state organized spectacles provide the actors with their possibilities to think and act politically, as social discourses are being constantly replenished with privileged "truths" and "realities" and public events create the one-sided inflow of information<sup>56</sup>. It is not real communication, since it works, as in Hafız Assad's Syria, as the general attitude of "as if" is a dominating ritual<sup>57</sup>. Tolerated and authorized practices of critique have a single purpose, to maintain a general share of disbelief, which is at the same time employed to set the margins of behavior for citizens.

Mega-events were presented as personal initiatives of the president and, as Gogishvili has remarked, it did not go without affecting public space in Baku, which became controlled and securitized by the police. It made the public space limited to certain strata of "the corporate and political elite, wealthy locals and ticket-purchasing

<sup>52</sup> Laszckowski, 2016. Footnote 1, p. 64.

<sup>53</sup> Militz, Elisabeth (2016). Public Events and Nation-Building in Azerbaijan, in: Rico Isaacs (ed.) *Nation-building and identity in the post-Soviet space: new tools and approaches*, London: Routledge, pp. 176–195.

<sup>54</sup> Jafarli, 2016.

<sup>55</sup> Militz, Elisabeth and Schurr, Carolin (2016). Affective nationalism: Banalities of belonging in Azerbaijan. *Political Geography* 54, pp. 54–63.

<sup>56</sup> Adams, Laura (2010). *Spectacular State: Cultural and National Identity in Uzbekistan*, Duke University Press: Durham, p. 3.

<sup>57</sup> Weeden, 1999, p. 92.

tourists who can afford the costly admission”<sup>58</sup>. The regime’s purposes overlapped with the spectacular urbanization and construction agenda of Baku that furthered the allocation of large urban construction contracts to benefit from population growth and coalesced with the construction elite to form a “growth machine”<sup>59</sup>.

Another PR promotion represented the establishment of easy access to public services. “A.S.A.N.” which is an abbreviation of the State Agency for Public Service and Social Innovations, under the President of Republic of the Azerbaijan also has a parallel meaning translated as “easy”. It was considered to be a pilot project and ASAN employees were transported in special vehicles to diverse places outside of Baku and into different regions, to serve people in their administrative needs. An essential mark of the ASAN Service was that it promised to be unwavering and professional in its duties, as such it was under the direct auspices of the presidential administration. Such an institution was at first glance an embodiment of the regime’s intention to stamp out corruption, however, it is more credible to believe that the regime, incapable of fundamental and full-fledged reforms, attempted to compensate its failures with small success stories, which actually are only islands in the sea. If we contrast the number of employees engaged in the public sector, estimated for June 1, 2017 as 886, 4 thousand, a slight effect of this reform is obvious with only 640 of employees currently laboring for the ASAN Service.<sup>60</sup>

## Fetishism of the regime

The ideological instrumentalization of symbols allows, to a certain extent, to muddle through and pass by the formal structures and reproduce an inherent power logic<sup>61</sup>. The symbolism in central Asian countries, in contrast to Azerbaijan, has been closely analyzed, possibly because it appears to some scholars that Central Asian politics is particularly imbued with symbols. The symbolism of new dictatorships explains the reactions of regimes toward their diminishing power and shows attempts, to fill the gaps of legitimacy crisis. Stability and national unity are laid out as particular merits of the government and as such, social comfort converts from abstract concepts into the real wishes of people<sup>62</sup>.

<sup>58</sup> Gogishvili, David (2017) The Eventful Turn: Baku and Mega-Event Led Urban Changes, 04.04.2017 <https://ge.boell.org/en/2017/04/04/eventful-turn-baku-and-mega-event-led-urban-changes> (15.11.2017).

<sup>59</sup> Koch Natalie and Valiyev Anar (2015). Urban boosterism in closed contexts: spectacular urbanization and second-tier mega-events in three Caspian capitals, *Eurasian Geography and Economics*, 56:5, p. 578.

<sup>60</sup> Number of persons engaged in economy and salaries 2017.07.19 <https://www.stat.gov.az/news/index.php?id=3603>; “ASAN xidmət” in işçilərinin sayı artırılıb 23 Avqust, 2017 <https://report.az/daxili-siyaset/asan-xidmet-in-iscilerinin-sayi-artirilib/>

<sup>61</sup> Brooker, Paul (2000). *Non-Democratic Regimes: Theory, Government and Politics*, Macmillan Press: London, pp. 111–112.

<sup>62</sup> Cummings, Sally (2010). Inscapes, Landscapes and Greyscapes: The Politics of Signification, in: Sally Cummings (ed.): *Symbolism and Power in Central Asia. Politics of Spectacular*. Routledge: London, pp. 1–12.

New state-building in the post-Soviet space took the advantage of symbolic-ideological experiences of the previous soviet times<sup>63</sup>. The creation of a new state was accompanied by popularization of national unity and democracy by new leaders. Homogenizing contents with population gave to state institutions a guarantee of their persistence, as they were designated to be representative of the people. Symbols and ideology wield into a meta-narrative, which was emulated and internalized by individuals<sup>64</sup>. This “meta-narrative” expresses a very simplistic pattern, which trenches the communication between the regime and its subjects, while it marginalizes other meanings and concepts of world<sup>65</sup>.

The measures by similar regimes were mostly orchestrated to accent the leadership’s ability to rise to the challenges in critical times<sup>66</sup>. The state utopia of regimes in Kazakhstan and Uzbekistan is exemplar for Azerbaijan; Azerbaijan emulates the regime in Uzbekistan which essentializes the patronizing role of the state and quotes the glorious history of the Uzbeks state model as well as the Kazakh, which represents a neoliberal version embodying the economic welfare priority of its citizens. More like in Kazakhstan, incentives for market competition and the idea of “compatible nation with competitive products” was propagated. As in the Uzbek regime, the symbolical state image was inserting in different social spheres and demanded unconditional participation in Azerbaijan<sup>67</sup>.

Upon the demise of the Soviet Union, the issues of national identity for the incumbent regime had to be borrowed from the Popular Front (a national-democratic government from 1992–1993 in Azerbaijan), so as to disarm the opposition ideologically<sup>68</sup>. Immediately after Heydar Aliyevs death a campaign started to rename airports, squares and avenues, museums and educational centers after him. Every city and districts sought pride in having one statue or park named after Heydar Aliyev, while his portraits embellished city centers.<sup>69</sup> In Azerbaijan, on several state constructions, names or phrases of the president were carved on the forefront. Signs were placed on underground passages to honor the president and his decrees.<sup>70</sup> Visionaries of the regime usurped popular ideas about “love to homeland”, “honor of the family”, “son of people” in posters, while depicting Aliyev jr. as worthy successor of his father (*layiqli davamçısı*). Central State Television broadcasted video clips in which

<sup>63</sup> Furman, Dmitrij (2006). Ursprünge und Elemente imitierter Demokratien, in: *Osteuropa* 56 (9), pp. 3–25, p. 237; Gel’man, 2004. p. 1027.

<sup>64</sup> Lewis, 2016, p. 421.

<sup>65</sup> Gill, Graeme (2011). *Symbols and Legitimacy in Soviet Politics*. Cambridge University Press: Cambridge, p. 3.

<sup>66</sup> Cummings, 2010. Footnote 62, p. 10.

<sup>67</sup> Adams, Laura and Rustemova, Assel (2010). Mass Spectacle and Styles of Governmentality in Kazakhstan and Uzbekistan, in: Cummings, Sally N. (ed.): *Symbolism and Power in Central Asia*. Routledge: New York, pp. 164–192.

<sup>68</sup> Mamedzade, Ilkham (2001). Avtoritarniy rezhim v Azerbaizhane i problemy ego transformacii, CA&CC Press, [https://www.ca-c.org/journal/2001/journal\\_rus/cac-03/12.mamru.shtml](https://www.ca-c.org/journal/2001/journal_rus/cac-03/12.mamru.shtml) (30.11.2017).

<sup>69</sup> *Imeni Gejdar Alieva*, Radio Azadlyg 12.10.2010; Vgl. Frank-Schwenk (2013), 3.

<sup>70</sup> *Rayonlarda prezidentin portretləri yığışdırılır*, Azadlıq Radiosu 06.08.2008, *V Azerbajdžane pojavilas’ nauka “alievovedenie”*, Radio Azattyk 26.02.2013

the wlyrics included recast names of the president and first lady Mehriban Aliyeva in several grotesque connotations, as the one *we are inspired by him*” (*ondan ilham (Ilham Aliyev) alırıq*), while the word “*ilham*” in Azerbaijani means “inspiration.” An example, such as “*həm mehriban, [Mehriban Aliyeva] həm nəvazışli vətəndir*”, meaning “homeland is both loving and pleasant”, subliminally was a praise campaign for the first lady’s charity works, while her name means in translation “affable”. Through skillful application of the personal-private notion of communality, this symbolism created an ambiguous, partially idealizable and artificially venerated nimbus of domination. It was an artificial cult, which also taught devoutness to patriotic values<sup>71</sup>. Statements, signs and designations were also significant under vernacular terms and were anchored with great effect to guide personal interpretations, just as one understands how to act in one’s own in everyday<sup>72</sup>.

Very natural for authoritarianism in Azerbaijan, and this lays out its monopolizing effect, was the way that the government claimed the responsibility for all types of activities in the country. It laid claims on every new built factory and constructed site that materialized from the developmental agenda. The real authorship might be attributed to the oligarchs’ financial contributions, but as if everything were owned by the president, he was shown as key figure in every opening ceremony, which went through televisions as a new feature of the policy narrative of the country. Ilham Aliyev moved gradually from using a personal cult or overt propaganda, as he saw the Soviet type of propaganda discredited by the hollowness of the message<sup>73</sup>. He was concerned to gain varied and specific support by citizens<sup>74</sup>. Nevertheless, the regime had never refrained from nurturing inadvertent complicity and guide lining how the citizens have to perform on the public. Oscillating between two antithetical realms, people were positively disposed toward the co-option possibilities opened up by the regime<sup>75</sup>.

The rhetoric in politics, which is carefully rehearsed from top to bottom with repetitive and routine speech acts, as contentless as they are, had an impact on the discipline and actions of state officials. Shared unbelief of the spoken language created a certain standardized form, and perpetually repeated they turned into a general exercise of conscience. The rhetoric revolved, for instance, around the national path of development and modernization, implied foremost that the “own” has to be pre-

<sup>71</sup> Babajew, Aser (2010). *Politische Transformation im postsowjeti-schen Aserbajdschan: eine historisch-institutionalistische Analyse*. Dissertation. <https://ub-madoc.bib.uni-mannheim.de/2925/> (11.02.2014), pp. 94–113; March, Andrew (2002). The Use and Abuse of History: ‘National Ideology’ as Transcendental Object in Islam Karimov’s ‘Ideology of National Independence’, *Central Asian Survey* 21(4), pp. 371–384, pp. 374–376.

<sup>72</sup> Safiyev, Rail (2017). The State Capture in Azerbaijan between clan politics and ‘bureaucratic oligarchy’, in: Leitner, Johannes/Meissner, Hannes (eds.): *State Capture, Political Risk and International Business*. Cases from the Black Sea Region, Routledge: London, pp. 74–89, p. 86.

<sup>73</sup> Schatz, 2009. Footnote 10.

<sup>74</sup> Easton, David (1965). *A systems analysis of political life*. New York, NY: John Wiley & Sons; Gerschewski, 2013. Footnote 3, p. 20.

<sup>75</sup> Corner, Paul (2002). Italian Fascism: Whatever Happened to Dictatorship? *The Journal of Modern History*, 74 (2), pp. 325–351.

served as naturally given. The democracy import, as it is alleged to originate from the West, was considered as a threat to sovereignty, and the promotion of democracy as a pretext of meddling into internal affairs of countries<sup>76</sup>. This has been linked with a general postcolonial attitude to protect one's own cultural forms in a globalization era and basically not to approve of western culture<sup>77</sup>. Pseudo-theories of the "sovereign democracy" were models based on which the regime chose its self-identification. Similar argumentation was evident in negotiation with western partners, such "Azerbaijan finds herself in early stages of democratization and must handle first the economic development". In 2009, during a meeting with the EU Commission president Manuel Barroso, İlham Aliyev got it straight, that the democracy is not on the priority list of Azerbaijan, but the main goal was combating poverty and the encouragement of economic production, as he stated democracy is possible only if poverty is overcome.<sup>78</sup>

It is favorable for the elite to envelope itself in the image of being proponents of political-social commonness, while also to address rhetorically public sentiments. Alternative approaches were invalidated, as issues of development and national growth were addressed solely by the government. While the symbolic elements of politics were ritualized, this engendered offers to formalistic compliance with the general propaganda line and created a sense of continuity, belonging and recognition. It also offered the membership, participation and integrity needed to make the differences in opinions appear irrelevant<sup>79</sup>.

### Atmosphere of denunciation and collective surveillance

One managerial campaign of discourse prevention by the government toward public media was the case of *haqqin.az*. Launched as a media-information portal, it took the role of the regime's attack dog and "president's hatchet man"<sup>80</sup>. Editor-in-chief Eynulla Fatullayev, who acted as a harsh-criticizer of the regime, had dramatic change of heart after his release from jail in 2011. An obstructing effect of such manipulation of information was that within a short of time the portal became the most readable news agency with the capacity of quasi-analytical channeling and filtering of information, but also being a first and primary opinion-maker. Generally, the Socio-Political Affairs Department under the administration of the president makes it its daily business to control news and maintain the supervision over the information flows in Azerbaijan as to streamline them to the right purpose. In fact, it started to act

<sup>76</sup> Mehdiyev, Ramiz (2007). Globalization and National Values, *Journal of Philosophy and Sociopolitical Studies*, 3, p. 73.

<sup>77</sup> Rzayeva, Gunay (2011): How Youth Gender & Intergenerational Relations Affect Democratization in Azerbaijan? *Caucasus Ressource Research Center*, [http://dspace.khazar.org/jspui/bitstream/123456789/1970/1/final%20report\\_%20Gunay%20Rzayeva.pdf](http://dspace.khazar.org/jspui/bitstream/123456789/1970/1/final%20report_%20Gunay%20Rzayeva.pdf), p. 2.

<sup>78</sup> İlham Əliyev: "Yoxsulluq olan yerdə demokratik dövlət qurmaq çətinidir", *Azadlıq Rədiosu* 29.04.2009

<sup>79</sup> Gill, 2011. Footnote 65, p. 15.

<sup>80</sup> Kucera, Joshua (2017). Azerbaijan: Government Watchdog Transforms into Attack Dog, March 16, 2017 <http://www.eurasianet.org/node/82866> (15.11.2017).

as an agitational organ, while the mainstream media in Azerbaijan was bound with delicate instructions to the presidential administration. The regime did not allow the distribution and sale of independent newspapers outside Baku, placing unofficial obstacles to it.

Informal dialogues were held in the cabinets of the presidential administration with the oppositional opinion leaders on the conditions of their work. Good students received a variety of rewards. The presidential family were agreed to not be a target of oppositional criticism, which is why they never appeared in a critical light in the press. A general tendency was to put the president above politics, so as to position him as not responsible for unpopular acts. This strategy, with regard to faking loyalty, was meant to spoil the impact of a possible counter elite<sup>81</sup>.

The arrest of two ministers and several high-ranking officials in 2005 who were suspected of a coup d'état attempt, was a warning signal to accomplices.<sup>82</sup> Repression against them deterred possible financial support of the opposition by the oligarchy. As one ruling party politician, Mirzazade, testified, the arrest of the statesmen-oligarchs had not been a big surprise, since before there were rumors about connections between the oligarch-paymasters and the opposition circles.<sup>83</sup> Remarkably, it was the first and probably the last revelation of behind-the-scene contacts between the opposition and the ruling elite.<sup>84</sup> Their statements of loyalty during trials showcased the penitence of a regime's main adversaries.

A corruption scandal around a university rector elucidated some taboos, which obviously created an atmosphere of self-cautiousness among elite figures. In this way, we can scrutinize how the government meted out alternative opinions. A female parliamentarian from the YAP, Gular Ahmadova, who was displayed on a video in the role of a front man, appeared to be well informed about the internal workings of Azerbaijani politics, insistently trying to explain to the rector Elshad Abdullayev how complex things can get and how no one should feel secure: "politics does not allow excuses for wrongdoings. I am talking open with you, this here is politics and not a joke (*nala mixa vurmaq olmaz*). It is paid always by heavy penalties. You know well how the big personalities (referring to A. Insanov and F. Aliyev, arrested in 2005) ended up. Me and you are no one in relation to them and neither mine nor yours is a small fraction of their wealth".<sup>85</sup>

Instances from Ledeneva's studies on Putin's Russia make this informal collective surveillance comprehensible. Since the state in Russia is controlled selectively, this generates in close circles a certain awareness that there are given playgrounds which might be profitable, but also accompanied by risk, as no one has the capacity to recognize the source and origin of the threat from higher positioned members. The

<sup>81</sup> Franke-Schwenk, 2012, p. 260.

<sup>82</sup> *Farkhad Aliyev arestovan*, Ekho 05.10.2007 (the Vlast article)

<sup>83</sup> *Azerbaijan's 2005 Elections: Lost Opportunity*, Crisis Group Europe Briefing No 40, 21.11.2005, pp. 9–10.

<sup>84</sup> *Fərhad Əliyev hakimiyyəti topa tutdu*, Yeni Musavat 07.06.2007; *Farkhad Aliyev vystupil s poslendim slovom*, Zerkalo 05.10.2007.

<sup>85</sup> *Gülər Əhmədovanın şək görüntüləri*, Youtube 18.04.2013.

common wisdom in such a system is that one has to be aware of the fact that in case one faces a wash-out, one will never be able to grasp the reason for it. Apart from this, the formal regulations are preserved with their overregulation in a constant complexity, so that the individuals' gain is kept in limits and never becomes excessive or exorbitant<sup>86</sup> (Ledeneva 2013, 1154). It is not a system of watching or policing others, it is constructed in a more complex way and causes the networks to surveil each other making the messaging and gossiping to the head of management instantaneous. Dual-morality and cynicism is a survival strategy in this Azerbaijani system, which actually allows participants to build a cage themselves and be incarcerated in it<sup>87</sup>.

In Azerbaijan, through allocation of resources, financial support, donations and patronage the regime found itself to be in the right to demand unquestionable and utter devotion. Such an instance is ostensible in words by an executive head of regional district Ahad Abiyev who made a confession in a press interview: "I swear by my conscience those who has been treacherous to the YAP (the ruling party, he himself a party member), was goddamned and ended up badly. Officials who have so far been ungrateful or outrageous but got all benefits from YAP (*YAP-dan su içib*), found God's punishment. Therefore, I am aware of never making errors. And I will never make any".<sup>88</sup> In the ranks of the governmental cliques, this is inculcated as a moral code, which instills the norms out of gratitude and as "official" duties require it.

The following passage is an excerpt from an article in the state-run official newspaper "*Azərbaycan*", which in special cases, and when it is instructed, hauls the bureaucratic organ over the coals, otherwise imitates a genuine way of journalism in good Soviet traditions of the glorification of national growth and progress. To keep order among the regime's loyalists it exercises criticism of the lack of discipline in the state organs:

"A sudden ring of the phone caused a turmoil in the office, all bumped into each other. The employees in the reception threw their pen from hand and began to push out people waiting in the waiting room to the exit. Police guarding the outdoor, started to empty the yard from foreign cars. Two huge men in business suits run the stairs down from the second floor. One stood at the exit door, the other one to oversee in front of the elevator. No, it wasn't a drill to increase the vigilance of the employees in the emergency. The "Mr. Minister" (Head, Chief, Director and etc.) has arrived at the work. This situation is familiar to everyone, who at least once by occasion visited the ministry, or state committee or central executive and had to deal with them. Yes, it may sound ridiculous, but the appearance of the minister, the chief officer, and the head of the committee or the director is a special event, actually something a part of their supposed official job. And we do not talk about special bodyguards, the entourage and other unrepresented measures for protection and security. Those "attributes" are long ago inseparable from the work and life style of ministers as to contrast them against the plebs. ... And this, although

<sup>86</sup> Ledeneva, Alena (2013). Russia's Practical Norms and Informal Governance: The Origins of Endemic Corruption, *Social Research*, 80 (4), pp. 1135–1162, p. 1154.

<sup>87</sup> Ibid., p. 1157.

<sup>88</sup> *Ahad Abiyev: Prezidentdən başqa heç kimdən çəkinmirəm*, Yeni Musavat 26.04.2008.

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it belongs to the duty of the officials to serve the people. (...) Nowadays, it is seldom a case to meet a high-ranking official, one hears of officials either on TV screens or from newspapers, though it is their obligation to receive citizens one time in a month. Even this appears to be too much. They let their deputies to do it. And those deputies are not even authorized to move their chair without permission of the “first one”.<sup>89</sup>

The passage pointed to a discipline of parallel hierarchy one comes across at many public institutions, such as the ministry, university, different public institutions and state enterprises in Azerbaijan. Improper behavior and non-conformant style of ministers and public servants were highlighted and such circumstances laid the basis of an outcry from the top. An offering occasion for it was the unrest inspired by the Arab Spring in 2011 in Azerbaijan, after which the government started to localize the dissatisfaction of the people through direct contacts between the governmental bodies and the population. In this way, the blame of the malfeasance of the state was shifted on heads of the political institutions at the lower level.

## Conclusion

We have had an example of an intertwined, complex and hierarchically organized state apparatus which was molded during the years into a stronghold of regime incumbency. The elite organization is resilient— it rests particularly on trust and reciprocal commitments driven by family ties, but more than this it is rooted in the organizational settings of economic, cohesive, corporate relationships, which are as matter of fact barely ever breakable, as there are permissive arrays of clientelistic networks, which also display a high magnitude of compromised institutions. Regular ideological work conducted by the government were lectures about punitive measures to construct order. Ilham Aliyev favored rationed coercion to brute force. He showed restraint, factually deterring dissent, and deploying persuasive methods instead of direct confrontation<sup>90</sup>. Based on this insight, we can assume that a regime based on material and non-material elements of legitimacy may endure and face challenges of democratic opposition, sustain power, and withstand popular protests – which explains the life expectancy of an authoritarian regime measured now by decades.

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<sup>89</sup> *Hazırın nazirləri*, Azərbaycan qəzeti 03.11.2011.

<sup>90</sup> Schatz and Maltseva, 2012. Footnote 10.

# The Nexus between Regime Security, Nationalism and Democracy in Post-Communist Turkmenistan and Tajikistan

ARZUU SHERANOVA

## *Abstract*

Post-Communist Central Asian (CA) nationalisms, in comparison with Baltic or Balkan post-communist states, did not have a national awareness, except the ones inherited from communist rule. Despite the internationalist spirit of communist nationalism, the post-Communist CA region has favored ethnic-centered national policies notwithstanding its multi-ethnic composition. These ethno-nationalist policies were the result of domestic concerns, such as ethnic imbalance in favor of ethnic Kazakhs (Kazakhstan), border disputes and fear of irredentism (Kyrgyzstan, Uzbekistan and Tajikistan), post-conflict concerns (Tajikistan) and fear of interference into domestic affairs (Turkmenistan). Another important feature that characterizes these post-Communist states is the power-continuation of the Soviet nomenklatura. All these factors contributed to what is today called illiberal regimes. According to some studies, nationalism in CA is an alternative to the liberal democracy lacking in the region. Indeed, opposite to strong nationalization efforts (national language elevation, re-construction of myths and symbols, re-writing of history, etc.), CA states made much weaker efforts to build liberal democracies (human rights violations, unfair elections, restriction of mass media freedom, pressure on civil society, etc.). While there are studies which closely examine causal relations between democracy and nationalism, and regime security and democracy in CA, there is a lack of literature which looks at how regime security shape both nationalism and democracy. The paper argues that regime security in CA was key in shaping both nationalism and democracy. The research examines how regime security used nationalism and democracy in Turkmenistan and Tajikistan, shaped ethnic nationalism and illiberal democracy; and contributes to a more comprehensive approach in the study of nationalism in the post-Communist world.

## Introduction

Most of the post-Communist countries are categorized in the literature as weak democracies. In particular, the post-Communist Central Asian regimes have been labeled as hybrid or virtual democratic regimes. Several post-Soviet transition and democratization studies on CA differentiate between “soft” and “hard” authoritarian regimes in the region<sup>1</sup>. These studies suggest number of explanations on democrati-

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<sup>1</sup> Treacher, Adrian. “Political evolution in post-Soviet Central Asia.” *Democratization*, 3:3, 1996: 306–327; Glenn, John. “The economic transition in Central Asia: Implications for democracy.” *Democratization*, 10:3, 2003: 124–147.

zation development variations within CA geography, which span from institutional, cultural, economic, historical to geopolitical factors, such as so-called ‘neighborhood effect’ of Russia and China<sup>2</sup>. Scholars distinguish degrees of authoritarianism in CA based on freedoms of political opposition, election practices, freedom of media, activeness of civil society, power distribution and other variables<sup>3</sup>. Democracy in CA has been also discussed as “artificial” because it does not produce a part of any “local tradition or collective memory”<sup>4</sup>. Democracy attempts in most of Central Asia mainly resulted in the legitimization of post-Communist authoritarian regimes, and these regimes simulated democracy performance by establishing virtual party competition and inventing fake opposition parties<sup>5</sup>.

Democratization in post-Communist states is inevitably linked with national identity questions, while both democratization and nationalism were outcomes of security concerns of regimes in power. As rightly put by Pridham, democracy provides an opportunity for a “new beginning” and “reinterpretation rather than simply affirmation of national identity”<sup>6</sup>. CA states, “products of Soviet ethnic engineering”<sup>7</sup> announced independence only after the collapse of the Soviet Union and missed “traditional Westphalian State or national consciousness”<sup>8</sup>. Turkmen and Tajik leaderships, like other CA successor-states, immediately inherited their power from the Soviets. The old Soviet *nomenklatura* (ruling elite) retained the power from nationalists within these republics. Therefore, nation-building processes in CA countries predominantly were aimed at the legitimization of ruling regimes through a “model of Central Asian political management” characterized by “reliance on natural resource wealth” (oil, gas, cotton, etc.) and “reliance on traditional social organizations” (informal social networks, such as clans, kinship ties, etc.) to strengthen ruling regimes<sup>9</sup>. Following the Soviet model of nationalism, post-Communist national engineers have put much effort in reinterpretation and re-invention of their own histories and cultures in order to build ‘new’ nations around titular<sup>10</sup> ethnic groups, and diminishing the position of non-titular groups. In all Central Asian states titular ethnic groups’ languages were declared state or official. Geographical names were renamed or translated into

<sup>2</sup> See Pop-Eleches, Grigore. “Historical Legacies and Post-Communist Regime Change.” *The Journal of Politics*, 69, 2007: 908–09.

<sup>3</sup> See Treacher, 1996. Footnote 1; Ziegler, Charles E. “Great powers, civil society and authoritarian diffusion in Central Asia.” *Central Asian Survey*, 2016: 1–21.

<sup>4</sup> Treacher, 1996. Footnote 1, p. 323.

<sup>5</sup> Dagiev, Dagikhudo. *Regime Transition in Central Asia. Stateness, nationalism and political change in Tajikistan and Uzbekistan*. London and New York: Routledge, 2014.

<sup>6</sup> Pridham, Geoffrey. “Post-Communist Democratizations and Historical Legacy Problems.” *Central Europe*, Vol. 12 No. 1, May 2014: 82–98, p. 88.

<sup>7</sup> Gerlach, Julia. “Nationalism and Identity Construction in Central Asia. Dimensions, Dynamics, and Directions.” *Europe-Asia Studies*, 68:5, 2016: 948–950, p. 948.

<sup>8</sup> Massansalvador, Francesc Serra. *The Process of Nation Building in Central Asia and its Relationship to Russia’s Regional Influence*. The Jean Monnet/Robert Schuman Paper Series, Vol. 10 No. 5, Miami : Jean Monnet/Robert Schuman Paper Series, 2010, p. 4.

<sup>9</sup> Strakes, Jason. “Tools of Political Management in the New Central Asian Republics.” *Journal of Muslim Minority Affairs*, Vol. 26, No. 1, April 2006: 87–99, p. 89.

<sup>10</sup> Ethnic group after which the state is named.

state languages or were given names after prominent national heroes. Old Soviet monuments were replaced with monuments of titular ethnic heroes, new monuments celebrating independence, the majority's historical achievements or golden ages were erected, and titular groups' cultures were declared official.

Democracy and nationalism can complement and compete with each other<sup>11</sup>. Despite criticism, nationalisms and democracies co-exist, as the latter can sustain within nation-states. There is an important relationship between democracy and nationalism. According to Miller (1995, 2000), a well-functioning democracy is the one in which citizens actively engage with government. Whereas, "this engagement necessitates a shared national identity" to promote cooperation and mutual support<sup>12</sup>. In addition, Miller continues, there is a need for a trust in order to have a strong democracy. Famously Linz and Stepan argue that under conditions of congruency of identity and borders there are democratization opportunities, whereas when they are not congruent democratization is less likely because regimes will prioritize issue of state over democracy<sup>13</sup>. In other words, the elites claimed that for the unity of the state during the transition, authoritarian rule was essential. Dagiev further develops this idea and states that:

"Subsequent to the disintegration of the Soviet state, political elites in post-Soviet Central Asia *hijacked* the transition. Instead of building new state institutions and introducing new constitutions, the elite's immediate concern was how to maintain power. For this they altered Communist parties into nationalist parties and employed nationalism as a *state ideology* through which they attempted to forge an image of national leaders from the figures of current presidents, as nation and state builders. As a result, authoritarian regimes and dictators triumphed rather than the anticipated introduction of democracy in post-Communist Central Asia."<sup>14</sup>

Thus, Linz and Stepan<sup>15</sup> and Dagiev<sup>16</sup> provide important insight about a nexus between regimes' security and democracy. Because of regime security concerns, authoritarian regimes emerged. Dagiev also proposed a 'patrimonial nationalism' as a context-specific form of nationalism in Central Asia that challenged democratization. Under which he means "the elite's form of nationalism" designed to "maintain control over the newly independent states", "legitimize their own rule" and "maintain political power rather than democratize society"<sup>17</sup>. The paper argues that regime security concerns in CA used nationalism and democracy and shaped consequently content of nationalism and democracy. Building on works of Linz and Stepan<sup>18</sup> and

<sup>11</sup> See Helbling, Marc. "Nationalism and Democracy: Competing or Complementary Logics?" *Living Reviews in Democracy*, 2009: 1–14.

<sup>12</sup> Helbling, 2009. Footnote 11, p. 6.

<sup>13</sup> Linz, Juan and Stepan, Alfred. *Problems of Democratic Transition and Consolidation: Southern Europe, South America and Post-Communist Europe*. Baltimore: John Hopkins University Press, 1996.

<sup>14</sup> Dagiev, 2014. Footnote 5, p. 1.

<sup>15</sup> Linz and Stepan, 1996. Footnote 13.

<sup>16</sup> Dagiev, 2014. Footnote 5.

<sup>17</sup> *Ibid.*, p. 2.

<sup>18</sup> Linz and Stepan, 1996. Footnote 13.

Dagiev<sup>19</sup>, the paper claims that for a better understanding of nationalism in CA a more comprehensive approach is needed, namely a nexus between regime security, nationalism and democracy.

To illustrate the argument the paper discusses cases of Tajikistan and Turkmenistan, despite this all Central Asian states could be illustrative examples to support this argument because the five Central Asian states have regime security concerns, are illiberal regimes that consolidate power along ruling clans and have ethnic nationalism. The paper limits itself with these two cases only because of data constraints. Tajik and Turkmen regimes tend to eliminate political opponents, instrumentalize elections, and monopolize media for the purpose of power consolidation and legitimation. The paper, by studying two case-countries, represents a qualitative study. The research findings are based on secondary data, namely on existing reports and primary data, such as legislative documents, official statistics (except for Turkmenistan), and observation of state and non-state media sources. The paper starts with a brief discussion of key literature on nationalism and democracy studies in CA; then the paper moves to its subsequent two main sections, each of which serve a purpose to unveil how Turkmen and Tajik regime security concerns had driven into a direction of ethnic nationalism and illiberal democracy.

## Various nationalisms and democracies in Central Asia: Key definitions and literature

In the study of nationalism, four main approaches exist: modernist-constructivist, primordial, perennial and ethno-symbolic. The modernist-constructivist approach in the study of nations and nationalism is one of key explanations of the rise of nations. The approach's main argument in contrast to other three is that a nation as such is a relatively modern invention and concept, and it is not in existence since the time immemorial. In contrast to primordialism and perennialism, modernists argue that nationalism rose in response to historical developments of civilizations, but was not natural or organic. The approach stresses key factors contributing to rise of nations, such as industrial revolution, modernization, urbanization<sup>20</sup>. The modernist school in general stresses the role of elites and state intellectuals in the rise of nations. Therefore, the modernist-constructivist approach can be summarized as top-down, elite-driven and socially constructed process. This approach in the study of nationalism was a rival with primordialism and perennialism which claim that nations are organic and existed since the time immemorial. Currently the modernist approach in the study of nationalism remains the most referred along with the ethno-symbolist approach, which stands in between the two rival approaches, and makes corrections to both primordial and modernist approaches, by highlighting another missed popular

<sup>19</sup> Dagiev, 2014. Footnote 5.

<sup>20</sup> See Gellner, Ernest. *Nations and Nationalisms*. Oxford UK, Cambridge USA: Blackwell Publishers Inc., 1983; Anderson, Benedict. *Imagined Communities. Reflections on the Origin and Spread of Nationalism*. London, New York: Verso, 1991.

nationalism or inner side of nationalism (by looking at emotions, myths, symbols, etc.)<sup>21</sup>. According to the ethno-symbolic approach nations are modern inventions, however they are rooted on pre-modern culture or ethnicity which are re-interpreted in a new way. The paper adopts ethno-symbolic approach because in the Central Asian context both elites and pre-modern cultures played a key role in building new nations.

In the literature of nations and nationalism, there are several classifications of nationalisms. Nationalism in general bifurcates between two opposite groups: voluntarist versus organic or non-voluntarist, inclusive versus exclusive, moderate versus aggressive, ethnic or genealogical versus civic or territorial, Western versus Eastern, etc. Regardless of differences in terminology proposed by various scholars, the ideas presented in these terms are very similar. For instance, the voluntarist and organic or non-voluntarist distinction was proposed by Hans Kohn. According to him, non-voluntarist nationalism does not have a freedom of choice, and imposes membership/non-membership to a society based on “fixed and indelible character which was stamped on its members at birth and from which they could never free themselves”<sup>22</sup>. In almost a similar way, Rogers Brubaker points out two types of nationalism: “civic nationalism, characterized as liberal, voluntarist, universalist, and inclusive; and ethnic nationalism, glossed as illiberal, ascriptive, particularist, and exclusive”<sup>23</sup>. Thus, the civic nationalism built is on common citizenship, the ethnic nationalism built is on common ethnicity. It is important, however, to mention that some scholars, such as Walker Connor<sup>24</sup> disagree that civic nationalism exists at all. According to Connor, ethnicity is not declining in Western Europe, not speaking about other third world countries that are experiencing ethnic clashes. Connor notes, “the doctrine that modernization dissolves ethnic loyalties can be challenged on purely empirical grounds”<sup>25</sup>. For the purposes of the paper, we stick to the definition proposed by Brubaker<sup>26</sup> and define ethnic nationalism in CA as nationalism built around titular ethnicity and titular culture.

The third wave of democratization in 1990–1991, which geographically spread from Latin America to Asia, marked a substantial shift in history by changing the political outlook of new nation-states into democracies. If in 1974, 41 states among 150 states officially declared themselves as democracies; in 2006, 123 states among 192 states declared their countries formally democratic<sup>27</sup>. Although formal democracies

<sup>21</sup> See Smith, Anthony, D. *The Ethnic Origins of Nations*. Cambridge, Massachusetts: Blackwell Publishers Inc., 1986.

<sup>22</sup> As cited in Smith, D., Anthony. *Nationalism and Modernism*. London and New York: Routledge, 1998, p. 146.

<sup>23</sup> Brubaker, Rogers. *Ethnicity without groups*. The United States: The President and Fellows of Harvard college, 2004, p. 133.

<sup>24</sup> Connor, Walker. “Nation-Building or Nation-Destroying?” *World Politics*, Vol. 24, No. 3, 1972: 319–355.

<sup>25</sup> *Ibid.*, p. 327.

<sup>26</sup> Brubaker, 2004. Footnote 23.

<sup>27</sup> Rocha Menocal, Alina, et al. “Hybrid regimes and the challenges of deepening and sustaining democracy in developing countries.” *South African Journal of International Affairs*, June 2008: 29–40.

were declared, only a modicum of transition countries ended up as full democracies. However, not only transition states of the 90<sup>s</sup> ended up with some extent of authoritarian regimes in practice, since these types of regimes even existed in the 1960<sup>s</sup><sup>28</sup>. The post-Communist Central Asian regimes have been labeled as hybrid or virtual democratic regimes. Many other adjectives are applied to describe these states in transition. The literature is rich in terms *illiberal, inegalitarian, uncontrolled, delegative, defective, semi-democratic, hybrid or virtual* democracies<sup>29</sup>, despite this, all of them to more or less degree entail a “grey zone”<sup>30</sup> between full democracy and autocracy (in some literature authoritarianism<sup>31</sup>). Therefore, the paper adopts the adjective illiberal to describe CA democracies. The paper considers an illiberal democracy as a regime in-between full democracy and autocracy. In other words, illiberal democracy is distinguished by democratic formalities and politics of authoritarianism at the same time: “neither a subtype of autocracies nor of democracies but a regime type on their own, encompassing those political systems that on plausible grounds cannot be classified as either autocracy or democracy”<sup>32</sup>.

Reasons behind the formation of a “grey zone” between full democracy and autocracy are research question for a number of studies. Their findings suggest several explanations of democratization development variations within CA geography, which span from institutional, cultural, economic, historical to geopolitical factors, such as so-called ‘neighborhood effect’ of Russia and China<sup>33</sup>. Another study suggests that the CA leaderships’ unwillingness to democratization is connected to “socio-economic decline” in the region which raises ruling regimes’ concerns related to their capacity of re-election in case of competitive democratic elections, which is especially true for all resource-based economies in Central Asia. Although, both Turkmenistan and Tajikistan rely on oil resources and aluminum deposits accordingly, their economies are dependent on aluminum and oil-price fluctuations on the world market<sup>34</sup>. Recent statistics suggest significant decline in socio-economic quality of life of citizens in the two countries. According to the recent report by the Center for Global Development, Tajikistan is listed among eight states, which have over-debt to China and could suffer from debt distress. Tajikistan’s debt in March 2017 against the country GDP made around 65% of GDP<sup>35</sup>. Whereas, in Turkmenistan, the country GDP growth is gradually declining (in 2013 it was 10.2%, while in 2016 it made only

<sup>28</sup> Diamond, Larry Jay. “Thinking About Hybrid Regimes.” *Journal of Democracy*, Volume 13, Number 2, April 2002: 21–35.

<sup>29</sup> See Bogaards, Matthijs. “How to classify hybrid regimes? Defective democracy and electoral authoritarianism.” *Democratization*, Vol. 16, No. 2, April 2009: 399–423; Zakaria, 1997; O’Donnell, 1996; Diamond, 2002. Footnote 28; Roy, 2008; Rocha Menocal et al. 2008. Footnote 27.

<sup>30</sup> Cassani, Andrea. “XXVII Annual Conference of the Italian Political Science Society (SISP).” *Does it make a difference? Hybrid regimes and their consequences on citizens’ wellbeing*. Florence, 2013.

<sup>31</sup> See Bogaards, 2009. Footnote 29.

<sup>32</sup> As cited in Bogaards, 2009, p. 415. Footnote 29.

<sup>33</sup> See Pop-Eleches, 2007. Footnote 2.

<sup>34</sup> Glenn, 2003. Footnote 1, p. 134.

<sup>35</sup> Hurley John, et al. *Examining the Debt Implications of the Belt and Road Initiative from a Policy Perspective*. Washington DC: Center for Global Development, 2018.

6.2%<sup>36</sup>), and the current government had to cancel subsidies on gas and electricity that Turkmens were granted by President Niyazov.

According to Treacher, democracy “exercises” in the region only legitimated post-communist authoritarian regimes, which is of high importance on the one hand, to keep the region out of dissolution into “small regional fiefdoms” in case weaker leaderships are established<sup>37</sup>. The regime security was key factor in shaping democracy and nationalism too. For instance, in Tajikistan and Turkmenistan, Bohr observed along with declining socio-economic factsheets, falsified and fabricated elections<sup>38</sup>. During the last elections in February 2017, Berdymukhammedov received 97.7% of votes in a non-competitive environment as was reported by the OSCE/ODIHR. Whereas, Tajik president, Rahmon, won 83,6% of votes during the last presidential elections in 2013. In other words, to ensure stability of regimes, both leaders opted to electoral falsifications. Falsifications were not merely around electoral procedures, the presidents appointed loyal people around him, developed regionalism or tribalism. In addition, in order to eliminate political opposition, they persecuted both political opponents and religious leaders, reinforced security along borders and established president-centered administrations. President-centered were also national identity insights, where each of the presidents were saluted as nation founding fathers. National identity engineers have put much effort in reinterpretation and invention of some parts of their histories and cultures around figures of Tajik and Turkmen presidents. These reinterpretations were ethnic-nationalist in practice. The following section, by presenting first a brief political setting of two states, discusses how regime security was an important shaper of illiberal democracy and ethnic nationalism in Turkmenistan and Tajikistan.

### Political/security background of Turkmenistan and Tajikistan: interplay between illiberal democratic practices and ethnic-centered policies

Turkmenistan obtained its independence in August of 1990. Saparmurat Niyazov, the 1<sup>st</sup> Secretary of the Central Commission of Turkmenistan’s Communist Party, became the president of independent country during 1990–2006. By the decision of the Public Council (*halkmaslahaty*) in 1999, President Niyazov’s presidential term was not limited. The neutrality status of the Turkmen state which was supported by the United Nations, was merely designed to guarantee a non-intervention into Turkmen domestic affairs. The neutrality status of Turkmenistan allowed Niyazov enjoy status of the only owner of the state. The regime security of Niyazov led him to concentrate power around his figure. In addition to his position as the president, Ni-

<sup>36</sup> Transformation Index BTI, 2018. URL: <https://www.bti-project.org/en/reports/country-reports/detail/itc/TKM/>

<sup>37</sup> Treacher, 1996, Footnote 1, p. 323.

<sup>38</sup> Bohr, Annette. *Turkmenistan: Power, Politics and Petro-Authoritarianism*. Chatham House, 2016, p. 27.

yazov was also head of the ministerial cabinet, Public Council (*halkmaslahaty*), *Aksakals* (Elderly People) Council, commander-in-chief, head of defense council, and national security, and held the honorary title of *Turkmenbashi* (translated as Head of Turkmen). Activity of opposition in Turkmenistan was prohibited, opponents were arrested and pressured<sup>39</sup>. President's Democratic party of Turkmenistan (a former Communist party) was the single political party until 2012. The successor of Niyazov, Gurbanguly Berdymukhammedov gained power in 2007. Similar to the first *Turkmenbashi*, Berdymukhammedov concentrated power around himself. President Berdymukhammedov simultaneously holds a position as head of the ministerial cabinet. Under the current president, opposition is oppressed and exiled<sup>40</sup>. According to Human Rights Watch Report (2017), "The government effectively bans all forms of religious and political expression not approved by authorities, tightly controls media, and allows no independent monitoring groups. Dozens of people remain victims of enforced disappearance."<sup>41</sup>

The first President of Tajikistan, Rahmon Nabiev (1991–1992) was overthrown very shortly after being elected because of the commencement of the civil war in Tajikistan in 1992, and after, died under mysterious circumstances. In 1997, in Kremlin with the United Nations involvement, the Peace Accord between the Tajik Government and the United Tajik Opposition was signed. In 1994, Emomali Rahmon, a head of the Tajik Parliament since 1992, was elected the President of post-independence Tajikistan. Post-civil war situation and a threat to the regime security, in a similar way, drove Rahmon towards illiberal and ethnic-centered policies. In post-civil-war Tajikistan, in particular, the President Emomali Rahmon successfully uses a narrative of threats of religious radicalism and extremism for the state's security and stability among its population heavily traumatized by civil war. The extremist and anti-state rhetoric goes against the president's main political opponent – the Islamic Renaissance Party (IRPT). The IRPT was declared a terrorist organization in September 2015 and its members are subjects to continuous persecution and arrest. Despite this, the government exaggerates the threat of the Islamic State, according to the existing estimates, in 2016 around 2,000 Tajik militants fought in Syria, including ex-colonel Khalilov. Poor socio-economic conditions, nepotism, pressure of diverse values and many other factors lead to religious radicalization in Tajikistan. The Tajik president distributed key government and business positions to his close and extended family members, including his children's parents-in-law, and reliable Kulob clan members.<sup>42</sup> His daughter, for instance, since 2016, is a head of President's Apparatus; while in 2017, his son was appointed a mayor of Dushanbe. Rahmon had been elected three times since 1994, and in 2020, his term is going to end. However, a referendum (90%

<sup>39</sup> Treacher, 1996. Footnote 1.

<sup>40</sup> Bohr, 2016. Footnote 38.

<sup>41</sup> Human Rights Watch report, 2017. URL: <https://www.hrw.org/world-report/2018/country-chapters/turkmenistan>

<sup>42</sup> Said Kabulov, "EmomaliRahmon – osnovateldinastii 'rahmonidov'", *eurasianews-info*, 2016. [http://ca-snj.blogspot.com/2016/03/blog-post\\_1.html](http://ca-snj.blogspot.com/2016/03/blog-post_1.html)

of votes) in 2016 allowed the Tajik president to be re-elected for non-limited number of times. Similarly, to Berdymukhammedov, Rahmon de-facto made himself a life-long term president. In addition, a new Tajik Constitution decreased age limitations from 35 to 30 years, and allowed his son Rustam Rahmon to campaign in 2020, in case if Rahmon will not be able to run.

Institutional reforms, namely a series of amendments to the Constitutions of the two countries allowed ruling regimes to secure major decision-making roles and consolidate power around ruling clans. In addition, as rightly noted, presidential elections in Turkmenistan and Tajikistan “lacked democratic voting” and a spirit of “competition”<sup>43</sup>. State media outlets in these two countries dominate, as most media is monopolized and non-state or foreign media is restricted or controlled. Both countries are rated by Freedom House (2018) as not free. Turkmenistan’s freedom rating is 7/7, and political rights’ rating is 7/7 (1=Most Free, 7=Least Free<sup>44</sup>). Tajikistan’s freedom rating is 6.5/7, and political rights’ rating is 7/7.

In both countries, a personality cult became a part of regime security strategy and shaped ethnic nationalism both in Tajikistan and Turkmenistan. Nationalisms in CA states became a means of political mobilization: “elites...apply the ideology of nationalism not only as an alternative to Communism, but also as a means of mass mobilization to strengthen themselves against competing political forces...”<sup>45</sup>. *Turkmenbashi* served also as a nation-building policy developed around the figure of the president. According to it, Niyazov was the leader of the nation, the founding father of the nation. Niyazov’s personality was glorified to a great extent that his birthday became a national holiday, and names of calendar months were reflecting his achievements, including name of his mother, while monuments dedicated to him and his family became everyday practice in Turkmenistan<sup>46</sup>. The personality cult in Turkmenistan has especially drawn the attention of many scholars, some of them even noted “overlap” between personality cult and nation-building narratives<sup>47</sup>. If the first life-long president, Niyazov was granted a title of *Turkmenbashi* (translated as head of Turkmens) and *Sedar* (leader). Berdymukhammedov along with the title of *Turkmenbashi*, in 2011 received another title of *Arkadag* translated as Protector. Niyazov’s *Ruhnama* during his presidency were mandatory subjects for reading and learning by-heart at schools and universities. Similarly, today books authored by Berdymukhammedov are compulsory in the education sector. Berdymukhammedov’s regime is characterized by a personality cult too even though, unlike Niyazov, he did not make his own birthday a national holiday or named one of calendar months after his mother. With the same level of pomposity, Tajik students, children, and public servants praise and recite poems about the Tajik President during meetings

<sup>43</sup> Treacher, 1996. Footnote 1, p. 309.

<sup>44</sup> Freedom House, 2018.

<sup>45</sup> Dagiev, 2014. Footnote 5, p. 4.

<sup>46</sup> Horak, Slavomir. “The Ideology of the Turkmenbashi Regime.” *Perspectives on European Politics and Society* 6 (2), 2005: 305–319.

<sup>47</sup> Polese, Abel and Slavomir Horak. “A tale of two presidents: personality cult and symbolic nation-building in Turkmenistan.” *Nationalities Papers, Vol. 43, No. 3*, 2015: 457–478, p. 457.

with him. In poems, Rahmon is compared to the sun and stars. The Tajik President is the central figure, like Berdymukhammedov, his portraits are placed in all public and state buildings. One of villages in Gorno-Badakshan was renamed after the president. In 2013, Rahmon introduced to Tajiks a national holiday dedicated to himself – Day of the President. Similar to Turkmenbashi Rahmon entitled himself a title *Peshvoi Millat* (leader of the nation) and *Peace-maker* in 2015, after the parliament adopted a Law on the founder of peace, unity and the leader of the nation (2015). Along with this title, people also address him *Janobi Oli* (Your Excellency). According to this Law, he receives immunity from criminal suits against him, and a personal museum and a library will be established. Rahmon’s widely cited book on Tajik history written in 2002 was monumentalized in 2016, whereas a mandatory course called “Emomali Rahmon is the architect of the Tajik nation” is taught in all universities. Last but not least, both Tajik and Turkmen media remain solely President-focused and used as a tool to praise presidents, consolidate their power, justify repressive authoritarian leadership and ethnic-centered policies. Thus, political leadership in post-independence Turkmenistan and Tajikistan, driven by own regime security concerns shaped illiberal democratic practices and policies build around dominant ethnic cultures, leaving minor cultures out of attention.

### Ethnic nationalism in Turkmenistan: criterion of “ethnic purity” and Turkmenisation policy

Turkmenistan, in comparison with other CA states, is more homogeneous, but it has some share of Russian and Uzbek ethnic minorities, which are the largest minority groups (in 2003: Russians 4%, Uzbeks 5%, according to CIA Factbook 2018; per 1989 census data Russians made 9.5% and Uzbeks –9%). According to Art. 22 of the Law on state service (2016), recruitment is based on principles of competency, professionalism, transparency and inclusivity (participation of ethnic and religious minorities in governance). Nevertheless, in practice, the titular ethnic group is heavily over-represented in government institutions, especially judicial, security and law-enforcement bodies. According to Bohr, non-Turkmens are regularly refused jobs in public bodies (2016). Whereas, personal information datasheets prior to applying for government positions, serve as a key tool to prevent minorities applying for jobs in “the judicial system, in law enforcement and security agencies, or in financial and military organizations”<sup>48</sup>. The more central or higher the position is within the government structure, the more a position-holder is expected to meet a criterion of Turkmen “ethnic purity” verified by at least three forefathers in a family lineage<sup>49</sup>. High official positions in the current state administration of Turkmenistan, are likely held by ethnic Turkmen, the only exclusion is Mr. Meredov, a half-Turkmen and half-Azerbaijani minister of Foreign Affairs. However, there are non-Turkmen advis-

<sup>48</sup> Bohr, Annette. “Turkmenistan.” *Nations in Transit*, 2007: 707–733, p. 727.

<sup>49</sup> Bohr, 2016. Footnote 38.

ers and businessmen, who tend to play a key role in domestic and foreign politics, namely on energy and finance-related issues, despite they do not hold official positions within the Turkmen government. For instance, they are represented by ethnic Russians, Jews, Armenians or Turkish and Israeli businessmen, one of whom advised the Trans-Caspian Pipeline route<sup>50</sup>. Non-involvement of acting Turkmen high officials in finance, business or energy-related topics is explained by lack of trust towards each other within the administration. Thus, more inclusive representation of non-Turkmens is related to aspirations of keeping business topics secret from other Turkmen, and has nothing to do with inclusive governance per se.

Since the country cancelled dual-citizenship in 2003, the Russian population started massively emigrating from the country. Because of the visa regime between the Russian Federation and Turkmenistan, many Russian-speaking citizens of Turkmenistan applied for the second (Russian) citizenship to be able to visit own relatives, study or work under the bilateral Agreement on Dual Citizenship (1993). From 2013, Turkmenistan has stopped issuing passports to those who hold dual citizenship. According to the present Constitution (adopted in 2016), Turkmenistan does not acknowledge Turkmen citizenship if there is citizenship of another country. This affected around 100,000 Russians and led to mass emigration of ethnic Russians who were left without alternatives.<sup>51</sup> Russians along with other ethnic minorities were Turkmenised, they were forced to wear Turkmen national dresses and hats at schools and universities, especially during holidays and other official gatherings. According to Minority Rights Organization International, the Russian-speaking minority is nearly excluded from the state employment, because Russian diplomas are not acknowledged in Turkmenistan and state employment is prohibited for those who hold dual citizenship.<sup>52</sup> The role of the Russian language has been downgraded even prior to the cancellation of the dual citizenship. Today the Russian language sounds more like a foreign language, despite that earlier in the old version of Constitution (1992) Russian was a “language of inter-ethnic communication”. Schools with Russian, as well as Uzbek and Kazakh-language of instruction were switched gradually to Turkmen-language during Niyazov’s presidency in 2000, except a couple of Russian-language schools in large cities. The Turkmen language had replaced Russian as a medium of instruction in universities. According to Act. 5 of the Law on education, Turkmen language is a dominant language in all state and private educational institutions. Implementation of the statement in the same article: “the state supports their citizens in learning their own mother-tongue”, however remains in paper. Officials explained the closure of Russian-language schools by the decrease of the ethnic Russian population and a lack of space at schools.<sup>53</sup> As Peyrouse notes, in early 1991 there

<sup>50</sup> Ibid., p. 24.

<sup>51</sup> HronikaTurkmenistana. *Ishod. RusskiebegutizTurkmenistana*. April, 2015. <https://www.hronikatm.com/2015/04/ishod-russkie-begut-iz-turkmenistana/>

<sup>52</sup> Minority Rights Organization International. 2018. <http://minorityrights.org/minorities/russians-and-ukrainians-3/>

<sup>53</sup> HronikaTurkmenistana. *Sokrashaetsyaobuchenienarussskomyazyke*. July, 2014. <https://www.hronikatm.com/2014/07/sokrashaetsya-obuchenie-na-russkom-yazyike/>

## ARTICLES

were around 2000 Russian-language schools, by 2000, less than 100 remained, and in 2005, they made only 50<sup>54</sup>. The OSCE High Commissioner on National Minorities had visited Turkmenistan during its on-going educational reform in 2015. It recommended a multilingual approach in education-delivery taking into account ethnic diversity and cultural and linguistic rights of non-Turkmens. However, its recommendations remain on the paper too. Recent international observation in 2016 noted a lack of teaching in minority languages at schools<sup>55</sup>. Identically, Russian media outlets in television, radio and newspapers are banned in the country, they are produced in the Turkmen language. However, it should be noted that, official websites have three language options: Turkmen, Russian and English, although internet remains under strict control, censored by security services and remains limited for public access.

Ethnic Uzbeks living in the bordering areas with Uzbekistan were forcibly replaced to idle deserts in the north-west to keep Uzbeks further from their kin-state<sup>56</sup>. According to Minority Rights Group International, around a thousand ethnic Uzbeks cannot get Turkmen passports after returning back to their homeland from their studies in neighboring Uzbekistan or Kazakhstan in Lebap and Dashoguz<sup>57</sup>. Their Soviet-period passports had expired and the government has been regularly refusing to issue new Turkmen passports, even though the procedure of applying for passports has been eased due to an on-line submission option. Uzbeks left without passports and *propiska*<sup>58</sup> are out of basic needs and public services, such as schooling, health services and social support. Uzbeks are subject to intentional and unintentional discriminations according to Peimani<sup>59</sup>. Bohr in her article notes that Uzbeks were denied access to universities and other higher education institutions<sup>60</sup>. Education in Uzbek is restricted and they have a poor knowledge of the state language. As a consequence, the Uzbek minority remains out of well-paid and prestigious jobs, and public jobs in particular. Other minority groups' situation in Turkmenistan is more desperate. For instance, ethnic Afghans, and other Iranian ethnic groups are under strict control of the security services of Turkmenistan. These citizens are not allowed either to read and write on mother-tongues, neither to celebrate weddings in their own national dresses, observe national customs, or perform national music and songs.<sup>61</sup>

<sup>54</sup> Peyrouse, Sebastien. *Russian Minority in Central Asia: Migration, Politics, and Language*. Woodrow Wilson Institute, 2007.

<sup>55</sup> International Partnership for Human Rights. "Turkmenistan: Submission To The Committee On The Elimination Of Racial Discrimination (CERD)." Brussels, 2016.

<sup>56</sup> Bohr, 2016. Footnote 38.

<sup>57</sup> Minority Rights Organization International. 2018. <http://minorityrights.org/minorities/uzbeks-4/>

<sup>58</sup> Registration based on permanent address.

<sup>59</sup> Peimani, Hooman. "Turkmenistan Reconsiders Relations with Uzbekistan." *The Central Asia-Caucasus Analyst*. 2003. <http://www.cacianalyst.org/publications/analytical-articles/item/8101-analytical-articles-caci-analyst-2003-6-4-art-8101.html> (accessed 08 12, 2018).

<sup>60</sup> Bohr, 2007. Footnote 48.

<sup>61</sup> Hronika Turkmenistana. Turkmenistan: problem nacmenov. July, 2015. <https://www.hronikatm.com/2015/07/turkmenistan-problemyi-natsmenov/>

Art. 21 of the Constitution declares that citizens of Turkmenistan are entitled to use and preserve their own mother-tongue<sup>62</sup>. Likewise, Turkmenistan is an implementer of a number of important international conventions and resolutions, among them are international documents regulating Human Rights, including minority rights, such as the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Official websites state Turkmenistan's adherence to adopted international conventions and resolutions. According to the official statement, the government guarantees the inalienability of Human Rights and Freedoms based on internationally adopted documents.<sup>63</sup> As an example, the Turkmen government has issued Turkmen citizenship to 6,455 people without citizenship since 2011. However, in their report in 2016 to the Committee on the Elimination of Racial Discrimination (CERD), as a follow-up observation on recommendations to Turkmenistan issued by CERD in 2012, a Brussels-based NGO noted that Turkmenistan "failed to support and respect the right of minority communities to preserve and develop their culture"<sup>64</sup>. It concluded, "Turkmenization policies continue to be pursued," and summarized that "no significant improvements in the human rights situation" are observed<sup>65</sup>. Turkmenistan promised to improve their own records by adopting, for a first time in their history, a National Human Rights Action Plan for 2013–2020. One of declared aims of amending the Turkmen Constitution by the government in 2016 was "to improve compliance with international standards"<sup>66</sup>. However, OSCE ODIHR's recommendations to the Constitution's draft were not considered in its final version. The modified Constitution in contrast strengthened Berdimukammedov's position by de-facto making him the second, after Niyazov, lifelong president, increasing his term from five to seven years by cancelling age restrictions for presidency candidates (earlier it was 70 years old). Thus, *Turkmenbashi* and his regime despite declaring opening policies and demonstrating its willingness to democratize and comply with international norms and standards, remains an illiberal democracy with ethnic-centered practices mainly because of regime security concerns.

<sup>62</sup> Constitution of Turkmenistan, 2016. [http://minjust.gov.tm/ru/mmerkezi/doc\\_view.php?doc\\_id=8124#](http://minjust.gov.tm/ru/mmerkezi/doc_view.php?doc_id=8124#)

<sup>63</sup> Department of Migration of Turkmenistan statement, <http://migration.gov.tm/ru/articles/turkmenistan-demonstriruet-tverduyu-priverzhennost-prinyatym-na-sebya-mezhdunarodnym-obyazatelstvam/>

<sup>64</sup> CERD, 2016. Footnote 55, p. 2.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

## Ethnic nationalism in Tajikistan: “Khujand governs, Kulob protects, Pamir dances”

Unlike Turkmenistan, Tajikistan is more heterogeneous, more than 15% of the population are non-Tajik. In 2010, the population of the country was made of 84.3% ethnic Tajik, 13.8% ethnic Uzbeks, 2% other ethnic groups<sup>67</sup>. The last Soviet census reported about 62% of Tajik population, 23.5% Uzbeks and 7.6% Russians<sup>68</sup>. Before the civil war, in 1992, around 60.3 thousand Russians speeded up leaving Tajikistan<sup>69</sup>. According to the official data, the number of Uzbeks drastically decreased by 29.3%, while the Tajik population increased by 110% since the independence of Tajikistan. However, as other sources state, there was no massive emigration of Uzbeks to Uzbekistan observed. This discrepancy might speak about manipulation of census by the Tajik government: artificial decrease of Uzbeks and increase of Tajik, as were suggested by Ferrando<sup>70</sup>.

After independence most of the Russians emigrated to Russia, however some among the holders of Russian passports were also ethnic Tajik, who needed Russian citizenship to work in Russia. Today, labor migration makes almost 52% of the country's GDP. The Russian language is replaced with Tajik language at education institutions. After independence, the Russian language was announced as a language of inter-ethnic communication. During the Soviet period more than 150 Russian-language schools were functioning, in 2015 that number had decreased twice. The Tajik language is not in the same family group language with Uzbek, Kazakh, Turkmen and Kyrgyz languages, therefore these minority groups face difficulties in understanding and speaking Tajik.

Relations are especially tense towards ethnic Uzbeks, who are often marginalized according to independent media sources. Uzbeks are systematically refused jobs or not promoted in state bodies, in addition they are subject to intentional decrease or dividing into several sub-groups/clan-groups in statistical demographic reports. To be employed, Uzbeks, along with other ethnic minorities, have to know Tajik. However, Uzbeks have a very poor knowledge of the state language, because they usually attend schools in their own language with poor educational facilities (usually they share 2–3 books for the whole class). Therefore, the majority of Uzbeks are self-employed entrepreneurs, most of them even do not get higher education. According to independent media sources, Uzbeks in Tajikistan also face difficulties in accessing other public services. A number of Uzbek families register their children as Tajik in their passports is growing. They believe that once their children will become Tajik, they would have more education and job opportunities, as well as full access to pub-

<sup>67</sup> CIA Factbook, 2018.

<sup>68</sup> Akbarzadeh, Shahram. “Why Did Nationalism Fail in Tajikistan?” *Europe-Asia Studies*, Vol. 48, No. 7, November 1996: 1105–1129.

<sup>69</sup> Harris, Chauncy D. “The New Russian Minorities: A Statistical Overview.” *Post-Soviet Geography* 34:1, 1993: 1–27.

<sup>70</sup> Ferrando, Olivier. “Manipulating the Census: Ethnic Minorities in the Nationalizing States of Central Asia.” *Nationalities Papers*, Vol. 36, No 3, July 2008: 489–520.

lic services. Fear of Tajik authorities of Uzbeks undoubtedly is linked to a fear of Uzbek opposition mobilization led by Uzbek leaders who might influence domestic politics. A series of anti-government riots in 1996, 1997 and 1998 occurred in Tajikistan under the leadership of colonel Khudoiberdiev, an ethnic Uzbek. The refusal of Karimov to hand over Khudoiberdiev to Tajikistan, led to the worsening of relations between Tajikistan and Uzbekistan. In 2013, another Uzbek ethnic leader, Shamsiddinov, went missing.

The Tajik authorities do not support minority schools; they are usually supported by kin-states if they are capable of it, or by the communities themselves. For instance, in the Khatlon region of Tajikistan there is a Turkmen settlement with an estimated population of 20 thousand people. In 2014, Turkmen authorities had allocated 3.5 million USD for the construction of a Turkmen-language school in the area of Khatlon. The Turkmen national minority had several times referred to Tajik authorities to deal with the issue of lack of books and personnel to teach in Turkmen in seven Turkmen-language schools. Therefore, the Turkmen Embassy works closely with Turkmen diasporas to maintain education in Turkmen via the printing and developing of books in Turkmen language. However, after graduation, Turkmens have no choice; they continue education in Tajik, because of different alphabet system they cannot study in Turkmenistan. Uzbek or Kyrgyz minorities in Tajikistan face similar difficulties in terms of education, such as a shortage of books and teaching personnel in own languages at schools, whereas the Kazakh minority, looks toward Kazakhstan.

Around 214,000 Pamiris, as of 2015, living in Gorno-Badakhshan are another cultural, linguistic and confessional minority in Tajikistan. The Tajik geography also contributed to the lack of interaction between Pamiris and Tajiks. Therefore, assimilation of Uzbeks, Turkmens and Kyrgyz were more of a success than the assimilation of Pamiris. However, not only cultural differences make Pamiris distinct, as they have different political preferences, often blamed as separatist. As Akbarzadeh notes, the conflict back in 1992 “lost its ideological coating and turned into clan warfare between Kulobis on the one hand and Pamiris and Gharmis on the other” and then fueled into civil war<sup>71</sup>. After pogroms in Gorno-Badakhshan in 2012, the relationship between Pamiris and the central government became even tenser. Pamiris preserve their own language and religion, while Tajik treat them with distrust and suspicion. According to the report of a Warsaw-based NGO issued in 2017, Tajikistan violates rights of national minorities. They note that Pamiri officials are forbidden to speak in Pamir, their own language, during official and unofficial events, such as family weddings or other gatherings. Failing to do so leads to problems at work, as the use of local languages by statesmen is prohibited by law. Television programs in the local Pamirian language are banned, even interviews on television by Pamiris are given in Tajik language. Even though Pamiris learn from Pamiri teachers, at schools they cannot use their own languages, all subjects are taught in Tajik, or they are taught in

<sup>71</sup> Akbarzadeh, 1996. Footnote 68, p. 1113.

English at private schools. Most Pamiris have a good level of English due to generous technical and material support by Aga-Khan IV foundations, which make studying abroad possible. The Aga-Khan network especially supports and encourages girls and women to get higher education. According to media, Aga-Khan IV is a very influential person in maintaining peace and communication between the Shia minority in Tajikistan and the central power in Dushanbe, relations of which had worsened since the 2012 events in Khorog.

Extracts from the Pamiris' interviews in the report<sup>72</sup> to the Committee on the Elimination of Racial Discrimination (CERD), by the NGO called the Anti-Discrimination Center Memorial, note that Tajik do not recognize them as Pamiris. According to this report Pamiris are publicly stigmatized and labeled as infidels, Shiite, sectarian, Ismaili or krauts (Gansy form the German Hans). Interviews confirm that even within the Pamir autonomous governance they are not allowed to serve in national security services and law-enforcement bodies, because the central power does not trust Pamiris and considers them separatists. According to Pamiris, despite the fact that they are indicated in their passports as Tajik, they usually are not promoted higher than the first deputy at any official position. Exceptions are only from non-strategic nominal ministerial positions like the Minister of Culture of the Republic of Tajikistan, who is ethnic Pamiri. Among Tajiks there is a saying exactly describing division of power between various clans: "Khujand governs, Kulob protects, Pamir dances"<sup>73</sup>.

The Law on state service (2007) highlights that state service is open to all ethnic and religious groups living in Tajikistan. In 2009, Tajikistan adopted the Law on freedom of religion. Article 6 of the Law on education (2013) describes the state's guarantee concerning the access to education of its citizens despite race, ethnicity, language, religion and gender. Article 7 of the Law on education continues, that education is delivered in Tajik, however there is a freedom of choice for studying in minority languages in places of their compact residence. Article 4 of the Law on periodic print and mass media (2013) states that mass media is transmitted in the Tajik language and other languages based on legislation of the republic. However, Article 3 of the first version of the Law in 1990 stated that "citizens are entitled to use their own language and other languages of people living in the republic in receiving and transmitting mass media", which today has lost its legal force. According to the Article 6 of the Law on culture (1997), national and ethnic minorities in Tajikistan have a right to save, develop and protect own culture, to organise cultural centres. Finally, the Constitution of the republic (1994) states that all nations residing there have a right to use their mother-tongues without restraint. However, in Tajikistan, similar to Turkmenistan, in practice illiberal democratic and ethnic-centered practices prevail. Similar to the Turkmen regime security concerns, the Tajik regime security shaped its ethnic-based and illiberal practices.

<sup>72</sup> CERD, 2016. Footnote 55.

<sup>73</sup> Memorial, The Anti-Discrimination Center. *Alternative Report on Tajikistan's Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination*, 2017, p. 8.

## Conclusion

The paper adopted an ethno-symbolic approach in the study of nationalism to describe CA states. This paper discussed the nexus between regime security, democracy and nationalism in Central Asia, namely in Tajikistan and Turkmenistan. Despite the illustration of interplay between regime security, democracy and nationalism could be applied to entire Central Asian region, because of data limitations this argument was applied to only the Tajik and Turkmen cases. The nexus provides a more comprehensive approach in the study of nationalism in Central Asia, which is omitted in most of the existing literature on the subject. While there are studies which closely examine causal relations between democracy and nationalism, or regime security and democracy in CA, there is a lack of literature which looks at how regime security shapes both nationalism and democracy. For instance, Linz and Stepan<sup>74</sup> and Dagiev<sup>75</sup> provide important insights about the nexus between regimes security and democracy. They claim that because of regime security concerns, authoritarian regimes emerged. Building on works of Linz and Stepan<sup>76</sup> and Dagiev<sup>77</sup>, the paper claimed that for a better understanding of nationalism in CA a more comprehensive approach is needed, namely the nexus between regime security, nationalism and democracy. The paper argued that regime security in CA is key in shaping both nationalism and democracy. The old Soviet nomenclature immediately adopted a nationalist narrative as a regime security or regime legitimation strategy, as rightly observed by Dagiev, ethnic nationalism was an immediate “reaction to sudden independence”<sup>78</sup>. The paper, using the example of Tajikistan and Turkmenistan, demonstrated how regime security concerns in CA used nationalism and democracy and shaped ethnic nationalism and illiberal democracy.

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<sup>74</sup> Linz and Stepan, 1996. Footnote 13.

<sup>75</sup> Dagiev, 2014. Footnote 5.

<sup>76</sup> Linz and Stepan, 1996. Footnote 13.

<sup>77</sup> Dagiev, 2014. Footnote 5.

<sup>78</sup> *Ibid.*, p. 1.



# The Campaign to Open up the West: The Uyghur in Contemporary Xinjiang

CLINTON J. WEBB\*

Throughout the 1990s and early 2000s, the Chinese Communist Party (CCP) implemented a series of policies throughout the western half of the People's Republic of China (PRC) that significantly altered the demographic, economic, and infrastructural composition of several provinces. These policies became known as the campaign to Open Up the West. Their impact was felt perhaps most noticeably throughout the Xinjiang Uighur Autonomous Region, or simply Xinjiang.<sup>1</sup> Although the policies of the campaign to Open Up the West were heralded by the CCP as initiatives that were designed to bring about "common prosperity" throughout Xinjiang, scholarly evidence has revealed that the "real objectives" of these policies were hidden through policies of propaganda and "coded double-speak".<sup>2</sup> Indeed, while the campaign to Open Up the West has resulted in infrastructural development and economic growth, it has also greatly contributed to, and arguably caused, a sharp increase in "ethnic strife" and economic inequality for Xinjiang's native Uyghur people. In recent decades the Uyghur have increasingly become involved in an economic, social, and religious conflict, at times violent, with the CCP. Furthermore, because of the policies of the campaign to Open Up the West, the Uyghur have become increasingly viewed by the CCP as potential radical Islamic insurgents and as a significant threat to Chinese stability in central Asia.<sup>3</sup> These problems have been compounded by the Uyghurs' lack of political representation within the CCP, and by rising economic disparities between Uyghur and Han Chinese in Xinjiang.<sup>4</sup>

Numerous secondary sources, government documents, and verifiable statistics have demonstrated that the campaign to Open Up the West has benefitted Xinjiang's Han Chinese population at the expense of the native Uyghur. These sources, peer-reviewed and accurate, are essential to understanding recent events in Xinjiang. Although there is comparatively little information concerning Xinjiang and the campaign to Open Up the West when compared to other academic and historical fields of

<sup>1</sup> Nicolas Becquelin, "Staged Development in Xinjiang," *The China Quarterly*, no. 178 (1 June 2004), p. 358.

<sup>2</sup> *Ibid.*, p. 374.

<sup>3</sup> Ehsan Ahrari, "China, Pakistan, and the Taliban Syndrome," *Asian Survey* 40, no. 4 (2000), pp. 661–662.

<sup>4</sup> Yuchao Zhu and Dongyan Blachford, "Economic Expansion, Marketization, and Their Social Impact on China's Ethnic Minorities in Xinjiang and Tibet," *Asian Survey* 52, no. 4 (2012), p. 726.

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inquiry, there is sufficient information to understand the effects that the campaign to Open Up the West had in Xinjiang throughout the 1990s and 2000s.

Furthermore, these sources have demonstrated that there is a consensus that the CCP's main goals in Xinjiang do not include promoting common prosperity, as they have claimed. Rather, the ultimate goal of the campaign to Open Up the West was securing Xinjiang's geopolitically significant natural resources, and permanently, and perhaps forcefully, stabilizing this potentially rebellious province. Any assessment of the CCP development model in Xinjiang "must acknowledge the numerous cases of the authorities' heavy-handedness which has actually added to the causes of intensified social unrest."<sup>5</sup> These trends become abundantly clear upon examining Xinjiang's changes in demographic data, ecological development, and economic statistics; they can also be understood by analyzing recent shifts in Uyghur separatist thought. The campaign to Open Up the West was introduced by the CCP to obtain Xinjiang's abundant natural resources, to forcefully stabilize and secure China's Muslim west, and to aid and benefit Xinjiang's Han population at the expense of the native Uyghur people.

## Xinjiang and the Chinese state

Xinjiang is the northwestern-most province in the PRC. The province has an area of approximately 5,600 kilometers and makes up one-sixth of PRC territory.<sup>6</sup> Xinjiang is geographically the largest province in the PRC and shares borders with Pakistan, India, Afghanistan, Kazakhstan, Kyrgyzstan, Tajikistan, Mongolia, and Russia. Xinjiang's proximity to, and frequent interaction with, these numerous and diverse bordering countries has meant that the "history of Xinjiang is the history of many interacting peoples, cultures and polities, not of a single nation."<sup>7</sup> The Uyghur, who are native to Xinjiang, and are its largest overall ethnic group, are one of China's 55 recognized minority nationalities. The majority of Uyghur are Sunni Muslims, are ethnically Turkic, speak Turkish languages, use Arabic script, celebrate their own festivals, and, traditionally, wear their unique style of clothing.<sup>8</sup> The Xinjiang Statistical Yearbook, an official government record, reported in 2010 that there were "more than ten million Uyghurs living in Xinjiang."<sup>9</sup>

The CCP has argued that Xinjiang has been part of China for centuries, and that the PRC, therefore, has a legitimate claim to the area.<sup>10</sup> However, there is little sub-

<sup>5</sup> Harry Roberts, "The Rationale behind the China-Pakistan Economic Corridor: The View from Beijing," in *Changing Regional Alliances for China and the West*, ed. David Lane and Guichang Zhu (2017), pp. 93–94.

<sup>6</sup> Xiaowei Zang, "Uyghur Islamic Piety in Urumchi, Xinjiang," *Chinese Sociological Review* 44, no. 4 (2012), p. 83.

<sup>7</sup> James A. Millward, *Eurasian Crossroads: A History of Xinjiang* (2007), p. xiv.

<sup>8</sup> Zang, note 6 above, p. 83.

<sup>9</sup> Xiaowei Zang, "Uyghur Support for Economic Justice in Urumchi," *Pacific Affairs* 86, no. 1 (2013), p. 6.

<sup>10</sup> *The State Council: The People's Republic of China*, "The History and Development of the Xinjiang Production and Construction Corps," *The State Council: The People's Republic of China*, October 5,

stantive historical data that thoroughly supports these claims. Whereas it is true that the Han Dynasty “set up the Office of Protector-General of the Western Regions in Xinjiang,” and that the Tang Dynasty established the “Anxi and Beiting Office of Protector-General in the region,” the majority of scholars have argued that “until the eighteenth century no Chinese dynasty had continuously controlled for any length of time or governed in any thoroughgoing way the entire territory that is modern Xinjiang.”<sup>11</sup> Chinese rule in Xinjiang was not thoroughly established until the Manchu-led Qing Dynasty conquered Xinjiang in 1759.

Chinese historical sources suggest that Uyghur origins can be traced to “Dingling nomads” who lived in present-day Mongolia during the third century BCE.<sup>12</sup> Following the fall of the Uyghur Empire in 840 AD, the Uyghur collectively migrated from Mongolia to Xinjiang. The Uyghur initially practiced shamanism, Manichaeism, and Nestorian Christianity, but they are believed to have fully converted to Islam during the 1400s due to Mongol and Central Asian influences. After the Qing conquest of Xinjiang, Uyghur rebellions against the Qing periodically occurred, and the area was ruled by harsh Han warlords following the fall of the Qing Dynasty in 1911.<sup>13</sup>

Throughout the early twentieth century, Xinjiang’s provincial borders were “fairly turbulent”; the nearby influential colonial powers of Britain and Tsarist Russia attempted to “destabilize” the Xinjiang government by seizing land.<sup>14</sup> Following the October 1917 Russian Revolution, Xinjiang’s provincial government combatted Soviet “extremism” by suffocating “any influence it had, with the result that these events had little real (immediate) impact in Xinjiang.”<sup>15</sup> However, Soviet interaction with Xinjiang gradually increased, and in autumn 1921, the Soviet Red Army and Yang Zengxin, the governor of Xinjiang, came to an agreement that would allow the Red Army to “cross the border to pursue and eliminate rogue elements of the White Army.”<sup>16</sup> Soviet interest in Xinjiang was motivated in part by “anti-British paranoia” as well as interest in the food and raw materials that Xinjiang could provide for Soviet “economic development in Central Asia – most importantly the expansion of cotton cultivation.”<sup>17</sup> To this end, the Soviet authorities sent consul Maks Dumpis to Kashgar in 1925 to win friends among the “progressive ulama” and to oversee the export of Xinjiang cotton to the Soviet Union.<sup>18</sup> Dumpis’ background as a Soviet dip-

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2014, [http://english.gov.cn/archive/white\\_paper/2014/10/05/content\\_281474992384669.htm](http://english.gov.cn/archive/white_paper/2014/10/05/content_281474992384669.htm).

<sup>11</sup> Zang, note 6 above, p. 83.

<sup>12</sup> *Ibid.*, p. 84

<sup>13</sup> Xiaowei Zang, “Major Determinants of Uyghur Ethnic Consciousness in Urumchi,” *Modern Asian Studies* 47, no. 6 (2013), p. 248.

<sup>14</sup> Qin Huibin, “History of Civilizations of Central Asia: Volume VI: Towards Contemporary Civilization: From the Mid-Nineteenth Century to the Present Time.” *United Nations Educational, Scientific and Cultural Organization* 6 (2005), p. 379.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> Brophy, David John *Uyghur Nation: Reform and Reformation on the Russia-China Frontier* (2016), p. 205.

<sup>18</sup> *Ibid.*, p. 206.

lomat in Iran and Afghanistan indicated that the Soviets still “considered Xinjiang as part of the Islamic, and not the Chinese, world.”<sup>19</sup>

Much of Xinjiang was briefly stabilized and controlled by the Guomindang Republic of China in 1944; several governors were appointed to control the province between 1944 and 1949.<sup>20</sup> Despite much of the province being under official Chinese control, “formal contacts” between the Soviet Army and Xinjiang still existed. Throughout the early 1940s, the “region remained loosely under the protection of the Red Army.”<sup>21</sup>

During this time, with support from the Soviet Union, Uyghurs established and ruled the East Turkistan Republic in northern Xinjiang between 1944 and 1949.<sup>22</sup> This was extremely significant because, prior to the establishment of the East Turkistan Republic, most Uyghurs in Xinjiang “lacked any coherent sense of (ethnic) identity.”<sup>23</sup> Accordingly, in 1945, the provisional government of the East Turkistan Republic, aided by Soviet diplomats, published a “Nine-Point Bulletin” which established a framework for the East Turkestan Republic’s secession from China.<sup>24</sup> The provisional government followed the advice of Soviet consultants and organized a “complete military infrastructure and regular, armed troops known as the ‘Nationality Army.’”<sup>25</sup> Infighting, however, plagued the government, and the East Turkestan Republic accepted Chinese Communist leadership in 1949.

While Uyghur nationalism formally “began to take shape in the 1920s and 1930s,” studies indicate that Uyghurs in Xinjiang had a “very weak historical claim to a coherent Uyghur identity.”<sup>26</sup> Prior to 1949, most Uyghurs were more oriented “towards their oases” where they lived throughout Xinjiang’s arid landscape, and were much less concerned with achieving a homogenous Uyghur self.<sup>27</sup> Indeed, the term *Uyghur* was itself an invention of “Soviet bureaucrats in the (late) 1920s” who wished to foster, or arguably create, a united, appreciative, ethnic group in the East Turkistan Republic who would be willing to join the USSR as a client state.<sup>28</sup> This term was later adopted by CCP officials.<sup>29</sup>

After the People’s Republic of China was established in 1949, the CCP strived for “total power in an effort to transform China into a socialist country and to fully integrate Xinjiang into the PRC.”<sup>30</sup> From the very outset, the CCP regarded Islam as “an alternative to political allegiance to the PRC state,” and, as a result, made

<sup>19</sup> Ibid.

<sup>20</sup> Zang, note 6 above, p. 84.

<sup>21</sup> Huibin, note 14 above, p. 382.

<sup>22</sup> Zang, note 13 above, p. 248.

<sup>23</sup> Ibid., p. 249.

<sup>24</sup> Huibin, note 14 above, p. 385.

<sup>25</sup> Ibid.

<sup>26</sup> Zang, note 13 above, p. 249.

<sup>27</sup> Ibid.

<sup>28</sup> Sean R. Roberts, “Imagining Uyghurstan: re-evaluating the birth of the modern Uyghur nation,” *Central Asian Survey* 28, no. 4 (2009), p. 361.

<sup>29</sup> Ibid.

<sup>30</sup> Zang, note 13 above, p. 249.

repeated efforts to undermine the role of Islam throughout Xinjiang.<sup>31</sup> Indeed, the CCP immediately instituted land reforms, which caused land owned by mosques and imams to be redistributed among the peasants, eliminated Islamic taxes, which served as the main source of revenue for mosques and imams, and executed Uyghurs who held deviant religious or political views.<sup>32</sup> As a result of these rapid communist and authoritarian reforms, the economic and social status of traditional Uyghur elite groups, such as “landlords, the Islamic establishment, and former nationalist government officials” was severely diminished.<sup>33</sup>

However, many Uyghur workers and peasants actually benefitted from CCP leadership, and, as a result, saw their living standards improve after 1949.<sup>34</sup> Xinjiang enjoyed reasonably friendly Uyghur-Han relations between 1949 and 1966. This was largely due to the CCP funding the socio-economic development of Xinjiang through relief support, tax relief, direct subsidies and the “extensive development of infrastructure and rapid industrialization.”<sup>35</sup> Employment opportunities were provided to Uyghurs on an unprecedented scale by the State. These programs significantly improved Xinjiang’s GDP per capita, which nearly doubled from 170 yuan in 1952, to 314 yuan in 1960.<sup>36</sup> These reforms caused Uyghurs to, overall, develop an “undivided loyalty to the Party, and (a) total commitment to socialist construction” before 1966.<sup>37</sup> The land reform policies in particular were beneficial to the peasantry.

The Cultural Revolution ended this relatively brief era of goodwill between the Uyghur and the Han. Not only did the State attack imams and mosques, close local bazaars, and burn religious scripts, but, from 1966 to 1976, they dismissed 99,000 of the 106,000 minority cadres from their leadership posts in the CCP.<sup>38</sup> Many Uyghur intellectuals and officials were persecuted despite their “commitment to the PRC and enthusiastic participation in socialist construction in the pre-1966 era.”<sup>39</sup> The extreme policies of the Cultural Revolution led to the growth of “ethnic consciousness” among Uyghurs, and also the development of resentment towards the Chinese Communist Party.<sup>40</sup>

Following Mao’s death, Deng Xiaoping drastically relaxed the CCP grip on Xinjiang and on Islam in general. In an attempt to salvage its relationship with the Uyghur, the CCP encouraged Han Chinese to learn from minority groups, authorized the resumption of religious pilgrimages to Mecca, and allowed the construction of tens of

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<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Xiaowei Zang, note 9 above, p. 6.

<sup>34</sup> Ibid.

<sup>35</sup> Zang, note 13 above, p. 249.

<sup>36</sup> Ibid.

<sup>37</sup> William Carl Clark, “Convergence or Divergence: Uyghur Family Change in Urumqi” (Ph. D. dissertation, University of Washington, 1999).

<sup>38</sup> Zang, note 13 above, p. 249.

<sup>39</sup> Xiaowei Zang, “Age and the Cost of Being Uyghurs in Urumchi,” *The China Quarterly*, no. 210 (2012), p. 421.

<sup>40</sup> Zang, “Major Determinants of Uyghur Ethnic Consciousness in Urumchi,” p. 249.

thousands of new mosques in Xinjiang.<sup>41</sup> The Government “gave Uyghurs preferential considerations in family planning, college admissions, job placement, and ethnic slots in leadership representation.”<sup>42</sup> Furthermore, the CCP announced the two restraints and one leniency policy which gave minority criminal suspects increased avoidance of prosecution.<sup>43</sup> These policies also caused Han Chinese to resent the perceived preferential treatment that minorities were now receiving. Nevertheless, the reforms that occurred from 1978 through the 1980s generally improved the overall quality of life of Uyghurs in Xinjiang. Despite the success of these early reforms, the CCP plan to Open Up the West in the 1990s and 2000s eliminated many gains achieved in the 1970s and 1980s and resulted in a sharp increase in ethnic inequality throughout the PRC.

### The campaign to open up the West

Beginning in the late 1980s, the Chinese government developed strategies that would allow Xinjiang to develop economically through a series of high-profile national campaigns.<sup>44</sup> These strategies, which became known as the campaign to “Open Up the West,” or *Xibu Da Kaifa*, were allegedly developed in order to fulfill the promise that Deng Xiaoping had made to ensure that the economic development of China’s coastal regions would soon be followed by rapid governmental investment in “poorer inland areas” and provinces and the “considerable natural resources” that lay untapped in many inland areas.<sup>45</sup> The campaign to Open Up the West involved direct investments from the State, and “incentives to encourage investment by Chinese and foreign firms” throughout these areas.<sup>46</sup> Although the campaign to Open Up the West affected numerous provinces and areas, including Qinghai, Sichuan, and Shaanxi, the seismic effects were intentionally felt most in Xinjiang. This was affirmed in 2002 by Wang Lequan, a senior CCP official and member of the Politburo, who proclaimed that developing Xinjiang is the main priority for the campaign to Open Up the West.<sup>47</sup>

Xinjiang’s share of funds from the campaign to Open Up the West came to a total of over 900 billion yuan. Most of this money was “earmarked for major projects” that included a “rail-link from Kashgar to Kyrgyzstan, regional highway construction, telecommunications, water conservancy, environmental rehabilitation, agricultural expansion,” and the extraction and delivery of energy-related natural resources.<sup>48</sup> One main components of the campaign to Open Up the West was the development

<sup>41</sup> Ibid., p. 250.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> James A. Millward, *Eurasian Crossroads: A History of Xinjiang* (New York: Columbia University Press, 2007), p. 298.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Michael Wines, “A Strongman Is China’s Rock in Ethnic Strife,” *The New York Times*, July 11, 2009, sec. International / Asia Pacific, <http://www.nytimes.com/2009/07/11/world/asia/11xinjiang.html>.

<sup>48</sup> Millward, note 44 above, p. 299.

of cotton and oil which were traditionally seen as the two main aspects of Xinjiang's economy. This heavy investment in the production of cotton and oil, referred to as the one white and one black policy, led to a substantial increase in cotton and oil yields throughout Xinjiang. Cotton production alone increased by substantial amounts, as Xinjiang's total harvest improved from 55,000 tons of cotton in 1978 to 1.5 million tons in 1998.<sup>49</sup> Eventually, in 2001, Xinjiang had become China's largest cotton producer, and was responsible for 25% of national cotton cultivation. This increase in annual cotton yields has been vital for Xinjiang, and since 2005 cotton-related jobs have been responsible for over 40 percent of rural income in the province.<sup>50</sup>

The development of Xinjiang's oil resources has also been essential for the Chinese government. Xinjiang is predicted to become the "energy base of the country for the 21<sup>st</sup> century" because of its substantial petroleum, natural gas, and oil reserves.<sup>51</sup> The Chinese government in 2004 completed a 4,200 kilometer pipeline that delivered natural gas from Xinjiang to the city of Shanghai on China's eastern seaboard.<sup>52</sup> This 140 billion yuan pipeline, financed by the Chinese government without private or international support, is viewed as evidence of the government's goal to stimulate growth "in the far west, without consideration for cost."<sup>53</sup>

These heavy investments in Xinjiang have not necessarily resulted in unhampered economic progress for Xinjiang. The province consistently "runs huge annual deficits," with its expenditures "routinely exceeding its GDP by between 12 and 19 billion yuan."<sup>54</sup> These deficits are estimated to equate to "around 20 per cent of Xinjiang's GDP;" and are paid off by national government subsidies.<sup>55</sup> As a result, despite the heavy investments in Xinjiang, the province's effective annual subsidy remains "on a par with those of Yunnan and Guizhou, the poorest parts of China."<sup>56</sup>

The fact that Xinjiang's economic progress has been relatively slow and not comparable to the rapid rise of the eastern Chinese cities is due, in part, to the fact that the extraordinary success of liberalization and privatization elsewhere in China has been stifled in Xinjiang under a centralized and State-driven development plan. These unwise economic decisions have been compounded by the fact that the campaign to Open Up the West has been a failure in improving the living conditions of many of Xinjiang's native Uyghur people.

Numerous independent studies have suggested that there is a strong correlation between ethnicity and income in counties throughout Xinjiang. These studies have demonstrated that the "greater the Turkic population of a given area, the lower the

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<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Xiaowei Zang, "Uyghur Islamic Piety in Ürümchi, Xinjiang," *Chinese Sociological Review* 44, no. 4 (Summer 2012), pp. 82–100.

<sup>52</sup> Millward, note 44 above, p. 302.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Millward, note 44 above, p. 303.

GDP per capita for that area.”<sup>57</sup> Ethnic economic problems have arisen as a consequence of government-sponsored programs that encourage Han migration into Xinjiang from eastern provinces. These problems have contributed to ethnic unrest and widespread economic disparity throughout the province, and they are contrary to the government’s claims that the campaign has resulted in increased economic development and improved ethnic unity in Xinjiang.<sup>58</sup> As a result of these developments, the campaign to Open Up the West has, in fact, adversely affected the quality of life of many native Uyghur people.

In sum, the policies of the campaign to Open Up the West caused numerous changes throughout the People’s Republic of China, and, specifically, in Xinjiang. These changes have produced intense discussions related to these topics and led to numerous arguments regarding the cause and effects of the campaign to Open Up the West. Overall, there is consensus that the campaign to Open Up the West did not achieve the CCP stated goals of increasing regional harmony. Most specialists agree that these policies instead contributed to increases in regional ethnic economic inequality. These arguments have often conflicted with the Chinese government’s official statements regarding the goals and effects of the campaign to Open Up the West.

The most significant areas of discussion have addressed such topics as Han migration into Xinjiang, the pronounced economic disparity between Xinjiang’s ethnic groups, and the rise in ethnic conflict and repression throughout Xinjiang. Analyzing the arguments associated with these issues is critical to understanding the effects of the campaign to Open Up the West in Xinjiang.

## Han migration

Han migration was “at the core of the policies” designed by the CCP in the early 1990s to develop Xinjiang and is perhaps the most consequential component of the campaign to Open Up the West.<sup>59</sup> The migration policy, also referred to by its critics as “settler colonization,” was allegedly used intentionally by the Chinese government to rapidly move large numbers of Han Chinese into Xinjiang in order to change the ethnic composition of the province. However, the Chinese government has historically promoted a different view of this policy, arguing for years that Han migration to Xinjiang was overstated, and was largely due to “seasonal migrants” and not to permanent settlers.<sup>60</sup> These differing perceptions resulted in a rigorous debate over the causes, effects, and, for years, even the existence of Han migration into Xinjiang.

Specialists have agreed that increased Han migration has been a technique used by the Chinese government during the campaign to Open Up the West to secure Xin-

<sup>57</sup> Ibid.

<sup>58</sup> The State Council: The People’s Republic of China, “China Issues White Paper on Xinjiang Production and Construction Corps,” *The State Council: The People’s Republic of China*, October 5, 2014, [http://english.gov.cn/news/top\\_news/2014/10/05/content\\_281474992384654.htm](http://english.gov.cn/news/top_news/2014/10/05/content_281474992384654.htm).

<sup>59</sup> Becquelin, note 1, p. 368.

<sup>60</sup> Ibid.

jiang and reduce ethnic tensions throughout the region. In particular, Becquelin has been especially prominent drawing attention to the Chinese government's actions related to demographic shifts in Xinjiang. Becquelin argued that, beginning in the early 1990s, the Chinese government viewed "the Sinicization of Xinjiang" as "the ultimate solution for long-term stability" in China's northwest.<sup>61</sup> The government's desire to thoroughly Sinicize China's northwest increased, according to Becquelin, after the dissolution of the Soviet Union and the independence of the Central Asian States that bordered Xinjiang. Additional geopolitical tensions caused the CCP to focus attention on Xinjiang. These tensions included territorial disputes with India, which declared in 1998 that "its nuclear armaments were pointed at the PRC"; potential spillover from the Pakistani-Indian conflict; Afghanistan's "never-ending" civil war; the rising pressures, and eventual civil war, in Tajikistan; and, above all, domestic ethnic unrest in Xinjiang.<sup>62</sup> Despite these occurrences, Becquelin argues that the Chinese government kept its migratory policy "almost entirely covert," and that, until the official announcement of the campaign to Open Up the West, the Chinese authorities had "always denied charges of engineering state-sponsored population transfers," and had additionally "continuously underplayed the increased rate of the Han Chinese population settlement in minority areas."<sup>63</sup>

The understatement of Han migration was accomplished, according to Becquelin, through persistent inconsistencies in the official demographic data that appeared in Xinjiang's annual statistical yearbooks, and scientific articles.<sup>64</sup> The extent to which this information was deceitful was exposed in the 2000 National Census, which revealed that up to two million Han migrants had settled in Xinjiang since 1990.<sup>65</sup> This meant that, in just ten years, the Han population had grown by approximately 31.6%, which was roughly twice the rate of the Uyghur population which had grown at 15.9% over the same period.<sup>66</sup> According to Becquelin's analysis, in 2000 the total Han population in Xinjiang stood at 7.49 million, or 40.6% of Xinjiang's total population, whereas in 1949 Han Chinese only made up 6% of Xinjiang's total population.<sup>67</sup> These changes are notwithstanding the fact that China's ethnic minorities are exempt from the One Child Policy, and that, therefore, ethnic minority families raise substantially larger families than their Han counterparts.<sup>68</sup>

Becquelin argued that these figures "undoubtedly confirm the scale of vast in-migrations" to Xinjiang.<sup>69</sup> Indeed, they are noteworthy when one realizes that these recent demographic shifts have caused the population levels of native ethnic groups to

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<sup>61</sup> Ibid.

<sup>62</sup> Nicolas Becquelin, "Xinjiang in the Nineties," *The China Journal*, no. 44 (July 1, 2000), p. 65.

<sup>63</sup> Becquelin, note 1, p. 368.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid., pp. 368, 369.

<sup>66</sup> Ibid., p. 369.

<sup>67</sup> Ibid., p. 359.

<sup>68</sup> Yuchao Zhu and Dongyan Blachford, "Economic Expansion, Marketization, and Their Social Impact on China's Ethnic Minorities in Xinjiang and Tibet," *Asian Survey* 52, no. 4 (August 1, 2012), p. 714.

<sup>69</sup> Becquelin, note 1 above, p. 369.

decrease below 60% “for the first time in (recorded) history.”<sup>70</sup> This is despite the fact that the population of these groups increased by 1.5 million throughout the 1990s.

According to Becquelin, Han population growth has been accomplished by “indirectly promoting migration” through economic incentives rather than by using Mao-era practices of “forcibly deporting people to Xinjiang.”<sup>71</sup> The Chinese government agrees with this assessment, for official State Council recommendations have stated that “to attract migrants ... the main point is to allow individuals to accumulate riches.”<sup>72</sup> The government has also stated that migrants must be given property rights that would permit “the division, transfer, rental and inheritance of land.”<sup>73</sup> Despite the capitalist tone of these government announcements, Becquelin argues that the migratory policies of the 1990s ultimately are based on the same logic that was employed in the Maoist years.<sup>74</sup> According to Becquelin, this Maoist thinking considers that “a transfer of population would both alleviate population pressures in overcrowded central provinces and guarantee the security of the (western) region.”<sup>75</sup> This view is apparent in Communist Party documents from 1997, which state that in order to correct the “imbalance in the distribution of population and natural resources at the national level, to accelerate the building of the great Northwest of the motherland, (and) to protect the unity of the country and the unity of the nationalities of China,” the government must “organize the transfer of Han people from the interior to Xinjiang to protect the order and reclaim land.”<sup>76</sup> These arguments by Becquelin appear to be well-supported by Chinese government documents.

Perhaps the most significant shift in Chinese government rhetoric concerning Han migration in Xinjiang occurred in June 2000, when an article by Li Dezhu, the head of the State Ethnic Affairs Commission, was published in *Qiushi* [*Seeking Truth*]. This article, published in “the authoritative journal of the CCP on doctrinal issues,” signaled a “radical alteration of nationality policies.”<sup>77</sup> Li wrote that “implementation of the campaign to Open Up the West has enabled our nationality work to enter a new historical era.”<sup>78</sup> Li surprisingly acknowledged that the State was intentionally fostering “increased migrations to national minorities areas ... in order to dilute the ethnic populations in the border areas ... and strengthen national unity.”<sup>79</sup> However, the most significant topic discussed in Li’s article was the acknowledgement that “inter-ethnic conflicts were likely to be heightened by this process.”<sup>80</sup> Li argued that

<sup>70</sup> Ibid.

<sup>71</sup> Becquelin, “Xinjiang in the Nineties,” p. 76.

<sup>72</sup> Wang Xiyu and Chen Jianpo, “Channel the Migrants and Establish Agriculture in the Desert,” *Studies on the Development of China*, 1996 edition, (1996), p. 439.

<sup>73</sup> Ibid.

<sup>74</sup> Becquelin, note 62 above, p. 77.

<sup>75</sup> Ibid.

<sup>76</sup> Li Fusheng, “The Xinjiang Bingtuan, Border Defence and Land Reclamation,” *Xinjiang Ketu Weisheng Chubanshe*, (1997), p. 1539.

<sup>77</sup> Becquelin, note 1 above, pp. 373–374.

<sup>78</sup> Li Dezhu, “The Opening of the West and China’s Nationality Problem,” *Qiushi*, (June 1, 2000.)

<sup>79</sup> Note 1 above, p. 374.

<sup>80</sup> Ibid.

if the population flow of Han migrants continued, there will be substantial changes in the proportions of the nationalities groups in Xinjiang, and that, as a result, there will be “some changes and clashes in their conflicts.”<sup>81</sup> He continued that if the conflicts are not handled well, that they will “have a deleterious effect on national unity and social stability,” and that, therefore, these conflicts should “draw a high level of attention” from the government.<sup>82</sup>

Becquelin argued that Li’s piece was a “landmark article” whose importance “cannot be overstated.”<sup>83</sup> In his view, Li’s article represented a hugely significant “change in the articulation of the CCP’s doctrine on national minorities,” and a reversal of the CCP years-long denial of an increase in Han migration. Not only did Li openly discuss what was “plainly apparent to any casual observer,” but his article also addressed the “real” objectives of the campaign to Open Up the West, instead of using the rhetoric of “shared prosperity” which had been prevalent in CCP documents until then. Becquelin also noted that Li’s “candid acknowledgement” that increased Han migration will likely lead to increased ethnic strife “goes against everything previously said on how economic development would bridge the differences between the Han and the national minorities.”<sup>84</sup>

These analyses and government policies indicate that the CCP leadership is well aware that policies conducted from the 1990s to the 2000s actually increased the marginalization of ethnic groups such as the Uyghur. This is in direct contradiction to all previous official statements that underscored “vast improvements in minorities’ living standards and statutory rights.”<sup>85</sup> Becquelin argued that this shift in CCP rhetoric was a sign of closure and a signal of the approaching end of minority strife in Xinjiang. He concluded his analysis of the Han migration by pointing out that:

The long-sought objective of seamless integration of minority nationalities into the ‘Chinese nation’ draws near, history has entered an end-game, and there is no necessity to proceed with caution and coded double-speak any more. This shift is thus essentially a narrowing between the unstated and the stated goals of policies regarding minority nationality areas. It reflects the new-found confidence that the party-state now has sufficient control and power to take any counter-measure needed.<sup>86</sup>

Millward predicted an additional problem related to heavy Han migration to Xinjiang. According to his analysis of Xinjiang’s environment and climate, Millward observed that “unprecedented warming,” climate change, man-made drought, and extensive irrigation have significantly altered much of Xinjiang’s geography in recent decades.<sup>87</sup> These changes have contributed to the rapid acceleration of “the

<sup>81</sup> Li, note 78 above.

<sup>82</sup> Ibid.

<sup>83</sup> Note 1 above, p. 374.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> Millward, note 44 above, p. 317.

melting of the snowcap and glaciers in the Tianshan and Kunlun ranges over the past few decades,” and that, since 2004, these glaciers have been melting at a rate “equivalent to all the water in the Yellow River ... every year.”<sup>88</sup> If these rates continue, Millward argued, Xinjiang’s glaciers may be completely gone by the end of the twenty-first century, which would be disastrous for areas of Xinjiang that receive up to “58 per cent” of their yearly water supply from annual “glacier melt-water.”<sup>89</sup> This drastic change in environment and livability will undoubtedly conflict with the Chinese government’s goals of increasing the overall Han population of Xinjiang. Millward observed this potential conflict and noted that “Chinese official publications do not acknowledge the fundamental contradiction between the pro-migration thrust” of the Open Up the West campaign and the “environmental constraints” on Xinjiang’s carrying capacity that will only tighten as the glaciers melt away.<sup>90</sup> Unless new and substantial sources of water are located or created, the CCP Han migration goals in Xinjiang may soon become incompatible with the province’s climate.

### Economic disparity in Xinjiang

Much has been written about economic inequality among ethnic groups in Xinjiang. Although Uyghurs legally enjoy favorable hiring practices in Xinjiang, widespread *de facto* discrimination has resulted in intense social stratification and economic inequality between the Han and Uyghur.<sup>91</sup> Prior to the reforms of the late 1980s and early 1990s, Chinese minorities, and especially Uyghur, were victims of a “discriminative system” that discriminated in favor of certain types of nationalities, such as the Han.<sup>92</sup> Following these social reforms, China abandoned the discriminatory system in favor of a *de facto* “segregative one,” that economically and socially separated and dissociated Uyghurs and Han from one another in Xinjiang.<sup>93</sup> The results have had serious consequences for the Uyghur population.

Yuchao Zhu and Dongyan Blachford have argued that increased “economic expansion, in general, and marketization, in particular, have actually destabilized the demographic and employment situations” in Xinjiang “particularly in respect to the local ethnic populations.”<sup>94</sup> Negative consequences of this exclusion, according to Zhu and Blachford have included widespread marginalization and social exclusion.<sup>95</sup> Additional consequences of Xinjiang’s marketization have been the increased migration of Uyghurs from Xinjiang to eastern cities where jobs are more plentiful.

Overall, Zhu and Blachford argue that economic inequality is overwhelmingly prevalent throughout Xinjiang. They state that not only has the campaign to Open Up

<sup>88</sup> *Ibid.*, p. 318

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*, p. 322.

<sup>91</sup> Zhu and Blachford, note 68 above, p. 715.

<sup>92</sup> Becquelin, note 62, p. 90.

<sup>93</sup> *Ibid.*

<sup>94</sup> Zhu and Blachford, note 68 above, p. 720.

<sup>95</sup> *Ibid.*

the West not resulted in Uyghur economic prosperity, or the “shared harmony” that the government had promised, but has instead caused widespread economic inequality between the Han and Uyghur. Zhu and Blachford note that, among China’s population as a whole, “59% of people living below the poverty line are ethnic minorities, even though the proportion of the ethnic population to the total population is no more than 9%.”<sup>96</sup> This extreme stratification is exacerbated in Xinjiang where Han possess 71% of “high-end jobs such as officials and managers,” and 57% of all “professional jobs.”<sup>97</sup> By comparison, Uyghurs merely hold 17% of all government positions in Xinjiang, despite being the ethnic majority and native group in the province. Job prospects are bleak for even highly qualified Uyghurs, as data from 2005 demonstrated that “ethnic minority (college) graduates only had about a 50% employment rate after graduation.”<sup>98</sup> Zhu and Blachford argue that these terrible economic statistics have greatly contributed to worsening ethnic tensions in Xinjiang.

To address this problem, Zhu and Blachford believe that “policy adjustment by the government is crucial,” and that the government should “utilize its regulatory and administrative resources to better manage the employment situation” throughout Xinjiang, and particularly in Xinjiang’s larger cities.<sup>99</sup> These solutions could be economic rewards given to businesses that hire Uyghurs, or increasing preferential hiring policies to create more Uyghur jobs in the public sector. However, Zhu and Blachford admit that government power is constrained by the “market mechanisms and private ownership” that have flourished under Han businesses. Because of the multitude of religious, educational, and ethnic imbalances and prejudices that exist as a result of the liberalization and migration policies of the Open Up the West campaign, Zhu and Blachford conclude that it is difficult to find minorities that fit the “certain skills and education levels” that many jobs require.<sup>100</sup> Many Han employers still, according to data, prefer “hiring people within whom they find it easier to communicate.”<sup>101</sup> Often these are other Han Chinese.

Zhu and Blachford complete their analysis by arguing that economic and social factors are not the only ones that have led to ethnic economic inequality in Xinjiang. Cultural factors, such as long histories of persecution and alternating separation and integration with the Chinese central State are “inseparable” factors as well for explaining the Uyghur’s economic exclusion from a period of unprecedented Chinese economic growth.<sup>102</sup> Andrew Fischer described this type of exclusion as “social exclusion within growth,” which can be used as an explanation for the fact that “ethnically exclusionary processes appear to be intensifying alongside growth and despite improving livelihoods.”<sup>103</sup> Zhu and Blachford concur with this analysis and argue

<sup>96</sup> *Ibid.*, pp. 725–726.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*, p. 726.

<sup>99</sup> *Ibid.*, p. 727.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

<sup>103</sup> Andrew Fischer, “Resolving Theoretical Ambiguities of Social Exclusion with Reference to Polariza-

that China's market-oriented economic outlook, as well as its ineffective government programs, are to blame for the economic situation in Xinjiang. Thus, their argument does not blame "state-sanctioned, deliberate deprivation," as Becquelin does, but rather Xinjiang's unchecked free market economy which has created "inequality and marginalization of vulnerable and less competitive social groups, mainly because people's social status, conditions, and capacities are different."<sup>104</sup> According to Zhu and Blachford, it is because of this free market that, overwhelmingly throughout Xinjiang, "some win and some lose."<sup>105</sup> Therefore, it is "only" through implementing more "specifically targeted redistributive policies" and intervening more prominently in locally operated employment practices that the government can support and empower local populations and promote "sustainable development in China's periphery."<sup>106</sup>

Uyghur emigration from Xinjiang has also resulted from the economic problems in the region. According to Steve Hess, these migrations have led to the further oppression of Uyghurs. According to Hess, when Uyghurs obtain employment at factories in China's eastern cities, they were frequently subject to increased marginalization and exclusion. Hess argued that "clashes between managers and workers have become frequent occurrences and increasing worker solidarity and growing labour activism have become leading concerns" of the CCP.<sup>107</sup> Hess believes that Uyghur labor exportation is primarily used not as a tool to alleviate poverty, as claimed by CCP documents, but, rather as "an instrument of business class interests for dividing and conquering the shop floor through the ethnic diversification of the work force," which is an "age-old tactic of factory bosses harkening back to the manipulation of foreign-born workers in late nineteenth century industrial America."<sup>108</sup> By encouraging Uyghurs to work in these eastern factories, the Chinese government and the factory owners will, according to Hess, ensure that there are "maximal language and cultural barriers between them and their Han co-workers."<sup>109</sup> These challenges will, in turn, lead to a severe segmentation of the existing workforce.<sup>110</sup> Hess said that it is no coincidence that the implementation of the 2002 labor export program in Xinjiang which facilitated Uyghur emigration coincided with a "rising tide of labor activism" throughout China.<sup>111</sup> Based on the analysis provided by Hess, Zhu, Blachford, and Fischer it is no surprise that surveys regularly indicate that Uyghurs, as a whole, op-

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tion and Conflict," *DESTIN Working Paper*, no. 90 (2008), [www2.lse.ac.uk/internationalDevelopment/pdf/WP90.pdf](http://www2.lse.ac.uk/internationalDevelopment/pdf/WP90.pdf).

<sup>104</sup> Zhu and Blachford, note 68 above, p. 731.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*, p. 732.

<sup>107</sup> Steve Hess, "Dividing and Conquering the Shop Floor: Uyghur Labour Export and Labour Segmentation in China's Industrial East," *Central Asian Survey* 28, no. 4 (December 1, 2009), p. 404.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

pose *laissez-faire* capitalism, and, instead, substantively prefer communitarian economic practices.<sup>112</sup>

Despite these findings, not all agree with the overwhelming narrative that the Uyghurs have been economically oppressed by campaign to Open Up the West. Barry Sautman said that the arguments presented by most specialists create an image of China being an imperial oppressor who has effectively colonized its western provinces and minority populations. This view that Sautman criticizes is widely shared among Xinjiang scholars, and Dru Gladney articulates it by arguing that “the categorization and taxonomization of all levels of Chinese society, from political economy, to social class, to gender, to ethnicity and nationality” represents a “wide-ranging and on-going project of internal colonialism.”<sup>113</sup> Sautman thoroughly rejects this notion, and argues that “none of the elements of the internal colonialist concept are sufficiently present to warrant characterizing Xinjiang as an internal colony of China.”<sup>114</sup> However, while Sautman disagrees with Gladney’s conclusion, he explicitly acknowledges that several existing factors “suggest that China proper ... and Xinjiang are like metropole and colony.”<sup>115</sup> These factors include the government’s desire to extract raw resources from Xinjiang, the extremely apparent ethnic division of labor throughout the province, the income imbalances that are undoubtedly related to ethnicity, the province’s ethnic division of political power, and the recent wave of Han migrations.<sup>116</sup> However, despite the admission that these events are real and relevant concerns, Sautman argues that the current situation in Xinjiang is not a result of “exploitation and ethnic domination,” but is rather a consequence of the “complex historical, geographic, and political factors” that have influenced Xinjiang’s development.<sup>117</sup> These factors include Xinjiang’s historically underdeveloped pre-1949 education system, the “legacies of domination that arise from China’s evolution as a conquest state,” and the “remoteness and aridity” of Xinjiang itself.<sup>118</sup> As a result, Sautman believes that Xinjiang’s contemporary dilemmas are not a result of colonialism, but are rather a consequence of numerous interconnected factors.

Sautman’s direct critique of the opinions of Gladney and others differs from the views of nearly every contemporary Xinjiang scholar. His assertion that the Chinese State is not interested in either exploiting Xinjiang for its resources or in achieving stability in the region through ethnic domination is opposed by Gladney, Becquelin, and Hess. Nevertheless, Sautman’s views do occupy an important minority view in the field of Xinjiang and Uyghur studies.

<sup>112</sup> Tyler Harlan and Michael Webber, “New Corporate Uyghur Entrepreneurs in Urumqi, China,” *Central Asian Survey* 31, no. 2 (2012), p. 175.

<sup>113</sup> Dru C. Gladney, “Internal Colonialism and the Uyghur Nationality: Chinese Nationalism and its Subaltern Subjects,” *Cahiers d’Etudes sur la Méditerranée Orientale et le monde Turco-Iranien*, no. 25 (January 1, 1998), <http://cemoti.revues.org/48>.

<sup>114</sup> Barry Sautman, “Is Xinjiang an Internal Colony?,” *Inner Asia*, Vol. 2, No. 2, Special Issue: Xinjiang (2000), p. 239.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*, pp. 239–243.

<sup>117</sup> *Ibid.*, p. 261

<sup>118</sup> *Ibid.*

## Uyghur dissent and separatism

Following the implementation of the campaign to Open Up the West, multiple ethnic conflicts have occurred between the Uyghur and the Han in Xinjiang, and throughout the PRC. Throughout the 1990s and early 2000s, it was possible to read more about unrest and separatism in Xinjiang than perhaps at any other point in the twentieth century.<sup>119</sup> These conflicts have become more significant due to the rise of numerous radical Islamic groups in Afghanistan, Pakistan, and Central Asian countries which neighbor Xinjiang.<sup>120</sup> The violent “theological aspects” of these groups have caused CCP leaders to become concerned about the possibility of an “Islamic revolution” occurring in Xinjiang.<sup>121</sup> This apprehension derives from the fact that the dominant ethnic group in Xinjiang, the Uyghur, is composed of Sunni Muslims, and not nominally atheist Han Chinese.<sup>122</sup> Several specialists have argued that the policies associated with the campaign to Open Up the West were designed to address these apprehensions.

The validity of the Chinese government’s apprehensions of an anti-Chinese, Islamic, revolution occurring in Xinjiang have been extensively discussed. Indeed, subject has attracted more attention than other areas of Xinjiang research. Some, such as Rafael Israeli, argue that Islam in China has, historically, been incapable of peacefully existing within a non-Islamic state.<sup>123</sup> His views have been summarized as holding that Islam in Xinjiang is “almost unavoidably rebellious and that Muslims as minorities are inherently problematic to a non-Muslim state.”<sup>124</sup>

Ehsan Ahrari agrees with several aspects of this argument by describing his “Taliban syndrome” thesis.<sup>125</sup> This argument suggests that, unless sufficient actions are taken, the “ever-escalating role of radical Islamists in the domestic and foreign policy of Pakistan and other contiguous states” could likely result in the establishment of “an Islamic form of government anywhere in the region,” including in Xinjiang.<sup>126</sup> Becquelin alters this argument by stating that the overly aggressive policies of the Chinese government, and not the efforts of the Taliban and other radical groups, will potentially cause the Uyghur to adopt radical Islam.<sup>127</sup>

Dru Gladney rejects these arguments; he states that the Uyghur are not, nor have they ever been, “united around separatist or Islamist causes.”<sup>128</sup> In his view, they are divided by internal linguistic, territorial, religious and political conflicts, and it is

<sup>119</sup> Millward, note 44 above.

<sup>120</sup> M. Ehsan Ahrari, “China, Pakistan, and the ‘Taliban Syndrome,’” *Asian Survey* 40, no. 4 (July 1, 2000), p. 661.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*, p. 296.

<sup>124</sup> Dru C. Gladney, “Islam in China: Accommodation or Separatism?,” *The China Quarterly*, no. 174 (June 1, 2003), p. 452.

<sup>125</sup> Ahrari, note 120 above, p. 658.

<sup>126</sup> *Ibid.*

<sup>127</sup> Becquelin, note 1 above, p. 378.

<sup>128</sup> Gladney, note 124 above, p. 457.

inaccurate to suggest that all Central Asian Islamic ethnic groups are highly susceptible to radical Islamic fundamentalism.<sup>129</sup>

An argument offered by Zhu Yuchao and Dongyan Blachford analyzes the economic, ethnic, and religious inequality occurring in Xinjiang differently from these specialists. In their view, Xinjiang's market economy and its persistent economic inequality, and not its religious, cultural, or social dilemmas, are the main cause of conflict in the region.

Taken as a whole, these discussions contain much substantive overlap. Ahrari believes that because the Uyghur never did "accept the Confucian formulation of state and society," they have historically "remained alien to the larger culture while their shared faith led them to identify deeply with the larger world community of Islam."<sup>130</sup> According to Ahrari, this historic cultural isolation, when combined with the rise of radical Islam and the "success of the Afghan mujahedeen against the former Soviet Union," has resulted in an environment in which the Uyghur have become highly susceptible to Islamic fundamentalism and extremism.<sup>131</sup> However, as Gladney argues, Ahrari's Taliban syndrome argument largely ignores the many cultural differences that separate Central Asian Muslim groups. Throughout Ahrari's argument, he tends to treat all Central Asian Muslims as if they all have the same history, and as if they are all equally susceptible to Islamic fundamentalism. Gladney countered Ahrari's thesis by arguing that Islam is "only one of several unifying markers for Uyghur identity."<sup>132</sup> He said that the Uyghur distinguish themselves from the Hui, another Chinese Muslim minority, by maintaining that they are China's true indigenous minority.<sup>133</sup> Uyghurs further claim that they differ from the nomadic Kazakh peoples by reason of their attachment to "land and oases of origin," and they oppose the Han by emphasizing their long history in Xinjiang.<sup>134</sup> All these diverse claims, according to Gladney, suggest that Islamic fundamentalist groups will have a "limited appeal among the Uyghur" because of their relatively strong sense of uniqueness from other regional Muslim groups.<sup>135</sup>

Becquelin faced criticism in arguing that the economic liberalization and development of Xinjiang will result in an end to ethnic conflict. Becquelin's argument is critiqued by Zhu and Blachford, who concluded that only through large-scale economic reform can officials "empower local populations and promote sustainable development in China's periphery."<sup>136</sup> They further criticized Becquelin by pointing out that "market-oriented economic expansion is largely unfavorable to ethnic minorities"

<sup>129</sup> Ibid.

<sup>130</sup> Ahrari, note 120 above, p. 660.

<sup>131</sup> Ibid.

<sup>132</sup> Gladney, note 124 above, p. 457.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> Zhu and Blachford, note 68 above, p. 732.

in China, as is evidenced by the vast economic inequality that exists between the Uyghur and the Han in Xinjiang.<sup>137</sup>

Upon examination, the views offered by Gladney, and by Zhu and Blachford, correctly explained the ethnic conflict in Xinjiang. According to Gladney, the area is not in danger of embracing the Taliban's radical Islam, and, as Zhu and Blachford observed, the Han-Uyghur conflict is mainly caused by vast economic differences, and not by historical, religious, or cultural ones. The Chinese government should, therefore, focus on resolving economic issues in the area through redistributive and regulatory policies in order to end the conflict in Xinjiang.

Millward criticized the concern and alarm raised by nearly every Xinjiang specialist, journalist, and politician who has written about these issues. Millward holds that contemporary specialists, and the Chinese government, may be drastically overreacting to ethnic conflicts in Xinjiang. They, according to Millward, only began to gain substantive access to Xinjiang in the late 1980s, and that as a result the world knows "relatively little" about violent incidents or ethnic conflicts between Uyghurs and Han that occurred in Xinjiang prior to the 1990s.<sup>138</sup>

As a result, Millward believes that this unprecedented access to information, when combined with the media's attraction to conflict, has potentially manufactured the seriousness of the ethnic conflicts in Xinjiang. He further noted that most information regarding separatist violence and anti-Chinese dissent has come from "either Chinese government or Uyghur exile sources," both of which, he states, have "reason to shape the record in their own way."<sup>139</sup> Although he concedes that 162 people were killed and 440 were injured in "terrorist acts" throughout the 1990s in Xinjiang, most of these deaths occurred in "small-scale events involving one or two victims," and that, therefore, they are not indicative of a widespread "holy war" against the Han.<sup>140</sup> Millward acknowledged that any violence is "deplorable," but that the situation in Xinjiang should not be compared to the ethno-nationalism and separatism that ravaged Northern Ireland, Chechnya, Iraq, Bosnia, and Rwanda during the late twentieth and early twenty-first centuries.<sup>141</sup>

In sum, since the 1990s, CCP actions in Xinjiang have resulted in increased ethnic inequality and unrest and caused widespread Sinicization throughout much of the province. The policies of the CCP have led to the exploitation of Xinjiang's natural resources, have caused a sharp increase in economic inequality, and have helped create the groundless assertion that Uyghurs represent a clear and growing danger to the long-term stability of the PRC. CCP policies in recent decades have resulted in Uyghur marginalization, impoverishment and oppression.

It is difficult to find any reputable source, with Sautman and the Chinese government being the exceptions, which offer any views to the contrary. For instance, Chi-

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<sup>137</sup> Ibid.

<sup>138</sup> Millward, note 44 above, p. 324.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

nese government documents, particularly those released to the international community, make reference to the concept that “it is an inevitable choice based on China’s historical and cultural tradition that China persists unswervingly in taking the road of peaceful development.”<sup>142</sup> These statements imply that China is incapable of engaging in ethnic oppression, or in creating economic inequalities, by reason of its peaceful history. These claims are not only repudiated by statistics that reveal the true effects of policies associated with the campaign to Open Up the West, but also by specialists who have studied CCP policies towards Xinjiang.

An overwhelming consensus among scholars believes that the campaign to Open Up the West was simply a “classic process of consolidation” by the Chinese government designed to allow the CCP to obtain Xinjiang’s natural resources, to secure and ensure the stabilization of China’s conceivably rebellious Muslim west, and to allow the Han to achieve increased homogeneity throughout the PRC.<sup>143</sup> The construction of the expensive “west to east pipeline” from Lunnan in Xinjiang to Shanghai, as well as the disregard for the potential ecological catastrophes that could result from increased Han migration and pollution, serve as evidence that the Chinese government is not primarily concerned with improving the quality of life of Xinjiang’s native Uyghur people as previously claimed.<sup>144</sup> By exorbitantly investing in, and directly profiting from, the extraction of geopolitically significant resources in Xinjiang, the CCP has demonstrated that it is ultimately concerned with its own stability and not with the overall welfare of its own citizens.<sup>145</sup>

This concern for stability motivated the government to create policies that would allow it to “colonize” and “integrate” all of Xinjiang under its rule, such as by promoting Han migration into Xinjiang.<sup>146</sup> By increasing the Han presence in Xinjiang, the CCP was able to “isolate and weaken” any potential rebel groups that may originate in Xinjiang, or that could be imported via “cross-border separatist movements.”<sup>147</sup> Han migration allowed the Chinese government to fill local government positions in Xinjiang with Han Chinese and encouraged a Han-dominated business climate to develop throughout Xinjiang. Moreover, Uyghur emigration from Xinjiang has increased in recent years. The CCP has been chartering entire trains to bring Uyghurs and other western ethnic minorities to eastern areas of China where the Han are the ethnic majority.<sup>148</sup> This policy of ethnic redistribution has been endorsed by Chinese President Xi Jinping, who, in 2014, expressed support for sending Uyghurs to live, work, and be educated in Han-majority areas to “enhance mutual understand-

<sup>142</sup> China Through a Lens, “White Paper on Peaceful Development Road Published,” Accessed November 27, 2014, <http://www.china.org.cn/english/2005/Dec/152669.htm>.

<sup>143</sup> Becquelin, note 1 above, p. 378.

<sup>144</sup> *Ibid.*, 365.

<sup>145</sup> Becquelin, note 68 above, p. 69.

<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.*, pp. 69–70.

<sup>148</sup> Edward Wong, “To Quell Unrest, Beijing Moves to Scatter Uighurs Across China,” *The New York Times*, November 6, 2014, <http://www.nytimes.com/2014/11/07/world/asia/labor-program-in-china-moves-to-scatter-uighurs-across-han-territory.html>.

ing among different ethnic groups and boost ties between them.”<sup>149</sup> Following this statement, Guangdong Province announced plans to import 5,000 ethnic minority workers from Xinjiang over the next three years and confirmed that each worker would be required to undergo “ideological and political review” before being allowed to relocate.<sup>150</sup> These “voluntary” relocations have increased in recent years due to the widening economic gap between Han and Uyghur communities and are a direct result of the poor economic conditions that Uyghur’s face in Xinjiang.<sup>151</sup> The CCP has increased arrests of high-profile Uyghur activists in recent years in an attempt to solve the perceived issue of Uyghur separatism in Xinjiang.<sup>152</sup>

The campaign to Open Up the West preceded, and in many ways caused, these developments in Xinjiang. Not only is the language of President Xi’s statement reminiscent of the language that the CCP used to promote the campaign to Open Up the West, but his support of ethnic redistribution demonstrates that his administration supports a continuation of the policies and effects of the campaign. Upon examination, the campaign to Open Up the West was not a struggle for promoting economic equality and social fairness throughout Xinjiang, but was rather a ruthlessly pragmatic move by the CCP to extract Xinjiang’s natural resources and eliminate any potential political opposition through a series of pro-Han, anti-Uyghur policies.

## Conclusion

The campaign to Open Up the West had a tremendous impact on Xinjiang and on the native Uyghur people. These policies resulted in increased Han migration into Xinjiang, fostered substantial ethnic economic disparity in much of the province, and prompted the growth of ethnic unrest. In short, these policies were, as a whole, disastrous for Xinjiang’s Uyghur population. As numerous scholars have noted, it is clear that, in order to end the ethnic, economic, and political tensions in Xinjiang, the CCP should implement substantive economic and social reform to improve the status of minorities. Policies like these should strongly be considered, since it is apparent that the Uyghur are not a threat to the PRC, or to the political rule of the CCP. However, upon examination of the effectiveness of state crackdowns in Xinjiang, the lack of significant Uyghur political leaders in the CCP, and the historic success of the CCP in maintaining order throughout the PRC, it is clear that even the continuation of current CCP policies will likely not result in a substantively negative outcome for CCP leadership. Indeed, unless a major political or social shift occurs in the PRC or abroad, which is highly unlikely, it is probable that the Uyghur will be condemned

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<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid.

<sup>152</sup> James A. Millward, “China’s Fruitless Repression of the Uighurs,” *The New York Times*, September 28, 2014, <http://www.nytimes.com/2014/09/29/opinion/chinas-fruitless-repression-of-the-uighurs.html>.

for the foreseeable future to endure further marginalization from the CCP because of the policies of the campaign to Open Up the West.



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