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BRICS LAW JOURNAL (BRICS LJ)

An independent, professional peer-reviewed academic legal journal.

Aims and Scope

The *BRICS Law Journal* is the first peer-reviewed academic legal journal on BRICS cooperation. It is a platform for relevant comparative research and legal development not only in and between the BRICS countries themselves but also between those countries and others. The journal is an open forum for legal scholars and practitioners to reflect on issues that are relevant to the BRICS and internationally significant. Prospective authors who are involved in relevant legal research, legal writing and legal development are, therefore, the main source of potential contributions.

It is published in English and appears four times per year. All articles are subject to professional editing by native English speaking legal scholars.

Notes for Contributors

Manuscripts must be the result of original research, not published elsewhere. Articles should be prepared and submitted in English. BRICS LJ doesn't accept translations of original articles prepared not in English. The BRICS LJ welcomes qualified scholars, but also accepts serious works of Ph.D. students and practicing lawyers.

Manuscripts should be submitted electronically via the website *www.bricslawjournal.com*. Articles will be subjected to a process of peer review. Contributors will be notified of the results of the initial review process within a period of two months.

Citations must conform to the *Bluebook: A Uniform System of Citation*.

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CHIEF EDITOR'S NOTE ON THE JUDICIAL SYSTEMS IN THE BRICS COUNTRIES

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Motivated by the idea of extending and strengthening cooperation between their court systems, in 2015 the BRICS countries held the BRICS Justice Forum in Sanya, Hainan Province, China. Their joint statement at the conclusion of the Forum announced, "The Supreme Courts of BRICS are willing to improve the mechanism for regular cooperation and wide-ranging exchanges under the framework of the Protocol of Intent among the BRICS Countries' Supreme Courts to improve the level of justice and to better protect and serve the economic and social development of their countries." The problem is that the court systems in the BRICS countries are very different from each other.

The following snapshots of the court systems of the BRICS countries provide a glimpse at the measure of the difference and hint at the degree of the problem.

The **Brazilian** judiciary comprises federal, state and municipal courts. There are also some special courts that deal with labor and election matters: the Superior Labor Court, created in 1946, and the Superior Electoral Court, established in 1932. The National Justice Council exercises the power of administrative and disciplinary control over the Brazilian judiciary.

The **Russian** judiciary is regulated by special chapter 7 "Judiciary" of the Constitution as well as by the special laws "On the Judicial System" (1996), "On Courts of General Jurisdiction" (2011), "On Commercial Courts" (1995) and "On the Status of Judges in the Russian Federation" (1992).

Today the Russian civil judiciary is composed of the courts of general jurisdiction, military courts, commercial courts and the Intellectual Property Court. The main law

governing the fundamental principles of the Russian court system is the Law "On the Judicial System of the Russian Federation" (1996).

Arbitrazh (commercial) courts are charged with settling economic disputes, while courts of general jurisdiction handle disputes between individual citizens. The arbitrazh court system was established in 1991 after the collapse of the Soviet Union and the adoption of a market economy. Arbitrazh courts are structured as a three-tier system. The main law governing the activity of arbitrazh courts is the Law "On Arbitrazh Courts in the Russian Federation" (1995). Arbitrazh courts also have exclusive jurisdiction over the recognition and enforcement of foreign court decisions and arbitral awards. There are four levels in the system of arbitrazh courts: 85 regional courts, 21 appellate courts, 10 territorial courts and the Supreme Court.

The competence of the courts of general jurisdiction includes civil disputes, appeals of administrative actions, labor and employment disputes, family law and consumer protection, among other types of cases. There is a general rule that all cases not referred to the arbitrazh courts are handled by the courts of general jurisdiction. The main law governing the activity of the courts of general jurisdiction is the Law "On the Courts of General Jurisdiction of the Russian Federation". There are three levels in the system of the courts of general jurisdiction: district courts, regional courts and the Supreme Court. District courts are established based on the administrative divisions of a region and regional courts operate on the level of the region (i.e. a subject of the Federation). There are eighty-five regions in Russia.

Justices of the peace handle property disputes with an amount of claim under 50,000 RUR and some types of family cases.

Military courts deal with civil cases that fall under the jurisdiction of the courts of general jurisdiction that occur while service in the military services is involved.

Owing to its adherence to international treaties, Russia is subject to the jurisdiction of the European Court of Human Rights and the Court of the Eurasian Economic Community.

The **Indian** judiciary is a single, integrated court system made up of district courts, twenty-four high courts and the Supreme Court. The Supreme Court has original, appellate, writ and advisory jurisdiction and is composed of the Chief Justice and thirty judges, all of whom are appointed by the President. The high courts have jurisdiction over the states of India and hear appeals from the lower courts in civil cases.

The **Chinese** judiciary is divided into a three-level court system: the Supreme People's Court, the local people's courts and the courts of special jurisdiction. The Supreme People's Court has a criminal division, a civil division and an economic division. The Supreme People's Court supervises the work of the local people's courts. Its primary competence is the interpretation of the law, adjudication and the administration of the local people's courts. The local people's courts are established in accordance with the country's administrative divisions. There are three specialized

courts: military courts, railway transport courts and maritime courts. Hong Kong and Macau have different court systems.

The **South African** judiciary consists of magistrate's courts, high courts and the Supreme Court of Appeal. There are also many specialized courts such as income tax courts, the Labour Court and the Labour Appeal Court, the Land Claims Court, the Competition Appeal Court, the Electoral Court, divorce courts, small claims courts, military courts and equality courts. There is also the Judicial Service Commission that consists of the Chief Justice, the President of the Constitutional Court and the Minister of Justice. A decision of the Supreme Court of Appeal can be changed only by the Constitutional Court. The high courts can act as courts of first instance as well as courts of appeal.

ARTICLES

BRICS COUNTRIES' POLITICAL AND LEGAL PARTICIPATION IN THE GLOBAL CLIMATE CHANGE AGENDA

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DOI: 10.21684/2412-2343-2016-3-3-8-42

The article presents an overview and analysis of international legal regulations on climate change. The authors examine how the international regime related to climate change has evolved in multilateral agreements. A special focus is put on the principle of common but differentiated responsibilities which became the basis of discord among states in discussing targets and responsibilities in climate change mitigation. The authors note that in 2015 the international climate change regime entered a new stage where the most important role is determined for developing countries, both in the legal and in the financial infrastructure, and in the formation of an international climate change policy.

The importance of the participation of Brazil, Russia, India, China, and South Africa (BRICS) in an international climate change regime has been recognized for some time. The article describes the policy and regulations on climate-related issues in BRICS. The authors compare the key actions and measures BRICS have taken for complying with international climate change documents. They highlight that global climate change action cannot be successful without BRICS countries' involvement. BRICS must therefore make adequate efforts in emissions reduction measures and significant commitments in respect of the international climate change regime. The authors propose three major steps for BRICS to take the lead in dealing with climate change. First, BRICS need to foster further discussion and cooperation on climate issues and work out an obligatory legal framework to fight climate change collectively as well as unified legislation at their

domestic levels. Second, Russia and other BRICS countries have the potential to cooperate in the field of renewable energy through the exchange of technology, investment in the sector, and the participation of their energy companies in each other's domestic market. Assuming Russia will support the development and enhancement of renewable technologies in BRICS countries, it can take a leadership position in the group. Third, in the international process of tackling climate-related issues BRICS should act as a bloc. Russia's distancing itself from its partners is considered a deficiency in strengthening the BRICS countries' role in global governance. BRICS are capable of serving as a vigorous platform in driving climate change negotiations leading to effective binding regulations in 2020–2030 and, provided that the countries cooperate successfully, BRICS will carry the combined weight of the entire group in the global arena.

Keywords: BRICS countries; climate change; emissions reduction; international agreements; common but differentiated responsibilities.

Recommended citation: Elena Gladun & Dewan Ahsan, *BRICS Countries' Political and Legal Participation in the Global Climate Change Agenda*, 3(3) BRICS Law Journal 8–42 (2016).

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1. Introduction

One of the global objectives of sustainable development set forth by the international community is to improve the quality of life within the constraints of the natural environment. The primary way to achieve this is to mitigate global

climate change. The global problem of climate change is addressed in the plethora of international documents which have formed the legal framework governing the activities of states to reduce greenhouse gas (GHG) emissions, to create and implement the best technologies, and to cooperate in the area of protecting the ozone layer. By the mid-1980s, the accumulating observed evidence of actual ozone layer depletion was a key factor leading countries into the era of climate change.

The politics of global climate change are as complex as the science underpinning the debate. State, regional and multilateral efforts to address climate change differ in scope, focus and style.[1] There is also great diversity in the social and legal systems in the states that have undertaken to regulate climate issues. Different countries have widely divergent histories, levels of wealth, economic conditions, cultures, and systems of government and laws, hence, they regulate environmental protection according to their own conceptions, legal instruments, and national norms. Some countries are more experienced in regulating efficiently matters related to the natural environment, while others have little experience in using regulatory instruments in respect of this question.

The problem of climate change, however, cannot be solved by the efforts of any one country acting alone. Successful climate change mitigation, firstly, will require global consensus and efficient global environmental agreement on the appropriate response to climate change. The effectiveness of such an agreement depends on the participation of both developed and developing nations. All countries acknowledge the need to reduce ozone-depleting emissions though some developed countries are reluctant to ratify climate change agreements, for instance the Kyoto Protocol,[2] and developing countries lack adequate commitment to reduce their emissions. It is crucial that all governments comply with international agreements and not set emissions reduction targets with ambiguous sustainability goals, which only undermines long-term efforts at the domestic level, i.e. replacement of state policy, extensive amendments in legislation, and special judicial or administrative measures.[3]

This paper analyzes the efforts of Brazil, Russia, India, China, and South Africa (BRICS) in complying with the existing international climate change regime as well as the transformation in their domestic policy and regulations addressing climate change in the last decade. The objective of the research is to determine the role of the

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1 Cinnamon Carlarne, *Risky Business: The Ups and Downs of Mixing Economics, Security and Climate Change*, 10 Melb. J. Int'l L. 439 (2009).

2 The rationale for the previous United States Administration's not ratifying the Kyoto Protocol was partly based on the lack of commitment to GHG emissions reduction by developing nations. *See* Philippe Tulkens & Henry Tulkens, *The White House and the Kyoto Protocol: Double Standards on Uncertainties and Their Consequences*, FEEM Working Paper 89.2006 (2006) (Jun. 12, 2016), available at http://ageconsearch.umn.edu/bitstream/12063/1/wp060089.pdf.

3 Michael Burger et al., *Rethinking Sustainability to Meet the Climate Change Challenge*, 43 Envtl. L. Rep. News & Analysis 10342, 10345 (2013).

BRICS countries in the future global response to climate change and to propose steps that Russia needs to adopt in order to be capable of taking the lead in this area.

2. The Evolution of Multilateral Environmental Agreements on Climate Change

The Vienna Convention for the Protection of the Ozone Layer (1985) became the first document establishing the duty of state Parties to

> adopt appropriate legislative or administrative measures and cooperate in harmonizing appropriate policies to control, limit, reduce or prevent human activities under their jurisdiction or control should it be found that these activities have or are likely to have adverse effects resulting from modification or likely modification of the ozone layer (Article 2).[4]

The Convention provided a list of chemical substances which have the potential to modify and deplete the properties of the ozone layer. In addition, the document required participating countries to adopt legislative measures to control and limit the behavior of individuals within a state's jurisdiction to prevent them from conducting activities which are shown to cause further depletion of the ozone layer. The participants also agreed to cooperate in the research effort to determine which human activities effect the depletion of the ozone layer, although individual participating countries had the latitude to exploit their own resources in accordance with their own environmental policies.[5] Generally speaking, this document was of a framework nature and imposed no specific obligations on the signatory countries in reducing consumption and production of ozone-depleting substances (ODS). In 1987, the Montreal Protocol[6] amended the Vienna Convention by specifically providing for the Parties' gradual reduction in the production and consumption of chlorofluorocarbons (CFCs) and other ozone-depleting chemicals. The Montreal Protocol also set controls on the trade of such chemicals with non-Parties. In 1990, the London Amendment to the Montreal Protocol strengthened these control measures by requiring the Parties to phase out the production of CFCs by the year 2000, and to gradually phase out other controlled substances by 2005.[7] Subsequently,

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[4] Vienna Convention for the Protection of the Ozone Layer (with Annexes I & II), UNEP Doc. IG.53/5, 26 I.L.M. 1529 (1987).

[5] Jeffrey M. Pollock & Jonathan S. Jemison, *The Emerging of International Environmental Law*, 195-Feb. New Jersey Lawyer 25 (1999).

[6] Montreal Protocol on Substances that Deplete the Ozone Layer, 26 I.L.M. 1550 (1987).

[7] The Evolution of the Montreal Protocol, Amendments, Ozone Secretariat (UNEP) (Jul. 28, 2016), available at http://ozone.unep.org/en/handbook-montreal-protocol-substances-deplete-ozone-layer/27608.

a number of amendments were adopted extending the list of banned substances,[8] banning the import of the controlled substances from any state not a Party to the Protocol as well as establishing and implementing a system for licensing the import and export of controlled substances,[9] and establishing deadlines for the production and consumption of these substances.[10]

The Montreal Protocol divides its Parties into categories – developed and developing countries, but only countries under the latter category have special rights. This mechanism is based on the principle of common but differentiated responsibilities and has a crucial meaning for international cooperation. Article 5, paragraph 1 of the Protocol provides delayed compliance for developing countries; it reads:

> Any Party that is a developing country and whose annual calculated level of consumption of the controlled substances in Annex A is less than 0.3 kilograms per capita on the date of the entry into force of the Protocol for it, or any time thereafter until January 1, 1999, shall, in order to meet its basic domestic needs, be entitled to delay for ten years its compliance with the control measures set out in Articles 2A to 2E.[11]

This means that every developing country is granted a grace period if its emissions are below a certain threshold (making them "Article 5, paragraph 1 Parties").[12] The 10-year grace period that was arranged made it possible to require developing countries to meet the same obligations as developed countries.[13] The Montreal Protocol accordingly provides another mechanism for developing countries – a special fund to facilitate implementation. This emphasizes that developing

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8 The Copenhagen Amendment (1992): The Amendment to the Montreal Protocol Agreed by the Fourth Meeting of the Parties, Ozone Secretariat (UNEP) (Jul. 28, 2016), available at http://ozone.unep.org/en/handbook-montreal-protocol-substances-deplete-ozone-layer/27610.

9 The Montreal Amendment (1997): The Amendment to the Montreal Protocol Agreed by the Ninth Meeting of the Parties, Ozone Secretariat (UNEP) (Jul. 28, 2016), available at http://ozone.unep.org/en/handbook-montreal-protocol-substances-deplete-ozone-layer/27611.

10 The Beijing Amendment (1999): The Amendment to the Montreal Protocol Agreed by the Eleventh Meeting of the Parties, Ozone Secretariat (UNEP) (Jul. 28, 2016), available at http://ozone.unep.org/en/handbook-montreal-protocol-substances-deplete-ozone-layer/27612.

11 Montreal Protocol, Art. 5, para. 1.

12 Pieter Pauw et al., *Different Perspectives on Differentiated Responsibilities: A State-of-the-Art Review of the Notion of Common but Differentiated Responsibilities in International Negotiations*, German Development Institute / Deutsches Institut für Entwicklungspolitik Discussion Paper 6/2014 (2014) (Aug. 8, 2016), available at https://www.die-gdi.de/uploads/media/DP_6.2014.pdf.

13 Sarah Davidson Ladly, *Border Carbon Adjustments, WTO-law and the Principle of Common but Differentiated Responsibilities*, 12 International Environmental Agreements 63 (2012).

countries are minor contributors to current global climate problems, have lower capacities, and still have high levels of poverty that need to be addressed first.[14]

In 1992, the United Nations Framework Convention on Climate Change was adopted and signed by most of the countries of the world. The ultimate objective of this Convention

> is stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.[15]

The Convention divides countries into three main groups according to differing commitments. Annex I Parties include the industrialized countries that were members of the Organization for Economic Co-operation and Development (OECD) in 1992, plus countries with economies in transition (the EIT Parties), including the Russian Federation, the Baltic states, and several central and eastern European states. Annex II Parties consist of the OECD members of Annex I, but not the EIT Parties. The countries in Annex II are obliged to assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting the costs of adaptation to those adverse effects. They are required to "take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing country Parties, to enable them to implement the provisions of the Convention."[16]

Thus, the developed countries that are Parties to the Convention obligate themselves to take the lead in dealing with this problem by promising to implement national policies and to take the corresponding measures to assist in the reduction of greenhouse gases.

Non-Annex I Parties (the third group) are mostly developing countries. Certain groups of developing countries are recognized by the Convention as being especially vulnerable to the adverse impacts of climate change, including countries with low-lying coastal areas and those prone to desertification and drought. Others (such as countries that rely heavily on income from fossil fuel production and commerce)

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[14] Joanna Depledge & Farhana Yamin, *The Global Climate Change Regime: A Defence* in *The Economics and Politics of Climate Change* 433 (D. Helm & C. Hepburn, eds., Oxford University Press, 2009).

[15] United Nations Framework Convention on Climate Change, Art. 2 (Aug. 1, 2016), available at https://unfccc.int/resource/docs/convkp/conveng.pdf.

[16] *Id.* Art. 4, paras. 4, 5.

feel more vulnerable to the potential economic impacts of climate change response measures. The Convention emphasizes activities that promise to answer the special needs and concerns of these vulnerable countries, such as investment, insurance, and technology transfer.[17] Funding provided by Annex II Parties is channeled mostly through the Convention's financial mechanisms.

Despite the commitments declared by the Convention on Climate Change, it places no legally binding requirements on the Parties. The Kyoto Protocol of 1997, however, amended the Convention by imposing the specific legal requirements that the initial agreement lacked.[18] In particular, the Kyoto Protocol's major feature is that it has mandatory targets on GHG emissions for the world's leading economies that have accepted it.[19] Thus, it requires industrialized and developed countries to reduce the emissions of greenhouse gases to 5% below 1990 levels between 2008 and 2012, although it specifically declines to extend the reduction of emissions requirement to developing countries. Further, based on the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC),[20] industrialized countries need to achieve aggregate emissions cuts of 25%–40% by 2020 in order to limit global warming to 2˚C. To achieve these objectives, the Kyoto Protocol provides three mechanisms for countries to control their emissions through flexible arrangements. For trade with developing countries, the Kyoto Protocol created a Clean Development Mechanism (CDM) that accepts contributions from industrialized countries, invests in emissions abatement in developing countries, and obtains certified emissions reductions in return, which it credits to the industrialized investor countries' targets. The CDM can be seen as a vehicle for "joint implementation with credit," but potentially through a centralized fund rather than through decentralized bilateral investments.[21]

A Joint Implementation (JI) mechanism enables industrialized countries to invest in climate-friendly projects in other industrialized countries and earn carbon credits in exchange. Lastly, an emissions trading system creates a market for trading carbon credits with countries that are over their target.[22]

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17 Parties and Observers, United Nations Framework Convention on Climate Change (Aug. 1, 2016), available at http://unfccc.int/parties_and_observers/items/2704.php.

18 Pollock & Jemison 1999, at 27.

19 A Summary of the Kyoto Protocol, United Nations Framework Convention on Climate Change (Aug. 1, 2016), available at http://unfccc.int/kyoto_protocol/background/items/2879.php.

20 Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (Core Writing Team, R.K. Pachauri & A. Reisinger, eds., Geneva: IPCC, 2007) (Aug. 1, 2016), also available at https://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_full_report.pdf.

21 Jonathan Baert Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 Yale Law Journal 677 (1999).

22 *The Global Climate Change Regime*, US Council on Foreign Relations (Aug. 1, 2016), available at http://www.cfr.org/climate-change/global-climate-change-regime/p21831.

The Protocol's first commitment period started in 2008 and ended in 2012, and at that time the need for a new international agreement on climate change became evident. The global community admitted that the first phase of the Protocol had failed to slow global carbon emissions.[23] One of the main reasons for this was that it was not well thought out enough to make it a realistic way for developed countries to reduce their emissions levels. As *The New Yorker* magazine put it in one article, "[T]he best way for a Kyoto signatory to cut its carbon output has been to suffer a well-timed industrial implosion…"[24] No developed country has succeeded in cutting emissions levels unless its economy completely crashed. That does not bode well for future attempts to lower GHG emissions.[25] The Copenhagen Climate Summit, which took place in 2009, raised climate change policy to the highest political level and made an effort to negotiate for effective global climate change cooperation, including improvements to the Clean Development Mechanism of the Kyoto Protocol.[26] Even though this 15th session of the Conference of the Parties (COP) produced the Copenhagen Accord, which clearly expressed the political intent to constrain carbon emissions and respond to climate change, in both the short and the long term, again the states failed to establish a comprehensive international climate change regime.[27] The unilateral pledges under the Copenhagen Accord would limit warming to some 3˚C by 2100. The document was not legally binding; however, it placed the issue on the agenda of future climate change negotiations.[28]

One evident reason for the international climate change regime's deficiency is the debate among states over the principle of common but differentiated responsibilities, which was created by the Rio Declaration on Environment and Development[29] and articulated in the Montreal Protocol and the UN Framework Convention on Climate Change with Kyoto Protocol Annexes. Many researchers have noted that international

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[23] *See in detail Has the Kyoto Protocol Made Any Difference to Carbon Emissions?*, The Guardian, Environment Blog (Aug. 1, 2016), available at https://www.theguardian.com/environment/blog/2012/nov/26/kyoto-protocol-carbon-emissions; *see also* Пискулова Н.А. и др. Климатическая политика основных торговых партнеров России и ее влияние на экспорт ряда российских регионов [Natalia A. Piskulova et al., *Climate Policy of the Main Trade Partners of Russia and Its Impact on Exports in a Number of Russian Regions*] (Moscow: WWF, 2013).

[24] David Owen, *Economy vs. Environment*, The New Yorker, March 30, 2009 (Aug. 1, 2016), available at http://www.newyorker.com/magazine/2009/03/30/economy-vs-environment.

[25] Romain Morel & Igor Shishlov, *Ex-Post Evaluation of the Kyoto Protocol: Four Key Lessons for the 2015 Paris Agreement*, 44 Climate Report (2014).

[26] Copenhagen Climate Change Conference (December 2009) (Jul. 20, 2016), available at http://unfccc.int/meetings/copenhagen_dec_2009/meeting/6295.php.

[27] *Id.*

[28] Anna Korppoo, *Russia's Climate Commitments: Which GDP Growth Contributes to Emissions?*, International Association for Energy Economics, Fourth Quarter 2010, at 23.

[29] Rio Declaration on Environment and Development, 31 I.L.M. 874 (1992), Principle 7.

instruments in the field of climate change are highly politicized.[30] The principle creates tension between developing and developed countries fueled by ongoing disagreements over how to interpret it, particularly when it comes to establishing and achieving meaningful mitigation targets.[31] To begin with, some developing countries blame the developed world for having created the global warming crisis in the first place, because it was the developed countries that emitted most of the carbon dioxide during the 20th century, and vulnerable countries perceive that it should be the developed countries that ought to pay to address the challenge.[32]

In addition, a delay in compliance with international obligations on the production and consumption of ozone-depleting substances in developing countries cannot be reconciled with the interests of humanity and future generations, because it allows developing countries to increase this production. The fact that the developed countries emitted large amounts of ODS previously does not necessarily mean that developing countries should now be allowed to emit an equal amount over a similar time frame. This would not be sustainable in terms of protecting the climate system for the present and future generations, because the concentration of greenhouse gases in the atmosphere is already high.

Moreover, developing countries have resisted adopting verifiable carbon dioxide targets for fear of the impacts on their economies and have chosen not to accept commitments under the international documents. On the other hand, as efforts to mitigate climate change require the reduction of emissions by all major emitters, industrialized countries argue that the dichotomy between developed and developing countries is no longer tenable to the extent that emerging economies still fall under the category of developing countries without clear and binding responsibilities. Emerging economies, such as Brazil, China, India, South Africa and major oil producers, still have an interest in not taking the same responsibilities as traditional developed countries.[33]

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30 *See* Devian K. Harris, *The Politicization of Climate Change*, Thesis, Georgia State University, 2012 (Jul. 20, 2016), available at http://scholarworks.gsu.edu/political_science_theses/49; Соловьянов А.А. Озоновый кризис и Монреальский протокол [Alexander A. Solovyanov, *Ozone Crisis and the Montreal Protocol*] (May 1, 2016), available at http://www.rus-stat.ru/stat/9531998_4.pdf.

31 *The Global Climate Change Regime*, *supra* note 22.

32 India's foreign minister warned in 2007 that "attempts to secure uncompensated GHG abatement commitments from developing countries is not the way forward." He instead pressed for "a constructive response recognising common but differentiated responsibilities for the developed and developing countries." Mukherjee also argued that "the mitigation (of GHG) regime must not reduce the prospects for economic growth and poverty alleviation" in developing countries. *See in detail* Julio Godoy, *G8 Makes Room at Table for Emerging Five*, Global Policy Forum, June 1, 2007 (Jul. 15, 2016), available at https://www.globalpolicy.org/component/content/article/209/42852.html; *see also* Karl Mathiesen, *Climate Talks: Should Rich Countries Pay for Damage Caused by Global Warming?*, The Guardian, Environment, November 20, 2013 (Jul. 20, 2016), available at https://www.theguardian.com/environment/2013/nov/20/climate-talks-rich-countries-pay-damage-global-warming.

33 Clara Nobbe, *Universality, Common but Differentiated Responsibilities and the Sustainable Development Goals*, SWP Working Paper 7 (Berlin, 2015).

The architecture for global climate governance looked particularly shaky after the 15th COP failed to overcome entrenched differences among the major Parties and deliver targeted emissions cuts. Following Copenhagen, COP-16, held in Cancun, Mexico, made some strides towards effective multilateral action, but the regime still fell well short of promoting needed action to effect positive change, including committing to a post-Kyoto framework. At the launch of the UN Framework Convention on Climate Change, 17th session of the Conference of the Parties (COP-17) in Durban, South Africa, many climate change experts were concerned that the Kyoto Protocol could expire in 2012 with no secondary legally binding accord on limiting global emissions in place. This fear, however, was somewhat assuaged as the nearly two hundred countries present at COP-17 approved an extension of the Protocol through 2017, and potentially 2020. A decision was also reached at the conference to draft a successor accord to the Kyoto Protocol by 2015, which would ultimately come into force in 2020. Delegates also envisioned that the new accord should include GHG emissions targets for all countries, regardless of their level of economic development. This framework notably contrasted with that of the Kyoto Protocol, which primarily focuses on reducing emissions emanating from developed countries.[34]

Hence, at the end of 2012 the climate change policy of the international community entered a new stage. COP-18, which took place in Doha, Qatar (November–December 2012), delivered significant results. Going into the conference, all the major Parties had clearly signaled that they were unlikely to move beyond existing pledges. Countries were seeking to conclude negotiations on a second Kyoto Protocol commitment period, terminate parallel Convention talks on how to enhance collective climate change action by all countries, and give shape and direction to the new process for agreeing to a new international climate change treaty in 2015.[35]

The old approach, as described above, was based on a strict division of responsibilities between developed and developing countries. The new approach provides unified action by all countries, where the most important role is for developing countries, both in the financial infrastructure and in the formation of a global climate policy. This approach is characterized by very active actions by the countries themselves to develop market-based and non-GHG emissions regulation mechanisms. Big emitters, including the BRICS countries, put forward their own complementary initiatives.[36] For example, the environment ministers from each of the BRICS countries met in April 2015 to discuss the crisis of climate change. The success

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34 *The Global Climate Change Regime*, *supra* note 22.

35 Dalia Štreimikienė, *The 18th Session of the Conference of the Parties to the United Nations Convention on Climate Change (UNFCCC)* (Aug. 1, 2016), available at https://www.mruni.eu/upload/iblock/3ee/IE-13-7-2-09.pdf.

36 Кокорин А.О. Современная климатическая политика мирового сообщества и ее значимость для России [Alexey O. Kokorin, *Modern Climate Policy of the International Community and Its Importance for Russia*] (Moscow: WWF, 2013).

of the BRICS Environment Ministers meeting lay in its decision to launch cooperation on environmental issues by setting up a steering committee to coordinate efforts and by sharing technologies and best practices. The ministers discussed proposals of mutual cooperation to tackle issues of water, air, industrial pollution, waste management, and sewerage treatment. In this context, the BRICS Bank, with a $100 billion corpus, could play a constructive role, investing in the promotion of green technology, and providing financial aid to help reduce air pollution.[37]

The new climate change regime was eventually established in December 2015 in Paris where, after 20 years of fraught meetings, negotiators from nearly 200 countries signed on to a legal agreement that set ambitious goals to limit temperature rises and to hold governments to account for reaching those targets.[38] Parties to the UN Framework Convention on Climate Change adopted the Paris Agreement at the 21st session of the Conference of the Parties. The purpose of the Agreement is formulated in its Article 2 as "holding the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change."[39] The goal of limiting the global temperature increase to 1.5°C is a big leap *below* (thus, more stringent than) the 2°C that nearly 200 countries had agreed to as a limit six years earlier in Copenhagen.[40] The Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.[41] Developing countries are determined with a special status expressed in Article 4 of the Agreement, which says:

> Developed country Parties shall continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances. Support shall be provided to developing country Parties for the implementation of this Article, in accordance with Articles 9, 10 and 11, recognizing that enhanced

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37 Debidatta Aurobinda Mahapatra, *BRICS to Push Cooperation on Climate Change*, Russia and India Report, April 29, 2015 (Jul. 1, 2016), available at https://in.rbth.com/economics/2015/04/29/brics_to_push_cooperation_on_climate_change_42893.

38 *Paris Climate Deal: Nearly 200 Nations Sign In End of Fossil Fuel Era*, The Guardian, December, 12, 2015 (Jul. 1, 2016), available at https://www.theguardian.com/environment/2015/dec/12/paris-climate-deal-200-nations-sign-finish-fossil-fuel-era.

39 Paris Agreement to the United Nations Framework Convention on Climate Change, Art. 2, para. 1(a) (Aug. 1, 2016), available at http://unfccc.int/paris_agreement/items/9485.php.

40 *Paris Climate Deal*, *supra* note 38.

41 Paris Agreement, Art. 2, para. 2.

> support for developing country Parties will allow for higher ambition in their actions.[42]

Thus, the Agreement sustains the principle of common but differentiated responsibilities as articulated in the UN Framework Convention on Climate Change.

The Agreement introduces a new committing instrument – Intended Nationally Determined Contributions (INDC). Parties, according to Article 4, will

> prepare, communicate and maintain successive nationally determined contributions that… [they] intend to achieve… [and] pursue domestic mitigation measures with the aim of achieving the objectives of such contributions… Each Party shall communicate a nationally determined contribution every five years… [and inform COP] about the outcomes of the global stocktake referred to in Article 14.

Before the conference in Paris started, more than 180 countries had submitted pledges to cut or curb their carbon emissions through INDCs. The INDCs are recognized under the Agreement, but are not legally binding. A Party may at any time adjust its existing nationally determined contribution with a view to enhancing its level of ambition, in accordance with guidance adopted by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement.

The Paris Agreement will enter into force in 2020.[43] The documents inaugurate a new era in international climate change regulation with a more ambitious objective and a special role for each country Party that clearly defines its targets and formulates its implementation action plan.

3. BRICS Countries' Domestic Policies and Regulations Related to Climate Change

BRICS countries are not an exception in respect of the global climate change agenda. All of them are signatory parties to the major international instruments governing the impact on the ozone layer and the climate, but BRICS countries are given a different status that determines their different roles and responsibilities in the climate change regime. In particular Brazil, China, India and South Africa are in the list of Parties categorized as operating under Article 5, paragraph 1 of the

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[42] Paris Agreement, Art. 4, para. 4.

[43] As of August 3, 2016, there are 180 signatories to the Paris Agreement. Of these, 22 states have also deposited their instruments of ratification, acceptance or approval accounting in total for 1.08% of the total global GHG emissions.

Montreal Protocol,[44] which means they are granted a grace period as to the Protocol's commitment, because their level of consumption of the controlled substances is less than 0.3 kilograms per capita. Russia is in the list of Parties categorized as operating under Article 2 of the Montreal Protocol, meaning the country has the imposed obligation to reduce the production and consumption of ozone-depleting substances by different means, including:

> – cooperate by means of systematic observations, research and information exchange in order to better understand and assess the effects of human activities on the ozone layer and the effects on human health and the environment from modification of the ozone layer;
>
> – adopt appropriate legislative or administrative measures… and policies to control, limit, reduce or prevent human activities under their jurisdiction or control should it be found that these activities have or are likely to have adverse effects resulting from modification or likely modification of the ozone layer;
>
> – cooperate in the formulation of agreed measures, procedures and standards for the implementation of… [the Vienna Convention and the Protocol];
>
> – cooperate with competent international bodies to implement effectively… [the Convention and the Protocol].[45]

Accordingly, the Russian Federation is the only one of the BRICS countries included in Annex I of the UN Framework Convention on Climate Change (as an EIT Party),[46] i.e. the country assumes special obligations to take all possible measures for abatement of GHG emissions.

Brazil, China, India and South Africa are non-Annex I Parties to the UN Framework Convention on Climate Change and do not have a formal obligation under the Convention and the associated Kyoto Protocol to reduce their GHG emissions. However, they are still required to take actions to encourage such reductions. The state of their domestic GHG emissions policies may indicate their readiness to undertake further binding commitments.

The BRICS nations have undertaken very different role behaviors within the international climate change regime. For example, at Copenhagen (COP-15) in 2009 Russia distanced itself from the other BRICS countries.[47] For a long period of time the

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[44] Article 5 Parties Status, Ozone Secretariat (UNEP) (Aug. 1, 2016), available at http://ozone.unep.org/en/article-5-parties-status.

[45] Vienna Convention for the Protection of the Ozone Layer, Art. 2.

[46] List of Annex I Parties to the Convention, United Nations Framework Convention on Climate Change (Aug. 1, 2016), available at http://unfccc.int/parties_and_observers/parties/annex_i/items/2774.php.

[47] Niall Duggan, *BRICS and the Evolution of a New Agenda Within Global Governance* in *The European Union and the BRICS. Complex Relations in the Era of Global Governance* 16 (M. Rewizorski, ed., Springer International Publishing Switzerland, 2015).

country remained largely irrelevant in international negotiations on climate change and positioned itself as reluctant to set clear-cut targets and change domestic climate-related legislation.[48] In contrast, the other BRICS countries have been playing a crucial role in international discussions and meetings since 2007.[49]

3.1. Brazil

Brazil produces 2.8% of the world's greenhouse gases and it is considered the seventh largest emitter of greenhouse gases according to 2014 World Resources Institute figures.[50] However, the majority of its power comes from hydroelectricity. Consequently, Brazil's energy sector contributes little to its GHG emissions. Unsustainable land use, large livestock numbers, large-scale use of fossil fuels in its mineral processing industries and deforestation are the major emission sources. Conversely, Brazil is the world's largest producer and consumer of ethanol, which it has added to gasoline, or used as a fuel in its own right, since the 1970s. This has reduced both GHG emissions and pollution in urban centers.[51]

Since early 2000, Brazil has employed significant political effort to adopt climate change legislation and policies. As a result, the Brazilian emissions decreased by 41% between 2005 and 2012 from the highest reported level in 1996. This is mainly due to significant emissions reductions in the forestry and land use sector. Brazil is home to the largest part (about 60%) of the Amazon rainforest where alarming levels of deforestation in the early 2000s contributed to very high emissions.[52] However, as a result of strong policies to fight deforestation in the Amazon, Brazil has turned this trend around.

In 2007, the Brazilian government began to reformulate its response to climate change. The result was the National Plan on Climate Change finalized in December 2008. Its overall goal was to achieve sustainable economic and social development. Its main points included:

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48 For more information *see* Liliana B. Andonova & Assia Alexieva, *Continuity and Change in Russia's Climate Negotiations Position and Strategy,* 12(5) Climate Policy 614 (2012).

49 *See in detail* Fang Rong, *Understanding Developing Country Stances on Post-2012 Climate Change Negotiations: Comparative Analysis of Brazil, China, India, Mexico, and South Africa*, 38(8) Energy Policy 4582 (2010).

50 Mengpin Ge et al., *6 Graphs Explain the World's Top 10 Emitter*, World Resources Institute, November 25, 2014 (Aug. 1, 2016), available at http://www.wri.org/blog/2014/11/6-graphs-explain-world%E2%80%99s-top-10-emitters.

51 E.L. La Rovere & A.S. Pereira, *Brazil & Climate Change: A Country Profile*, SciDev.Net, February 14, 2007 (Jul. 20, 2016), also available at http://www.scidev.net/en/policy-briefs/brazil-climate-change-a-country-profile.html.

52 Climate Action Tracker (Jul. 20, 2016), available at http://climateactiontracker.org/countries/brazil.html. The "Climate Action Tracker" is an independent science-based assessment, which tracks the emission commitments and actions of countries. The website provides an up-to-date assessment of individual national pledges, targets, and intended nationally determined contributions (INDCs) and currently implemented policy to reduce their GHG emissions.

– increasing energy efficiency leading to a decrease in electricity consumption by 10% in 2030, compared to current levels,

– maintaining a high proportion of Brazil's electricity supply from renewable sources (Brazil sourced about 77% of its electricity from renewable sources, mainly hydropower, in 2007),

– encouraging the increased use of biofuels in the transport sector (the proportion of biofuel use was already high) and work towards a sustainable international market for such fuels,

– sustained reduction in de-forestation rates, particularly in the Amazon region; the aim is to reduce the rate of de-forestation by 70% by 2017 in gradual stages,

– increasing research and development to precisely identify environmental impacts and minimize the costs of adaptation, and

– eliminating net loss of forest cover by 2015 through re-forestation and establishment of forest plantations.[53]

Brazil has identified the Kyoto Protocol's Clean Development Mechanism (CDM) as the main avenue for international cooperation on climate change matters, though the National Action Plan noted that changes to the CDM regime may need to be made. This strategy comes on top of extensive existing measures that are either aimed at mitigating climate change or have that outcome.[54]

The National Plan on Climate Change was updated after the consultation process ended in December 2014. In the updated plan, the country voluntarily establishes an emissions reduction target of 36.1% to 38.9% by 2020 with 2005 as a baseline. Emissions reduction targets are presented for four designated strategic areas: deforestation (24.7%), agriculture and livestock (4.9% to 6.1%), energy (6.1% to 7.7%) and the steel sector (0.3% to 0.4%). The policy leaves specific implementation measures to be either established by decree or determined by the Second Brazilian Inventory on GHG Emissions and Reductions. It also incorporates all laws, measures, and policies pertaining to climate change.[55]

In 2010, the President passed a Decree establishing a nationwide target for annual GHG emissions of 2.1bn tons of CO2e by 2020, as compared to the current 2020 projection of 3.2bn tons of CO2e. This Decree made Brazil the first developing country to institute an absolute limit on its GHG emissions. The Decree also requires the elaboration of sectoral plans outlining mitigation actions for key economic sectors, with targets to be revised on a tri-annual basis. Currently there are eight

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[53] Leslie Nielson, *Climate Change Policy: Brazil, China, India and Russia*, Parliament of Australia, Parliament Library, February 25, 2009 (Jul. 20, 2016), available at http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/0809/ClimateChange#_Toc222285937.

[54] *Executive Summary: National Plan on Climate Change: Brasilia*, at 14 (Jul. 20, 2016), available at http://www.mma.gov.br/estruturas/imprensa/_arquivos/96_11122008040728.pdf.

[55] *Id.*

sectoral plans, in different phases of implementation: the Action Plan to Prevent and Control Deforestation in the Amazon; the Action Plan to Prevent and Control Deforestation and Fire in the Cerrado; the Low-Carbon Agriculture Plan; the Ten-Year National Energy Expansion Plan; the Plan for Climate Change Mitigation for the Consolidation of a Low-Carbon Economy in the Manufacturing Industry; the Low-Carbon Mining Plan; the Plan on Transportation and Urban Mobility for Climate Change Mitigation; and the Health Mitigation and Adaptation Plan. The agriculture, manufacturing industry, mining, and health plans are new plans especially prepared in response to the climate legislation, while the other four plans pre-existed the National Policy on Climate Change and were taken as sectoral plans.[56]

In September 2015, Brazil submitted its Intended Nationally Determined Contribution (INDC), with a target to reduce net GHG emissions, including land use, land use change, and forestry, by 37% below 2005 levels by 2025. In addition, it mentioned an "indicative contribution" to reduce emissions by 43% below 2005 levels by 2030. The country intends to achieve these targets through a series of measures, including reaching a share of 45% renewables in the total energy mix by 2030.[57]

In this way, Brazil becomes one of the first major developing countries that has set a high emissions reduction target and emphasizes its willingness to do more in the context of an international environmental agreement.[58] However, Brazil characterizes its actions as conditional on financial support.[59]

Additionally, policymakers in Brazil argue that investing in a green economy that takes the environment and climate into consideration would slow down Brazil's economic growth rate and undermine objectives for social inclusion. This clearly illustrates the "prioritization tension" created by the emergence of environmental policy issues in the context of poverty reduction. Furthermore, Brazilian policymakers are wary of the possibility of developed countries imposing export barriers on other countries based on non-adherence to mandates for action on environmental and climate issues.[60]

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56 Michal Nachmany et al., *Climate Change Legislation in Brazil: An Excerpt from the 2015 Global Climate Legislation Study: A Review of Climate Change Legislation in 99 Countries*, at 3 (Jul. 20, 2016), available at http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2015/05/BRAZIL.pdf.

57 Climate Action Tracker, *supra* note 52.

58 *Executive Summary*, *supra* note 54, at 20.

59 Climate Action Tracker, *supra* note 52.

60 Lesley Wentworth & Chijioke Oji, *The Green Economy and the BRICS Countries: Bringing Them Together*, SAIIA Occasional Paper No. 170 (2013) (Jul. 20, 2016), available at http://www.saiia.org.za/occasional-papers/479-the-green-economy-and-the-brics-countries-bringing-them-together/file.

3.2. Russia

Russia's share in global emissions of greenhouse gases is 5.2%,[61] making the country the fifth biggest emitter in the world.[62] Russia, unlike other BRICS countries, has obligations for systematic reduction of the production and consumption of ODS under international agreements.

The history of the Russian Federation's compliance with the international climate change regime was rather difficult in the 1990s. The Russian Federation, classified as a non-Article 5 Party to the Montreal Protocol, submitted a statement to the Meeting of the Parties to the effect that it might not meet compliance requirements for the phaseout of halons by 1994, and CFCs by 1996, due in part to the country's domestic conditions. This submission was treated by the Secretariat as a submission under paragraph 4 of the non-compliance procedure and referred to the Implementation Committee.[63]

At the Conferences of the Parties, the Implementation Committee of the Ozone Secretariat noted the situations of non-compliance in the Russian Federation with the Montreal Protocol.[64] Through Decision VII/18 it "allowed" the Russian Federation to export to the non-Article 5 Parties of the former USSR, which had traditionally depended on Russia for all of its supply of ODS. This implicitly suspended the right of the Russian Federation to export to other non-Article 5 Parties, or to Article 5 Parties, to meet their basic domestic needs as provided in Articles 2A-2F and 2H. In response to this development, on 9 December 2000 the Prime Minister signed the Appeal to the Parties to the Vienna Convention and the Montreal Protocol, confirming Russia's intention to phase out production of ODS as from 20 December 2000 and followed this with a set of domestic regulations.[65] In 2003, the 15th COP recognized

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61 *UNFCCC Country Brief 2014: Russian Federation*, United Nations Climate Change Secretariat (Jul. 20, 2016), available at http://newsroom.unfccc.int/media/262717/profile-russia.pdf.

62 Ge et al., *supra* note 50.

63 Parties to the Montreal Protocol have issued a number of cautions to non-compliant Parties in accordance with paragraph B of the Indicative List of Measures that might be taken in case of non-compliance and threatened to consider other measures such as trade restrictions in order to ensure that the supply of ozone-depleting substances which are the subject of non-compliance is ceased and the exporting Parties are not contributing to the non-compliance situation. *See in detail The Montreal Protocol: Celebrating 20 Years of Environmental Progress: Ozone Layer and Climate Protection* 88 (D. Kaniaru, ed., London: Cameron May, 2007).

64 Decision VII/18: Compliance with the Montreal Protocol by the Russian Federation, Ozone Secretariat (UNEP) (Aug. 1, 2016), available at http://ozone.unep.org/es/node/27158; Decision IX/31: Compliance with the Montreal Protocol by the Russian Federation, Ozone Secretariat (UNEP) (Aug. 1, 2016), available at http://ozone.unep.org/en/handbook-montreal-protocol-substances-deplete-ozone-layer/1749.

65 Русакова Ю.А. Климатическая политика Российской Федерации и решение проблем изменения глобального климата, 1(40) Вестник МГИМО-Университета 170 (2015) [Julia A. Rusakova, *Russian Climate Policy and Addressing Global Climate Change*, 1(40) Herald of the MGIMO-University 170 (2015)].

and stated its appreciation for the return to full compliance by the Russian Federation in 2002.[66]

The ratification of the Kyoto Protocol by Russia in 2004 was crucial for the entry into force of this international treaty. The Protocol was ratified by Federal law No. 128-FZ of November 4, 2004,[67] but unfortunately was not followed by any action plan or subsequent climate-related legislation. The main legislation on climate and emissions mitigation rested mainly on various laws on establishing the domestic compliance instruments as required by the Protocol. An important component of the Protocol's framework, the "joint implementation mechanism," was adopted in Russian legislation in 2009 in accordance with Article 6 of the Protocol.[68] Regrettably, only a few of the joint implementation projects have been approved, as they were not considered by the special commission established in the Ministry of Economic Development of Russia with the participation of other federal executive bodies and were not approved by the relevant ministries.[69]

The evolution of the Russian emissions limitation pledge for the future climate change regime since summer 2009 has been intriguing. In June 2009, Russian President Dmitry Medvedev announced a 2020 emissions reduction target of 10%–15% below 1990 levels.[70] At the EU-Russia Summit in Stockholm in November 2009 he pledged a deeper target of 22%–25% over the same period;[71] in Copenhagen (at COP-15) the negotiation process never reached the stage of bargaining over emissions reduction commitments due to fundamental differences between the developed and developing country groups. After the summit, the UNFCCC Secretariat invited pledges under the Copenhagen Accord by the end of January 2010. This time, the Russian government took a step back, offering a 15%–25% limitation only from

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66 K. Madhava Sarma, *Compliance with the Montreal Protocol* in *Making Law Work: Environmental Compliance & Sustainable Development Volume 1* 287 (D. Zaelke at al., eds., London: Cameron May, 2005).

67 Российская газета от 9 ноября 2004 г. № 3624 [Russian Newspaper, November 9, 2004, No. 3624].

68 Постановление Правительства РФ от 15 сентября 2011 г. № 780 "О порядке утверждения и проверки хода реализации проектов, осуществляемых в соответствии со статьей 6 Киотского протокола к Рамочной конвенции ООН об изменении климата" [Decree of the Government of the Russian Federation No. 780 of September 15, 2011. On the Procedure for the Approval and Inspection of Projects Implemented under Article 6 of the Kyoto Protocol to the UN Framework Convention on Climate Change] (Aug. 1, 2016), available at http://www.consultant.ru/document/cons_doc_LAW_119466/.

69 *Позиция РСПП по вопросу реализации в Российской Федерации проектов совместного осуществления (статья 6 Киотского протокола)* [*Position of the Russian Union of Industrialists and Entrepreneurs on the Issue of Joint Implementation Projects in the Russian Federation*] (2009) (Aug. 1, 2016), available at http://www.rspp.ru/position/view/10?year=2009.

70 *Conversation between Dmitry Medvedev and Director of News Programmes at Russia's Channel One, Kirill Kleimenov* (Aug. 1, 2016), available at http://www.kremlin.ru/eng/speeches/2009/06/18/1241_type82916_218210.shtml.

71 *Пресс-конференция по итогам 24-го саммита Россия–ЕС* [*Press Conference Following the 24th EU–Russia Summit*] (Jul. 10, 2016), available at http://kremlin.ru/events/president/transcripts/6034.

1990 levels.[72] Further, at a meeting of domestic stakeholders in February 2010, President Medvedev confirmed the Russian commitment to the 25% below 1990 levels target.[73]

The Climate Doctrine, approved in 2009,[74] marks a crucial step in Russia's recognition of the potential benefits of mitigation measures and its willingness to engage with the international community. Although it is not legally binding, the Doctrine is a strong statement of intent. It sets strategic guidelines and targets as well as serves as a foundation for developing and implementing future climate policy, covering issues related to climate change and its consequences. The Doctrine may be characterized as a blueprint with which to harmonize domestic climate-related legislation with international standards, improve climate monitoring, and stimulate the adoption of stronger environmental standards and energy-efficiency and energy-saving measures as well as greater use of alternative (including renewable) energy sources. Although the Climate Doctrine recognizes the potential of Russia's vast forests as a carbon sink and recommends their use, it does not set up any major forestry action.

In 2013, the Russian President issued a decree setting out the national domestic target for reducing emissions by 2020 to 25% below 1990 levels, and in March 2014 the Ministry of Economic Development rolled out a draft action plan to deliver the 2020 goal. In November 2014, the government also presented a general concept for a measuring, reporting, and verification (MRV) system for businesses as one of the measures to help attain the 2020 goal. A first set of scenarios on Russia's emissions trajectory until 2020 and beyond (2030) has been elaborated within the Ministerial document Projection of long-term social and economic development until 2030 (March 2013), with projected GHG emissions peaking beyond 2020 and then declining again to 70% of 1990 levels by 2030.[75]

On March 31, 2015, the Russian Federation submitted to the United Nations its INDC, proposing to reduce its emissions of net greenhouse gases by 25% to 30% below 1990 levels by 2030. This official climate action plan was submitted well in advance of the Paris COP.[76] "After accounting by experts for forestry this is a reduction of only

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[72] *Russian submission to the UNFCCC*, January 29, 2010 (Jul. 10, 2016), available at http://unfccc.int/files/meetings/application/pdf/russiacphaccord_app1.pdf.

[73] Dmitry Medvedev, *Opening Remarks at Meeting on Climate Change*, February 18, 2010 (Jul. 10, 2016), available at http://en.kremlin.ru/events/president/transcripts/48584.

[74] *Climate Doctrine of the Russian Federation*, December 17, 2009 (Jul. 10, 2016), available at http://en.kremlin.ru/supplement/4822/print.

[75] Michal Nachmany et al., *Climate Change Legislation in Russia: An Excerpt from the 2015 Global Climate Legislation Study: A Review of Climate Change Legislation in 99 Countries*, at 4 (Jul. 20, 2016), available at http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2015/05/RUSSIA.pdf.

[76] Quentin Buckholz, *Russia and Climate Change: A Looming Threat*, The Diplomat, February 4, 2016 (Jul. 20, 2016), available at http://thediplomat.com/2016/02/russia-and-climate-change-a-looming-threat/.

6% to 11% below 1990 levels of GHG emissions excluding land use, land use change and forestry… and an increase of 30% to 38% compared to 2012 levels."[77] However, the ambitious goals announced by the Russian Federation are not supported by the current federal legislation. The Climate Doctrine of 2009 and the Comprehensive Plan for the implementation of the Climate Doctrine for the period up to 2020 adopted in 2011 do not contain effective tools to reduce GHG emissions. Moreover, the Comprehensive Plan is financially provided for neither by the federal budget nor by regional budgets and extra budgetary sources.[78] State Policy of the Russian Federation in the Field of Environmental Development for the period until 2030[79] was approved by the Russian president on 30 April 2012. It declared a number of global environmental problems associated with the loss of biodiversity, desertification, and other adverse environmental processes alongside the problem of climate change. But this document, in comparison with the Climate Doctrine, lacks practical measures, and the ways to achieve the targets are not set out. Targets and funding for the implementation of climate change goals are dependent on future plans for socio-economic development and the federal and regional programs to be adopted. Environmental legislation in Russia has not changed to a large extent in the wording of climate change. A few articles have been supplemented to the Federal law "On Environmental Protection" defining ozone-depleting substances (Article 1) and setting the goal of ozone-layer protection and the powers of federal authorities in regards to this issue (Article 54).[80] These provisions cannot be considered sufficient in terms of establishing a legal framework for climate change mitigation in the country.

The basic document regulating the development of the Russian energy sector is the "Energy Strategy of Russia for the period up to 2030." The main objective of the energy policy is stated as the transition from a fuel and raw material economy model to an innovative model of development. However, the Strategy assumes that "Russia will remain a major actor on the world hydrocarbon market and will actively participate in the development of electricity markets and coal, as well as the country will strengthen its position in the global nuclear power industry." Some provisions of the Strategy outline priorities in nuclear technology and the hydropower sector. Development of

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77 Climate Action Tracker (Jul. 20, 2016), available at http://climateactiontracker.org/countries/russianfederation.html#Footnote2.

78 Ларсен А.Х. и др. Изменение климата и возможности низкоуглеродной энергетики в России [A.H. Larsen et al., *Climate Change and the Possibility of Low-Carbon Energy in Russia*] (Moscow: RSEU, 2012).

79 *Основы государственной политики в области экологического развития Российской Федерации на период до 2030 года* [*Basic Principles of State Environmental Development Policy of the Russian Federation through to 2030*] (Jul. 20, 2016), available at http://kremlin.ru/events/president/news/15177.

80 Федеральный закон от 10 января 2002 г. № 7-ФЗ "Об охране окружающей среды" [Federal law No. 7-FZ of January 10, 2002. On Environmental Protection] (Jul. 20, 2016), available at http://www.consultant.ru/document/cons_doc_LAW_34823/.

new renewable energy sources plays a certain role in the country's energy policy, in overall terms of production and consumption of electricity from renewable energy sources, excluding hydropower plants whose role is secondary, as the relative volume of renewable sources is estimated to be between 0.5% and 4.5%.[81]

There are two facts that make the climate change policy of the Russian Federation divergent from the policies of other BRICS countries.

First, the possible positive effects of climate change that Russia predicted in its Climate Doctrine. The positive effects are associated with a significant potential for effective sectoral and regional economic development, including:

– reduction in energy consumption during the (e.g., home) heating season;

– improving ice conditions and, consequently, cargo transportation conditions in the Arctic seas, which would facilitate access to the Arctic shelf and its development;

– improving the structure and expansion of land devoted to the growing of crops, as well as increasing the efficiency of livestock;

– increasing the productivity of boreal forests.[82]

According to some projections, countries far north of the Equator such as Canada and Russia could benefit from warmer temperatures as enormous swathes of perpetually frozen, barren territory are transformed into arable land and the extraction of mineral resources farther north of the Arctic Circle becomes possible.[83]

Second, compared to other regions and countries of the planet, Russia has a higher adaptive capacity owing to its large territory, significant water resources, and a relatively small proportion of the population living in areas vulnerable to climate change.[84]

Together, these two facts may be one reason for the country not being ambitious in setting targets for ozone-depleting emissions reductions and standing aside from active discussion of climate issues. Another possible reason is that Russia is a major fossil fuel producer, and the fact that the country's economy is heavily based on this underlies Russia's historically skeptical attitude regarding the necessity of international action on climate change and its slow movement in domestic legislation on climate issues.[85] However, this limited and optimistic view appears misguided. It

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81 Распоряжение Правительства РФ от 13 ноября 2009 г. № 1715-р "Об Энергетической стратегии России на период до 2030 года" [Decree of the Government of the Russian Federation No. 1715-r of November 13, 2009. On the Energy Strategy of Russia for the Period Up to 2030] (Jul. 20, 2016), available at http://www.consultant.ru/document/cons_doc_LAW_94054/.

82 *Climate Doctrine of the Russian Federation*, *supra* note 74, para 28.

83 Buckholz, *supra* note 75.

84 *Climate Doctrine of the Russian Federation*, *supra* note 74, para 29.

85 For more on this *see* Eva Hartog, *Won't Change Russia's Attitude to Climate Change*, The Moscow Times, December 2, 2015 (Jul. 20, 2016), available at https://themoscowtimes.com/articles/less-fur-more-oil-why-paris-wont-change-russias-attitude-to-climate-change-51051.

is increasingly clear that climate change is likely to adversely affect Russia in several ways, from severe weather events to territorial loss to growing instability in the country's southern periphery and in its major cities.

The Russian government has developed a number of non-climate-specific laws that could benefit efforts to reduce GHG emissions, which is a constructive political initiative that sends a strong signal of intent, although Russia should improve its standing in international climate negotiations by strengthening the climate-specific legislation. The implementation of the regulations in place should also be strictly controlled.[86]

3.3. India

India is now the world's fourth largest emitter of greenhouse gases.[87] Between 1990 and 2004 emissions increased by 97% – one of the highest rates of increase in the world.[88]

India's compliance with climate change agreements in 2000–2011 is quite difficult to assess, as the data underlying the target is not available.[89] Under the National Fuel Policy issued in 2003 the following measures were implemented:

– new four-wheel vehicles to meet European emissions standards by 2010,
– conversion of public transport and taxies to compressed natural gas fuel,
– expansion of urban mass-transport systems, and
– expansion of ethanol–blended gasoline sales.

In addition, the government made efforts to expand the amount of forest cover in India by 1%.[90]

A new policy in India was given life in June 2008, when the Indian Prime Ministers Council on Climate Change released India's National Action Plan on Climate Change (NAPCC).[91] This document primarily offers a list of eight technological efforts, the pride of place being given to research and development of solar energy, but it does not set any numerical goals for emissions reductions or for energy intensity. The Plan

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86 Alina Yablokova, *Russia at COP21: An Opportunity to Reengage with the West*, Russian International Affairs Council, November 27, 2015 (Jul. 20, 2016), available at http://russiancouncil.ru/en/inner/?id_4=6910.

87 Ge et al., *supra* note 50.

88 *Human Development Report 2007/08*, United Nations Development Program, at 42 and 152 (Jul. 20, 2016), available at http://hdr.undp.org/sites/default/files/reports/268/hdr_20072008_en_complete.pdf.

89 Climate Action Tracker (Jul. 20, 2016), available at http://climateactiontracker.org/countries/india/2011.html.

90 *Climate Change Mitigation Measures in India*, Pew Centre on Global Climate Change, International Brief 2, September 2008 (Jul. 12, 2016), available at http://www.pewclimate.org/docUploads/India-FactSheet-09-08.pdf.

91 *National Action Plan on Climate Change*, Government of India, Prime Minister's Council on Climate Change (2008) (Jul. 25, 2016), available at http://www.moef.nic.in/sites/default/files/Pg01-52_2.pdf.

outlines eight national missions: the National Solar Mission, the National Mission for Enhanced Energy Efficiency, the National Mission for a Green India (focusing on increasing India's forest cover), the National Mission on Strategic Knowledge (aiming at establishing a research fund), the National Water Mission, the National Mission on Sustainable Habitat, the National Mission for Sustaining the Himalayan Ecosystem (aiming at helping protect India's water supply), and the National Mission for Sustainable Agriculture.[92]

The focus of the NAPCC is on promoting understanding of climate change and action on adaptation, mitigation, energy efficiency, and the conservation of natural resources while pursuing overall economic growth.[93] Four new missions were announced under the NAPCC in 2014 – the National Wind Energy Mission, the National Human Health Mission, the National Coastal Resources Mission, and the National Waste-to-Energy Mission.[94]

In addition, the country introduced energy efficiency and conservation measures with the National Mission on Enhanced Energy Efficiency, which was approved in 2010. A number of regulations and incentives promote energy efficiency and the use of renewable energy at the federal and state levels. These include a revision in 2007 of the Energy Conservation Building Code that sets minimum requirements for building envelope components, lighting, electrical systems, and water heating and pumping systems. In August 2014, the government approved the National Mission on Enhanced Energy Efficiency (NMEEE). This effort enhances investments for better technology, the creation of venture capital with a partial risk guarantee fund, an appliance rating system, and notification of a new building code for energy conservation. Energy legislation also includes the Electricity Act of 2003, which sought to better coordinate the development of the power sector and to promote efficient and environmentally benign policies. The Act recognizes the role of renewable energy in the country's National Electricity Policy (issued in 2005) and contains key provisions relating to renewable energy. The 2006 Integrated Energy Policy that received Cabinet approval in 2008 aims to meet energy demand "at the least cost in a technically efficient, economically viable and environmentally sustainable manner." It contains a number of policies that contribute to avoiding GHG emissions.[95]

India is a non-Annex I country under the Kyoto Protocol and thus has no binding target for emissions reduction. Nonetheless, it is an active participant in the Clean Development Mechanism (CDM) established by the Kyoto Protocol. The country

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92 *National Action Plan on Climate Change, supra* note 91.

93 Michal Nachmany et al., *Climate Change Legislation in India: An Excerpt from the 2015 Global Climate Legislation Study: A Review of Climate Change Legislation in 99 Countries*, at 2 (Jul. 25, 2016), available at http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2015/05/INDIA.pdf.

94 *Id.* at 3.

95 *Id.* at 4.

had more than 1,479 registered CDM projects as of February 2014. In 2010, India released a GHG inventory for 2007 and stated that it would be the first developing country to publish its emissions inventory in a two-year cycle going forward. Efforts by India include improved energy efficiency, increased use of renewable and nuclear power, expanded public transportation, and energy pricing reform. Rather than integrative binding legislation, India is developing a policy process to specifically target climate change.

On October 1, 2015, India submitted its INDC, including the targets to lower the emissions intensity of GDP by 33% to 35% below 2005 levels by 2030, to increase the share of non-fossil-based power generation capacity to 40% of installed electric power capacity by 2030 (equivalent to 26%–30% of power generation in 2030), and to create an additional (cumulative) carbon sink of 2.5–3 GtCO2e through additional forest and tree cover by 2030. For 2020, India earlier put forward a pledge to reduce the emissions intensity of GDP by 20% to 25% below 2005 levels by 2020. According to expert analysis, with the policies it already has in place India will achieve an emissions intensity reduction of around 41.5% below 2005 levels by 2030.[96] It is obvious that this ambitious goal is in line with the country's current policies.

3.4. China

China is the world's number one emitter of greenhouse gases[97] and the country that has officially identified that climate changes due to global warming are already occurring in its territory.[98]

China's actions to tackle climate change have focused mainly on energy production and energy efficiency. Climate change was first officially referred to in legislation and regulations in China's National Climate Change Program released in June 2007.[99] The Program outlined activities both to mitigate GHG emissions and to adapt to the consequences of potential climate change. Within the Program, perhaps most challenging was China's goal to lower its energy intensity. Related goals include more than doubling renewable energy use by 2020, expansion of nuclear, gas, and renewable generated power to displace the use of coal-fired power, closure of inefficient industrial facilities, tightened efficiency standards for buildings

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96 Climate Action Tracker, *supra* note 89.

97 Ge et al., *supra* note 50.

98 Gorild Heggelund, *China's Climate Change Policy: Domestic and International Developments*, 31(2) Asian Perspective 166 (2007); *China's National Climate Change Program*, People's Republic of China, National Development and Reform Commission, at 4–6 (Jul. 25, 2016), available at http://en.ndrc.gov.cn/newsrelease/200706/P020070604561191006823.pdf.

99 Michal Nachmany et al., *Climate Change Legislation in China: An Excerpt from the 2015 Global Climate Legislation Study: A Review of Climate Change Legislation in 99 Countries*, at 2 (Jul. 25, 2016), available at http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2015/05/CHINA.pdf.

and appliances, and forest cover expansion of 20%.[100] However, it is a notable feature of this Program that it rejected mandatory limits on emissions.

Recent political and legislative reforms by the country in the area of climate change have included:

– The renewable energy law has been effective since February 2005 and mandates that 16% of all energy is to come from wind, biomass, solar, and hydropower energy by 2020.

– One of China's main concerns is to promote the development of nuclear power as part of its national energy strategy. In 2008, the National Energy Administration raised its target to 5% of installed capacity by 2020.

– China has ambitious goals to improve power sector efficiency by decommissioning small, inefficient power generators and accelerating the deployment of very advanced power plant technology (e.g., "supercritical" and "ultra-supercritical" combustion technology).

– The coal-bed methane industry is being actively developed because capturing methane (CH4) released during coal production and using it as a fuel both reduces emissions and substitutes for other fuel use and emissions.

– The Top-1000 Enterprise Efficiency Program was established in 2006 and aims to reduce energy use by China's 1,000 most energy-intensive enterprises. These enterprises consume one-third of the country's energy and emit the bulk of China's GHG pollution.

– The non-military building sector accounts for some 28% of national energy consumption. New buildings constructed between 2006 and 2010 were subject to a design standard that improved energy conservation by 50%; in major cities (e.g., Beijing) buildings are subject to a 65% energy-saving standard.

– China makes more consumer appliances than any other country. In order to cut electricity growth and GHG emissions, China established energy efficiency standards and labels for lighting, air conditioners, and home appliances. The standards set a target of reducing residential electricity use by 10% by 2010.

– In 2006, China announced the decommissioning of hundreds of small, old industrial plants. Many of the plants were in the cement and steel sectors, but other chemical, refining, and manufacturing facilities were slated for closure as well.[101]

These measures are repeated in China's Policies and Actions for Addressing Climate Change (2008). In 2009, the National People's Congress passed a comprehensive Climate Change Resolution. Technically, this is not a set of laws, but policy documents

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[100] Jane A. Leggett et al., *China's Greenhouse Gas Emissions and Mitigation Policies*, CRS Report for Congress, September 10, 2008, at 18 (Jul. 20, 2016), available at http://assets.opencrs.com/rpts/RL34659_20080910.pdf.

[101] *Id.* at 19; *see also Climate Change Mitigation Measures in the People's Republic of China*, Pew Centre on Global Climate Change, International Brief 1, April 2007 (Jul. 12, 2016), available at http://www.pewclimate.org/docUploads/International%20Brief%20-%20China.pdf.

guiding legislation. Although there is not yet a comprehensive climate change law in China, in 2010 the government announced that China would begin work on climate change legislation.[102]

China's domestic climate-related laws are dominated by a focus on saving energy, reflecting the need to improve energy efficiency to enable the country to keep pace with energy demand as the economy grows strongly. China has passed an Energy Conservation Law and the 2005 Renewable Energy Law and is planning a new Energy Law, the official draft of which contains 14 chapters totaling 140 articles. The chapters are: General Principles, Energy Comprehensive Management, Energy Strategy and Planning, Energy Exploration and Transfer, Energy Supply and Service, Energy Conservation, Energy Reservation, Emergency Supplies, Energy in Suburban Areas, Energy Price and Taxes, Energy Technology, International Co-operation, Monitoring and Investigation, and Legal Responsibilities. The goals are relatively vague, with clearer targets to be set by ministries, including the National Development and Reform Commission (NDRC), Ministry of Construction, Ministry of Agriculture, Ministry of Transportation, and the Bureau for Tax. China's 12th Five-Year Plan, published in 2011, includes the target to reduce the carbon intensity of the economy by 17% of 2010 levels by 2015, which is in line with the 40%–45% from the 2005 target by 2020 committed to under the Copenhagen Accord.[103] Experts believe that further reductions could be possible if financial resources are made available.[104]

In July 2013, to strengthen top-level planning on climate change, the State Council adjusted the composition and personnel of the National Leading Group for Addressing Climate Change. All provinces established their own leading groups to address climate change, with the provincial governors chairing the groups. To underpin China's top-level planning on climate change, the NDRC developed a National Plan to Address Climate Change (2014–2020) that outlines the framework for addressing climate change in China, including targets, tasks, and safeguarding measures. Under this framework, all provinces and municipalities must develop their own plans. The future of China's climate policy will be heavily influenced by the 13th Five-Year Plan (2016–2020), which was endorsed in March 2016.[105]

It is important to note that China is an active participant in the Clean Development Mechanism, accounting for over 40% of the global emissions credits arising from such projects.[106] This may be a pointer as to its preferred way of participating in any new international GHG emissions-control agreement.

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102 Nachmany et al., *supra* note 99, at 2.

103 *Id.* at 2–3.

104 Climate Action Tracker (Jul. 25, 2016), available at http://climateactiontracker.org/countries/china/2011.html.

105 Nachmany et al., *supra* note 99, at 3.

106 *Climate Change Mitigation Measures*, *supra* note 101.

On June 30, 2015, China submitted its INDC, which includes the following targets: peak CO2 emissions by 2030 at the latest, lower the carbon intensity of GDP by 60% to 65% below 2005 levels by 2030, increase the share of non-fossil energy carriers of the total primary energy supply to around 20% by that time, and increase its forest stock volume by 4.5 billion cubic meters compared to 2005 levels. However, the emissions resulting from the 2030 carbon intensity targets if taken in isolation are significantly higher. China's INDC actions and non-fossil energy target lead to GHG emissions levels of around 13.6 GtCO2e in 2030 and to an improvement of carbon intensity of 70%. The INDC carbon intensity target, if it dominates other elements of the INDC, national policies, and actions, would lead to much higher 2030 emissions levels.[107]

3.5. South Africa

South Africa joined BRICS in December 2010, at the invitation of China.[108] As a developing country with high levels of poverty and perhaps the world's most serious crisis of unemployment, South Africa needs its economy to grow as rapidly as possible. In light of this, the country continuously measures how its economic development goals are compatible with climate change commitments.

South Africa is undertaking mitigation actions which will result in a deviation below the current emissions baseline of around 34% by 2020 and by around 42% by 2025. This target was proposed during the Copenhagen negotiations and submitted to the Copenhagen Accord on 29 January 2010. This level of effort enables South Africa's emissions to peak between 2020 and 2025, plateau for approximately a decade, and decline in absolute terms thereafter. This undertaking is conditional on a fair, ambitious, and effective agreement in the international climate change negotiations under the Climate Change Convention and the Kyoto Protocol and the provision of support from the international community.[109] To achieve the target, South Africa has launched an ambitious African Renewable Energy Initiative (AREI). The launch of the initiative, which aims to produce 300 gigawatts of electricity for the continent by 2030, is a demonstration of Africa's willingness to cooperate in the UN climate negotiations. The initiative's goals are to help achieve sustainable development, enhance well-being, and foster sound economic development by ensuring universal access to sufficient amounts of clean, appropriate, and affordable energy. The project also aims to help African countries leapfrog towards renewable

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107 Climate Action Tracker, *supra* note 104.

108 *The Response of China, India and Brazil to Climate Change: A Perspective for South Africa* 1 (University of Oxford: Smith School of Enterprise and the Environment, 2012).

109 Climate Action Tracker (Jul. 25, 2016), available at http://climateactiontracker.org/countries/southafrica/2011.html.

energy systems that support their low-carbon development strategies while enhancing economic and energy security.[110]

South Africa considers the growth of a competitive renewable energy sector a key element for developing a green economy. South Africa's rationale for investing in renewable energy is mainly the creation of "green jobs" through small- and medium-sized enterprises, while maintaining the environment by reducing carbon emissions and diversifying its energy mix to ensure energy security. South Africa showed its dedication to transitioning to low-carbon technologies and the development of a green economy in its National Development Plan which was released in 2011. The Plan detailed the country's strategy for national growth until 2030 and called for a tax on carbon by 2015.[111]

On September 25, 2015, South Africa submitted its INDC, which includes the target of reducing its GHG emissions to a 20%–82% increase on 1990 levels.[112] According to experts' analyses, South Africa will need to implement additional policies to reach its proposed targets.[113]

4. Conclusion – The Increasing Role of the BRICS Countries in the Implementation of Global Climate Change Goals

Brazil, Russia, India, China, and South Africa, due to their rapid economic growth and high rates of energy consumption, are among the top GHG emitters in the world. The economic growth and increased energy demands of BRICS countries will continue to have significant impact on climate change.

The international climate change regime has sustained the principle of common but differentiated responsibilities from the time of the adoption of the Montreal Protocol to the signing of the Paris Agreement by a majority of the world's countries. Though developing countries, including four of the BRICS countries, are not legally bound to take measures and have the right to financial support in their mitigation and adaptation process, an effective climate change regime should bring on board and place responsibility on all major GHG emitters in an equitable manner "without ignoring the historical responsibilities on the part of developed countries."[114] While the

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110 *AfDB to Support Electricity Access for All by 2030 with African Renewable Energy Initiative*, African Development Bank Group, December 2, 2015 (Aug. 1, 2016), available at http://www.afdb.org/en/news-and-events/article/afdb-to-support-electricity-access-for-all-by-2030-with-african-renewable-energy-initiative-15119.

111 Wentworth & Oji, *supra* note 60.

112 Climate Action Tracker, *supra* note 109.

113 *Id.*

114 Rafael Leal-Arcas, *BRICS and Climate Change*, 4(1) International Affairs Forum 1 (2013).

substance of the climate actions to be taken by developed and developing countries may differ, they should be enshrined in a single international legal instrument.

One of the reasons for BRICS countries to take more active part in the international climate talks is their exposure to high climate change risks. The record shows a close connection between a country's economic well-being and the extent of its vulnerability to the risk of catastrophic losses from climate change.[115] Like many other developing countries, Brazil, India, and South Africa face frequent financial and material losses from natural hazards, and anthropogenic climate change exacerbates old hazards and generates new ones, affecting their assets, including human, physical, and socioeconomic assets, and causes widespread indirect losses.[116] The leaders of these countries understand that their national ambitions and the stability of their societies are threatened by climate change. The "rich world" can – for a while at least – afford to adapt. Developing countries, with much lower per capita incomes, have much less room to maneuver.[117]

Another reason to foster climate change policy and related legislation in BRICS states is the hope of acquiring a range of financial mechanisms to achieve their climate goals. For example, the BRICS countries (excluding Russia) have demanded that the developed countries provide funds to the proposed Green Climate Fund and technology to developing countries for better adaptation and mitigation in response to climate change.[118] The governments of Brazil, India, and China have been successful in encouraging the operation of the Clean Development Mechanism in their countries. At the same time, Russia has demonstrated its unwillingness to use this or other financial instruments proposed by the international climate change regime, and there remains the inability of international instruments to overcome bureaucratic obstacles at the domestic Russian level.

As illustrated above, the BRICS nations have undertaken very different role behaviors in the realm of climate change governance. Additionally, on the theme of climate finance, it is important to bear in mind the divergent approach taken by Russia and the BASIC bloc (Brazil, South Africa, India, and China). While all countries agree on strongly demanding the application of "Common but Differentiated

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115 *See in detail Storm Alert: Natural Disasters Can Damage Sovereign Creditworthiness*, Standard & Poor's Ratings Services, September 10, 2015 (Aug. 1, 2016), available at http://unepfi.org/pdc/wp-content/uploads/StormAlert.pdf.

116 *Mechanisms to Manage Financial Risks from Direct Impacts of Climate Change: Technical Paper*, United Nations Framework Convention on Climate Change (2008), at 28 (Aug. 1, 2016), available at http://unfccc.int/resource/docs/2008/tp/09.pdf.

117 *Could China and Its Fellow BRICS Nations Lead the Way on Climate Change?*, The Guardian, Environmental Sustainability, Poverty Matters Blog (Aug. 1, 2016), available at https://www.theguardian.com/global-development/poverty-matters/2013/jan/28/china-brics-lead-climate-change.

118 *See* Li Xing, *The BRICS and Beyond: The International Political Economy of the Emergence of a New World Order* (Routledge, 2014).

Responsibilities and Respective Capabilities" (CBDR-RC) as well as a right-to-develop approach, Russia aligns itself with the position of its own negotiating scheme.[119]

Until 2012, four BRICS countries (excluding Russia), as developing economies, were not obliged to comply with the Kyoto Protocol directive of the UN Framework Convention on Climate Change to reduce GHG emissions. But, with the Protocol having ended in 2012, and a new global agreement needed to curb emissions, BRICS countries have taken up voluntary emissions reduction targets in recent years. For instance, Brazil has committed to reduce its emissions by 36%–39% below 1990 levels by 2020. India has pledged to reduce its emissions by 20%–25% below 2005 levels by 2020; China's pledge is to reduce its emissions by 40%–45% per unit of GDP by 2020 compared to 2005 levels; while South Africa has committed to reduce its GHG emissions by 34% by 2020 and 42% by 2025. The emissions targets are, however, not subject to a legally binding instrument, and this means that countries may opt out. Russia's position is interesting in this group. It did not support the Kyoto Protocol second commitment period and always stated the position that both developed and developing countries should have binding obligations. Nevertheless, the country has made voluntary pledges under the Paris Agreement to reduce its emissions to 25%–30% below 1990 levels by 2030 and in 2015 showed its willingness in committing to the targets.

It is evident that all the BRICS countries position themselves as active actors in the international climate change arena, setting goals according to their economic possibilities and political willingness. However, ensuring compliance with international commitments is one of the main challenges for the BRICS countries. Proper implementation of many of the new climate targets will involve a great deal of commitment from the states. It is unrealistic, however, to assume that all BRICS states have the same institutional and financial capacity to implement these goals at once or within the same period. The differences in the domestic policies and regulations related to climate issues is stark.

To summarize the efforts and results in changing the domestic policy and legislation in the BRICS countries, it would be reasonable to mention that climate change has undoubtedly become a key concern for the governments of all the countries as they endeavor to align climate change issues as a priority for state development. All BRICS countries have adopted climate change strategies in which they outline the steps necessary to achieve the emissions reduction goals. With regard to the legislation without which climate change policies are unlikely to be realized, it is clear that Brazil, India, and China have been quite successful in adopting new laws and regulations. The three countries are taking action on many fronts to regulate environmental issues, natural resource management, agriculture, forest regulations, and climate

[119] Alice Amorim, *BRICS Analysis: Climate Finance and INDC commitments*, Nivela, November 21, 2015 (Aug. 1, 2016), available at http://www.nivela.org/articles/brics-analysis-climate-finance-and-indc-commitments/en.

change mitigation. On the contrary, Russian domestic climate-related legislation (laws on environmental protection, forest management, and agriculture) remains weak due to the lack of efficient legal instruments, economic incentives, and political will. While Brazil, India, and China also address a number of other sustainability issues, such as pollution, energy efficiency, and the use of non-fossil fuel sources of energy, Russia, in its Energy Strategy, confirms priorities in the hydrocarbon, nuclear, and hydropower sectors. Russian plans on the development of new renewable energy sources are vague. At the same time, India and China are becoming global leaders in the renewable energy sector, developing legislation on alternative sources (solar energy, wind energy). The same is true for Brazil, which has proven to be a world leader in low carbon agriculture and biofuels. However, with the boom in Brazil's oil and gas industry, its GHG emissions from fossil fuels are projected to increase rapidly.

For better implementation of climate change targets it is crucial to enact regional programs, which are on the rise in China's provinces and India's states, while in Russia funding for the implementation of climate change goals is dependent on future plans for socio-economic development and government programs still to be adopted.

One of the main areas and the topic of dialogue among the BRICS countries is sustainable development, environmental protection, and the climate change problem.[120] This means that all BRICS countries need to foster further discussion and cooperation on climate change regulations and work out a unified legislation at their domestic levels. They could strive for developing an obligatory legal framework to fight climate change collectively. This possibility was mentioned, for example, at the Environmental Ministers meeting where they discussed proposals of mutual cooperation to tackle issues of water, air, industrial pollution, waste management, and sewerage treatment.[121] Especially for Russia, it could be beneficial to borrow from its BRICS partners' experience in effective regulations on energy efficiency, industry standards, and best available technology, which could help in effective implementation of climate change targets.

As clearly seen from the analysis above, the BRICS countries are already doing much in the area of the green economy. The executive director of the United Nations Environmental Program, Achim Steiner, at the BRICS Environmental Ministers meeting in Moscow, highlighted some of the progress made in renewables among BRICS countries. He mentioned that in recent years China has had the biggest renewable energy investments, at US $83.3 billion; South Africa had a 5% increase in renewable energy investment equal to US $5.5 billion in 2014; Brazil's investments in renewables

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120 *See in detail* Трифонов В.И. Взаимодействие стран БРИКС в международных структурах [Victor I. Trifonov, *Interaction of the BRICS Countries in International Structures*] in Стратегия России в БРИКС: цели и инструменты [*Russia's Strategy in BRICS: Objectives and Instruments*] (V.A. Nikonov, G.D. Tolorai, eds., Moscow: PFUR, 2013).

121 Mahapatra, *supra* note 37.

amounted to US $7.4 billion, with wind attracting 84% of that investment. India's renewable energy investment reached US $2.4 billion in 2014, with wind attracting nearly half of the total investment; and India pledges to raise solar production to 100 gigawatts by 2022.[122]

Energy has featured in the declarations of the BRICS group since its inception, as has reference to the green economy and climate change. Individually, there have been areas where BRICS have become leaders in technologies: three of the top five solar photovoltaic firms are Chinese, while in the wind sector Indian and Chinese companies are also among the leaders.[123] At the same time, Russia is a major fossil fuel producer and South Africa has vast deposits of coal. The main challenges for renewable energy development in Russia are the lack of financial support mechanisms and a deficit of related legislation. Research in the area does not receive proper state support, and there is no system of special industrial standards.

Clearly, the commitment of the BRICS countries largely depends on developed countries taking action first and providing funding to developing countries for mitigation and adaptation measures, which include renewable technologies. Considering that Russia is an Annex I Party to the UN Framework Convention on Climate Change and a powerful leader within its region, any contributions on finance and means of implementation would be expected to place Russia in a donor position rather than in a position as a recipient, as most of BRICS countries' cohorts posit themselves. Exact figures on national climate finance contribution are scant in Russia, but the country does arguably provide support to former soviet countries and other allies.[124] For instance, Russia made a unique contribution towards supporting the Sustainable Development Goals in countries in Europe, the CIS, and beyond in April 2016 in the framework of the Russia-UNDP Trust Fund established in June 2015, which launched with initial funding of US $25 million. The Fund was designed to help "mitigate the negative effects of climate change," according to a Russian government decree of April 2016.[125]

Also, cooperation between Russia and India in the energy sector is on the rise, and though more evident in sectors such as oil, gas, and nuclear power, the renewable sector is slowly gaining momentum. While Russia has participated in a number of

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122 Agathe Maupin & Elizabeth Sidiropoulos, *BRICS and Climate Change*, South African Institute of International Affairs, July 6, 2015 (Aug. 1, 2016), available at http://www.saiia.org.za/opinion-analysis/brics-and-climate-change.

123 *BRICS Environment Ministers Discuss Green Economy, Climate Change*, Climate Change Policy and Practice, News, April 22, 2015 (Aug. 1, 2016), available at http://climate-l.iisd.org/news/brics-environment-ministers-discuss-green-economy-climate-change/.

124 Amorim, *supra* note 118.

125 *Russia Pledges $10 Million to Help Mitigate Climate Impact in Developing Countries*, United Nations Development Programme in Europe and Central Asia, April 22, 2016 (Aug. 1, 2016), available at http://www.eurasia.undp.org/content/rbec/en/home/presscenter/pressreleases/2016/04/22/russia-pledges-10-million-to-help-mitigate-climate-impact-in-developing-countries.html.

hydropower projects across India, the promising solar sector lags behind. The Russian Energy Agency and Solar Energy Corporation of India signed a Memorandum of Understanding for several large-scale solar photovoltaic power plants in December 2015. The initial pilot project of up to 500 MW is, however, just at the "initial planning stage."[126] Thus, Russia and the other BRICS countries have the potential to cooperate in the field of renewable energy through the exchange of technology, investment in the sector, and the participation of their energy companies in each other's domestic market. Initiating joint renewable energy projects with other BRICS states, Russia will be able to fulfill its commitment obligations under Article 4 of the UN Framework Convention on Climate Change and Article 9 of the Paris Agreement, i.e. "take all practicable steps to promote, facilitate and finance the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing country Parties, to enable them to implement the provisions of the Convention."[127] On the assumption that Russia will support the development and enhancement of endogenous capacities and technologies of BRICS countries, it can take a leadership position in the group.

In the various international discussions and meetings on climate change (including COP processes) BRICS countries do not negotiate as a group. All the BRICS countries (barring Russia) are part of a larger group, the G77 + China group, which includes smaller groups such as the Least Developed Countries (LDC), among others. In addition, four of the five BRICS countries are members of the informal grouping created at the Copenhagen Summit in 2009, the BASIC group. These countries have been meeting on the margins of various global gatherings, with their most recent meeting and ministerial statement taking place in June 2015 at the UN headquarters in New York City.[128] At the Copenhagen Climate Conference in 2009, Russia distanced itself from the other BRICS countries.[129] This might be considered a deficiency in strengthening the BRICS role in global governance. What is clear though is that the BRICS countries have a responsibility to play a central role together with players from the industrialized world in driving climate change negotiations, leading to effective binding regulations in 2020–2030. Moreover, it is important for the Russian Federation to show more leadership in this area so as to maintain credibility on the world stage. In any event, the BRICS countries cannot afford to ignore this issue, because one of them, Russia, is the world's largest producer of energy resources and another, China, is the world's greatest consumer of these resources.

To change the situation, the BRICS Environment Ministers at their first meeting in 2015 in Russia decided to: establish a Working Group on the environment to

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126 *From Russia with Solar Energy*, BRICS, July 18, 2016 (Aug. 1, 2016), available at http://infobrics.org/russia/news/2016/07/18/8942/.

127 United Nations Framework Convention on Climate Change, Art. 4.

128 Maupin & Sidiropoulos, *supra* note 122.

129 Duggan 2015, at 16.

identify and discuss priority areas of cooperation; explore the potential of the BRICS New Development Bank for funding environmental projects; explore the possibility of establishing a collaborative platform of the BRICS countries, intended to share best environmental practices and facilitate the exchange of environmentally sound technologies and know-how with the participation of public and private stakeholders; and hold regular meetings of the Environment Ministers of BRICS.[130] BRICS is capable of serving as a useful platform in two ways: first, to seek convergence among its members (given their different priorities and approaches) and, second, to prepare and present a common position, which would carry the weight of the entire group in the global arena.[131] The climate change issue could be a key issue enabling the BRICS countries, acting as a bloc, to take the lead in the discourse on sustainable development and climate change, the format of which will undergo inevitable changes in the coming decades.

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130 *See more BRICS Environment Ministers*, *supra* note 123.

131 W.P.S. Sidhu, *BRICS: Shaping a New World Order, Finally*, Geneva Center for Security Policy, July 28, 2015 (Aug. 8, 2016), available at http://www.gcsp.ch/News-Knowledge/Global-insight/Brics-shaping-a-new-world-order-finally.

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RECOGNIZING THE RIGHT OF THE THIRD GENDER TO MARRIAGE AND INHERITANCE UNDER HINDU PERSONAL LAW IN INDIA

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One of the most implicit foundations of a person's identity today, in a cultural, national as well as global context, is the collegial relationship which he or she shares with another person, that relationship ultimately giving formation to a conjoint, consolidated and co-dependent recognition of the two as one under the law, particularly with respect to resolving socio-familial issues such as those of parentship, guardianship, adoption, succession and inheritance, among others.

The term "relationship" mentioned above is connotative of marriage and the following paper attempts to look at this relationship, in its connection to the various facets of one's personal identity as a citizen, from the perspective of a third gender Hindu Indian national. Though the right to marry of such an individual, especially as seen against the backdrop of the existing communal ethos in the country, may be accepted as being some form of a heterodoxy, it still falls short of qualifying as anything that could be called, in the least, "heretical" or even illegal.

While due to the constraints of time the authors of the present study have been compelled to restrict the same to only a particular division of nationality and a further specific sub-class thereof, the authors sincerely hope that this study will inspire further such examinations into its chosen subject within the field domains of other religions and nationalities.

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1. Introduction

Marriage is believed to be one of the most essential constituents of a person's identity, both in a socio-economic and in a politico-legal sense. The institution of marriage, which is a codified and legally identifiable relationship between two people, has immense public significance, as it garners much footing in respect of the rights and obligations, especially those of property, succession, inheritance and such related rights, which eventually stem from the solemnization of a marriage.[1] Today, marriage is not only a recognized civil right[2] that belongs to each and every member or citizen of the state, but also a concept that has both national and international acceptance.[3] It is on this account that it can be said that the enforcement of marriage as an individual's right is imperative on the state, particularly in regard to all such laws and policies that emanate from it and, further, regulate the interpersonal domain of marriage.

[1] Indra Sarma v. V.K.V. Sarma, 2013 (14) SCALE 448 ("Marriage as an institution has great legal significance and various obligations and duties flow out of marital relationship, as per law, in the matter of inheritance of property, successionship, etc."); *see also* Perez v. Lippold, 198 P.2d 17, 20.1 (1948); Loving v. Virginia, 388 U.S. 1 (1967).

[2] Skinner v. Oklahoma, 316 U.S. 535 (1942).

[3] International Covenant on Civil and Political Rights, December 19, 1966, 999 U.N.T.S. 171 (1976), Art. 23; Universal Declaration of Human Rights, December 10, 1948, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), Art. 16; International Covenant on Economic, Social and Cultural Rights, December 16, 1966, 993 UNTS 3 / [1976] ATS 5 / 6 ILM 360 (1967), Art. 10; European Convention on Human Rights, November 4, 1950, 213 U.N.T.S. 221, Art. 12.

The right to marry, now a constitutional right in India, permits persons to make the choice of spouse according to their own free will, and this right cannot be infringed by the state.[4] In the Indian context, the right of life and personal liberty under Article 21 of the Constitution does not merely provide for a physical existence, rather it implies the existence of human life which is qualitative and meaningful.[5] The recognition of inherent human dignity is a prerequisite for the warranting of rights under Article 21.[6] The right to marry being crucial for retaining individual dignity and for enjoying a meaningful human existence, Indian courts have therefore interpreted marriage to be an essential right under Article 21 of the Constitution.[7]

When marriage is such an essential civil right that is fundamental to each and every citizen of the country, is it justifiable to ostracize people merely on the grounds of their non- conformity to a stereotyped differentiation of binary genders? Sadly, even though the right to marry as per one's own choice has been recognized as a fundamental right, the contemporary social scenario which third gender people are facing strips them of this basic right. The personal law recognizing Hindu marriage and law enforcement agencies make no effort to guarantee third gender people their fundamental right to marry any individual of their own choice.

2. Marriage under Hindu Customary Law

Under Hindu law, marriage has a divine origin and is essentially understood to mean a sacred union of two individuals for the performance of religious duties.[8] Marriage, as per Vedic scriptures, is known to exist in eight different forms, namely, *brahma*, *asura*, *daiva*, *arsha*, *prajapatya*, *paisaca*, *rakshasa* and, lastly, *gandharva*.[9] Amongst these, *Gandharva vivaha* is the most pious and widely used form of marriage in view of the fact that it is marriage based on mutual love and attraction between two individuals. This type of marriage supports the performance of third gender weddings as the only qualification it demands prior to solemnization is mutual love and attraction[10] between the marrying individuals, accompanied by the performance

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4 Loving, 388 U.S.

5 Olga Tellis and Ors. v. Bombay Municipal Corporation and Ors., (1985) 3 SCC 545.

6 Maneka Gandhi v. Union of India, AIR 1978 SC 597; Francis Coralie v. Union Territory of Delhi, (1981) 1 SCC 608.

7 Mr. X v. Hospital Z, AIR 1999 SC 495.

8 Swarajya Lakshmi v. G.G. Padma Rao, AIR 1974 SC 165.

9 Rajbali Pandey, *Hindu Samakaras: Socio-Religious Study of the Hindu Sacraments* (2nd ed., Delhi: Motilal Banarasidass Publishers, 1969).

10 Sir Dinshaw Fardunji Mulla, *Mulla Hindu Law* 605 (12th ed., LexisNexis, 1960).

of relevant ceremonies and customs.[11] Common customary Hindu rituals include the exchange of garlands and an invocation before the sacred fire known as *saptapadi*. These ceremonies form an important aspect even in the legislation codifying Hindu marriage wherein the absence of the customary ceremonies will have the effect of not solemnizing the marriage in its true sense.[12] *Gandharva* marriage is primarily performed with mutual consent between individuals partaking in the marriage and, as such, requires no witnesses, no ceremonial official and no parental consent. Despite its disputed status as a suitable form of marriage in Hindu sacred texts, the 4th-century literary masterpiece *Kamasutra* accepts *Gandharva vivaha* as the best form of marriage because it is based on mutual attraction or *anuraga*.[13]

In the Hindu narrative, one's choices, known as *samskaras*, are the cumulative outcome of the desires and wants of an individual's past lives, a pattern representing one's conditioned as well as innate tendencies.[14] The word *samskara* is also understood to mean a rite of passage, that is, a rite by exercise of which one attains to almost near completion or self-fulfilment.[15] Hinduism believes life's objective to be four-fold, and the four tenets that form the basis of this belief are *artha, kama, dharma and moksha*.[16] Hindus believe in the rebirth of human life so as to be able to work through the unfulfilled attachments of previous births and, thus, ultimately move towards liberation from the attachments along with freedom from the cycle of birth and death.[17] This urge to work through one's attachments constitutes one's individual and eternal *dharma*, and it is considered inborn, innate and inerasable. It is in this context that it can be said, since marriage is an essential requisite for the fulfilment of one's individual *dharma*, that a person possessing an innate desire to love another person may do so without considering the gender of that person. Individuals, irrespective of their sex or gender, should have the right to express such desire in the form of marriage if they wish to do so, and, if this union with the person

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11 *See, e.g.*, Bhaurao Shankar Lokhande & Anr v. State of Maharashtra & Anr., AIR 1965 SC 1564 ("The two ceremonies essential to the validity of a Hindu marriage, i.e. invocation before the sacred fire and sapatapadi, are also a requisite part of a 'Gandharva' marriage, unless it is shown that some modification of these ceremonies has been introduced by custom in any particular community or caste.").

12 S. 7, Hindu Marriage Act, Act No. 25 of 1955; *see also* Bhaurao, AIR 1965 ("Unless the marriage is celebrated or performed with proper ceremonies and due form, it cannot be said to have been 'solemnised' within the meaning of S. 17.").

13 Ruth Vanita, *Love's Rite: Same-Sex Marriage in India and the West* (New York: Palgrave Macmillan, 2005; New Delhi: Penguin Books, 2005).

14 Dieter Senghass, *The Clash within Civilisations: Coming to Terms with Cultural Conflicts* (London: Routledge, 2005).

15 U.R. Ananthamurthy, *Samskara: A Rite for a Dead Man* (Oxford: Oxford University Press, 2012).

16 R.C. Mishra, *Moksha and the Hindu Worldview*, 25(1) Psychology & Developing Societies 21 (2013).

17 Nevill Druru, *Reincarnation: Exploring the Concept of Reincarnation in Religion, Philosophy and Traditional Cultures* 6 (New York: Barnes & Nobles Books, 2002).

of their choice is not allowed, it would constitute a potential intrusion into the way of their attainment of *moksha* or eternal liberation.

2.1. Queer Marriages in the Hindu Context

Against the historical backdrop, Hindu marriages have never been performed in a uniform manner but have always been in accordance with the customs of different schools that individuals preferred to follow.[18] In the earlier Vedic society, third gender people were bestowed with all the liberties and basic rights, including that of marriage, which were guaranteed to any other individual.[19] Later, third-sex citizens' existence and marriage were also recognized in the *Kamasutra*.[20] In fact, Hindu jurisprudence has not explicitly prohibited queer marriages, such forms of non-binary gender marriages are laid down in most of the major Hindu texts that are followed,[21] as has also been enumerated over the years by a number of personalities of religious position, priestly scholars and spiritual teachers who have espoused their respective opinions on the same, deriving their knowledge from their own readings, experience or practice.[22] These opinions have been simultaneously recorded in the form of different treatises which exist today for our study.[23]

One of the most prominent examples of queer marriage in Hindu literature is the story of Princess Sikhandini that was written into the epic Mahabharata. Princess Sikhandini married a woman she was in love with, and subsequently she was transformed into the physical sex of a man. Despite not having married again the woman she loved but this time as a man, the marriage remained a valid marriage.[24] The story of Mohini and Aravan also proves the existence of non-binary gender marriages in the ancient historical past. Arjuna's son Aravan's only wish before his sacrificial death was to be married for the last night of his life. In order to satisfy this last desire, Lord Krishna himself transformed into the female form of Mohini and married Aravan.[25] The marriage was considered to be valid as per customary Hindu laws. These stories show that any marriage ceremony, where either of the parties belongs to a non-binary gender sphere or both, having been conducted

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18 M.P. Jain, *Indian Legal History* (Lulu Press, Inc., 2014).

19 Amara Das Wilhelm, *Tritiya-Prakriti: People of the Third Sex: Understanding Homosexuality, Transgender Identity, and Intersex Conditions Through Hinduism* (Philadelphia: Xlibris Corporation, 2004).

20 Marvin Mahan Ellison & Judith Plaskow, *Heterosexism in Contemporary World Religion: Problem and Prospect* 219 (Cleveland: Pilgrim, 2007).

21 Mark Philip Strasser et al., *Defending Same-Sex Marriage: Volume 2 of Our Family Values Same-Sex Marriage and Religion* (Westport, CT: Praeger, 2007).

22 *Id.*

23 *Id.*

24 Kanhu Charan Mishra, *Studies in the Mahabharata* (Bhubaneswar: Institute of Orissan Culture, 1989).

25 National Legal Services Authority v. Union of India and Ors., AIR 2014 SC 1863, at 14.

in accordance with the customary rites and rituals of the location, will still retain its sanction or force by law. Thus, ancient Hindu customary laws of marriage also recognized non-binary marriages, thereby laying down a base for third gender marriages in India.

3. Recognition of Third Gender in India

The gender of an individual as opposed to the sex of that individual, scientifically speaking, is not merely restricted to the heteronormative idea of existence as male or female. The concept of gender not only is related to the physical characteristics of a person, but also is inclusive of the subtle psychological traits and a unique consideration of social interaction.[26] Thus, gender is an inclusive umbrella term which includes an array of varied gender schemes between the two poles of heterosexual males and females.[27] Since the ancient era, Vedic and Puranic literature have recognized the presence of three genders, *viz.* heterosexual male, heterosexual female and the *tritiya prakriti* or the third sex.[28] The third gender category, commonly referred to as *Hijras*, in India, can be described as a natural combination of male and female features to such an extent that they cannot be categorized within the separate classification of two distinct binary genders, i.e. male and female.[29] *Hijras* are not men by virtue of anatomical appearance, and psychologically they are also not women, though they are like women, but have no female reproductive organs and they do not menstruate.[30]

In Hindu culture, *Hijras* were socially recognized and held a special status, for they ushered in blessings on auspicious occasions such as marriage or the birth of a child. With time, however, this elevated position of the *Hijra* community fell low, relegated to the dust, and incarceration. During the British Rule, third gender people were likened to a deadly disease that could infect society. In consequence, the Criminal Tribes Act was enacted in 1871, which granted powers to the government to apprehend third gender people for the mere apprehension of promiscuous activities.[31] In this period the intersex *Hijra* community suffered immensely at the hands of law enforcement agencies that grossly abused their powers. Ultimately, the Act was repealed in August

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[26] Wilhelm 2004.

[27] Fausto Sterling, *Sexing the Body: Gender Politics and the Construct* (New York: Basic Books, 2008).

[28] *Supra* note 26; *supra* note 25, at 12.

[29] *Id.*

[30] *Supra* note 25, at 11.

[31] Criminal Tribes Act, Act XXVII of 1871.

1949; however, the ill effects of the Act still continued. *Hijras* were deprived of the basic rights guaranteed under Part III of the Indian Constitution and were subjected to constant humiliation.[32] Often, right up to today, society shuns and ridicules people from the third gender community. Heavy discrimination is directed against them merely because of their transsexual or intersex nature.[33] As a result of this they join the secluded and ostracized *Hijra* community. But even there they live under the *guru-chela* system where, once again, they have to be subservient and submissive, this time to the *gurus*.[34]

Across the globe, seven countries have recognized the third gender community as a separate class of people fitting into neither male nor female categories. These include the states of Pakistan,[35] Nepal,[36] Australia,[37] Bangladesh, Germany and New Zealand. Being influenced by these states as well as by the international obligations under different conventions and treaties,[38] a major breakthrough came in 2015 when the Indian Supreme Court recognized the existence of third gender people.[39] This was done to satisfy state obligations under international conventions and principles in respect of an individual's right against discrimination based on sex, right to equality and right to life and personal liberty.[40] Furthermore, this ruling reinforced the idea that individuals have the option of choosing their own identity and that it is the state's duty to respect, protect and fulfil the human rights of these persons irrespective of

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[32] *Supra* note 25, at 1, 2, 16 & 44.

[33] General Comment No. 2, Implementation of Article 2 by States Parties, Committee Against Torture, CAT/C/GC/2, January 24, 2008; General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights), Committee on Economic, Social and Cultural Rights, E/C.12/GC/20, July 2, 2009.

[34] Gayatri Reddy, *With Respect to Sex: Negotiating Hijra Identity in South India* (Chicago: University of Chicago Press, 2010).

[35] Dr. Mohammad Aslam Khaki and Anr. v. Senior Superintendent of Police (Operation) Rawalpindi and Ors., Constitution Petition No. 43 of 2009 (decided on March 22, 2011).

[36] Sunil Babu Pant and Ors. v. Nepal Government, Writ Petition No. 917 of 2007 (decided on December 21, 2007).

[37] Norrie v. NSW Registrar of Births, Deaths and Marriages, (2013) NSWCA 145.

[38] Universal Declaration of Human Rights, Art. 5; International Covenant on Civil and Political Rights, Art. 7; *see also* General Comment No. 2 (specifically deals with protection of individuals and groups made vulnerable by discrimination or marginalization); Universal Declaration of Human Rights, Art. 12 ("No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."); International Covenant on Civil and Political Rights, Art. 12 ("1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.").

[39] *Supra* note 25.

[40] *Id.*

their gender identity.[41] The Court, in *National Legal Services Authority*,[42] recognized third-sex people as a separate class apart from the straightjacket classification of gender as male and female, along with recognizing their civil right to vote, to receive education and to contest elections as well as to marry, to receive inheritance and to adopt children.[43] Thus, gender recognition is the first step towards acknowledging the need and creating an enforcement mechanism for the array of human rights that every citizen including third-sex people are entitled to. Multiple problems faced by the third gender community with respect to marriage and other rights necessitate a variety of solutions and actions which need to be reflected in policies and the laws, and in the attitude of the government and the general public.[44]

4. Legal Status of Marriage and Its Consequences under Hindu Law

The codification of customary Hindu laws dates back to the mid 20th century, the codification having been made for the purpose of creating a standardized pattern to solemnize Hindu marriage and its allied aspects in a more uniform manner. The parent legislation governing the performance of Hindu marriage lays down the essential concomitants of a valid marriage, as under S. 5 of the Hindu Marriage Act, 1955. The Act, aside from discussing the essentials of a valid marriage[45] as mentioned, also enumerates on instances of voidable marriage,[46] void marriage,[47] judicial separation,[48] restitution of conjugal rights,[49] divorce[50] and all other such rights and duties that flow from a marriage between two individuals. For the context of establishing a valid marriage, a key factor is to determine the two personalities entwined in the marriage. However, one basic problem that individuals as well as interpreting authorities face while determining the validity of a marriage is when crucial terms establishing the capacity and ability of individuals to marry lack any concrete definition. The legislation currently in place fails to conclusively define key terms such as "bride" and "bridegroom" or the parties that constitute a valid

41 National Legal Services Authority v. Union of India and Ors., at 23.

42 National Legal Services Authority v. Union of India and Ors., AIR 2014 SC 1863.

43 *Id*. at 45.6.

44 *Id*.

45 S. 5, Hindu Marriage Act, 1955.

46 *Id.* S. 12.

47 *Id.* S. 11.

48 *Id.* S. 10.

49 *Id.* S. 9.

50 *Id.* S. 13.

marriage.[51] Interestingly, however, the essential conditions as required of a valid Hindu marriage under S. 5 of the Act[52] have by no means restricted the meaning as being that which is made only between a man and a woman. S. 2(1)(a) of the Act[53] instead defines marriage as being applicable "to any person who is a Hindu by religion in any of its forms or developments." Although the legal definition of "marriage", as has been laid down through judicial interpretation, is a legal union of a man and woman as husband and wife,[54] yet again these terms have not been defined under any law.[55]

The primary principle of interpretation dictates that a constitutional or statutory provision should be construed literally, in accord with the legislative intent which is gathered from the words of the provision.[56] However, if the words used in the provision are imprecise or can reasonably bear multiple meanings, the rule of strict grammatical construction would cease to guide us through the real legislative intent.[57] In such cases it would be incumbent on courts to go beyond the literal confines of the provision and to consider certain factors, namely, the legislative history, basic scheme and framework of the statute as a whole, the purpose of the legislation, the object sought to be achieved, and consequences that may flow from the adoption of one interpretation in preference to another possible interpretation.[58] Although, ordinarily, words should be neither added nor deleted from a statutory provision, there are some said exceptions to the rule. Where the alternative lies between either supplying by implication words which appear to have been accidentally omitted or adopting a strict construction which leads to absurdity or deprives certain existing words of all meaning, it may be permissible to supply words to the statute.[59] In defining a marriage as being that which is performed only between a man and a woman,[60] the courts could be said to have employed the aforementioned principle of interpretation, namely, supply of words in the event they have been accidentally omitted, although it could be argued that the legislative intent still remains ambiguous in light of the absence of any codified definition of

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51 S. 5(iii), Hindu Marriage Act, 1955.

52 *Id.* S. 5.

53 *Id.* S. 2(1)(a).

54 Reema Aggarwal v. Anupam and Ors., (2004) 3 SCC 199.

55 I. Jackuline Mary v. The Superintendent Of Police, W.P. No. 587 of 2014.

56 A.P. v. L.V.A. Dixitulu, (1979) 2 SCC 34.

57 *Id.*

58 Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. Ors., (1987) 1 SCC 424.

59 Justice G.P. Singh, *Principles of Statutory Interpretation* 71–76 (9th ed., Nagpur: Wadhwa & Co., 2004).

60 *Supra* note 55.

marriage.[61] The issue that has often been raised in regard to the terms "man" and "woman," as frequently found in any statute or legislation, is that these terms are never defined, neither in the body of the concerned statute nor in a pre-defining code or legislative act that would take precedence over all legislation so far as the interpretation and meaning of the terms in question would be concerned.[62] Even though the words "male," "female," "bride," "bridegroom," "son" and "daughter" have been included as part of the basic text of a number of state enactments, such as the Hindu Marriage Act of 1955, the Special Marriage Act of 1954, the Pre-Conception and Pre-Natal Diagnostics Techniques Act of 1994, the Child Marriage Act of 2006 and the Hindu Succession Act, 1956, in addition to many others, the same legislation fails to define these common yet crucial terms which ultimately lay out an essential framework for the entire legislation. Further, the Hindu Succession Act, 1956, having even laid down a classification as to how the law would be applied differently in respect of a "male" Hindu and a "female" Hindu,[63] nowhere defines the same nor lays down the elements differentiating the same. Even the General Clauses of the Interpretation Act of 1897 makes no mention of these definitions.

The Hindu Marriage Act, 1955 was legislated by lawmakers so as to primarily give effect to the customs and traditions presiding within the domain of Hindu law.[64] A point of essential consideration is that historically Hindu law has been known to be inclusive of gender and sexual preferences that fall within a broad spectrum.[65] So, what symptomatically progresses from this view is that the judiciary, through successive interpretations of the law, must accommodate within its definition of marriage the roles and qualifications to suit the real purpose of Hindu marriage, which is the spiritual union of two souls, and not procreation.[66]

One significant aspect of marriage pertains to the rights of inheritance and succession that are generated from the juridical solemnization of the marriage. The right of inheritance under Hindu law is based on the coparcenary model of succession and inheritance.[67] This right of inheritance emanates from the concept of "Hindu joint family" which is understood as the principle of *sapindaship*.[68] Hindu joint

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61 I. Jackuline Mary v. The Superintendent Of Police, W.P. No. 587 of 2014.

62 *Id.*

63 S. 6, Hindu Succession Act, Act No. 30 of 1956.

64 59th Report on Hindu Marriage Act, 1955 and Special Marriage Act, 1954, Law Commission of India, March 1974.

65 Preeti Sharma, *Historical Background and Legal Status of Third Gender in Indian Society*, 2(12) IJRESS 64 (2012).

66 Reema Aggarwal v. Anupam and Ors., (2004) 3 SCC 199.

67 Maitrayee Mukhopadhyay, *Legally Dispossessed: Gender, Identity, and the Process of Law* (Calcutta: Stree, 1998).

68 Surjit Lal Chhabda v. Commissioner of Income Tax, AIR 1976 SC 109; Commissioner of Income Tax v. Ghansham Dass Mukim, (1979) 118 ITR 930 (P&H).

family can be considered as consisting of "a group of persons who are united by the tie of *sapindaship* arising by birth, marriage or adoption"[69] that ultimately constitutes this larger body or organization. Furthermore, the Hindu Succession Act, 1956 even lays down a classification as to how the law would be applied differently in respect of a male and female coparcener,[70] as also in case of a Hindu male or female dying intestate.[71] In this setting, it is essential for an individual either to marry or to have a blood relationship so as to gain the right of inheritance and succession.

5. The Case for an Inclusive Interpretation of Marriage

The legal classification of gender clearly identifies two separate classes having their corresponding rights, that is, a man who can legally marry a woman and a woman who can legally marry a man. Despite this seemingly linear segregation, and its consequent assignment of rights, the existence of an unambiguous legal criterion that could actually enable the working of such segregation is absent.[72] It is the fundamental right of an individual to marry and, therefore, it would be a question of grave prejudice if an entire group or class of society were precluded from the right to marry simply because they did not fit the definitions of "male" and "female," and any corollaries. When facing the challenge of deciding the legal validity of a marriage based on the sex or gender of the parties committed to the marriage, the court must take into consideration the *legal sex* of each and every individual.[73] When it comes to determining the legal sex of an individual, different circumstances in the legal context call for different ways of dealing with the question, such ways not necessarily required to intersect.[74]

When the relevant terms of a legal statute have not been defined, the natural recourse is to consider their "ordinary meaning."[75] However, when their "ordinary meaning" is resorted to, it must be seen that it does not obscure the context and purpose of the statutory legislation, in this specific instance the legislation concerning

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69 *See, e.g.*, Surjit, AIR 1976 ("The fundamental principle of the Hindu joint family is the sapindaship. Without that it is impossible to form a joint Hindu family. With it as long as a family is living together, it is almost impossible not to form a joint Hindu family. It is the family relation, the sapinda relation, which distinguishes the joint family, and is of its very essence.").

70 Ss. 10 & 16, Hindu Succession Act, 1956.

71 *Id.* Ss. 8 & 15.

72 Theodore Bennett, *Cuts and Criminality: Body Alteration in Legal Discourse* 167 (Burlington, VT: Ashgate Publishing, 2015).

73 Randi E. Frankle, *Does A Marriage Really Need Sex?: A Critical Analysis of the Gender Restriction on Marriage*, 30(6) Fordham Urb. L. J. (2002).

74 *Supra* note 72.

75 W v. Registrar of Marriages, (2012) 1 HKC 88.

marriage.[76] Judicial declarations in foreign jurisdictions are seen to increasingly favour the interpretation of sex "for the purpose of marriage."[77] Judith Butler's performance theory assumes a particular significance in this regard, which is, in understanding the above-discussed relation of a person's "sex" to his or her marriage. According to Butler's theory, every person is primarily performing a "gender" role of his or her own construction or choice, based on social expectations, and particularly with respect to the specific relationship that he or she shares with another person, especially a relationship in an apparently sexual context.[78] Now, based on the argumentative position of this theory, it may be put forward for assumption that, in a marriage existing between two partners, at least one of the partners, who is entering into a marital relationship with the other, adopts an identity which this partner knows as being distinct from his or her biological identity, meaning that, any one of the two partners in a marriage may choose to undertake either a feminine or a masculine gender role in contrast to the other partner.[79]

Butler's theory *also* determines the role of gender from the nature and manner of a person's living in the shared domestic household of his or her respective marriage partner, that is, with respect to the duties which each person has chosen to share in the marriage.[80] In this way, the conjugal performative aspect of Butler's theory erases the supposition of consummation as being an essential determinant of "marriage," thereby erasing also the identification of the "bride" and "bridegroom" with their concomitant traditional sexual roles and characteristics, and replacing it with a rather normative and mundane version of marriage, which on its face seems inclusive of people falling outside the non-ambiguous gender binary.[81] Ultimately, legal constructs of sexual identity have the fundamental purpose of serving as a sorting mechanism rather than being held up as a mirror to our society. They are manifestations of the natural element of law, existing to simplify complex structures by segregating them into separate and identifiable classes.[82]

One must especially understand constructs of social implications such as marriage as being the "practical" and "forward looking" intention of the law to create legal relationships between different classes of people; and, in this context, legal

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76 W v. Registrar of Marriages, at 50.

77 David B. Cruz, *Getting Sex "Right": The Heteronormativity and Biologism in Trans and Intersex Marriage Litigation and Scholarship*, 18 Duke Journal Gender Law & Policy 203 (2010).

78 Shari L. Thurer, *The End of Gender: A Psychological Autopsy* 136 (New York: Routledge, 2005).

79 Vanita 2005.

80 Chris Beasley et al., *Homosexuality in Theory and Practice* 35 (New York: Routledge, 2012).

81 Heather Brook, *Conjugal Rites: Marriage and Marriage-like Relationships Before the Law* (Dordrecht: Springer, 2007).

82 Laura Grenfell & Anne Hewitt, *Gender Regulation: Restrictive, Facilitative or Transformative Laws?*, 34 Sydney Law Review 761 (2012).

categories of sex and gender must be said to be calibrated in ways as to be made more accommodative of the variances exhibited by individuals in their respective gender spheres and also, thereby, to alleviate the psychological flagellations regularly imposed upon them by virtue of the natural existence of such variances.[83] Furthermore, the discursive appreciation of sex having become an intrinsic as well as a fundamental principle of the entire legal system itself, it appears imperative to conclude that the whole gender/sex divide carries with it the import of having already been codified in a prominent legal domain, *viz*. the Constitution.[84] Therefore, the stipulation of the meaning of gender-relevant terms in the Hindu Marriage Act and such allied laws would essentially give effect to the words of the Constitution itself, which has recognized the inclusion of third gender within the discretive "sex" of Article 14.[85] Thus, a third gender individual may be validly permitted to assume the role of a "husband" or a "wife" as to the extent that the fulfilment of the essentials of a valid Hindu marriage is concerned.

5.1. An Implication of Non-Recognition of Third Gender Rights under Personal Laws

Non-recognition of third-sex marriage rights can have manifold implications. In a *hijra gharana*, the *guru-chela* relationship is of specific emphasis as there is a need for economic dependence along with a show of social control.[86] Thus, kinship flows in the closed *Hijra* community by means of affiliations and familial ties between *gurus* and *chelas*.[87] However, this kinship flows with a cost which the *chelas* have to pay by being subservient and tolerant to the whims and orders of their *gurus*, so as to meet the basic necessities of life which may merely amount to a square meal and a place to reside in. *Hijras* cannot live a life solely as they wish lest they may bear the misery of being ostracized and boycotted from their own community.[88] In lieu of the need for protection and to get certain limited inheritance rights in the property of the *hijra gharana*, these vulnerable *Hijras* still choose to remain within the four corners of their community despite the adversities they have to face even there. This brings us to the need for legalizing and recognizing marriage as well as the inheritance rights of third-sex people.

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83 Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* 13 (New York: South End Press, 2011).

84 *Critical Intersex* (M. Holmes, ed., Farnham: Ashgate Publishing, 2012).

85 *Supra* note 25.

86 Serena Nanda, *Neither Man nor Woman: The Hijras of India* (2nd ed., Belmont, CA: Wardsworth Publishing Co., 1999).

87 *Id.*

88 Reddy 2010, at 142.

Recognizing the *Hijra* community's right to marry will lay the foundation for granting them the rights of succession, inheritance and adoption which are vital aspects of Hindu personal law. The judicial understanding of the term "Hindu joint family" and the "coparcenary model of inheritance" and *sapindaship* can be interpreted to include *Hijras* only when their initial right to marry is recognized.

5.2. Recognizing Hijra Gharana's Right of Inheritance

Now, the other less discussed aspect of the enforcement of rights of the third gender community under Hindu law as has been mentioned is the recognition of the inheritance rights of the *hijra gharanas*. Here, it first becomes pertinent to point out a striking note of comparison that exists between the *Hijra* community and a Hindu joint family. In a Hindu joint family, the person lower in the relationship status within the kinship needs the nurture and protection of the person who is more elevated in position, and will therefore show proper deference and loyalty to the superior. The same may be said of a *hijra gharana* where the emotional need for such a relationship is even more evident than among many Indian families today because of the fact that the *Hijra* community exists and sustains itself as both a kinship group as well as a work group.[89] Since a *hijra gharana* has the same structural flow as that of a Hindu joint family, the legal plausibility of recognizing *hijra gharanas* along the lines of a Hindu joint family should receive immediate recognition, although the existing judicial principles if viewed in this regard offer little support. However, there has indeed been a shift in judicial understanding, over the years, in the interpretation of the term "Hindu undivided family" or "Hindu joint family". The Hindu joint family has been limited in its membership not only to a system that accommodates a coparcenary model of succession and inheritance but also to "a fringe of persons, males and females"[90] who exist outside the limits of coparcenary. It remains to be seen whether, in the course of this evolution in judicial understanding of the term "Hindu joint family", the concept of *sapindaship* could also eventually be interpreted to cover the existing relationship between the members of *hijra gharanas*. One may especially consider the case of *Aravanis* of Tamil Nadu who are married to their deity of a local fame and significance by a priest.[91] It is essential to determine whether the marriage of these *Aravanis* to this deity, who is otherwise a "juristic person"[92] in the eyes of the law, could be seen as

89 Reddy 2010, at 142.

90 Surjit Lal Chhabda v. Commissioner of Income Tax, AIR 1976 SC 109.

91 O. Somasundaram, *Transgenderism: Facts and fictions*, 51 Indian J Psychiatry 1, 73–75 (2009); *see also* Garry Ferrard & Susan Andreatta, *Cultural Anthropology: An Applied Perspective* (10th ed., Stamford, CT: Cengage Learning 2014).

92 *See, e.g.*, Vidya Varuthi Thirtha v. Balusami Ayyar, (1922) 24 BOMLR 629 ("Under the Hindu law the image of a deity of the Hindu pantheon is, as has been aptly called, a 'juristic entity,' vested with the capacity of receiving gifts and holding property."); *see also* Shriomani Gurudwara Prabandhak

constituting a valid marriage within the context of Hindu law, particularly in light of provision 3(a) of the Hindu Marriage Act, 1955,[93] and whether such marriage, if found to be valid, could be said to form a valid *sapinda* relationship amongst the members of the community who are together given in consecration to such marriage. The implication of recognizing this marriage would be to recognize their inheritance right as well as to provide them with a secured life where they will live on an equal basis as other citizens.

6. Conclusion

The crucial yet intriguing questions with respect to third gender people's right of marriage and inheritance can be answered by a broader judicial interpretation, most importantly by bringing the much needed change in the law, in the aftermath of the third gender's recognition in the *National Legal Services Authority*[94] judgment. As enumerated, the lack of clarity under Hindu personal law, in addition to the absence of legislation recognizing marriage and inheritance rights of third-sex people, subjects them to indefinite discrimination even though the Supreme Court has recognized their right of equality under Article 14 of the Indian Constitution.[95] Indian laws relating to marriage, adoption, inheritance and other welfare legislation merely recognize the paradigm of binary genders of male and female which is based on a person's sex assigned at birth.[96] However, this is a flawed approach especially in the contemporary scenario where third gender rights have been recognized globally and domestically. The doctrine of incorporation which stands at the base of India's international obligations mandates legislators to enact laws for implementing those recognized international principles so long as they do not contravene domestic provisions.[97]

The Yogyakarta Principles address a broad range of human rights standards and their application to issues of sexual orientation and gender identity.[98] These

Committee, Amritsar v. Shri Som Nath and Ors., AIR 2000 (3) SC 1421 (the term "juristic person" also connotes the "recognition of an entity to be in law a person which otherwise it is not. In other words, it is not an individual natural person but an artificially created person which is to be recognised to be in law as such.").

93 S. 3(a), Hindu Marriage Act, 1955.

94 National Legal Services Authority v. Union of India and Ors., AIR 2014 SC 1863.

95 *Id.* at 54, 75, 76 & 77.

96 *Id*. at 49.

97 Art. 51 & 253, The Constitution of India, 1950 (Jan. 31, 2016), available at http://lawmin.nic.in/olwing/coi/coi-english/Const.Pock%202Pg.Rom8Fsss(2).pdf.

98 *Routledge Handbook of International Human Rights Law* (S. Sheeran & Sir N. Rodley, eds., Abingdon: Routledge, 2013).

principles even embody the duty on states to include interpretations and amendments to legislation so as to ensure equality and non-discrimination on the basis of gender identity or sexual orientation.[99] Furthermore, these principles have been endorsed by the UN Special Rapporteur,[100] regional human rights bodies, national courts, government commissions and commissions for human rights, and the Council of Europe as a human rights standard for protecting and fulfilling the human rights of all persons, regardless of their gender identification.[101] Against this backdrop, it is the duty of Indian legislators to amend the current legislation governing Hindu personal law so as to bring it into consonance with India's international obligations as well as with its duty to protect the fundamental rights of the third gender community.

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[99] The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, International Commission of Jurists (2007), Prin. 2 (Jan. 31, 2016), available at http://www.yogyakartaprinciples.org/principles_en.htm.

[100] Vernor Munoz, Report of the United Nations Special Rapporteur on the Right to Education, UN Doc. A/65/162, 23 (July 2010).

[101] Douglas Sanders, *International: The Role of Yogyakarta Principles*, OutRight Action International (Jan. 31, 2016), available at https://www.outrightinternational.org/content/international-role-yogyakarta-principles; National Legal Services Authority v. Union of India and Ors., AIR 2014 SC 1863, at 23.

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PUBLIC INTEREST AND ADMINISTRATIVE LEGAL PROCEEDINGS*

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This paper focuses attention on the issue of the definition of public interest, in particular, on the fact that the public interest lies in the organization of the most efficient protection system, one that also protects against possible abuse of power by the State itself. The paper argues that the adoption of the Administrative Court Proceedings Code of the Russian Federation was a mistake and demonstrates that the mechanisms implemented in the code to protect public interests are inefficient.

Keywords: public interest; state interests; administrative legal proceedings; Administrative Court Proceedings Code of the Russian Federation.

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1. Introduction

The definition of "public interest" should include both the interests of society in general and the interests of certain social groups representing society. In this matter it is important to correlate the categories of public and state interests. Now, it is commonly known that different approaches to such correlation have been offered in legal science. Public and state interests are frequently equated. However, in the author's opinion, public and state interests by no means always coincide; they are, in essence, independent phenomena.[1] Upon that understanding, the lack of coincidence may be traced in various aspects which, owing to the limited framework of this paper, cannot be elaborated here in sufficient detail. So let us, rather, focus our attention on the fact that multiple cases have been reported where the State has acted contrary to the interests of society and has implemented the will of specific persons or certain groups. Moreover, the contradistinction of public and state interests cannot be excluded even when the actions of the State are in line with the will of the majority, since in such cases the interests of minorities may simply be ignored, though such persons are also members of society. In any event, it is obvious that the State is a specific subject of the law, whose interests as a legal entity can contradict other interests, including those of society.

The aforesaid by no means implies that public and state interests always contradict each other; however, it shows that they may not coincide.

Notwithstanding allegations made by certain authors,[2] public and state interests in general are independent in a law-bound state. Clearly, a law-bound state is more

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[1] The regulations do not allow characterizing the current approaches to correlation between the interests of society and those of the State in Russian legal science.

In this case it is necessary to comment that, in the opinion of the author, any state is a unique entity that can participate in public or social life in various guises, and therefore it is impossible to assert that its interests coincide with or differ from public interests in any and all situations.

An important circumstance must be underlined. It is a well-known fact that in foreign law literature "public interest" means the interest of society but not that of the State. However, historically in Russian law literature the term "public interest" (*publichny interes*) means both public and state interests. For this reason, when such a term is used in Russian legislation, as a rule, it can mean either of the aforementioned interests. This is largely related to the fact that *in Russia the interests of society and those of the State are often equated*. I, however, *do not equate them*. Therefore, in order to avoid confusion as to which of the interests (those of society or those of the State) is implied in the Russian text of this paper, a term different from the "public interest" to refer to the interests of society, namely, "societal interest" (*obschestvenny interes*) will be used. The term "public interest" will be used only if present in the corresponding law. At the same time, the term "public interest" will be used in the English version of this paper, since, as specified above, it generally means the interests of society and not those of the State, i.e. in contrast to the corresponding Russian term, there can be no inconsistency of interpretation.

[2] For example, among modern Russian scientists in the field of procedural law the interests of society and a law-bound state are equated by E.S. Smagina. *See* Смагина Е.С. Публичный и государственный интерес: соотнесение категорий [Elena S. Smagina, *Public and State Interest: Correlation of Categories*] in Проблемы обеспечения и защиты публичных интересов: Сборник научных статей [*Problems of Provision and Protection of Public Interests: Collected Scientific Works*] 5–13 (Moscow, 2015).

efficient compared to other states (i.e. those which are not law-bound) in the actual implementation of the interests of society as a whole as well as the interests of specific social groups and individuals. However, acting for the benefit of someone's interests and being the holder of such interests are not the same thing. Moreover, the premise that the State always acts for the benefit of society or that state interests absolutely equate to public interests is rather typical of states without the rule of law, where the State is commonly idolized. Such a state is not bound by law; it dominates it. So any possibility of unlawful state conduct is excluded although in reality the State often acts arbitrarily. On the other hand, in a law-bound state that is characterized by the rule of law *also* with regard to the State[3] itself the possibility that the State can sometimes act unlawfully is not excluded precisely because the State is not idolized. Therefore, the most efficient protection is implemented in a law-bound state, including protection against arbitrary actions undertaken by the State itself.

The availability of such a protection system is sought by society, which is why it is especially important to implement judicial review as to the legal validity of the acts and actions (or inactions) of any state authority, whether a person or an administrative body.

2. Is There an Actual Need for the Administrative Court Proceedings Code?

It has been a while since there have been disputes over the organization of administrative justice. Until recently, cases originating from administrative and other public law relations (constitutional, administrative, financial), i.e. related to disputes with entities invested with authority or the exercise of such authority (further sometimes referred to as administrative cases), have been reviewed by the courts of general jurisdiction under civil procedure as regulated by the Civil Procedure Code of the Russian Federation (CPC RF).[4] Currently, however, such cases are reviewed by the courts of general jurisdiction using the Administrative Court Proceedings Code

[3] As specified in one of the papers by S.S. Alekseev, a famous Russian expert in the field of law, "*a law-bound state* is a unique crown, a culmination that reflects the positive potential of law in its relation to the state; specifically if such formula does not mean that state authorities and officers do not obey their own laws, but rather that *the law rules*…" The same legal scientist, when defining the levels of positive law development, indicates that the highest level is the so-called civil society law, which is characterized by its utmost proximity to the intrinsic law. "It is based on the natural rights of an individual that are used as a ground to define the lawfulness of judicial provisions that are introduced and supported by the government." *See* Алексеев С.С. Теория права [Sergey S. Alekseev, *Theory of Law*] 106, 131 (Moscow, 1995).

[4] It is generally known that a system of arbitration courts exists in Russia; these courts hear cases that are, as a rule, related to disputes arising from any business or other economic activity between legal entities and business people. The law that regulates the court procedure is the Arbitration Procedure Code of the Russian Federation (APC RF). Furthermore, there are administrative cases among the cases heard by arbitration courts; APC RF is used in legal proceedings, ACPC RF is not.

of the Russian Federation (ACPC RF), which was adopted on 8 March 2015 and came into effect on 15 September 2015.

Some legal scientists say that the adoption of this law is an important step towards the formation of administrative justice in Russia. In particular, a well-known expert in administrative proceedings, Yu.N. Starilov, believes that the emergence of ACPC RF

> was an epic event that will be part of the Russian lawmaking history… Only after the adoption of such law a complete administrative procedural system became available for regulation of any relations in the course of court actions against decisions, actions (inactions) of any public authorities or officials… The adoption of ACPC RF is a very significant and important event in development of the country's judicial system, improvement of the Russian legal system, expansion of legal state boundaries, as well as in putting the justice structure in proper order that corresponds to the standards that ensure the rights, freedoms and legal interests of individuals and entities.[5]

This statement allows drawing the conclusion that until the adoption of ACPC RF the protection of the rights and interests of various persons against illegal decisions, actions or inactions of those vested with authority, if any, was organized in a very poor manner and that this situation was rectified by the introduction of ACPC RF.

However, the validity of this conclusion is disputable.

First of all, historically in Russia, in contrast to some other countries, as soon as cases stemming from administrative and other public (authority-related) legal relations became an allowed subject for judicial inquiry, their hearing was included in civil proceedings, and certain sections relating to the particularities of such proceedings were added to the code of civil procedure (initially CPC RSFSR, later on CPC RF). Therefore, the development of the law in this area did not follow the path towards the formation of an independent administrative proceedings, but rather opted for the universality principle of the civil proceedings so that, not only cases of a civil nature could be considered within its framework, but also other cases including public (administrative) ones.

At the same time, the author believes that the unique features of public (administrative) cases are so substantial that they simply cannot be fully taken into account within the code of civil procedure, which is mainly focused on cases of a civil

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[5] Старилов Ю.Н. Кодекс административного судопроизводства Российской Федерации – надлежащая основа для развития административно-процессуальной формы и формирования нового административного процессуального права, 1 Журнал административного судопроизводства 31 (2016) [Yurii N. Starilov, *Administrative Court Proceedings Code of the Russian Federation as a Due Ground for Development of Administrative Proceedings and Formation of a Novel Administrative Procedural Law*, 1 Journal of Administrative Proceedings 31 (2016)].

legal nature. In this pattern of thought, it is the existence of the unique features of public cases that should have caused the adoption of a separate code that fully regulates their hearing in courts and includes provisions that are not (or cannot be) included in the code of civil procedure. ACPC RF was supposed to be such a code. However, real-life practice demonstrates that ACPC RF is not essentially unique but rather includes repackaged provisions of CPC RF and the Arbitration Procedure Code of the Russian Federation (APC RF). We may say that ACPC RF is a "legal clone" of the aforementioned codes, which in itself signifies that there is no specific need to regulate the judicial examination of public (administrative) cases using provisions different from those included in CPC RF.[6] However, such "legal cloning" in itself is not

[6] As aptly remarked by A.T. Bonner: "Based on subparagraph 1, paragraph 6, Article 1259 of the Civil Code of the Russian Federation, laws and other legislative instruments are not subject to copyright. If not for this provision, it would be just right to introduce the term of legal plagiarism. However, such plagiarism is to a certain degree forced, since the Code authors could not and would not be able to invent something new, even if they wished to do that." *See* Боннер А.Т. Административное судопроизводство в Российской Федерации: миф или реальность, или Спор процессуалиста с административистом, 7 Закон (2016) [Aleksandr T. Bonner, *Administrative Proceedings in the Russian Federation: A Myth or Reality, Or a Dispute Between Experts in Procedural Law and Administrative Proceedings*, 7 Law (2016)].

It should be taken into account that as soon as the draft of ACPC RF appeared it was negatively evaluated by almost all processualists. In addition, some experts of the Civil Proceedings Chair at MSAL (including the author) prepared and forwarded notes proving that such law is not required by the relevant committees of the State Duma. In particular, Alla K. Sergun, a well-known processualist scientist, member of the working group for development of CPC RSFSR in 1964, CPC RF in 2002, APC RF in 1995 and 2002, called attention to the fact that: "The authors of this draft specify in the explanatory note that the Code is required due to the absence of equality between the subjects of public legal relations, and therefore the need for a 'different procedural law' exists for hearing of cases stemming from such legal relations. Such law must cover the court activities, the right to call for evidence independently, control of the procedure development and regulatory activities of the parties, the right to move beyond the grounds and arguments of the applicant party when reviewing legal and non-regulatory instruments (p. 1, paragraph 1; p. 2, par. 7; p. 3, par. 4 and 5). However, the authors fail to mention that all of these rights have been provided to the court long ago both in CPC and APC, and the corresponding provisions have long been in force! (See part 2, article 12; part 2, article 39; parts 3 and 4, article 246; parts 1 and 2, article 249 of CPC; part 3, article 9; part 5, article 49; part 3, article 189; parts 3 and 5, article 194; parts 4 and 5, article 200 of APC). Any cases stemming from administrative or other public legal relations are considered within the framework of both civil and arbitration proceedings following the rules that include all provisions indicated in the Explanatory Note. Therefore, there is no need for a 'different procedural law' as such 'different' procedural rules have been long in force. There are no new provisions in the Code that are related to ***the essence of the process***; several new provisions that have been included (i.e. mandatory representation, involvement of co-defendants, simplified (written) procedure etc.) ***do not influence or modify the nature of the proceedings***, and therefore can be included into the corresponding sections of APC or CPC if required, of course after the corresponding legal elaboration. However, they cannot serve as a ground for introduction of a new Code." *See* О проекте кодекса административного судопроизводства, 12 Законы России: опыт, анализ, практика (2013) [On the Draft of the Administrative Court Proceedings Code, 12 Russian Laws: Experience, Analysis, Practice (2013)] (limited access at http://base.garant.ru/57631888/#friends#ixzz4GwPNbTV1); On the lack of necessity to introduce ACPC RF, *see also* Громошина Н.А. С принятием Кодекса административного судопроизводства не следует торопиться, 3 Законы России: опыт, анализ, практика 9 (2015) [Nataliya A. Gromoshina, *There is No Need to Hurry with Adoption of the Administrative Court Proceedings Code*, 3 Russian Laws: Experience, Analysis, Practice 9 (2015)].

a very serious issue. The problem is that the authors of ACPC RF, probably afraid of being accused of word-for-word retelling of the provisions already existing in the procedural legislation, tried to modify some of them when composing ACPC RF. As a result, in many cases the meaning was wrenched, and the strict implementation of such provisions will do more harm than good.

One cannot deny that ACPC RF has some appropriate new provisions that do not exist in CPC RF. However, all of them could be introduced into CPC RF, either added to provisions that are generally applicable to all cases or to those that rule the proceedings for cases stemming from public legal relations (i.e. administrative cases).[7] The introduction of ACPC RF also has raised other issues. As pointed out by A.T. Bonner, "Judges, lawyers and other legal practitioners as well as citizens now need to rack their brains as to which code (CPC or ACPC) should be used to file and hear the corresponding case."[8]

In this situation the issue is not about the legal illiteracy of citizens, but rather about the difficulty to understand which procedure (civil or administrative) should actually be used to consider the claim. Moreover, often the issues of private and public law are closely interrelated, and certainly their joint consideration would be more appropriate. It is known that in a letter No. 7-BC-7105/15 of November 5, 2015, the Supreme Court of the Russian Federation tried to define which disputes related to civil rights and obligations linked to claims to invalidate non-regulatory acts are subject to consideration within the civil court procedure. However, the approach suggested by the Supreme Court is far from being unassailable.[9] This issue has also not been resolved in the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 36 of September 27, 2016 "On Some Issues Related to Application of the Administrative Court Proceedings Code of the Russian Federation by Courts."

So, just the aforesaid is enough to understand that the introduction of ACPC RF has not duly facilitated the implementation of societal (public) interests in efficient administrative justice.

3. Public Interest as a Protected Object in Administrative Legal Proceedings

Let us move on to the issue of public interest as a protected object in administrative court proceedings.[10] It is clear that the public interest may be an immediate or indirect

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[7] For solid criticism of certain provisions of ACPC RF, *see, e.g.*, in papers published in "5 Russian Laws: Experience, Analysis, Practice (2016)."

[8] Bonner 2016.

[9] *Id*.

[10] The constraints of space do not permit specifying all the aspects of public interest protection issues in administrative proceedings, therefore only some of them will be considered here.

object of protection, which influences the defense procedure.[11] The public interest is indirectly protected if it is not a direct object of protection. For example, it is clear that the protection of the interests and rights of individuals is also within the scope of the public interest, as individual protection fosters public order. However, it is also clear that in cases where the public interest is indirectly protected, i.e. exclusively through the protection of rights and interests of individuals, following the general rule, only persons whose interest is subject to immediate protection may apply to the courts.

The public interest is often an immediate object of protection. It is obvious that in actions considered within ACPC RF this is frequently the situation in many cases related to, for example, the protection of electoral rights and challenges to non-regulatory instruments that affect the rights and interests of the general public or social groups whose members can be personified. On account of that, the public interest is often an immediate object of protection together with other interests, including the interests of individuals. For example, in Russia, according to Article 208 of ACPC RF, any person can file a suit challenging a statutory act if he or she believes that such act violates his or her rights, freedoms or legal interests. Therefore, as a result of such suit his or her personal interests are also protected. At the same time, if it is found that such challenged statutory act in fact contravenes another statutory act that prevails, this will be enough to sustain the claim (paragraph 1, part 2, Article 215 ACPC RF). Consequently, if such claim is sustained, this leads to the simultaneous immediate protection of two types of interests: (*a*) the interests of the applicant party, whose violated rights served as a ground for the suit and whose rights were protected as the result of such challenge (in addition, when the statutory legal act is rendered invalid for the person who challenged it, this allows requesting review of other court orders where the invalidated act was applied to such person due to newly discovered circumstances); (*b*) public interests, as the invalidated act will not be applicable to any persons to whom it was supposed to be applicable before the court proceedings.

It should be taken into consideration that in Russia the right of recourse to the courts for the protection of public interests is allowed in cases specified by the law. Prosecutors, as well as certain authorities and officials, are vested with such a right within their power by virtue of the explicit reference in the law. In some cases the law states that non-governmental entities and sometimes citizens can also apply to

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[11] On this issue, the opinion of the author is described in: Туманов Д.А. Об общественном интересе и его судебной защите, 12 Законы России: опыт, анализ, практика 54 (2015) [Dmitry A. Tumanov, *On Public Interest and Its Judicial Protection*, 12 Russian Laws: Experience, Analysis, Practice 54 (2015)] (the English version is available at https://www.academia.edu/19957808/On_Public_Interest_and_Its_Judicial_Protection_Russian_Laws_Experience_Analysis_Practice._2015._No._12._p.54-70_English_). *See also* Туманов Д.А. Общественный интерес как опосредованный и непосредственный объект защиты в гражданском судопроизводстве, 2 Юстиция 8 (2016) [Dmitry A. Tumanov, *Public Interest as Indirect and Immediate Object of Protection in Civil Court Proceedings*, 2 Justice 8 (2016)].

the courts in order to protect public interests.[12] On this last point we should note that individuals can take legal recourse to protect public interests only if such protection is integrated within the simultaneous protection of individual rights and interests of such person searching for legal recourse. In its turn, if a citizen cannot prove his or her personal (immediate) interest that directly follows from the law, but can only specify that he or she is a member of a social group for which such interest may be important, most probably he or she will not be recognized as a person having the right to take legal recourse.[13]

Detailed inspection of ACPC RF shows that the issue related to the right to apply to the courts in order to protect public interests is resolved by the code in a manner that is totally unacceptable. On the one hand, from part 1, Article 40 of ACPC RF it follows that only governmental bodies, officials and human rights ombudsmen in the Russian Federation or its entities can take legal recourse in order to protect the general public and public interests. It is easy to see that neither public nor non-profit organizations nor citizens are indicated as allowed applicants. Therefore, following the logic described here, it is obvious that the applicability of the right to take legal recourse is reduced as compared to the provisions noted above.

On the other hand, the provisions of part 1, Article 40 of ACPC RF directly contravene other provisions of many federal laws that grant the right to protection also to public entities, not to mention some other provisions of ACPC RF itself (e.g., Article 4).

This flaw in ACPC RF (as well as other flaws) was discussed both in law publications[14] and during hearings related to the provisions of ACPC RF in the Supreme Court of the Russian Federation.[15] It should be noted that, as far as the author is aware, currently a draft law that will modify ACPC RF has been developed; it is targeted at elimination of this flaw.[16]

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[12] *See, e.g.*, paragraph 3, part 3, Article 26 of the Federal law No. 212-FZ of June 21, 2014 "On Basic Principles of Public Control in the Russian Federation," which allows public associations and other non-governmental non-profit entities to take legal recourse in specific cases in order to challenge statutory acts, orders, actions (inaction) of various bodies and persons that are vested with authority. It is clear that if the suit is filed for the benefit of the general public, then the public interest is the object of protection.

[13] Often judicial practice is based on that, though there are exceptions in certain cases.

It has already been mentioned that it is required to expand the list of cases when the law would allow citizens to take legal recourse in order to protect public interests, where it would be only required to prove that such a citizen is part of the corresponding social group. *See* Туманов 2015.

[14] *See, e.g.*, Туманов Д.А. Участие в административном судопроизводстве прокурора, а также органов, организаций и граждан с целью защиты «чужих» интересов, 5 Законы России: опыт, анализ, практика 60 (2016) [Dmitry A. Tumanov, *Participation of Prosecutor, Bodies, Entities and Individuals in Administrative Proceedings in Order to Protect "Another Person's" Interests*, 5 Russian Laws: Experience, Analysis, Practice 60 (2016)].

[15] The author is a member of a working group that elaborates comments in regard to ACPC RF together with the judges of the Supreme Court of the Russian Federation.

[16] However, unfortunately, ACPC RF not only leaves some flaws uncorrected but also aggravates the corresponding issues.

The Administrative Court Proceedings Code of the Russian Federation also includes other substantial flaws that are related to the protection of public interests. Let us consider just some of them.

ACPC RF specifies that if a prosecutor, entities or persons that took legal recourse in order to protect the general public (which usually also means protection of public interests) withdraws the suit, the proceedings continue. However, it is completely unclear as to who is supposed to carry on the lawsuit in order to protect the general public. Obviously, several solutions may be proposed, as has already been done in the judicial literature.[17] Nevertheless, in any case such proceedings can hardly be efficient as in fact the public interest will not be actively defended in court, which will definitely affect the result.

4. Class Action as One of the Mechanisms to Protect Public Interests

One of the procedural mechanisms to protect *inter alia* the public interest is a class action. Article 42 of ACPC RF provides for the possibility to take legal recourse using such action. In particular, the article states that citizens who participate in administrative or any other public legal relations, as well as other persons as specified by federal law, can file administrative class actions with courts in order to protect violated or challenged rights and legal interests of a group of people.

Article 42 also specifies the conditions required for such application, which include: (*a*) the numerical size of the group or the impossibility to define the number of its members, which hinders filing of individual claims by potential group members or filing of joint administrative claims (joint participation); at the same time the law determines that administrative cases for protection of violated and challenged rights and legal interests of a group shall be considered by the court if as of the day of such application at least twenty persons acceded to the aforementioned claim filed by a person in order to protect the rights and legal interests of a group; (*b*) consistency of the dispute subject and grounds for the claims made by the group members; (*c*) the presence of a common administrative defendant (co-defendants); and (*d*) all group members must use the same remedies.

A case for the benefit of a group is handled by a person (or persons) who have been appointed to do so. Such person must be indicated in the statement of the administrative claim. On account of that, such person (or persons) acts without any power of attorney, enjoys the rights and must perform the procedural duties of administrative plaintiffs.

Article 42 also addresses other issues, including a description of the consequences of class actions filed in the absence of the required conditions and the consequences

[17] Tumanov, *supra* note 14.

of legal recourse for a person with a claim that is similar to a claim heard within the framework of a class action. In addition, the article contains a highly disputable provision stating that if administrative co-plaintiffs are involved in an administrative case and it is found that there are circumstances allowing to consider the case as an administrative class action, upon petition of a claim participant, and taking the opinions of the parties into account, the court may issue an order to consider the administrative case as an administrative class action. The author has already indicated that this provision of ACPC RF is erroneous, because it means it is not the co-plaintiffs but the court which decides that the case is transferred to the category of administrative class actions: the court is only supposed to take the opinion of such persons into account, which, as we know, does not mean it is obligated to follow it.

If the case is considered an administrative class suit, the co-plaintiffs will lose their status (and therefore the corresponding rights); therefore such transfer should be possible only if the co-plaintiffs expressly agree to it and provided that the court has explained the consequences to them.

There are no other rules that govern the procedures for consideration of class suits in ACPC RF. There are even no provisions that define the rights of group members. This circumstance led V.V. Yarkov to believe that similar provisions of APC RF that govern the protection of group interests in arbitration procedures (Chapter 28.2 of APC RF) can be applicable to resolving the corresponding issues.[18]

We should note the following regarding this issue.

First, the presence of a major gap in ACPC RF attests to its poor elaboration, which once again shows that the law was prepared in a hurry causing the appearance of unsustainable provisions.

Second, since there is a gap in regulation of class action consideration in ACPC RF, one may raise the question of whether in this case Chapter 28.2 of APC RF is applicable in a similar way; however, it is doubtful that this will finally make administrative class suits efficient, as the relevant provisions of APC RF are far from perfect, which also explains why the concept of class action is rarely used in arbitration proceedings.[19]

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[18] Комментарий к Кодексу административного судопроизводства РФ (постатейный, научно-практический) [*Comments to the Administrative Court Proceedings Code of the Russian Federation (Article-by-Article, Research and Practical)*] 146 (V.V. Yarkov, ed., Moscow, 2016).

[19] On the flaws of Chapter 28.2 of the APC RF, *see, e.g.*, Алехина С.А., Туманов Д.А. Проблемы защиты интересов группы лиц в арбитражном процессе, 1 Законы России: опыт, анализ, практика 38 (2010) [Svetlana A. Alehina, Dmitry A. Tumanov, *Problems of Protection of Group Interests During Arbitration Proceedings*, 1 Russian Laws: Experience, Analysis, Practice 38 (2010)]; Стрельцова Е.Г. О некоторых сложностях практического применения гл. 28.2 АПК РФ, 4 Право и политика 718 (2010) [Elena G. Streltsova, *On Some Difficulties of Practical Implementation of Chapter 28.2 of APC RF*, 4 Law and Politics 718 (2010)]. *See also* Малешин Д.Я. Гражданская процессуальная система России [Dmitry Ya. Maleshin, *Civil Procedural System of Russia*] (Moscow, 2011).

Finally, we should note that any cases considered within the framework of ACPC RF are quite specific with regard to the presence of required circumstances or shortened periods for proceedings. In its turn, the protection of group interests within APC RF also has substantial features that may be implemented during extended periods for proceedings (in APC RF claims are processed within a period not exceeding five months after a determination is rendered to initiate the proceedings based on the action). In this case it is clear that the provisions of the law do not match. Therefore, it is doubtful that the provisions that regulate the order of proceedings for protection of group interests in APC RF, if applied by analogy to administrative court proceedings, would fully foster the efficient functioning of the administrative class action institution.

An attempt was made to resolve certain issues related to class suits in administrative legal proceedings, as reflected in the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 36 of September 27, 2016 "On Some Issues Related to Application of the Administrative Court Proceedings Code of the Russian Federation by Courts." In particular, the Resolution sets out the procedural rights of group members. These include the right to familiarize oneself with administrative case materials, to make excerpts and copies; to request the substitution of a person who is appointed to pursue an administrative case to the benefit of a group of persons.[20] At the same time, in the author's opinion, the rights of group members specified in the draft document are not enough, as the author and others have repeatedly pointed out in legal publications.

Specifically, it is more than disputable that members of a group are not entitled to individually appeal against a court order, since it is obvious that the person who pursues the case can refuse to file the appeal. It should also be taken into account that the initial version of the draft Resolution featured a rule stating that court orders can be appealed by any group member provided that he or she is supported by at least twenty other group members.[21] Such an approach, in the author's opinion, is also far from being the best one; however, it is definitely better than that reflected in the Regulation adopted by the Supreme Court of the Russian Federation on September 27, 2016.

5. Conclusion

We see from the foregoing that, as has been frequently noted in judicial publications, ACPC RF is a law that notably repeats the provisions of CPC RF and APC RF. Its adoption was not governed by a critical societal need for a law that

[20] As such rights are not mentioned in Article 42 of ACPC RF, the Resolution proposes to release them from the general provisions of ACPC RF. In addition, there is a reference to part 3, Article 225 of APC RF, which probably means that the corresponding provisions of APC RF are applicable to ACPC RF by analogy, though this is not indicated in the Resolution.

[21] The aforementioned version of the Resolution was received by the Civil and Administrative Legal Proceedings Chair at the Kutafin Moscow State Law University (MSAL) for comment by the chair members.

regulates consideration of administrative cases by the courts, as such laws already existed and had been efficiently applied prior to its adoption.

ACPC RF was adopted in a hurry, which resulted in substantial defects in some of its provisions. This in turn has led to a lower level of warranty ensuring the administration of justice as compared to its level before the adoption and enactment of the new code. The provisions referring to the protection of the public interest are also faulty. In particular, ACPC RF restricts the right to judicial protection. Some of its institutions cannot be implemented owing to important legal gaps that can hardly be successfully overcome even by the use of legal analogy.

It follows then that the availability and application of ACPC RF is unlikely to foster the actual protection of the rights and interests of various social groups and individuals, nor the protection of public interests.

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FACTUAL INDETERMINACY IN INTERNATIONAL TAX LAW

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Legal indeterminacy comes in a variety of forms identified here as: (i) general legal indeterminacy; (ii) factual indeterminacy; and (iii) Mach/Feyerabend factual indeterminacy. The concept of general "legal indeterminacy" refers to problems in legal interpretation and has been extensively studied. "Factual indeterminacy" refers to the indeterminacy of facts as a matter of tax law when derived from separately indeterminate fields of law. "Mach/Feyerabend factual indeterminacy" refers to fact words as derived from legal theory which provide the content for legal interpretation. The "facts" in tax law are not transcendent to law; in addition, the "fact" words of tax law cannot be simply imported from the field of economics. The incremental question of the origins of theory (as discussed by Karl Popper and Albert Einstein) is also analyzed here. The theory of tax law originates with "sympathy with experience" or "intellectual love" (tr. Einfühlung) of tax law by lawyers as reflected in the special heuristics and practices of the profession. Legal theory accordingly functions in similar fashion to scientific theory where a particular legal theory can be falsified (qua Popper) or understood in pluralistic terms by incorporating auxiliary ideas.

Keywords: indeterminacy; legal science; Mach; Feyerabend; Popper.

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Table of Contents

1. Introduction

The identification of "facts" is a critical aspect of legal interpretation. If the respective "facts" to which a law will be applied are not consistently determinable then legal outcomes may be indeterminate. But, the potential for *factual* indeterminacy is not what is meant by the general usage of the term "legal indeterminacy". In the theory of positive law (particularly as relevant to tax law) "legal indeterminacy" refers to the potential for differing interpretations of a given law.[1] For example, where the legislature did not contemplate a particular situation in drafting a law the codified result may then be indeterminate in application. Both legal realists and positive law scholars allow for the potential of legal indeterminacy.[2] However, the question not normally addressed by positive legal theory is: *Where do legal "facts" come from?* Here, the reference to "facts" means the fact words necessary to identify the "facts" relevant to legal interpretation under the law.[3] As recently identified by Mikhail Antonov, Continental European positive law scholars have insufficiently addressed the pertinent question about the origin of legal "facts".[4] One proposal is that the

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1 *See* Michael Potács, *Legal Theory* (Vienna: Kluwer, 2015), at ch. V, sec. A, pt. 2 ("Even Kelsen stressed the exact opposite: 'All previously developed methods of interpretation always lead only to a possible, not a single correct result.' The assumption here is that legal positivism constitutes an objective meaning (or content) of legislation. However, this assumption does not exclude the possibility that the objective meaning of legislation is vague or indeterminate.").

2 Karl N. Llewellyn, *The Bramble Bush: Some Lectures on Law and Its Study* 26 (New York: Columbia University Press, 1930) ("Is it not obvious that as soon as you pick up this statement of the facts to find its legal bearings you must discard some as of no interest whatsoever, discard others as dramatic hut as legal nothings? And is it not clear, further, that when you pick up the facts which are left and which do seem relevant, you suddenly cease to deal with them in the concrete and deal with them instead in *categories* which you, for one reason or another, deem significant?"); Cristoph Möllers, *Towards a New Conceptualism in Comparative Constitutional Law, or Reviving the German Tradition of the Lehrbuch*, 12(3) Int'l J. Constitutional Law 603 (2014) ("Perhaps the most important element in the realist critique of legal concepts has stressed their indeterminacy. This is surprising because there is virtually nobody in the classical formalist era of 'Begriffsjurisprudenz' or common law formalism à la Langdell to have claimed that legal concepts were determinate.").

3 *See infra* part 3.

4 Mikhail Antonov, *Systemacity of Law: A Phantasm?* 3(3) Russian Law Journal 110 (2015) ("[T]he paradigm of interpretation of reality dictates, or is interrelated with, the paradigm of facts. In continental legal doctrine, the concept of a 'legal system' constitutes the predominant paradigm of interpretation, which in turn indicates that law shall be described and interpreted as a whole. Even if this approach can appear intuitively correct within the continental legal paradigm, it remains basically devoid of any serious analytical evidence."); *see also* Антонов М.В. О системности права и «системных» понятиях

content of legal "fact" words comes from the meanings of everyday language. And, since legal words have the meaning given in everyday language, positive law scholars are thus able to reject the theory of Ernst Mach (and refined by Paul Feyerabend) that words must derive their content from theory.

Some Continental scholarship says that legal "facts" correspond to everyday language, so if a positive codified law has words, the meaning of those words has some content because it is based on the everyday usage of language.[5] And, that might very well be true in criminal law, for example. Yet, the countervailing thesis given here is that tax words do not correspond to everyday language. This is particularly true of the important tax words upon which international tax planning is conducted. Tax words are not derived from everyday language and often vary in meaning from colloquial usage; for example, a "hybrid" refers to something entirely different in everyday language usage taken in comparison to the usage of tax practitioners. The practical issue can then be given with a hypothetical where a statute is codified that says "All hybrids will be taxed at a rate of 20%." One (of many) problems is the inherent issue of *factual* indeterminacy in the meaning of the word "hybrid." Even if an attempt to define the word were made in the positive law, in order to know the meaning of the word "hybrid" in situations *not* covered by the statutory definition (which in taxation often turns out to be *all* situations) one needs to be familiar with the *theory* of taxation. Mikhail Antonov (citing Wittgenstein) nicely explained the backdrop to this view as follows:

> [L]aw is not a set of natural facts that can be inspected directly. Rather, it is an "institutional fact" setting out a scheme of interpretation under which certain acts acquire a special meaning. That is why, according to MacCormick, such facts are dependent on human activity. That assignment of meaning to a social fact (i.e., a speech or behavioral act) depends on the scheme of collective intentionality in general, and, for the sphere of law, on frameworks of legal reasoning in each particular legal community.[6]

The alternative is to say that uncovered factual situations are just "null" results under the positive law. To avoid such "null" results, the determination of "facts" must come from the legal theory of taxation and cannot be derived by some combination of positive law and everyday language taken in isolation. The additional question then

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в правоведении, 1 Известия высших учебных заведений. Правоведение 24 (2014) [Mikhail V. Antonov, *On Systemacity of Law and on "Systemic" Notions in Legal Science*, 1 News of Higher Educational Institutions. Legal Studies 24 (2014)].

5 Potács 2015, at 21.

6 Antonov 2015, at 117 citing Neil MacCormick & Ota Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (Boston: D. Reidel Pub., 1986); Ludwig Wittgenstein, *Philosophical Investigations* 198 (Oxford: Wiley-Blackwell, 2009).

arises of: *Where does legal "theory" comes from?* And, notably, both Karl Popper and Albert Einstein addressed that question in identifying the origins of scientific theory.[7] The answer given here with respect to legal theory is effectively the same answer given in the theory of science. That is, legal theory comes from the intellectual love of tax law as reflected in the heuristics and specialized knowledge and practices of tax lawyers. As discussed in detail below, this is a different answer than that given by Hans Kelsen (and as further developed by positive law scholars) who said that legal theory apart from positive law comprises "sociology" or something other than pure law.

Factual indeterminacy in legal interpretation is not a "myth" in the context of tax law.[8] In the field of taxation, tax planning is often premised on *factual* indeterminacy. So, the question given here: *Where do legal "facts" come from?* is really the central point of inquiry as a matter of the theory of tax law. A common issue in international tax law is the treatment of a legal entity classifiable either as a regarded entity (i.e., a corporation) or a pass-through entity (i.e., a partnership). This sort of classification issue was at one point so significant to tax law in the United States, the Internal Revenue Service gave up on attempting to classify legal entities as a *matter of fact* and adopted the check-the-box regulations.[9] Under the check-the-box regulations, taxpayers can now elect the *factual* classification of the legal entity and thereby avoid legal indeterminacy as to entity classification. But, in the international context, legal entity classification is still a significant matter of international tax planning because the factual classification of an entity can be mismatched between jurisdictions. The seeking-out of *factual* indeterminacy is actually the primary activity of international tax planning. So, to the extent legal theory ignores *factual* indeterminacy, and focuses only on the positive law concept of general legal indeterminacy, such theory is mostly irrelevant to the actual practice of international tax law. As such, it is necessary to identify precisely the categories of indeterminacy that can arise under the law.

There are at least three forms of indeterminacy in law. Each are listed here with a brief explanation, as follows:

(i) Legal Indeterminacy (i.e., the meaning of the legal provision is subject to doubt).

Llewellyn speaks of premises "mutually contradictory as applied to the case at hand," and it is important to note that the clusters of premises he has in mind are not formal contradictories as, say, "Pacta sunt servanda" and "Pacta non sunt servanda"

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[7] Karl Popper, *The Logic of Scientific Discovery* 8 (2nd ed., Vienna: Springer, 1935; reprinted: London: Routledge, 2002) ("[M]y view of the matter, for what it is worth, is that there is no such thing as a logical method of having new ideas, or a logical reconstruction of this process. My view may be expressed by saying that every discovery contains 'an irrational element', or 'a creative intuition.'") citing Albert Einstein, *Mein Weltbild* 168 (Amsterdam 1934) [= *The World as I see It* 125 (A. Harris, tr., London: Lane, 1935)].

[8] John Gardner, *Legal Positivism: 5½ Myths*, 46(1) American J. Juris. 199 (2001).

[9] Internal Revenue Code, 26 U.S.C. § 7701 (the "check-the-box" regulations).

would be. The sort of cluster Llewellyn has in mind is not of the form "P and not-P" but of the more complex form "If P then R and if Q then not-R." Trouble arises only if "the case at hand" presents both P and Q and there is no metarule determining when to follow the "P" rule and when to follow the "Q."[10]

Here, "legal indeterminacy" means interpretational problems regarding the law itself with the fact words taken as given (perhaps derived from everyday language). This comprises the prior discussion of indeterminacy in the context of positive law and legal theory.

(ii) Factual Indeterminacy (i.e., the judge must find *the facts* to apply the positive law).

Factual indeterminacy in tax law is distinguishable from general legal indeterminacy. Indeterminate fact patterns typically arise where a finding of a separate body of law, such as corporate law, is be taken as a matter of fact for the application of tax law. Such situations are ubiquitous to tax practice and continuously arise in new and differing forms. The classic example is Original Issue Discount (OID) where a bond is issued at a discount to par value, which creates factual indeterminacy as to the characterisation of such a discount as either interest income or capital gains (each with differing tax consequences). Other frequent examples as a matter of international taxation include hybrid debt/equity arrangements, transfer pricing of intangibles, and hybrid entity mismatches.[11]

Here, "factual indeterminacy" means the application of indeterminate law taken as "fact" from the perspective of tax law. This is, in part, the denial of the positive law synthesis idea where all law is taken together as one grand structure of which tax law is one component part. In tax law, we need to determine the application of some other substantive area of the law first, then, we proceed with application of the tax law. If the other area of the law is indeterminate (as positive law scholars admit that it is), then we have factual indeterminacy in respect of the tax law. The use of factual indeterminacy in international tax planning is now so ubiquitous this aspect of indeterminacy is probably beyond reasonable question in practical terms.

(iii) "Mach/Feyerabend" Factual Indeterminacy (i.e., *the facts* (or fact words) are dependent upon *legal theory* and special language).

Taking all this into account we see that the theory which is suggested by a scientist will also depend, apart from the facts at his disposal, on the tradition in which he participates, on the mathematical instruments he accidentally knows, on

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[10] William Edmundson, *The Antinomy of Coherence and Determinacy*, 82 Iowa L. Rev. 4 (1996).

[11] Bret Bogenschneider, *Manufactured Factual Indeterminacy and the Globalization of Tax Jurisprudence*, 4(2) Univ. College London J. Law & Juris. 250, 251–252 (2015); *see also* Frans Vanistendael, *Judicial Interpretation and the Role of Anti-Abuse Provisions in Tax Law* in *Tax Avoidance and the Rule of Law* 132 (G.S. Cooper, ed., Amsterdam: IBFD, 1997) ("The tax avoidance that is considered problematic typically occurs when factual situations are moulded in legal forms that bear less tax than would alternative forms.").

his preferences, on his aesthetic prejudices, on the suggestions of his friends, and on other elements which are rooted, not in facts, but in the mind of the theoretician and which are therefore subjective… the freedom of theorizing granted by the indeterminateness of facts is of great methodological importance.[12]

Here, "Mach/Feyerabend factual indeterminacy" refers to the origin of facts in the theory held by the practitioner or judge. So, if the legal theory changes then, by necessity, the "facts" also change. There is no transcendent idea of "facts". This is also to say that the meaning of facts is indeterminate.

The remainder of the paper is organized as follows. First, the origin of the indeterminacy thesis is explored in the context of tax law. This frames the importance of the issue to the field of legal theory particularly given that various tax scholars have proposed importing the meaning of words from the field of economics. Second, the question: *Where do legal "facts" come from?* is explored in detail. The conclusion based on Mach/Feyerabend is that facts come from theory. Third, the question: *Where does legal "theory" come from?* is explored. The corollary issue is taken from Popper/Einstein that theories arise from the German word *Einfühlung* (translated as "intellectual love"). Here, the idea is the heuristics (i.e., specialized language) of the tax profession constitute the theory which gives rise to the "factual" content of words. Finally, the method of replacing legal theories is discussed in the context of tax law.

2. The Indeterminacy Thesis

Tax law is derived from many sources. This is true both in Europe and the United States. And, that is simply to say in most countries an underlying tax code codifies a system of positive law, but the tax law also includes principles as determined by courts or the taxing authority in respect of particular cases. In the modern era, this observation is increasingly important for Europe as the common law tax rulings of the European Court of Justice now overlay sharply positive law traditions in much of Continental Europe;[13] in the United States, extensive Treasury regulations are combined with broad enforcement discretion by the taxing authority, which is more characteristic of an inquisitorial legal system.[14] The result is an extraordinary diversity

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[12] Paul Feyerabend, *Realism, Rationalism and Scientific Method: Philosophical Papers Volume 1* (Cambridge: Cambridge Univ. Press, 1981); Paul Feyerabend, *Knowledge, Science and Relativism: Philosophical Papers Volume 3* 12 (J. Preston, ed., Cambridge: Cambridge Univ. Press, 1999) ("A special feature of Mach's philosophy is that science explores all aspects of knowledge, 'principles' as well as theories, 'foundations' as well as peripheral assumptions, local rules as well as the laws of logic; it is an autonomous enterprise, not guided by ideas imposed without control from its own ongoing process."); *see* Ernst Mach, *Die Analyse der Empfindungen und das Verhältnis des Physischen zum Psychischen* (5th ed., Vein, 1906).

[13] *See* Nial Fennelly, *Legal Interpretation at the European Court of Justice*, 20(3) Fordham Int'l L. J. 656 (1996).

[14] *See* Brian Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56(1) Florida L. Rev. 1 (2004); Bret Bogenschneider, *Foucault and Tax Jurisprudence*, 8(1) Wash. U. Juris. Rev. 59 (2015).

of legal thought as applied within the context of international tax law. Any reference to legal indeterminacy means that with this composite jurisprudence of taxation in the practice of international tax law outcomes are often unpredictable.[15]

The legal training of tax lawyers is highly relevant to tax jurisprudence since such training will typically be undertaken either predominantly from a positive law or common law tradition thus reflecting ideas of legal realism. And, as was famously pointed out by William Edmundson, the positive law tradition tends to favor *determinative* outcomes whereas the tradition of legal realism tends to favor *coherent* outcomes.[16] Edmundson explained as follows: "Two appealing ideas about law turn out to be in conflict. The first idea is that the law is or should be *coherent*... the law should or does make sense as a whole, hang together, or fit together… The second idea is that the law is or should be *determinate*… fixed and unambiguous."[17] Many doctrinal debates between tax lawyers trained in the various traditions, such as the role of GAARs (general anti-avoidance rules) reflect at least in part simply a preference for *determinacy* over *coherence*, or vice versa.[18] Tax law is often taught by tax practitioners, and at least as an historical matter, this turns out to be significant because it reflects the distinction between the theories of legal realism of Karl Llewellyn[19] and empirical positive legal science of Christopher Langdell[20] (taken here in parallel to the German-language tradition of Hans Kelsen).[21]

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15 *See* Ken Kress, *A Preface to Epistemological Indeterminacy*, 85 Nw. Univ. L. Rev. 1340 (1990); Chris Kutz, *Just Disagreement, Indeterminacy and Rationality in the Rule of Law*, 103 Yale L. J. 997 (1994); Nikolas Rajkovic, *Rules, Lawyering, and the Politics of Legality: Critical Sociology and International Law's Rule*, 27(2) Leiden J. Int'l L. 331 (2014).

16 Edmundson 1996, at 8.

17 *Id.* at 1–2; Michael Waibel, *Demystifying the Art of Interpretation*, 22(2) European J. Int'l L. 571, 576 (2011) ("Interpretation in international law is a legislative function… counterbalanced by the need for positivism to provide a measure of legal certainty in an international legal order often characterized by a lack of consistency, clarity, and completeness.").

18 *See* Judith Freedman, *Interpreting Tax Statutes: Tax Avoidance and the Intention of Parliament*, 123 Law Quart. Rev. 53 (2007); Judith Freedman, *Improving (Not Perfecting) Tax Legislation: Rules and Principles Revisited*, 6 British Tax Review 718 (2010); John Avery Jones, *Tax Law: Rules or Principles?* 6 British Tax Review 580 (1996).

19 Edmundson 1996, at 4 ("Llewellyn is making the simple point that deductive reasoning proceeds from premises and, in law, disputed cases typically involve a dispute as to which of two competing major premises should be given effect.").

20 *See* Michael H. Hoeflich, *Law and Geometry: Legal Science from Leibniz to Langdell*, 30 American J. Legal History 95 (1986); Thomas Grey, *Langdell's Orthodoxy*, 45 Pitt. L. Rev. 1 (1983); Nancy Cook, *Law as Science: Revisiting Langdell's Paradigm in the 21st Century*, 88(1) N. Dak. L. Rev. 21 (2012).

21 Hans Kelsen, *The Pure Theory of Law* (Knight, tr., 2nd ed., Berkeley: University of California Press, 1967); Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 Harv. L. Rev. 44 (1941); Jochen von Bernstorff & Thomas Dunlap, *The Public International Law Theory of Hans Kelsen* (Cambridge: Cambridge University Press, 2011); *see also* Cook 2012, at 29–30 ("The basic principles underlying Langdell's pedagogy have been simply stated: Law involves a scientific analysis able to reveal the life-giving principles of the common law. This science of law could be advanced only by specially trained researchers – not practitioners – who were committed to disciplined analysis… Like other sciences, law should be pursued under circumstances most conducive to scientific thought, viz., in a university rather than in the hurly-burly world of law offices and courts where law is learned, at best, unscientifically.").

Notably, in his advocacy for law as empirical positive legal science Langdell set out to exclude law practitioners from legal scholarship and instruction entirely.[22]

To set the table on indeterminacy in tax law, let us first consider a general description of legal instruction in international tax law. If you were to sit in on a course in international tax law in nearly any country chances are the professor would at some point begin to draw intricate diagrams comprised of carefully-labeled boxes and circles on the board in the classroom, usually containing sets of arrows or lines connecting the boxes and circles. But, then, something else more important happens: From these diagrams the professor will begin to talk about *tax law* as applied to the boxes and circles; notably, the applicable *tax law* is mentioned only after the boxes, circles and arrows appear on the board. If the course is a matter of tax treaty interpretation the professor will refer to the articles of the applicable tax treaty as *law*. The law can be applied to the boxes and circles in a determinative or "correct" way and the purpose of the legal instruction is to explain that determinative legal analysis to reach the correct answer. However, problems arise where various provisions of law might seem to simultaneously apply to a certain set of boxes and circles. The professor will normally explain how logically to determine which provision of law to apply in that situation based on a certain method of legal interpretation. A test for the tax course will then ultimately be administered to determine if the student was able to apply the proper article of the tax treaty under a new and previously unknown fact pattern, for example. At least in European tax circles, the positive law instruction will usually also involve a brief mention of the countervailing approach of "normative" legal analysis.[23] This is presented as the wrong way to do legal interpretation (i.e., to allow "policy" considerations to enter into the legal analysis). The Kelsenian argument reiterates that the delegates at the Vienna Convention precluded the consideration of "policy" analysis from the international interpretation of treaties. Malgosia Fitzmaurice has published a considerable number of articles emphasizing this distinction between "policy" and "law," with each article citing Sir G. Fitzmaurice with the famous quote:

> This, of course, however excellent, is not law but sociology: and although the aim is said to be "in support of search for the genuine shared expectation of the parties," it would in many cases have – and is perhaps subconsciously designed to have – quite a different effect, namely, in the guise of interpretation, to substitute the will of the adjudicator for that of the parties.[24]

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22 Cook 2012, at 29–30.

23 *See* George G. Fitzmaurice, *Vae Victis or Woe to the Negotiators! Your Treaty or Our "Interpretation" of It*, 65(2) American J. Int'l L. 372 (1971).

24 *See, e.g.*, Malgosia Fitzmaurice, *Review of Recent Books on International Law* (R.B. Bilder, ed.), 104(2) American J. Int'l L. 329 (2010); Malgosia Fitzmaurice, *Book Review: Richard Gardiner, Treaty Interpretation*, 20 European J. Int'l L. 952 (2009).

So, every *positive law*-trained tax lawyer ought to know by now *not* to use the New Haven School of legal interpretation because it ostensibly constitutes a violation of the rule of law.[25] Prebble has famously taken this argument to an even further extreme by saying that tax words must correspond directly to natural law or economics to have any meaning, as everything else is "normative" or incomprehensible; "[T]he problem is that lawyers' and accountants' distinction between income and capital is not a distinction that is fundamental to natural law, nor to economics, for that matter."[26] Prebble takes this as true because any legal outcome whatsoever could result from such "normative" interpretation, thus representing a legal outcome the drafters of the tax code did not intend. For now, suffice to say, there is the potential for other methods of legal interpretation that might better account for the indeterminacy of law.[27] As explained in detail below, this can be illustrated by reference to Ernst Mach's and Paul Feyerabend's description of science where a parallel issue is described in terms of positive science.

The problem then arises in setting out to actually advise a client in legal practice (say, a multinational engaged in tax planning).[28] On the instance of first setting out to advise the client, the process typically plays itself out as follows: (i) The new lawyer says to the client: "Please give me the diagram of boxes, circles and arrows and I'll give you the correct legal answer on how much taxes you should pay." The client then replies, "I don't have any diagram, that's exactly why I called you. I want you to construct the diagram so that I don't have to pay taxes on the upcoming dividend payment." The new lawyer must then begin to go about making the diagram and quickly discovers that the client must not be found to be in the standard *factual*

[25] Julian D. Mortenson, *The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History?* 107 American J. Int'l L. 780, 781 (2013) ("Rather, the delegates were rejecting Myres McDougal's view of treaty interpretation as an ab initio reconstruction of whatever wise interpreters might view as good public policy. They objected to the purpose for which New Haven School interpreters wanted to use travaux – not to drafting history as a source of meaning per se. To the contrary, the drafters repeatedly reiterated that any serious effort to understand a treaty should rely on a careful and textually grounded resort to travaux, without embarrassment or apology.").

[26] John Prebble, *Why is Tax Law Incomprehensible?* 4 British Tax Review 380, 388 (1994) ("But the tax lawyer knows that the ultimate answers in taxation can never be found. It is the province of most legal scholarship to build a coherent intellectual discipline on foundations of tested and true principle. The tax lawyer tries to build a coherent intellectual discipline on foundations of sand and clay. That is the real challenge."); *but see* Bret Bogenschneider, *Wittgenstein on Why Tax Law is Comprehensible*, 252(2) British Tax Review (2015); *see also* Christian Zapf & Eben Moglen, *Linguistic Indeterminacy and the Rule of Law: On the Perils of Misunderstanding Wittgenstein*, 84 Georgetown L. J. 485 (1996).

[27] *See* Nancy Levit, *Listening to Tribal Legends: An Essay on Law and the Scientific Method*, 58(3) Fordham L. Rev. 263, 277–79 (1989) ("Classical analysis, according to the realists, failed to account for the indeterminacy of legal rules and the manipulability of legal reasoning. As a theory of science, classical analysis did not adequately account for changes in law.").

[28] *See* Jeffrey Waincymer, *The Australian Tax Avoidance Experience and Responses: A Critical Review* in *Tax Avoidance and the Rule of Law* (G.S. Cooper, ed., Amsterdam: IBFD, 1997) ("University law courses tend to underplay the importance of facts. Students are usually encouraged to concentrate on appellate court decisions and discern principles from them. However the nature of legal practice in general and the tax avoidance area in particular show how fundamental fact finding is to the judicial function.").

situation as then taxation will presumably result. The client is essentially authorizing the tax lawyer to structure the facts so as to be indeterminate by falling outside the typical "valid legal norm" under a set of facts. Of course, this indeterminacy planning is what international tax planning is all about.

Any easy questions (i.e., where a tax treaty can be simply applied to avoid taxation) without re-structuring the facts are not the predominant part of international tax practice. Gardner described the importance of the "null" (i.e., no valid legal norm on certain facts) result as follows: "If judges are professionally bound to decide cases only by applying valid legal norms to them, the argument goes, then there are necessarily some cases that they should refuse to decide, for there are necessarily some cases not decidable only be applying valid legal norms."[29] Gardner then describes these as "gaps" in positive law adjudication (the idea of which is also applicable to tax planning). In international tax law characterized by manufactured indeterminacy planning by multinational firms the "gaps" between "valid legal norms" is effectively all international tax planning. So, as a practical matter, any easy questions are quickly resolved, and tax lawyers are working almost entirely on "gap" matters in tax planning. Accordingly, all of the prior sets of boxes, figures and arrows previously contemplated by the new lawyer do not describe the set of facts the lawyer now encounters in the actual practice of law.

So, what to do? At this point, if the problem involves tax treaty interpretation the new lawyer might go and look to the Vienna Convention on the Law of Treaties and finds it necessary to determine original intent as that is the determinative factor in treaty interpretation under the Vienna Convention. If the new lawyer is diligent she might also find various books or law journal articles that say how exactly to interpret Articles 31 and 32 of the Vienna Convention.[30] This might include, for example, situations where the intent seems to have changed, or even to contemplate a situation where the parties did not have a common intent when the treaty was signed. Various commentators say if more than one article applies at the same time we apply the "crucible" approach where everything gets mixed together and then out from the crucible "pops" the determinative result (much like a piece of bread "pops" out of the toaster oven).[31] But, this approach is strange because the fact pattern described here is entirely novel and it could not have been contemplated by the lawmakers in drafting the law.

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[29] Gardner 2001, at 212.

[30] Ulf Linderfalk, *Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making*, 26(1) European J. Int'l L. 169, 175 (2015) ("Despite the existence of Articles 31–33 of the VCLT, to some extent, issues of interpretation still have to be resolved at the discretion of the law-applying agents themselves. The crucial question is whether this makes treaty interpretation an art and not science. As I will argue in the following section, the answer to this question inevitably depends on the approach taken by each and every law-applying agent in disposing of the discretion given to her.").

[31] Fitzmaurice 2009, at 952 ("The ILC named this system of interpretation a "crucible" approach to treaty interpretation which it describes as follows: "[a]ll various elements, as they were present in any given case, would be thrown into the crucible, and their interpretation would give the legally relevant interpretation."); Fitzmaurice 2010, at 330.

Nonetheless even if we use the "crucible" approach this still does not render a strictly "positive" result at least from the perspective of the new lawyer. As far as the new lawyer is concerned, there was substantial doubt as to the legal outcome in her mind when she first encountered the problem. This causes a crisis for the new lawyer as she begins to realize that there is no "positive" outcome to the legal question at issue; the new lawyer is "free to choose" (as Jean-Paul Sartre said) from a variety of potential outcomes in advising the client on questions of positive tax law.[32] But the new lawyer does not want to be "free to choose" in classic Sartrean terms. She does not want to tell the client that there is not a determinative legal outcome to the question at bar. The law is supposed to be determinate in application to "facts"; the legislature gave its pronouncement on all questions of law and that ought to be the end of the matter. And, this is merely to observe the tax law is not *determinate*. But, the *common law*-trained lawyer also suffers what might be called a reverse-"existential crisis" particularly in tax treaty interpretation. That is, in the case of the strange "null" result (e.g., double taxation, or, double non-taxation) – where a "null" means the treaty does not apply to the particular "facts" as given. For the common law-trained lawyer the "null" legal result is utterly baffling. The very purpose of common law is to resolve a novel legal problem in the ostensibly best manner; here, there is no potential to legally resolve a problem under the terms of the treaty at all. The lawyer is supposed to arrive at the best resolution of the legal problem.[33]

We are now in a position to respond to Fitzmaurice (in a partial defense of the American system of legal interpretation) as it is premised on resolving issues of both legal and factual indeterminacy. Prior English-language discussions of "law-as-sociology" either disregard the potential for indeterminate outcomes entirely, or refer to the first problem of "legal indeterminacy" and not "factual" indeterminacy. Kelsen's discussion of "normative" legal interpretation is accordingly incomplete because the theory of legal realism as given by Llewellyn deals in part with the second problem of factual indeterminacy (where the judge must find the facts in order to apply the positive law).[34] Furthermore, at the end of the Nineteenth century legal scholars in the United States first adopted the law as positive science method directly from German legal institutions;[35] this was inspired by Langdell who was the Dean at Harvard Law School at that time. Langdell used the positive legal science methodology (including

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[32] *See Jean-Paul Sartre: Basic Writings* (S. Priest, ed., New York: Taylor & Francis, 2001).

[33] *See* Kutz 1994 citing Ronald Dworkin, *Law's Empire* 65, 271–275 (Cambridge: Harvard University Press, 1986).

[34] Christoph Kletzer, *Absolute Positivism*, 42(2) Netherlands J. Legal Phil. 89 (2013) ("The validity and the content of the positive law cannot be derived from moral premises, then positivism present itself as a negative or relative position, i.e., as the rejection of certain normative relations of derivation. Positivism, understood in this way, first and foremost tells us what law is not.").

[35] Cook 2012, at 35 ("The German system, from which Langdell borrowed, as well as other civil law systems, still approaches law as a set of fundamental norms which, by deduction, govern operative facts.").

the common law) to convince other scholarly disciplines within Ivy League institutions that legal studies was a *scientific* discipline; the positive law doctrinal method of case law illustrated that the subject of law was really scientific and worthy of being included in the university curriculum. However, after the legal community succeeded in incorporating legal studies into the university curriculum this method of legal science was quickly abandoned. This was not done to abandon the "rule of law"; rather, the method was abandoned because it was not found to yield determinative, predictable, results since every case seemed to involve a new set of *facts*.

Accordingly, we need to begin any legal analysis by asking the question: *Where do the facts come from?* The "facts" that the lawyers or judge chooses to cognize are based on legal language and often determine the outcome of legal cases as a practical matter.

3. Where Do Legal "Facts" Come From?

In the prior section the link between legal analysis and linguistics was formally given; legal "facts" come from language (i.e., linguistical methods) and language is to varying degrees malleable which allows legal words to function on an ongoing basis; Feyerabend wrote: "[A] language does not change by itself. It is a product of the human beings who speak it, and, therefore, it reflects the ideas, the views, and also the behaviour of those human beings."[36] In this respect, Ulf Linderfalk has very recently applied a linguistic approach to treaty interpretation under the Vienna Convention.[37] In reviewing Linderfalk's theory, however, Malgosia Fitzmaurice skeptically pointed out that linguistic meanings are not normally investigated in treaty interpretation;[38] furthermore, Linderfalk did not explain why he was engaged in linguistical analysis in treaty interpretation.[39] The reason for linguistic analysis as explained by Feyerabend is that such is necessary for positive law interpretation because a true "stability thesis" for any positive law is unworkable in practice;[40] as

[36] Feyerabend 1999, at 43.

[37] Linderfalk 2015, at 171 ("By the legally correct meaning of a treaty, international lawyers generally understand the communicative intention of the treaty parties – that is to say, the meaning that the parties intended the treaty to express.").

[38] Fitzmaurice 2010, at 332 ("The VCLT's textualism is also rejected by Linderfalk in On the Interpretation of Treaties. Instead, he adopts an approach based on linguistics and pragmatics, using terms such as 'applier' or 'utterer,' which are not commonly used in relation to treaty interpretation.").

[39] Linderfalk 2015, at 172 ("The communicative intention of the treaty parties can only be assumed. Thus, the interpretation of a treaty is no different than the understanding of any verbal utterance produced by a person or group of persons, whether orally or in writing. As emphasized by modern linguistics (pragmatics), an utterance can be understood only on the assumption that whoever produced it acted rationally.").

[40] Feyerabend 1999, at 40 ("[O]bservation statements are statements which can be explained without reference to theories and whose meaning is also independent of changes in the 'theoretical superstructure'… I call the claim that the meaning of observation statements is independent of change of theories the stability thesis.").

he says, pure stability will cause the positive law terminology applied to become subjective in application. Feyerabend wrote: "We are forced to say (as is admitted by all positivists from Berkeley to Ayer) that our elements turned out to be subjective: positivism sooner or later leads to subjectivism."[41] In simple terms, even the purest of positive law systems has to bend (or expand or contract) a little every time it gets applied to a new situation; even if two factual situations are held to be identical the meaning of the words has thus shifted to account for this equivalency. Likewise, Feyerabend's point in logical terms is akin to Llewellyn's in that if the positive law meant previously only P and Q (with no other implications), a determination that it either does or does not entail R must be subjective.[42] Accordingly, Linderfalk is correct in that the shifting of the legal meaning of words is relevant to positive law interpretation; it represents the origin of "facts" into the context of legal theory.

The objective in identifying where "facts" come from in positive tax law is to try to move beyond Prebble's idea that tax law should take its "facts" directly from a transcendent idea of sense-impression-words (tr. *empfindungen*) applicable to all human observations. In economic theory the link from sense impression to empirical knowing is Jeremy Bentham's familiar theory of utility; the field of econometrics has further increasingly moved toward the idea of science as given by Francis Bacon.[43] Feyerabend of course rejected Bacon's approach in the context of the philosophy of science.[44] He wrote:

> The principle of phenomenological meaning as well as the principle that descriptions are uniquely determined by facts will appear to be correct and Bacon's philosophy will appear to be the only reasonable one… But this interpretation is not conferred upon them because they "fit", but it is an essential presupposition of the "fitting". This is easily seen when considering

41 Feyerabend 1981, at 35.

42 This is setting aside the "null" result of tax treaty interpretation discussed above.

43 Feyerabend 1981, at 42 ("According to the realistic interpretation, a scientific theory aims at a description of states of affairs, or properties of physical systems, which transcends experience not only insofar as it is general (whereas any description of experience can only be singular), but also insofar as it disregards all the independent causes which, apart from the situations described by the theory, may influence the observer or his measuring instrument."); *see also* Feyerabend 1981, at 212 ("First we find the facts (or, 'phenomena', in Newton's terminology). Then we derive laws. Finally, we devise hypotheses for explaining the laws. Hypotheses and facts must be kept apart. It is not the imagination of the theoretician but the skill of the experimenter that determines what counts as a fact and how the facts are to be presented."); Sir Francis Bacon, *Novum Organum* 50 (J. Devey, ed., 1902).

44 Feyerabend 1999, at 99, 105 ("As is well known, there are empiricists who demand that science start from observable facts and proceed by generalization, and who refuse the admittance of metaphysical ideas at any point of this procedure. For them, only a system of thought that has been built up in a purely inductive fashion can claim to be genuine knowledge… Bacon and Descartes are quite explicit about their enterprise and they oppose common sense from the outset.").

> signs whose interpretation has been forgotten; they no longer fit the phenomena which previously evoked their acceptance.[45]

Feyerabend also draws the general idea that a fully stable positivist system is totally content free (i.e., it does not cover any situation at all as a theoretical matter, as is often observed in the actual practice of tax law). He wrote: "[I]t is a theory or a general point of view which has been conserved because it appears to be phenomenologically adequate. The price we have to pay if we proceed in this way is that the chosen theory will finally be completely void of empirical content."[46] And, this links the current discussion back to the introduction of the new tax lawyer who encounters a client in legal practice. The positive legal knowledge the new lawyer qua scientist thought she had would not *in actual* practice cover the real legal situation. So, positive "facts" (whether in positive science or positive law) come from the malleability of language. The question then is how to incorporate a degree of malleability into positive legal language to avoid a subjective meaning of words.

a. Feyerabend's "observational language" versus everyday language

New language formation can also be divided into borrowing from other disciplines versus created in a "local" context. Positivist scholars in tax law usually have in mind the particular defining of tax words; whereas Prebble has in mind borrowing tax words from natural law or economics. In either case, "[t]his procedure quite obviously presupposes that the meaning of the observational terms is fixed independently of their connection with theoretical systems."[47] The Mach/Feyerabend thesis of factual indeterminacy is the rejection of the claim given in the prior sentence. As a matter of positive science (here positive law) such linguistics become the "observation method" of language to arrive at facts. Feyerabend wrote:

> [L]anguage must satisfy in order to be acceptable as a means of describing the results of observation and experiment. Any language satisfying those conditions will be called an observation language… the condition of decidability… Secondly, it is demanded that in the appropriate situation the associated series should be passed through fairly quickly. This we call the condition of quick decidability.[48]

The immediate question is then how to define what positive law legal "interpretation" actually means. Legal "interpretation" of course forms the basis for

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45 Feyerabend 1981, at 26–27.

46 *Id.* at 35.

47 *Id.* at 53.

48 *Id.* at 18.

nearly all positive law tax analysis. If positive law applies a fixed set of legal terms such "interpretation" ought not to be necessary; the question might be posed as whether "interpretation" is intended to mean something like "translation". Feyerabend specified that legal interpretation actually means the specification of additional conditions to applying "observational language." He wrote: "Any complete class of such further conditions will be called an *interpretation*. A particular observation language is completely specified by its characteristic together with its interpretation."[49]

And, Feyerabend appears to be exactly correct if we look to Linderfalk's theory of treaty interpretation; Linderfalk expressly began to specify linguistical rules for positive law "interpretation" (and listed them as purported interpretational "rules"). Linderfalk wrote:

> Rule 1: If a treaty uses elements of conventional language (such as, for instance, words, grammatical structures, or pragmatic features), the treaty shall be understood in accordance with the rules of that language. Rule 2: If one of the two possible ordinary meanings of a treaty provision makes a part of the treaty redundant, whereas the other ordinary meaning does not, then the latter meaning shall be adopted. Rule 3… [and so on].[50]

This setting out to identify the "rules" of positivist legal "interpretation" leads directly to the proposal for "everyday language" where the transcendent rules will be layered over the transcendent facts. In the terms of Feyerabend, as explained in detail below, Michael Potács said that everyday language is the applicable "observational language" for positive law.[51] However, as discussed in detail below Feyerabend expressly rejected for positive science what Potács proposed for legal theory. Feyerabend wrote:

> At this stage is seems appropriate to make a few remarks about the role of everyday language in scientific practice. It has been frequently asserted that the language in which we describe our surroundings, chairs, tables and also the ultimate results of experiment (pointer-reading) is fairly insensitive towards changes in the theoretical "superstructure." It seems somewhat doubtful whether even this modest thesis can be defended; first, because a uniform "everyday language" does not exist. The language used by the "everyday man" (whoever that may be) is a mixture of languages, as it were,

[49] Feyerabend 1981, at 19.

[50] Linderfalk 2015, at 174.

[51] Feyerabend 1999, at 21 ("[A]n observational concept is a concept which is constructed so that a singular statement which contains only this concept is not only arrived at immediately, without reflecting on it at all, but is also a statement which does not require further justification other than pointing out that a certain observation was made. Observation statements are certain, not hypothetical.").

> i.e., it is a means of communication which has received its interpretation from various and often incompatible and obsolete theories. Secondly, it is not correct that this mixture does not undergo important changes: terms which at some time were regarded as observational elements of "everyday language" (such as the term "devil") are no longer regarded as such.[52]

Feyerabend further rejected even the idea that "everyday language" could allow for "interpretation". He continued:

> It also becomes clear that the analysis of everyday language cannot provide us with an interpretation either.
>
> On the basis of the foregoing discussion we may now tentatively put forward our *thesis I: the interpretation of an observation language is determined by the theories which we use to explain what we observe, and it changes as soon as those theories change*.[53]

To next apply this philosophy of science to legal theory, Potács declined to apply the Mach/Feyerabend thesis, and argued instead that legal language is always imbued with theory because the legal words correspond to everyday language. Potács argument is that legal words are not generally ascribed different meanings other than ordinary meanings. Potács identified the importance of this line of reasoning in the context of legal theory. He wrote:

> This situation is referred to… as "transcendence of perception" that there is no uninterpreted visual sense-data, no "facts" (empfindungen: translated as "sense data") for the purposes of Mach. What sets legal analysis apart is that it is "always given," law is already interpreted theoretically, decrypted, imbued with hypotheses. The theories in the empirical sciences as the natural or social sciences (economics and sociology) is only a continuation of this practice of everyday knowledge.

But, that claim is obviously contrary to that given by Prebble in the context of tax law, where Prebble claimed that the words of tax law were so far removed from ordinary meanings that it rendered the tax law incomprehensible to lay persons.[54] Bogenschneider subsequently gave the Wittgensteinian response to Prebble that the meaning of tax words was determined by the heuristics of the tax profession. But, this also constitutes a *de facto* rejection of Potács argument for the positive law

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52 Feyerabend 1981, at 30–31.

53 *Id.* at 31.

54 Prebble, *supra* note 26.

in the context of legal theory because the claim is that the "foreign language" of tax words may not be understandable to laypersons. The next point of investigation then is if tax "facts" do not come from everyday language and instead come from legal theory, then *where does "legal theory" come from?*

4. Where Does Legal "Theory" Come From?

The Mach/Feyerabend thesis is that "facts" are not separable from theory.[55] The origin of "facts" is legal theory including positive legal science (as discussed in further detail here). Therefore, it is potentially fruitful to discuss the origin of scientific theory as a matter of the philosophy of science since this parallels the origin of legal theory and the origin of "facts." However, in the first place there cannot truly be a wholesale importation of words from the field of economics into taxation without substituting also the theory of economics for the theory of taxation. Rather, the "facts" (and also the meaning of words) are malleable and determined by changes in legal theory; "[The] argument against meaning invariance is simple and clear. It proceeds from the fact that usually some of the principles involved in the determination of the meanings of older theories or points of view are inconsistent with the new, and better, theories."[56] Simply put, as legal theory changes this also changes the words of tax law.

The practice of setting out specialized (i.e., "stable" word meanings) in positive-law tax research may limit the usefulness of that research to future scholars if the meaning of words *necessarily* shifts. However, the use of defined words is a tacit rejection of the everyday language meaning in the context of taxation. New legal ideas that shift the meaning of words are not provide by "facts", but by legal theory. Feyerabend wrote: "Interpretations of this kind could not possibly emerge from close attention to the 'facts.' It follows that we need a non-observational source for interpretations. Such a source is provided by (metaphysical) speculation which is thus shown to play an important role within realism."[57]

Nonetheless, some tax words are given in ordinary language. This dichotomy within tax law represents the further distinction between "common" and "abstract" theories as explained by Feyerabend (given here as the difference between Potács' conception of public law and Prebbles' conception of tax law). Feyerabend discussed further as follows:

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55 Feyerabend 1999, at 16 ("A concept is a theoretical concept if in order to determine the truth-value of a singular statement which contains it, theories, in addition to observations, are also required. To be brief and imprecise, an observation statement is accepted (or rejected) by merely looking (or listening, etc.). A theoretical statement is accepted or rejected by looking and thinking (calculating).").

56 Feyerabend 1981, at 82.

57 *Id.* at 36.

> What has just been said applies most emphatically to the relation between (theories formulated in) some commonly understood language and more abstract theories. That is, languages such as the "everyday language," that notorious abstraction of contemporary linguistic philosophy, frequently contain (not explicitly formulated, but implicit in the way in which its terms are used) principles which are inconsistent with newly introduced theories, and they must therefore either be abandoned and replaced by the language of the new and better theories even in the most common situations.[58]

However, if tax law is more consistent with Potács' conception of everyday language as imbued within legal theory, then we would need to observe tax terminology that has a colloquial meaning. The Prebbles also object to any malleability because they see a shift in word meanings as a violation of the rule of law;[59] that issue was also addressed by Craig Latham in response to Prebble along pragmatic lines.[60] To simply continue with Bogenschneider's helpful example of "Original Issue Discount" (OID) in the tax context – referring to a bond issued below par value – this does not at all comprise ordinary or everyday language usage imbibed with theory. Rather, the words "original issue discount" are meaningless outside the tax context; furthermore, in parallel fashion the concept to which OID refers, i.e., "discounted bond" are meaningless in the context of taxation without reference to the tax concept of OID. The point is, the special tax words "OID" actually are at once the legal theory but the words are not ordinary; this is worth repeating: *Special tax words are imbued with legal theory but the words do not arise from everyday language*.

The conclusion that special tax words do not arise from ordinary language changes the prior results of general legal theory because Potács' rejection of Ernst Mach on the grounds of everyday knowledge falls apart. So, as explained by Feyerabend in the context of positive science, theory is *necessary* in order to arrive at the meaning of words; "theories shape and order facts."[61] Feyerabend wrote: "[F]actual adequacy can be asserted only after it has been confronted with alternatives whose invention and detailed development must therefore precede any final assertion of practical success and adequacy. This, then, is the methodological justification of a plurality of theories."[62]

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58 Feyerabend 1981, at 78.

59 Rebecca Prebble & John Prebble, *The General Anti-Avoidance Rule and the Rule of Law* in John Prebble, *Ectopia, Formalism, and Anti-Avoidance Rules in Income Tax Law* in *Prescriptive Formality and Normative Rationality in Modern Legal Systems* (W. Krawietz et al., eds., Berlin: Duncker and Humblot, 1994).

60 Craig Latham, *A Tax Perspective on the Infrastructure of Regulatory Language and a Principled Response*, 1 British Tax Review 65, 73 (2012).

61 Feyerabend 1999, at 183.

62 *Id.* at 80.

An alternative source of legal theory other than setting out definitions of word or importing tax words from economics (qua Prebble) is accordingly required for tax law which is of course legal theory. Legal theory is hence strictly necessary for taxation; and, it will not suffice to simply set out a set out a series of "definitions" of positive terms at the beginning of a tax research paper. An entirely "stable" set of defined terms are meaningless because they are outdated as soon as they hit the page. This conclusion is strikingly reinforced in the context of tax law because multinational firms are constantly "manufacturing" new ideas (i.e., "facts") to throw at positive law theory. So, the theory of positive law must be highly malleable and not fixed in order to withstand this "manufacturing" of words in the context of taxation. Mach and Feyerabend argue the origins of legal theory are in an historical and pluralistic account of theory. Preston explained:

> Pluralism, [Feyerabend] assures us, affords us our best chance of securing knowledge… Knowledge so conceived is an ever-increasing ocean of alternatives, each of them forcing others into greater articulation, all of them contributing, via this process of competition, to the development of our mental faculties.[63]

The pluralistic idea of science as proposed by Feyerabend allows for science in the context of indeterminacy where legal theories are taken as in aggregate comprising a composite, pluralistic, view. Knowledge of as many competing legal theories as possible is therefore desirable for the lawyer or legal scholar since "facts" are derived from legal theory.

5. Legal Science and Indeterminacy

The thesis that tax law is "incomprehensible" was given by Prebble in a series of articles and lectures delivered at Vienna University.[64] Prebble develops numerous specific cases where tax law fails to correspond to the underlying economics of the case; with the lack of correspondence, Prebble then arrives at the conclusion that tax law is "incomprehensible" and further violates the "rule of law" because it is not determinative in positive law terms.[65] However, the heuristics of tax law are indeed *knowable* to tax lawyers engaged in the practice of law.[66] Hence, incoherency does

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[63] Preston citing Feyerabend at 5.

[64] *See* Prebble, *supra* note 26; John Prebble, *Ectopia, Tax Law and International Taxation*, 5 British Tax Review 383 (1997).

[65] Prebble & Prebble 1994, at 367.

[66] This view of the science of tax law is similar to that given by Prof. Nagel for positive science. Feyerabend 1999, n. 23, at 83 ("Professor Nagel… [wrote] 'the expressions peculiar to a science will possess

not preclude positive knowing particularly with the benefit of hindsight. Prebble sets out to correspond tax law to economic reality, which he described as the "physical facts of the world."[67] This becomes an analogous approach to what Feyerabend termed: "Naive realis[m]. Many scientists and philosophers belong to this group [and] assume that there are certain objects in the world and that some theories have managed to represent them correctly."[68] The search is for a "pure" theory of law (in Kelsenian terms) that also corresponds to economic "reality" which Prebble refers to as the "physical facts" or "natural law"; that is, a factual description of taxation as analogous to "[s]cientific realism [representing] a general theory of (scientific) knowledge… assum[ing] that the world is independent of our knowledge-gathering activities and that science is the best way to explore it."[69]

In the context of the philosophy of science, Feyerabend discussed the same issue in reference to the positive theory of physics given by Albert Einstein. Einstein's version of positive scientific realism looks like Prebble's vision of tax law as a Kelsenian version of positive economic realism. Einstein, as quoted by Feyerabend, wrote as follows:

> Out of the multitude of our sense experiences we take, mentally and arbitrarily, certain repeatedly occurring complexes of sense impressions… and correlate to them a concept – the concept of a bodily object. Considered logically this concept is not identical with the totality of sense impressions referred to; but it is a free creation of the human (animal) mind. On the other hand, this concept owes its meaning and its justification exclusively to the totality of the sense impressions we associate with it. The second step is to be found in the fact that, in our thinking (which determines our expectations), we attribute to this concept of a bodily object a significance which is to a high degree independent of the sense impressions which originally gave rise to it. This is what we mean when we attribute to the bodily object a "real existence".[70]

The corollary argument for tax law is that the field of taxation attributes significance to the observations of economics to ascertain *factual* significance for application of law. The positive law *theory* should then be built on the economic

meanings that are fixed by its *own* procedures and are therefore intelligible in terms of its own rules of usage; whether or not the science has been, or will be [explained in terms of] the other discipline.'") citing E. Nagel, *The Meaning of Reduction in the Natural Sciences* in *Philosophy of Science* 301 (A. Danto & S. Morgenbesser, eds., New York: World Publishing, 1960).

67 Prebble 1997, at 387 ("The logical separation of the world of physical facts and the world of abstract concepts is the fundamental reason for the difficulty of relating income to a particular jurisdiction.").

68 Feyerabend 1981, at 8.

69 *Id.* at 3.

70 *Id.* at 10–11.

foundations of these sense impressions (e.g., as Prebble argued in the context of economics a distinction between "income" versus "capital").[71] Feyerabend applied the positive theory given by Einstein for the illustration that the system of physics is also a construction of the human (qua animal) mind. So, the analogous economic "facts" are subjectively given by the scientists in the choosing of the scientific structure; thus, Feyerabend's primary objective is to show "facts" are not transcendent to the theory of physics.[72] Feyerabend then identifies the differences between Mach and Einstein as follows: "Mach differs from the positivists ([Einstein's] version, explained above) in two ways: he does not assume a two layer model of knowledge (except locally) and he examines the historical (physiological, psychological) determinants of scientific change."[73] In simple terms, this means that positive law is constructed by human beings as an arbitrary set of knowledge conditions that are not transcendent in Kantian terms.[74]

The positive science of physics is similar to the positive science of tax law because it is a human construct (and not a human measurement of a separate physical world); and, again very similar to physics, the problems of the discipline of taxation are not set forth in everyday language.[75] The idea of law as a human construct is actually easier to understand than a transcendent idea of taxation (i.e., taxes as akin to absolute space or time). However, it is Feyerabend's further averment to scientific *change* that becomes particularly important to the positive legal science idea of tax law. That is, Feyerabend proposes that science is dynamic, not static. Indeed, tax law is seemingly always malleable. And, it is exactly the contrary "stability thesis" central to Prebble's claim regarding tax law that Feyerabend next addressed:

> Any philosopher who holds that scientific theories and other general assumptions are nothing but convenient means for the systematization of the data of our experience is thereby committed to the view (which I shall

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71 Prebble 1994, at 386 ("The tension between natural law and lawyer's law is seen in many areas, but nowhere so markedly as in the distinction between capital and income… Explaining the difference between capital income and income items in terms of time illustrates the difficulty of drawing a distinction between the two concepts at all.").

72 Feyerabend 1981, at 13 ("In other words, *science explores all aspects of knowledge, 'phenomena' as well as theories, 'foundations' as well as standards; it is an autonomous enterprise not dependent on principles taken from other fields*.").

73 *Id.*

74 Feyerabend 1999, at 128 ("[T]he new creed generates technical problems of its own which are in no way related to specific scientific problems (Hume), and how there arises a special subject that codifies a science without looking back on it (Kant).").

75 *Id.* at 20 ("The problem of the intensity of the gravitational field at a certain location on the earth's surface is not formulated in everyday language – what one doesn't know, one doesn't speak about. But as soon as the problem is formulated there is the possibility of recruiting an entirely everday action… for solving it 'by observation.'").

> call the stability thesis) that interpretations do not depend upon the status of our theoretical knowledge. Our first attack against positivism will consist in showing that the stability thesis has undesirable consequences. For this purpose it is sufficient to point out that we make assertions not only by formulating (with the help of a certain language) a sentence (or a theory) and asserting that it is true, but also by using a language as a means of communication.[76]

To briefly summarize, the malleability of words allows for positive science (or, in this case, positive law to shift in meaning) is essential for any workable theory of science or law. However, as will be discussed in detail here, tax words in comparison to general legal words are to a much greater degree not used as everday language. If tax words are not part of the ordinary language that could change as usage changed over time then we will need to explore other determinants of legal change. Science is not rigid or "stable" sets of definitions followed by deduction syllogisms;[77] however, this idea reflects perhaps a common misunderstanding of positive legal science. The colloquial idea of positive law as legal science (which may correspond to the theory of Bertrand Russell)[78] appears to be premised on an idea of science as "scientific realism" where predictability in legal rules might be achieved through the stability of meaning in legal words. This approach is essentially equivalent to what Feyerabend referred to as "reductionism."[79] Feyerabend advocated science through a plurality of knowledge; "[plural] knowledge so conceived is an ocean of alternatives channeled and subdivided by an ocean of standards. It forces our mind to make imaginative choices, and thus makes it grow. It makes our mind capable of choosing, imagining, criticizing."[80] In any case, pursuant to the linguistic explanation set forth above any definition of legal science needs to describe a dynamic (not static) process including the potential for the emergence of new "facts" in positive law; in general, the purpose of legal theory is to encounter these new "facts" particularly in tax law.

To simply explain what Feyerabend meant by the "plurality" idea of science, the easiest way is to distinguish the "reductionist" idea of scientific realism and the

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[76] Feyerabend 1981, at 20.

[77] Feyerabend 1999, at 42 ("[Epistemological problems] are not solved by proofs, but by decisions, as well as by the (empirical or logical) evidence that the decisions are realizable.").

[78] *Id.* at 41 ("A coherence theory is untenable. It is missing reference to facts, and thus, and this is Russell's argument, there must be a language which does not depend on any theory, and this is the observation language.").

[79] *Id.* at 47 ("We must answer Russel's argument… every language is a theoretical language, i.e., a language which contains an abstract, detailed, and changeable system of categories, and that the observation language is… the sum of all those parts of different theoretical languages now in use, of which human individuals can quickly come to a decision which will be unanimous.").

[80] *Id.* at 184.

"instrumental" idea of scientific method given by Popper.[81] Feyerabend explained the distinction as follows:

> [One might] den[y] a descriptive function to the sentences of a theory and by declaring that these sentences are nothing but parts of a complicated prediction machine (instrumentalism), or by conferring upon these sentences an interpretation that completely depends upon their connection with the observational language as well as upon the (fixed) interpretation of the latter (reductionism).[82]

Simply put, the reductionist idea of legal science corresponds to the inductive problem which Popper was trying to address. Feyerabend explained this by reference to Aristotle where the idea is to inductively verify sets of claims to arrive at truth.[83] Potács concisely explained as follows:

> In traditional terms verification of a theory is carried out in accordance with the "principle of induction", which can be inferred from a number of individual observations on the accuracy of a general statement. Accordingly, the verification due to an inductive inference is both a criterion of demarcation between "empirical-scientific" and "metaphysical" theories as a methodological principle of the empirical sciences.[84]

a. The Testing of Legal Theory by Theory

Popper set out to eliminate the metaphysical (i.e., inductive) verification element of theory. Popper did this by tearing down rather than building up; that is, by identifying what scientists do as falsifying rather than verifying. This focuses on using empirical verification to falsify theory based on the observed results. Feyerabend gave the "instrumental" terminology for Popper's method as follows: "Instrumentalism maintains that the new theory must not be interpreted as a series of statements, but that it is rather to be understood as a predictive machine whose elements are tools rather than statements and therefore cannot be incompatible with any principle already in existence."[85] Again, Potács concisely described Popper's falsification method of science:

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[81] Feyerabend 1999, at 183 ("One answer which is no longer as popular as it used to be is that science works by collecting facts and inferring theories from them. The answer is unsatisfactory as theories never *follow* from facts in the strict logical sense.").

[82] Feyerabend 1981, at 52.

[83] Feyerabend 1999, at 146 ("The rule that a theory which contradicts experience must be excluded from science and replaced by a better theory was invented by Aristotle.").

[84] Potács 2015, at sec. B, pt. 3.

[85] Feyerabend 1981, at 83.

> The falsification as demarcation criterion means, as I said, that only those theories are "not metaphysical" are regarded as "scientific." The check is based on the empirical reality and will refute most theories. Such a review is carried out by statements about observations of individual events, which are called "log records" or "base sets." This is mainly for the legal rules of interpretation of meaning that can be regarded as theories of language use. On the applicability of the falsification principle is conceivable as a demarcation criterion. Accordingly, only those rules of interpretation should be recognized as lawful for the interpretation, their acceptance and use in the practice of communication can be checked refutable by observation.

Potács then explores whether it is plausible to link Kelsen to Popper as a matter of legal theory. Obviously, for a German-language legal audience linking Kelsen and Popper has extraordinary appeal because it would render legal science a function of positive law norms, exclusively. Potács concludes that positive law is based on everyday language, but does not constitute "empirical" science; "[a]lthough is now the status of the legal doctrine as science largely beyond dispute, if one understands science gained under due process of rational knowledge. However, it seems doubtful whether the legal doctrine may be regarded as 'empirical' science." Potács then quotes Kelsen for legal theory,[86] and says that law is built on everyday language with the facts and theory implicit.[87] He wrote:

> Natural languages have to a greater uncertainty than formal art languages. The importance of formal art languages is determined by fixed rules, while on the other hand in natural languages the meaning of expressions is characterized by its practical use… [S]ince laws are written in natural language, they are also to be interpreted according to the rules in everyday language. Because right to use translators to communicate their arrangements of natural language, they want to be understood according to the rules of natural language.[88]

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[86] Potács 2015, at ch. V, sec. A, pt. 1 ("Hans Kelsen said as follows: "If within the meaning of philosophical positivism may be the subject of a science only the 'given', and the given... facts, can the postulate of philosophical positivism in provisions no, or at least are not directly applicable, since legal norms are no facts but the sense of facts, namely the sense of looking at human behavior as volitional acts".)

[87] *Id.* ("Rather, in particular Karl Popper and Hans Albert have shown that any form of perception occurs because of a theoretical pre-knowledge and is thus 'bound by theory' [here, everyday language]. This is especially true for everyday observations (e.g., a glass of water), which is always certain theoretical ideas (e.g., on certain regular features of a 'glass' and 'water' in it) require.").

[88] *Id.* at ch. V, sec. A, pt. 1.

Potács then goes on to say that the results of legal theory can be observed rendering them partially scientific.[89] However, the idea of tax terminology as everyday language does not seem to be apropos; the practical end result of Potács' analysis of Kelsen, Popper (and Alberts) seems to be that law is itself typically everyday language and therefore partly scientific to the extent it relies on testable observation; and, thereby rejecting Ernst Mach's claim that there must be ideas in language beyond the everyday usage of language. This would presumably allow for empirical testing by falsification under the Popperian conception of science if legal words.[90]

Simply put, lawyers in a common law jurisdiction apply legal theory to what Gardner called "gap" situations as a matter of tax planning or in adjudication of tax disputes. Where the positive tax law as set forth in the statute and is not sufficient then the theory of tax law is the means to resolve the "gap" thereby avoiding the potential for "null" results under a strict version of positive law. An obvious illustration (as previously given in the tax context) is OID (original issue discount). If a bond is intentionally issued below par value to create built-in gain as opposed to interest, thereby changing the applicable tax rate, every tax lawyer in the world ought to know that looks like OID. The OID term has been codified in many countries including the United States.[91] In other words, the legislature actually codified the existing heuristics of the tax profession (which is what we would expect to see in a healthy legal system). Of course, that word came from theory where a tax lawyer somewhere acted with "intellectual love" to create the terminology of "OID" which was then rightfully incorporated into law.

And, this process of the codification of tax words happens in a quasi-scientific manner as different tax lawyers propose novel means, for example, to deal with a discounted bond as a matter of tax practice. Such scientific analyses of tax theory can be found in law journals. As an example, a Popperian article on discounted bonds might say that the understanding of interest/capital gain must be abandoned entirely (i.e., falsification) in favor of some other approach to taxation in light of the

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89 Potács 2015, at ch. V, sec. A, pt. 2 ("Decisive for the determination of this 'will' of a translator, and thus the contents of positive legal norms are thus the rules in everyday language. These rules in everyday language can be divided into semantic and pragmatic rules. Under semantics is understood here linguistic communication with due regard to the usual in the language use of words (word semantics) and sets (set semantics).").

90 *Id.* at pt. 2 ("So it's not as if the group referred to Kelsen some sciences (such as the natural or social sciences) with 'facts' involved and in contrast, the legal doctrine of 'the sense of facts' incorporated… Between the findings of the natural and social sciences and the legal doctrine in this respect there is no difference, because the knowledge of the legal doctrine constitute (legal norms) interpretations of sensory perceptions (e.g., texts) in the light of theories (interpretation rules than general statements about the use of language). It follows that the findings of the natural and social sciences alike as those of legal doctrine 'not direct observation, but only the understanding accessible' are… 'immediate perception' is possible in any of these studies. The legal doctrine is therefore the natural and social sciences to the extent 'empirically equivalent.'").

91 Internal Revenue Code, 26 U.S.C. § 1273 ("Determination of Original Issue Discount").

new practice of the issuance of discounted bonds to avoid the payment of interest which renders the prior theory incoherent. Another article might say that a new auxiliary concept (such as OID) can be incorporated into the theory of "interest" known by tax lawyers to augment the existing theory of interest/capital gains. In any case, the factual content of the word "interest" is subject to change based on the heuristics and practices of the tax profession which we call the "theory" of taxation. The evolution of such legal theory is similar to the evolution of scientific theory.

6. Conclusion

Mach/Feyerabend factual indeterminacy refers to the first identification of a situation that cannot be expressed under the existing framework of tax words. An obvious historical example might be a limited liability company defined as a partnership for tax purposes under the laws of the United Kingdom, but which is treated as a corporation in the Netherlands. Of course, this eventually came to be known as a "hybrid" entity for purposes of tax theory, likewise new circumstances eventually gave rise to the term "reverse-hybrid", and so forth. Notably, once the new words (i.e., hybrid, reverse-hybrid) exist it is still possible to have general factual indeterminacy under the tax law, but at least the word-categories exist to formulate a decision about the "facts." This example should further illustrate that the proposal everyday language would suffice for tax law is clearly unsatisfactory; such an idea is ostensibly inapplicable in the tax context (i.e., since as an example "hybrid" now actually refers to a car in colloquial language).

The phenomenon of Mach/Feyerabend factual indeterminacy is of further significance to international tax law for at least the following three reasons. First, an additional answer can be given to the Fitzmaurices in the repeated criticisms of the (non-positivist) common law of taxation. For example, if a strict positive law were applied to a previously unknown form of legal entity (i.e., a "limited liability company") the tax classification of that entity would be automatically *subjective* as explained by Feyerabend; at the minimum, legal entity classification would then be determined under Rule 1, 2, 3, and so on, in the manner akin to that given by Linderfalk under interpretation of the Vienna Convention. But, in the case of an interpretational rule of original legislative intent, the positive law could potentially be *more subjective* than a form of legal realism under the common law. Indeed, there is no possibility of achieving legal coherence where identification of original legislative intent cannot operate because the category of "fact" did not exist when the law was drafted.

Second, the importation of words from economics cannot remove incoherency from the field of taxation. Take the example of an economic *profit*. Each of wages, capital gains, even gifts might meet the condition of the economic word "profit"; note further that *inflation* is typically *not* considered economic profit (yet it is taxable).

Where a common law court encounters a question of measuring "taxable income" it actually cannot use the economic definition of profit (even the Haig-Simons definition) without incorporating some (or even all) aspects of economic theory. So, economic "fact" words like "profit" cannot simply be substituted even for *exactly the same word* if that word happened to appear in the positive law. As Feyerabend explained, this is a nonsensical proposal for tax law; the "factual" meaning of words must be determined by the operation of the *legal theory* of taxation just as in any other area of the law. Accordingly, the idea of "profit" as a "fiction" (and weakness of the tax system) as Prebble stressed is not helpful as a matter of legal theory;[92] to the contrary, such flexibility in encountering new situations with shifts in the meaning of words is a fundamental aspect of any legal (or scientific) system.

Third, with Mach/Feyerabend factual indeterminacy the importance of the GAAR to tax systems becomes rather obvious. In the situation where a new "fact" word arises, as under a codified system of tax law, such would automatically create an "interpretational" dilemma for strict positive law systems in particular.[93] The GAAR then becomes appealing where legal theory has been partially excluded from the law under a positive law framework.

In conclusion, legal theory functions in much the same manner as scientific theory. Tax lawyers function as clinicians of taxpayer behavior and with practical knowledge are in position to derive legal theory (and, to test it). Potács provided an extensive explanation of the limits of the falsification method vis-à-vis Popperian theory for positive legal science. A further limitation of the Popperian theory of scientific method was given by Feyerabend in that even falsified theories still contribute new concepts to science. Perhaps the most important lesson from the philosophy of science with respect to tax law is Feyerabend's link between "facts" and theory. He wrote: "[T]he descriptions of the observable facts contradict a theory often only because the concepts with which they were formulated belong to older theories. In this case, the contradiction is not between theory and 'fact,' but between newer theory and older theory."[94] Accordingly, the idea of "naïve scientific realism" previously offered as critique of tax law as "fictions" (reflecting the idea that legal theory does not properly reflect economics "facts") radically understates the fundamental importance of legal theory to tax law. For example, if legal theory were found not to correspond to "economic reality" in a given situation this reflects merely a difference as between legal theory and economic theory and accordingly not a misapplication of economic "facts" by lawyers.

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92 Prebble 1994, at 387.

93 *See* Judith Freedman, *GAAR as a Process and the Process of Discussing the GAAR*, 1 British Tax Review 22 (2012).

94 Feyerabend 1999, at 169.

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COMMENTS

RESTRICTION OF RIGHTS OF NON-GOVERNMENTAL ORGANIZATIONS IN RUSSIA AS A SUBJECT OF JUDICIAL CONTROL

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This article examines the issue of the regulation of the Russian state's control over the activities of non-governmental organizations and the limits to that control. Important changes made in 2014–2016 in the regulation of the organization and activity of judicial power show that the tasks of transformation of the judicial power structure, establishment of effective control mechanisms and strengthening of the requirements on substantiation of court judgments have become more topical. Addressing this issue and taking it as the subject of study are motivated by the small number of works dealing with this issue. The task of enhancing the effectiveness of the exercise of their powers by public authorities necessitates consideration of special features of judicial control over disputes related to restriction of rights. The adoption of the Administrative Procedure Code of the Russian Federation and the statutory formalization of special features of judicial control with respect to certain non-commercial organizations imply changes in judicial practice related to challenging the decisions made by public authorities. In addition to special procedural features such changes also facilitate the spread in law enforcement practice of legal arrangements like the 'proportionality test' and determining the balance between competing constitutional values and conditions of public order observance. The analysis carried out by the author reveals tendencies of improvement in legislative action and allows identification of future lines of improvement in judicial practice.

Keywords: judicial control; non-governmental organizations; non-state actors; non-profit organizations; non-commercial organizations; unregistered organizations; undesirable foreign organization.

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1. Introduction

Consideration of the restriction of rights in the area of the interaction between public authorities and civil society is of particular relevance today. Special attention given to the issue of the state's control over the activities of non-governmental organizations (NGOs) is evidenced by the difference in legislative provisions reviewed by the Constitutional Court of the Russian Federation and recommendations on this issue adopted by the Council of Europe's European Commission for Democracy through Law (the Venice Commission). Addressing this issue and taking it as the subject of study are motivated by the small number of works dealing with this issue.

Mendelson (senior fellow with the Center for Strategic & International Studies Russia and Eurasia Program) and Glenn (executive director of the Council for European Studies at Columbia University) state succinctly that, "Foreign policy increasingly involves non-state actors."[1] According to David P. Forsythe, author and professor emeritus at the University of Nebraska, non-governmental organizations (NGOs) "have advanced some form of liberalism in international relations through their emphasis on individuals and law, as compared with state interests and power."[2] With these particular non-state actors in mind, i.e. NGOs, Mendelson and Glenn point out the following:

> The strategies that international NGOs have used for pursuing the institutionalization of various rights have been, with few exceptions, composed and carried out with relatively little interference or supervision from government bureaucracies or market interests, although the interests of donors, including foreign governments, have shaped NGO activities. In the post-communist cases it makes sense to look closely at the work of NGOs, since they are the actors that provide much of the external support within the country.[3]

The right to freedom of association is guaranteed by international human rights treaties and many national constitutions. Non-commercial organizations (NCOs) –

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[1] Sarah E. Mendelson & John K. Glenn, *The Power and Limits of NGOs: A Critical Look at Building Democracy in Eastern Europe and Eurasia* 4 (New York: Columbia University Press, 2002).

[2] David P. Forsythe, *Human Rights in International Relations* 214 (Cambridge: Cambridge University Press, 2006).

[3] Mendelson & Glenn, *supra* note 1, at 7–8.

according to Federal law No. 121-FZ, Law on Non-Commercial Organizations, in Russia NCOs fall into six categories, namely, "social and religious organizations, funds, non-profit partnership, private institutions, autonomous non-profit associations, and associations (unions)" – are of paramount importance in modern societies. It should be noted, though, that Russia has never had a strong civil society. These circumstances make it necessary to carry out an analysis of the legal conditions of restriction of rights of non-governmental organizations in Russia.

2. Russian Legislation and International Standards

Article 30 of the Constitution of the Russian Federation states that the "freedom of the activity of public association shall be guaranteed." At the same time, the Constitution sets out certain restrictions:

– The creation and activities of public associations whose aims and actions are aimed at a forced change of the constitutional system and at violating the integrity of Russia, at undermining its security, at setting up armed units, and at instigating social, racial, national and religious strife shall be prohibited (Article 13.5).

– The exercise of the rights and freedoms of man shall not violate the rights of other people (Article 17.3).

– The rights and freedoms of man and citizens may be limited by federal law only to the extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defense of the country and security of the State (Article 55.3).

The right to freedom of association is not an absolute right and, therefore, limitations on this right are possible. Article 22 of the International Covenant on Civil and Political Rights states that restrictions are permissible only when prescribed by law and necessary in a democratic society in the interests of national security or public safety, public order or the protection of the rights and freedoms of others. Similarly, Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) states that the only restrictions permissible are those that are prescribed by law and are necessary in a democratic society in the interests of, for example, national security or public safety. The most important aspect of the definition of "association" especially with regard to public relations is that an association must not distribute any profits that might arise from its activities among its members or founders, but should invest them in the association and use them for the pursuit of the association's objectives.[4] Article 1 of the European Convention on the

[4] Recommendation CM/Rec(2007)14 of the Committee of Ministers of the Council of Europe to Member States on the Legal Status of NGOs in Europe, October 10, 2007, para. 9 (Oct. 25, 2016), available at https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2007)14E_Legal%20status%20of%20NGOs.pdf.

Recognition of the Legal Personality of International Non-Governmental Organizations states that NGOs satisfy the following conditions: they have a non-profit-making aim of international utility; they have been established by an instrument governed by the internal law of a party; they carry on their activities with effect in at least two states; and they have their statutory office in the territory of a party and the central management and control is in the territory of that party or another party. In Federal law No. 7-FZ on Non-Commercial Organizations, a non-commercial organization is defined as "one not having profit-making as the main objective of its activity and not distributing the earned profit among the participants" (Art. 2(1)).

Federal law No. 121-FZ on Amendments to Certain Legislative Acts of the Russian Federation Regulating the Activities of Non-Commercial Organizations acting as Foreign Agents introduced the legal status of a "foreign agent," which pertains to NCOs receiving funding from abroad and participating in activities with underlying political motivations.

> The rationale for the introduction of the status of a "foreign agent" consists… in an attempt to ensure openness and publicity in the activities of non-commercial organizations, exercising the function of a foreign agent, and exercise the organization of the needed social control of the work of non-commercial organizations, participating in political activities in the territory of the Russian Federation and financed from foreign sources. This rationale is… a legitimate one, as states certainly have a right to take steps in order to ensure transparency in matters pertaining to foreign funding of NGOs.[5]

It is clearly in the interest of a state to ensure the transparency of NGOs operating in its territory that receive foreign funding, so as to prevent their misuse for the political aims of foreign countries. Legal steps taken in this regard by a state can be considered to be "necessary in a democratic society in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others"[6] (para. 2 Article 11 ECHR).

> A non-commercial organization is considered to exercise the functions of a foreign agent if ***three conditions*** are met: a) the organization is registered

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[5] European Commission for Democracy through Law, *Opinion on Federal Law No. 121-FZ on NCOs ("Law on Foreign Agents"), on Federal Laws No. 18-FZ and No. 147-FZ and on Federal Law No. 190-FZ on Making Amendments to the Criminal Code ("Law on Treason") of the Russian Federation*, adopted by the Venice Commission at its 99th Plenary Session (Venice, 13–14 June 2014) (CDL-AD(2014)025), para. 57 (Oct. 25, 2016), available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)025-e.

[6] *Id.* para. 111.

> in Russia as a[n] NCO; b) the organization receives monetary assets and other property from foreign states, their state bodies, international and foreign organizations, foreign persons, stateless persons or from the persons authorized by them and/or from Russian legal entities receiving monetary assets and other property from the cited sources; c) the organization participates[,] including in the interests of foreign sources, in political activities exercised in the territory of the Russian Federation.[7]

A non-commercial organization participates in political activities if, regardless of the purposes and tasks cited in the constituent entities thereof, it participates in arranging and conducting political actions for the purpose of influencing the adoption by the state bodies of decisions aimed at changing the state policy pursued by them, as well as in forming public opinion for the cited purposes.

On April 8, 2014, the Constitutional Court of the Russian Federation delivered its ruling on the constitutionality of the legislation obliging foreign-funded NCOs to register as "organizations, performing a function of a foreign agent" in the event that they participate in political activities.[8] The Constitutional Court assessed in its judgment on the constitutionality of the law that "any attempt to find, based on stereotypes of the Soviet era that have effectively lost their meaning under modern conditions, any negative connotation in the phrase 'foreign agent' would be devoid of any constitutional and legal basis."

The forms of political activities can vary widely. In addition to meetings, rallies, demonstrations, marches and pickets, political activities include canvassing in connection with elections and referendums, public appeals to government bodies, dissemination, including with the use of modern information technologies, of their assessments of the decisions made and policies pursued by state bodies as well as other activities which it would be impossible for legislation to list comprehensively. These and other activities organized by and/or carried out with the participation of NCOs are subject to the aforementioned statutes when their goal is that of influencing directly or through forming public opinion changes to state policy.

There is no universal definition of what constitutes an NGO. Although many relevant international and regional documents have attempted to outline the form that such organizations take. The Council of Europe's Recommendation on the legal status of NGOs in Europe states that NGOs are "voluntary self-governing bodies or organizations established to pursue the essentially non-profit-making objectives of their founders or members," and it does not include political parties. The

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[7] European Commission for Democracy through Law, *supra* note 5, para. 44.

[8] Judgment of the Constitutional Court of the Russian Federation on the Constitutionality of the Regulation of Political Activities by Foreign-Funded NGOs (Sep. 1, 2016), available at http://ksrf.ru/en/Decision/Judgments/Documents/2014%20April%208%2010-P.pdf.

Recommendation goes on to state that NGOs "encompass bodies or organizations established both by individual persons (natural or legal) and by groups of such persons." For the purposes of these guidelines, NGOs that are not membership-based or do not have several founders do not fall under the definition of an association.[9]

Federal law No. 121-FZ "is designed to regulate the activities of non-governmental organizations (NGOs) that receive funding and other resources from foreign sources and engage in political activities."[10] Furthermore, "the law sets the conditions of and the procedure for acquiring this status by means of a registration and regulates the legal responsibility of non-commercial organizations which fail to register as foreign agents."[11] In addition:

> The law provides for the establishment of a register of NGOs acting as foreign agents. In order to carry out its activities as a foreign agent, an NGO must apply to be included in the above register before starting its operation… NGOs acting as foreign agents shall submit to the… [Ministry of Justice of the Russian Federation] registration documents containing a report on their activities and personnel in their governing bodies once every six months, and documents on the expenditure of funds and resources… [and t]he materials published or distributed by these NGOs… The creation of an NGO that infringes on the personal freedoms and rights of citizens, as well as the consistent non-observance of the duties under the Russian legislation on NGOs acting as foreign agents[,] constitute criminal offences.[12]
>
> The law requires all non-commercial organizations (NCOs) to register in the Registry of NCOs, which is maintained by the Ministry of Justice, prior to receipt of funding from any foreign sources if they intend to conduct political activities. Such NCOs are called "NCOs carrying functions of a foreign agent." In addition, Russia ordered the U.S. Agency for International Development to halt its work in Russia by October 1, 2012, alleging that USAID was meddling in domestic politics by providing grants for election monitoring and other programs. As of August 1, 2016, the Registry of NCOs Carrying Functions of Foreign Agents included 137 NCOs, with 17 of them registered voluntarily (mostly because of considerable administrative penalties). The Federal law of March 8, 2015 specified the grounds and procedure for exclusion from the register of NCOs performing functions of a foreign agent. As of August 1, 2016, 21 NCOs had

[9] Recommendation CM/Rec(2007)14, *supra* note 4, "Basic principles," paras. 1, 2.

[10] *Law Regulating the Activities of NGOs Acting as Foreign Agents* (Sep. 1, 2016), available at http:en.kremlin.ru/acts/news/16034.

[11] European Commission for Democracy through Law, *supra* note 5, para. 10.

[12] *Law Regulating the Activities of NGOs*, *supra* note 10.

> been excluded from the Registry because they had been liquidated. Thirteen NCOs that applied for withdrawal from the Registry on the grounds of the absence of foreign funding were also excluded from the Registry (nevertheless they remain in the Registry with their changed status).[13]

If NCOs fail to apply for registration, they will be included in this registry by the competent body. The decision can be appealed in the courts.

> The… provisions [of Federal law on Amendments to Certain Legislative Acts of the Russian Federation (Federal law on Undesirable Activities of Foreign and International NGOs) No. 129-FZ] introduce the definition of undesirable institutions – foreign and international non-governmental organizations whose activities are deemed to pose a threat to Russia's security and basic interests and are therefore undesirable on Russia's territory. This has necessitated amendments to a number of existing laws, including federal laws on Measures Applicable to Individuals Involved in Violating the Basic Human Rights and Civil Liberties of Russian Federation Citizens, on Procedures for Entry and Exit To and From the Russian Federation, the Criminal Code and the Administrative Offences Code.
>
> Under the law's provisions, foreign or international NGOs that pose a threat to Russia's constitutional foundations, defence capability or national security, can be recognized as undesirable on Russian soil. The decision to recognize an organization's activities as undesirable in Russia is taken by the Prosecutor General or Deputy Prosecutor General in agreement with the federal executive bodies responsible for drafting and implementing state policy and legal regulation in the area of international relations. The same officials are responsible for reversing such decisions.[14]

The decision taken by the Prosecutor General or his deputies will be communicated to the Ministry of Justice of the Russian Federation.

> The foreign or international organizations whose activities are recognized as "undesirable" are included in a list administrated and maintained by the Ministry of Justice. The decision on the recognition of the activities of a foreign or international organization as undesirable may be repealed by the Prosecutor General or his/her deputies in coordination with the Ministry

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[13] The International Center for Not-For-Profit Law (ICNL), Civic Freedom Monitor: Russia (Sep. 1, 2016), available at http://www.icnl.org/research/monitor/russia.html.

[14] *Amendments to Legislative Acts*, May 23, 2015 (Sep. 1, 2016), available at http://en.kremlin.ru/acts/news/49511.

of Foreign Affairs and the NGO may then be taken off the List on the official web-site of the Ministry of Justice.[15]

The consequences for an organization whose activities have been recognized as undesirable are (under Federal law on Undesirable Activities of Foreign and International NGOs):

– prohibition to establish structural units in Russian territory and termination of the activities of structural units previously established in Russian territory;

– prohibition to distribute information material issued by a foreign or international NGO whose activities are declared "undesirable" and (or) to disseminate such information, including through the media and (or) with the use of the Internet or telecommunications networks, as well as to produce or store such information for purposes of distribution;

– prohibition to realize (implement) projects or programs in Russian territory;

– prohibition to use bank accounts and deposits for purposes other than settling for business operations and work contracts, compensating for losses caused by its actions, and paying taxes, duties and fines;

– prohibition to execute operations with funds and other property, one of the parties to which is a foreign or international NGO included in the list for all credit and non-credit financial organizations and provide information about the refusal to the Ministry of Finance. The Ministry of Finance will submit this information to the office of the Prosecutor General as well as to the Ministry of Justice.

In addition, the decision taken by the Prosecutor General or his deputies entails the consequence of "[s]uspension of the rights as a founder of a mass media organ and prohibition to organize and conduct any mass action and public events and to take part in them."[16]

The federal law also stipulates administrative and criminal liability in cases where foreign or international NGOs that have been recognized as undesirable in Russia carry out activities in Russian territory. The directing of activities of an NGO included in the list "participating in" such activities in Russian territory by a person who has been subject to administrative responsibility for committing an analogous offence twice in the course of one year qualifies as a new criminal offence. Sanctions are proportional and will always be proportional to the gravity of the wrongdoing; they will accord with the requirements of legality, legitimacy and necessity in a democratic society.

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[15] European Commission for Democracy through Law, *Opinion on Federal Law No. 129-FZ on Amending Certain Legislative Acts (Federal Law on Undesirable Activities of Foreign and International NGOs)*, adopted by the Venice Commission at its 107th Plenary Session (Venice, 10–11 June 2016) (CDL-AD(2016)020-e), at 6–7 (Oct. 25, 2016), available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)020-e.

[16] *Id.* at 7.

As of October 1, 2016, the registry of "undesirable organizations" includes six organizations: National Endowment for Democracy, OSI Assistance Foundation, Open Society Foundation, U.S.-Russia Foundation for Economic Advancement and the Rule of Law, Media Development Investment Fund and National Democratic Institute.

The Venice Commission has called upon the Russian authorities to work towards a clear definition of "political activities."[17] Dissatisfaction with the definition (in Federal law No. 179-FZ of June 2, 2016) has also been expressed by the Civic Freedom Monitor of the International Center for Not-for-Profit Law:

> Conducting political activity is one of the criteria for an NCO to be qualified as an organization carrying out the functions of a foreign agent under Russia's Law on NCOs. The new definition remains vague and may make it even easier for the government to label almost any activity as "political." Nevertheless, political activities do not include activities in the sphere of science, culture, art, healthcare, prevention and protection of public health, social maintenance, social support and protection of citizens, protection of motherhood and childhood, social support of persons with disabilities, propaganda of healthy lifestyle, physical culture and sports, protection of flora and fauna, charitable activities.[18]

On June 2, 2016, President Vladimir Putin signed Federal law on Amendments to Article 8 of the Federal law on Public Associations and Article 2 of the Federal law on Non-Profit Organizations, which "aims to provide a more detailed definition for the term 'political activity' as applied to non-profit organizations that function as foreign agents. In particular, the Federal law directly sets out the goals, forms and spheres of activity the totality of which allows defining an NPO as a political organization."[19]

3. Proportionality Test

The Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe (OSCE) and the Commission for Democracy through Law (the Venice Commission) of the Council of Europe jointly developed guidelines on the freedom of association. According to their *Joint Guidelines on Freedom of Association*:

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17 European Commission for Democracy through Law, *supra* note 5, para. 135.

18 ICNL, *supra* note 13.

19 *Law Specifying Political Activity of Non-Profit Organizations* (Sep. 1, 2016), available at http://en.kremlin.ru/acts/news/52101.

> [T]he principle of proportionality becomes essential in the assessment of whether an association may be prohibited or dissolved… Ensuring that an interference by the state in the exercise of a fundamental freedom does not exceed the boundaries of necessity in a democratic society requires striking a reasonable balance between all countervailing interests and ensuring that the means chosen are the least restrictive means for serving those interests… [T]his should be done by assessing whether a planned interference in the exercise of the right to freedom of association is justified in a democratic society, and whether it is the least intrusive of all possible means that could have been adopted… [I]n matters concerning restrictions placed on an association, the right to receive a fair hearing by an independent and impartial tribunal established by law is an essential requirement to be secured by legislation.[20]

A proportionality test means that when framing restrictions the least intrusive means should be employed. Furthermore,

> [r]estrictions must never entirely extinguish the right nor deprive it of its essence… The principle of necessity in a democratic society requires that there be a fair balance between the interests of persons exercising the right to freedom of association, associations themselves and the interests of society as a whole. The need for restrictions shall be carefully weighed, therefore, and shall be based on compelling evidence. The least intrusive option shall always be chosen. A restriction shall always be narrowly construed and applied and shall never completely extinguish the right nor encroach on its essence. In particular, any prohibition or dissolution of an association shall always be a measure of last resort, such as when an association has engaged in conduct that creates an imminent threat of violence or other grave violation of the law, and shall never be used to address minor infractions. All restrictions must be based on the particular circumstances of the case, and no blanket restrictions shall be applied.[21]

As pointed out in the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association,

> restrictions on access to resources from abroad (or from foreign or international sources) must be prescribed by law, pursue a legitimate aim in conformity with the specific permissible grounds of limitations set out in the relevant

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[20] Joint Guidelines on Freedom of Association (OSCE/ODIHR Legis-Nr:GDL-FOASS/263/2014), adopted by the Venice Commission at its 101st Plenary Session (Venice, 12–13 December 2014), paras. 112–114.

[21] *Id.* para. 35.

> international standards, as well as be necessary in a democratic society and proportionate to the aim pursued. Combating corruption, terrorist financing, money-laundering or other types of trafficking are generally considered legitimate aims and may qualify as being in the interests of national security, public safety or public order.[22]

The Russian legislation in this field meets the internationally accepted legal standards. Moreover, the right of NGOs to judicial protection is guaranteed in Russia. In the course of an appeal against decisions made by public authorities, a non-governmental organization may submit petitions under the general procedure provided for by the Administrative Procedure Code. Russian legislation does not provide for any special features of judicial examination of this category of cases. Acting in the context of control over the legality of actions taken by public authorities to restrict the rights of non-governmental organizations, the court will establish the circumstances referred to in parts 9 and 10, Article 256 of the Administrative Procedure Code. When examining the legality of decisions or actions (or the omission of actions), the court will establish whether the applicant's rights and lawful interests have been violated, and whether the requirements of the legal acts formalizing the disputed exercise of power or the procedure for making the disputed decision, the grounds for making it, and the consistency of the content of the disputed decision with the legal acts governing the disputed relations have been observed, as well as other procedural issues.

The result of legal qualification is a properly substantiated conclusion made by the court, which will be recorded in the operative part of the judgment. One of the main criteria for the effectiveness of judicial control is the legal sufficiency of delivered judgments and their proper substantiation and cogency. A court judgment is properly substantiated if the facts that are relevant to the case are confirmed by the evidence examined by the court and the conclusions made by the court are based on such facts.

The circumstances outlined above allow arriving at the conclusion that the right of non-governmental organizations to judicial protection and to a fair trial on the basis of the principles of the adversarial relationship and the equality of the parties with the provision of sufficient procedural powers for protection of their rights when performing any procedural action is guaranteed in Russia.

4. Discussion and Conclusion

The availability of a wide range of guarantees for the exercise of their rights by NCOs implies mutually conditioned duties for their operation within the legal

[22] Report to the UN Human Rights Council (Funding of Associations and Holding of Peaceful Assemblies), UN Doc. A/HRC/23/39, April 24, 2013, para. 35.

framework. In this connection, attention should be paid to the impossibility of appealing against the actions taken by non-registered non-governmental organizations.

> Legislation should not compel associations to obtain formal legal personality, but it should provide associations with the possibility of doing so… Legislation should not require associations to go through formal registration processes. Rather, associations should be able to make use of a protective legal framework to assert their rights regardless of whether or not they are registered… An association that obtains legal personality thereby acquires legal rights and duties, including the capacity to enter into contracts and to litigate and be litigated against. Informal associations depend on the legal personality of their members for any such actions required for the pursuit of their objectives.[23]

Not being parties to civil law relationships, non-registered organizations may not have the right of ownership of property or the right of its legal protection, nor enter into contractual relations or be a party to an obligation; additionally, they cannot lodge collective actions with the courts to protect the interests of third parties having interests equal to their own. On the one hand, the absence of any legal status considerably limits the opportunities for the activities of a non-governmental organization, while, on the other hand, it allows avoidance of judicial control over its activities. As a consequence, it becomes impossible to implement constitutional provisions and judicial protection guarantees for the persons whose rights are violated as a result of the activities of non-registered organizations.

The *Joint Guidelines on Freedom of Association* supports this position when it explains clearly:

> [T]he acquisition of legal personality is a prerequisite for an association to gain the legal capacity to, in its own name, enter into contracts, make payments for goods and services procured, and own assets and property, as well as to take legal action to protect the rights and interests of associations, among other legal processes that can be essential for the pursuit of the objectives of associations. It is reasonable to put in place registration or notification requirements for those associations that wish to have such legal capacities, so long as the process involves requirements that are sufficiently relevant, are not unnecessarily burdensome and do not frustrate the exercise of the right to freedom of association. The particular legal capacities thereby acquired may vary according to the type of association concerned…

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[23] Joint Guidelines, *supra* note 20, paras. 48, 50.

> States may… require that associations that are seeking to enjoy various forms of public support, or that wish to be accorded a particular status (such as being recognized as a charity or public benefit organization), first obtain legal personality.[24]

It is therefore necessary to consider the limited legal capacity of informal associations.

> Where legislation requires certain formalities to be undertaken to establish an association with legal personality, it is good practice for a state to provide for a "notification procedure." In such a procedure associations are automatically granted legal personality as soon as the authorities are notified by the founders that an association has been created.[25]

In summary, the conclusion can be reached that the necessity for resolving the issue of the legal status of non-registered organizations may be determined by legislation, subject to the established guarantees in respect of the activities of non-governmental organizations. Statutory formalization of the notification procedure for recording non-registered organizations also seems to be important for the purposes of judicial control.

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STRUCTURAL INEQUALITY IN THE THIRD SECTOR: HOW LAW AND LEGISLATIVE DRAFTS PRODUCE, SUPPORT AND ORGANIZE HIERARCHICAL SYSTEMS AMONG NON-GOVERNMENTAL ORGANIZATIONS*

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Within the framework of the article the problem of inequality in the Third Sector is defined. The authors tie the production and institutionalization of this inequality with laws that were passed in the sphere of the regulation of non-governmental organizations (NGOs) in recent years as well as with several draft laws. The analysis focuses on the "foreign agent" status. Organizations that receive this status have more obligations and fewer rights in comparison with other NGOs. According to the research, the burden of a foreign agent status can be measured in terms of legal discrimination, but it also may be measured financially. The authors see fit to analyze other existing legal statuses of Russian NGOs, above all the status of an NGO realizing socially valuable projects (SO NGO), and to compare them with the legal status of a "foreign agent" NGO. The analysis shows that foreign agent NGOs and SO NGOs gradually stand at opposite poles of the legal system: the former are synonymous with politically and legally undesirable subjects, whereas the latter step by step become the state-oriented, useful organizations meriting additional support, protection and social, economic and legal benefits.

Keywords: third sector; NGOs; foreign agent; socially oriented NGO; political activity.

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1. Introduction and Context

The term "foreign agents law" is used to describe the set of amendments to the statutory acts regulating the activities of non-profit organizations (NPOs) on the territory of the Russian Federation that were passed in the summer of 2012.[1] Only one non-profit organization[2] that operated on Russian territory entered the Federal Ministry of Justice list of foreign agents voluntarily. In practice, then, the law was not having the intended effect. This situation initiated a wave of investigations by prosecutors against organizations that, in the opinion of regulatory agencies, should be added to the list of organizations functioning as foreign agents. In the spring of 2013, investigations took place into more than 300 organizations conducting activities in 67 regions of the Russian Federation.[3]

Alongside the investigations, the media formed the public image of a foreign agent as something not very different from a "foreign spy."[4] The picture was completed by the judicial proceedings against the most politically active (or the most discriminated against) organizations – in Moscow it was the Golos[5] scandal,

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[1] Федеральный закон от 20 июля 2012 г. № 121-ФЗ «О внесении изменений в отдельные законодательные акты Российской Федерации в части регулирования деятельности некоммерческих организаций, выполняющих функции иностранного агента», Собрание законодательства РФ, 2012, № 30, ст. 4172 [Federal law No. 121-FZ of July 20, 2012. On Amendments to Particular Statutory Acts of the Russian Federation with Regard to the Regulation of Activities of NGOs Functioning as Foreign Agents, Legislation Bulletin of the Russian Federation, 2012, No. 30, Art. 4172].

[2] The non-commercial partnership *Sodeystviye razvitiyu konkurentsii v stranakh SNG* entered the list of non-profit organizations performing the functions of a foreign agent on June 27, 2013 on a voluntary basis. This NGO was established by *Federal Antimonopoly Service of the RF* in 2009. The appearance of the first volunteers in the registry caused a massive public outcry.

[3] There are no official statistics in this sphere. The data provided here is derived from the project ClosedSociety ((Mar. 31, 2016), available at http://closedsociety.org/data/checks).

[4] About the negative connotation *see Zastavit' stat' "inostrannym agentom"*, comments from Alexej Kudrin, RadioSvoboda (Jan. 2, 2014), available at http://www.svoboda.org/content/article/25215790.html; Lyudmila Alekseyeva, *"Inostranny agent" – shpion i predatel*, comments from Ludmila Alexeeva, Finam (Nov. 21, 2014), available at http://finam.info/news/lyudmila-alekseeva-inostranniy-agent-shpion-i-predatel/. A public opinion poll conducted in July 2012 showed that 64% of respondents are against the participation of foreign-funded non-profit organizations in the public and political life of Russia. Press release No. 2071 *Inostrannye dengi dlya rossiyskikh NKO: obshchestvennaya otsenka*, WCIOM (Mar. 31, 2016), available at http://wciom.ru/index.php?id=459&uid=112925.

[5] In April 2013, Golos was fined 300,000 rubles. In addition, the head of the organization, Lilia Shibanova, was fined 100,000 rubles. In the summer of 2013, the court dismissed the complaint by the organization over its inclusion in the registry of foreign agents. In the autumn of 2013, the director of Golos

in St. Petersburg it was the trials against the antidiscrimination center Memorial[6] and the LGBT organizations Vyhod[7] and Bok o bok.[8] When the State Duma passed the "foreign agents law" it was regarded by the representatives of the third sector[9] as a repressive measure against the work of non-profit organizations. The general anxiety felt by non-governmental organization (NGO) employees related to the question of whether they could maintain the flow of their work unhampered and preserve the reputation of their organization rather than to the complication of the daily activities of, and the furnishing of statements by, their organization. As expressed by Svetlana Gannushkina, the "effect on our activities takes on an increasingly negative character."[10]

The wave of investigations by public prosecutors that followed the law's enactment was connected with dozens of infringements of the law perpetrated by representatives of the executive power. Prosecutors' investigations in contravention of procedural rules were a topic of heated discussion. After the unscheduled inspections in the spring of 2013, several NPOs received remedial action orders or advisements on the inadmissibility of the federal law infringement; however, in the majority of cases public prosecutors' offices did not publish any documents as a result of their investigative activities. Organizations whose activities were qualified as political, and that consequently violated federal legislation on NPOs, were added to the "foreign agents" list. Administrative fines were imposed on organizations, the activities of several NPOs were suppressed and some of them decided to begin the process of liquidation.

attempted to liquidate the organization in order to avoid further prosecution as a foreign agent. On September 1, 2014, the Moscow City Court quashed the decision of the Presnensky District Court on the administrative liability of Golos and Lilia Shibanova. However, Golos is still listed in the registry of foreign agents.

6 The prosecutor's investigation found that the activities of Memorial corresponded to the status of a foreign agent (March 2013); the organization's leaders refused to voluntarily register the organization in the previously mentioned status. The Admiralteysky Court of St. Petersburg appealed the prosecutor's demand to recognize Memorial as a foreign agent (December 2013), and in April 2014 the decision was confirmed by the St. Petersburg City Court ((Mar. 31, 2016), available at http://www.spb.aif.ru/society/people/1147690). Currently, ADC Memorial carries out its activities without registration as a legal entity (http://adcmemorial.org/).

7 The ANO for Social and Legal Services LGBT organization Vyhod was abolished on 24 July 2014, according to the information from the official website of the Russian Federal Tax Service (http://egrul.nalog.ru).

8 The organization was liquidated by its creators. According to an interview with Gulya Sultanova, the decision was made in order to avoid prosecution in the future ((Mar. 31, 2016), available at http://upogau.org/ru/inform/ourview/ourview_980.html).

9 The "third sector" is a term that describes organizations which are not part of the public or private sector. It encompasses non-governmental and non-profit-making organizations or associations, and it includes charities, voluntary and community groups, cooperatives, etc.

10 *Chto proiskhodit s NKO: Glava komiteta "Grazhdanskoye sodeystviye" Svetlana Gannushkina o prokurorskoy proverke nekommercheskikh organizatsiy v Rossii*, Moskovskie Novosty, March 21, 2013 (Nov. 3, 2016), available at http://www.mn.ru/society/20130321/340545531.html.

At the moment there are 147 non-profit organizations on the list of non-profit organizations functioning as foreign agents.[11]

The adoption on July 22, 2012 of legislative amendments to the legal acts regulating the activities of non-profit organizations and the subsequent enactment of these acts marked a new stage in the development of the third sector in Russia.

The institution of the socially oriented non-profit organization (SO NPO) that had existed since 2010 was also reconsidered by the Russian government during the affair over "foreign agents." Projects on the approval of SO NPOs began to appear towards the end of 2011. That is why we offer the proposition that two types of NPOs were constructed – "maleficent" spies receiving money from foreign states and institutional funds and carrying out activities that accord with their interests, on the one hand, and beneficent, useful NPOs providing support to the most socially unprotected groups of society and supported with money from the Russian state, on the other.

The work of NPOs – organizations covering a wide functional spectrum including educational institutions, research centers, philanthropic funds, human rights structures and religious, cultural and sports organizations, etc. – is regulated by the Russian Administrative Code, the Civil Code and the special Law on Non-Profit Organizations.[12] Depending on the type of legal entity and the sphere of its activities, NPOs may be regulated by different structures functioning within the executive branch of power (the Ministry of Justice, the Ministry of Education, and others). The amendments to the law in the summer of 2012 led to the creation of a new status (i.e., category) of non-profit organizations – the status of an NPO functioning as a foreign agent – and introduced a new order of regulation of NPO activities.

When speaking of the Russian "foreign agents law," first of all it is necessary to explain the status of an NPO functioning as a foreign agent. The law established two obligatory criteria to receive the status of a foreign agent. An NPO performing the functions of a foreign agent is a Russian non-profit organization that, firstly, receives foreign money and other property from foreign states, their state authorities, international and foreign organizations, foreign citizens, stateless persons or their authorized agents from Russian legal persons receiving money or other property from the mentioned sources (excluding companies limited by shares and their branch organizations with the participation of the Russian state),[13] and, secondly, participates, particularly in the interests of foreign sources, in political activities carried out on the territory of the Russian Federation.[14]

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[11] The official website of the Ministry of Justice of the Russian Federation (Nov. 3, 2016), available at http://unro.minjust.ru/NKOForeignAgent.aspx.

[12] Федеральный закон от 12 января 1996 г. № 7-ФЗ «О некоммерческих организациях», Собрание законодательства РФ, 1996, № 3, ст. 145 [Federal law No. 7-FZ of January 12, 1996. On NGOs, Legislation Bulletin of the Russian Federation, 1996, No. 3, Art. 145].

[13] *Id.* Art. 2, para. 6.

[14] *Id*.

Article 2 of Federal law No. 7 gives the definition of political activity carried out on the territory of the Russian Federation:

> [A n]on-profit organization (excluding political parties) is recognized as participating in political activities realized on the territory of the Russian Federation if, without connection with aims and issues mentioned in [the] organization's constituent documents, it participates (in particular by financing) in [the] organization and realization of political actions with the aim to influence the state authority's decision making[,] oriented at the alteration of their policy, as well as [the] formation of the public opinion with the same aims.[15]

According to the law, some types of organizations that may not be recognized as political when carrying out their activities include, among others, organizations of science, sport, ecology, culture, art, health-care, social care and the protection of motherhood and childhood.

Thereafter, the status of a foreign agent is tied to the level of financial dependence on foreign sources and also to the type of activities carried out, but activities without connection to the content of the constituent documents. Organs of the Russian executive branch of power (the public prosecutor's office, the Ministry of Justice) have the authority to qualify an NPO's activities as political.

The main public debate played out around the content of the concept "political activities" and around the wide-ranging possibilities as to the concept's interpretation due to the wording of the law. In the course of the unscheduled investigative activities of 2013, public prosecutors made inquiries not only into "political organizations" but also into human rights centers, religious movements and educational, scientific and other institutions whose activities could not be called political according to the law.

A few organizations took the position of active defense of their rights and appealed the prosecutors' decisions to the courts of general jurisdiction all the way to the Supreme Court, but none of them had significant success. After obtaining a decision from the courts of general jurisdiction, they petitioned the Constitutional Court, where their petitions were accepted for hearing as one single case. The hearings resulted in the legal basis for the status of a "foreign agent," that is, the Decision of the Constitutional Court of the Russian Federation No. 10-P of April 8, 2014.[16]

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[15] Federal law on NGOs, *supra* note 12, Art. 2.

[16] Постановление Конституционного Суда РФ от 8 апреля 2014 г. № 10-П «По делу о проверке конституционности положений пункта 6 статьи 2 и пункта 7 статьи 32 Федерального закона «О некоммерческих организациях», части шестой статьи 29 Федерального закона «Об общественных объединениях» и части 1 статьи 19.34 Кодекса Российской Федерации об административных правонарушениях в связи с жалобами Уполномоченного по правам человека в Российской Федерации, фонда «Костромской центр поддержки общественных инициатив», граждан Л.Г. Кузьминой, С.М. Смиренского и В.П. Юкечева» [Decision of the Constitutional Court of the Russian Federation No. 10-P of April 8, 2014. On the Case of Verification of the Constitutionality of State-

The Constitutional Court formulated its position by explaining what political activity by an NPO means. This judicial body, responsible for constitutional supervision, set down the legal formula of political activity as "organization and realization of political actions with the aim of exerting influence on the decision making of the state authorities or influencing their policy," as well as "formation of public opinion" and "formation of public mood with the previously mentioned aims."[17]

It must also be mentioned that the Constitutional Court laid out an approximate listing of the forms of political activities that combine political action with the aim of exerting influence to effect changes in state policy:

> [A]long with assemblies, meetings, demonstrations, processions and vigils, political actions may be expressed in electioneering and agitation, in public calls to the state authorities, in expansion of own [i.e., personal or self-serving] appraisals of state authorities decisions and policy (in particular, through the internet), and also in other actions, exhaustive legislative determination of which is impossible.[18]

Consequently, each of these activities allows adding an NPO to the list of organizations functioning as foreign agents regardless of the actual aims that govern the actions of the representatives of the organization.

On January 21, 2016, on the online federal portal of draft laws, there appeared the project of Federal law "On the changes of par. 6 of art. 2 of the Federal law 'On Non-Profit Organizations,' in Part of Their Political Activities."[19] The draft law contains a list of forms of political activities. Five out of seven on the list were already mentioned in the Decision of the Constitutional Court.[20] The new draft law is supposed to add to

ments, Described in Point 6, Article 2 and in Point 7, Article 32 of the Federal law of the Russian Federation on nongovernmental organizations, in Article 29 of the Federal law of the Russian Federation on Public Associations and in Part 1, Article 19.34 of the Code of the Russian Federation on Administrative Violations (in Connection with Complaints from the Commissioner for Human Rights in the Russian Federation, the Fund "Kostromskoy Tsentr Podderzhki Obshchestvennykh Initsiativ" and from the Citizens L.G. Kuzminoy, S.M. Smirenskogo and V.P. Yukecheva] (Mar. 31, 2016), available at http://doc.ksrf.ru/decision/KSRFDecision158063.pdf.

17 *Id.* para. 3.1.

18 *Id.* para. 6.

19 Проект федерального закона «О внесении изменений в пункт 6 статьи 2 Федерального закона «О некоммерческих организациях» в части уточнения понятия политической деятельности» [Draft Bill on the Amendments to para. 6, Art. 2 of the Federal law on NGOs in Part of Improvement of Legislation on the Specification Criteria of Political Activities] (Apr. 1, 2016), available at https://regulation.gov.ru/projects#npa=45477.

20 According to the Decision of the Constitutional Court of the Russian Federation No. 10-P of April 8, 2014 the previously defined forms of political activity include: 1) participation in organizing and holding public events in the form of meetings, rallies, demonstrations, marches or picketing or various combinations of these forms, and the organization and conduct of public discussions, performances;

the definition of political activity the conducting and publishing of public opinion polls as well as other sociological research (as an activity aimed at the formation of public views and feelings). Moreover, henceforth the involvement of citizens in one of the mentioned spheres is also considered political activity.

The affair over the "foreign agents law" did not end at the moment of NPOs' voluntarily joining "Assistance to the development of competition in the Commonwealth of Independent States" nor with the prosecutors' investigations in the spring of 2013. Furthermore, it continued with the series of amendments to the law and legal initiatives, complicating the legal status of NPOs functioning as foreign agents and transforming the entire third sector in Russia. And as we can see, the timeline of amendments is still running. After public anti-corruption testimony on February 28, 2016, Draft Law 04/13/01-16/00045477[21] was delivered to the Russian State Duma.[22] Owing to this draft, the Russian legislator is going to reconfirm the criteria of political activities of NGOs stated in the Decision of the Constitutional Court of the Russian Federation No. 10-P of April 8, 2014[23] (mentioned above). At the time this article was written, no hearings were being held in the State Duma, and the draft law was being actively discussed by civil society institutions.[24] Shortly, we will outline how that draft law encountered criticism, even from a regional Ombudsman.

2. The Idea and the Aim of the Research

We see the problem in the quick transformation of the third sector caused by the adoption and implementation of the "foreign agents law" and other legislative initiatives regulating this sphere. The aim of our article is to demonstrate the existence of structural inequality in the third sector and to show how statutory acts and their drafts produce and maintain this inequality.

Here we present an outline of the analysis and the main theses that are postulated.

2) participation in activities aimed at obtaining a specific result in the elections, the referendum, to observe the elections, the referendum, in the formation of election commissions, referendum commissions in political parties; 3) public appeal to the state authorities, local self-government, their officials as well as other actions affecting their activities, including those aimed at the adoption, amendment, repeal of laws or other legal acts; 4) dissemination of information, including the use of modern information technologies, assessments of decisions taken by public authorities and their policies; 5) implementation of activities aimed at the formation of social and political views and convictions, including through publication and public opinion polls or other sociological research.

21 *See* the official website of the Government of the Russian Federation (Mar. 31, 2016), available at https://regulation.gov.ru/projects#npa=45477.

22 *See* documents of public testimony on the site of the Presidential Council on the Development of Civil Society and Human Rights (Mar. 31, 2016), available at http://president-sovet.ru/documents/read/432/.

23 *See supra* note 20.

24 *See supra* note 22.

Our analysis proceeds from the starting point that structural inequality inside the third sector exists and is produced by the legal rules, legal discourse and law enforcement in this sphere. It is natural that non-profit organizations work in different professional spheres (tied to education, scientific projects in culture, sport, human rights and so on), but also that initially they all have unequal resources. The idea consists in the fact that before special legal statuses were assigned, NPOs had been more or less equal in the eyes of the state structures, and that their internal life, which along with their other daily activities includes the search for financial resources, had not been defined by their political status. In practice, it had been possible to call successful those NPOs that had formed the most stable and strongest support networks, had been competitive and professional in their own spheres, and had possessed greater material and informational resources and abilities for strategic management and development. New legal initiatives (in particular the "foreign agents law") not only complicated the work of certain NPOs but also made the mere existence of these organizations dangerous. In this way, we think that inside the third sector there has appeared a new type of inequality that is connected with the legal status of an NPO (i.e., whether an organization is in the list of foreign agents or not) that is anchored in statuses developed in the legal sphere.

When speaking of such statuses, first of all we have in mind organizations-as-foreign agents, and we suppose that the creation of such a label not only arouses public outcry, but also is underlain by political aims: control over the civil society and people's associations, and also construction of the image of the internal enemy who prevents the quick and harmonious development of Russia. "Foreign agent" is not the only type of NGO that is at the top of the current agenda. In recent years there have appeared socially oriented NPOs that receive financial support from the Federal Ministry of Economic Development and also from the local budgets of sub-federal entities. This status, already mentioned, and other statuses given to NGOs provide not only the special order of functioning and special rules of activities, but also special social practices and strategies of survival. In this manner we proceed from the assumption that changes in legislation have led to changes in the structure of the third sector in Russia: there appeared "black sheep" organizations and 'showcase' organizations, regardless of the activities they carry out.

Unfortunately, we have examined the "foreign agent" status in far more detail than the rest of the NPO types, which is why generally we will talk about why "foreign agents" are not equal to other organizations and how this inequality creates conditions for discrimination and prejudice against these NPOs. This discrimination which appeared on the stage with the adoption of the law spreads in the process of its implementation. For this reason we are also interested in the practices of enforcement of the "foreign agents law" by the state authorities, and particularly by the courts. We argue that law enforcement practice reproduces and maintains the discriminatory status of foreign agents and that it complicates and undermines their core activities.

Finally, we insist that consolidation of such a status in statutory acts, as well as its realization at the level of the executive branch of power, creates consequences for the NPOs that go beyond the legal sphere. Organizations seen in the capacity of foreign agents (whether potential or real) that come to the attention of the authorities are under the necessity to invent survival strategies tied to restructuring (the creation of a new legal person or network of organizations) or going out of business. Fears are raised that paralyze the professional activities and strategic planning of the organization's work, as well as the making of important decisions related to resources, projects, partnerships and development. In the organizations, the requirement of self-censorship and total control over statements and every kind of public activity that could be deemed "political" or "unwelcome," or even "harmful," is formed. It is not uncommon to find that some clients, partners and contractors are not prepared to take upon themselves the risks associated with having the status of being in contact with "foreign agents."

As the method of research, we have chosen, primarily, documents analysis (statutory acts, draft laws, official commentaries, law enforcement acts and court decisions), interviews with the administrative staff of "foreign agent" NPOs and also with employees of these organizations, as well as interviews with experts in the field (first of all with lawyers representing the interests of NPOs in the courts). As an additional method we used participant observation, which was available owing to an employment relationship with a foreign agent NPO.

We are aware of the methodological limitations of our work, as we understand that our attention was concentrated on the legal status of a foreign agent and practices connected with this type of NPO. So, in this case the fate of SO NGO is less clear to us (in the part where they go beyond the analyses of statutory acts) and are of a hypothetical character. We expect that our theses can be confirmed or rejected during further discussion and future development of the third sector in Russia.

3. To Be a Foreign Agent

3.1. Political Rights and the Political Sphere

The legal status of a foreign agent differs from other types of non-profit organizations by the additional number of duties and by the absence of symmetrical rights. Carrying out the activities that fit under the criteria of the "foreign agent" definition without the voluntary inclusion into the list of organizations functioning as foreign agents is a violation of an administrative law.[25] The measure of liability

[25] Кодекс Российской Федерации об административных правонарушениях от 30 декабря 2001 г. № 195-ФЗ, Собрание законодательства РФ, 2002, № 1 (ч. I), ст. 1 [Code of the Russian Federation on Administrative Violations No. 195-FZ of December 30, 2001, Legislation Bulletin of the Russian Federation, 2002, No. 1 (part I), Art. 1], at Art. 19.34, para. 1.

in the article is the administrative fine at the sum of US$1,454–$4,363[26] for the administrative staff of the NGO and $4,363–$7,272 for the NGO as a legal entity.

Below, we will provide a comprehensive list of duties and bans existing in Russian statutory acts for non-profit organizations operating with the status of foreign agents.

Most under threat of fine is the duty of organizations to provide all published and disseminated information by them with a mark indicating their origin is from a foreign agent.[27] We underline that this applies to any informational product coming from the organization with the status of a foreign agent (books, booklets, notifications, programs and material of events, as well as all the information that is disseminated via the media or the Internet). Violation of this rule results in administrative fine in accordance with KOAP RF.[28]

In addition, an annual report by organizations functioning in the status of a foreign agent is subject to obligatory audit.[29] A financial audit is applied to the set of documents that a foreign agent provides each year to the Ministry of Justice, and the procedure is financed from the budget of the organization, so it is an additional financial charge for the NPO.[30]

When speaking of other material that foreign agents are to provide to the Ministry of Justice, one must mention the statements on current activities and on the organization's administrative staff (once every six months), documents relating to the purposes of financial resources and other property expenditures, in particular from foreign sources (quarterly). We point out the general rule that NPOs which have yearly income less than $43,633 are not obliged to undergo a financial audit and provide a formalized statement to the Ministry of Justice; customary NGOs have an obligation to publish on the Internet a note on the operational activities of the organization in the following year.[31] Report documentation by foreign agents must be entered into special forms,[32] which contain more than fifty pages, that are validated according to

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[26] Hereafter, all monetary amounts are calculated in U.S. dollars at the exchange rate of The Central Bank of the Russian Federation as of March 30, 2016. According to the data, which is published daily on the Central Bank's official website ((Mar. 31, 2016), available at http://www.cbr.ru), the price of $1 on that date was 68.7549 rubles.

[27] Federal law on NGOs, *supra* note 12, Art. 24, para. 1.

[28] Code of the Russian Federation on Administrative Violations, Art. 19.34, para. 2.

[29] Federal law on NGOs, *supra* note 12, Art. 32, para. 1.

[30] *See* Федеральный закон от 6 декабря 2011 г. № 402-ФЗ «О бухгалтерском учете», Собрание законодательства РФ, 2011, № 50, ст. 7344 [Federal law No. 402-FZ of December 6, 2011. On Business Accounting, Legislation Bulletin of the Russian Federation, 2011, No. 50, Art. 7344], at Art. 6, para. 5.

[31] Federal law on NGOs, *supra* note 12, Art. 32, para. 3.

[32] For more information about rules on foreign agent NGO's accountability to the Ministry of Justice of the Russian Federation, *see* Приказ Министерства юстиции РФ от 16 апреля 2013 г. № 50 «О форме и сроках представления в Министерство юстиции Российской Федерации отчетности некоммерческих организаций, выполняющих функции иностранного агента» [Order of the

statutory act by the Ministry of Justice. Failure to provide documentation as specified or to provide it on time or presentation of incomplete or modified information may lead to administrative fine of the organization in accordance with Article 19.7.5-2 KOAP RF (the sum of the fine is $145–$436 for the administrative staff of the organization and $1,454–$4,363 for the legal entity). The Russian Criminal Code was updated with the addition of Article 330.1 creating a new crime with criminal liability for "fraudulent evasion of the duties required by Russian legislation for the organizations performing the functions of a foreign agent."[33] The criteria for the "fraud" are not described in the article; it is also not clear exactly which activities provide the formal elements for a definition of the crime. Nevertheless, violation of the article may expose a person to criminal fine at the sum of $4,363 or at a rate of salary payments for a period of two years, or compulsory community service for a period of 480 hours, or correctional labor, or deprivation of liberty for a period up to two years.

Foreign agents have an obligation to publish every six months, in the media or on the Internet, information on the NPO's activities (in fact this means that the organization is obliged to provide information to the same extent of thoroughness as in the statement to the Ministry of Justice). Other NPOs are obliged to provide such information only once a year.[34]

The law requires scheduled inspections for foreign agents, whereas, in general, inspections do not exist for NPOs. However, the law forbids more than one inspection a year.[35] Still, unscheduled inspections for foreign agents are aggravated by two additional (to the general procedural) rules: they are carried out (1) spontaneously and (2) without notice. Similar rules exist only for organizations suspected of extremism (paras. 4 and 5, Art. 32 of the Federal law "On Non-Profit Organizations"). The legal reasons for carrying out such an inspection may be limited to a report to the Ministry of Justice that a certain NPO implements activities performing the functions of a foreign agent. Notification may come from any state authority, person or organization, and may even be anonymous.

It is forbidden for foreign agents to participate in any capacity in elections or referendums at any level if the election or referendum takes place in Russia.[36] The

Ministry of Justice of the Russian Federation No. 50 of April 16, 2013. On Blanks and Time Frames of Accounting for an NGO's Functioning as a Foreign Agent] (Mar. 31, 2016), available at https://rg.ru/2013/05/14/nko-dok.html.

33 Уголовный кодекс Российской Федерации от 13 июня 1996 г. № 63-ФЗ, Собрание законодательства РФ, 1996, № 25, ст. 2954 [Criminal Code of the Russian Federation No. 63-FZ of June 13, 1996, Legislation Bulletin of the Russian Federation, 1996, No. 25, Art. 2954], at Art. 330.1.

34 Federal law on NGOs, *supra* note 12, Art. 32, paras. 2 and 3.

35 *Id.* Art. 32, paras. 4 and 5.

36 For more information about guarantees of electoral rights and the right to participate in a referendum, *see* Федеральный закон от 12 июня 2002 г. № 67-ФЗ «Об основных гарантиях избирательных прав и права на участие в референдуме граждан Российской Федерации», Собрание законодательства

only legal form of participation is in the status of a foreign observer. The proscription against participating in elections is duplicated in the law on the election of the State Duma deputies[37] and also in the law on the election of the Russian President.[38] When speaking of other forms of political activities, it must be mentioned that it is forbidden for the NPOs to perform the functions of foreign agents in financing political parties and their regional authorities.[39] It is forbidden for political parties to sign any contracts with foreign agents.[40]

In addition to excessive duties (formalized statements, financial audits, etc.), foreign agents are subject to legal rules of a "reputational" character. The Ministry of Justice provides an annual statement to the State Duma on the activities of NPOs performing the functions of a foreign agent, including information on their participation in political activities on the territory of the Russian Federation, on their financial resources and money received from abroad, and also information about the results of state control over such NPOs.[41] The media is obliged to inform Roskomnadzor about every fact of receiving money from NPOs functioning as foreign agents.[42]

At the same time, the Constitutional Court of the Russian Federation denies the existence of any negative characteristics of the "foreign agent" legal status in Russian legislation, consequently, descriptive characteristics of discrimination also do not exist:

РФ, 2002, № 24, ст. 2253 [Federal law No. 67-FZ of June 12, 2002. On the General Guarantees of Electoral Rights and the Right of Citizens to Participate in a Referendum of the Russian Federation, Legislation Bulletin of the Russian Federation, 2002, No. 24, Art. 2253], at Art. 3, para. 6.

37 For more information about elections to the State Duma of the Russian Federation, *see* Федеральный закон от 18 мая 2005 г. № 51-ФЗ «О выборах депутатов Государственной Думы Федерального Собрания Российской Федерации», Собрание законодательства РФ, 2005, № 21, ст. 1919 [Federal law No. 51-FZ of May 18, 2005. On Elections to the State Duma of the Russian Federation, Legislation Bulletin of the Russian Federation, 2005, No. 21, Art. 1919].

38 For more information about the election of the President of the Russian Federation, *see* Федеральный закон от 10 января 2003 г. № 19-ФЗ «О выборах Президента Российской Федерации», Собрание законодательства РФ, 2003, № 2, ст. 171 [Federal law No. 19-FZ of January 10, 2003. On the Election of the President of the Russian Federation, Legislation Bulletin of the Russian Federation, 2003, No. 2, Art. 171].

39 For more information about political parties, *see* Федеральный закон от 11 июля 2001 г. № 95-ФЗ «О политических партиях», Собрание законодательства РФ, 2001, № 29, ст. 2950 [Federal law No. 95-FZ of July 11, 2001. On Political Parties, Legislation Bulletin of the Russian Federation, 2001, No. 29, Art. 2950], at Art. 30, para. 3, sec. "N".

40 *Id.* Art. 31, para. 4.1, sec. "D".

41 Federal law on NGOs, *supra* note 12, Art. 32, para 16.

42 For more information about the media, *see* Закон РФ от 27 декабря 1991 г. № 2124-I «О средствах массовой информации», Ведомости Съезда народных депутатов Российской Федерации и Верховного Совета Российской Федерации, 1992, № 7, ст. 300 [Law of the Russian Federation No. 2124-I of December 27, 1991. On the Mass Media, Gazette of the Congress of People's Deputies of the Russian Federation and the Supreme Soviet of the Russian Federation, 1992, No. 7, Art. 300], at Art. 19.32.

> [a]cknowledgement of certain Russian non-profit organizations performing the functions of a foreign agent is objectively based on the fact that they are really involved in such a system of activities where they receive money and property from foreign sources, the law is intended to identify them as a special subject of political activities functioning on the Russian territory. This is not meant to indicate danger coming from such organizations to the authorities of the Russian state or institutions of Russian civil society, even if such NPOs implement interests of foreign resources, that is why efforts to find negative contexts in the wording "foreign agent" rooted in obsolete stereotypes of the Soviet times and do not have any constitutional law grounds.[43]

In 2014, the Ministry of Justice became eligible to include NPOs on the list of organizations performing the functions of a foreign agent through the pre-trial process.[44] As well, it was forbidden for the NPOs to use state symbols of Russia, including "The State Flag of Russia, The State Coat of Arms of Russia, The State Anthem of Russia, flags, coats of arms of federative entities, foreign states and religious symbols."[45] The procedure for removal from the list was also described in the law at that time (in the event an NPO returned foreign money to the grant holder and did not receive any other foreign money for one year).

Legal initiatives existing in the sphere allow to predict the complication of the situation around the "foreign agent" status and inside the third sector on the whole.[46] On the level of federative entities, there appear NPOs (i.e., foreign agents) that are deprived of the ability of their administrative staff to participate in local elections.[47]

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43 Decision No. 10-P of April 8, 2014, *supra* note 16.

44 According to the Federal law No. 147-FZ of June 4, 2014 "On the Amendments to Article 32 of the Federal law on NGOs" (Legislation Bulletin of the Russian Federation, 2014, No. 23, Art. 2932) [Федеральный закон от 4 июня 2014 г. № 147-ФЗ «О внесении изменений в статью 32 Федерального закона «О некоммерческих организациях»», Собрание законодательства РФ, 2014, № 23, ст. 2932] amendments allow executive authorities to force NGOs to register as organizations performing the functions of a foreign agent.

45 Федеральный закон от 21 июля 2014 г. № 236-ФЗ «О внесении изменений в отдельные законодательные акты Российской Федерации по вопросам символики некоммерческих организаций», Собрание законодательства РФ, 2014, № 30 (ч. I), ст. 4237 [Federal law No. 236-FZ of July 21, 2014. On Amendments to Particular Statutory Acts of the Russian Federation on Questions of Symbols of NGOs, Legislation Bulletin of the Russian Federation, 2014, No. 30 (part I), Art. 4237].

46 Проект федерального закона от 25 июля 2014 г. № 00/03-16960/07-17/46-13-4 «О внесении изменений в отдельные законодательные акты Российской Федерации в части совершенствования законодательства о некоммерческих организациях, выполняющих функции иностранного агента» [The Draft Bill No. 00/03-16960/07-17/46-13-4 of July 25, 2014. On the Amendments to Particular Statutory Acts of the Russian Federation on the Improvement of Legislation on NGOs Performing the Functions of Foreign Agents]. For more information about the project, *see* the website (Mar. 31, 2016), http://www.regulation.gov.ru/projects#npa=24662.

47 *Zheltaya zvezda dlya "inostrannykh agentov"*, Rosbalt, March 13, 2015 (Mar. 31, 2016), available at http://www.rosbalt.ru/kaliningrad/2015/03/13/1377614.html.

This prohibition against participating in elections is quite strict. Regional laws forbid "organizations… performing the functions of foreign agents… [from participating] in any kind of activity in local elections," and such laws guarantee only one election right for foreign agent NGOs and their representatives – to participate in the special status of foreign (international) elections observer.[48] In our opinion, such regulation may lead to the limitation of election rights through law enforcement.

The idea to forbid the participation of state and municipal civil servants in the activities of foreign agent NGOs is not new, for in the legal sphere it appeared in July 2014.[49] According to the draft law, the definition of the word "activity" must be interpreted in the broadest of potential meanings, as it was realized in other legal activities. In March 2015 the project was delivered to the State Duma, but it was rejected on September 23, 2015.[50]

3.2. Discrimination Outside the Legal Sphere

The discrimination against foreign agents exists not only in the legal sphere. Laws and other regulations provide a ground for the emergence of other effects related to a specific understanding of the status of a foreign agent and law enforcement.

We did not conduct a poll into what Russian citizens think about foreign agents, so we provide the results of a survey conducted by the Levada Center. In September 2012 they published a report based on a sociological survey in which they asked 1,600 people what a "foreign agent" means.

The responses of the people describe their distinctly negative attitude towards the concept of a "foreign agent." Sixty-two percent of respondents perceive the term negatively, believing that it is, first of all "a spy, the representative of special services of other states planted into the country, a scout, acting under cover" (ca. 39%) or a "hidden internal enemy, acting in Russia in the interests of other countries, the fifth column" (ca. 23%).[51]

But despite the lack of evidence in the form of data-filled charts and diagrams, we are convinced that "foreign agent" now appears in public discourse with negative connotations (along with 'fifth column' and other terms) and is part of the vocabulary

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[48] *See, e.g.*, Закон Калининградской области от 18 марта 2008 г. № 231 «О муниципальных выборах в Калининградской области», Калининградская правда, 2008, № 52 [Law of the Kaliningrad Region No. 231 of March 18, 2008. On Local Elections in the Kaliningrad Region, Kaliningradskaja Pravda, 2008, Art. 52], at Art. 8.

[49] The Draft Bill No. 00/03-16960/07-17/46-13-4 of July 25, 2014, *supra* note 46.

[50] Законопроект № 735229-6 «О внесении изменений в отдельные законодательные акты Российской Федерации (об установлении дополнительного ограничения для членов Совета Федерации, депутатов Государственной Думы, государственных гражданских и муниципальных служащих)» [Draft Law No. 735229-6. On Amendments to Particular Statutory Acts of the Russian Federation on the Additional Limitation for Public Servants] (Apr. 3, 2016), available at http://asozd2.duma.gov.ru/main.nsf/%28Spravka%29?OpenAgent&RN=735229-6.

[51] Information may be found in the recent research from the Levada Center, *see* http://www.levada.ru/.

of hate that is actively promoted in the media. A new wave of discussions criticizing foreign agents arose after the adoption and official publication of the law on "undesirable organizations."[52]

Along with the symbolic effects of carrying the name of a foreign agent, there are very specific effects associated with the investment of time, money and the use of human resources. The writing of additional reports for the Ministry of Justice, copying documents while participating in an unscheduled inspection and litigation (sometimes there are a number of parallel cases against officers of the NGO and against the NGO as a whole, and, consequently, in addition the filing of appeal petitions to a number of authorities) all require the organization to use additional resources and absorb additional costs.

According to a research project conducted by one Russian sociological center that took place in November 2015, we can describe the everyday life of foreign agents in the following way.[53]

Firstly, the financial costs of the organization increase significantly due to an obligatory financial audit required by the Ministry of Justice. The current average market value of an audit varies from $436 to $7,564 (depending on the region and the characteristics of the organization). The average cost of an audit in Russia (according to the study) amounts to $2,908. Before entering the registry, 80 percent of the organizations did not have to undergo the process of the audit. Researchers estimate that the net revenue of auditors comes out at about $196,349 per year. At the same time, about 5 percent of audit companies refused to conduct an audit of foreign agents (without offering any explanation).

The so-called "agency report" requires serious efforts on the part of the organizations. According to those who took part in the project, the report requires the participation of a minimum of two employees (even though some NGOs have only two or three employees). These two people waste, as estimated by experts, about 284 working hours, which is 10 percent of their annual work time. If we focus on the average cost of a working hour in Russia (about $2), an organization spends approximately $1,064 yearly to work on drawing up a report (including payments

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[52] Федеральный закон от 23 мая 2015 г. № 129-ФЗ «О внесении изменений в отдельные законодательные акты Российской федерации», Собрание законодательства РФ, 2015, № 21, ст. 2981 [Federal law No. 129-FZ of May 23, 2015. On Amendments to Particular Statutory Acts of the Russian Federation, Legislation Bulletin of the Russian Federation, 2015, No. 21, Art. 2981]. This law postulates that executive branch authorities in coordination with the Ministry of Foreign Affairs of the Russian Federation are able to ban the activity of any foreign organization in Russia. The General Prosecutor has the power to make a decision on this, and an "unwanted organization" will be listed in the special registry. If an "unwanted organization" continues to carry on any kind of activity despite the proscription, it will receive an administrative fine (up to 100,000 rubles) or criminal sanctions (up to 500,000 rubles, or up to 5 years of compulsory labor, or up to 8 years of imprisonment) ((Mar. 31, 2016), available at http://publication.pravo.gov.ru/Document/View/0001201505230001?index=0&rangeSize=1).

[53] The authors of the research requested that their names and that of the organization not be mentioned, because they feared the consequences that might occur following the publication of their research.

to non-budgetary funds). Altogether, the organizations that at the time of the study were listed in the registry of foreign agents spent about $89,448 in the previous year on writing the reports.

Not only audit and ministerial reports take a bite out of the budgets of foreign agents. Experts have tried to calculate the costs of litigation, as far as they can be estimated without taking into account the fact that the NGOs contest court decisions not only in regional courts, but also in Moscow (the Ministry of Justice of the Russian Federation locates jurisdiction in the Zamoskvoreckij Municipal Court of Moscow). Fifty percent of the organizations that are in the registry as a result of the court's decision challenge its application. The cost of this to these organizations is about $5,817 in the form of administrative fees and for the heads and/or representatives of the NGOs at least forty hours in the form of time spent; additionally, the preparations for the court hearings (excluding the cost of lawyers) costs an average of $2,908.

We cannot ignore the fines that have been imposed on NGOs that did not register as a foreign agent on a voluntary basis. The average fine for non-registration is 320,000 rubles (in reality it varies from $2,908 to $13,089. If all organizations that were ordered to pay fines do so, the amount comes to $450,876.)

4. Socially Oriented Non-Governmental Organizations

New legislation has not only created a new type of actors in the field of non-profit organizations, but also completely redefined the structure of the third sector. Organizations with different statuses have different possibilities not only in the legal sphere, but also in connection with financial resources. Thus, depending on the status of an organization (and, in many respects, its loyalty), government grants are allocated for the development of the non-profit sector and community initiatives.[54]

Socially Oriented Non-Profit Organizations (SO NPOs), as the legal status provided for by the Russian law on NGOs, appeared in 2010.[55] The law itself (par. 2.1, Art. 2)

[54] For more information, *see* Распоряжение Президента РФ от 17 января 2014 г. № 11-рп «Об обеспечении в 2014 году государственной поддержки некоммерческих неправительственных организаций, участвующих в развитии институтов гражданского общества, реализующих социально значимые проекты и проекты в сфере защиты прав и свобод человека и гражданина» [Resolution of the President of the Russian Federation No. 11-rp of January 17, 2014. On the Providing of State Support for Non-Profit NGOs Participating in the Development of Civil Society, Implementing Socially Valuable Projects in the Sphere of Civil Rights Protection] (Mar. 31, 2016), available at http://kremlin.ru/acts/bank/38054.

[55] Федеральный закон от 5 апреля 2010 г. № 40-ФЗ «О внесении изменений в отдельные законодательные акты Российской Федерации по вопросу поддержки социально ориентированных некоммерческих организаций», Собрание законодательства РФ, 2010, № 15, ст. 1736 [Federal law No. 40-FZ of April 5, 2010. On Amendments to Particular Statutory Acts of the Russian Federation on the Question of SO NGOs' Support, Legislation Bulletin of the Russian Federation, 2010, No. 15, Art. 1736].

defines socially oriented non-profit organizations as "carrying out activities aimed at solving social problems, development of civil society in the Russian Federation, as well as the activities provided for in Article 31.1 of the law on NGOs."[56] State corporations, public companies, associations and political parties are not allowed to receive the status of a socially oriented non-profit organization. A key feature of these organizations is the priority for receiving support from public authorities. The law on NGOs[57] speaks openly about providing state support to this type of NGOs.

In accordance with Russian legislation, SO NGOs are entitled to receive the following benefits:

- reduced payment of taxes and fees;
- a special procedure for procurement of goods, works and services for state and municipal needs;
- financial support through the granting of subsidies;
- procurement of property from specially created federal, regional and local lists of property free of third-party rights;
- information support through federal, regional and municipal information systems, and information and telecommunications networks;
- consulting support;
- assistance in training and further education of employees and volunteers.[58]

Federal and regional executive branch authorities and also local authorities support socially oriented non-profit organizations and prepare and maintain registries of recipients of the support. The registry contains information about the organization, details of its activities and information about the form, size and duration of the support. The rules on these procedures are defined by an order of the Ministry of Economic Development of the Russian Federation.[59]

The policy of state support for SO NGOs is carried out through budgetary allocations within the framework of national and regional programs. For example, the program "Social Support for Citizens"[60] (approved in 2014) contains a section titled

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[56] Federal law on NGOs, *supra* note 12, Art. 31.1.

[57] *Id.* Art. 1, 31.3.

[58] *Id*.

[59] Приказ Министерства экономического развития РФ от 17 мая 2011 г. № 223 «О ведении реестров социально ориентированных некоммерческих организаций – получателей поддержки, хранении представленных ими документов и о требованиях к технологическим, программным, лингвистическим, правовым и организационным средствам обеспечения пользования указанными реестрами» [Order of the Ministry of Economic Development and Trade of the Russian Federation No. 223 of May 17, 2011. On the Managing of the List of SO NGOs Receiving Support, on the Holding of Their Reports, on the Technological Requirements to the Programming, Linguistic, Legal and Organizational Resources of the Lists Exploitation] (Mar. 31, 2016), available at http://economy.gov.ru/minec/activity/sections/SocOrientNoncomOrg/doc20110517_17.

[60] Постановление Правительства РФ от 15 апреля 2014 г. № 296 «Об утверждении государственной программы Российской Федерации «Социальная поддержка граждан»», Собрание законода-

"Strengthening the State Support of Socially Oriented Non-Profit Organizations," with total financing of $200,712,967 (for 2016 $25,307,287 was allocated[61]). The goal of this program is to increase the amount and improve the quality of social services provided to citizens by ensuring conditions for the effective operation and development of socially oriented non-profit organizations. As part of the program, the Russian government may allocate direct subsidies to individual organizations. In 2015, the Federal Government allocated $11,133,751 in direct subsidies to these organizations.[62] For example, the non-governmental educational institution of higher education "Humanitarian University of Trade Unions" in St. Petersburg received $538,143. The autonomous non-profit organization "Moscow Patriarchate's Central Hospital of St. Alexis the Metropolitan of Moscow" was granted $2,574,361.

In 2011, there was a regional program of support for the SO NPOs in St. Petersburg. The budget of the program amounted to 626 million rubles.[63] The lead time for the regional program "Social Support for Citizens,"[64] containing a sub-program "Improving the Efficiency of the State Support of Socially Oriented Non-Profit Organizations," is 2015–2020. The budget for the sub-program is $15,998,859 (in 2016 $989,020 is planned for allocation to SO NGOs).

тельства РФ, 2014, № 17, ст. 2059 [Regulation of the Government of the Russian Federation No. 296 of April 15, 2014. On Adoption of the State Program "Social Support of Citizens," Legislation Bulletin of the Russian Federation, 2014, No. 17, Art. 2059].

61 Федеральный закон от 14 декабря 2015 г. № 359-ФЗ «О федеральном бюджете на 2016 год», Собрание законодательства РФ, 2015, № 51 (часть I, II, III), ст. 7230 [Federal law No. 359-FZ of December 14, 2015. On the State Budget for Year 2016, Legislation Bulletin of the Russian Federation, 2015, No. 51 (parts I, II, III), Art. 7230].

62 Распоряжение Правительства РФ от 29 декабря 2014 г. № 2767-р «О распределении субсидий, предоставляемых в 2015 году из федерального бюджета на государственную поддержку отдельных общественных и иных некоммерческих организаций», Собрание законодательства РФ, 2015, № 2, ст. 542 [Resolution of the Government of the Russian Federation No. 2767-r of December 29, 2014. On the Assignment of Grants, Provided from the Federal Budget on State Support of Certain Non-Profit Organizations and Other Types of NGOs, Legislation Bulletin of the Russian Federation, 2015, No. 2, Art. 542].

63 Постановление Правительства Санкт-Петербурга от 21 октября 2011 г. № 1451 «О мерах по поддержке социально ориентированных некоммерческих организаций в Санкт-Петербурге», Реестр нормативных правовых актов Санкт-Петербурга, 2011, № 11908 [Resolution of the Government of St. Petersburg No. 1451 of October 21, 2011. On the Measures of SO NGOs' Support at St. Petersburg, Registry of the St. Petersburg Statutory Acts, 2011, No. 11908].

64 Постановление Правительства Санкт-Петербурга от 23 июня 2014 г. № 497 О государственной программе Санкт-Петербурга «Социальная поддержка граждан в Санкт-Петербурге» на 2015–2020 годы», Реестр нормативных правовых актов Санкт-Петербурга, 2015, № 17819 [Resolution of the Government of St. Petersburg No. 497 of June 23, 2014. On St. Petersburg's State Program "Social Support of Citizens at St. Petersburg in the Years 2015–2020," Registry of the St. Petersburg Statutory Acts, 2015, No. 17819].

5. Conclusions

In this article we have tried to explain why in our opinion the amendments to the law on non-profit organizations that have already been adopted, and also those which are still under consideration, produce, organize and maintain inequality within the third sector.

We do not claim that before the adoption of the amendments or before the invention of a new legal formula of "foreign agent" and the legal duties behind this formula there was no inequality within the third sector in Russia. Definitely, it existed: the inequality was provided by the amount of resources (financial, informational, human resources, etc.) and by the mechanisms of tactical and strategic management within a concrete organization. Eventually, the inequality can be interpreted in various ways (as the difference in the positions or as the difference in access to power, etc.). In our work we understand inequality as structural conditions which are rooted within the strict legal framework. These special formulas describing the activities of NPOs are used as an instrument of support for one type of NPOs and as an instrument of control and disqualification for the other types.

In this sense, the most stringent legal framework is the status of a foreign agent. It suggests that an organization registered in the Russian Federation carrying out political activities and receiving funding from any kind of foreign sources is obliged to submit an application for entry in the registry of foreign agents. A failure to register on a voluntary basis requires the penalty of an administrative fine. As the executive authorities have the administrative power to add organizations to the relevant registry of NGOs, we believe that it is a violation of the organizations' rights. The status of a foreign agent is not only a financial, organizational and professional burden. Contrary to the official position of the Constitutional Court, the label of "foreign agent" shuts organizations out of professional networks and relationships and makes some activities unavailable (for example, it is impossible for staff of the foreign agent organization to participate in the electoral process). This status contains explicit ideological connotations.

These are only a few of the consequences that occur in connection with the status of a foreign agent: refusal to cooperate with them, offensive graffiti on the walls of offices, inclusion in the discourse of hate. Foreign agents constantly have to defend their everyday life and practices. They have to prove that they are not a "public enemy" and not a "fifth column." They also have to seek new strategies to survive, to avoid prosecution and to find new ways and legal forms of work. The search for a new way of living is another point that is in the background of having the status of a foreign agent. There are two draft laws related to the activities of NGOs that are now at the stage of examination. The area of law which consists of rules on how to be a foreign agent may be characterized as turbulent and rapidly changing. Under these conditions the process of strategic and tactical management within NGOs is

becoming more complicated and unpredictable. Administrators are unable to make decisions under conditions of total uncertainty and an unclear understanding what a "foreign agent" will mean tomorrow. Partners, donors and clients are in the same situation: none of them can be sure that the activities of the organization tomorrow (or in the near future) will not be suspended or completely folded. Unfortunately, the organization's liquidation carries less cost than the exhausting struggle against the "Leviathan" in the courts. The federal law on "unwanted organizations" adopted under the conditions of constant "adding fuel to the fire" on state television makes life more difficult for NGOs. Currently, there are four foundations in the registry of "unwanted organizations," and most of them cooperated with NGOs in Russia.[65]

Simultaneously with the formation of the status (and the image) of a foreign agent, there is an attempt to create a type of a "good" NGO. "Socially oriented" NGOs or NGOs implementing socially valuable projects are not new to Russian legislation and the public sphere, but now they are in a process of transformation. For organizations that enter the lists of winners of presidential grants for specific projects and current activities it is possible to receive cash and other rewards. In contrast to the status of a foreign agent, SO NGO do not need to publish additional reports (except, of course, grant reports) or become more "transparent." These organizations also do not need to undergo audits (only in the event they are registered as a foundation). Additionally, there are different rules regarding unscheduled prosecutorial inspections for SO NGO, and so on. While the status of a foreign agent corresponds to an additional set of duties, SO NGOs have an "extra" set of rights and benefits. Thus the government constructs the image of the "positive" NGOs involved in the implementation of state policy in the form of its agents and the "enemy" NGOs living off the money of foreign funds and engaging in "subversion" on the territory of Russia.

The border between these two statuses is blurred. In fact, it includes two quite subjectively evaluated elements. The first of them, of course, is political loyalty. We have no certainty as to whether SO NGOs engage in political activities. We have no certainty as to whether SO NPOs supporting the official line of policy try to avoid criticizing the government and carry out politically committed activities. The second criterion is the subjective measure of "usability" and "social orientation" of the organization. "Useful" in terms of the law means "supporting vulnerable groups."

Our main concern is related to the worsening position of the foreign agents. We cannot make any positive prognosis when we analyze existing draft laws and the discourse of hate that continues to be reproduced and broadcast by the media. A third sector that is able to think critically and shape the agenda is dangerous and undesirable for the government. A controlled civil society represented by the so-called loyal SO NGOs or non-profit organizations is the goal of the current state policy.

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[65] The Registry of Non-Profit Organizations Performing the Functions of a Foreign Agent (Mar. 30, 2016), available at http://minjust.ru/ru/activity/nko/unwanted.

Understanding the limitations and realizing that our experience with SO NGOs is insufficient to build extensive conclusions, we have focused on understanding the status of the foreign agent. Our analysis has demonstrated that, firstly, the structural inequality within the third sector exists, and it is provided by the law. We believe that there has appeared a new type of inequality and discrimination within the third sector, and the law is the basis for it.

Our second thesis is that the status of a foreign agent is characterized by a small number of rights and a large number of additional duties. We are convinced that the transformation of the legal playing field has led to the birth of organizations that are "black sheep". The implementation of the law reproduces and supports the discriminatory status of foreign agents and makes their core activities impossible.

Finally, the consolidation of this status in the statutory acts, as well as its implementation at the level of executive authorities, produces consequences for NGOs that go beyond the legal sphere.

With the advent of the new legal status of a foreign agent and the formation of law enforcement around it, Russian law itself has become more chaotic and unpredictable.

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BOOK REVIEW NOTES

THE ARCTIC ENERGY BASKET: TREASURE CHEST OR PANDORA'S BOX?*

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The never-ending race after the world's limited energy resources puts forward a wide range of questions and concerns to be responded to in a short period of time. Even with the boom in renewable sources of energy[1] and the provocative forecasts of the collapse of the oil and gas markets[2] new opportunities for oil and gas exploration and exploitation are still the focus of global attention. However, what appears new and promising may be deceptive. The abundant yet hard to obtain Arctic oil and gas reserves are an apt illustration of the case. The main question in this regard is whether the Arctic is a treasure chest whose opening will free vast energy resources for future generations or a Pandora's Box whose opening will let loose irreversible troubles upon humankind.

The book *New Energy Basket of the World: The Arctic* by Manjeet Kumar Sahu, advocate, High Court of Jharkhand, India, serves as a springboard in the debate over the benefits and drawbacks of oil and gas activities in the Arctic. It provides

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* Reviewed book: Manjeet Kumar Sahu, *New Energy Basket of the World: The Arctic* (LAP Lambert Academic Publishing, 2015).

1 *A Renewable Energy Boom*, The New York Times, April 4, 2016 (Nov. 21, 2016), available at http://www.nytimes.com/2016/04/04/opinion/a-renewable-energy-boom.html.

2 John Vidal, *The End of Oil is Closer than You Think*, The Guardian, April 21, 2016 (Nov. 21, 2016), available at https://www.theguardian.com/science/2005/apr/21/oilandpetrol.news.

readers with insightful facts and data on both sides of the debate. The book mostly concerns, but is not limited to, the legal regulations and environmental policy in respect of Arctic hydrocarbon activities. Sahu digs deep into a wide range of thorny issues encompassing a complex diachronic overview of oil and gas exploration in the Arctic Region: the basins lying within the scope of the Arctic; the activities of the major players in the Arctic oil and gas arena; the governance of the Arctic Region via the Arctic Council and international law on the use of the Arctic reserves. All the aforementioned points are organized into the conceptually overlapping chapters of the book that provide an in-depth, comprehensive analysis of the past and contemporary trends in the expansion of the Arctic Region.

In the introduction to the book, Sahu refers to the Arctic as perhaps the most "promising arena for the oil and gas industry in human history" and lists the key countries engaged there, specifically the eight Arctic states that comprise the Arctic Council: the USA, the Russian Federation, Canada, Norway, Greenland (that is to say, the Kingdom of Denmark), Finland, Iceland, and Sweden, each of which has a stake in the huge energy hub of the Arctic. All the activities carried out in the Arctic area are supposed to comply with agreements arrived at on this country-based delimitation of boundaries, aimed at eliminating the risks of boundary disputes.

The second chapter, titled "History of Oil and Gas Exploration in the Arctic Region," presents the diachronic perspective of oil and gas exploration in the Arctic Region. To highlight the milestones of the process, Sahu organizes information in a chart spanning the years from 1920 to 2015. The history of the exploration of the Arctic reserves reveals not only the triumphs of discovering new oil fields and the collaborative and partnering activities of the countries bordering the Arctic, but also the obstacles encountered, including oil spills and pipeline explosions as well as oil price declines.

The concept of a "new energy basket" is thoroughly unveiled via a brief overview of seven Arctic basin provinces that, according to the data provided, contain 87 per cent of the Arctic oil and natural gas reserves. Sahu notes that due attention should be paid to the volume of the hydrocarbons discovered in the basins, as it renders the picture of Arctic "treasures" more distinctive, and a bit of geographical awareness may benefit the reader, bridging the gap between the true state of affairs and bare legal interpretations, which follow in the final chapters of the book.

The information on Arctic oil and gas exploration would not be complete without at least the basic facts on the major players – the corporations competing in the face of many challenges. As Sahu informs us, various multinational oil and gas companies came together to set up their R&D in the Arctic Region. Making his Arctic "story" more illustrative, Sahu provides information on such oil and gas giants as Rosneft, ExxonMobil, Statoil, Gazprom, and Shell and their current activities relating to the exploration of the Arctic reserves. Reading this brief yet comprehensive second chapter, one learns about Russian-American joint development projects in the Arctic Region, the world's largest oil spill preparedness and response organization

Oil Spill Response Limited and its links to the exploration and exploitation of the Arctic reserves, as well as many other fascinating facts on the diverse activities of the major players. It is obvious that their presence and involvement in the Arctic arena brings into play each and every aspect of possible relationships, from collaboration to confrontation between the giant transnational oil and gas corporations. Thus the focus of the book on the legal and environmental regulations of Arctic activities comes as no surprise: where there are such enormous assets at stake and such powerful players, willing to compete with each other, a solid legal background is vital.

Whereas the four preliminary background chapters of the book present basic information essential for a better and deeper understanding of the dichotomy of the Arctic Region's exploration, the last two chapters are mostly of an analytical nature and may draw the particular attention of legal scholars carrying out research in correlated areas. The governance of the Arctic Region, referred to by Sahu in the fifth chapter as a "unique blend of arrangements between domestic and international legal instruments with soft law arrangements," is represented by its central institution, the Arctic Council. According to its Action Plan strategy, the Council aims at "a critical and noteworthy commitment to the general global push to diminish environmental damage on a global level." As a promoter of soft law and the sustainable development of the Arctic Region, the Council attends to such matters as monitoring and assessment, conservation of Arctic flora and fauna, emergency prevention measures, preparedness and response, and the protection of the Arctic marine environment. The Council embraces a sustainable development mission, contributing immensely to the environmental, economic, and social well-being of humankind in respect of the exploration and exploitation of the Arctic reserves.

The sophisticated subject of the international legal regime for the Arctic is the focus of Sahu's attention in the final chapter of the book. He claims that international law relating to the Arctic, although extensive and systematic, still has much room for improvement on the whole range of current complex issues arising in the Arctic Region due to its importance for the world community. Sahu suggests utilizing a multifaceted approach to tailor the international legal regime for the Arctic to a more or less updated format, as the existing one contrasts with current political and social trends, to be observed in the regulation of the activities in the Arctic Region. In his view, the regime requires simpler laws in comparison to the existing "boundless and complex accumulation of standards, settlements, traditions and soft law." The reasons for this push to reshape and restructure the current legal regime in respect of the Arctic are climate change and the consequences it may entail, alongside politically grounded territorial conflicts.

Moving forward in his analysis of the attributes of the international legal regime for the Arctic, Sahu identifies two elements of the regime: firstly, the soft non-binding nature of laws proposing to the Arctic states methods for mostly preventive measures, but not dispute-settlement schemes, and, secondly, the absence of an international treaty or convention aimed at regulating specific types of industrial activities in the

Arctic. Further analysis of the applicable conventions and their relevancy to offshore oil and gas activities supports the stated reasoning.

The thorough and thoughtful interpretation of the currently in effect international conventions and treaties provided by Sahu should be of particular interest to legal scholars researching the same or similar area of international law. While analyzing the legislative instruments regulating Arctic activities, Sahu challenges himself with disputable questions that arise owing to the ambiguity of related cases, thus making the analysis even more complex. For instance, in answering the question of whether the decisions of the Commission on the Limits of the Continental Shelf (CLCS) are binding or not, Sahu makes reference to statements on the matter by the US president, to possible legal interpretations of articles of the United Nations Convention on the Law of the Sea (UNCLOS) as well as to commentaries of prominent legal scholars, thereby shaping solid grounds for his own opinion.

In analyzing the applicability of existing international law to dispute resolution in respect of the Arctic, Sahu comes to the conclusion that, because the UNCLOS regime currently faces a wide range of difficulties and inconsistencies in dealing with the disputes related to the Arctic, other instruments to deal with the conflicting claims should be worked out, introduced, and enforced. The two possible solutions he suggests are a multilateral Arctic treaty, aiming at the delimitation of boundaries, similar to the existing Antarctic treaty (a rather disputable solution), or the so-called joint development agreements between the key countries involved. In Sahu's view, the agreements would boost collaboration between the countries in dealing with the difficult cases that may arise in the course of exploration and exploitation of the Arctic reserves. However, since it is unclear as to what extent any of the Arctic states may succeed in proving the existence of a continental shelf beyond their 200 nautical miles exclusive economic zone (EEZ), not a single state is willing to commit to any final and binding instrument as the means for resolving potential disputes.

Alongside the analysis of the adaptability of UNCLOS to the resolution of Arctic disputes, Sahu covers the relation of the Arctic to a number of other international conventions, including the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR), the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), the International Labor Organization Convention (ILO), the International Covenant on Civil and Political Rights, and the UN Framework Convention on Climate Change (UNFCCC). The reference to such an abundant number of sources of international law contributes greatly to the in-depth awareness of the concerns and thorny issues that may entail international conflicts during the exploration and exploitation of the Arctic reserves, making the legal analysis more comprehensive, multidimensional and, as mentioned before, multifaceted. Apparently, the dichotomy of the "treasure chest" versus "Pandora's Box" overlaps all the activities of exploration and exploitation of the Arctic reserves, rendering the possibility faint as to the creation of a solid legal background. Nevertheless, the international community may benefit greatly from the work of such an analytical

nature as the book provides, because it thoroughly reveals the main threats, risks, and inconsistencies relating to the existing international legal regime for the Arctic.

In the final chapter of the book Sahu comes to an array of sophisticated conclusions that may capture the attention of lawmakers and policymakers, and even those who are indifferent to the future of the fragile Arctic environment. The first and foremost conclusion relates to the aforementioned idea according to which the current international legal regime for the Arctic is inadequate to handle the existing socio-legal concerns in a comprehensive and well-organized manner. That notwithstanding, it may be considered a successful part of a social experiment and a certain legal driver for the development of the hydrocarbon resources in the Arctic Region. Sahu asserts that thus far the legal regime has been nothing more than a realm of conflict between the common heritage of mankind and the territory of Arctic states. The solutions he suggests for better organizing the entire legal regime encompass the following: the introduction of a new dispute settlement mechanism incorporated with the Arctic Council; the formation of an Arctic treaty, based on the Antarctic treaty system, shifting the soft legal arrangement of the Arctic into a hard legal regime; the governance of the Arctic Region, according to Sahu, should be vested solely in the Arctic Council; the necessity of NGO participation in the composition of the Arctic Council; the entire current legal framework in respect of the Arctic should be consolidated in a single legal instrument; the particular requirement for oil and gas corporations to maintain environmental standards in respect of Arctic exploration; the role of non-Arctic states should be specified and limited to scientific research on climate change, energy security, and shipping routes, among other matters.

The style of writing adopted by Sahu in *New Energy Basket of the World: The Arctic* is concise and at the same time accessible, making the information covered by the research engaging and noteworthy, both for legal scholars, law-makers, policy-makers, law students, etc. and for interested laypeople. The quotation from the Atharva Veda, provided as the final lines of the book, tunes the interpretation of the main ideas to the philosophical mode. The treasure chest of the Arctic may turn into a Pandora's Box if explored and exploited recklessly and greedily. The world community should embrace the sustainable development mission in order to anticipate and avoid the possible risks of international conflicts and natural disasters for, "[W]hatever we dig out from Earth must have to be filled up again, and restored as fast as possible…" Hopefully, "[W]e do not intend to hit the Earth at the Heart of the Hearts."

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CONFERENCE REVIEW NOTES

ADMINISTRATIVE JUSTICE: COMPARATIVE AND RUSSIAN CONTEXT

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International conference "Administrative Justice: Comparative and Russian Contexts" took place in Tyumen at the Tyumen State University on September 29–30, 2016 in the framework of the II Siberian Legal Forum devoted to the development of administrative legal proceedings in Russia.

The conference was held in four sessions. The first section was devoted to administrative legal proceedings in economic litigation. The newly adopted Administrative Procedure Code regulates the administrative proceedings in courts of general jurisdiction. Commercial courts still have some competence to hear public matters cases. Such proceedings are governed by the Commercial Procedure Code. The retired judge of the Constitution Court of Russian Federation, professor **Mikhail Kleandrov** debated if judges have got specialization after the adoption of the Administrative Procedure Code. He pointed out that there were no real specialization before the Code, but he characterized the new Code as "a horse's saddle for a cow." The Code and other relevant legislation do not settle the peculiarities of the proceedings or a judge legal status for the administrative proceedings. He offered to address to German approach, in particular to give more competence in resolving public matter disputes to district courts and to justices of the peace. Also he suggested establishing a separate High administrative court, and later returning to the High Commercial Court. He pointed out that some competence of the court of general jurisdiction in

administrative cases is beyond their jurisdiction. He spoke in support of the idea to establish constitutional courts in regions and to develop separate law concerning constitutional proceedings.

The scholar of the substantive administrative law science professor **Yuri Starilov** (Voronezh State University) argued with the delegates who represented the procedural law science about their negative appraisals concerning the new Code. He thought that the Constitution of Russian Federation had correctly prognosticated the necessity of the administrative justice. The new Code is not "early fruit," but circumspect act, that establishes the new procedural form of justice (administrative one). The Code does not create any problems for the judges, but defend ordinary citizens from arbitrariness of the state. The reporter admitted that the Code had already been amended seven times, but he considered it as normal practice for the act of such complexity. The main urgency now in administrative law is the federal regulation of administrative proceedings that take place in state (executive) bodies.

The representative of the practical views the Judge of the Arbitrazh Court of the West-Siberian Circuit **Olga Chernousova** pointed out some main characteristics of adjudication of public matter disputes in commercial courts. The most frequent public matter cases are concerned tax, budget and antimonopoly (competition) legal relations. Commercial courts apply mechanisms of e-justice and systems of video conferencing in such disputes. Some public matter cases could be settled by means of summary proceedings. It is interesting that the problems of adjudication of such disputes arise not from procedural law regulation, but from some deficiency of administrative law. For example, there are four state bodies that control preservation of roads and it is difficult to define the right defendant in such cases. Also new mechanisms of the execution of the state functions had appeared, i.e. the "system of one window," when an applicant applies to one state body and the latter itself obtains all necessary permissions from other state bodies. In this case often such questions arise as whose decision to dispute in case of rejection to perform state functions, who should be defendant, who would pay court's costs. Also it is not still clear how to distinguish normative and non-regulatory acts, non-regulatory act and decision of an executive state body. Sometimes the relations that are regulated by the administrative law and subject of dispute are quite complicated for application. The reporter also mentioned that it is possible to challenge only acts, that violates somebody rights. But in practice it is quite difficult to establish a fact of negative consequences of the act. For example, it is impossible to dispute an official warning about offence. But if a company does not perform duties stated in the notification the fine can be imposed.

The Judge of the Tyumen Regional Court Professor **Maxim Mateykovich** in his report concerning protection of rights and freedoms of person in administrative proceedings pointed out that it is important to ensure a balance of private and

public interests in administrative proceedings. It is not clear what public interest is, for example in a case concerning duties of the regional or municipal authorities to remove waste. This interest also is not uniform. There are federal, regional and municipal authorities. Disputes with citizens can involve state bodies with different status and powers. The reporter doubted that such cases as a setting of an administrative supervision or defense of the voting rights should be adjudicated in administrative proceedings. In practice it is quite difficult to choose the right form of adjudication (civil, administrative or criminal), for example in such cases as road accident. But sometimes there is a malusage of choice of these forms. The Judge saw the perspective of the development of administrative justice in further reforming of the legislation (the Administrative Procedure Code). He offered to regulate a right to void acts of non-profit corporations that perform some state functions (i.e. Platon), but he disputed the necessity of specialized administrative courts.

The second and third sessions under moderation of the Chairman of the Arbitrazh Court of West-Siberian Circuit **Vladislav Ivanov** and professor **Dmitriy Maleshin** (Lomonosov Moscow State University, Russia) were devoted to the analysis of the administrative justice in comparative context. Professor of the University of Pavia (Italy) **Elisabetta Silvestri** presented an extensive overview of the administrative justice in Italy. Administrative justice in Italy is dispensed by special courts (twenty Regional Administrative Tribunals, one for each Italian Region). The Council of State is the appeal administrative court. In one case of lack of jurisdiction one more appeal can be brought before the Court of cassation. Also there is a separate administrative court which adjudicates cases concerning public finance (the Court of Accounts). The Constitution of the Italian Republic regulates main basics of the administrative justice. It grants individuals the right to seek judicial protection against state bodies. Another act that thoroughly regulates the administrative proceedings in Italy is the youngest Italian Code – the Code of Administrative Procedure (September 2010).

It is interesting that ordinary courts also have competence to hear administrative cases and the delineation of competence of ordinary and administrative courts bases on the distinction between "substantive right" (which is protected by ordinary courts) and "legitimate interest" (that is protected by the set of administrative courts). The reporter pointed out that the distinction between the two forms of entitlement is very elusive. The fact that a public entity or administration is a party of a case does not mean that an administrative court has jurisdiction over the case. According to the Article 7 of the Code of Administrative Procedure legitimate interests arise when a state body exercises (or fails to exercise) an authoritative power affecting individuals. The administrative court now may also award monetary compensation to the claimant for the harm caused by unlawful acts of the state body. Earlier such damages had been compensated only for the infringement of subjective rights. Administrative courts have a general jurisdiction to review the lawfulness of any

administrative acts. The administrative act, once found unlawful, is declared null and void, while ordinary court cannot declare the act null and void, it can only disregard it, and decide the case as though the act had never existed. Administrative courts also have so called "exclusive" jurisdiction, when some cases concerning protection of substantive rights are excluded from the jurisdiction of the ordinary court and adjudicated by administrative one. The reporter referred to the speech of the Chief Justice of the Council of State who had emphasized that in spite of the improvements brought about by the Code of Administrative Procedure there is still room for more efficiency and, most of all, for a better understanding of the important role played by administrative courts. But in fact, people do not recognize administrative courts as their protectors and doubt the necessity for their existence.

The Federal Judge of Rio de Janeiro, the Executive Secretary of the Drafting group of the Model Code of Administrative Procedure for the countries of Latin America **Ricardo Perlingeiro** in his report about the reform of administrative justice in Latin America noted that in the field of the administrative justice the prerequisites for effective judicial protection of rights are judges who are administrative law specialists and independent from the authorities responsible for the challenged decisions, as well as the reinforcement of procedural principles that enable weighing private interests against public interests. In many Latin-American countries there are three main rules of effective judicial protection in administrative disputes. First, the judicial protection must be complete. Second, the judicial protection must cover every type of conduct of public authorities. The third rule concerns the timeliness of the protection.

The reporter focused on two different approaches of organization of administrative adjudication. The first way can be found in common-law countries where there are no specialized administrative courts but specialized quasi-judicial bodies within the administrative body. The second way when the courts have a special division for adjudication of administrative cases is typical for Continental Europe. So regardless of the organizational system, administrative justice is always placed in hands of specialized adjudicators.

As former Iberian colonies, the countries of Latin America inherited the Continental European legal culture, with its civil law tradition. Lately the USA Constitutional law had a strong influence on Latin-American countries. As a result, most of them have adopted a judicial system in which ordinary courts of general jurisdiction hear both civil and administrative disputes. Thus, now administrative dispute resolution system in Latin America countries suffers both from the lack of specialized administrative courts and absence of quasi-judicial bodies within the administrative authorities themselves.

The reporter offered a solution for the noted problem. He thought that after over two centuries of a judicial system consisting only of courts of general jurisdiction, it would not seem the best option to establish administrative courts. The future

of Latin American administrative justice depends on compensating for the lack of specialized administrative courts by endowing administrative agencies with guarantees of procedural due process.

The speaker from France Professor **Hugo Flavier** (University of Bordeaux**)** gave an overview of the administrative justice in France. He began with the history of development of the administrative law and administrative proceedings which had been originated in the XVII century. The reporter pointed out that the administrative law in France was developed by case law.

There are ordinary and specialized administrative courts in France, the ordinary administrative courts are the *Conseil d'Etat*, administrative courts of appeal and administrative courts. *Conseil d'Etat* was established by the Constitution of the Year VIII and consists of 300 members who work in 7 sections. The judicial powers of the *Conseil d'Etat* are governed by Article L. 111-1 of the Administrative Justice Code. The *Conseil d'Etat* is the highest administrative court. The *Conseil d'Etat* hears cases at first and last instance. Administrative courts were created by the Decree of September 30. Administrative Courts of Appeal were established on December 31, 1987 to unload the *Conseil d'Etat* overloaded with administrative cases. These courts have both administrative and judicial powers, what is subject to criticism by French experts. But in 2006 ECtHR in the case Sacilor Lormins v France considered that such powers duality did not violate the principle of judicial impartiality.

The French case law has elaborated the principle of separation which governed the determination of jurisdiction of courts of general jurisdiction and administrative courts. The principle means that jurisdiction follows the substance, so competent court is determined by applicable law (civil or administrative). There are two criteria that determine the jurisdiction of administrative courts – organic and material one. The organic criterion concerns that person involved in the dispute (public or private one). The material criterion concerns the nature of activity or the nature of act in dispute.

There is special *Tribunal des conflits* had been established which adjudicates conflicts of jurisdiction between ordinary courts and administrative courts. It can hear cases of negative or positive conflict. There are negative conflicts when neither court considers that it has jurisdiction to hear the case brought before it. There are positive conflicts when both courts consider that they have jurisdiction.

The reporter made some remarks concerning the influence of the European laws on the French administrative justice. The speaker admitted that the standard of protection required by the European Convention resulted changes in the French administrative justice.

Professor **Jaroslaw Turlukowski** (Warsaw University, Poland) gave extensive analysis of the development of the administrative justice in Poland over the last centuries. He outlined the system of the administrative courts and judges in Poland and presented fundamental principles that governed administrative proceedings

in Poland. There is dual court's system in Poland. There are courts of general jurisdiction and administrative courts headed by the Supreme Administrative Court. The proceedings in administrative courts are regulated by the special act – Law on Proceedings before Administrative Courts. According to this act administrative courts have control functions over activities and acts of public state bodies.

The speaker emphasized the following principles of the administrative justice: the principle of two instances, the principle of legality, the principle of legal assistance to parties, the principle of procedural economy, the principle of transparence, the principle of access to the court and others.

Professor **Francisco Verbic** (University La Plata, Argentina) overviewed the administrative justice in Argentina. Argentina is a federal country, and the Article 5 of the Federal Constitution sets that Provinces must organize their own administrative justice system. Thus, there are 25 different system of procedural law in Argentina now. The system of administrative court is quite complicated in Argentina. The administrative justice delivered by the Argentina Supreme Court of Justice, 15 Appellate Courts, courts od federal general administrative jurisdiction and 6 specialized administrative courts. It is worth to mention that even though there is system of administrative courts in Argentina, there is no special regulation of the proceedings in such courts. Administrative courts hear cases followed by the National Civil and Commercial Procedural Code. The speaker also paid attention to the problem of class actions in administrative proceedings.

The forth session under the moderation of professor **Sergey Belov** was devoted to Reforms of Administrative Justice in Russia. The moderator pointed out that the Russian Administrative Procedure Code was created by thoughtless extraction of the norms concerning public matter disputes to the separate act. There are two main problems arise in the field of administrative justice: 1) it is complicated to distinguish civil and administrative procedure and uniform terminology in the Civil Procedure Code and the Administrative Procedure Code leads to the unification of the procedural form, but not to the peculiarities of the administrative justice; 2) it is not clear what is the main task of a court in administrative justice (to resolve a dispute or to check the legality of the acts and actions of the state bodies).

The judge of the Tyumen Regional Court **Svetlana Koloskova** highlighted main problems that arise during adjudicating public matter cases. The speaker noted that the list of the cases that can be adjudicated under the Administrative Procedure Code is not exhaustive. It is set that other cases can also be heard in accordance with the Code. But that results problem to identify such cases. For example, should a court consider as administrative a case concerning an exemption from paying execution fee.

Other problem is the question of a choice of the form of procedure. There are complicated cases that include claims concerning both public and private relations. For example the claim about void of an act and claim for damages, caused by such

act. The recently adopted the Act of the Plenum of the Supreme Court of the Russian Federation No. 36 concerning the implementation of the Administrative Procedure Code interprets that a court may not adjudicate any disputes concerning civil rights (also concerning damages) under the regulation of the Administrative Procedure Code. It means that a court should terminate proceedings and explain a claimant that he may take action to a court under the Civil Procedure Code. Moreover, in case when a court had adjudicated a case concerning private relation in accordance with the Administrative Procedure Code, his decision should be overruled by the appellate court and the case should be adjudicated again in accordance with the "right" Code. Thus a court would hear the same case twice, and the legal certainty of the rights of a plaintiff would not be attained for a long time.

Professor **Svetlana Savchenko** (Institute of the State and Law of the Tyumen State University) overviewed the main tasks of the administrative justice.

Professor **Nataliya Bocharova** (Lomonosov Moscow State University) criticized the Administrative Procedure Code and doubted the necessity of its adoption. The Code for the most part just replicates norms of the Civil Procedure Code and the Commercial Procedure Code. The Code also uses legal terms related to action-based proceedings that results some confusion especially party autonomy in administrative proceedings is analyzed. Party autonomy is one of the principles of civil procedure law and international arbitration. Traditionally it is explained by way of the possibility to freely dispose one's civil law substantive rights (which are subject of the dispute). In Russian civil procedure theory we called it dispositive principle, which in the first place means the possibility to dispose one's civil substantive rights during the judicial proceedings. It is obvious that the nature of private and public rights is different. There is the possibility to dispose public rights (for instance to refrain from disposition of a public right), but the scope of such disposition is incomparably less than for civil rights. Public relations by the legal nature are subordinated. Russian scholars admit that public right unlike private one does not include the possibility to claim something from the state body. The private person has only right to appeal to the court for protection against unlawful acts of public authorities and official. The Administrative Procedure Code contains the list of principles that governs administrative justice (Art. 6), which includes such principles as independence of the judiciary; equality before the law and the courts; the legality and justice of adjudication of administrative cases; the implementation of the administrative proceedings within a reasonable time and the enforcement of judgments in administrative cases within a reasonable time; transparency and openness of the trial; the immediacy of the trial; equality of parties and adversarial administrative proceedings with the active role of the court. The principle of party autonomy is not mentioned in this list. Russian scholars acknowledge that in some extent this principle should be applied to the adjudication of administrative cases. Meanwhile this principle is confined (in more extent than in civil procedure) by the

idea of the active role of the judge. The active role of the court in administrative justice is manifested in the implementation not only to the principle of adversarial proceedings but also to other principles. In particular, the specificity of the party autonomy principle in administrative proceedings assumes, in contrast to the civil proceedings, that the court overseeing the development of the judicial process and the disposition of the substantive rights.

Professor **Dmitriy Tumanov** (Kutafin Moscow State Law University) in his report concerning the defense of common (public) interest noticed that the development of law concerning public matter disputes did not proceed the path of formation of a separate administrative procedure, but the path of attribution of universality to the civil procedure form. It means that public matter disputes were adjudicated in accordance with special norms of the Civil Procedure Code and there was no need in the separate Administrative Procedure Code. The new Administrative Procedure Code is not original one; it is "legal clone" of the Civil Procedure Code and the Commercial Procedure Code.

The analysis of the Administrative Procedure Code indicates that the right to protect the public (common) interest in the court is totally unacceptably regulated by this Code. For example without any reason the right to protect common interest was granted only to the state bodies. Also the Code allows these state bodied to decline their claim. In this case the process would continue. But there is no rules that indicate who would keep up the claim before court.

One of the procedural mechanisms that help to defend common (public) interest is class administrative action. The Administrative Procedure Code mentioned class action, but there is no detailed regulation of the proceedings, initiated by such action.

Professor **Dmitriy Abushenko** (Ural State Law University) in his report concerning replacement of a defendant in administrative procedure also made critical review of the Administrative Procedure Code. The reporter focused on the rule of the Code that sets the right of a judge to bring to trial another defendant without consent of a plaintiff. The rule that gives a court in adversarial proceedings to define proper defendant before adjudication of a case is unacceptable. It means that a court predetermines a court decision before adjudication. Bringing to trial another defendant against the will of the administrative claimant means ad litteram the possibility of the court to initiate a new administrative lawsuit, which violates the fundamental principle of the procedural law.

The conference showed that administrative justice is very controversial and complicated subject and in Russia and other countries we still do not have some perfect systems of protecting the public rights of individuals against violations of their rights by state authorities.

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