Russian Journal of Comparative Law

Has been issued since 2014.
E-ISSN 2413-7618
2017. 4(2). Issued 2 times a year

Journal is indexed by: **OAJI, MIAR, ROAD, E-library, Scilit**

All manuscripts are peer reviewed by experts in the respective field. Authors of the manuscripts bear responsibility for their content, credibility and reliability.

Editorial board doesn't expect the manuscripts' authors to always agree with its opinion.

Postal Address: 1367/4, Stara Vajnorska str., Bratislava – Nove Mesto, Slovakia, 831 04

Website: http://ejournal41.com/
E-mail: aphr2010@mail.ru

Founder and Editor: Academic Publishing House Researcher s.r.o.

Release date 20.12.2017.
Format 21 × 29,7/4.

Headset Georgia.

Order № RJCL-12.

Russian Journal of Comparative Law

2017

Is. 2

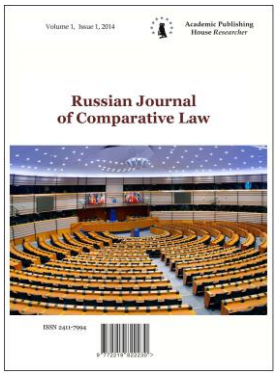
C O N T E N T S

Articles and Statements

Reviews

Published in the Slovak Republic
Russian Journal of Comparative Law
Has been issued since 2014.
E-ISSN 2413-7618
2017, 4(2): 63-70

DOI: 10.13187/rjcl.2017.2.63
http://ejournal41.com



Articles and Statements

Legal Framework of International Cooperation of the Republic of Serbia in Agriculture

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Abstract

The main aim of this article is to determine and analyse the legal framework of international cooperation of the Republic of Serbia in agriculture. In this paper, the formal-legal method, the method of text analysis, and the statistical method have been used. When it comes to the materials and sources, both domestic and international regulations in force have been used, as well as the concluded international agreements and conventions, together with international acts, newspaper articles, relevant scientific papers and databases. The starting point in this research has been that agriculture, as an extremely important economic area for Serbia, and for the most countries in the world, is a significant segment of the international economic cooperation of Serbia. The legal framework governing this cooperation can be classified as the global level, the continental, i.e. the European level, and the regional level. Simultaneously, at all levels, the basic legal acts regulating the international cooperation of the Republic of Serbia in agriculture have been determined, whether they are signed international agreements, both multilateral and bilateral, or international recommendations and standards, i.e. recommended acts for legal harmonization and their implementation in the process of international integration.

Keywords: law, agriculture, international cooperation, FAO, WTO, EU, Russian Federation, China, India, CEFTA, Serbia.

1. Introduction

Agriculture, as an economic area, is one of the segments of the international economic cooperation of the Republic of Serbia. Thereby, agriculture is an extremely important part of economics, both for Serbia and internationally. Namely, traditionally, Serbia is an agricultural country. In addition to this, according to the latest data, agriculture has a share of about 47 percent in the GDP of the Republic of Serbia, with about 1.3 million farmers, which is about 17 percent of the total population. The contribution of agriculture to the Serbian foreign trade balance is particularly significant, given the fact that the data for 2013 indicated that the foreign trade surplus of agriculture amounted to about 912 million euro. According to the general assessment, it is considered that in the agriculture, Serbia has the potential to increase its exports to large markets, such as Russia and China.

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Internationally, agriculture is considered a strategic activity, and agricultural products are "sensitive products" since agriculture provides nutrition to population, i.e. the stability of the country in crisis situations. Therefore, agriculture has a special status in international agreements as a result, agricultural products are regulated separately from other (industrial) products. This can be seen at the global, continental and regional levels. Namely, the Food and Agriculture Organization (FAO) was established within the United Nations, and special agreements in the field of agriculture (and food) were concluded within the World Trade Organization: The Agreement on Agriculture and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). At the continental or European level, the importance of agriculture is reflected in the share of agricultural expenditure in the EU total budget (39 % in 2015) (EC, 2017). Also, agriculture is especially regulated at the regional level, that is, within the framework of the CEFTA 2006 (CEFTA).

The Republic of Serbia is a member of all important international organizations, as well as signatories to all principal international agreements in the field of agriculture. Firstly, at a global level, Serbia is a fully-fledged member of the FAO. Also, Serbia has committed itself to the implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures, as well as other international agreements in this field. Besides this, in the process of joining the European Union, Serbia has signed the Stabilization and Association Agreement (SAA) which regulates the issue of agriculture, and has committed itself to harmonize its regulations in the field of agriculture with the *acquis communautaire*. At a regional level, Serbia is a signatory to the CEFTA which also regulates agricultural products. Furthermore, Serbia has concluded several bilateral agreements in the field of agriculture, on general, as well as on individual issues.

2. Materials and methods

When it comes to the materials and sources, both domestic and international regulations in force have been used, as well as the concluded international agreements and conventions, together with international acts, newspaper articles, relevant scientific papers and databases. In this paper, the formal-legal method, the method of text analysis, and the statistical method have been used.

3. Discussion

1.1. *Constitutional basis*

According to the Constitution of the Republic of Serbia of 2006, confirmed international treaties and generally accepted rules of international law are part of Serbian legal system (Ustav, 2006; clan 194). This provision for the first time fully equalled the confirmed international agreements and generally accepted rules of international law with the national sources of law, primarily with the regulations and official legal interpretations and opinions. Therefore, institutions in Serbia are able to make decisions based on international law that has not been ratified by the National Assembly (Dabovic, 2017; 15). This mixed approach to the application of international law, which relates to the entire Serbian legal system, is of a particular importance in the field of agriculture, since various aspects of this field are regulated by international regulations, at a global, continental and regional level. Namely, at a global level, agriculture is regulated in detail by the World Trade Organization agreements, systems, or collections of technical rules (HACCP and *Codex Alimentarius*) and international agreements on individual issues. At the continental level in Serbia, the law of the European Union can be applied, since EU legislation is generally accepted in Europe, mainly by the member states and candidate countries, but also by third countries, which voluntarily apply it for easier business cooperation with the member states (like the EFTA countries). Also, bilateral agreements in the field of agriculture can be directly applied.

1.2. International cooperation of Serbia in agriculture at the global level

The importance of international cooperation in agriculture at the global level comes primarily from the large number of countries involved in this cooperation. Namely, the international organizations and multilateral agreements most often comprise countries that commit themselves to cooperating with other member states, i.e. signatories within them, thus achieving global uniformity in the handling of certain issues. In this way, easier cooperation between economically, politically and culturally different countries is possible in trade of agricultural products, as well as in their production, and also in other economic, and non-economic areas. In the field of

agriculture, the Republic of Serbia has largely applied the FAO rules within the *Codex Alimentarius* (CA), the relevant World Trade Organization agreements (although not yet a member of the WTO), the HACCP system, and several individual conventions on various issues, such as: plant health; protection of new varieties of agricultural plants; plant genetic resources, sugar production and marketing; labour inspection in agriculture; and protection of vertebrates intended for experimental and other purposes.

1.2.1. Food and Agriculture Organization

Serbia has been a member (initially within ex-Yugoslavia) of the Food and Agriculture Organization since the founding of this organization, and after gaining its independence, this membership was succeeded. According to a FAO report from 2016, the cooperation of this organization with Serbia continued in 2001, following the break caused by international sanctions, and has been steadily increasing ever since, as Serbia has provided sustainable support to the goals of the FAO. The technical support provided by the FAO in the previous period focused on supporting the development of diverse policies, investment support, sustainable development and social inclusion, especially of farmers, as well as strengthening the cooperation and stability in the region. Also, the cooperation included post-flood recovery (from 2014) and risk management (FAO, 2016).

CA is a collection of internationally recognized standards, rules of practice, guidelines and recommendations relating to food, including production and food safety. The CA text was adopted and updated by the Commission (Codex Alimentarius Commission), founded by the FAO and the World Health Organization in 1961. The main proclaimed objectives of the Commission are the protection of consumers' health and the provision of fair practice in the international food trade. Therefore, the WTO has recognized CA as the international reference basis for the settlement of disputes related to food safety and consumer protection. CA includes all foods, processed, semi-processed or raw, whereas more attention is paid to foods that are directly available to consumers on the market. As well as food standards, CA contains standards that cover other issues in this area, such as food labelling, food hygiene, additives, pesticides, and safety assessment procedures of the food that is created by biotechnology. Additionally, there are guidelines for inspection control of food import and export, as well as certification of the food system (FAO, Understanding...).

1.2.2. World Trade Organization

In 2005, the Republic of Serbia submitted a request for accession to the WTO on a special memorandum outlining trade policy in various fields, including agriculture. In 2006, the Working Group for Serbia started negotiations, 13 meetings were held by 2013, 12 bilateral protocols on access to goods and 9 bilateral protocols on access to services were concluded.

The accession country is expected to harmonize all the regulations regarding foreign trade directly or indirectly with the WTO rules. This means that a significant liberalization of the foreign trade regime must be carried out in a way that it is in line with the WTO rules. Serbia, although not yet a member of the WTO, has committed to the application of the rules of this organization, or its agreements, the Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Agriculture.

The Agreement on the Application of Sanitary and Phytosanitary Measures refers to the harmonization and implementation of regulations in the field of food safety, veterinary medicine and plant protection and health. It allows Member States to establish their national standards in these areas that must be medicine-based and can only be applied to the extent necessary for the protection of humans, animals or plant. All Member States have adopted measures to ensure that food is safe for consumers, as well as to prevent the spread of pests or diseases among animals and plant. These sanitary (human and animal health) and phytosanitary (plant health) measures can be different and can be applied to both the production and the import of food. The main objective of the Agreement is to retain the sovereign right of each member state to provide the level of healthcare that is considered appropriate in certain circumstances, but also to ensure that these sovereign rights are not abused for protectionism and do not lead to unnecessary barriers to international trade.

What is more, within the framework of the Agreement, the procedure for the adoption of national regulations in this area is determined by the annexes, as well as the establishment of contact points and procedures for notification, control, inspection and issuance of approvals.

By the Agreement on Agriculture, the Parties firstly undertook that all non-tariff measures be replaced by customs and thus increase the transparency and security of trade in agricultural products ("tariffing"). In addition, members have pledged that tariffs received after tariffication in developed countries will be 36 percent on average, with a minimum reduction of 15 percent for individual products, while tariff reductions in developing countries will be reduced by 24 percent on average, whereas the minimum reduction for individual products should be 10 percent. The period for reducing customs is six years for developed countries and 10 years for developing countries. In the event of a significant fall in the price of imported products or the rise in the volume of imports, it is envisaged that a member may, to mitigate the negative consequences of the application of the Agreement, postpone the undertaken obligations temporarily. Also, the Agreement provides that Member States may retain the existing import restrictions for a product for non-commercial purposes (such as food safety, environmental protection, etc.). Furthermore, the system of tariff quotas has been introduced, which ensures the continuation of imports of the same quantities of agricultural products before the commencement of the Agreement. In this way, the reduction of customs rates is applied only to quantities within a certain quota, while considerably higher customs rates are applied for the quantities exceeding this quota (Popovic, Katic, 2007; 3-61).

1.2.3. *Hazard Analysis and Critical Control Point (HACCP)*

Hazard Analysis and Critical Control Points (HACCP) is a systematic preventive approach to food safety that identifies physical, chemical and biological hazards in production processes that can cause the finished product to be unsafe (FAO, 2013). As defined herein, HACCP is a set of hazard prevention measures and can be used at all stages of the food chain, starting from food production and the preparation process, including packaging, distribution, and more. This system has been accepted by the FAO and the World Health Organization, as recommended by the WTO.

HACCP is based on the following principles: conducting a hazard analysis; identification of critical control points; establishing critical boundaries for each critical control point; establishing a critical monitoring points; establishing a corrective action; establishing a procedure to ensure that the HACCP system functions adequately. The HACCP system works by first, identifying risky production points, or the points in the technological process in which product contamination may occur. Then, preventive measures for control are taken that will prevent contamination. One of the most important aspects in the production and distribution of food is its quality and safety, and it is the responsibility of every manufacturer to provide quality food to the market with certain nutritional properties and sensory qualities, but at the same time hygienically clean, safe food, which will favourably affect the health of consumers. Therefore, the main goal of the HACCP system is the production of safe food products. This system implies determining the responsibility of all participants in the food production chain for the safety of food. This means that, if there is a risk to the health of consumers, all participants are obliged to take measures without delay to prevent harmful consequences (for example, the product may be withdrawn from sale) and inform the competent authorities thereof.

1.2.4. Multilateral conventions and bilateral agreements

At the global level, The Republic of Serbia achieves international cooperation in the field of agriculture with international organizations, as well as within multilateral conventions and bilateral agreements, regulating certain issues of importance for agriculture. Thus, Serbia is a signatory, or is considered a signatory, in multilateral conventions such as: International Convention on Plant Protection, International Convention on protection of new varieties of plants, International Agreement on plant genetic resources for food and agriculture, International sugar agreement, Convention on labour inspection in agriculture, and European Convention on protection of the vertebrates intended for experimental and other scientific purposes. In addition, Serbia has concluded bilateral agreements in the field of agriculture with India (Zakon o potvrdjivanju..., 2010), Tunisia and Israel. Also, several bilateral agreements in veterinary medicine and animal health were concluded.

An agreement between India and Serbia on cooperation in the field of agriculture and related sectors was concluded in 2009 with the intention to develop and improve economic, scientific and technical cooperation in the field of agriculture and food industry. Namely, the contracting parties have agreed to stimulate the development of economic, scientific, technical and business relations

in the field of agriculture and food industry. In addition, the contracting parties are to facilitate the establishment of institutional links between enterprises and other economic entities of the two countries in this area. The cooperation between the two countries pursuant to this agreement shall take place in the following areas: Exchange of the scientific and technical information; organizing training programmes, seminars and visits by experts and consultants; exchange of quality hybrids of crops and vegetables and gene pool of fruit; development and introduction of modern technologies in the field of agriculture and food industry; harmonization/cooperation in veterinary, phytosanitary and other regulations with international standards; the improvement of agricultural trade between the two countries, and others. To that end, the contracting parties agree to establish a Joint Commission to monitor the implementation of this Agreement. The Joint Commission meets at least once a year alternately in the Republic of India and the Republic of Serbia.

The General Directorate for Quality Control, Inspection and Quarantine of the People's Republic of China and the Ministry of Agriculture of the Republic of Serbia concluded the Memorandum of Understanding on Cooperation in the Field of Granting Food Safety Guarantees for Import and Export in May 2017. Moreover, on this occasion, a protocol was signed on the exchange of scientific information related to *Nodular dermatitis*, i.e. lumpy skin disease of cattle. The memorandum is umbrella document which is supposed to allow Serbia to export goods of plant and animal origin to China, primarily regarding to various types of meat, milk and dairy products, corn, sugar beet and dry plums. The signed protocol on *Nodular dermatitis* is important since Serbia got the disease under control last year and received recognition from the EU for defending Europe's territory. Additionally, China's representatives submitted a questionnaire to the Serbian side. The questionnaire is related to the Serbian export of pork meat, which is the starting point for realization of exports of this type of meat, especially the frozen one, in China. Serbia has committed itself to submit a completed questionnaire on the export of products of plant origin, primarily mercantile corn, dried plums and molasses. It is expected that the export of these goods will start soon (Ministarstvo..., 2017a).

In January this year, as an introduction to the memorandum on food safety, the Minister of Agriculture of the People's Republic of China and the Minister of Agriculture of the Republic of Serbia, signed a Memorandum of Understanding on Cooperation in the Field of Agriculture which envisages the arrival of investors from China in Serbia and the increased export of Serbian agricultural products to China's large market. This document is related to investments of China's large companies in the food and processing industry of fruit and vegetables, and meat processing, as well. The goal is to use the existing raw materials in Serbia and to export them with higher value. This memorandum also refers to the deployment of protocols related to Serbia's exports to China, with a view to increase exports and cooperation of scientific-research institutions (Ministarstvo..., 2017b).

1.3. International cooperation of Serbia in agriculture at the continental (European) level

International cooperation of Serbia in agriculture at the continental (European) level is being implemented primarily with the European Union, but recently also on an increasing scale with Russia, as well as with other European countries and organizations.

The process of accession of the Republic of Serbia to the European Union has been formally initiated by the Resolution on the Accession to the European Union, adopted by the National Assembly in 2004, given that this Act emphasizes that EU membership is a strategic commitment of Serbia. To this end, the harmonization of regulations with the EU *acquis communautaire* has started. In Article 1, point 4 of the Stabilization and Association Agreement signed by Serbia with the EU Member States in 2008, it is stated "to support Serbia's efforts to develop economic and international cooperation, among other things, through the harmonization of its legislation with the Community legislation". Namely, it is one of the main objectives of this agreement, i.e. preparation for accession to the European Union. In this regard, the National Program for the Adoption of the Acquis of the European Union was adopted in 2013 and renewed in 2014 and 2016. According to the National Program, the entire area of the *acquis communautaire* is divided into 33 negotiating chapters, including Agriculture and Rural Development (Chapter 11) and Food Safety and Veterinary and Phytosanitary Policy (Chapter 12). Within Chapter 11, in addition to agriculture and rural development, issues related to the organization of the agricultural market, quality policy, and organic agriculture have been addressed, while chapter 12 presents food safety and veterinary

policy, plant health, seed and planting material, as well as plant protection products, residues and genetically modified organisms.

Also, at the European level, Serbia concluded the Free Trade Agreement with the Russian Federation, as well as the agreement on agricultural cooperation and agreements on veterinary and plant protection. Furthermore, Serbia has concluded bilateral free trade agreements (including agricultural products) with the EFTA, Belarus, Turkey and Kazakhstan, as well as the agreement with Ukraine in the field of plant protection.

1.3.1. Stabilization and Association Agreement with the EU

By concluding the Stabilization and Association Agreement (Zakon o potvrdjivanju..., 2008, 2014) in the process of accession of the Republic of Serbia to the European Union, among other things, a free trade zone between Serbia and the Union (i.e. the member countries of the Union) is gradually created. In this regard, agricultural products are given special significance, since agriculture is regulated by a separate chapter under this agreement. By the agreement, the European Union has committed itself to abolish all quantitative restrictions and measures, as well as all customs duties and charges which have the same effect on the imports of agricultural products originating from Serbia. This rule does not apply to beef products, for which the reduction in the customs duty is 20 percent, for an annual quota of 8,700 tonnes, or for sugar for which duty-free imports only apply up to an annual quota of 180,000 tonnes. On the other hand, Serbia has committed itself to abolish customs duties on imports of certain agricultural products originating in the Union, to progressively abolish customs duties on imports of certain agricultural products (in accordance with the dynamics indicated for each product in the Annex) and to reduce the import customs duties of certain agricultural products (in accordance with the dynamics given for each product in the annexes). In addition to the above-mentioned provisions, which are solely applicable to agricultural products, general provisions also apply to this product group for all types of goods, such as provisions on rest periods, dumping, safeguard clauses, rules of origin, etc.

1.3.2. Free Trade Agreement with the Russian Federation

This agreement (Zakon o potvrdjivanju..., 2001) was concluded with the purpose of expanding and encouraging mutual trade-economic relations aimed at accelerating the economic development of the two parties. It is also aimed at the harmonization of customs procedures and the manner of application of the rules of origin of goods that correspond to the norms of international practice and the harmonization of the procedure for controlling the origin of goods by the customs authorities of both parties. Within a period of five years from the date of entry into force of this Agreement, the parties undertook to endeavour, to take concrete measures for the gradual abolition of the import duties and other equivalent measures of foreign trade for goods originating in the customs territories of the contracting, including agricultural product. In doing so, it has been agreed that the contracting parties will harmonize the exemptions from the regime each year, which will be applied based on bilateral protocols. It has been agreed that the contracting parties will cooperate and exchange information in the field of standardization, metrology and conformity assessment to prevent technical barriers to trade between them. The parties have committed themselves and will apply the normative acts of their countries in the field of veterinary medicine, quarantine and plant protection, especially in the part within the jurisdiction of relevant international institutions that provide information on the spread of infectious diseases in domestic animals and quarantine diseases, pests and weeds in plants and on the occasion of harmonization of the necessary documents for mutual deliveries and transit of goods, as well as mutual agreements in these areas.

1.4. International cooperation of Serbia in agriculture at the regional level

At the regional level, within the framework of international cooperation Serbia concluded a free trade agreement (including trade in agricultural products) with the CEFTA parties, as well as several agreements in the fields of veterinary medicine and plant protection.

1.4.1. CEFTA

With this agreement (Zakon o potvrdjivanju..., 2007), the Republic of Albania, Bosnia and Herzegovina, the Republic of Moldova, the Republic of Montenegro, the Republic of Serbia and UNMIK on behalf of Kosovo, in accordance with United Nations Security Council Resolution 1244, joined the Free Trade Agreement in Central Europe in 2006. The Parties undertook to establish a free trade zone in accordance with the provisions of this Agreement and in accordance with the

relevant WTO rules and procedures. Principally, the objectives of this agreement are as follows: consolidation within the framework of a single agreement of the existing level of trade liberalization achieved through the network of bilateral free trade agreements previously concluded between the parties; improving conditions for further investment promotion including direct foreign investment; expanding trade in goods and services and fostering investment through fair, clear, stable and predictable rules; removing obstacles and irregularities in trade and facilitating the movement of goods and services between the territories of the parties to this agreement; ensuring equal conditions of competition affecting foreign trade and investment and the gradual opening of the public procurement market of the parties to this agreement; etc.

In the separate chapter on agricultural products, it is stated that the parties will abolish all customs duties on import of goods, all measures of the same effect, and all import duties of a fiscal nature in trade on the date of commencement of this agreement, for all products except those subject to bilateral concessions within the list in Annex 2 of this Agreement. For this smaller group of products, all customs duties on imports, as well as all measures of the same effect and all import duties of a fiscal nature in trade between the parties have been gradually reduced.

1.4.2. Regional bilateral international agreements in the fields of veterinary medicine and plant protection

The subject of bilateral agreements in the field of veterinary medicine and animal health in the region of South East Europe is cooperation aimed at controlling, eradicating and improving the system of monitoring of infectious diseases of land and aquatic animals, as well as facilitating the trade of goods designated in the World Health Organization for the protection of animal health. The agreements in general stipulates that the contracting parties will instruct their competent veterinary authorities to jointly develop and sign a protocol regulating the professional and technical conditions for the implementation of this agreement, as well as cooperation in the field of veterinary medicine.

In the field of plant protection, according to the usual model which contains minimal corrections in each bilateral agreement in this area, the basic issues in the field of plant protection (and plant quarantine) are: the lists of quarantine harmful organisms, plant quarantine, use of phyto-certificates, introduction of emergency measures, mutual notification, establishment of a joint body that will meet regularly and resolve disputable issues, etc. In terms of the list of harmful organisms, the parties agree to take appropriate measures within the scope of their competence to prevent the occurrence, introduction and spread of plant diseases, plant pests and weeds or harmful organisms included in the national lists of quarantine harmful organisms for each of the countries, which are cited in the annex to the agreement. In addition, these lists may be amended or supplemented, which shall be notified to the contracting parties within 60 days from the date of their entry into force or 30 days from the notification.

4. Results

The lack of global international standards is evident in the field of organic food. Namely, at a global level, international regulations (conventions) on the production and marketing of organic agricultural products should be adopted in the future to harmonize existing different national standards in this field. In this way, international trade in organic food would be facilitated, which would increase the production of this type of products and, therefore, a healthier nutrition in the world.

5. Conclusion

International cooperation in agriculture is a very important segment of international economic cooperation for the Republic of Serbia and it is being implemented at a global, European and regional level. The legal framework of this segment of international economic cooperation of Serbia consists of international multilateral agreements, i.e. conventions, bilateral agreements, as well as international recommendations and standards of international organizations in the field of agriculture. In addition, the legal basis includes also the regulations that require harmonization in the process of international integration. At the global level, the most important international instruments in the field of agriculture are FAO standards (*Codex Alimentarius*), as well as rules of the World Trade Organization (SPS Agreement) and food hygiene standards (HACCP). Besides this, at the global level, the legal framework includes bilateral agreements in the field of

agriculture, including the agreement with India, as well as preparatory acts for cooperation in this area with China. At the continental or European level, the most important international legal instruments are the Stabilization and Association Agreement, with the EU, as well as the EU sectoral regulations for harmonisation of national legislation with *acquis communitarian*. Also, recent cooperation with Russia based on the Free Trade Agreement, which includes agricultural products, has become increasingly important. In addition to this Serbia has concluded free trade agreements with some other European countries (EFTA, Belarus, Turkey, and Kazakhstan). At the regional level, Serbia has been achieving the most significant international cooperation in the field of agriculture with the CEFTA member countries, as well as the regional countries based on a series of bilateral agreements in the fields of veterinary medicine and plant protection.

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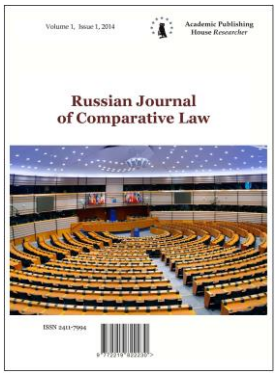
Published in the Slovak Republic
Russian Journal of Comparative Law
Has been issued since 2014.
E-ISSN 2413-7618
2017, 4(2): 71-77

DOI: 10.13187/rjcl.2017.2.71
http://ejournal41.com



Gender Representation in Legislative and Executive Bodies through Constitutional Quotes, Legal and Political Parties

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Abstract

Gender representation in public institutions is an immediate goal in modern democracies. Efforts targeting this goal can be implemented in various forms of lobbying such as: international women's mobility for gender equality, international gender equality associations, or through the definition of domestic legislation by applying constitutional, legal and party quotas for the representation of women in public institutions. Some states guarantee gender representation in legislative and executive bodies in their constitutions while others in ordinary laws. Gender representation in representative bodies through constitutional quotas is more advanced than gender mainstreaming in executive bodies. The efforts of women to be represented in public institutions through voluntary contributions from political parties have encouraged women to be an active part of public life through political parties. In contemporary world due to establishing constitutional, legal, or party quotas a sufficiently satisfying percentage of females is actively integrated in public institutions, gaining mandates of MPs in representative bodies, as well as senior positions in government and other executive bodies. Through affirmation of female gender representation in public institutions in some countries of the world we have women as speakers of parliament, presidents of the states, prime ministers, and political party leaders. The focus of this article is on representation of women in legislative and executive bodies through constitutional, legal, and party quotas.

Keywords: gender representation, constitutional, legal, party quotas, public representation.

1. Introduction

The issue of elections is of significant importance for society. States that manage to organize fair and transparent election process are capable to build credible institutions (Dalipi and Sahiti, 2017). In this context, equal gender representation in the governmental institutions is the ongoing debate throughout the countries in the world. Gender quotes are the means and methods through which a better gender representation in representative and executive bodies can be made. The gender quota system sets a mandatory minimum of seats to be held by men and women in the parliament, the government or in other decision-making bodies.

The first step in assessing gender equality in representative and executive bodies nationally is estimating how such representation is defined: by the constitution, the laws, or other legal acts. These definitions come as a result of many elements, such as political culture, experience of political pluralism, historical past, national affiliation, religious affiliation, and gender. A number of states defined gender equality in the constitutions, some through electoral laws, and some

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through statutes of political parties. On the other hand, there are states that have not as yet set any criteria for gender equality in public bodies, except the general constitutional definition of equality before the law.

2. Materials and methods

The main sources for writing this article are the official documents of Kosovo, materials in journal publications, and archive materials. The study used basic methods of cognition: problem-setting, chronological analysis, historical and situational analysis, systemic method, and the methodology of comparative law. The use of historical and situational methods allows to reproduce the assessment approach to the problem of national law. Method of comparative law defines the difference in views on actual rules in national jurisdictions. Systematic method used in a variety of disciplines such as constitutional law, administrative law being accessible and comparable in modelling and determining the past and the future events.

3. Discussion

Gender quotes through acts

During the twentieth century, continuous efforts have been made for recognitions of equality of women and their participation in public life through various quotas. Gender quotas reflect insights into the overall situation of women in society and the political arena (OSCE/ODIHR, 2004). They do not automatically imply women's equality with men. Quotes have a more comprehensive character because they can be understood as: gender neutral quotas, quotas for women, quotas for national minorities, and quotas according to religious affiliation (Kosovo Constitution, 2008; Šinko, 2006; Haxhiu, 2013).

Through quotas the states should include the principle of equality of men and women in their national constitutions or legal provisions. A series of international acts that define gender equality provisions such as the Universal Declaration of Human Rights (United Nations, 1948), the International Covenant on Civil and Political Rights (OHCHR, 1976) and, in particular, the Convention on the Elimination of Discrimination against Women – CEDAW (OHCHR, 1979) with its protocols, the Convention for the Protection of Human Rights and Freedoms (Council of Europe, 1950), or the Beijing Declaration and Action Plan (United Nations, 1995). The CEDAW establishes punitive measures if its principles are not respected which oblige the parties to the convention to adopt measures prohibiting any form of discrimination against women. Many states in their constitutions stipulate gender equality quotas in representative bodies and other decision-making bodies. Major differences between the states reflect political and cultural traditions on the basis of which the reality of equal rights for women lags far behind promises, even in countries where gender equality is envisaged by the Constitution. It is common for the constitutions to include guarantees that citizens within the state are equal before the law and to prohibit discrimination on the grounds of sex. (OSCE/ODIHR, 2004). The CEDAW obliges the state parties to embody the principle of equality of men and women in their national constitutions or in their legislation.

In addition to the constitutions, equal rights for women and the extension of women's participation in the electoral process can be implemented by a variety of laws and acts of subordinate legislation (OSCE/ODIHR, 2004). In 1982 the Parliament of France adopted the law establishing gender quotas in the lists of political parties for elections. This law stipulated that there must not be more than 75 % of the candidates of the same gender in electoral rolls. Against the background of this law the Constitutional Court proceeded to evaluate whether it was in accordance with the Constitution. The Court took the decision to abolish this law based on Article 6 of the Convention on Human and Citizens' Rights of 1879 which equate citizens with the law (Трипковић, 2007).

As for other examples of fixing gender equality in the constitutions, France changed its constitution to achieve the parity between husband and wife in 1989 (The Constitution of France, 1989). The Constitution of Portugal states that it is the duty of the state to promote equality between men and women (The Constitution of Portugal, 1976). The Belgian law of parliamentary elections of 1994 provides that 1/3 of the electoral list should be composed of women and that the number of candidates from the same sex cann't exceed 2/3 of the total number of seats to be elected. During 1990, following the fall of communism in Southeast European states, the

proportion of women in the parliaments was relatively small by 7-23 %. Thus, Slovenia elected women as MPs in the number of 13.3 %; Croatia 20.5 %; Bulgaria 22.3 % (Novosel, 2007).

In Macedonia for the first time a quota of 30 % of female candidates was applied in 2002 in order to ensure higher representation of women in the Assembly. The same pattern was used during the 2006 parliamentary elections and in the 2008 early parliamentary elections (Parliament of Macedonia, 2014). Thus, in Macedonia due to the application of gender quotas, the number of women elected to parliament in 1998 with the application of gender quotas was 7.5 %. Already in 2002 during parliamentary elections this number increased up to 18.3 % (European Court of Human Right, 2010). Under the Constitution of the Republic of Kosovo, the composition of the Assembly of Kosovo respects the principles of gender equality which are accepted in accordance with international principles (Constitution of Kosovo, 2008).

The Law on Elections in Kosovo states that at least thirty (30 %) percent of candidates in each Political Entity are male and at least thirty (30 %) percent are female (Law on Elections in Kosovo, 2008). Kosovo is above the average of EU countries respecting the level of 30 % of women elected in parliament in 2007 (Central Election Commission in Kosovo, 2007); 33.3 % in the parliamentary elections of 2010 (Central Election Commission in Kosovo, 2010); 31.6% in 2014, (Central Election Commission in Kosovo, 2014); and also 31.6 % in 2017 (Central Election Commission in Kosovo, 2017). Macedonia is ranked as the second after Kosovo with a 32.5 % share of women represented in parliament in 2011 (Assembly of Republic of Macedonia, 2017).

States like Italy or France demonstrate a lower level of female participation in parliaments. France is one of the countries with the oldest democratic traditions. Although it has reinforced the quota system by guaranteeing constitutional and legal quotas, it still has a low representation of women in parliament, i.e., 12.3 % (Трипковић, 2007).

Women currently account for only 17% of the US Congress. Of the 244 representatives elected by the Democratic Party in both chambers, 61 are women, and out of 289 representatives elected by the Republican Party in both chambers, only 9 are women. Of the more than 1,700 women serving in state legislatures, about 60 percent are members of the Democratic Party (Political Party, 2017).

In some states not only gender quotas remain unapplied in the laws but basic legal guarantees of the right of women to participate in political life, in elections, and the right of women to be elected in representative and executive bodies are lacking. Worldwide, various constitutional and legal barriers are introduced for women preventing them from effective participation in elections and subsequently from being elected to parliament.

In Switzerland in Canton Appenzell Innerrhoden women waited to participate in elections until 1991 (Gay, 1994). Appenzell Innerrhoden was the last canton in Switzerland and the last in Europe to provide women with the right to vote in local elections. This was achieved in 1990 when two women from Appenzell Innerrhoden filed a lawsuit to the Swiss Federal Court and won the right for women to take part in elections. The law earlier deprived women this canton in their opportunity to vote in local elections. This law was changed in 1991 after the Swiss federal court ordered the canton to give women the right to vote (Le News, 2017).

In Egypt male citizens are required to enroll in voter registers while women in the country must apply for registration. This in some way prevents the females from participating in elections (Gay, 1994), given that a relatively large percentage of women are illiterate. In 2005 in Kuwait women finally got the right to elect and to be elected (Haxhiu, 2013). On January 11, 2013 Absolute King of Saudi Arabia Abdullah bin Abdul Aziz issued a historic decree that allowed women to be elected members of the Shura Council for the first time. According to this decree, the King appointed 30 female deputies or 20%, out of 150 deputies as there are in Saudi Arabia's parliament (Alarabiya News, 2013). In Saudi Arabia, however, neither women nor men are elected by the people but are appointed by the absolute monarch. In Vatican the votes in the Pope's elections are only allowed for members of the Council of Cardinals which consists only of men (Knight, 2012). Brunei and the United Arab Emirates are the examples of states where neither men nor women have the right to vote (Inter Parlamentary Union, 1994). In Lebanon women have applied the education census while all adult men are required to vote (Haxhiu, 2013).

Unlike it happens in the Arab states, in Turkey women for the first time gained the right to vote in local elections in 1930. In the 1935 elections when the formal quota system was applied, out of the 395 elected MPs only 4.6 % were women (Blagojevici, 2003). In 1946 the proportion of

women elected to parliament decreased to 2 %. The results of parliamentary elections in Turkey from 1983-1999 show that in 1983 out of 450 elected MPs only 1.3 % were women, in 1991 women made 1.8 %, and in the 1999 parliamentary elections out of 527 elected deputies women made 1.21 % (Blagojevic, 2003). This symbolic number of women's representation in Turkey's parliament is the result of conservative political culture. Research results on women's representation in the parliaments in Central and East European states for the period 2007-2010 reveal that the three states where the position of women is the least favourable are: Turkey remaining at a constant percentage, Hungary where the said percentage decreased from 10.4 % to 9.1 %; and Montenegro allowing a fluctuation from 8.6 % to 11.1 % (Blagojevic, 2003). It should be noted that a large number of international organizations for gender equality are trying to orient the world's states towards affirmation of the minimum level of gender representation in representative and executive bodies at a 30 % quota.

Voluntary quota system by political parties

With the exception of independent candidates, the majority of women aspiring to be elected in public posts are dependent on political party structures for their support, both during the campaign and after their election (OSCE/ODIHR, 2004). Organization and registration of political parties is usually regulated by law yet under the general legal framework political parties often have wider freedoms to define their internal structures and procedures. In advanced democracies political parties vary at different levels in which they apply democratic principles within the party, for example, how party lists are drawn up to participate in elections and how their candidates can be elected. West European countries apply higher gender quotas in their party lists for parliamentary elections that have gained success rates of representation in legislative bodies. 10 out of 30 European countries have more than 30 % representation of women in parliament (Sweden, the Netherlands, Finland, Denmark, Spain, Belgium, Austria, Germany, Iceland, Portugal), eight thers keep such representation at the rate between 20 and 30 % (Lichtenstein, Luxembourg, Lithuania, Bulgaria, Latvia, Poland, Estonia, United Kingdom) and the rest at less than 20 % (NDI, 2015). In Portugal, according to the Constitution, political parties contribute to organization and expression of the will of the people and must respect the principles of national independence and political democracy. Yet the Constitution does not explicitly define gender equality (Constitution of Portugal, 1976). In general, the more effectively the parties pursue democratic principles and transparent practices in their internal procedures, the better opportunities open up for women to run as candidates, and that issues of particular concern to women will emerge as serious campaign issues (OSCE/ODIHR, 2004). This is also the most widespread system in Europe (Germany, Italy, Norway, Sweden, England, etc.), consisting of rules set by political parties to include a compulsory percentage of women as candidates for elections. In this case, it is the will of the political parties to set gender quotas without legal obligations. It may happen that in some countries all political parties have provided quotas, while in some other countries only one or a few of them can set quotas. However, if most political parties in a country use quotas, this system can be fruitful and capable to increase the standards of representation of women in legislative and executive bodies (Anastasi and Olldashi, 2006).

The highest level of sanctioning quotas has not always been the most successful. Unfortunately, neither the constitutional nor legal quotas have proven their superiority over those cases when political party quotas have been placed. Meanwhile, it has been fully verified that the key to success in achieving the best standards in gender representation remains the conviction within the political parties and civic culture in balanced gender representation. It is not a coincidence that the highest rates of representation of women in today's parliaments of Europe have been achieved by countries using the quota system from the political parties: 45,3 % in Sweden, 40 % in Austria, and 36 % in Denmark (Anastasi and Olldashi, 2006). In 2002 in France party quotas were introduced for women running for elections. Women accounted as 39 % of all the candidates in elections. In the second round only 24 % of female candidates qualified while eventually parliamentary mandates were won by only 12.3 % of them (Трипковић, 2007). Thus, a high percentage of women's candidacy to be elected and a low percentage in selected candidate comes as the result of applying the two-round majority election system.

The said quotas initially set some democratic impetus. Quotas operate in different ways in different electoral systems. It is clear that in the proportional system their placement is easier. However, in many states it has been used successfully in major systems. Indeed, even in the

proportional system quotas have been difficult to implement due to the weakness of political parties in the selection of candidates. In order to achieve success nationally, the electoral codes of the states should determine the allowance of a quota system along with the sanctions for their non-implementation.

Representation of women in public functions

Starting in 1970 women's representation in public functions has profoundly changed in Europe. As a recruiting basis for public institutions, political parties had played a decisive role in implementing this change. The increase in the number of women elected in many countries was preceded by changes within the political parties themselves. However, the analysts point at the difficulty in achieving gender balance within political organizations as one of the major barriers to increasing the number of women candidates run for election. Women face obstacles in access to participation in political life. Structural barriers through discriminatory laws and institutions still limit women's opportunities to run for public office. Capacity gaps imply that women are less likely than men to have education, contacts, and resources needed to become effective leaders (UN Women, 2011).

Parties constantly revise their positions on gender diversity in politics. They develop discussions on new ways to develop democracy, focusing on the best concepts of representation. Although the number of European political parties claim that gender balance of general membership is increasing, their high instances rarely reflect that.

Contribution by women is significant for party mobilization and campaign support, but in internal organizational life women had rarely been elected to high party functions. In fact, around the world female party leaders are less than 11 % (FCZB, 2000). While their number elected to the post of chief of government or the head of the state is rare. When Margaret Thatcher ran for the post to lead the British Government in the 1970s, she found courage to say that she could politically fail. But during her government she proved to be a skillful in leader. The success of good governance in recent decades shows such female leaders as Tansu Çiller in Turkey; Benazir Butto in Pakistan; Corazon Aquino in the Philippines; Julia Gillard in Australia; Jozefina Topalli as a Parliament Speaker of Albania; Atifete Jahjaga as President of the Republic of Kosovo; Kolinda Grabar Kitarevic as President of Croatia; Cristina Fernandez de Kirchner as the President of Argentina; or Simonetta Sommaruga as the President of Switzerland.

Currently in two of the most powerful states in Europe the strong governments run by women show the particular examples of Theresa May in Britain and Angela Merkel in Germany. Angela Merkel, alongside the government leadership in two mandates, is playing a role in the international arena for housing refugees from the Middle East. Although not much anticipated, but still the election from ultra-nationalist and conquering political parties of Mrs. Ana Bunabic as the Prime Minister of Serbia succeeded in 2017 in Serbia. These and many other success of leading women in executive power led many states and political parties to intensify women's candidacy in public office.

Because of many historical, social, cultural, and economic factors, women are less engaged in leadership positions. That does not mean that women's engagement in decision-making is weak. If scrutinized carefully, the states with a higher representation of women in parliaments are among the most developed countries in Europe. This is certainly not a coincidence but an indicator of development, both as a result of meritocracy and not just imposed legal quotas. In the Nordic states women in parliament and government are approaching the most balanced representation while in South European countries limited presence of women in public institutions should still be further investigated (Della Porta, 2006).

While in the Swedish Parliament there are 43 % women, in Denmark, Finland, Norway, Holland and Iceland women's participation in parliament is between 35-37 %. In Germany, South Africa, Bosnia and Herzegovina, and Austria it is about 30 % while in Italy France and Bulgaria it barely reaches 12 % (Della Porta, 2006). In Albania low women's participation in political life has resulted in low representation of women in decision-making structures. This non-representation is also due to the lack of quotas or other similar criteria that encourage women's participation in politics or in decision-making structures (USAID, 2005) or because of the electoral system or political culture in which men are more worthy to represent the will of the people in parliament and executive power.

4. Results

Amidst the conditions where discriminatory practices and other barriers to effective participation of women in political decision-making are so highly classified, the quota system is a long-awaited and highly justified means of positive measures against discrimination. The experience of developed democracies shows that conditions for equal opportunities are not created mechanically and spontaneously but appear with the establishment and functioning of institutional and legal mechanisms.

5. Conclusion

While there are no clear research results as for the determinants of success in balanced representation of women in legislative and executive bodies, constitutional, legal, and party quotas are desired to be applied. This should be done selectively where each state, depending on its political culture and architechture of representative democracy could decide on application or non-application of gender quotas. In line with the legal definition of gender quotas, political culture of citizens should constantly be raised so that women can take responsibility as well as men to make decisions about the destiny of the nation to the state and humanity. This has been proven over the last decades in the practices of governments in Britain, Germany, Turkey, India as well as in te practices of the country's leadership in Brazil, Kosovo, Croatia, Argentina, not to mention the practices of parliamentary presidency in Albania, Serbia, Switzerland, etc. The world was open to a success of women in politics and administration while world scholars bowed to humanitarian Mother Teresa.

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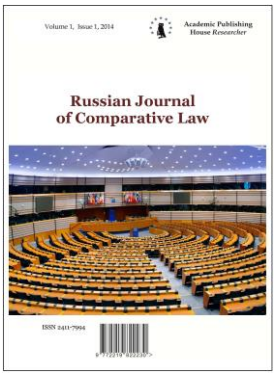

Published in the Slovak Republic
Russian Journal of Comparative Law
Has been issued since 2014.
E-ISSN 2413-7618
2017, 4(2): 78-87

DOI: 10.13187/rjcl.2017.2.78
http://ejournal41.com

Access to Mental Health Care in the Arctic: a Case Study on the Rights of Indigenous Women in Norway

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Abstract

Indigenous women are often doubly under pressure when it comes to the full realization of human rights. In particular they might face increased risks to their health and life and suffer from a lack of access to health care. In particular language and cultural differences can make it difficult for indigenous women to access health care services. This research looks at the tip of the iceberg of this problem, taking as a point of departure problems of Sámi women in Norway to access mental health care service. This is the tip of the iceberg as indigenous women in other states suffer much worse forms of discrimination, Norway has an excellent health care system and has ratified ILO 169. Yet, indigenous women in Norway are significantly less likely than non-indigenous women to access mental health care services. In the context of the conference's overall theme this research project looks at the question whether international instruments applicable to the situation in Norway (such as CEDAW, ICCPR, ICESCR and ILO 169) give indigenous women a right to access to health care. Particular attention is given to the prohibition of discrimination and to the question of horizontal effect, which are necessary for effectively ensuring the right to access to health care.

Keywords: indigenous, women, Sámi, health, human rights, law.

1. Introduction

For a long time, the use of the indigenous Sámi languages had been outlawed in the four countries which govern Sápmi, the homeland of the Sámi people: Norway, Sweden, Finland and Russia. While the situation has improved in recent decades, indigenous language rights are still under threat in the region. Today, most Sámi people speak the dominant language of the country they live in in addition to their native language. For many elderly people, the native language becomes more relevant in old age (cf. Dehler, 2013: 49). Research into the situation of elderly indigenous persons is still limited (Braun et al., 2014), and there is a risk that groups of persons within minorities (the term is used in a general, rather than a legal sense here, on the distinction between minority rights and indigenous rights (see Fresa, 2000) benefit too little from academic research. This is particularly the case when it comes to women. In recent decades, international law has been used in an attempt to improve the rights of women and this study is also meant to enable an assessment of the effectiveness of the existing legal norms in this respect. With regard to access to health care and medical services, mental health remains particularly challenging due to the stigma associated with it and the need for adequate communication with the patient (Iezzoni et al., 2006). Additional problems arise in situations when patients do not have access to health care in their native language (Röysky, 2015:31 et seq.; Jacobs et al., 2006; Schyve, 2007; Meuter et al., 2015).

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This text aims at investigating the ability of international law to realize indigenous rights as well as access to health care for disadvantaged persons who often continue to suffer from longstanding institutional discrimination.

2. Materials and methods

The material researched, i.e., the sources for this article, consists of primary, secondary and tertiary legal materials. The primary legal materials utilized in this research include both international treaties as well as domestic legislation from Norway. The secondary materials include case law from different courts, in particular in the context of international human rights treaties. All of the treaties and cases are available online free of charge. In addition, academic research results have been utilized. This work is primarily based on literature research. The scientific literature used for this study, however, is not limited to legal research. Due to the nature of the topic and its practical relevance, medical research had to be taken into account as well.

In terms of methodology, the study is based on the analysis of international legal standards as well as of Norwegian law in a specific situational context, in this case the situation of the aforementioned elderly indigenous persons.

While the research undertaken for this text is based on a review of different forms of textual materials from several disciplines, the research would not have been possible without prior research in the Sámi home area and the willingness of indigenous and non-indigenous persons in Sápmi to share information about their situation in Europe's far north[*].

3. Discussion

3.1. Indigenous Women as a particularly vulnerable group

The protection of the human rights of women needs to be improved in many ways just as the rights of women are violated in many ways, ranging from everyday discrimination to the systematic use of rape in armed conflicts (e.g. Kirchner, 2008) and the widespread murder of girls by their own parents in some cultures. Some of these issues are very individual, many, however, are the result of a systematic disregard for the value of women. International law seeks to find solutions for all of these problems as human rights are concerns which go beyond borders (Gibney, 2008: 1). Among the most important contributions of international law to the protection of the rights of women is the Convention on the Elimination of all forms of Discrimination against Women (hereinafter – CEDAW).

When we ask ourselves which contribution international law can make to the improved protection of the rights of all women, we will sooner or later come to a point at which declarations and international treaties no longer suffice. International law can be used to protect those who are most in need of protection, and in many places around the world, this still includes women. In an ideal world, there would be no need for international legal instruments like CEDAW because existing general instruments such as the International Covenant on Civil and Political Rights (hereinafter – ICCPR) and the International Covenant on Economic, Social and Cultural Rights (hereinafter – ICESCR) should be sufficient to protect the human rights of everybody. Yet, even these basic human rights obligations are often violated and the rights of women continue to be under particular forms of pressure. This raises the question how it can be possible that even in developed countries which have a very good human rights record most fundamental human rights of women are neglected by public authorities?

One group which is particularly vulnerable are indigenous women. Belonging to two vulnerable groups can translate into a particular vulnerability which can be overlooked if a problem is only seen from the perspective of one of these groups. This is even more so, when particular groups have experienced forms of discrimination and rights advocates now have a strong interest in preventing internal discrimination and unequal treatment, as it the case for both the women's rights movement as well as the indigenous rights movement. Indigenous women therefore are not only doubly vulnerable, they are also at an increased risk of being overlooked when it comes to defending human rights. In addition, existing forms of discrimination against both groups make it often more difficult for indigenous women to assert their rights effectively.

[*] All opinions expressed in this text are only attributable to the author.

3.2. Access to Mental Health Care for Sámi Women in Norway

A few months ago, news outlets reported the story of a pregnant indigenous woman in Mexico who had been turned away by a hospital and eventually gave birth on the lawn in front of the hospital building. While public authorities in Norway are not preventing indigenous patients from receiving medical care per se, it appears from research which has been conducted in Norway (Hansen, 2011:29 et seq. and 54 et seq.) that language barriers might contribute to the fact that Sámi women in Norway, in particular, it appears, Sámi-speaking women who live in parts of Norway outside Sámi settlement areas are about 40 % less likely than ethnic Norwegian women to seek help for mental health ailments (Øvreberg, 2012). Even when taking into account the fact that the overall health situation of the Sámi is significantly better than that of other indigenous groups in the Arctic (Hansen, 2011: 54), the aforementioned research project found a lower rate of mental health ailments among one group of Sámi women when compared to other persons (Hansen, 2011:50), the fact that indigenous women are so much less likely to seek medical help is striking. At the same time, this is only one example to illustrate a more widespread problem: "Research into indigenous peoples worldwide has showed a persistent disparity in health status among many ethnically native groups compared to the respective majority populations" (Hansen, 2011: 55). Discrimination can have a particular negative effect on mental health (Hansen, 2011: 26). An inability to communicate not only makes it more difficult to find information about available health care services, in the case of mental health issues, it can also make it more difficult to provide both diagnosis and treatment.

While Sámi traditions, such as a taboo not to speak about mental health ailments for fear of the "evil ear" (Øvreberg, 2012), may also play a role in this context (Øvreberg, 2012), it appears that there are a degree of discrimination and/or language barriers which are sufficient to prevent at least some women who are in need of health care from seeking the health they are entitled to. In particular in a health care system such as Norway's, which is characterized by public funding and, under Norway's Patients' Rights Act (PRA), an equal (PRA, Section 1-1, sentence 1) right to the "necessary health care" (PRA, Section 2-1, sentence 2), such obstacles should no longer exist. This is especially so in the case of language barriers as Section 3-5 sentence 1 of the Patients' Rights Act requires that the patient's right to information (PRA, Section 3-2) has to be implemented with due regard for the patient's "linguistic background" (PRA, Section 3-5, Sentence 1).

3.3. Are existing treaties not enough?

The obvious first question would be, whether Norway's existing international obligations are not sufficient to ensure the necessary access to health care for everybody. After all, Norway is one of the wealthiest countries on the planet, has the third highest GDP (United Nations Statistics Division National Accounts Main Aggregates Database, 2014) and its health care system is highly regarded internationally (cf. Squires, 2013: 3).

3.4. Indiscriminate access to health care under CEDAW

Also, existing human rights norms already provide for access to health care. Article 12 CEDAW stipules that *"1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. 2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation."* The first paragraph of this norm already indicates that the right to non-discrimination when it comes to access to health care not only has a vertical but also a horizontal dimension in that the States are obliged to "take *all* appropriate measures to eliminate discrimination"

3.5. The Prohibition of discrimination under the ICCPR

The prohibition of discrimination based on gender is so important in international human rights law that it can be found several times in the ICCPR, in Article 3 and in Article 2 paragraph 1 ICCPR. The latter norm also prohibits discrimination based on other distinctions, which would seem to provide an additional level of protection for indigenous women.

3.6. Discrimination-free access to health care under the ICESCR

Also, Article 12 ICESCR obliges States to take measures which will result in universal access to health care.

3.7. ILO Convention 169

The International Labour Organization's Indigenous and Tribal Peoples Convention (hereinafter - ILO 169) remains the key binding international treaty concerning indigenous rights. While it has been widely adopted in South America, in a European context it applies to indigenous communities only with regard to the Norwegian part of Sápmi and with regard to the obligations by Denmark and the Greenlandic home rule government to the Inuit people. The Convention was drafted in the 1980s, a time when social rights were sometimes viewed with suspicion, at least in the Western Hemisphere. Also, it was meant to improve the situation of indigenous peoples as a whole rather than create individual rights. Therefore it hardly comes as a surprise that ILO 169 remains relatively silent on such matters. as an individual right to access to health care. The only reference can be found in Articles 24 and 25 ILO 169: Article 24 ILO 169 demands that "[s]ocial security schemes shall be extended progressively to cover the peoples concerned, and applied without discrimination against them." This rule does not create individual rights but obliges States to eventually include indigenous peoples in social security systems. In Europe, this is hardly a problem anymore, although it remains a challenge in other countries. Article 25 (1) ILO 169 obliges governments to work towards the goal of making the best health care possible also available for indigenous persons. Neither norm provides an individual right to access a specific medical service as such but imposes obligations on States to make the best medical service possible accessible in the long run. The idea behind these norms is that there should be no discrimination against indigenous persons when it comes to accessing health services. States which have ratified ILO 169 therefore have to remove structural inequalities.

While Article 2 (2) and Article 3 ICESCR require that all rights enshrined in the ICESCR have to be enjoyable without discrimination, it also has to be noted that the rights contained in the ICESCR are to be achieved over time. Notably, paragraph 1 of Article 2 ICESCR reads as follows: *"Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."*

3.8. Non-Discrimination and Access to Health Care under the United Nations Declaration on the Rights of Indigenous Peoples

While ILO 169, as a binding international treaty, has not found universal acceptance, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is not binding (UN Charter, Article 10) but enjoys widespread support (Anaya, 2009: 57 et seq.) and which has already influenced national judges (Cal et al. v. Attorney General, 116 et seq.).

Articles 2 and 17 of UNDRIP prohibit discrimination of indigenous persons. Article 7 (1) UNDRIP reiterates "the rights to life, physical and metal integrity" of indigenous persons. Apart from that, one would not be surprised, would UNDRIP focus more on indigenous rights rather than human rights. While both sets or rules are closely interrelated, indigenous rights have a function which goes beyond traditional human rights. Both sets of rights can be enjoyed individually and as groups and indigenous rights in this sense are a subset of human rights. However, the raison d'être of indigenous rights is also tied to the structural injustices suffered by indigenous peoples and by the desire to have a say on matters which affect them. Therefore indigenous rights go beyond human rights in the classical sense of the term, as they are reflected for example in the ICCPR or CEDAW. Nevertheless does UNDRIP contain both a norms which takes into account the right to access to health care (Article 21 UNDRIP) and the risk of discrimination against women (Article 22 UNDRIP). Article 21 (2) UNDRIP even opens the door to affirmative action for the benefit of indigenous persons and requires the States to take the needs of particularly vulnerable groups of indigenous persons, including women, into account when taking measures in order to improve the social and health conditions of indigenous peoples. Therefore, UNDRIP already reflects an awareness of the particular vulnerability of certain groups of indigenous persons. What Articles 21 and 22 UNDRIP do not do, however, is to establish a clear right to access to health care. Such a right follows from Article 7 (1) UNDRIP, but it is not spelled out as such.

3.9. Interim Conclusions

While UNDRIP is not even legally binding, the other international human rights instruments mentioned so far all suffer from an enforcement deficit. This is even true for ILO 169, although the

ILO's supervisory system is rightfully praised (Swepston, 1998: 28) and noteworthy when compared to other standards. There are supervisory systems in place for ILO 169, ICCPR, ICESCR and CEDAW – but at the end of the day, more often than not, while legally relevant, these enforcement mechanisms hardly carry the full political effect enjoyed by the judgment of an international court. This might be different in inter-state cases but these are rare. Also, it has to be kept in mind that with the exception of the ILO procedures, international institutions will require that an applicant has exhausted all domestic remedies, which in turn will require years of court proceedings on the national level. Obviously, there will also be few cases in which an indigenous victim of such human rights violations will have access to sufficient funding to engage in lengthy legal battles with a national government.

3.10. The European Convention on Human Rights (cf. Koivurova, 2011: 1)

This is also true for proceedings before the European Court of Human Rights (ECtHR) in Strasbourg. However, the ECtHR can grant legal aid to applicants (Leach, 2005:26 et seq.) and enjoys a very high compliance (Hawkins et al., 2008; Hillebrecht, 2013) rate among the States which have ratified the European Convention on Human Rights (hereinafter – ECHR). While the Inter-American Court in San Jose can take into account not only the American Convention on Human Rights (hereinafter – ACHR) but all international legal rules applicable to the situation, i.e. also other international treaties such as ILO 169, the European Court of Human Rights applies the ECHR and its protocols. On paper, the protection enjoyed by indigenous persons under international law ought to be best in states which have ratified both ILO 169 and a regional human rights instrument, as is the case for example with regard to most South American states or Norway.

3.11. Access to health care as a human right under the ECHR

In Norway, most hospitals are of a public law character, meaning that the public authorities which operate them are bound by the ECHR. So far, there is very little jurisprudence on indigenous issues under the ECHR but that does not mean that the ECHR could not be used for the purpose of ensuring full access to health care for everybody.

The question to be asked is therefore whether the ECHR provides for a right to access to health care. Neither the text of the Convention nor the Protocols to the ECHR include a right to access to health care. Article 3 of the Convention on Human Rights and Biomedicine (hereinafter - Oviedo Convention), which, like the ECHR has been created under the auspices of the Council of Europe, provides for a right to equitable access to health care, dependent on the resources available. Equitable here means fair access – and does not necessarily require complete equality. For most practical purposes, Article 3 of the Oviedo Convention could be sufficient to provide for a right to access to health care also for members of marginalized groups, such as women or indigenous persons. However, unlike the European Convention on Human Rights, the Oviedo Convention does not allow for applications to the European Court of Human Rights for alleged violations. The Convention on Human Rights and Biomedicine therefore remains much less accessible to potential litigants than the ECHR, which is why we have to focus our attention on the European Convention on Human Rights, when looking for internationally enforceable norms. Likewise, compliance with the European Social Charter (hereinafter - ESC) cannot be controlled by the European Court of Human Rights. Articles 11 and 13 ESC aim at ensuring access to health care. In particular Article 13 no. 1 ESC seems to presume the existence of a right to access to health care.

However, to find such a right in the ECHR is significantly more difficult. Yet, the ECHR is more easily enforced due to the inherently legal nature of the European Court of Human Rights. This factor should not be underestimated. Despite occasional criticism, the European Court of Human Rights is very much respected in general. Of similar importance is that neither the Oviedo Convention nor the ESC spell out a direct individual claim against the state to provide access to a specific form of health care. While Article 13 ESC can give individuals a right to public funding for health care, it does not include an explicit right to access to health care. Article 3 of the Oviedo Convention on the other hand is phrased in the classical form of a social right, meaning that the states which have ratified this Convention should take measures to reach the situation envisaged by the Oviedo Convention at some point in the future. Therefore the question remains, whether there is a right to access to health care - especially health care in one's own language - under the ECHR.

Since no such right is mentioned explicitly in the ECHR, there are only a few cases which deal with the right to access to health care. In a number of cases, such a right was claimed by prisoners, with limited success (Ashingdane v. United Kingdom, para. 50; Winterwerp v. the Netherlands,

para. 51), as long as the lack of treatment did not amount to an inhuman treatment (*Riviere v. France,* para. 74). In 2012, however, the Grand Chamber of the European Court of Human Rights found that applicants who suffer from health problems and who lost their health insurance status due to a discriminatory treatment by the state could claim a violation of the right to private life under Article 8 ECHR (Kurić and others v. Slovenia, para. 21 et seq.). In this case, which concerned the treatment by non-Slovenian persons who found themselves residing in newly independent Slovenia after the dissolution of Yugoslavia, however, the loss of health insurance benefits was only one of several factors which led the European Court of Human Rights to the overall conclusion that Article 8 ECHR had been violated (Kurić and others v. Slovenia, paras. 21 et seq.). Also, in cases related to the right to a fair trial under Article 6 of the European Convention on Human Rights, the ECtHR has found Article 6 ECHR applicable to proceedings concerning health insurance benefits (Feldbrugge v. the Netherlands, paras. 26 et seq.; De Haan v. the Netherlands, para. 44).

While there are indicators to the effect that the ECHR presupposes a right to access to health care, this has to be taken with a grain of salt and it remains to be seen whether this indicates a right to a specific treatment (Reid, 2008:442, fn. 45).

3.12. Non-discrimination (Article 14 ECHR)

If we assume the existence of such a right to access to health care under the ECHR, states which have ratified the ECHR have the obligation to ensure that this right can be enjoyed without discrimination.

Unlike many other human rights documents, the ECHR does not contain a general anti-discrimination clause. However, Article 14 ECHR prohibits discrimination in the application of the Convention. As the Convention includes a right to access to health care, this right must be enjoyable by all "without discrimination on any ground" (Article 14 ECHR). While Article 14 ECHR does not make any reference to language skills, the wording of the norms makes it clear on two occasions ("on any ground", "or other status") that all forms of discrimination are forbidden. Likewise, indigenous persons are covered by Article 14 ECHR, although the norm only makes explicit references to national minorities. The lack of language skills in the majority language therefore must not be a barrier to the enjoyment of the right to access to health care.

4. Results

ICCPR. This conclusion, however, is not only valid under the ECHR. Under Article 27 of the International Covenant on Civil and Political Rights, indigenous peoples have the right to use their own language. Under Article 25 lit. (c) ICCPR, they have equal access to public services. This includes public health care systems.

Horizontal obligations. In order to be fully effective, the right to access to health care has to be both vertical and horizontal (Clapham et al., 2002), meaning that not only public but also private actors have to take this right into account. While many international human rights instruments don't make an explicit reference to the horizontal effect of human rights, states have an obligation to implement international human rights obligations domestically. This also requires states to enact legislation to ensure that this right is not denied by private actors.

In the context of the Council of Europe, this approach can now be found in Article 12 (1) of the Istanbul Convention, according to which states *"shall take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men"* (Article 12 Paragraph 1 Istanbul Convention). Although the wording might at first sight seem unfortunate from the perspective of those who are concerned with indigenous rights, as indigenous rights place a strong emphasis on the possibility to preserve customs and traditions, Article 12 (1) of the Istanbul Convention must not be taken out of context but interpreted in light of the aim of that convention, that is, to prevent violence against women.

5. Conclusion

In the Norwegian cases mentioned earlier, the problem is not so much that the State would prevent indigenous women from accessing health care. Rather, there appears to be a general environment which makes it harder for indigenous women to access medical services - for example a mutual lack of language skills on the part of both patients and medical service personnel.

However, the State has an obligation to create an environment in which the full realization of the right to health care is possible.

The European Court of Human Rights appears to be an underutilized forum when it comes to claiming rights of indigenous persons outside the realm of traditional indigenous rights claims, such as those relating to the use of land. Indigenous women who face discriminatory restrictions when it comes to accessing health care services can take States to court for such practices. However, it has to be kept in mind that the States' responsibility to protect human rights such as the equal access to health care, ought not to be engaged by legal proceedings, let alone on an international level. Rather, the State is the primary locus where human rights are to be protected actively, not just by refraining from further human rights violations.

It is this active dimension of human rights that is often overlooked. In particular when it comes to the rights of women, often small measures which aim at removing discriminatory practices can often go a long way. While there are also cases in which the State is guilty of actively discriminating against women, very often women suffer human rights violations by private actors. Dealing with this issue adequately does not always require new rules. It does require both all relevant actors to take their human rights obligations more seriously.

The right to access to health care has a horizontal effect. As under the ICESCR as well as the (non-binding) UNDRIP and, to some extent, ILO 169, this requires the States which have ratified the ECHR, including Norway, to take positive action to create an environment in which everybody involved is aware of his or her rights and responsibilities and in which the right to access to health care can be fully realized. It has to be kept in mind, though, that the legal basis for the right to access to health care under the ECHR is somewhat sketchy. A full realization of human rights therefore would be easier, would states ratify also ILO 169 and incorporate the rules contained in the UNDRIP into domestic law.

When it comes to language barriers, the question has to be asked how far the right to access to health care goes. Here specific indigenous rights norms go further than traditional human rights instruments. While not everybody has a right to health care in his or her mother tongue all over the world, indigenous persons have such a right in the state in which they live, even if their mother tongue is not that of the majority population. For indigenous women, who in many countries are still denied a sufficient access to education, this can make a big difference. What might be considered a mere inconvenience in Norway can be a "life or death"- issue elsewhere. By utilizing international norms, indigenous women might overcome at least some of the structural barriers they might face when trying to access health care services.

International law can be difficult to enforce on the national level. Therefore institutions such as the European Court of Human Rights are important because they give individual victims direct access to legal proceedings against the State. Given the importance of specific indigenous rights documents, the procedural options under ILO 169 are outdated and insufficient. Rather, indigenous individuals and groups should be given a judicial forum in which to bring claims for violations of indigenous rights. In an ideal scenario, this could include a binding treaty version of the most advanced rules contained in both ILO 169 and UNDRIP as well as a protocol to such a binding treaty which provides for an enforcement mechanism similar to that of the European Court of Human Rights. For the time being, however, such a system might not find widespread support from states. It is not, though, completely unrealistic to aim for such an enforcement system in the long run. A lot has been achieved in the field of indigenous rights in the last decades and the initial opposition by some states to UNDRIP has been given up as well. UNDRIP, though, is widely supported also because it is not a legally binding document. The discussions in Finland surrounding the potential ratification of ILO 169 show that a binding treaty which would include the provisions found today in the non-binding UNDRIP, complemented by a judicial enforcement system, would be even more controversial.

The widespread ratification of ILO 169 by Latin American states and their ratification of the American Convention on Human Rights and accordingly their experiences with the Inter-American Court of Human Rights could make the development of such a hypothetical international indigenous rights treaty possible. However, it is exactly in Latin America that the proposed protocol would not be necessary as the Inter-American Court of Human Rights (unlike the European Court of Human Rights) is not restricted to applying the regional human rights convention but can base its decision on any international laws and conventions which apply to the

situation in question. In this sense, the Inter-American Court of Human Rights can be used to implement ILO 169 outside the ILO supervisory system and therefore already functions as a potential indigenous rights court of Latin America.

In the long run, the creation of a protection system as described here, appears desirable. More important in the short term, however, is a fuller human rights awareness of public and private actors on the local level. Human rights training for public sector employees but also a general culture of human rights education is therefore essential for the creation of an environment in which the human rights of even the most marginalized members of society are to be protected.

Ways in which the right to access to health care for indigenous persons could be realized better would be the training of physicians who speak indigenous languages (as is hinted at in ILO 169) and UNDRIP but also language training for non-indigenous physicians in indigenous languages. As long as there is an insufficient number of indigenous persons who have access to medical training and to universities, this will remain a necessity. In particular in countries with a Nordic-style public health system, it should be possible to train a number of staff members in each medical institution in indigenous languages. For Norway, this would simply mean a deeper and more widespread implementation of Section 3-5 sentence 1 of the Patients' Rights Act.

Norway, it has to be noted, has already ratified ILO 169, while, other Arctic Nations, with the exception of the Denmark on behalf of Greenland, have not yet done so. Ratifying ILO 169 is not an uncontroversial question due to open questions concerning the effect of a ratification on land rights disputes. From the perspective of the right to access to health care, however, indigenous persons, and in particular indigenous women, could benefit if ILO 169 were ratified – and implemented effectively. It is this effective implementation with regard to horizontal effects of the right to access to health care which ought to be improved in Norway.

But when we look at the situation of indigenous women elsewhere, the shortcomings of the Norwegian system are only the tip of the iceberg. Indigenous women's rights to health care will be far easier to implement in Nordic countries with a relatively strong interest in human rights and with a few Sámi languages than in a developing country which might lack a human rights tradition and in which dozens or hundreds of indigenous languages are spoken in any given geographical area for which a medical institution is responsible. In principle, however, training medical staff on all levels to speak the locally spoken indigenous languages and to understand indigenous cultures, in particular in the context of health issues, can go a long way to fully integrating indigenous persons into existing social systems, as was envisaged already with ILO 169, and to ensuring access to all necessary health care. In particular the example of the taboo of talking about mental health issues in parts of the Sámi society indicates that language skills will often have to be complemented by cultural skills.

For the time being, though, the right to access to health care for indigenous women remains a problem – and in many countries much more so than in Europe. Both rich and poor States have to take decisive action for the improvement of both indigenous rights and women's rights, including the facilitation of access to all necessary medical services. Social rights are to be realized over time.

According to Article 2 paragraph 1 ICESCR, *"[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."* But this does not mean that States can fall short of their obligations indefinitely. At the very least, the conditions have to be created in which those who are most vulnerable have the possibility to claim their rights effectively.

International human rights instruments place direct, vertical, obligations on states. These obligations can be both positive and negative in nature. However, this is no longer enough. The full and effective realization of human rights, in particular the rights of women, requires the recognition of horizontal obligations. In the case outlined here, this does not mean that every physician will have to have language skills in indigenous languages. But it means that there has to be a way to make health care more accessible by removing language obstacles. This can require public health care providers to ensure some kind of translation service.

This example, access to mental health care for indigenous women in a very affluent country, is only the tip of the iceberg. Rights of indigenous women are threatened in many different situations and in many different forms.

International human rights law needs to be enforced in order to be effective (Gibney, 2008: 115 et seq.). As recent events in Ukraine show again, it is not enough to have rules on paper when they are not enforced. ILO 169 already benefits from a the ILO's exemplary mechanism and yet it is not enough. What will be needed in the long run are mechanisms which will enable indigenous peoples to access health services in their own language. This will require the majority society to become more aware of indigenous issues and to empower indigenous persons to become health care providers as well. In the long run, human rights, in particular for those who have long been marginalized and all too often continue to be marginalized, will require a horizontal dimension in order to be enjoyed by all. It remains the legal responsibility of states to ensure that human rights are given full effect domestically.

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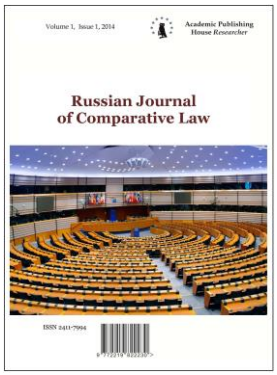
Published in the Slovak Republic
Russian Journal of Comparative Law
Has been issued since 2014.
E-ISSN 2413-7618
2017, 4(2): 88-95

DOI: 10.13187/rjcl.2017.2.88
http://ejournal41.com



About Optional or Mandatory Constitutional Control in the Russian Federation and Foreign Countries (Comparative Legal Study of the Constitutional Laws of the States with the European Model of Constitutional Justice)

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Abstract

The article overviews the topical issues of transition from optional to mandatory and preliminary judicial control carried out by the Constitutional Court of the Russian Federation which allows securing constitutionality of federal constitutional laws and federal laws based on blanket regulations of the Constitution.

The author analyses general characteristics of the European (continental, concentrated) model of constitutional control, as well as particular features of its organization and implementation in selected European states which are largely determined by the peculiarities of the adopted form of government.

Taking into consideration the similarity of constitutional system of state authority organization in the Russian Federation and the semi-presidential model of the republican form of government which is fulfilled in the constitutional system of many countries of Western Europe and, especially France, it is proposed to use the French model of the judicial control organization as regards the positive experience of the French Constitutional Council in implementation of preliminary and mandatory constitutional control over organic laws.

Keywords: constitutional control, optional or mandatory judicial constitutional control, the European model of constitutional review, the constitutional Council of France.

1. Introduction

The analysis of current domestic federal and local constitutional legislation on the organization and operation of constitutional and statutory courts allows a conclusion that European (continental, concentrated) model of constitutional control based on the Romano-Germanic legal system where the most important source of law is a regulative legal act is currently adopted in the Russian Federation.

The basic features of this model distinguishing it, for example, from the Anglo-Saxon model of constitutional control, are as follows:

- the existence of specialized bodies designated to carry out, as a rule, abstract constitutional control and enjoying a special constitutional status of state authorities being judiciary authorities, in particular;

- administrative and financial autonomy of constitutional control bodies which is a necessary condition for their independence from other state authorities and judicial bodies in decision-making processes;

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- constitutional control bodies are vested exclusive powers to rule legal acts unconstitutional and therefore null and void, including regulatory legal acts and laws adopted by the parliament;
- the formation of constitutional control bodies within a special constitutional procedure by state authorities out of recognized experts in the field of constitutional law having special qualifications;
- consideration of constitutional disputes following a particular procedure which is regulated in detail in constitutional legislation in order to implement constitutional legislation (constitutional justice), etc. by the constitutional control bodies.

Along with the common features characterizing European model of constitutional control, separate European countries introduced specific features of its organization and implementation which, in the author's opinion, are largely determined by the peculiarities of the adopted form of government. The form of government can be seen as an indicator of that particular mode by virtue of which the national constitution guarantees separation of powers between the supreme public authorities and, among other things, determines the place and role of the constitutional bodies within the system of such bodies.

2. Materials and Methods

The main sources for writing this article are official documents in the field of constitutional law of the Russian Federation and other states, such has France, which adopted the European model of constitutional control, as well as materials of journal publications and judicial practice.

In the process of research the main methods of cognition were used: systematic-legal, historical-legal and comparative legal analysis.

The author's reasoning is based on the systematic analysis of domestic and foreign constitutional legislation which allows to identify intra-system connections, public legal mechanisms of interaction, regularities, and the tendency of development, as well as effective functioning of the whole system, in case the Constitutional Court of the Russian Federation is considered the most important element of the judiciary system and the system of public authority.

The use of the historical-legal method allows to identify the reasons for deviation of the drafters of the 1993 Constitution from the classical conception of the semi-presidential republic on the whole and the French model of the constitutional justice organization in particular, which, in the author's opinion, are primarily related to the events preceding the adoption of the 1993 Constitution, when the Constitutional Court of the Russian Federation got involved in the process of political confrontation between the Supreme Council and the President due to a number of objective and subjective factors.

The method of comparative legal analysis consists of the analysis based on borrowing the relevant material from the constitutional legislation of European states. The use of this method allows to identify both, general features characteristics of the European model of the constitutional control and specific features of its organization and implementation which, in the author's opinion, indicate how the constitution of a certain country determines the place and role of the constitutional control bodies in the system of the supreme public authorities. This method makes the achievements of certain European countries in the field of constitutional and legal regulation of the constitutional justice organization accessible and comparable; therefore, it makes it plausible to define the main directions in making the implementation of constitutional control in the Russian Federation more effective.

3. Discussion

In accordance with the above-mentioned features characterizing the European system of constitutional control (constitutional justice), the Constitutional Court of the Russian Federation has a special constitutional legal status due to the fact that, on the one hand, in accordance with the provisions of Article 1 of the Federal Constitutional Law of July 21, 1994 No 1-FKZ "On the Constitutional Court of the Russian Federation" it is a judicial body of constitutional control which independently exercises judicial power by means of constitutional legal procedure. On the other hand, in accordance with the requirements of Article 11 of the Constitution, the Constitutional Court is a part of the system of state authority alongside with the President, the Federal Assembly

and the Government, and therefore, the constitutional control it exercises may be considered as a special and independent direction of the activities of state authorities.

Russian renown scholar Nikolay V. Vitruk considers the role of the Constitutional Court as a special role in the system of public authority due to the following facts: the Court influences significantly the activities of the President, the Federal Assembly, and the Government, the laws and by-laws adopted by them , as well as their decisions and actions by means of the constitutional control; it participates in securing the principle of separation of powers, the system of checks and balances; 'by resolving conflicts, disputes between the legislative and executive powers, it acts as a body of compromise and reconciliation, as a guarantor of political peace and stability in society and the state, as a custodian of the Constitution, constitutional values and ideals' (Vitruk, 2010: 176, 177).

Relationships between the status of constitutional control bodies and the form of government in the state is explained by the fact that such bodies due to their special constitutional status are called upon not only for resolving legal disputes in judicial procedure but also for performing other non-judicial functions which are of controlling and consultative nature. The said bodies are public authorities taking special place in the system of public authority organization and playing a significant role in ensuring the balance of powers in a democratic and rule of law state.

Analysing the peculiarities of legal status of the constitutional control bodies, another authoritative Russian scholar Veniamin Ye. Chirkin draws attention to the fact that "the procedure of taking decisions, including in Russia, starting in 2010, especially after a number of amendments to the Federal Constitutional Law of July 21, 1994 No 1-FKZ "On the Constitutional Court of the Russian Federation", for example the Law of November 3, 2010 No 7-FZK and the Law of December 14, 2015 No 7-FKZ, is now similar to judicial process to a lesser degree, as in fact there exists revision with the decision about the constitutionality of certain legal acts. In his opinion, "the word 'court' is not quite appropriate for the constitutional control body, since the Constitutional Court of the Russian Federation possesses certain non-judicial functions before (e.g., giving a statement in examining the issue of impeachment of the President or the issues of the Constitution interpretation when federal or local authorities address it), and now many court cases are tried by it without judicial hearings. In France, where the constitutional control body also has other non-judicial powers they apparently took this into account and called it the Constitutional Council" (Chirkin, 2017: 129).

Taking into consideration the above-mentioned dependence of legal status of constitutional control bodies on the peculiarities of the form of government chosen in the country, it seems interesting to draw on the experience of France in regulating the legal status of constitutional control bodies. It is important bearing in mind the similarity between the constitutional system of public authority organization in the Russian Federation and the semi-presidential model of the republican form of government which was fully realised in the constitutional structure of many countries in Western Europe and, above all, France.

In addition, the French experience of constitutional and legal regulation of the most important social relations is also important for Russia, taking into account the complexities of the transitional period of the state and society, which it is currently experiencing, as well as the fact that state-legal presidency institutions, parliament, constitutional control were quite new for Russia and relatively recently – during the USSR – were sharply criticized from the position of the then prevailing Marxist-Leninist ideology as extremely reactionary bodies of the bourgeois state.

In this regard, one should agree with Veniamin Chirkin that "the presidential-parliamentary republic with a strong president and, essentially, a sole leader, which existed in the majority of post-Soviet countries, had certain advantages, especially during the transitional period and with the necessity to mobilize society in order to tackle priorities. This was first shown, apparently, using the experience of France in the difficult situation of 1958" (Chirkin, 2003: 127).

With this in mind, it seems that the Constitution of the French Republic of October 4, 1958 (as amended and supplemented on July 23, 2008) had to be a model for the drafters of the Constitution of the Russian Federation in 1993 in determining the legal status of public authorities and state-legal mechanisms for their interaction, mutual control, implemented in the system of "checks and balances," in general, and the powers of the constitutional control bodies, in particular.

In France the body entitled to exercise constitutional control is the Constitutional Council of the French Republic whose legal status is defined in Section VII of the 1958 Constitution,

supplemented by Article 61-1 introduced by Constitutional Law No 2008-724 of July 23, 2008 "On modernization of the institutions of the Fifth Republic".

The terms of application of this Article are determined by the Organic Law No 2009-1523 of December 10, 2009 and provide for the implementation by the Constitutional Council of the subsequent constitutional control over the inquiries of the State Council or the Court of Cassation, "if in connection with the handling of a case in court an assertion is made that a certain provision of the law damages the rights and freedoms guaranteed by the Constitution".

The Constitutional Council of France in its Decree No 2009-595 of December 3, 2009 No 2009-595 has found Law No 2008-724 of July 23, 2008 "On modernization of the institutions of the Fifth Republic" constitutional, subject to the following provisions: the application of the legal procedure set out in Article 61-1 of the Constitution in assize courts; assessment of a change of circumstances; the priority of verifying the laws for compliance with the Constitution before verifying for compliance with international obligations (Constitutional Council of France at the present time, 2015: 208-215).

Despite the progressive nature of the above-mentioned legal novelties which significantly expand the powers of the Constitutional Council of France and the range of constitutional control it exercises it should be recognized that the primary type of its activity continues to be the preliminary control of the constitutionality of laws.

According to Article 61 of the Constitution, all organic laws before their promulgation, and legislative proposals set out in Article 11 of the Constitution prior to their submission to the referendum, and the regulations of the Chambers of Parliament prior to their application, are subject to preliminary and mandatory constitutional control. In addition, to reach a solution of the compliance of laws with the Constitution they may be transferred to the Constitutional Council by the President of the Republic, the Prime Minister, the Chairman of the National Assembly, the President of the Senate, or sixty deputies or sixty senators.

The judgment should be issued by the Constitutional Council within a month's time. However, at the request of the Government, in case of urgency of the matter, this period is reduced to eight days.

Reflecting the peculiarities of legal status of constitutional control bodies as the public authorities, on the one hand, and bodies of judicial authorities, on the other hand, the Constitution of France defines the Constitutional Council as a quasi-judicial body and does not consider it to be the highest judicial authority of the country.

The Constitutional Council consists of nine members, and its one-third is renewed every three years. Three members of the Council are appointed by the President of the Republic, three members by the President of the National Assembly and three members by the Chairmen of the Senate. The highest presidents of the Republic are by right the members of the Constitutional Council for life.

Judicial procedure is conducted in writing and is adversarial, except for the cases when actions are brought before a court on a mandatory basis. There is no practice of giving dissenting opinions. The results of discussion in the advisory room and the results of voting on the issues discussed are not subject to disclosure (Constitution of foreign states, 2012: 81–116).

According to the precise expression of Andrey A. Klishas, the implementation by the Constitutional Council of this kind of constitutional control "resembles one of the stages in legislative process within which, with the exception of such a form of direct democracy as referendum, individual citizens or their collectives do not possess any powers" (Klishas, 2010: 84).

Thus, it can be said that the French model of constitutional justice is peculiar when it provides both, a subsequent and a preliminary abstract constitutional control over the constitutionality of organic (constitutional) laws and regulations of the Chambers of Parliament which is simultaneously mandatory (imperative), since without a relevant conclusion of the Constitutional Council of France the mentioned regulative acts are not legally valid and cannot be applied.

It is important to note that the French model of constitutional control organisation is in demand in a number of European countries. For example, in accordance with Law of May 18, 1992 the Constitutional Court of Romania exercises both preliminary and subsequent constitutional control. However, unlike the Constitutional Council of France, preliminary constitution control (resolution of cases on the constitutionality of laws prior to their promulgation) in Romania is not mandatory and is possible only upon the request of the President of Romania, the Chairman of one

of the Parliament chambers, the Government and the Supreme Court, as well as at least 50 deputies or 25 senators. The preliminary constitutional control becomes mandatory only in cases of hearing the proposals for the revision of the Constitution by the Constitutional Court of Romania.

An important feature of the constitutional control in Romania which greatly differs it from the procedure for considering the constitutionality of regulative legal acts adopted in most countries of Europe and America is the possibility of the parliament stipulated by the law to overcome the decision of the Constitutional Court to rule the law unconstitutional by the majority of at least two-thirds of votes in each of the chambers. Moreover, if the Parliament overcomes the decision of the Constitutional Court the latter has no longer a right to return to consideration of the issue of the constitutionality of the given law (Miryasheva, 2015: 260-263).

Preliminary and simultaneously mandatory, as well as subsequent constitutional control is provided for in the constitutional legislation of other European countries influenced by the French model of the constitutional control (Belarus, Bulgaria, Hungary, Lithuania, Moldova, Romania, Ukraine, Albania, and Poland).

At the same time, in some of these states, preliminary and simultaneously mandatory constitutional control is exercised by constitutional courts on their own initiative (Albania, Hungary, Moldova, or Poland).

For example, according to the requirements of Article 24 of the Constitution/Basic Law of Hungary of April 25, 2011 (came into force on January 1, 2012), the Constitutional Court exercises preliminary abstract constitutional control:

- on its own initiative in mandatory (imperative) order over the laws on the state budget and its implementation, on central taxes, fees and custom duties, on pensions and health care contributions, on unified requirements for local taxes;
- upon the request of legal entities and individuals over the laws relating exclusively to the right to life and human dignity, the right to protection of personal data, the right to freedom of thought, conscience and religion, or the law related to Hungarian citizenship;
- on the initiative of the Government or one-fourth of the Members of Parliament over all laws.

In addition, the Constitutional Court of Hungary exercises specific constitutional control over the constitutionality of legislation which will be applied in a particular case based on a constitutional control, upon a judge's request or a judicial decision (Constitution of Hungary, 2011: 8).

It should be noted that despite the announcement in the Russian Federation of a semi-presidential model of the republican form of government, the underlying state-legal mechanisms of interaction and mutual control exercised by state authorities in the system of "checks and balances" characterizing classical concepts about this form of government which were set forth in the 1958 Constitution of the French Republic of did not fully reflect in the 1993 RF Constitution.

It should be recognized that the modern Russian model of the republican form of government is more characterized by the dominance of the President in the system of public authority of the Russian Federation, which is quite appropriate in the conditions of transition period the Russian state and society were in.

In addition, the French model of constitutional justice organization was unclaimed in the Russian Federation, the characteristic features of which, as is mentioned above, is the existence of a quasi-judicial body designed among other things to exercise preliminary, mandatory constitutional control over certain legal acts.

In the Russian Federation, according to Article 125 of the Constitution, the Constitutional Court has the right to exercise only optional, current constitutional control upon the request of the President, the Federation Council, the State Duma, one-fifth of the members of the Federation Council or deputies of the State Duma, Government, the Supreme Court, legislative and executive authorities over compliance of the federal and local legal acts, agreement between federal and local bodies, as well as preliminary constitutional control over international agreements of the Russian Federation which have not come into force, with the Constitution.

In our opinion, the reasons why the drafters of the 1993 RF Constitution deviated from the classical concepts about semi-presidential republic on the whole and the French model of constitutional justice organization, in particular, should be sought in the conditions in which the Constitution was drafted and adopted. According to the opinion of authoritative Russian

constitutional law scholar Suren A. Avakyan, any constitution "is the result of interaction and sometimes even confrontation of various layers, forces, groups existing in society". Such a conclusion is made on the basis of analyzing the events which preceded the adoption of the 1993 RF Constitution when the existing internal political crisis and confrontation of the Supreme Council, on the one hand, and the President, on the other hand, became a reason for the "formal and bloody dispersal of the Supreme Council and the Congress of People's Deputies when one branch of power proved its strength and advantage with the help of tanks" (Avakyan, 2007: 2).

In this regard it becomes clear why the 1993 RF Constitution formalised the dominant position of the President in the system of state authority of the Russian Federation, which undoubtedly does not correspond to the tendencies of its further democratic development, related to ensuring a more balanced power of the state authorities of the Russian Federation, in accordance with the principle of separation of powers" (Pisarev, 2016: 295-307).

In addition, in the specified period of time preceding the adoption of the 1993 RF Constitution, the Constitutional Court of the Russian Federation was involved in political confrontation between the Supreme Council and the President due to a number of objective and subjective factors.

As a result of this, on September 21, 1993, the Constitutional Court adopted a resolution in which the Presidential Decree No 1400 "On the phased constitutional reform in the Russian Federation" and his appeal to the citizens of Russia on September 21,1993 were recognized unconstitutional and being the grounds for the removal of the President of the Russian Federation B.N. Yeltsin from office or putting into effect other special mechanisms of his responsibility following the procedure provided for by the Constitution.

A number of judges of the Constitutional Court (Ernest M. Ametistov, Nikolay V. Vitruk, Anatoly L. Kononov, and Tamara G. Morschakova) not only voted against the approval of this conclusion and expressed their dissenting opinion on this matter, but also announced their refusal to participate in the sessions of the Constitutional Court pending the adoption of the new Constitution and the beginning of the work of the Federal Assembly, i.e. before the implementation of the Presidential Decree of September, 21, 1993.

On October 7, 1993, the President of the Russian Federation issued Decree No 1612 "On the Constitutional Court of the Russian Federation" which highly criticized his activities in connection with the involvement of the Constitutional Court in the political struggle. As it was not possible to hold the sessions of the Constitutional Court until the crisis situation was over, a temporary suspension of Constitutional Court sessions to consider specific cases was announced.

In our opinion, the above-mentioned facts of politicization of the Constitutional Court in the 1990s explain the significant reduction of the Constitutional Court's competencies determined by the previous legislation, for example those connected with the possibility of considering cases on its own initiative, and the French model of constitutional justice organization providing for the implementation of preliminary, mandatory constitutional control over the most important regulatory legal acts was not claimed.

It appears that taking into account the abovementioned uneasy experience of development of domestic constitutional justice, the prospects for further development of constitutional legislation in the Russian Federation should be related to the detailed regulation of measures which would allow, according to Nikolay V. Vitruk, "regardless the body of judges and their personal beliefs to exclude or, at least, make it as difficult as possible to use the Constitutional Court as an instrument of political struggle and to ensure stable and Constitution and law-based activities of this body, its positive role in preserving public peace, consent and tranquility". He also notes that in order to exclude the possibility for politicization of the Constitutional Court in the Federal Constitutional Law of July 21, 1994: "any extraordinary, simplified procedures for initiating and consideration of cases; collegial decision-making by the Constitutional Court is consistently ensured; the possibilities for political maneuvering around the results of voting, motivation of decisions and dissenting opinion of judges are restricted; the decision of the Constitutional Court is supposed to be declared in full; a dissenting opinion of a judge shall be published along with the decision of the Constitutional Court; judges' responsibility to participate in political activities and in political actions has been increased" (Vitruk, 2010: 89).

Taking into account the current tendencies in the Russian Federation for building a democratic and rule-of-law state, ensuring a better balance between the powers of government

bodies of the Russian Federation, in accordance with the principle of separation of powers, as well as pan-European trends in the further expansion of the powers of constitutional control bodies; dependence of the model of constitutional control organization adopted in the Russian Federation on the semi-presidential model of the republican form of government which found its full embodiment in the constitutional structure of France, and also in order to improve the quality of law-making activity, it appears that the Federal Constitutional Law of July 21, 1994 No 1-FKZ "On the Constitutional Court of the Russian Federation", taking into consideration the foreign experience which has been analyzed above and fully justified itself, it is possible to formalize a provision about a mandatory and preliminary consideration in the Constitutional Court of the Russian Federation federal constitutional laws and federal laws based on blanket norms of the Constitution.

Veniamin Ye. Chirkin critically appraises the model of optional constitutional control currently in use in the Russian Federation, which excludes preliminary verification of the constitutionality of the laws prior to their coming into force on the principle "let them pass a law, and then we'll see". In his opinion, "the preliminary verification (even if it does not apply to all kinds of laws) can exclude some errors in a law before its coming into force in order to eliminate the necessary and expensive procedure in the Constitutional Court" (Chirkin, 2017: 130).

4. Results

The limited format of this article does not allow the author to analyse in detail all the changes and additions made to the existing federal constitutional and federal laws, as well as the decisions of the Constitutional Court on finding the provisions of federal laws to be in conflict with the Constitution. However, even this brief analysis points out to the significant quantity of the said decisions which allows a conclusion that improving the quality of legislative activity is significant as well as ensuring the constitutionality of the laws passed, reduction of the costs of implementing complex and lengthy legal procedures for resolving cases of compliance of the Constitutional Court of the Russian Federation with the Constitution on enquiries of federal and local public authorities depend on the introduction in the Russian Federation of preliminary and mandatory constitutional control.

5. Conclusion

Entrusting the Constitutional Court of the Russian Federation with the authority to implement preliminary and mandatory constitutional control over the compliance of federal constitutional and federal laws with the Constitution has several important outcomes:

1. Allows to fully capture the peculiarities of the constitutional and legal status of the Constitutional Court not only as a judicial body designed to resolve legal disputes in judicial procedure but also as a public authority exercising other non-judicial functions of abstract preliminary constitutional control, having a significant impact on securing greater balance of powers of public authorities of the Russian Federation in accordance with the principle of separation of powers.

2. Is more in line with the French model of constitutional control adopted in countries with a semi-presidential form of government, to which the modern constitutional system of state authority organization in the Russian Federation is the closest.

3. Reflects the current trends in the Russian Federation in the construction of a democratic and rule-of-law state and pan-European trends in the further expansion of the powers of constitutional control bodies.

4. It does not threaten the use of the Constitutional Court as an instrument of political struggle, which existed in the period prior to the adoption of the 1993 Constitution, and in many respects caused a significant reduction of the powers of the Constitutional Court provided for in the former legislation to implement mandatory constitutional control.

5. Contributes to the improvement of the quality of the federal constitutional and federal laws adopted, their greater constitutionality, and also significantly minimizes the costs and time for implementing complex legal procedures for resolving cases of the compliance of the Constitutional Court of the Russian Federation with the Constitution upon enquiries of federal and local public authorities.

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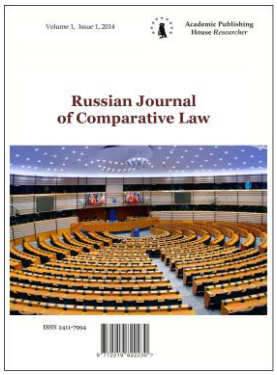
Published in the Slovak Republic
Russian Journal of Comparative Law
Has been issued since 2014.
E-ISSN 2413-7618
2017, 4(2): 96-102

DOI: 10.13187/rjcl.2017.2.96
http://ejournal41.com



Politics and the Use of Force: the Analysis of Academic Opinions Regarding the Motives behind US Military Interventions from the Perspective of Neorealism

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Abstract

Since the end of the World War II, military intervention and the use of force have taken many modes of recognition in international law. While its justification as a means of self- or collective defence remains the most commonly used, not all academicians have considered this objective as the only justification for interventions. This article analyses the opinions of researchers espousing that some powerful states can assert their dominance in other sovereign states in pursuits of national interests. This is what neorealism is concerned with and what it inevitably seeks to understand and explain. Against the opinions of scholars sharing neoliberal approach, the author analyses the examples military intervention in the 20th and 21st century particularly focusing on US and NATO military intervention. The article attempts to examine the claims for the existence of other possible political justifications for the use of force which are different from self- or collective defence.

Keywords: international law, international politics, military intervention, NATO, use of force, United Nations Security Council.

1. Introduction

Military intervention in international law refers to the introduction of one state's military forces into that of another sovereign state. Unilateral intervention extends to include also the sphere of economy and diplomacy. Military intervention is considered a mode of the use of force exercised on international arena. The development of military intervention since the end of World War II has seen its expansion with its inherent use of force and the possibility of its abuse attracting much attention over its authorisation and legitimacy. With the increase of the role of non-state actors, international organisations have also increasingly become involved in the process of the use of force in international law.

2. Materials and methods

This article considers the opinions of researchers who espoused that some powerful states can assert their dominance in other sovereign states based not on the rule of law but on the dominance of power and the exertion of force in pursuits of national interests. This is what neorealism is concerned with and what it inevitably seeks to understand and explain. This paper predominantly focuses on military intervention and the use of force in contemporary international law, specifically outlining the US and the North Atlantic Treaty Organisation (hereinafter: NATO)

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military interventions over the past two decades. It examines the threat and use of force by one or more states and international organisations against other sovereign states, primarily examining the military interventions into Kosovo and Libya, as well as the 2003 US invasion of Iraq. An attempt is made to explain military intervention using a post-neorealist approach by analysing and interpreting these military interventions against the fundamental assumptions of neorealism.

Within the context of this paper, military intervention is considered broadly as an intervention in which military force is used by one or more states or international organisations against another sovereign state or states or international organisations. This can often be driven by the pursuit of both, internal and external interests of the intervening state, other states or organisations. Although such intervention can be authorised or unauthorised, most commonly the argument of self- or collective defence is most commonly used for its implementation.

Particular cases of military interventions are studied in this article in attempt to outline a framework of military intervention in the 19th and 20th centuries. The role of the United Nations, its Security Council (UNSC) and NATO in the context of military intervention and use of force is scrutinised. A vital question regarding whether military action by states and organisations which lack UNSC authorisation are legal or legitimate is then addressed.

Finally, the issue of expansion of NATO and US military influence geographically is addressed to in bridging a connection between such expansion and the maintenance of global hegemonic system.

3. Discussion

Military intervention in international law within the context of the neorealist approach, is not uncommon. This contribution compares the military intervention of Kosovo, Iraq and Libya, examining on a case-by-case basis historical facts in each region and justifications for such interventions. A neorealist approach is applied in determining what these justifications are, and whether they should be considered legitimate or contributing factors to these cases. This determination is based on US interests in sovereign states, both as a demonstration of geopolitics and the use of force in international law.

Since its founding in 1949, NATO has grown to become what is considered the most powerful international military alliance in history. NATO was initially established to counter soviet expansion as Lord Ismay, the first NATO secretary general said, NATO's goal was "to keep the Russians out, the Americans in, and the Germans downs" (Reynolds, 1994: 129).

NATO's new membership has largely been from central and Eastern European states. Currently, three candidate states are in the process of joining the alliance – Bosnia and Herzegovina, Montenegro and Macedonia. The Russian Federation, under President Vladimir Putin, has fiercely opposed what it described as NATO's eastward expansion. In 1999, NATO introduced a formalised membership invitation programme called the Membership Action Plan (MAP). Stemming from Article 10 of the Treaty, MAP was divided into five chapters assessing the potential of an aspiring state to join the alliance. The state of Montenegro is expected to be the latest state to join the alliance, having been invited on 15 December 2016.

US interest in the Alliance is considerable. According to NATO statistics for 2016, the US provided the highest contribution to NATO, with 3.61% of its total GDP going towards defence. This translated to the US spending $650 billion on defence in that year; more than double the amount all of NATO's 27 other members spent together (Defence Expenditure of NATO Countries, NATO Website). Comparatively, US military expenditure is the highest in the world, exceeding the top seven other countries combined (Stockholm International Peace Research Institute). Further, the US has the highest number of armed forces in the alliance, standing at 1 370 000 active personnel, with a further 850 000 reserve personnel (NATO Defence Financial and Economic Data). It is evidently clear that NATO represents a significant portion of US interests, consequently resulting in massive US investment into the organisation.

The military intervention into Kosovo was a 78-day air campaign by NATO against the Federal Republic of Yugoslavia (FRY). The military intervention had come shortly after the Kosovo war in which FRY forces, Serbian military and police forces were accused of persecuting the Albanian population of Kosovo. At the time, US President Bill Clinton had stated on national television that the US was upholding its values and protecting its interests, while also advancing the cause of peace. Lead by the US, the NATO campaign was supported by 12 other NATO

members, including the United Kingdom, Germany, France, the Netherlands, and Turkey. The NATO intervention into Kosovo was also the first instance it had conducted unilateral enforcement action without UN Security Council authorisation, a fact many considered to be against international law.

The air campaign eventually ended on 10 June 1999, although under dubious circumstances. The 11-week campaign against the FYR has prompted extensive analysis as to what interests the US or NATO would have in the region. Noam Chomsky seems to give a compelling argument against the claim that 'humanitarian intervention' was necessary in upholding the human rights of the Albanian Kosovars'. Describing western nations as being 'enlightened,' Chomsky is sceptical of the west's values as a guiding factor for military intervention. While contrasting the circumstances in the lack of US intervention into the Turkish attack on the Kurds, Chomsky defines several non-humanitarian, US/NATO interests which could explain NATO'S involvement in Kosovo. Perhaps one of Chomsky's greatest arguments against the intervention being humanitarian, is his stance regarding NATO's own interpretation of the Peace Accord and its demand for peacekeeping forces in Kosovo under NATO command (Chomsky, 1999: 106,107). Chomsky elaborates on this ulterior motive by quoting Alexander's Solzhenitsyn: 'we must recognise the fact that the world today is often ruled by the rule of power, and not the rule of law (Chomsky, 1999, 9). 'As Solzhenitsyn adds, there should be no indulging about NATO's aim in defending Kosovars in Kosovo, in that if protection of the oppressed was NATO's real concern, it could have defended the Kurdish population from decades of military attacks. Instead, NATO favours Turkey because it is a NATO member and a 'paying ally (Chomsky, 1999: 10).'

Chomsky draws a line between two kinds of interventions, i.e., those carried out under the auspices of the United Nations and with authorisation by the UNSC, and those carried out unilaterally without UNSC authorisation (Chomsky, 1999:10). Chomsky, who refers to the emerging norms of justified intervention as a new humanism, poses a simple test for interventions: 'is it guided by power interests, or by humanitarian concern? (Chomsky, 1999: 13).' A further point is assessed. The impact of the intervention on those it was supposed to protect – a radical escalation of the alleged ethnic cleansing in Kosovo, as well as the displacement of many thousands more Kosovars. Prior to the bombing of FYR, the United Nations High Commissioner for Refugees (UNHCR) had reported no data on refugees in Kosovo. After three days of bombing, on 27 March 1999, the UNHCR reported that 4 000 people had fled Kosovo. By the time the Peace Accord had been signed, the number of refugees had been reported at 671 500 to be beyond the borders of FYR.

In assessing the intent behind the intervention into Kosovo, Chomsky proposes a simple test, i.e. to check the same states acted elsewhere. Chomsky elaborates on this test referring to it as to the principle of selectivity – why intervention into one situation of human rights violations is undertaken which in another situation the same state abstains from action (Chomsky, 1999: 38, 40). On 10 June 1999 the Security Council Resolution No. 1244 was passed which mandated a NATO presence in Kosovo. From the initiation of the Peace Accords, however, it was evident that NATO demanded full command of any peacekeeping forces in Kosovo (Chomsky, 1999: 105, 107, 118, 125). Yet another object of the Kosovo intervention was maintaining NATO and US credibility within Europe and abroad. A 1992 draft of the Pentagon Defence Planning Guide detailed US foreign policy's importance in maintaining a significant present in Easter Europe. The intervention further allowed the US a platform to expand its influence and reduce any insecurities it may have had in the area, as well as expanding its ideology of democracy and the free markets (Belzil, 2013: 3, 5).

Another consequence of the intervention was, according to Chomsky, the benefit of military production and sales. Military intervention and war boosted the Pentagon defence spending, i.e., almost roughly $1 billion in military weapons such as the Tomahawk cruise missiles which were needed to replenish military stocks after the Kosovo intervention (Chomsky, 1999: 138). As Chomsky demonstrates, military interventions go further than benefiting military spending and the high-tech industry. Major US companies had shortly after the war made their interests clear in rebuilding infrastructure in the affected areas. The UK's own initiative to rebuild Kosovo after the destruction amounted to some $ 2 – $ 3.5 billion (Chomsky, 1999: 139).

While several UN Security Council resolutions regarding the situation in FRY were passed (Resolution No. 1160 (1998) and Resolution No. 1190 (1998)), no resolution explicitly authorising military intervention was adopted. As De Wet phrases the term, the closest such a matter would come to was *ex post facto* legitimisation of the Kosovo intervention, and certainly *ex post facto*

authorisation through UN Security Council Resolution No. 1244 (1999) was not an acceptable conclusion (De Wet, 2004, 65, 66).

In March 2003, the United States supported by the United Kingdom launched operation in Iraq. Dubbed 'Operation Iraqi Freedom' began on 20 March 2003 and lasted until 1 May of the same year. On 12 September 2002, then US President George Bush addressed the United Nations General Assembly expressing US concern over situation in Iraq. Among such concerns were the claims that Iraq had been in violation of the UN Security Council Resolution No. 1373 in supporting terrorist organisations, that there had been grave human rights violations under Saddam Hussein's rule, and most notoriously, that Iraq was producing weapons of mass destruction.

The intervention occurred shortly after the UN Security Council Resolution No. 1441 (2002), pursuant to several other Security Council resolutions, prompted Iraq a final opportunity to comply with certain disarmament obligations (UN Security Council..., 2002). The UK contributed its troops.

While both the Bush and Blaire administration accused Hussein of developing weapons of mass destruction, no conclusive proof of these allegations was found. Further, both the US and UK faced harsh criticism for their involvement in the invasion, which has since been broadly regarded as illegal and illegitimate. While sophisticated arguments were presented justifying the intervention, such as justifying the intervention based on previous UN Security Council resolutions, a military attack (even when under the guise of 'military intervention') based on UN resolutions (Taft, Buchwald, 2003: 557, 558) and lacking explicit authorisation does not seem to be acceptable for all the academicians (Lowe, 2003: 52). While the US and its allies continuously put forward arguments based on human rights violations committed by the Hussein government and the threat to international peace by the Iraqi regime, ulterior motives for the invasion of Iraq have been a common topic among scholars and academics of international law and politics. Several arguments are put forward in academic literature asserting that the said interventions could be based on other than human rights-oriented considerations. Such arguments are, in particular, linked to the attractiveness of Iraq' oil reserves. As Hinnebusch maintains, powerful strategic, political, and economic factors for the invasion of Iraq must have existed for the US to conduct military operations in the country (Hinnebusch, 2007: 212). Hinnebusch holds that the argument that oil was not a decisive factor for the invasion is so contradictory that the burden of proof would lie with those who deny this fact, adding that it was no coincidence the country had the second largest oil reserves in the world (Hinnesusch, 2007: 212).

As several other authors maintain, one of the US key interests in maintaining security and ultimately survival, are resources. In line with interests in oil, naval bases could, in the opinion of Bromley, be attractive for maintaining crucial military power (Bromley, 1991: 105). According to the 2016 BP Statistical Review of World Energy, the US is the largest oil consumer in the world, with 2015 estimates putting its oil consumption at 19 396 000 barrels per day. China is placed in the second position, with an oil consumption just over half of that of the US at 11 968 000 barrels per day ('BP Statistical Review..., 2016). Although the possible attractiveness of the Middle East oil reserves is regarded by the said researchers as substantial argument for intervention, there is objectively less need in invading Iraq for securing oil supplies since Hussein posed no threats to Gulf oil exporters, neither did he exert control over the oil market. While oil supplies could have played some role in the motive for intervention, Hinnebusch puts forward the argument that the US operation in Iraq was greatly centred around hegemonic stability (Hinnebusch, 2007: 213). Its involvement in the promotion of democratic course, in the opinion of Hinnebush, allowed it to predict environments and enforce property rights needed for global capital accumulation (Hinnebusch, 2007: 213). Combination of US hegemonic influences in global markets with the internationally acknowledged power of US dollar, and the presence of vast oil reserves in Iraq, arguably presented an interest for the US to control and maintain control over the territory of that state. The occurrence of the 9/11 attacks on the US, preceding the Iraq invasion, further allowed those who believed in a war with Iraq to advance their interests. After the 9/11 attacks, those advocating for military action against Iraq saw justification in intervention, and the hurdle of legitimisation of a war against a state which did not pose a threat to the US was bypassed by allegations of Hussein's alleged link to Al-Qaeda and the production of weapons of mass destruction (Hinnebusch, 2007: 220).

On 17 March 2011 UN Security Council Resolution No. 1973 (2011) was adopted on the situation in Libya. The resolution was approved by 10 Security Council members, including the United Kingdom, France, and the US. Permanent members, i.e., Russia and China, as well as Brazil, Germany and India, abstained from voting on the resolution. The adoption of Resolution No. 1973 (2011) came in the wake of nationwide Arab Spring protests of 2011, leading to a civil war and the eventual capture and death of Libyan leader Muammar Gaddafi. Among other things, the said Resolution authorised member states that had notified the Secretary-General acting nationally or through regional organisations or arrangements, to take all necessary measures to protect civilians, imposed a no-fly zone over Libya, enforced an arms embargo, imposed a ban on all Libyan designated flights and imposed an asset freeze on assets owned by Libyan authorities (UNSC Resolution 1973 (2011)). Criticism of intervention into Libya was widely shared, even among some western states. Moreover, the opinion of Venezuelan President Hugo Chavez had been remembered who was saying Gaddafi would be remembered as a martyr, accusing global superpowers of only wanting to 'grab Libyan oil,' while Zimbabwean President Robert Mugabe accused the US and NATO of hunting down Gaddafi, later adding that South Africa and Nigeria had betrayed Africa when they voted in favour of Resolution. Both Cuba and North Korea, as well as many other states and their leaders condemned the intervention into Libya.

Nonetheless, the question as to what interests Libya posted to the US and NATO members is merited. Chomsky refers to the Middle East in answering this question. The primary concern in the Middle East remains its incomparable energy reserves. Chomsky reiterates that 'control of [the energy reserves] would yield substantial control of the world.' Chomsky argues that due to Libya's wealth of oil reserves and a government that is neither reliable nor obedient, an undesirable situation was presented to the US and its allies (Chomsky, 2011). Oil specialists believed that Libya may have had vast unexplored reserves of oil, which a more dependable (and obedient) government would open up to 'Western exploitation.'

Chomsky further argues that there was no attempt in enforcing a no-fly zone but rather that Security Council Resolution No. 1973 (2011) was used as a tool for direct participation alongside rebel forces against the Libyan government. Similar to Iraq is the 'oil factor' in military intervention in Libya. Interests in oil reserves are invoked by Gleditsch as potential factors which could motivate the nation states to intervene in another state, especially where there are anticipated consequences of access to oil due to a civil war in such a state (Gleditsch, 2016). Empirical data has shown that military interventions occur more frequently in states with civil wars that are oil producers or that have large oil reserves, and that usually the intervening countries are oil importers (Gleditsch, 2016). Libya's oil wealth is, however, not the only possible hidden motive behind US intervention. According to International Monetary Fund data, in 2011 Libya held 4.6 million ounces of gold, translating to roughly 144 tons. Gold market prices in 2011 placed such a stockpile to be valued between $6 – $8 billion. While a relative comparison placed Libya in the top 25 states with the largest gold reserves in the world, Libya's small population relative to its gold reserve was significant. In this regard, arguments have been put forward that the military intervention into Libya was a result of Western governments preventing Gadaffi from establishing a 'gold dinar' – a currency meant to rival especially the US dollar. Within a neorealist approach, preventing any economic threat to Western currencies and particularly the US dollar as a global currency, while also ensuring further access to resources for the US economy, seem a desirable outcome for its military involvement in Libya.

4. Results

The ability for the US to cover large geographical areas when conducing and involving itself in military intervention owes to its greater military presence outside the continental US and NATO members. The US outranks every other state globally in terms of military spending abroad. Officially, there are over 190 000 troops and 115 000 civilian employees across 909 military facilities in 46 states and territories (Lutz, Enloe, 2009: 1). These installations account for 795 000 acres of land with over 26 000 buildings and structures. These official statistics however, do not reveal the full extent of US military involvement abroad. It excludes troop presence in Iraq and Afghanistan, as well as unacknowledged facilities in Israel, Kuwait, the Philippines and many other areas (Lutz, Enloe, 2009: 1). In the global context, Lutz and Enloe summarise US military bases abroad as follows: "Bases provide security for the United States by deterring attacks from hostile

countries and preventing or remedying unrest or military challenge (Lutz, Enloe, 2009: 21)." Further, the political purpose of US troops abroad is their use as tools for political change.

US military strength extends on a global scale and all such interests are vested in the survival and stability of the US in the global arena. In essence, the argument for global-wide bases consists of a neorealist outlook – ensuring internal and external interests of the state are secured. These interests vary from a defensive neorealist viewpoint, such as increasing capability by securing resources, to an offensive neorealist viewpoint, such as pursuing global hegemony. In the Middle East, US military presence ensures access and control of resources - oil fields (Lutz, Enloe, 2009: 54). In Japan, US military presence is meant to maintain the hierarchy of power resulting from World War II (Lutz, Enloe, 2009: 54). US bases in Korea, Japan and Australia encircle China, a perceived "superpower and competitor" to US interests in Asia (Lutz, Enloe, 2009: 55). A further dimension to containment includes the deployment of "missile defences". A global network of missile defence weapons deployed in Greenland, Czech Republic, Poland, Israel, Korea and Japan (Lutz, Enloe, 2009: 55).

While more extensive lists may be drawn, with their own conclusions and inferences, it would suffice to say that US military power remains unrivalled, for the greater part. Owing to its vast military and also economic resources, it remains a global superpower continually striving for its own survival.

5. Conclusion

While the United Nations and its Security Council is a stable departure in consolidating a single global order, there are cases when nation states start military operations in other states in absence of explicit resolution supporting such intervention.

The adoption of the UN Charter was aimed at limiting unilateral military action, enabling the UN Security Council to collectively decide on the use of force by states; it has however never truly achieved this (Blokker & Schrijver, 2005: 65, 66). In an international system that is a 'realm of high politics' where state survival and security are concerned, international law's impact on state behaviour is arguably limited (Glennon, 2005: 93).

Although the developments in international law have greatly curtailed state actions on the international arena, national interests remain the focal point of foreign policy and external state behaviour. As long as states are guided by their interests for survival, for stability and for capability, and for as long as international law remains a choice by states, following its rules and choosing to be bound by them will too remain a choice side-lined by the primacy of national interests. This is the main argument of neoliberal scholars cited in this article.

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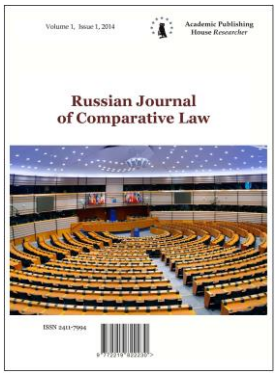
Published in the Slovak Republic
Russian Journal of Comparative Law
Has been issued since 2014.
E-ISSN 2413-7618
2017, 4(2): 103-105

DOI: 10.13187/rjcl.2017.2.103
http://ejournal41.com



Reviews

Tymofeyeva A. Non-Governmental Organisations under the European Convention on Human Rights: Exceptional Legal Standing. Monografie. RWW Science and New Media Passau-Berlin-Prague, 2015. 338 p. ISBN 978-3-9816855-9-6

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Abstract

The author elaborates on the legal standing of non-governmental organisations (NGOs) under the European Convention on Human Rights. This objective of this book is to reveal the unique status of the NGOs in proceedings before the European Court of Human Rights. The significance of their status as enshrined by the European Convention is much stronger in comparison with international regulation stipulated by other central human rights treaties. Special attention is paid to exploring the status of non-governmental organisations acting in the capacity of an applicant. The author shows that not all the procedural rights set forth by the European Convention can be effectively implemented by the NGOs. Yet the author scrutinizes the best practices of involvement of NGOs in the process having been able to attain significant amounts of just satisfaction for victims of violations.

Keywords: European Convention on Human Rights, European Court of Human Rights, non-governmental organisations, applicant, legal standing, just satisfaction.

The monograph written by Dr. Alla Timofeyeva of the Charles University in Prague, entitled "Non-governmental organizations within the framework of the European Convention on Human Rights: an exclusive legal position" (Tymofeyeva, 2015) explores the topical issue connected to legal status of NGOs as enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the European Convention).

The monograph stands out for its rich empirical and bibliographic base. Nearly 500 decisions and judgments by the ECHR are analyzed by the author. This analysis is substantiated with references to many authoritative monographs books and articles in English, French, and Czech languages. The author must be commended for using the documents from the collections of the library in the European Court of Human Rights and in the library of the Cambridge University (the Squire Law Library in Cambridge). The sources of international human rights law are also analyzed in detail by the author. Much attention is paid to the provisions of international treaties, both at the UN level and at the regional level (Mayer, 2011).

The author begins the first chapter with delving into the issues of interpreting the concept of "non-governmental organization" against the background of the doctrine of international law (Lindblom, 2005; Tomuschat, 2008;Willetts, 2002), provisions of universal human rights treaties, and regional human rights treaties (at the level of Asia, Africa, America, Europe). Taking into

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account the main purpose of the book, i.e., examining the legal status of NGOs within the framework of the European Convention, the author briefs the reader with consolidated main theses related to the exploration of the definition of "non-governmental organizations" in theory of international law and in selected international documents. The author elaborates on the main features of NGO which culminates in the following: “NGO is an association, independent of public authorities, whose goal is different from making profit”, i.e. we are talking about non-profit organizations. The status of NGOs differs from the status of political parties.

Most of the international human rights documents require that NGOs should be officially registered nationally, in the state where they operate, and their actual activity should be in accordance with the law. As a rule, NGOs at the universal level are expected to cooperate with the UN and other organizations that are part of its system and act, in accordance with their goals.

Moreover, the definition of NGOs in the European Convention itself is analyzed. In particular, the author departs from Article 34 of this Convention, according to which NGOs can file a complaint to the European Court of Human Rights. Yet for the purposes of filing a complaint to the Court, the status of the victim is considered important under the said Article 34 which reads:

“*The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right*”.

Thus, the Convention provides that "victim" is a person whose rights provided by this treaty are personally or directly violated by measures or actions of the state. In theory, there are three types of victims: direct, indirect, and potential. The author suggests that in order to qualify for standing in the process under the requirement of each of these types of victims, NGOs need to be officially registered. Examples of other types stand in, except NGOs, are contemplated in the book under the meaning of Article 34 of the European Convention. These are commercial entities and political parties (Fura-Sandstom, 2007; Emberland, 2014). In addition, the author elaborates on the four main roles that NGOs can perform during the proceedings before the ECHR: 1) the applicant; 2) the third party; 3) the representative of the applicant; 4) the source of information (Mayer, 2011).

The special term "Article 34 NGO" (NGOs within the meaning of Article 34 ECHR) is suggested by the author following the example of a well-known human rights organization "Article 19". The following definition of an NGO is provided by the author within the framework of the Convention: "a commercial or non-commercial legal entity, with or without official registration, which does not directly participate in the exercise of state powers and has a sufficient degree of independence from state control. Such an organization should have a status of the victim, in accordance with the case law of the ECHR (in the original – "The definition of the term ‘Article 34 NGO’, for the purposes of this study, is a profit or non-profit making legal entity, with or without formal existence, which does not directly participate in the exercise of governmental powers and has a sufficient degree of independence from governmental control. Such an organisation must have victim status in accordance with the Court’s case-law").

The second chapter of the book is devoted to examination of individual rights which, in the author's opinion, can be applied to non-governmental organizations within the meaning of Article 34 of the European Convention. A list of articles of the Convention is provided the violations of which can be ascertained by the above-mentioned NGOs (Articles 6-10, 11, 13 and 14). These subjects can file a complaint with the ECHR, where they can claim that they are victims of violations of rights enshrined in the additional protocols to the European Convention (Articles 1 and 3 of the First Protocol to the European Convention, Articles 2, 3 and 4 of Protocol No. 7 and Article 1 of the Protocol No. 12 to the European Convention). The possibility to seek recognition of violation of these rights is illustrated by special examples from the practice of the European Court of Human Rights.

The final chapter of the book entitled "Fair compensation based on Article 41 of the Convention" is divided into three parts. In the first Section, general description of international compensation mechanisms based on the guidelines of the United Nations and other organizations is provided. The author emphasizes that one of the most important documents in this area is the draft articles entitled "Responsibility of States for internationally wrongful acts", adopted by the UN General Assembly on December 12, 2001.

The second Section focuses on consideration of mechanisms for providing fair compensation under the European Convention. The author deals with individual elements of compensation, such

as pecuniary damage, non-pecuniary damage, and costs incurred (cost and expenses). The European Court of Human Rights shall on its own initiative indicate the period during which the compensation must be paid. This period makes usually three months from the date of entry into force of the judgment by the European Court of Human Rights. The Court also determines the interest rate (default interest) that must be assessed and paid to the applicant in the event that the payment of fair compensation is not transferred within the prescribed period. They are usually set at the rate of the marginal lending rate of the European Central Bank, plus three percentage points.

Further, the book refers to the largest amounts of fair compensation which the European Court of Human Rights had awarded in its judgments entailing non-governmental organizations. Practice shows that these amounts reached millions and even billions of euros. A striking example of one such situation is the judgment by the European Court of Human Rights in the case of OAO NK YUKOS v. Russia where the Court determined the sum of 1.8 billion euros as a fair compensation for violations of property rights committed against the company.

In this regard, the author attempts to answer the question why the amounts of fair compensation determined for the NGO for the loss of property are often higher than the amounts awarded to the relatives of the victims for violating Article 2 of the European Convention (the right to life). The conclusion is justified with the observation that by protecting the property rights the European Court of Human Rights eards compensation for material damage and in the case of the loss of life such compensation covers immaterial damage.

In conclusion, it is argued in the book that legal status of NGOs on the basis of the European Convention is exceptional. In the sense of Article 34 of this Convention, the similar status as NGOs is provided not only for non-profit entities, as stipulated by theory of international law and most international treaties, but also for political parties and commercial entities. In order to file a complaint to the European Court of Human Rights, non-governmental organizations are not required to be registered in the state where they carry out their activities. The main issues for NGOs are independence from public authorities. It must be stressed, however, that the status of NGOs within the framework of the European Convention may vary depending on the role it plays in the proceedings before the European Court of Human Rights and, subsequently, in the execution of judgment before the Committee of Ministers of the Council of Europe. In the author's opinion, non-governmental organizations as applicants under the European Convention enjoy a very favorable procedural position with a wide range of rights. No other international document provides NGOs with such a range of guarantees in the field of human rights protection.

Dr. Alla Timofeeva undertook a considerable research work and wrote a monograph which, undoubtedly, takes a worthy place in range of studies, both in the field of the European Court of Human Rights and in the area of legal status of NGOs.

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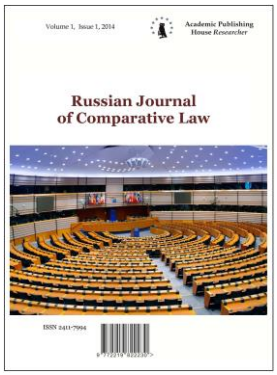
Published in the Slovak Republic
Russian Journal of Comparative Law
Has been issued since 2014.
E-ISSN 2413-7618
2017, 4(2): 106-107

DOI: 10.13187/rjcl.2017.2.106
http://ejournal41.com



International Standards of the State Financial Activity: course book Vladislav V. Kudryashov. M.: Financial University, 2017. 220 p.

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Mr. Kudryashov's course book is a relevant and up-to-date work, which would replenish the deficit of study literature in such disciplines as "International standards of financial activities of the state", "International financial law", and "International economic law", which are taught at the Financial University under the Government of the Russian Federation.

The course book is based on many years of practice and scientific research, as well as methodological work of the author in the field of regulation of multilateral interstate public financial relations, most importantly on the topic of multilateral interstate cooperation on maintaining stability of international financial system. According to the author, one of the main methods of achieving this stability is the harmonization of internal regimes of financial and legal regulation.

Building on a large amount of foreign research papers as well as his own findings, the author sees soft-law international financial standards, developed by a network of specialized international regulators controlled and coordinated by G20, as a legal mechanism of harmonization of internal standards of financial and legal regulation.

Supported by the authority of G20 member states and following their lead, international financial standards have found worldwide acclaim as a benchmark for countries willing to enter the world financial system and to align with the best international practice.

For the purposes of learning and practice the course book contains a wide variety of rules of international financial regulation, qualified as "soft law". The author believes that despite stirring heated debates among the legal community, exactly these rules comprise an integral part of contemporary international financial law, symbolizing practical results of interstate cooperation in such an important field as maintenance of international financial system sustainability and stability. International financial standards have undoubtedly gained universal acclaim and are used everywhere.

Such interstate cooperation has yet to obtain formal status through signing of international multilateral agreements of hard law; for that reason the implementation of international financial standards is non-mandatory. Nonetheless all-round examination of international and legal aspects of this phenomenon with the help of this course book will undoubtedly allow students to deepen their knowledge of processes of international financial legal regulation and to shape a broad view on the framework of contemporary international financial system.

Mr. Kudryashov's textbook provides the reader with extensive amount of facts and documents to analyze and evaluate the results of implementing of international financial standards

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in Russia's economy. The problem of introduction of international and foreign financial and legal mechanisms and their influence on the sustainability and reliance of the Russian financial system and the regime of Russia's internal financial and legal regulation remains extremely relevant.

The chapters and paragraphs of the course book are laid out according to the author's view starting with the notion of international financial standards, their implementation and compliance with them; the role of these standards in the WTO law; the notion of Islamic financial standards and standards, not included in the list of standards and ending with the status and functions of international standard-setting financial regulators and data on implementation of the standards in the financial and legal system of Russia.

The course book's goal is to make graduate and postgraduate understand what qualifies the international financial standards as an international and legal form of regulating the of interstate financial relations and how they are applied as such.

This course book serves as the main means of teaching and learning of the discipline "International standards of financial activities of the state", which is an obligatory course of the master's program "Lawyer in the sphere of public and corporate finance" and a non-obligatory part of the curriculum for postgraduate students of the specialization 40.04.01 "Jurisprudence" at the Financial University under the Government of the Russian Federation.

The course might be also used as a supplementary source for such disciplines as "Financial law", "International financial law", and "International economic law".

However, it appears that the proposed material is too specific and affects only a small part of the international regulation of international financial relations. International financial standards do not yet occupy a recognized place in the system of international financial law and in general states practice, except in the area of international financial stability.

In addition, the author did not offer a clear and understandable qualification of international financial standards as legal norms, so the students may wonder whether standards are a source of law or not. The author calls them «institutional form of financial and legal norms» (P. 36, 136) that does not allow to identify standards as sources of law.

The proposed course book can be used as supplementary reading in the study of international law and international financial law, applied only to a limited segment of international financial relations, that nevertheless, does not reduce the attractiveness and usefulness of the course book for widening horizons and legal knowledge of students.