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The new labour law of the Russian Federation

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On 1 February 2002 the Russian Federation's new Labour Code entered into force, marking a further step in the country's process of legislative and institutional reform in the field of labour. This process began in the early 1990s with the break up of the USSR, after seven decades of Soviet rule. Soviet institutions were in fact already being undermined by legislative changes prior to the collapse of the USSR. However, their dismantlement accelerated following the emergence of the Russian Federation as a sovereign State in 1991 and entered a decisive new stage with the adoption of the Constitution of December 1993. This defines Russia as a pluralistic, democratic, secularist State governed by the rule of law and upholding freedom of enterprise and the universally recognized norms and principles of international law.

The laws of the Soviet era were overtaken by this new legal and economic framework and were gradually replaced by new legislation. Several draft labour codes were considered over the years, leading finally to the adoption of a code in December 2001 and its entry into force in February 2002.[1] This new code repealed a great many outdated statutory instruments, including the 1972 Labour Code of the Russian Soviet Federative Socialist Republic (RSFSR).[2]

Though the new Labour Code reflects a radical departure from the structure and, even more so, the spirit of the KZoT, it stops short of making a clean break with the past. Indeed, numerous provisions originally enacted under the Soviet regime have found their way back into the new Code although many of them seem out of date or, at the very

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[1] An unofficial translation of this Labour Code is available online from the NATLEX database at www.ilo.org/dyn/natlex/docs/WEBTEXT/60535/65252/E01RUS01.htm

[2] The old Labour Code is hereinafter referred to by its Russian acronym, KZoT for *Kodeks Zakonov o Trude*, the full text of which was published in the (now discontinued) *Legislative Series* (*LS*) of the ILO, under the symbol 1971-USSR 1.

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least, out of place in the light of the legal and economic framework established by the 1993 Constitution.

This peculiarity, however, should not be seen as a shortcoming of the new Labour Code. On the contrary, any legislation – and, perhaps, labour legislation more than any other – tends to reflect a society's status at a particular stage in its evolution. Since Russia itself is a so-called *transition* country, it makes sense that it should adopt transitional labour legislation. At any event, this outcome was no doubt based on careful consideration: in the process of drafting the new Labour Code, numerous Russian and foreign experts were consulted, many opinions were sought and given (including by the ILO), and many provisions were drafted, discussed and amended, to be maintained in some cases and rejected in others. Moreover, as is often the case with changes to labour law, the drafting of the new Code gave rise to ideological confrontation, not to mention conflicts of interest between the parties to the talks, including clashes between proposals akin to the neo-liberal positions of the international financial organizations and counterproposals that were far more concerned with workers' protection. The Russian trade unions too were mobilized in readiness to counter neo-liberal initiatives. Yet another crucial influence in the drafting process was political pluralism within the State Duma (i.e. the legislative assembly, hereinafter "the Duma"), many of whose elected members still profess some degree of attachment to the old Communist ideals and remain committed to the philosophy underlying the legislation of the former regime. As a result, the final adoption of the new Code was the outcome of much political wrangling and compromise. This was bound to be reflected in its provisions, which often seem to make the present and future coexist with the past.

Yet it is precisely the closeness of the past coupled with the outlook to the future which make it so interesting to examine the development of labour law in Russia. This article presents a broad outline of this process. It begins by looking at the history of labour law under the Soviet regime. A second section examines the changes that occurred following the demise of the former regime, and a third section focuses specifically on the Labour Code of December 2001.

Labour law and labour relations under the Soviet regime

From the Revolution of 1917, there emerged a system that was at once legal, political and economic, and which differed substantially from the rule-of-law system upheld by the market-economy democracies. The founding principles of the Soviet State found expression at a very early stage in the first Constitution of Soviet Russia, in 1918, and were subsequently expanded in the Constitutions of the USSR of 1924, 1936 and 1977. This last Constitution was amended in 1988 to conform to the spirit

of Mikhail Gorbachev's policy of "perestroika" and remained in force until the demise of the USSR itself, in December 1991.

Under the Constitution of 1918, private ownership of land was abolished (article 3a); the ownership of all banks was transferred to the workers and farmers (article 3e); mineral resources were nationalized (article 3b); and, as a first step towards the full "socialization" of all means of production, the management of industry was handed over to the workers (article 3c). This Constitution also proclaimed that its primary purpose was to establish the dictatorship of the proletariat with a view to the complete elimination of the bourgeoisie and the abolition of "the exploitation of man by man". The Constitution of 1936 went on to strengthen the socialist-economy system and socialist ownership of means of production (article 4), while allowing pockets of private enterprise to survive in the form of small-scale farming and handicrafts provided that the workers involved were not in wage employment (article 9). Lastly, the Constitution of 1977 spelt out numerous provisions on the functioning of Soviet institutions which were not expressly detailed in the Constitutions of 1918, 1924 or 1936.[3] In particular, its article 6 asserted the dominant role of the Communist Party of the Soviet Union (CPSU) which was in effect synonymous with "the State" (just as the latter was synonymous with government). It also stipulated that the trade unions, Communist youth and other public organizations were to take part in running the affairs of the State and other public business and in decision-making on political, economic, social and cultural matters (article 7). Such organizations were given the right, together with the CPSU, to nominate candidates for elective offices (article 100). The 1977 Constitution also made "conscientious labour" an obligation. Another obligation was strict observance of labour discipline, with the express provision that evasion of socially useful labour was incompatible with the principles of socialist society (article 60). The Constitution further reaffirmed that the economy was to be managed on the basis of state plans (article 16) and that private enterprise was permissible only if it was based strictly on the individual activity of the persons involved and members of their families (article 17).

Trade unions in the USSR

Trade unions were given an important part to play in the Soviet system, albeit a very different one from that played by workers' organizations in market-economy, pluralistic democracies. Indeed, from the

[3] Excerpts of the 1977 Constitution are available in English in the *Legislative Series* (1977-USSR 2).

moment capitalism was abolished there could no longer be any conflict between the interests of managers and those of workers, let alone between the latter and the State which was, by definition, the State of the workers and farmers under the leadership of the CPSU. By rejecting both the concept of class-struggle unionism on the French model, and concession-seeking unionism on the British model, Soviet trade unionism was thus intended to function as a relay between the authority of the State – i.e. the Party – and the workers. Although they were ostensibly elected by trade union members, union leaders were in effect bureaucrats in the administration of the State or the Party, on secondment to the trade unions. Their election was a mere formality whereby the voters rubber-stamped an appointment from above. It was therefore not surprising that the 1989 miners' strike saw the union leadership side with the Party and Government, not with the striking workers.

The Soviet-era labour code stipulated that the trade unions were to represent workers' interests in regard to production, labour, welfare, living conditions and culture.[4] In short, they were supposed to serve three purposes. The first centred on their educational and mobilization function which made them responsible for enforcing labour discipline with a view to attaining and exceeding planned production targets at the plant level – hence their efforts to organize "socialist emulation". Their second function was to act as administrators of social well-being by managing an extensive network of sanatoria, rest homes, housing, children's holiday camps, cultural centres and sports facilities for workers, all of which played a crucial part in the daily lives of Soviet citizens – even more crucial, perhaps, than money.[5] The third function of the trade unions was to protect individual workers: along with the authorities of the State, they shared responsibility for monitoring and supervising the enforcement of labour legislation and regulations for the protection of workers.[6] Within each enterprise, the trade union effectively shared authority with the enterprise director and the representatives of the Party. For example, prior

[4] See article 226 of the Labour Code of the RSFSR in *LS* 1971-USSR 1.

[5] This explains why the rate of unionization approximated 100 per cent, although union membership was not compulsory by law. S. Ashwin and S. Clarke (*Russian trade unions and industrial relations in transition*, Palgrave-Macmillan, New York, NY, 2003, p. 30) point out that in the early stages of perestroika, the Soviet trade unions organized virtually the entire adult population of the USSR, including pensioners and high school and technical school students, into 31 mega unions at the industry level (the biggest being that of the agro-industrial sector, with 37.4 million members) to which some 713,000 primary-level unions were affiliated. The trade unions employed 7,500 occupational health and safety inspectors (in addition to over 4.6 million members who were also involved in inspection work on a voluntary basis or who served on workplace health and safety commissions). The trade unions' network of health and recreational facilities included some 1,000 sanatoria, 900 tourist resorts, 23,000 cultural clubs and centres, 19,000 libraries, some 100,000 "pioneer" camps and 25,000 sports centres. In addition, the trade unions were housed in grand and prestigious buildings in Moscow and in all of the regional capitals. The trade union daily, *Trud*, had a circulation of 20 million copies.

[6] KZoT, article 244.

to dismissing a worker, the management had to get the trade union's permission, failing which the dismissal would be illegal. Also, the trade unions were involved in the first-instance settlement of individual disputes at the factory, works and local levels (the outcome being subject to a right of appeal to the district peoples' court).[7] At the central government level, the unions were empowered to initiate legislation.[8]

Although the Soviet trade unions were organized by industry, they were also strongly represented at the enterprise level through the so-called district-level or primary-level unions. By the end of the Soviet era, the trade union hierarchy was dominated by the All-Union Central Council of Trade Unions (VTsSPS), to which both the regional unions and industry unions were accountable. There were altogether 31 major industry-level unions, with various sub-levels of representation down to the local or district committees operating at the factory or enterprise level (numbering over 700,000). With a total membership of some 140 million, the trade unions were the USSR's largest social organization. Trade union dues were withheld from workers' pay at source at the rate of 1 per cent approximately.

ILO consideration of the trade union situation in the USSR

The Soviet system did not allow for the establishment of any trade unions outside the official structure, let alone any unions at odds with the official ideology. This is amply illustrated by the consideration of the trade union situation in the USSR by the ILO's supervisory bodies. As early as 1950 and, again, in 1952, at a time when the USSR was not yet a member of the ILO, the International Confederation of Free Trade Unions (ICFTU) brought complaints of violations of trade union rights before the United Nations Economic and Social Council. The latter, in turn, referred these complaints to the ILO's Committee on Freedom of Association (CFA) as soon the USSR joined the ILO in 1954.[9] In the light of the complainants' allegations and the Government's response, the CFA considered there were reasons to believe that the ILO's principles on freedom of association were not being respected in the USSR. It therefore requested that the issue be referred to a Fact-Finding and Conciliation Commission. But the Government of the USSR refused. In 1958, however, the Government invited the International Labour Office to conduct a survey of the situation of trade unions in the Soviet Union. The Office responded by sending a mission

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[7] ibid., article 208.

[8] See the final paragraph of article 226.

[9] See Case No. 111 in the 23rd Report (paragraphs 4-228) and the 27th Report (paragraphs 499-517) of the Committee on Freedom of Association, in *Official Bulletin* (Geneva), Vol. 39, 1956, No. 4, and Vol. 41, 1958, No. 3.

in 1959, whose report was destined to become a classic reference for the comparative study of the role of trade unions in the Soviet system.[10]

Later on, in 1978, another complaint was brought before the CFA, whereby the ICFTU and the World Confederation of Labour (WCL) denounced the persecution endured by people who had tried to set up independent trade unions. In its reponse, the Soviet Government rejected the complainants' allegations. It explained that the people alleged to have been persecuted for trying to set up independent unions were in fact not workers at all, but ex-convicts, social dropouts, sexual harassers or individuals suffering from mental disorders.[11]

In due course, the ILO's Committee of Experts on the Application of Conventions and Recommendations was also called upon to examine the compatibility of the Soviet trade union system with the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), which the USSR had ratified in 1956. The Committee of Experts took the view that both the unity of trade unionism and the Soviet trade unions' dependence on the CPSU were incompatible with that Convention. In particular, it observed in 1979 and in 1985 that articles 7 (signing of collective agreements) and 230 (rights of factory, works or local trade union committee) of the KZoT effectively excluded other organizations freely chosen by the workers from exercising functions at the very heart of the trade union mandate. Furthermore, article 6 of the Soviet Constitution of 1977, which established the dominant role of the Communist Party, was also found to be at variance with the principle of the independence of workers' organizations as provided for in Article 3 of Convention No. 87.[12] But the Soviet Government once again rejected the observations of the Committee of Experts, arguing that Soviet law did not impose a trade union monopoly. The workers, if they so wished, had the right to establish other trade unions. As for the dominant role of the Communist Party, the Government argued that it had been freely accepted by the workers. The Committee of Experts, however, failed to find any of these arguments convincing and requested the Soviet Government to amend its legislation. But nothing was done to that end.

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[10] *The trade union situation in the USSR: Report of a mission from the International Labour Office*, Geneva, ILO, 1960.

[11] Case No. 905, complaint against the Government of the USSR presented by the International Confederation of Free Trade Unions and the World Confederation of Labour on 9 May 1978. The relevant reports are available in *Official Bulletin* (Geneva), Vol. 62, 1979, Series B, No. 1, for Interim Report No. 190 (paras. 361-388); Vol. 62, 1979, Series B, No. 3, for Interim Report No. 197 (paras. 592-640); Vol. 63, 1980, Series B, No. 3 and Vol. 64, 1981, Series B, No. 1, for Final Report No. 207 (paras. 100-130).

[12] See the Committee of Experts' reports to the International Labour Conference in 1979 (ILC, 65th Session, 1979, Report III (4A), pp. 149-151) and 1985 (ILC, 71st Session, 1985, Report III (4A), pp. 207-208).

Collective agreements in the Soviet Union

Aside from a few belated experiments conducted at the time of perestroika, the primary purpose of a collective agreement under the Soviet system was to spell out in writing "the mutual obligations of the management, on the one hand, and the manual and non-manual workers' collective, on the other, in the execution of the production plans, the improvement of organization of production and labour, introduction of new equipment and raising labour productivity, the improvement of quality standards and lowering of production costs, the promotion of social emulation, strengthening production and labour discipline, raising the occupational level of the workers and in-training (on-the-job training) of supervisory personnel" (KZoT, article 8). Accordingly, a draft collective agreement was drawn up as part of the production plan of the enterprise or production unit, and its preparation followed a schedule tied to the planning process, which was prescribed by administrative order.[13] The contents of the collective agreement – also determined by order – were structured into a number of subdivisions concerned, inter alia, with the implementation of the plan, socialist emulation and the encouragement of a communist attitude towards work, working conditions and remuneration,[14] the strengthening of socialist labour discipline, protection of labour, the organization of recreation, housing services, cultural, educational and physical education activities for the workers and members of their families. Significantly, collective agreements and production plans were so closely connected in the Soviet system that unions and management in non-productive sectors – e.g. public administration, health care or education – simply dispensed with collective agreements altogether. This was also why the only level at which there was any bargaining was the production unit.

Soviet labour law

The origins of Soviet labour law can be traced back to the very first legislative instruments adopted by the authorities that emerged from the October Revolution. Its development was pursued in the first code of labour laws, enacted in 1918, which was superseded by another code in 1922.[15] The most recent Labour Code of the Russian Soviet Federative Socialist Republic is the one which took effect in 1972 (i.e. the KZoT). This code was in fact adopted pursuant to the 1970 law of the USSR "to

[13] Order No. P-12/270 of 26 August 1977, in *LS* 1977-USSR 1.

[14] In principle, wages were set through a centralized mechanism (KZoT, article 80); a measure of flexibility was allowed under articles 83 and 84 of the Labour Code, which was reinforced in 1988 (see *LS* 1988-USSR 1).

[15] Published in *LS* 1922-RUSS.1.

approve the Fundamental Principles governing the Labour Legislation of the USSR and the Union Republics".[16]

In several respects, the 1972 Code is comparable to the labour legislation of market-economy countries. It is fairly concise, consisting of 256 articles divided into 18 chapters successively concerned with general provisions, collective agreements, contracts of employment, hours of work, rest periods, remuneration, standard output quotas and piece-work rates, guarantees and reimbursements, labour discipline, industrial safety, the employment of women, the employment of young persons, privileges for manual and non-manual workers who combine work with study, labour disputes, trade unions and workers' participation in production management, state social security, inspection and supervision of observance of labour legislation, and, lastly, final provisions.

However, there are areas in which Soviet legislation diverged sharply from the legislation of market-economy countries. Outside of collective labour relations, which have already been discussed above, the main differences centred on the contract of employment, relating primarily to the notion of guaranteed employment and freedom of work (or, as the case may be, lack of such freedom). Guaranteed employment was indeed one of the cornerstones of Soviet society. This principle was enshrined in article 40 of the Constitution whose literal application ensured that unemployment was virtually nonexistent while affording workers extensive protection against dismissal. The latter was only permissible in extremely limited cases and always remained subject to authorization by the enterprise trade union committee (KZoT, article 35).

However, the right to work entailed a corollary obligation to work which, in turn, gave the State the right to comandeer labour. This right could be exercised not only in exceptional circumstances, as in coping with natural disasters, but also whenever insufficient labour was available to carry out important work for the State, as provided for by article 11 of the Labour Code of 1922. Although this provision was criticized by the ILO's Committee of Experts, it was repealed only in 1971.[17] Besides, freedom of work was also jeopardized by the fact that it was up to the State, as the country's sole employer, to determine the type of employment it deemed desirable for each and every individual. A person's freedom to turn down an offer of employment was of course constrained by the practical impossibility of turning to an alternative employer. This system effectively gave the State broad powers for ordering the movements

[16] Law No. 2-VIII of 15 July 1970, adopted by the Supreme Soviet of the USSR (published in *LS* 1970-USSR 1).

[17] The Committee of Experts noted "with interest" in its report for 1972 that the 1971 Code contained no provisions analogous to those of article 11 of the 1922 Code (see International Labour Conference, 57th Session, 1972, Report III, Part 4A, p. 104).

of labour that were needed to carry out its grand projects in remote parts of Soviet territory. The State also used those powers to punish political deviants, would-be emigrants and other "undesirables" by assigning them to the worst possible jobs. And its powers in this respect were greatly strengthened, first, by article 209 of the Penal Code, which criminalized "social parasitism" and, by extension, anyone who turned down a job; and, second, by the "internal passport" regulations which restricted people's freedom of movement within the country.

In its 1968 general survey on forced labour, the ILO's Committee of Experts took the view that the above legal provisions were incompatible with the Forced Labour Convention, 1930 (No. 29), which the USSR had ratified in 1956.[18] The Committee subsequently called into question the Decree of 4 May 1961 (repealed in 1975), which authorized the mandatory assignment of a job to persons evading socially useful work and leading a "parasitic" way of life,[19] together with the Decree of 21 October 1953 concerning the internal passport, and the above-mentioned article of the Penal Code.[20] Although the Soviet Government had explained that the provisions of that article were only enforced against individuals who made a living from gambling and fortune-telling, the Committee of Experts noted that according to the ICFTU a number of Soviet citizens had been dismissed from their employment and prosecuted under article 209 of the Penal Code after they had expressed a wish to emigrate.[21] Lastly, the Committee of Experts also made an observation regarding the regulations governing the resignation of members of collective farms, because their right to resign was subject to the approval of the management committee and of the assembly of collective farm members.[22]

The end of communism and consequent changes

Mikhail Gorbachev's rise to power in 1985 marked the beginning of a period of reform. Its key slogans, launched on the occasion of the February 1986 Congress of the CPSU, were glasnost (transparency) and perestroika (restructuring). That same year a law was passed which liberalized individual private activity.[23] This was followed by the adoption of a

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[18] See International Labour Conference, 52nd Session, 1968, Report III (Part 4), p. 197, para. 54.

[19] ILC, 58th Session, 1973, Report III (4A), pp. 79-80; ILC, 59th Session, 1974, Report III (4A), pp. 88-89; ILC, 61st Session, 1976, Report III (4A), p. 79.

[20] ILC, 63rd Session, 1977, Report III (4A), pp. 97-98; 66th Session, 1980, Report III (4A), pp. 75-76; 68th Session, 1982, Report III (4A), pp. 83-84.

[21] ILC, 69th Session, 1983, Report III (4A), p. 81. Article 209 of the Penal Code was repealed in 1991.

[22] ILC, 61st Session, 1976, Report III (4A), pp. 80-81. This observation was reiterated in the subsequent reports of the Committee of Experts until 1990.

[23] USSR law No. 6050-XI of 19 November 1986, translated in *LS* 1986-USSR 1.

law on cooperatives in May 1987, which authorized the pursuit of economic activity through the establishment of private organizations in agriculture, industry, construction, catering, services, handicrafts, transport and trade.[24] Subsequent legislative reforms allowed workers to lease and manage state enterprises and eventually recognized private enterprise in 1991.[25] State enterprises were also given greater managerial autonomy, making them accountable for their own profits and losses. At the same time the powers of each enterprise's elected council of the "workers' collective" were strengthened, notably by empowering the council to elect enterprise managers and to negotiate wages freely.[26] Gorbachev's reforms also sought to give Soviet citizens more freedom of expression. A constitutional amendment adopted in December 1988 provided for the establishment of a new legislative body, the Congress of People's Deputies, whose members were elected on the basis of multiple candidatures. These developments were replicated in the RSFSR, where a new Congress was elected in March 1990.

The break up of the USSR

In spite of these reforms, it was already too late to arrest the decline of the USSR. As early as 1987, sporadic strikes had broken out, mostly as an expression of workers' discontent with poor living conditions rather than posing any challenge to the regime itself. Then, in July 1989, came the wave of miners' strikes. In January 1990, the Central Committee of the Communist Party agreed to relinquish its monopoly on power. In March of the same year, however, Lithuania and, later, Estonia announced their intention to reclaim their independence, while the other union republics, including Russia, distanced themselves from the USSR. The subsequent clash between the Government of the USSR and that of the RSFSR, coupled with the latter's ascendancy following the failed coup against Gorbachev in August 1991, eventually spelled the end of the USSR, which officially ceased to exist on 25 December 1991. A little earlier, in November 1991, President Yeltsin had signed a decree banning the activities of the Communist Party in the territory of Russia, while

[24] The text of this statute, as amended in 1988, is translated in *LS* 1988-USSR 2.

[25] Law establishing the General Principles relating to Private Enterprise in the USSR, in *Isvestia* (Moscow), 10 April 1991, No. 86, p. 2. This law defined private enterprise as independent activity carried on by private persons for profit, either on their own behalf or on behalf of a legal person.

[26] USSR law of 30 June 1987 on state enterprises (groupings), translated in *LS* 1987-USSR 1. The powers of the workers' collective are also the subject of some elaboration in the Fundamental Principles governing the Labour Legislation of the USSR and the Union Republics, in accordance with a reform approved in 1988 (see *LS* 1988-USSR 1). For an overview of the impact of Gorbachev's reform policy on labour legislation, see V. Egorov: "The reform of Soviet labour legislation: Problems and prospects", in *Columbia Journal of Transnational Law* (New York, NY), Vol. 28, 1990, No. 1, pp. 263-275.

the dissolution of the official trade unions was narrowly averted.[27] Meanwhile, Russia, it was announced, was set to revert to a market economy.

Legislation on strikes and trade unions

Two statutory instruments of the utmost importance – for their symbolic value, at least – were adopted in the interval between the miners' strike and the collapse of the USSR. They were the law of 9 October 1989 concerning the settlement of collective labour disputes and the law of 10 December 1989 on trade unions.

Although it was never expressly forbidden to strike, the logic underlying the Soviet system had made the very notion of strikes redundant: in the absence of capitalist exploitation it was unnecessary to strike.[28] The KZoT mentions "disputes … arising on the occasion of the conclusion of a collective agreement" (article 10) and details dispute settlement procedures (articles 201 et seq.), but nowhere does it expressly provide for collective labour disputes. This omission was consistent with the logic of the Soviet State, but that logic broke down when the miners went on strike in 1989 and forced the Government to the negotiating table. The legislative vacuum was filled by the enactment of the law of 9 October 1989 which reflected, in part at least, the doctrine of the ILO's Committee of Experts and Committee on Freedom of Association. The new law defined "collective labour conflicts" as disputes over

> questions pertaining to the application of labour legislation and the conclusion and compliance with the terms of collective agreements in regard to the establishment of new or the alteration of existing social and economic conditions of work and life between work collectives and the management of an enterprise, institution, organization or the branch or inter-branch bodies of management.[29]

This law also prescribed a mandatory mediation procedure at the outcome of which the parties may have recourse to arbitration, though the law does not make the latter compulsory. Lastly, the law recognized the right to strike as "a means of last resort to settle a collective labour conflict" (article 7) subject to the holding of a secret ballot in which at

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[27] See A. Rudovkas: "Trade unions and the labour law in a modern Russia", in *International Journal of Comparative Labour Law and Industrial Relations* (The Hague) Vol. 17/4, 2001, pp. 407-422.

[28] See Ménager-Sibé: *Le droit du travail en Russie* (unpublished thesis), Université de Paris X-Nanterre, 2004, p. 37. The ILO's mission of 1959 had raised questions about the possible use of a law of December 1958 concerning criminal liability for offences against the State, as a means of suppressing strikes. The authorities' reply was that this law applied only to criminal offences and not, therefore, to strikes. This law, however, defined as an offence any act or omission aimed at undermining industry, transport, agriculture with the intention of weakening the Soviet State, where the perpetrator has acted through the agency of a state or public institution, enterprise or organization or hampered the normal operation thereof. See *The trade union situation in the USSR*, op. cit., pp. 65-66.

[29] English translation from the ILO's *Labour Law Documents* (Geneva), 1990, No. 1, pp. 111-115 (document symbol 1989-SUN 1).

least two-thirds of the assembled workers' collective must vote in favour. A strike could be postponed or suspended by decision of the Supreme Soviet of the USSR or of a union republic, but not for longer than two months. Strikes were in fact forbidden only in a relatively small number of services and industries, including rail transport, urban transport, communications, civil aviation, defence enterprises and organizations, and in cases where a strike would be likely to jeopardize the life or health of persons. But a strike could only be ruled illegal by judicial decision (article 12). Lastly, the law provides that the work collective may set up a strike fund to ensure the material well-being of those on strike (article 13).

Next came the law on trade unions, dated December 1990. This also reflected the influence of the ILO's doctrine on the matter.[30] Under this law, workers had "the right, without distinction of any kind, of their own volition and without prior permission, freely to establish trade unions and to join a trade union" provided they complied with their union's rules (article 2).

> Trade unions shall be independent of state or economic bodies and of political or other public organizations, they shall not be accountable to such bodies or subject to their control. … Trade unions shall independently draw up and approve their rules, determine their structure, elect their governing bodies, organize their work, and convene their meetings, conferences, plenary sessions and congresses. …
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> … [T]rade unions shall have the right to cooperate with trade unions in other countries and … to join international and other trade union federations and organizations (article 3).

Such provisions seem to echo those of Convention No. 87. Interestingly, however, while this legislation permitted trade union pluralism, it failed to lay down rules or procedures for determining trade union representativeness although this was essential in situations where several competing unions might claim the privileges that trade unions traditionally enjoyed in Soviet society and which this law did not call into question.

The Constitution of 1993

Russia's new labour legislation needs to be considered within the framework of the 1993 Constitution. This proclaims that the Russian Federation is a democratic, federal State governed by the rule of law and endowed with a republican form of government (article 1), whereby the authority of the State is exercised on the basis of the separation and in-

[30] Former USSR law of 10 December 1990 on trade unions (*Labour Law Documents, 1990-SUN 4*). The current legislation is Russian Federation Law No. 10-FZ of 12 January 1996 (published in *Rossiskaya Gazeta*, 20 January 1996). This is available in English in the NATLEX database at www.ilo.org/dyn/natlex/docs/WEBTEXT/42900/64988/E96RUS01.htm

dependence of the legislative, executive and judicial powers (article 10). The Constitution recognizes ideological diversity and multipartism, and prohibits any ideology from becoming established as official or compulsory (article 13). Universally recognized principles and norms of international law, together with the international treaties concluded by the Russian Federation, are an integral part of its legal system. Should an international treaty ratified by the Russian Federation lay down rules at variance with the provisions of its domestic legislation, precedence will be given to the treaty rules (article 15). The Constitution guarantees freedom of conscience and belief (article 28), freedom of thought, of expression and of the press (article 29), private property, freedom of economic activity, the free movement of goods, services and financial resources (article 8), and people's freedom of movement within the national territory and right to leave the national territory (article 27). In the particular field of social and labour rights, the Constitution provides for the protection of labour and health, social security and minimum wages (article 7). It guarantees the right to freedom of association (article 30), prohibits forced labour, and upholds equal rights at work and the right to engage in a labour dispute, including the right to strike (article 37).

The new trade unions

Thrown into disarray by the events of 1989, the Central Council of Trade Unions of the USSR was reorganized in October 1990 in the form of a General Confederation of Trade Unions of the USSR (VKP), with no formal connection to the Communist Party or to state authorities. Following the break up of the USSR, the VKP turned itself into a "regional" trade union organization covering the entire Commonwealth of Independent States.[31] It currently claims to comprise 48 affiliated organizations across the CIS, with a total membership of some 75 million.[32] Meanwhile a new trade union organization had been established in the Russian Federation, namely, the Federation of Independent Trade Unions of Russia (FNPR).[33] At the time of its establishment in 1990, the FNPR boasted a membership of 54 million, organized into 19 industry-level unions and 75 regional unions. Although trade union membership has since declined very sharply in Russia, the FNPR, in its report to its 4th Congress in 2001, still claimed to comprise 48 nationwide industry unions, 78 territorially based unions and some 300,000 primary trade

[31] Established on 21 December 1991, the Commonwealth of Independent States (CIS) is an association of 12 former republics of the USSR (the Baltic States are not members). Its terms of reference cover trade, finance and security. The CIS charter is available in English at www.therussiasite.org/legal/laws/CIScharter.html

[32] These figures are from the VKP website at www.vkp.ru/world.html

[33] FNPR is the Russian acronym for Federatsiya Nezavisimykh Profsoyuzov Rossii.

union committees operating at plant level in industry and services.[34] Thus, in spite of its diminished membership, the FNPR remains Russia's largest trade union organization by far. And although it may appear to have simply taken over from the old Soviet trade union – many of whose assets, officials and representatives were actually transferred to the new organization – it is nonetheless independent and often critical of government and political parties alike.

Yet the new legislation also provided a framework for the establishment of other trade union organizations in Russia, such as the Russian Confederation of Labour (KTR), the Confederation of Labour of Russia (VKT) and the Congress of Russian Trade Unions (KRP).[35] The KTR held its founding congress in April 1995; its founding organizations were the Federation of Air Traffic Controllers, the Russian Union of Dockworkers, the Russian Union of Railway Locomotive Brigades, the Association of Aviation Personnel, together with several seafarers' trade unions and regional unions. It has a membership of some 900,000, organized into nine nationwide industry-level trade unions and six territorially based multi-industry unions.[36] The VKT too was founded in 1995. Its affiliates include the Union of Miners of Russia (NPG) and a number of regional and industry-level unions that profess to be "alternative" organizations, most of them established by strike committees. It is believed to have a membership of 1,385,000. The KRP, for its part, claims to have eight nationwide industry-level affiliates and a membership of 1,027,000. All four of the above organizations have seats on the National Tripartite Commission for the Regulation of Social and Labour Relations (RTK).[37] This brief overview of Russian trade unions would be incomplete without at least a mention of the Trade Union Association of Russia (SOTSPROF) and the Federation of Trade Unions of Russia (FTUR), neither of which has a seat on the RTK. SOTSPROF claims to have a membership of 457,000 organized into 11 nationwide industry-level unions and 67 territorially based multi-industry unions. The FTUR was established in April 2004 by organizations formerly affiliated to the KTR, two civil aviation unions and one territorially based union.

The legal framework for the exercise of trade union activity is set by the January 1996 law on trade unions. This legislation recognizes several

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[34] According to more recent data supplied by the Bureau for Workers' Activities of the ILO (ACTRAV), the FNPR has 31.8 million members, organized into 43 nationwide industry-level unions (five of which have bilateral cooperation agreements with the FNPR) and 79 territorially based multi-industry unions.

[35] The first two of these organizations, KTR and VTK, are members of the ICFTU, as is the FNPR.

[36] Figures supplied by ACTRAV.

[37] The FNPR holds 24 of the 30 seats set aside for trade unions on the Tripartite Commission. The remaining six seats are divided between the VKT, KTR and KRP.

types of trade union structure in which the first level of organization may be the so-called first-level local union, the industry-level union "of Russia", or the "interregional" union. Operating at enterprise level, first-level local unions are more or less equivalent to the "locals" of the United States. These unions are affiliated to a higher-level organization, though they can also comprise independent enterprise unions. As will be shown below, however, the coexistence of a first-level local union with an independent enterprise union can lead to problems when it comes to establishing recognition for the purposes of collective bargaining. The next level in the organizational hierarchy consists of the so-called trade unions "of Russia", which are industry-level organizations operating across the entire territory of the Russian Federation or "in the territory of more than half of its subjects" (i.e. federative entities)[38] or yet organizing at least half the total number of workers employed in one or more industries. If the organization represents workers employed in the same industry or in several industries and operates in the territory of fewer than half of the "subjects", it is called an "interregional" union. In addition to these three types of basic organization, there are also "territorial" unions whose members are organized within the boundaries of a city, a district or a territory. Lastly, the top level of organization consists of associations of unions (federations) whose scope may be local, territorial, regional, interregional or national.

Trade union registration – which lies within the competence of the Ministry of Justice – is required only if a union wishes to acquire legal personality. Rejection of an application for registration is subject to judicial appeal. The courts are also the sole authority that may decide to suspend or prohibit a trade union organization on grounds of unconstitutional or unlawful activity. To some extent, trade union rights in Russia are comparable to those enjoyed by trade unions in western Europe or North America, though they still extend to a number of functions that trade unions used to perform under the Soviet system (e.g. trade union labour inspection operating in parallel with the state inspectorate). Also, Russian trade unions, particularly the FNPR, are still in charge of much of the former USSR's network of social facilities and retain the ownership of many of the real-estate assets of the former Soviet trade union organizations.

Employers' organizations

In communist times there was, of course, no such thing as an employers' organization. However, from the moment the State decided to

[38] Under its 1993 Constitution, Russia is a federal State composed of 21 autonomous republics and 68 autonomous territories, regions and districts plus two major federal cities (Moscow and St. Petersburg), which gives a total of 89 "subjects" (entities).

promote social partnership and needed institutional partners, employers' organizations developed rapidly. The apex organization is the Coordinating Council of Employers' Unions of Russia (KSORR), which was set up in 1994 and subsequently reorganized in 1999 in the form of a private non-profit organization.[39] The KSORR claims to have 29 industry-level organizations and to represent some 5,000 enterprises, including some of the largest in Russia.[40] This organization performs consultative and representative functions that cover the entire range of Russian employers' economic interests, including internationally. In particular, it has been admitted to the membership of the International Organisation of Employers and one of its representatives sits on the Governing Body of the ILO. With a seat on the RTK, it also played a very active part in negotiations over the drafting of the new Labour Code.

Post-Soviet legislative reform

In the first few years that followed the break up of the USSR, Russia's return to a market economy and a democratically oriented political system gave rise to a spate of legislative activity. Though the Constitution of December 1993 formally institutionalized the break with the communist past, a number of reforms had already been introduced prior to its adoption, and others were to follow. For example, the Tripartite Commission for the Regulation of Social and Labour Relations (RTK) was established by an order signed in January 1992;[41] then, in March of the same year a new law was enacted on collective agreements;[42] January 1996 saw the adoption of a new law on trade unions;[43] and in November 2002 a law was enacted on employers' organizations.[44]

However, the main challenge throughout this entire period remained the adoption of a new Labour Code. The Labour Code of 1972, albeit extensively amended as from September 1992, was still in force although it was obviously ill-suited to the country's new economic and political system. The issues at stake are taken up in the following section.

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[39] The KSORR is also widely known by its English acronym, CCEUR.

[40] For further information, see the KSORR website at www.ksorr.ru/eng/index.html

[41] After several amendments, the instrument currently in force is Law No. 92-FZ of 1 May 1999 (*Sobranie Zakonodatel'stva*, 3 May 1999, No. 18, pp. 4208-4213).

[42] Law No. 2490-1 on collective agreements and accords of 11 March 1992, the text of which is available in English in the NATLEX database at www.ilo.org/dyn/natlex/docs/WEBTEXT/29677/64851/E92RUS01.htm This legislation was subsequently amended, notably in 1995 and by the Labour Code in 2002.

[43] Law No. 10-FZ "on trade unions, their rights and guarantees of their activity" (*Rossiskaya Gazeta*, 20 January 1996, pp. 3-4), the text of which is available in English in the NATLEX database at www.ilo.org/dyn/natlex/docs/WEBTEXT/42900/64988/E96RUS01.htm

[44] Law No. 156-FZ of 27 November 2002 on employers' organizations (*Sobranie Zakonodatel'stva*, 2 December 2002, No. 48, pp. 11213-11219.

The Labour Code

The drafting of the Labour Code was a long and tortuous process, to say the least. It took over seven years, in the course of which numerous drafts and counter-drafts gave rise to intense discussion and negotiation between Russia's successive governments since 1991, on the one hand, and a variety of other parties, on the other.[45] Among the latter were not only the major trade union organizations and the recently established Coordinating Council of Employers' Unions of Russia, but also various political groups represented at the Duma, including the former Communists who submitted counterproposals. The international financial institutions also had their say, while the ILO was called upon to provide technical advice even prior to the collapse of the USSR.[46] Within the Government itself there were occasional clashes between the ministries of labour and finance as to the type of Labour Code that the country should adopt – the former being more closely aligned on workers' interests, while the latter was more responsive to the tenets of liberal economics.

As early as 1994, the Government had submitted to the Duma a draft based on very liberal principles, whereupon the trade unions had countered with a draft of their own. However, neither of these initiatives got beyond that stage. At least seven subsequent drafts met the same fate. Only after each of the parties had made major concessions was agreement reached on the basis of a draft submitted by the Government in 1999. This draft was approved on first reading on 15 July 2001. It commanded a majority, though certainly not unanimity. Thousands of amendments were submitted with a view to a second reading, but another majority agreement was reached on their wholesale rejection. This cleared the way for the draft's eventual approval by the Duma on 21 December 2001, and by the Council of the Federation (the upper house) on 26 December. Signed into law by the Head of State on 30 December, the Code entered into force on 1 February 2002.

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[45] For a detailed description of this process, see Ashwin and Clarke, op. cit., pp. 73-78, and O. Rymkevitch: "The codification of Russian labour law: Issues and perspectives", in *International Journal of Comparative Labour Law and Industrial Relations* (The Hague), Vol. 19/2, 2003, pp. 143-162.

[46] In 1989, the ILO gave an opinion on the draft legislation concerning the settlement of disputes; in 1990, on the draft legislation on collective agreements; in 1991, on draft amendments to the Fundamental Principles of the USSR; in 1992, on an initial draft of the Labour Code; in 1998-99, on the draft which was ultimately adopted on first reading by the Duma in July 2001; and again in October 2001, on the draft Code that the Duma had just adopted. Throughout this period, the Office undertook numerous missions to Russia, while Russian delegations visited the ILO's headquarters in Geneva, for consultations.

Compared with the former Soviet Code, the new Labour Code introduced a fair amount of flexibility, though its underlying logic is still firmly on the side of workers' protection. On the whole, it is unquestionably a *new* labour code, but one which incorporates a number of provisions derived, not to say lifted, from the KZoT. Its novelty lies first of all in its length: it has 424 articles as against its predecessor's 256. Its structure is also novel: it is organized into six parts, divided into 14 sections which are, in turn, subdivided into 62 chapters, whereas the KZoT was simply divided into 18 chapters. Innovation is, of course, also reflected in the topics the new Code takes up. In particular, it regulates collective labour disputes and strikes (Part V, Section VIII, Chapter 51), which were not addressed in the KZoT, and social partnership (Section II). On this last point, the aim of the Code is to organize relationships in various areas, namely, collective bargaining, consultation (both bilateral and tripartite), participation in management, and participation of employers' and workers' representatives in pre-judicial dispute settlement procedures (article 27).

The very spirit of the Code is also new for it contains none of the ideological references that permeated the old Code. Its stated objective is simply to secure state protection of citizens' rights and freedoms at work by establishing favourable conditions for work and by safeguarding the rights and interests of workers and employers (article 1). In places, the new Code also reflects efforts to accommodate the special interests of small enterprises – with the introduction of ad hoc rules on contracts of specified duration (article 59) – and those of non-corporate employers (i.e. natural persons), who are allowed to conclude contracts of employment on more flexible terms as regards modification and termination of contract (articles 306 and 307). Also worth noting is the introduction of new rules governing the protection of workers' personal data (articles 85-90) and a broader definition of prohibited grounds of discrimination (article 3). This last innovation remedies an omission – perhaps not entirely innocent – of the old Soviet Code (article 16), which failed to prohibit discrimination on grounds of political opinion. To complete this overview, mention must also be made of the prohibition of forced labour. Indeed, the Code's definition of forced labour is probably unique from the perspective of comparative law: while seeking to conform to ILO Conventions Nos. 29 and 105, it also includes non-payment or incomplete payment of wages by an employer and any request that a worker perform a job without being provided with appropriate protective equipment or a task jeopardizing her/his life or health (article 4).

The most significant innovations, however, are those relating to the contract of employment, collective bargaining and the right to strike. The relevant provisions are examined below.

The contract of employment

The Code contains no rules on job placement. Thus, anyone over the age of 16 (or 15, subject to completion of compulsory schooling) is free to apply for employment and to accept or reject an offer of employment;[47] acceptance is to be followed up by the conclusion of a written contract of employment (article 67). A private employer who refuses to hire a worker is required to inform the unsuccessful applicant, in writing, of the grounds for that decision such that the worker may challenge it in court.[48] Reproducing the wording of article 39 of the KZoT almost literally, article 66 of the new Code reaffirms the practice of keeping individual employment records, although this should no longer give rise to the suspicions that used to surround the "employment book" in Soviet times. Save in exceptional circumstances, probation cannot exceed three months (six months for senior jobs) and must be expressly agreed upon by the parties to the contract of employment (article 70).

Contracts of employment are generally deemed to have been concluded for an indefinite period. A contract may be concluded for a specified period of less than five years, but only in such cases as are specified by the law (article 59). The general rule is that the conclusion of a contract of specified duration (CSD) must be justified by some objective reason. (In particular, such a contract would be justified where the employer's need for labour is itself of a temporary nature.) If this requirement cannot be met, the CSD is converted into a contract of unspecified duration (article 58). The new Code allows a few exceptions, however, including for enterprises employing up to 40 workers (25 in the retail trade) and non-corporate employers, both of which are permitted to hire as many workers on CSDs as they wish without having to furnish any objective justification. The same applies where the employer is a religious institution – a special case subject to a number of ad hoc provisions (articles 342-348).

Throughout the duration of a contract of employment, reassignment to a different job within the same enterprise or to a workplace located in another region is subject to the worker's written consent. However, a worker may be assigned to a different job or to a different workplace within the same region provided that such a move does not significantly affect the terms and conditions of employment specified in the

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[47] Subject to the restrictions applicable to the employment of minors under 18 years of age in jobs likely to jeopardize their health, safety or morals (see article 256).

[48] See article 64, which is evidently reminiscent of article 16 of the KZoT. However, while the latter prohibited the simultaneous employment in a given enterprise, establishment or organization of persons closely related by blood or by marriage (article 20), this prohibition has been dropped from the new Code.

contract (article 72). This rule, of great importance for functional mobility, stands in sharp contrast to the extremely restrictive prescriptions of the old KZoT. Provision is also made for temporary and permanent reassignment for technical reasons (article 73 and 74) and for transfers of enterprise ownership, under article 75, whereby the former owner's chief executive and his/her assistants and chief accountant may be dismissed by the new owner, but not the other workers. The latter's employment may be terminated only in the event of workforce downsizing, as was already provided for in the KZoT when an enterprise, establishment or organization was transferred from the authority of one overseeing body to the authority of another (article 29 *in fine*).

It is also interesting to compare the new Code's disciplinary provisions (articles 191-195) with the corresponding provisions of the Soviet Code (articles 127-138). The new Code is indeed much more concise than its predecessor on this point. Under the KZoT, the employer was, if the trade union so requested, required to terminate the employment of "an executive or member of the supervisory staff or to relieve him of his post, if he has violated labour legislation, if he fails to carry out the obligations under the collective agreement or if he resorts to bureaucratic methods or abusive officialdom" (article 37). Under the new Code, by contrast, the employer is simply required to "consider" the petitions of workers' representatives and, where their allegations turn out to be true, to take disciplinary action which may include termination (article 195). This provision may seem somewhat surprising for a country aiming to establish a market economy, yet it has thus been considerably toned down from its Soviet-era equivalent.

By far the most interesting developments, however, are those pertaining to dismissal. Indeed, the rules on this point follow entirely different logics as between a market economy and a centrally planned economy. In the Soviet system, both employment levels and the assignment of individual workers to particular jobs were determined by the plan, whereas in a market economy it is essentially the market itself that creates, redesigns or destroys jobs. In other words, while the first system can guarantee the jobs will be there, the second cannot. At best, the law can be expected to protect workers against unjustified dismissal. Aligned as it was on the Soviet system, the KZoT permitted the dismissal of workers only in a very limited number of cases, and even then, subject to clearance by the local trade union committee (article 35). Dismissal was otherwise unlawful and the dismissed worker had to be reinstated (KZoT, article 213).

This highly sensitive issue presumably gave rise to intense debate and some hard bargaining during the drafting of the new Labour Code. The resulting provisions read uneasily, not least because they are scattered across four different sections of the Code. The general rules are set out in articles 81-84: the grounds for dismissal at the initiative of the

employer (article 81); consultation with the trade union where dismissal is linked to workforce downsizing (article 82);[49] termination of the employment relationship for reasons beyond the parties' control (article 83); and cases where the employment relationship has to be terminated because the employee is incapacitated on medical grounds or forbidden to engage in a particular occupation (article 84). To find the next batch of provisions on dismissal, one has to jump to Chapter 27. This regulates safeguards and compensation for dismissed workers, including severance pay (article 178),[50] the order of priority of dismissals in the event of downsizing (article 179), and prior notice of two months at least (article 180). The next jump is to Chapter 58, on consultations with the trade union in the event of the individual dismissal of one of its members, which is no longer simply prohibited as used to be the case under the old Soviet law.[51] Then, in Chapter 60, one finds the provisions on the worker's right of appeal. This right must be exercised within three months, before the enterprise's dispute settlement commission where such a procedure is in place (article 386). If necessary, the worker can then lodge a judicial appeal within ten days of the announcement of the commission's decision (article 390). As a general rule, where the dismissal is found to have been unjustified, redress is provided in the form of reinstatement by court order (article 394) with immediate effect (article 396). It is also up to the court to rule on entitlement to back pay, which may be granted in full or in part.

Collective bargaining

The new Labour Code supplements the legal framework for collective bargaining established by the 1992 Law on Collective Agreements,

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[49] In such cases, the Code requires that the trade union be "informed" with at least two months' prior notice (three months in the event of "mass" redundancies), but it requires that the union be "consulted" if the employer contemplates individually dismissing a worker who is a member of the trade union on grounds of inadequate occupational competence or failure to carry out tasks inherent in the worker's job for no valid reason, where the worker in question has already been disciplined in the past. It seems to follow that the employer would not need to consult the trade union if the worker being dismissed has committed a serious fault.

[50] Severance pay amounts to two months' wages where dismissal is related to workforce downsizing or the winding up of the enterprise. The amount is increased to three months' wages "in exceptional cases", where the dismissed worker has filed an application with an employment agency within two weeks of her/his dismissal and the agency fails to find him/her a new job. The amount is brought down to two weeks' pay if the worker has been dismissed on grounds of ill health, military service or equivalent civilian service, or if the worker is dismissed upon the reinstatement of another worker whose job he/she had taken, or yet where the enterprise relocates and the worker refuses to follow.

[51] Except in the case of the elected head or deputy heads of a collegiate trade union body (article 374). Workers holding such positions can only be dismissed with the prior approval of a higher-level trade union body.

which remains in force as amended. It reaffirms the freedom of the social partners in setting the collective bargaining agenda (articles 36 and 41) and in determining the appropriate bargaining level. This may be the enterprise level or the level of one of the enterprise's subdivisions – in which case the aim is to conclude a "collective contract" – or the industry, regional, territorial or nationwide level, in which case the outcome would be a bilateral or tripartite "collective agreement" (article 45). The year 2000 thus witnessed the conclusion of one general tripartite agreement, 61 federal-level industry agreements, 77 regional agreements, 2,293 regional-level industry agreements, and 161,700 enterprise-level collective contracts.[52] This proliferation of bargaining levels makes an interesting contrast with the situation obtaining under the Soviet system: the only type of agreement that could be concluded then was an enterprise-level collective contract. Bargaining procedures and schedules are also left to the discretion of the parties (article 42). The same goes for the duration of the collective contract or agreement, subject to a maximum of three years renewable by the parties (articles 43 and 48). However, the new Code makes no provision for the possibility of concluding a collective agreement for a specific occupation, which was one of the grounds of the complaint that the Russian Confederation of Labour (KTR) referred to the Committee on Freedom of Association.[53] Similarly, there is nothing about the denouncement of collective agreements, nor about the legal effects of agreements that reach their date of expiry without being denounced or renewed.

Once it has been signed, a collective contract applies to the entire workforce of the enterprise or establishment concerned, regardless of whether all of its workers are members of the union that concluded the contract (article 43). As for collective agreements, the rule is that they apply only to the members of the signatory employers' organization and to their employees. In the case of a federal-level agreement, the competent government authority may invite employers that are not parties to the agreement to accede to it. Though they may decline, their decision not to accede to the agreement must be notified in writing within 30 days of the official publication of the accession proposal, with an explanation of their reasons for declining (article 48).

The most obvious difficulties with the current legal framework centre on representativeness for bargaining purposes. This raises three types of problem. The first issue that remains to be settled is whether the right

[52] V. Egorov: *National labour law profile: Russian Federation* (January 2000), available on the ILO website at www.ilo.org/public/english/dialogue/ifpdial/ll/rus.htm

[53] See Report No. 333 of the Committee on Freedom of Association (Case No. 2251), in *Official Bulletin* (Geneva), Vol. 87, 2004, Series B, No. 1. The Committee's recommendations are given in paragraph 1001 of that report.

to engage in collective bargaining is a prerogative of the trade unions or whether it also extends to alternative bodies representing workers. The second question is whether a trade union must meet some predetermined minimum representativeness requirement before the employer is obliged to recognize it and bargain with it. And the third relates to the procedure for determining which trade union(s) is/are empowered to bargain in cases where several unions operate within the same bargaining unit. On the first of these three issues, article 31 stipulates that the workers of an enterprise with no first-level local union – or in which the local union represents less than half the workforce – may empower "the said local union or an alternative representative to represent their interests". Following the above-mentioned complaint by the KTR, the ILO Committee on Freedom of Association requested the Government to amend this rule such that the extension of bargaining rights to non-union representatives be confined to workplaces where there is no union.

There is no set rule on union representativeness for the purposes of collective bargaining at enterprise level. While the Labour Code appears to require that unions seeking to engage in collective bargaining must represent more than half the workforce, it also provides that "where no first-level union represents more than half of the workers, a general assembly (conference) of the workforce shall designate by secret ballot the first-level union to be entrusted with the establishment of the representative body" (fourth paragraph of article 37). Similarly, there is no prescribed representativeness threshold for collective bargaining above the enterprise level.

On the third issue, the Code does seek to address the problems raised by competition between several unions operating in the same bargaining unit. Where two or more first-level local unions operate in a given enterprise, they are required to set up a joint representation body based on the principle of proportionality. Failing agreement on the establishment of such a body, bargaining is to be conducted by whichever union represents more than half the workforce and, if none of the unions meets this requirement, it is up to an assembly of the workers to elect a first-level union to be entrusted with the establishment of the representation body (article 37). For the purposes of bargaining above the enterprise level, similar rules apply as to the establishment of a proportionally representative joint bargaining body, though there is no requirement that a trade union should represent more than half the workforce or that a ballot should be organized to elect workers' representatives for the purposes of collective bargaining.

Lastly, it may be worth pointing out that the Labour Code reflects what appears to be an attempt to restrict enterprise-level bargaining to so-called local unions, i.e. unions that are themselves members of some higher-level trade union organization. This could result in the exclusion of "free" enterprise-level unions which are not affiliated to any umbrella

organization. This point also has been referred to the Committee on Freedom of Association for clarification.[54]

The right to strike

Recognized in the Constitution, the right to strike is regulated in some detail in Chapter 61 of the Labour Code, on procedures for collective labour disputes. As a rule, a strike can be called only at the outcome of a fairly formal procedure consisting of several successive stages, none of which can be skipped. The procedure begins with the listing, in writing, of the workers' demands. The list of demands must then be approved by an assembly of the workers or a conference of their representatives, with a quorum of the majority of the workers in the former case or a two-thirds majority in the latter (article 399). Next, the workers' demands are transmitted to the Collective Dispute Settlement Department of the competent government labour authority and to the employer, who must respond within three days (article 400). The dispute is then referred to a bipartite conciliation commission which must be set up within 30 days and commence its proceedings within five days (article 402). If the conciliation fails, the parties may attempt to settle the dispute by mediation or arbitration, though this step is not mandatory. Throughout the entire procedure, the parties can seek the assistance of the above-mentioned Collective Dispute Settlement Departments (article 407).[55]

Only after the conciliation or, as the case may be, mediation procedure has run its course can a strike be called,[56] subject to a majority vote by an assembly of the workers or a conference of their representatives (with a quorum of two-thirds at least of the total number of workers concerned).[57] Prior notice of the strike must be given ten consecutive days beforehand, indicating inter alia the date of the start of the strike, its estimated duration, the number of participants, the name of the chief officer of the body representing the workers, etc. (article 410). During the strike, the freedom of work of non-strikers must be guaranteed. Strikes, however, are forbidden in a number of industries, including essential public services, if the strike is likely to pose a threat to the defence of the country

[54] See Case No. 2251 in note 53.

[55] It is worth noting that, by early 2004, such Departments had been set up in only nine of the 89 "subjects" of the Russian Federation. And following the "dissolution" of the Ministry of Labour and Social Development, the establishment of additional Departments appears to have been suspended.

[56] Prior to this, the Code does provide that a 1-hour warning strike may be called during the proceedings of the conciliation commission after the latter has been in session for five consecutive days and subject to three days' prior notice (article 410).

[57] If the quorum is not met, the strike can still be called if it is backed up by a petition signed by more than half of the workers concerned (article 401).

or to people's life, health or safety, or yet in times of war or emergency situations. Strikes are also banned in industries and services related to defence, state security or law enforcement, and in enterprises operating high-risk facilities or equipment (article 413). A strike may be suspended by judicial decision if it puts the life or health of members of the public at risk, but only for a period of up to 30 days. The Government also has the right to suspend a strike but only in cases "of vital importance for the Russian Federation or a part of its territory" and for up to ten days only. At all events, a strike can only be declared illegal by a court.

The Labour Code provides that a worker's participation in a strike cannot be construed as a breach of labour discipline. Nor can it be cited as grounds for dismissal, except where the striker fails to return to work after the strike has been ruled illegal and the court's ruling has been notified to the strike committee. Lastly, though striking workers are not paid their wages there is nothing to prevent the parties to the dispute from agreeing otherwise in their final settlement (article 414). Lockouts are not only forbidden throughout the duration of the strike, but also during the preceding procedure for dealing with the collective dispute (article 415).

It should be mentioned that the ILO Committee on Freedom of Association requested the Russian Government to amend article 410 by reducing the quorum required for the vote on a strike and by dropping the requirement that workers' organizations should state the estimated duration of a strike beforehand. The Government was also asked to restrict the range of situations in which minimum services may be set up and to make a provision to the effect that any disagreement arising over the establishment of minimum services be referred to an independent body for settlement.[58]

By way of conclusion: Vestiges of the past and considerations for the future

There is no way that seven decades of history can be wiped away with a single stroke. With the market economy still in its infancy, Russia's lawmakers deemed it wiser to adopt a Labour Code that would present a "reassuring face" to millions of workers whose cultural and psychological environment was thrown into disarray by the collapse of the Soviet system. Thus, although the Labour Code is, on the whole, a forward-looking instrument, it also incorporates numerous provisions reminiscent of the past, reflecting the lawmakers' endeavours to ease

[58] See Case No. 2251 (cited above), para. 101, (i), (j), (k) and (l). The Committee also requested the Government to amend its legislation so as to extend the right to strike to railway workers and to civil service employees whose functions do not involve the exercise of authority in the name of the State.

the transition. Many of the Code's innovations have been reviewed in the preceding sections of this article. This concluding section begins by looking at vestiges of the past and then goes on to consider a few shortcomings of the Code that are likely to become issues of concern in the years ahead. Indeed, in some cases this is already happening.

A typical example of the Code's links to the past occurs in its article 28. This lists the duties and obligations of employers in what appears to be a somewhat didactic spirit which would come across as naïve in any country with a well-established market economy. The Code also spells out some rather odd requirements pertaining to probation: an employer who decides not to keep a worker on probation is expected to give reasons for that decision (article 71), whereas the whole point of probation is precisely to waive such requirements. Elsewhere, conceptual difficulties arise as to the distinction between suspension and termination of the employment relationship (article 78). Also uncomfortable is the fact that the only remedy that the Code provides for in the event of unjustified dismissal is reinstatement which, in practice, turns out to be the chosen remedy only in a small minority of cases – not to say an exception. Further on, one finds extremely detailed provisions on wages (articles 183-188) which, in other circumstances, would probably have been left to collective bargaining rather than written into the law. There is also a provision aimed at encouraging workers to apply themselves conscientiously at work (article 189) in a spirit that can readily be traced back to the Stakhanovist ideal. The Code goes on to give a catalogue of disciplinary penalties (article 190) and requires the employer to take disciplinary action against an enterprise manager or deputy managers if the body representing the workers so requests (article 193). This is the sort of provision one might expect to find in civil service regulations, but not in a private law code. Similarly, the lawmakers felt it appropriate to make special provisions governing the contracts of employment of enterprise managers (articles 271-280) and to extend powers of inspection to the trade unions (article 361), which employers in a market economy would find very hard to put up with. Lastly, mention must also be made of the survival of outdated provisions for the protection of women (article 253) and of the employer's obligation – archaic to say the least – to serve free rounds of milk to workers employed in hazardous conditions (article 222).

As regards the shortcomings of the new Code, the first relates to its scope, which is not specified. Yet, at a time when the liberalization of the Russian economy can be expected to lead to substantial inward and outward migratory flows of expatriates and other workers employed on temporary projects in Russia or recruited there for assignment abroad, it would have been helpful to specify the law applicable to their contracts of employment. Second, the provisions on job placement are arguably not up to market requirements. In particular, this applies to private intermediation in the labour market, including recruitment by temporary em-

ployment agencies, which the Code fails to address although this is a topical issue in Russia today. As a result, private employment agencies operate without a reliable institutional framework. Then, while the Code reflects innovative thinking on the cutting-edge issue of protection of workers' personal data (articles 85-90), it displays no such creativity in establishing an effective mechanism for upholding the equally important principle of equal pay for work of equal value. The same goes for equality of opportunity: aside from its somewhat laconically worded article 3, the Code is short of provisions that might help to give effect to the principle of non-discrimination although the market economy is known to entertain an unfortunate tendency to discriminate against women. In this respect, the Russian Code is out of step with the legislation of the many other countries which have followed the authoritative lead of European Community law in defining both direct and indirect discrimination and sexual harassment, in establishing the principle of reversed burden-of-proof rules, and in providing for fast-track procedures and effective remedies in order to offer better protection against discrimination at work. In a more practical spirit, at a time when Russia has been (and probably still is) confronted with recurrent instances of delays in the payment of wages, Russia's lawmakers also abstained from following the example of the many European countries that have legislated means of protecting wages in the event of the employer's insolvency.[59] Lastly, another shortcoming of the Code is that it contains no provisions whereby the worker might be entitled to terminate the contract of employment and demand some form of termination allowance or damages where the reason for such termination lies in a fault or breach of contract by the employer. The question here is whether the drafters of the Code might not have been better advised to provide workers in such situations with a more equitable alternative to outright resignation.

Of course, the quality and usefulness of a statutory instrument can only be judged from its application over time. It may well be – and this has happened – that the best drafted instruments come up against unforeseen difficulties when it comes to applying them or, conversely, that what appear to be clumsily drafted instruments pose no real problems when they are applied. The same goes for shortcomings in legislation. In some cases, they may need to be addressed promptly by further legislation; in others, a few wise judicial decisions or the interaction of the social partners may suffice to fill the gaps much more effectively than legislation ever could.

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[59] See the observation of the Committee of Experts on the Application of Conventions and Recommendations concerning the Protection of Wages Convention, 1949 (No. 95), in International Labour Conference, 90th Session, 2002, Report III (1A). This Report is available online at www.ilo.org/ilolex/english/newcountryframeE.htm

The Labour Code of the Russian Federation is now four years old – time for those who have to abide by it to assess it and determine whether it still satisfies their needs and if it does not, to identify such amendments as may be necessary for the Code to provide an equitable institutional framework, and one of sufficient dependability to ensure sound labour market governance.