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# From Worker's State to Work without Pay: Labor Law Reform in the Russian Federation

## **Cover Page Footnote**

International Law; Commercial Law; Law

## COMMENT

### From Workers' State to Work Without Pay: Labor Law Reform in the Russian Federation

#### I. Introduction

On March 28, 1997, almost two million Russian workers, joined by retirees, walked off their jobs in protest of unpaid wages and pensions.<sup>1</sup> Many workers had not been paid in months.<sup>2</sup> Communist party members joined the workers in the streets of hundreds of cities and towns to protest the economic reforms of the Yeltsin administration.<sup>3</sup> President Yeltsin responded with more promises to pay and with praises for the protesters' "orderly behavior."<sup>4</sup> The ex-official union of the Soviet era, the Federation of Independent Trade Unions of Russia (FNPR), estimated that over twenty million workers would protest Yeltsin's failure to fulfill promises to compensate workers.<sup>5</sup> Managers and employers joined the union in protesting government economic reforms that

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<sup>1</sup> Russia's Interior Ministry estimated that 1.8 million people participated in demonstrations in nearly 1,300 cities nationwide. But it was only a fraction of the 17 million strikers that labor leaders had expected to join the one-day strike against President Boris N. Yeltsin's government, which has not made good on promises to pay \$8.8 billion in wage and pension arrears.

Clara Germani, *Thousands of Russians Strike for Back Wages; One-day National Walkout Fails to Draw 10 Million Predicted by Unions*, BALTIMORE SUN, Mar. 28, 1997, at 12A.

<sup>2</sup> See *Protesters in Russia Seek Unpaid Wages, Pensions*, WALL ST. J., Mar. 28, 1997, at A12.

<sup>3</sup> See *Yeltsin Acknowledges Strikers' Demands, Promises Help*, DOW JONES INT'L NEWS SERV., Mar. 28, 1997, at 8:10:00.

<sup>4</sup> See *id.*

<sup>5</sup> See Mike Trickey, *Russia Braces for Huge Strike*, CALGARY HERALD, Mar. 26, 1997, at A15; see also Peter Ford, *Unpaid Russians Take to Streets to Shout 'Show me the Rubles'*, CHRISTIAN SCI. MONITOR, Mar. 28, 1997, at 1; Maxim Zhukov, *To Bid Up Its Price on March 27*, RUSS. PRESS DIG., Mar. 20, 1997, available in 1997 WL 7804895.

have created a climate of economic crisis.<sup>6</sup> Furthermore, throughout 1997, isolated strikes occurred across Russia.<sup>7</sup>

The recent strike in Russia indicates the depth and breadth of economic despair in Russia. In addition to employees working without pay, many workers have lost their jobs in mass discharges, reducing "redundancy" in formerly State owned enterprises.<sup>8</sup> The strike activity shows that labor relations are still conducted at the national level rather than the enterprise level. The alliance between the FNPR and management, which characterized the Soviet regime, surfaces again in this strike as management joined unions in their protest.<sup>9</sup> The presence of Communists at the demonstration also indicates that the FNPR may still be associated with the totalitarian politics of the past, rather than representing worker interests in the present.<sup>10</sup>

Tracing the development of trade unions in Russian law, this Comment will explore the Russian Federation's (RF) struggle to move from an ideological workers' State to a constitutional,

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<sup>6</sup> As is common knowledge, a tripartite agreement between employers, unions and the Government is observed in the country, each of the sides to which has assumed definite commitments for the period of market reforms. It can be easily guessed that the Government is the side which flouts its commitments the most, says the paper. This fact prompted the employers and unions to send a separate appeal the other day to President Yeltsin as the actual head of the third party to the agreement. The appeal says in part that "the massive violations of the worker rights are in many respects foreshadowed by factors outside the sphere of labor relations, which are directly linked to the destructive consequences of the sole course of economic reforms, conducted by the Government of the Russian Federation."

Alexander Zhelenin, *Unions and Employers Appeal to Yeltsin*, RUSS. PRESS DIG., Mar. 14, 1997, available in 1997 WL 7804830.

<sup>7</sup> For example, miners struck in the Far East, six thousand workers struck at the Yantar shipyard, and medical workers struck across Russia, dozens of whom participated in a hunger strike. *See id.*; see also *Sakhalin Doctors on Hunger Strike*, BIZEKON NEWS, Feb. 15, 1997, available in 1997 WL 7801479.

<sup>8</sup> See Vladimir Gerchikov, *Russia, in LABOR RELATIONS & POLITICAL CHANGE IN EASTERN EUROPE: A COMPARATIVE PERSPECTIVE* 137, 149 (John Thirkell et al. eds., 1995).

<sup>9</sup> "The demonstration here was organized by both union leaders and plant management—a co-existence that is a throwback to Soviet times when labor unions were just social services groups for each industrial sector." Germani, *supra* note 1, at 12A.

<sup>10</sup> *See id.*

market culture governed by the "rule of law." This history helps explain why labor relations are still a national issue, why the national union would be politically allied with communists, and why the union is economically allied with management. By analyzing the development of trade unions in Russian law, this Comment will illustrate that recent labor legislation does not address the current economic reality of Russia.

This Comment also raises broader jurisprudence questions regarding the legal foundation of state legitimacy and practical questions about the relation between economics and law. When a state is founded on an ideological economic premise, and then that premise is rejected, what is left of legitimate state rule? In particular, what happens to the legal and cultural status of work when the ideological premise of the worker State is overturned?

Part II of this Comment describes the ideological conceptions of Soviet labor law and trade unions as an instrument of Party action.<sup>11</sup> After summarizing the break down of ideological rule under *perestroika*,<sup>12</sup> Part III analyzes recent labor law reforms as compared to the United States and International Labor Organization standards.<sup>13</sup> This Comment concludes by speculating on the difficulties the Russian Federation faces in the establishment of "the rule of law" in a free labor market.<sup>14</sup>

## II. Ideology, Labor and the Law in the Union of Soviet Socialist Republics

With the success of the Bolshevik coup d'état in 1917, Vladimir Lenin and Leon Trotsky introduced a new kind of state rule.<sup>15</sup> Gone was the Tsar,<sup>16</sup> overthrown was the democratic

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<sup>11</sup> See *infra* notes 15-81 and accompanying text.

<sup>12</sup> See *infra* notes 82-113 and accompanying text.

<sup>13</sup> See *infra* notes 114-88 and accompanying text.

<sup>14</sup> See *infra* notes 188-210 and accompanying text.

<sup>15</sup> See ROBERT E. KERBER ET AL., WESTERN CIVILIZATIONS: THEIR HISTORY AND THEIR CULTURE 953 (11th ed. 1988). The "October Revolution" established the All-Russian Congress of Soviets and marked the beginning of an eight-year long civil war among the Bolsheviks (Reds) and a coalition of democrats, Tsarists, peasants, and foreign interventionists (Whites). See *id.* at 972.

<sup>16</sup> The Tsar Nicholas II and his family were killed in July 1918. See *id.* at 972-73.

Provisional Government,<sup>17</sup> and in their place was the Party.<sup>18</sup> In leading this revolution, Lenin adapted Marxist theories of historical and economic development to the agrarian Russian context.<sup>19</sup> Like Marx, Lenin felt that history is driven by successive modes of exploitation in which the exploiters control the means of production and accumulate wealth at the expense of the exploited.<sup>20</sup> Those who control production gain control of the State, and laws become "tools" of the exploiting class.<sup>21</sup> Thus, as the number of exploited workers increase, these workers would begin to recognize the class conflict inherent in the private control over production and would unite to overthrow the exploiters.<sup>22</sup> Workers with equal control over the means of production would end class conflict and the State would eventually "wither away."<sup>23</sup>

<sup>17</sup> Alexander Kerensky, a moderate socialist democrat, established the Provisional Government in March 1917 after forcing the abdication of the Tsar. *See id.* at 952.

<sup>18</sup> *See generally* DAVID MCCLELLAN, *MARXISM AFTER MARX* 86-87 (1979) (discussing Lenin and his philosophy).

<sup>19</sup> Promising "Peace, Bread, and Land," the Bolsheviks rapidly partitioned the land for peasants, nationalized banks, and gave factory control over to workers. *See id.* at 953.

<sup>20</sup> *See generally* KARL MARX & FRIEDRICH ENGELS, *THE COMMUNIST MANIFESTO* 57-58 (Samuel Moore trans., Joseph Katz ed., Pocket Books 1964) (1848).

The history of all hitherto existing society is the history of class struggles. Freeman and slave, patrician and plebian, lord and serf, guildmaster and journeyman, in a word, oppressor and oppressed stood in constant opposition to one another, carried on an uninterrupted, now hidden, now open fight, a fight that each time ended, either in a revolutionary reconstitution of society at large, or in the common ruin of the struggling classes.

*Id.*

<sup>21</sup> *See* KARL MARX & FRIEDRICH ENGELS, *THE GERMAN IDEOLOGY* 80 (C.J. Arthur ed., 1970) (1846).

Since the State is the form in which the individuals of a ruling class assert their common interests, and in which the whole civil society of an epoch is epitomised, it follows that the State mediates in the formation of all common institutions and that institutions receive a political form.

*Id.* "[L]egal relationships (and, consequently, law itself) are rooted in the material conditions of life, and [the] law is merely the will of the dominant class, elevated into a statute." Andrei Y. Vyshinsky, *The Foundations of the Marxist-Leninist Theory of State and Law*, in *RUSSIAN LEGAL THEORY* 321, 329 (W.E. Butler ed., 1996).

<sup>22</sup> *See* MARX & ENGELS, *supra* note 20, at 115-16.

<sup>23</sup> *Id.* at 94-95.

However, instead of a spontaneous and universal revolution envisioned by Marx,<sup>24</sup> Lenin believed that workers could not recognize class conflict while they were exploited. As such, workers needed a group of highly organized professionals, the "Vanguard," to raise their consciousness and lead the revolution.<sup>25</sup> Justified by this view of the historical process and the role of the State in exploitation,<sup>26</sup> the Vanguard seized control of production by force, and dismantled the political and legal institutions which dominated workers.<sup>27</sup> Ultimately the workers would be self-employed and self-governed with the State as their instrument of economic and political power.<sup>28</sup> This international revolutionary movement would eventually create a state of perfect equality where laws would be unnecessary.<sup>29</sup>

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<sup>24</sup> See *id.* at 74-75.

<sup>25</sup> See VLADIMIR I. LENIN, *WHAT IS TO BE DONE? BURNING QUESTIONS OF OUR MOVEMENT* 82-83 (Joe Fineberg & George Hanna trans., Victor J. Jerome ed., New York International Publishers 1969) (1902). According to Lenin, the correct class consciousness cannot be gained by the worker spontaneously in reaction to immediate economic needs. Rather, the "Vanguard" must educate and guide workers in a total vision of all class relations and must not participate in the political and economic reforms of the trade unions. To Lenin, the trade unions sell out worker short-term interest for the unions' own preservation in relation to the State and management. See *id.* at 35-44, 54-64.

<sup>26</sup> See MCCLELLAN, *supra* note 18, at 86-87 (stating that "professional revolutionaries" are required to raise class consciousness among the proletariat because "the proletariat, left to itself, would inevitably follow bourgeoisie ideology").

<sup>27</sup> Lenin envisioned that the Vanguard of the proletariat, the Party, would assume state power and would lead "the whole people to Socialism." *Id.* In the process,

workers will organise large-scale production on the basis of what capitalism has already created, relying on [their] own experience as workers, establishing strict, iron discipline backed up by State power of the armed workers; [they] will reduce the role of the state officials to that of simply carrying out [their] instructions as responsible, revocable, modestly paid "foremen and accountants."

*Id.*

<sup>28</sup> See Andrei A. Baev, *The Transformation of the Role of the State in Monitoring Large Firms in Russia: From the State's Supervision to the State's Fiduciary Duties*, 8 *TRANSNAT'L LAW* 247, 253 (1995). "[A]ccording to official Soviet ideology, labor is not viewed as a commodity. Workers are not exploited, since there is no private capital and the Soviet state, being 'the state of the whole people,' is not considered an employer." *Id.*

<sup>29</sup> See MARX & ENGELS, *supra* note 20, at 95.

Lenin considered law an instrument of the revolution, incidental to the Party's control of the State.<sup>30</sup> A Leninist ideological conception of the law considered all legal relationships as "a form of the relationships between egoistic and isolated subjects, bearing autonomous private interests as commodity owners."<sup>31</sup> The end of class conflict corresponds to "the general withering away of the legal superstructure,"<sup>32</sup> thus, progress toward justice diminishes the role of law, the State and the Party.<sup>33</sup>

Stalin saw things differently.<sup>34</sup> His nationalistic totalitarianism subverted the ideological goals of Lenin and the first generation of

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If the proletariat during its contest with the bourgeoisie is compelled, by the force of circumstances, to organize itself as a class, if, by means of a revolution, it makes itself the ruling class, and, as such, sweeps away by force the old conditions of production, then it will, along with these conditions, have swept away the conditions for the existence of class antagonisms and of classes generally, and will thereby have abolished its own supremacy as a class. In place of the old bourgeois society, with its classes and class antagonisms, we shall have an association in which the free development of each is the condition for the free development of all.

*Id.* at 95 (emphasis added).

<sup>30</sup> The view of the law under Lenin's ideological application of Marx's theory can be characterized as "instrumentalism." See KATHRYN HENDLEY, TRYING TO MAKE LAW MATTER: LEGAL REFORM AND LABOR LAW IN THE SOVIET UNION 18-19 (1996) [hereinafter TRYING TO MAKE LAW MATTER]. For example, newly created institutions and "revolutionary courts" were "instructed to disregard the law whenever it contravened the spirit of the revolution." *Id.* at 19.

<sup>31</sup> E.B. Pashukanis, *The General Theory of Law and Marxism*, in RUSSIAN LEGAL THEORY 229, 314 (W.E. Butler ed., 1996) (taken originally from PASHUKANIS: SELECTED WRITINGS ON MARXISM AND LAW 40-131 (P.B. Maggs ed., 1980)); see also TRYING TO MAKE LAW MATTER, *supra* note 30, at 19-20 (describing the "exchange of commodities" theory of law developed by Pashukanis as leading toward the dissolution of law in general, and recognizing the great import Pashukanis' ideas had on Marxist ideology in the 1920s).

<sup>32</sup> See Pashukanis, *General Theory*, *supra* note 31, at 279.

<sup>33</sup> As capitalism is dismantled during the "transitional period," the law should eliminate the opposition of interests between the State, labor, and industry with careful planning; the "process of creating the classless culture of the future" results in the "gradual expulsion of the legal superstructure itself." *Id.* at 278-79.

<sup>34</sup> Joseph Stalin (1879-1953) was the son of a Georgian shoemaker and was expelled from seminary before becoming a Bolshevik revolutionary. See KERBER ET AL., *supra* note 15, at 974. At the death of Lenin in 1924, Stalin emerged victorious over Leon Trotsky (1879-1940), the leader of the Red Army who was to succeed Lenin. See *id.*



revolutionaries.<sup>35</sup> Under Stalin, any intention to end the Party's supremacy as a class and create a democratic, classless society, dissipated quickly.<sup>36</sup> The Stalin Constitution of 1936 explicitly rejected the dissolution of the law in favor of a coercive role of law in protection of the Soviet State.<sup>37</sup> Rather than end class distinctions, Stalinist law created new social distinctions such as Party membership that were "relevant and often decisive in determining the applicability of the law."<sup>38</sup> In theory, Party members were to be punished more harshly than citizens because they were model citizens; but, in reality, a system of patron-client networks emerged in which the Party instructed judges how to decide cases involving members.<sup>39</sup> There were no legal procedures holding public officials accountable for public acts.<sup>40</sup> Trials of "enemies of the people" and Stalin's purges in 1937-38 clearly demonstrated that judges were instruments of the Party.<sup>41</sup> Laws were not published and administrative amendments made it difficult even for specialists to accurately state the law.<sup>42</sup> Laws were vague, inconsistent, and often ignored in practice.<sup>43</sup>

The Marxist-Leninist rhetoric was retained to support the totalitarian rule of the Party elite and to legitimate acts of

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<sup>35</sup> Stalin sought to focus on industrializing Russian while Trotsky hoped to end capitalism around the world. *See id.* at 975-76. In the end, Stalin's nationalistic totalitarianism won and he consolidated the power of the State as he began executing a series of "five year plans" designed to break the power of prosperous farmers (*kulaks*) and rapidly industrialize. *Id.* Leon Trotsky was expelled from the Communist Party after Stalin took control of the state, and was murdered in Mexico City in 1940 by Stalinist agents. *See id.* at 975.

<sup>36</sup> "As the so-called Stalin Constitution of 1936 vividly demonstrates, Stalin had no intention of allowing the state to wither away. Just the opposite: he wanted a strong state . . ." TRYING TO MAKE LAW MATTER, *supra* note 30, at 20.

<sup>37</sup> *See id.* at 20-21. "The Stalin Constitution is the greatest act of Soviet socialist law which has consolidated the sum total of twenty years of triumphant development of the Soviet state and of twenty years of struggle for socialism waged by the proletariat and those who toil in our land." Vyshinsky, *supra* note 21, at 358.

<sup>38</sup> TRYING TO MAKE LAW MATTER, *supra* note 30, at 21.

<sup>39</sup> *See id.* at 21-22. This system became known as "telephone law." *Id.*

<sup>40</sup> *See id.*

<sup>41</sup> *See id.* at 22-23.

<sup>42</sup> *See id.* at 25.

<sup>43</sup> *See id.* at 26-28.

exploitation, repression, and aggression.<sup>44</sup> Stalin subordinated everything to the "goal of rapid heavy industrialization at the expense of the agrarian sector."<sup>45</sup> In an effort to lay the foundations for industrialism, Stalin developed a notion of "revolution from above," which resulted in a policy of "eliminating the kulaks as a class."<sup>46</sup>

Labor law in the Soviet Union reflected the general ideological views of the role of the Party, the law and the State. Under Marxist-Leninist ideology, trade unions represented a "reservoir" of State power where workers were trained in communism and mobilized to create the "material and technical basis of communism."<sup>47</sup> On July 15, 1970, the Supreme Soviet approved "The Fundamentals of Labour Legislation of the USSR and the Union Republics," a normative labor code that was "the first national code of labour legislation in the history of the USSR."<sup>48</sup> This act consolidated the basic provisions of socialist labor legislation and provided a model for the republics.<sup>49</sup> The

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<sup>44</sup> The *kulaks* were "liquidated, either killed or transported to distant labor camps; the rural bourgeoisie was eliminated, to be replaced by a rural proletariat. Collectivization was an accomplished fact by 1939." See KERBER ET AL., *supra* note 15, at 976. "Twenty million people were moved off the land, which, once it had been reorganized into larger units, and production had been mechanized, required fewer laborers." *Id.*

<sup>45</sup> MCCLELLAN, *supra* note 18, at 131.

<sup>46</sup> *Id.* at 133. "Talking of the expropriation of the kulaks, Stalin wrote that 'the distinguishing feature of this revolution is that it is accomplished from above, on the initiative of the state, and directly supported from below by millions of peasants.'" *Id.* at 135-36 (quoting J. STALIN, HISTORY OF THE CPSU: SHORT COURSE 305 (1943)). Stalin justified the failure of the state to wither away by the "capitalist encirclement" that presented a "danger of foreign military attack"; thus, the state should continue to exist in Communism in one country to protect the workers. *Id.* at 136.

<sup>47</sup> ROMAN LIVSHITZ & VASILI NIKITINSKY, AN OUTLINE OF SOVIET LABOUR LAW 117 (1977). "Soviet power gave rise to fundamentally new relations between the state and the trade unions that completely ruled out any possibility of antagonistic contradictions between them. The socialist state and trade unions have a single class basis." *Id.*

<sup>48</sup> *Id.* at 20; see also *Fundamental Labor Legislation of the Union of Soviet Socialist Republics and the Union Republics*, in THE SOVIET UNION THROUGH ITS LAWS (Leo Hecht trans. & ed., 1983).

<sup>49</sup> The Russian Republic's Labor Code was first adopted at this time and is called the Kodeks Zakonov o Trude RF (KZoT RF). See *Labor Code of the RSFSR (1970)*, in THE SOVIET CODES OF LAW 681-761 (Preston M. Torbert trans., William B. Simmons

ideological concept of a workers' State made the freedom of labor association irrelevant and the need for collective bargaining absurd. In order to contrast the old law with the new, and understand the unity between State, management, and union, specific union rights and obligations should be analyzed under the Soviet Labor Code.

*A. State Interference in Union Activities and Union Participation in Political Process*

The State established one official union, the All-Union Central Council of Trade Unions (AUCCTU), that unified all other unions.<sup>50</sup> The labor code detailed permissible union activities, described union obligations to the State, management, and workers,<sup>51</sup> and mandated the AUCCTU to promote worker productivity and to help increase efficiency in the national economy.<sup>52</sup> On the national and republic level, the labor code required the AUCCTU to "participate in the development and realization of State economic development plans."<sup>53</sup> Further, it

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ed., 1980) [hereinafter *RSFSR Labor Code*].

<sup>50</sup> See generally TRYING TO MAKE LAW MATTER, *supra* note 30, at 154 ("Both in form and in substance, Soviet Trade unions bore only passing resemblance to their Western counterparts. One official trade union existed in the Soviet Union: the All-Union Central Council of Trade Unions (*Vsesoiuznyi Tsentral'nyi Sovet Profsoiuzov-Union* or *VtsSPS*)."); Leslie Deak, *Customary International Labor Laws and their Application in Russia*, 2 *TULSA J. COMP. & INT'L L.* 328-29 (1995) ("The State had established the official trade union structure. Accordingly, any action taken to establish a new union was an action against the official trade union and the State.")

<sup>51</sup> See *Fundamental Labor Legislation*, *supra* note 48, arts. 95-99, at 125-26; *RSFSR Labor Code*, *supra* note 49, arts. 225-35, at 748-53.

<sup>52</sup> See LIVSHITZ & NIKITINSKY, *supra* note 47, at 117.

<sup>53</sup> *Fundamental Labor Legislation*, *supra* note 48, art. 96, at 125; *RSFSR Labor Code*, *supra* note 49, art. 226, at 749. Article 16 of the Soviet Constitution stated that

[t]he economy of the USSR is an integrated economic complex which comprises all elements of social production, distribution and exchange on its territory. The economy is managed on the basis of state planning for economic and social development . . . by combining centralized direction with managerial independence and initiative of individual and amalgamated enterprises and other organizations.

KONST. SSSR [CONSTITUTION of the USSR], art. 16 (1977), in *THE SOVIET UNION THROUGH ITS LAWS* 23, 28 (Leo Hecht trans. & ed., 1983). While the Constitution of the USSR proclaimed fundamental principles, it was not self-executing and therefore required implementation legislation. See Harold J. Berman, *The Rule of Law and the*

allowed unions to initiate legislation in the Supreme Soviet,<sup>54</sup> and required them to work with enterprises, Ministries and Union Republics in the "fixing of wages and enterprises" and the "creation of working conditions."<sup>55</sup> In effect, unions operated as organizational appendages of State control in partnership with management.<sup>56</sup>

### *B. Union Dependence on Management*

Unions in the Soviet system performed many tasks that would be functions of management under market economies.<sup>57</sup> They supported management decisions and were required to "help to promote production and labor discipline."<sup>58</sup> In addition to management responsibilities, union leadership was co-opted by management.<sup>59</sup> The State, the enterprise management, and the

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*Law-Based State (with special reference to developments in the Soviet Union), in RUSSIAN LEGAL THEORY 449, 452 (W.E. Butler ed., 1996).*

<sup>54</sup> See LIVSHITZ & NIKITINSKY, *supra* note 47, at 122-23.

<sup>55</sup> *Fundamental Labor Legislation, supra* note 48, art. 96, at 125; *RSFSR Labor Code, supra* note 49, art. 230, at 751.

<sup>56</sup> See TRYING TO MAKE LAW MATTER, *supra* note 30, at 157.

<sup>57</sup> Unions participated with management in providing job training, planning wages, bonuses, quotas, safety measures, improving public utilities and living accommodations, distributing social insurance, pensions, and regulating access to health resort facilities. See LIVSHITZ & NIKITINSKY, *supra* note 47, at 118-19. Unions participated in national legislation on price setting and control of consumer goods and household services. See *id.* at 119.

Although workers did not have a residual claim on assets of the enterprise, they had explicit powers within the enterprise's internal decision-making process. These powers included the rights: 1) to independently determine how to utilize net profit; 2) to participate in distribution of the net profit; 3) to establish policy for compensation and define their own salary; 4) to elect the council (or board) of the enterprise; 5) to elect the director of the enterprise and his immediate supervisor (*brigadir*); and 6) other powers necessary to effectuate their self-managing function.

Baev, *supra* note 28, at 253-54.

<sup>58</sup> *Fundamental Labor Legislation, supra* note 48, art. 96, at 125; *RSFSR Labor Code, supra* note 49, arts. 226 & 230, at 749, 750-51; Baev, *supra* note 28, at 253 ("Indeed, trade union committees, jointly with the management, decided questions regarding internal labor regulations, estimates for use of the enterprise's funds, payment of bonuses, and allocation of apartments in houses owned by the enterprise.").

<sup>59</sup> The administration of an enterprise shall grant trade unions for use free of charge the equipped premises necessary for their activities, the conditions for

unions planned the economy; in addition, the union primarily distributed social goods and benefits such as housing, day care, cars, refrigerators, televisions, food and clothing.<sup>60</sup> When workers' interests came into conflict with State management, AUCCTU supported management.<sup>61</sup>

One legal duty the Union owed to workers was to ensure that working conditions adhered to safety and "labor protection regulations."<sup>62</sup> On behalf of workers, Unions administered the State social insurance plan and ran "the sanatoria, health protection institutions and rest homes under their management, in addition to cultural, educational, tourist and sports facilities."<sup>63</sup>

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their grant of which shall be determined by the decision of the labor collective with the participation of the administration and trade unions. In accordance with the decision adopted when the collective contract is concluded, an enterprise shall transfer for use free of charge to trade unions buildings on the balance sheet of the enterprise or leased by it, premises, installations, and other objects, as well as leisure base, children and youth, and other recreational camps, needed for the organization of leisure and the concluding of cultural-enlightenment, physical culture, and therapeutic work with working people and their families.

*On the Procedure for the Settlement of Collective Labour Disputes, Article 21*, adopted by USSR Supreme Soviet 9 Oct. 1989, in *BASIC DOCUMENTS OF THE SOVIET LEGAL SYSTEM* 391-92 (W. E. Butler ed., 3d ed. 1992).

Management exercised control over union leadership in three ways: 1) while salaries for the union leadership came from union dues, management was responsible for bonuses to union leaders; 2) since bonuses depended on fulfillment of the plan, "union leaders had a material stake in whether the plan was met"; and 3) although candidates for union leadership were technically elected by workers, the list of candidates was prepared by management together with the Party. See *TRYING TO MAKE LAW MATTER*, *supra* note 30, at 155-56. In 1987, only four percent of union leaders were drawn from the ranks of workers; the leadership's "lack of sympathy for workers' concerns is therefore hardly surprising." *Id.* at 156. Soviet trade unionists' encouraging of production was equal to submitting to interference because the employer ended up directing union activities in accordance with the enterprise's production schedule. See *Deak*, *supra* note 50, at 332.

<sup>60</sup> See *TRYING TO MAKE LAW MATTER*, *supra* note 30, at 150-51; see also Vladimir Ilyin, *Russian Trade Unions and the Management Apparatus in the Transition Period*, in *CONFLICT AND CHANGE IN THE RUSSIAN INDUSTRIAL ENTERPRISE* 65, 67 (Simon Clarke ed., 1996).

<sup>61</sup> See *TRYING TO MAKE LAW MATTER*, *supra* note 30, at 154-57; Baev, *supra* note 28, at 253-54.

<sup>62</sup> *Fundamental Labor Legislation*, *supra* note 48, art. 96, at 125; *RSFSR Labor Code*, *supra* note 49, art. 230, at 751.

<sup>63</sup> *Fundamental Labor Legislation*, *supra* note 48, art. 96, at 125; *RSFSR Labor*

*C. The Right to Bargain Collectively on Terms and Conditions of Employment*

While the Union was supposed to "represent the interests of the factory and white collar workers in respect to production, labor, well-being, and culture,"<sup>64</sup> collective bargaining was limited to social benefits, because terms and conditions of employment were established by State planning.<sup>65</sup> Collective contracts were permitted by the Labor Code.<sup>66</sup> Their terms, however, were limited by State plans and the Labor Code to general provisions, such as "strengthening work and production discipline," maintaining "benefits for outstanding workers, [and] improv[ing] housing, cultur[e] and other fringe benefits for employees."<sup>67</sup>

*D. No Right to Strike*

The right to strike was notably absent from the Labor Codes.<sup>68</sup> In a state where class conflicts were "resolved," work refusal was a criminal act against other workers and the whole of society, violating articles 209 or 148 of the Criminal Code.<sup>69</sup> Therefore, in

*Code, supra note 49, art. 230, at 751.*

<sup>64</sup> *Fundamental Labor Legislation, supra note 48, art. 96, at 125; RSFSR Labor Code, supra note 49, art. 226, at 749.*

<sup>65</sup> Collective bargaining agreements also existed in the Soviet Union, and their terms were the result of negotiations between management and the *profkom*, [the ruling committee of the Union]. But these agreements were largely meaningless. They were framed in vague and declaratory language that merely obliged management to try to improve working conditions or accomplish other goals. Workers had no recourse if management failed to live up to its promises. The very fact that the *profkom* participated in this charade only lessened its stature in the eyes of the workers.

TRYING TO MAKE LAW MATTER, *supra note 30, at 157.*

<sup>66</sup> *See Fundamental Labor Legislation, supra note 48, art. 6-9, at 100-01; RSFSR Labor Code, supra note 49, art. 7-14, at 687-88.*

<sup>67</sup> *Fundamental Labor Legislation, supra note 48, art. 7, at 100; RSFSR Labor Code, supra note 49, art. 8, at 687.*

<sup>68</sup> *See generally RSFSR Labor Code, supra note 48; McCLELLAN, supra note 18, at 102 ("Strikes were seen as illogical in a state 'belonging' to the workers.")*

<sup>69</sup> *See Criminal Code of the RSFSR, art. 209, in THE SOVIET CODES OF LAW 133; Criminal Code of the RSFSR, art. 148, in THE SOVIET CODES OF LAW 113. "The socialist principle, 'he who does not work, neither shall he eat,' requires that every able bodied citizen should work." LIVSHITZ & NIKITINSKY, supra note 47, at 162. Thus "when a member of socialist society shirks socially useful labour he is breaking the rules of*

the limited instances when “bargaining” was permitted, the worker had no bargaining power with respect to management and was consequently considered “a fungible commodity.”<sup>70</sup>

### *E. Effective Workers' Rights*

The Marxist-Leninist ideology justified this tripartite system of administration in which the State, management and unions planned the economy for the “benefit” of workers.<sup>71</sup> Fundamental worker rights to organize, bargain and strike were effectively denied workers,<sup>72</sup> but this does not mean workers were without rights altogether. The Soviet Constitution guaranteed citizens the right to work.<sup>73</sup> State planning and labor legislation ensured full employment.<sup>74</sup> Job security was guaranteed by law and, practically speaking, it was very difficult for management to discharge or

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socialist life. Naturally the society struggles against violations and urges the member to take the right path. Persuasion and education are the means used for this, and if necessary, compulsion.” *Id.* at 164.

<sup>70</sup> TRYING TO MAKE LAW MATTER, *supra* note 30, at 147.

<sup>71</sup> At the base of the labor relations system in the Soviet Union, as in most countries, were the trade unions which operated as part of a tripartite system, which also included management and the government. *See Zhelenin, supra* note 6. Under the Soviet system, however, the trade unions never had a powerful role. *See Deak, supra* note 50, at 331. This tripartite system under the Soviet regime has been modified since the collapse of the Soviet Union to include the State, employers and unions; thus, when the economy is not working, the state is still the easiest partner to blame. *See Zhelenin, supra* note 6.

As is common knowledge, a tripartite agreement between employers, unions and the Government is observed in the country, each of the sides to which has assumed definite commitments for the period of market reforms. It can be easily guessed that the Government is the side which flouts its commitments the most.

*Id.*

<sup>72</sup> *See supra* Parts IIA-IIID.

<sup>73</sup> *See* KONST. SSSR [CONSTITUTION OF THE USSR] art. 40 (1977), in *THE SOVIET UNION THROUGH ITS LAWS* 23, 33 (Leo Hecht trans. & ed., 1983). This right included guaranteed payment according to quality and quantity of work, right to choose trade or profession, right to professional training and job placement. *See id.*

<sup>74</sup> *See* LIVSHITZ & NIKITINSKY, *supra* note 47, at 33. “The Soviet State, however, does not simply proclaim the right to work but also ensures it by its whole system of the economic and political organisation of society.” *Id.*; *cf.* TRYING TO MAKE LAW MATTER, *supra* note 30, at 150 (“[F]inding a job was typically not a problem; unemployment had been largely eliminated thanks to the rapid industrialization drive of the 1930s.”).

transfer workers.<sup>75</sup> Dismissal is one area where workers could expect courts to reverse management decisions, but workers rarely used the courts despite rulings in their favor.<sup>76</sup> In addition to the right to work, citizens also had the right to health care,<sup>77</sup> housing,<sup>78</sup> social security,<sup>79</sup> and education.<sup>80</sup> Workers were protected, in a collective manner, by the policies of the State and management; however, the system was not structured to protect their individual rights as workers to choose work, choose union representation, or negotiate their own employment contracts.<sup>81</sup>

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<sup>75</sup> See TRYING TO MAKE LAW MATTER, *supra* note 30, at 52. In addition, management had a duty to find workers a job once they were discharged. *See id.* at 58. The Union also had the right to veto any dismissal or transfer made by management. *See Fundamental Labor Legislation, supra* note 48, art. 18, at 104; *RSFSR Labor Code, supra* note 49, art. 35, at 695. Dismissal had to be justified within the provisions of the Labor Code detailing just causes for dismissal. *See Fundamental Labor Legislation, supra* note 48, art. 17, at 103-04; *RSFSR Labor Code, supra* note 49, art. 33, at 693-94. Dismissal could be justified when: 1) the enterprise closes; 2) the worker lacks skill or capacity to execute work; 3) the worker consistently refuses to carry out his duties; 4) there is absenteeism without excuse; 5) the worker fails to report to work for over 4 months due to disability that is not subject to exemption by law or the result of maternity leave; or 6) reinstatement by a worker who held job previously. *See id.*

<sup>76</sup> "Labor law was one of only a few areas of Soviet law in which Soviet citizens had the right not only to question the legality of actions taken by those in positions of authority but also to obtain ostensibly meaningful remedies." TRYING TO MAKE LAW MATTER, *supra* note 30, at 50. "Empirical evidence—limited though it is—clearly indicates that the vast majority of Soviet workers dismissed at the initiative of management did not pursue the matter to court." *Id.* at 161.

<sup>77</sup> See KONST. SSSR [CONSTITUTION OF THE USSR] art. 42 (1977), in THE SOVIET UNION THROUGH ITS LAWS 23, 34 (Leo Hecht trans. & ed., 1983).

<sup>78</sup> *See id.* art. 44.

<sup>79</sup> *See id.* art. 43.

<sup>80</sup> *See id.* art. 45.

<sup>81</sup> *See generally* TRYING TO MAKE LAW MATTER, *supra* note 30, at 150-51. While workers' individual rights were not protected, they received collective protection in the form of job security and social benefits. Further, because social benefits such as housing were distributed by the unions on the basis of seniority, there were strong incentives for workers to find work young and stay at a job for life. *See id.* A worker in need of suitable housing "might wait years, even decades" before such housing became available. *Id.* at 151. As a result, workers were limited in their choice of jobs because the union-employer structure created strong incentives to take a job for life, thereby severely limiting an individual's choice of work.



### III. Transformation to Free Labor Market

Despite the ideology that created it, the centrally managed economy both failed to produce goods and services efficiently and distribute them equitably<sup>82</sup> and failed to contain the growth of the “private” economy which “g[ave] rise to growing inequalities and low morale among the population.”<sup>83</sup> These failings placed tremendous pressure on the Soviet system. In his effort to increase efficiency and accelerate the growth of the economy,<sup>84</sup> Gorbachev sought to: 1) decentralize decision making of the Ministries,

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<sup>82</sup> See, e.g., Kathryn Hendley, *The Role of Law in the Russian Economic Transition: Coping with the Unexpected in Contractual Relations*, 14 WIS. INT’L L.J. 624, 629 (1996) [hereinafter Hendley, *The Role of Law*] (“Both the myth and the reality of state control over the economy began to crack during the latter part of Gorbachev’s tenure (1987-1991).”). Mikhail Gorbachev became General Secretary of the Communist Party on March 11, 1985. At that time, the Soviet economy was experiencing a certain amount of prosperity; however, this success was short-lived, and the economy soon began to deteriorate. See Richard C. Schneider, Jr., *Privatization in One Country: Foreign Investment and the Russian Privatization Dynamic*, 17 HASTINGS INT’L & COMP. L. REV. 697, 702-03 (1994).

<sup>83</sup> TERRY COX, FROM PERESTROIKA TO PRIVITISATION: THE POLITICS OF PROPERTY CHANGE IN RUSSIAN SOCIETY 1985-1991, 42 (1996). Although a socio-economic analysis of the pressures leading to the need for reform in the Soviet system is clearly beyond the scope of this Comment, such an analysis would be helpful in understanding changing worker and management perceptions of the law and economic expectations.

<sup>84</sup> “Perestroika” was President Gorbachev’s effort to streamline the Soviet economic system, creating increased flexibility and efficiency, without destroying it. See Hendley, *The Role of Law*, *supra* note 82.

Perestroika was aimed at scaling back the scope of the national economic plan, and creating room for initiative from below. The purpose was to devolve power from bureaucrats at the ministerial level to enterprise managers who were closer to the production process. The plan was to be limited to goods of strategic importance (as defined by the ministries). Only orders for such goods were to be mandatory for enterprises. The use of the excess production capacity thereby created and the allocation of profits generated were to be left to the discretion of enterprise managers. Along similar lines, perestroika also brought the legalization of new property forms, thereby ending the monopoly of the state enterprise form over all productive assets. Perhaps unknowingly, Gorbachev also laid the groundwork for economic transactions unseen in the formal state economy since the 1920s and the days of the New Economic Policy.

*Id.* at 629-30. In addition to economic reforms, President Gorbachev initiated a policy of “openness”—or glasnost—a “willingness to discuss openly the shortcomings of the Soviet political and social order.” TRYING TO MAKE LAW MATTER, *supra* note 30, at 126.

giving increased autonomy to managers;<sup>85</sup> 2) make unions more representative of worker interest and less part of management;<sup>86</sup> 3) reform the laws and court structure to facilitate the rule of law;<sup>87</sup> and 4) allow individuals more control over their labor activity.<sup>88</sup> While these changes seemed to question the underlying principles

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<sup>85</sup> See COX, *supra* note 83, at 51; cf. TRYING TO MAKE LAW MATTER, *supra* note 30, at 149 (stating that while the 1988 Law on State Enterprises placed limits on the rights of Ministries to control management and gave management more control over resources, the law was not an effective tool for controlling the Ministries, since they were able to circumvent the restrictions). While the 1988 Law on State Enterprises allowed managers to challenge Ministry orders, the managers still depended on Ministries for raw materials. See COX, *supra* note 83, at 43.

<sup>86</sup> See COX, *supra* note 83, at 51. By stressing the "human factor," these reforms created conditions for greater "creativity" and "worker innovation" while they "turned to ways of circumventing bureaucratic opposition by empowering ordinary people in their roles as workers and citizens." *Id.* Soviet scholars, freed by glasnost, began to criticize the enterprise trade unions for bureaucratic lethargy and for "having sidestepped their obligation to defend worker's interests." TRYING TO MAKE LAW MATTER, *supra* note 30, at 157.

<sup>87</sup> See TRYING TO MAKE LAW MATTER, *supra* note 30, at 34-45. Gorbachev, trained in law himself, hoped to make the Soviet Union a "law based state." *Id.* at 34-35. His approach to reform was "top-down" and suffered from bureaucratic resistance and the "masses' disregard for these new laws." *Id.* at 35. Among his many legal reforms, Gorbachev's most important innovations include: 1) the creation of government liability for official misconduct; 2) a more impartial judiciary independent of the party; 3) the publication of laws; 4) more freedom among lawyers to choose cases and set fees; and 5) the repeal of presumptively unfair laws and clarification of vague and inconsistent laws. See *id.* at 35-45.

Prior to the accession of Gorbachev, the concept of a law-based state, which had been hotly debated by pre-revolutionary Russian writers . . . was uniformly denounced in published Soviet political and legal literature. In theory, it conflicted with the Marxist-Leninist doctrine that law in all societies is a reflection of the will of the ruling class and that the state is ultimately bound by that will and not by any laws.

Berman, *supra* note 53, at 449.

<sup>88</sup> The "new law on Individual Labour Activity was adopted by the Supreme Soviet on November 19th 1986 and scheduled for implementation on May 1st, 1987." COX, *supra* note 83, at 70. This law expanded the kinds of individual work that could be carried out for pay and broadened the conditions under which such activity could be carried out. See *id.* at 70-71. This reform was seen within the socialist framework by Gorbachev as within "principles of socialist management, based either on cooperative principles, or on a contractual basis with a socialist enterprise." *Id.* at 69 (quoting Gorbachev). This reform underscored the "growing concern about the inability of the state sector to provide services and consumer goods in sufficient quantity or quality to meet demand." *Id.*

of Marxist-Leninist ideology, they were administered through the traditional mechanisms of State control and justified in Marxist-Leninist terms.<sup>89</sup> The increased openness that accompanied the policy of *glasnost* led to challenges to the Marxist-Leninist premise itself.<sup>90</sup>

Since the end of the Soviet era and *perestroika*, the Russian State has undergone a slow, painful and uneven process of state building.<sup>91</sup> When Boris Yeltsin took power in 1989, he committed to a "strategy of rapid and radical economic reform,"<sup>92</sup> while simultaneously adopting "the dual goal of developing a democratic polity and creating a market economy."<sup>93</sup> The Russian Republic's Constitution of 1978 was still in effect and various parties struggled within its structure over the nature, pace, and goals of reform.<sup>94</sup> On March 20, 1993, Yeltsin suspended parliament and the Constitutional Court.<sup>95</sup> During this "interregnum," Yeltsin held new elections for parliament and a referendum on the final draft of

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<sup>89</sup> See *id.* at 55. "Gorbachev was happy to use the language of the revolution in promoting [reform;] the central aims of perestroika were to maintain and strengthen the state-owned sector of the economy as the preponderant sector." *Id.* "A basic assumption behind perestroika was that the over-centralisation, corruption, and lack of responsiveness of the Soviet system were not intrinsic to it, but products of mistaken policies under Stalin and under Brezhnev." *Id.* Leonid Brezhnev (1906-1982) became Secretary of the Communist Party in 1964, and began a policy of relaxing control on Soviet satellite nations; "while no socialist state should permit itself to adopt policies detrimental to the interests of international socialism, each state might proceed to determine the most appropriate path for its own development." KERBER ET AL., *supra* note 15, at 1042-43.

<sup>90</sup> The Gorbachev years were marked by political and economic turmoil. Although the perestroika process began as an effort to reform the existing system, it gave rise to a reevaluation (and ultimately a rejection) of many of Leninism's basic precepts. As private property, political pluralism, and other concepts previously unthinkable in the Soviet Union became realities, they required a legal foundation.

TRYING TO MAKE LAW MATTER, *supra* note 30, at 39.

<sup>91</sup> See Robert Sharlet, *Reinventing the Russian State: Problems of Constitutional Implementation*, 28 J. MARSHALL L. REV. 775, 775 (1995).

<sup>92</sup> *Id.* at 776.

<sup>93</sup> *Id.*

<sup>94</sup> See *id.* Locked in a bitter struggle with rival Ruslan Khasbulatov—a new leader of the more conservative parliament—Yeltsin supported reform at a faster pace. See *id.*

<sup>95</sup> See *id.*

the Constitution "revised to conform to presidential preferences."<sup>96</sup> The new parliament was more conservative and nationalistic than its predecessor, and the legitimacy of the Constitution was clouded by alleged official manipulation of turnout figures.<sup>97</sup> The instability of the current political situation in Russia casts doubt on the long-term commitment to economic reforms and the future of workers in the nascent labor movement. Doubts about the democratic process undermine the legitimacy of the State where the Communist ideology remains a threatening alternative to constitutional reform.

The privatization process has reflected an attempt to preserve some of the ideological and practical aspects of a worker state. Many workers, socialists, and unions opposed mass privatization because it contradicted the socialist notion of the "whole people's property."<sup>98</sup> In an effort to retain workers' controlling interest in State owned enterprises, the Russian Federation, along with the Czech and Slovak Republics, Romania, Kazakhstan, Ukraine, Lithuania, and Estonia, gave vouchers to workers without generating revenue for the State.<sup>99</sup> Some have argued that the voucher system and employee ownership schemes are more in line with Marxist notions of development than the original State run enterprises, and so the current privatization schemes could lead to

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<sup>96</sup> *Id.* at 777.

<sup>97</sup> *See id.* at 777-78.

<sup>98</sup> Baev, *supra* note 28, at 254. "Undoubtedly, the lobbying efforts of socialists and trade unions predetermined the development of the privatization process in Russia." *Id.*

<sup>99</sup> The State Privatization Program of 1992 created three ways for a state owned enterprise to privatize: 1) employees could receive 25% of preferred stock and 10% of common stock free of charge while management has a call option on 5% of common shares comprising 5% of charter capital; 2) employees could buy up to 51% of charter capital; and 3) employees could receive a call option on common stock comprising 20% of charter capital. *See* Emily Silliman & Edward Kayukov, *New Company Formation in Russia: Legal Regulation*, 3 PARKER SCH. J. E. EUR. L. 175, 192 (1996). Since the end of the voucher program on June 30, 1994, many criticisms have been levied, including: 1) failure to achieve greater efficiency; 2) failure to attract high levels of foreign investment; and 3) failure to adequately value vouchers resulting in a huge wealth transfer of three hundred trillion rubles in 1994 prices. *See id.* at 192-93; *see also* Baev, *supra* note 28, at 254-55 ("Since the community was regarded as the owner, there were logical arguments in favor of free distribution on an equitable basis on the ground that the property had already been paid for by the population.").

an even more Marxist system of employee ownership and worker democracy.<sup>100</sup> The privatization program has put some fifteen thousand mid-sized and large enterprises into private hands, and eighty percent of Russian workers now work in privatized enterprises, with managers and workers holding most of the private shares.<sup>101</sup>

Despite the fact the capital and labor markets are untested, many labor reforms have been enacted that are more suitable to a fully developed market economy. The relevant law reforms enacted before the new Constitution came into effect include the 1990 Labor Law Act,<sup>102</sup> the Collective Contracts and Agreements Act of 1992,<sup>103</sup> and the Employment Act of 1992.<sup>104</sup> These labor laws amended the existing Labor Code of the Russian Federation<sup>105</sup> and were interpreted in light of international labor standards even before there were Constitutional and legislative grounds to use international law.<sup>106</sup> This Comment focuses on the law as codified most recently under the Labor (Trade) Union Act of 1995,<sup>107</sup> the Rules for the Settlement of Labor Disputes of 1995,<sup>108</sup> and the new

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<sup>100</sup> See Baev, *supra* note 28, at 254.

<sup>101</sup> See Silliman & Kayukov, *supra* note 99, at 193. The privatization program has created the beginning of a capital market in Russia by "distributing some 146 million vouchers among the Russian citizens." *Id.*

<sup>102</sup> Act of the Soviet Union Socialist Republics on Trade Unions, their Rights, and Safeguards for their Activities, IZVESTIYA (Dec. 1990) §§ 1-3, 9 [hereinafter 1990 Labor Code]. For a discussion of the Labor Code, see Deak, *supra* note 50, at 334-36.

<sup>103</sup> *Sobr. Zakonod. RF*, 1992, No. 2490, Item 1, available in 1992 WL 472442.

<sup>104</sup> *Sobr. Zakonod. RF*, 1992, available in 1991 WL 496555.

<sup>105</sup> See RSFSR Labor Code, *supra* note 49.

<sup>106</sup> See Gennady M. Danilenko, *The New Russian Constitution and International Law*, 88 AM. J. INT'L L. 451, 462 (1994). In 1992, the Constitutional Court used international human rights documents and International Labor Organization conventions and recommendations to invalidate a simplified procedure under the old labor law allowing the annulment of labor contracts when workers reached pension age. See *id.* (citing *Vedomosti Fed. Sobr. RF*, 1992, No. 13, Item 669).

<sup>107</sup> *Sobr. Zakonod. RF*, 1995, No. 10, Item FZ, available in 1996 WL 128400 [hereinafter RF Trade Union Act]. There is no detailed analysis of the recent labor laws in Russia. Most analysts of privatization focus on the development of capital and management in enterprise organization and ignore the importance of labor relations, despite the singular importance of labor in the transformation of a workers state into a democratic market economy.

<sup>108</sup> *Sobr. Zakonod. RF*, 1995, No. 175, Item FZ, available in 1995 WL 798964

amendments to the Law on Employment.<sup>109</sup> With very few exceptions, these acts replace the old Soviet system with worker rights conforming to international labor standards<sup>110</sup> that are more progressive than United States labor law.<sup>111</sup> The radical departure from Marxist-Leninist ideology underlying the labor law of the Soviet system can be seen in the comparison of the new Russian Federation labor reforms with labor standards internationally<sup>112</sup> and in the United States.<sup>113</sup>

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[hereinafter RF Collective Labour Disputes Act].

<sup>109</sup> Amendments and Addenda to Law of the Russian Federation "On Employment of Population in the Russian Federation," *Sobr. Zakonod. RF*, 1996, No. 36, Item FZ, available in 1996 WL 560841 [hereinafter RF Employment Amendments].

<sup>110</sup> See KONST. RF [CONSTITUTION OF THE RUSSIAN SOVIET FEDERATED SOCIALIST REPUBLIC] art. 15, cl. 4, translated in THE CONSTITUTION OF THE RUSSIAN FEDERATION (Finnish Lawyers' Publ. 1994) "Universally-recognized norms of international law and international agreements of the Russian Federation are a component of its legal system. If an international agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement are used." *Id.*; see also Danilenko, *supra* note 106, at 464-67 (describing the relation between the Russian Constitution and International treaties, norms and principles); Deak, *supra* note 50, at 334. The drafts of the earlier reforms nearly conform to international standards. See *id.* at 334-35. This analysis will show that the latest reforms more fully comply than the initial reforms. The rapid succession of amendments has created multiple layers of provisions building on the Basic Labor Code of the Russian Federation. This makes it difficult to determine how much the new provisions have modified older code. To avoid the risk of misinterpreting the new meaning of the old code in light of the amendments, this discussion will primarily focus on the most recent amendments themselves in so far as they stand alone.

<sup>111</sup> See *infra* notes 115-88 and accompanying text.

<sup>112</sup> The freedom of association and the right to collective bargaining have been defined through the International Labour Organisation (ILO) multilateral conventions. There are two relevant conventions: the Convention Concerning Freedom of Association and Protection of the Right to Organise, No. 87, opened for signature July 9, 1948 31 ILO Official Bull., Ser. B, No. 1 [hereinafter ILO Convention No. 87], and the Convention Concerning the Application of the Principles of the Right to Organise and Bargain Collectively, No. 98, opened for signature July 1, 1949, 32 ILO Official Bull., Ser. B., No. 3 [hereinafter ILO Convention No. 98]. See also EDWARD E. POTTER, FREEDOM OF ASSOCIATION, THE RIGHT TO ORGANIZE AND COLLECTIVE BARGAINING: THE IMPACT ON U.S. LAW AND PRACTICE OF RATIFICATION OF ILO CONVENTIONS NO. 87 & NO. 98 (1984); Deak, *supra* note 50, at 322-23.

<sup>113</sup> Labor relations in the United States are regulated by the National Labor Relations Act (NLRA). National Labor Relations (Wagner) Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-87 (1988)). Subsequent amendments such as the Labor-Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-97 (1988)), and

### A. Coverage of Labor Law Protection

The Russian Federation has adopted legislation giving the right to organize and bargain to all employees, and broadly defining an employee as “a natural person working in an organization under a labour agreement (contract), a person engaged in individual entrepreneurial activity, a person studying at an educational institution of primary, secondary, or higher professional education.”<sup>114</sup> This broad coverage comports with international standards that guarantee the right of workers and employers to join organizations of their choosing “without distinction whatsoever.”<sup>115</sup> The Russian Federation has provided special rules for organizing the military, employees of internal affairs agencies, the security service, customs, police, judges, and prosecutors.<sup>116</sup> International standards would allow states to exclude the armed forces and the police from the right to join labor organizations, but all other public employees should have the right to organize.<sup>117</sup>

In the United States, the right to organize and bargain collectively is more circumscribed. Under the National Labor Relations Act (NLRA), supervisors,<sup>118</sup> agricultural workers,

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the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended at 29 U.S.C. §§ 153-87 (1988)), are collectively referred to as the National Labor Relations Act.

<sup>114</sup> RF Trade Union Act, *supra* note 107, ch. I, art. 3. In addition to employees, those who are “temporarily not working, or who are pensioners” are allowed to join labor unions. *Id.* Chapter I, Article 1(2) provides that

every person attaining the age of 14 years and engaged in labour (professional) activity shall have the right to set up, at his discretion, labor unions for the protection of his interests, to join these, and to engage in labor union activity and to withdraw from labor unions.

*Id.* ch. I, art. 1(2).

<sup>115</sup> ILO Convention No. 87, *supra* note 112, art. 2.

<sup>116</sup> See RF Trade Union Act, *supra* note 107, ch. I, art. 4, § 2. See, e.g., Customs Code of the Russian Federation, *Sobr. Zakonod. RF*, No. 5221, Item 1, art. 421, available in 1993 WL 831295 (“The customs officials shall not have the right . . . to organize strikes and to participate in them.”).

<sup>117</sup> See ILO Convention No. 87, *supra* note 112, art. 9.

<sup>118</sup> The definition of “supervisors” is interpreted broadly and so many employees with very little supervisory responsibility are exempted from collective bargaining. *NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 576-80 (1994) (licensed-practical nurses classifying as supervisory because of their role in directing, evaluating, and disciplining nurses’ aides).

domestic servants, independent contractors, and many public employees are given the right to organize without the corresponding right to protected bargaining.<sup>119</sup> In addition, the United States Supreme Court has withdrawn coverage for managers<sup>120</sup> as well as “confidential employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations.”<sup>121</sup> The armed forces have no collective bargaining rights in the United States,<sup>122</sup> and the ability of police officers to collective bargaining is usually limited by state law.<sup>123</sup> Unlike the Russian Federation, students in the United States are not considered employees and have no right to organize and bargain collectively.<sup>124</sup> Thus, the Russian Federation is more in compliance with international labor standards than the United States with respect to those given the right to organize and bargain collectively.

As we have seen, providing the right to join a union to a broad range of individuals is not technically a recent innovation to Russian law.<sup>125</sup> Under the Soviet regime, everyone belonged to the official trade union, AUCCTU (VTsSPS), and few employees opted out of the union, fearing the loss of benefits associated with work such as housing, kindergartens, youth camps, and other services.<sup>126</sup> If employees continue to belong to official unions without demanding the enforcement of their legal rights, broad legal protections are meaningless.

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<sup>119</sup> See 29 U.S.C. § 152(3) (1988).

<sup>120</sup> See *NLRB v. Bell Aerospace*, 416 U.S. 267 (1974).

<sup>121</sup> *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 172 (1981).

<sup>122</sup> See POTTER, *supra* note 112, at 41. Potter notes that the Civil Service Reform Act allows National Guard technicians limited collective bargaining rights as federal employees. See *id.* at 41 n.144.

<sup>123</sup> See *id.* at 41.

<sup>124</sup> See *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251 (1976) (holding that medical interns and residents are primarily students and not employees under the act, and, therefore, cannot bargain collectively).

<sup>125</sup> See *supra* notes 114-18 and accompanying text.

<sup>126</sup> See TRYING TO MAKE LAW MATTER, *supra* note 30, at 154.



*B. Worker Right to Join and Participate in Union of Choice Without Discrimination*

To make the right to union participation meaningful, workers must have a choice between union representatives and protection from discrimination on the basis of union activity. In the United States, a union enjoying the majority vote of a bargaining unit becomes the exclusive representative of all the employees in that unit.<sup>127</sup> Thus, an employee in the minority who is unhappy with union representation will be denied the ability to bargain individually with the employer.<sup>128</sup>

Given the unitary union structure of Russia's history, the majority-rule doctrine would not facilitate the transition to meaningful labor relations. Most employees are default members of the ex-official unions, and so the majority-rule would restrict the development of smaller, truly independent unions.<sup>129</sup> The Russian Federation has not adopted exclusivity and multiple primary labor organizations, as are contemplated by the act.<sup>130</sup> While rejection of the majority-rule doctrine may increase union rivalry and weaken overall union bargaining power, worker choice will ultimately be facilitated. The rejection of exclusivity

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<sup>127</sup> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . ." NLRA § 9(a), 29 U.S.C. §§ 152-68 (1988).

<sup>128</sup> See *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975) (holding that when an employee objects to the handling of a racial discrimination grievance by the union, direct protests and opposition by the complaining employee against the employer is prohibited by the majority/exclusivity rule that establishes the union as the exclusive representative of employees). Critics of the exclusivity rule show how it undermines union ability to represent conflicting interests of employees when the workforce is divided in racial and gendered terms. See Marion Crain & Ken Matheny, *Labor's Divided Ranks: Privilege and United Front Ideology* 31 (1996) (unpublished manuscript on file with authors).

<sup>129</sup> "Non-exclusivity is imperative in Russia because the former official trade unions still exist in all enterprises, and non-exclusivity was the only way to allow new unions to develop." Deak, *supra* note 50, at 336.

<sup>130</sup> See RF Trade Union Act, *supra* note 107, ch. II, art. 13(1). "Where several primary labour-union organizations of different labour unions operate in an organization, their representation in collective bargaining and conclusion of collective contracts shall be determined with due account of the number of represented labour-union members." *Id.*

complies with ILO Convention No. 87, Article 2, which promotes workers' "right . . . to join the organisations of their own choosing."<sup>131</sup>

Provisions prohibiting management discrimination against employees who participate in union activities support a worker's right to join union organizations. Recent reforms prohibit discrimination in the Russian Federation.<sup>132</sup> Article 9 fulfills the international labor standards requirement that "[w]orkers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment."<sup>133</sup> Because many claims turn on who carries the burden of proof, the burden of proving anti-union animus is one important question left open by the Russian labor act. In practice, the ILO requires the employer to show no anti-union animus once a discrimination claim is brought.<sup>134</sup> Since this question is left open by the Labor Trade Union Act, one may conclude that the Russian Federation follows ILO practice because the act states: "Where international treaties of the RF and conventions of the International Labour Organization ratified by the RF lay down rules other than those provided for by the present Federal Act, the rules of the treaties and conventions shall apply."<sup>135</sup>

In the United States, anti-union discrimination is also prohibited. Section 8(a)(3) of the NLRA makes it unlawful for an employer "by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any

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<sup>131</sup> ILO Convention No. 87, *supra* note 112, art. 2. The committee of experts that develop commentary on the ILO has stated that the "right to join" should be interpreted to mean that "minority organisations should be allowed to function and at least have the right to make representations on behalf of their members and to represent them in the case of individual grievances." POTTER, *supra* note 112, at 15 (quoting 1983 Report of the Committee of the Experts, para. 141). This is clearly contrary to U.S. application of the exclusivity rule, which would prohibit minority union representation of individual grievances. *See id.*

<sup>132</sup> *See* RF Trade Union Act, *supra* note 107, ch. 1, art. 9. "Making a person's admittance to employment, promotion at work, and also dismissal from work conditional on his labour-union affiliation or non-affiliation shall be prohibited." *Id.*

<sup>133</sup> ILO Convention No. 98, *supra* note 112, art. 1(1).

<sup>134</sup> *See* POTTER, *supra* note 112, at 52 (citing 1983 Report of the Committee of Experts, paras. 271, 280).

<sup>135</sup> RF Trade Union Act, *supra* note 107, ch. 1, art. 6(3).

labor organization."<sup>136</sup> However, the General Counsel of the National Labor Relations Board (NLRB) bears the burden of persuading the Board that the employer acted on anti-union animus.<sup>137</sup> Thus, while the Russian Federation complies with international labor standards, the United States is in violation of ILO Convention No. 98 with respect to the allocation of proof in discrimination cases.<sup>138</sup>

Where communist leadership is still inseparable from union leadership, anti-union discrimination may be a difficult issue for the Russian Federation. Communists view trade unions as a training ground for communist action,<sup>139</sup> and thus management may have legitimate business interests in discriminating against communists without necessarily maintaining any anti-union bias. Nonetheless, the Russian Federation cannot legislate a remedy without violating ILO Convention No. 87 Article 2; which protects the unfettered right to join and participate in union activities.<sup>140</sup> Such attempts to restrict communist membership in unions in the United States have been held unconstitutional by the Supreme Court,<sup>141</sup> and no successful challenge has been made that challenges the practice of requiring union officials to sign non-communist affidavits.<sup>142</sup>

### *C. Union Independence from State Interference*

Freedom from State and management interference in union

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<sup>136</sup> 29 U.S.C. § 158(a)(3) (1988). Section 158(a)(4) also makes it unlawful for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." *Id.* § 158(a)(4) (1988).

<sup>137</sup> See *NLRB v. Transp. Management Corp.*, 462 U.S. 393, 395 (1983); see also POTTER, *supra* note 112, at 52.

<sup>138</sup> See POTTER, *supra* note 112, at 52.

<sup>139</sup> See *supra* note 81 and accompanying text.

<sup>140</sup> See ILO Convention No. 87, *supra* note 112, art. 2. Such state interference with internal union membership would also constitute a violation of ILO Convention No. 87 art. 3(2). See POTTER, *supra* note 112, art. 3(2), at 10-12, 25.

<sup>141</sup> See *United States v. Brown*, 381 U.S. 437, 461 (1965).

<sup>142</sup> Such a challenge was raised in *Driscoll v. International Union of Operating Engineers, Local 139*, but the case was dismissed on jurisdictional grounds. See *Driscoll v. International Union of Operating Eng'rs, Local 139*, 484 F.2d 682 (7th Cir. 1973); see also POTTER, *supra* note 112, at 11.

affairs is a necessary pre-requisite to the rights to organize and bargain collectively. If unions cannot operate democratically and develop their own rules, then they cannot act as independent representatives of worker interests. Recognizing the importance of union autonomy, the ILO has established that 1) “[w]orkers’ and employers’ organisations shall have the right to draw up their constitutions and rules, and to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes,” and 2) “[t]he public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.”<sup>143</sup> The Russian Federation has adopted this principle as well,<sup>144</sup> but some analysts have pointed out that the broad powers given the President under the Constitution<sup>145</sup> would allow executive decrees aimed at particular union practices in specified enterprises.<sup>146</sup> If this Presidential power were exercised to set limits on union organization and activity, effectively amending the legislation by executive decree, the statutes would violate international standards of union autonomy. Economic conditions have not yet developed to the point for a meaningful test of executive resolve.

Union autonomy is not an explicit goal of labor law in the United States. Rather, the NLRA protects individual rights as workers act collectively.<sup>147</sup> Under the ILO and the RF Trade Union Act, workers’ rights are derivative of the union’s right to organize and bargain.<sup>148</sup> Presumably this policy applies to the RF Trade Union Act by incorporation.<sup>149</sup> On the other hand, under the NLRA, union rights are derivative of employees’ “full freedom of

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<sup>143</sup> ILO Convention No. 87, *supra* note 112, art. 3(2).

<sup>144</sup> See RF Trade Union Act, *supra* note 107, ch. I, art. 5.

<sup>145</sup> See KONST. RF [CONSTITUTION OF THE RUSSIAN SOVIET FEDERATED SOCIALIST REPUBLIC] arts. 95, 115, *translated in* THE CONSTITUTION OF THE RUSSIAN FEDERATION (Finnish Lawyers’ Publ. 1994).

<sup>146</sup> See Baev, *supra* note 28, at 288. “In other words, the Russian government and President possess an enormous capacity to influence the board of directors of almost any national corporation by issuing an individual decree pertaining to the specific business matters of the particular company.” *Id.*

<sup>147</sup> See POTTER, *supra* note 112, at 18.

<sup>148</sup> See *id.*

<sup>149</sup> See *supra* note 130.

association, self organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”<sup>150</sup> State interference in union organization may be justified in the United States to protect against union coercion, undermining workers’ freedom of choice.<sup>151</sup> Sometimes the workers’ right to refrain from joining a labor organization conflicts with the union’s right to make its own rules. In *Pattern Makers’ League of North America v. NLRB*,<sup>152</sup> the United States Supreme Court held that a union’s rule prohibiting members from resigning in anticipation of or during a strike violated the workers’ “right to ‘refrain from any or all [concerted] . . . activities.’”<sup>153</sup> Under the ILO and Russian Federation approaches, this ruling would violate the union’s right to create its own rules.

While the State cannot interfere in internal union affairs in Russia, trade unions can take an active role in political activity relating to the “protection of social and labour rights and interests of employees.”<sup>154</sup> The government is required to consider “with due account” proposals made by all-Russia labor unions.<sup>155</sup> In addition, labor unions have the right to make legislative proposals.<sup>156</sup> There are no restrictions on the political actions of

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<sup>150</sup> 29 U.S.C. § 151 (1988).

<sup>151</sup> Title IV of the Landrum-Griffin Act, which establishes comprehensive election procedures and requires certain union financial disclosures, violates ILO standards. See POTTER, *supra* note 112, at 22-23.

<sup>152</sup> 473 U.S. 95 (1985).

<sup>153</sup> *Id.* at 100 (quoting 29 U.S.C. § 157). The tension between individual and group rights is manifest when comparing the majority’s individualist approach with the dissent’s collective perspective. The dissent argued that this holding violated the employee’s right to act collectively and to promulgate rules binding on that collective. See *id.* at 118 (Blackmun, J., dissenting).

<sup>154</sup> RF Trade Union Act, *supra* note 107, ch. II, art. 11(1).

<sup>155</sup> *Id.* All-Russia labor unions are

voluntary amalgamation[s] of labour-union members working in one or more branches of activity linked by common social and labor and professional interests, operating throughout RF territory or in the territories of over one-half of RF subjects or uniting at least one-half of the total number of workers of one or more branches of activity.

*Id.* ch. I, art. 3.

<sup>156</sup> See *id.* ch. II, art.11(1).

unions that would violate international standards.<sup>157</sup> In the United States, however, there are clear lines between union political and economic activity. Section 304 of the Labor Management Relations Act (LMRA) restricts both union and employer political contributions to federal elections.<sup>158</sup> The Supreme Court has also held that unions cannot use dues collected under an agency shop arrangement for political purposes unrelated to collective bargaining.<sup>159</sup> Critics in the United States argue for union freedom to participate in political action and note that labor's role in politics has been historically significant.<sup>160</sup> In the case of the Russian Federation, a distinction between political and economic roles of the union might facilitate union organizing and collective bargaining by disassociating unions from the Communist Party and severing the connection between the ex-official unions and the State. Separating economic and political roles of the union, as the United States has done, might be a practical step toward legitimizing unions in the eyes of workers.

*D. Separation of Union Organization from Management Control*

Unions in the Russian Federation need autonomy not only from the State, but from management as well. The new labor law calls for such union autonomy: "Labor unions shall be independent in their activity from the organs of executive power, the organs of local self-government, *employers* and their amalgamations . . . political parties and other public entities, and shall not be accountable to them or subject to their control."<sup>161</sup>

This legal declaration of independence for unions is an incredible departure from the former Soviet system in which management exercised direct financial control over the chairman of the union *profkom* (executive committee) and provided bonuses

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<sup>157</sup> See ILO Convention No. 87, *supra* note 112, art. 3.

<sup>158</sup> See LMRA § 304, 29 U.S.C. §§ 141-67, 171-97 (1988).

<sup>159</sup> See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

<sup>160</sup> See C. REHMUS & D. MCLAUGHLIN, *LABOR AND AMERICAN POLITICS: A BOOK OF READINGS* (1967).

<sup>161</sup> RF Trade Union Act, *supra* note 107, ch. I, art. 5(1) (emphasis added).

to union officers.<sup>162</sup> This radical shift in union structure also comports with international standards, prohibiting employer acts which tend to control unions.<sup>163</sup> In the United States, § 8(a)(2) of the NLRA makes it an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or to contribute financial or other support to it.<sup>164</sup> The ex-official union refusal to break ties with management is one of the main impediments to worker negotiation of the terms of their employment.<sup>165</sup> Currently, the unions believe they can best represent workers by colluding with management and striking against the State for larger enterprise subsidies.<sup>166</sup>

*E. Worker Right to Bargain Collectively on All Terms and Conditions of Employment*

ILO Convention No. 98 requires nations to create the conditions necessary to encourage and promote voluntary collective bargaining.<sup>167</sup> As interpreted by the ILO Committee on Freedom of Association, ILO Convention No. 98 requires that 1) the terms and conditions of employment be regulated by collective bargaining agreements voluntarily negotiated by autonomous parties,<sup>168</sup> and 2) the government promote collective

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<sup>162</sup> See TRYING TO MAKE LAW MATTER, *supra* note 30, at 155.

<sup>163</sup> See ILO Convention No. 98, *supra* note 112, art.2.

<sup>164</sup> See 29 U.S.C. § 152(a) (1988); see also NLRB v. Pa. Greyhound Lines, 303 U.S. 261 (1938) (finding an unfair labor practice based on evidence that company representatives were active in promoting the plan, and urging employees to join in the preparation of the details of organization, including the bylaws).

<sup>165</sup> See Deak, *supra* note 50, at 340.

<sup>166</sup> "Some of the ex-official unions, perhaps the majority, have not moved at all from their position of colluding with management and distributing benefits. They do not fight for the workers directly. Instead of striking for wage increases, they strike for increased subsidies for the enterprise." *Id.*

<sup>167</sup> See LAMMY BETTEN, INTERNATIONAL LABOUR LAW 69 (1993); INTERNATIONAL LABOUR OFFICE, SUMMARIES OF INTERNATIONAL LABOUR STANDARDS 6 (2d ed., 1990) [hereinafter INTERNATIONAL LABOUR STANDARDS].

<sup>168</sup> Article 2 seeks to protect workers organizations and employers from interference in defining and pursuing their interests, and views collective bargaining as the preferred method of resolving disputes between employers and employees. See INTERNATIONAL LABOUR STANDARDS, *supra* note 167, at 6; see also N. VALTICOS, INTERNATIONAL LABOUR LAW 87 ("Another aim of the convention is protection, primarily of trade

bargaining by legislation and enforcement mechanisms that facilitate bargaining and adequate dispute resolution.<sup>169</sup> This requirement has been interpreted to mean that the government should not establish mandatory and discretionary items of bargaining or legislate terms of employment.<sup>170</sup> The United States clearly violates this requirement in that sections 8(d) & 8(a)(5) require bargaining on wages, hours and other terms and conditions

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unions, against acts of interference, although the matter is mentioned in respect to both workers' and employers' organizations."). For a discussion of the implied right of free collective bargaining, see BETTEN, *supra* note 167, at 95-105.

<sup>169</sup> See ILO Convention No. 98, *supra* note 112, art. 4; see also POTTER, *supra* note 112, at 56-57; INTERNATIONAL LABOUR STANDARDS, *supra* note 167, at 6 ("Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the development and utilisation of voluntary collective bargaining to regulate terms and conditions of employment."); VELTICOS, *supra* note 168, at 87 (stating that "Art. 4 requires the government to encourage and promote conditions for successful voluntary negotiation between employers and workers").

<sup>170</sup> See POTTER, *supra* note 112, at 58-59. When interpreting ILO Convention No. 98, the ILO Committee on Freedom of Association case law has established principles that preclude governmental ratification of collective bargaining agreements based on certain terms and conditions approved by the government. See A. Pankert, *Freedom of Association*, in *COMPARATIVE LABOR LAW AND INDUSTRIAL RELATIONS* 146, 158 (R. Blanpain ed., 1982).

The most important principle adopted in this respect by the Committee of Freedom of Association can be summarised as follows: right to bargain collectively is a fundamental trade union rights;—legislation excluding certain matters from the field of collective bargaining or providing that collective agreements may not grant more favourable terms and conditions than those set out in the law are contrary to Convention No. 98;—legislation according to which collective agreements must be approved by the public authorities before becoming effective are contrary to Convention No. 98; governments may feel in certain cases that the economic situation of the country calls for stabilisation measures during the application of which it would not be possible for wage rates to be fixed freely by means of collective bargaining. Such a restriction, however, should be imposed as an exceptional measure and to the extent necessary, without exceeding a reasonable period, and it should be accompanied by adequate safeguards to protect workers' living standards.

*Id.* at 158. When interpreting ALO Convention No. 98, the ILO Committee on Freedom of Association case law consistently prohibits governmental interference in trade union organization activities such as: "inspection of trade union books and records, cancellation of legal personality by administrative means, monitoring union meetings, obliging unions to apply political and economic directives, and *intervening in collective bargaining and industrial action*." BETTEN, *supra* note 167, at 94 (emphasis added). The Committee of experts has declared that freedom in negotiating wages and working conditions is a fundamental part of free association. *Id.* at 97.



of employment.<sup>171</sup>

Russia may also violate this standard because the content of the collective contract is defined by statute.<sup>172</sup> The statute prohibits negotiation of benefits lower than those mandated by law,<sup>173</sup> and may also limit the subjects of bargaining.<sup>174</sup> Thus, even though many collective bargaining issues are still determined by administrative ministries, they establish a floor and may not interfere with bargaining in practice.<sup>175</sup> Some familiar statutory

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<sup>171</sup> See 29 U.S.C. § 158 (1988); see also *Fiberboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203 (1964) (setting out considerations for determining whether certain items were mandatory bargaining items under the act).

<sup>172</sup> See RF Collective Contracts and Agreements Act, RF Act No. 2490, Item 1, ch. III, art. 13, available in 1992 WL 472442 [hereinafter RF CBA Act].

<sup>173</sup> Chapter I, Article 2 of the RF CBA Act states that “[t]he terms of collective contracts or agreements worsening employees’ conditions, as compared with legislation, shall be invalid. Labour contracts may not include provisions worsening employees’ condition, as compared with legislation, collective contracts and agreements.” RF CBA Act, *supra* note 172, ch. I, art. 2.

<sup>174</sup> Chapter III, Article 13 states that a “[c]ollective contract may include mutual obligations by employer and employees on the following matters: form, system and amount of pay, money rewards, grants, compensations, additional payments, mechanism for regulating remuneration depending on price rises, inflation, and attainment of targets written into collective contract . . .” *Id.* This may violate the ILO. If this list is read as an exclusive exposition of the areas of bargaining, then the Act may violate the ILO because the government is prescribing the acceptable limits of bargaining in advance and conditioning the conclusiveness of the agreement on these conditions—no matter how broad ranging. *Cf.* Pankert, *supra* note 170, at 158 (“legislation excluding certain matters from the field of collective bargaining . . . are contrary to Convention No. 98”).

While Article 13 provides that “[t]he content and structure of the collective contract shall be determined by the parties,” the RF CBA Act also requires that contracts comply with all legislation, including the list of terms and conditions parties may bargain over. *Id.* Article 4 under Chapter I sets out factors to determine the conclusiveness of collective bargaining agreements, including: “compliance with legislative norms; empowerment of the parties’ representatives; equality of the parties; free choice and discussion of issues constituting the subject-matter of collective contracts and agreements; voluntary assumption of obligations; guarantees of assumed obligations; systematic control and unavoidable liability . . .” *Id.* Thus, it seems that parties are free to determine the subject-matter of their agreements within the parameters set out in the Act, including the list of subjects they may consider.

<sup>175</sup> Deak states that the possible subjects of bargaining are within the ILO Convention’s requirements. “The scope of bargaining is well within the internationally designated area. The collective bargaining agreements should cover wages and the general compensation package, work-time and leave-time, health and safety protection, and a variety of other work condition issues.” Deak, *supra* note 50, at 337-38. Yet, she

items permitted in a collective bargaining agreement include: wages, hours, vacation, medical and social insurance, workplace health and safety, and no-strike provisions.<sup>176</sup> Other statutory bargaining items reveal the changing nature of the Russian economy: 1) "employment, retraining, and terms of redundancy," and 2) "measures to safeguard both the interests of employees in the event of privatization, and the interests of employees with regard to departmental housing."<sup>177</sup> Other provisions regulate the validity of the collective bargaining agreement during reorganization and changes in ownership.<sup>178</sup> Thus, to a certain

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also recognizes that

[m]any of the collective bargaining issues remain in the hands of the administrative ministries. Significantly, the law, by implication, allows the negotiation of benefits greater than those allowed by law. The statute prohibits the negotiation of benefits below those mandated by law, implying that collective bargaining contracts can only cover benefits greater than those the law provides.

*Id.* She concludes that "the ministry regulation might not substantially interfere with collective bargaining negotiations." *Id.*

Deak's interpretation may be contrary to the ILO. However, under interpretations of the ILO Convention No. 98, such governmental interference with the subjects of bargaining is contrary to its purposes. The case law developed by the ILO Committee on Freedom of Association clearly indicates that the government may not interfere in collective bargaining by "intervening in collective bargaining and industrial action." BETTEN, *supra* note 167, at 94-95. When provisions of collective bargaining agreements are contrary to government policies, governments should "try to persuade the parties to collective bargaining to have regard voluntarily in their negotiations to major economic and social policy considerations." *Id.* at 97. Any control retained by the ministries over issues considered in collective bargaining would thus violate ILO interpretations of the freedom of association.

<sup>176</sup> See RF CBA Act, *supra* note 172, art. 13.

<sup>177</sup> *Id.*

<sup>178</sup> See *id.* art. 14.

Collective contract shall remain valid in the event of changes in the composition, structure, or name of the managerial organ of the enterprise, or rescission of labour contract with the head of the enterprise. At reorganization of enterprise, collective contract shall remain valid throughout the reorganization period, and may then be reviewed on the initiative of either party. At change of owner of enterprise assets, collective contract shall remain valid for three months. In that period, the parties shall be entitled to start negotiations with a view to concluding a new collective contract or retaining, amending, or expanding the existing contract.

*Id.*

extent, workers should be able to bargain with enterprise managers over how privatization proceeds.

#### *F. Worker Right to Strike*

The final and most fundamental right workers possess is the right to strike. Refusing to work, an illegal act under the Soviet regime,<sup>179</sup> forms the basis of the workers' collective bargaining power. The ILO recognizes the right to strike as the fundamental essence of labor organizational autonomy and freedom of association.<sup>180</sup> The right to strike is guaranteed by the new Russian Constitution.<sup>181</sup> The Collective Labour Disputes Act sets out procedures for resolving labor disputes and for the declaration and execution of peaceful strikes when conciliation procedures fail.<sup>182</sup>

One of the most notable sections of this Act is article 17 which defines illegal strikes.<sup>183</sup> A strike is declared illegal in four instances: 1) when unions fail to follow conciliation and notice

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<sup>179</sup> See Criminal Code of the RSFSR, art. 209, in THE SOVIET CODES OF LAW 133; Criminal Code of the RSFSR, art. 148, in THE SOVIET CODES OF LAW 113; see also *supra* notes 68-70 and accompanying text (discussing the Soviet prohibition against organized strikes).

<sup>180</sup> See generally ILO Convention No. 98, *supra* note 112, art 4; ILO Convention No: 87, *supra* note 112, art. 3. While Conventions No. 87 and No. 98 do not explicitly recognize the right to strike or collectively bargain, these rights have been found implicit in these conventions. See Deak, *supra* note 50, at 329 n.54; see also VALTICOS, *supra* note 168, at 85-86; Pankert, *supra* note 170, at 159 (noting that while the conventions do not explicitly state a right to strike, "[t]he Committee on Freedom of Association has recognised this right with certain restrictions"). The basic rules governing strikes are that 1) a general prohibition on strikes is contrary to Convention No. 87; 2) prohibitions on strikes because they are "prejudicial to public order, nation interest or economic development are not admissible, because they are drafted in too general a way"; 3) "prohibition on purely political strikes is admissible"; 4) restrictions requiring conciliation procedures, safety measures and on public employees in essential services also are tolerated. *Id.* at 159. But see BETTEN, *supra* note 167, at 105-23 (noting that the right to strike implicit in the ILO Conventions has recently been challenged by employer groups).

<sup>181</sup> See KONST. RF [CONSTITUTION OF THE RUSSIAN SOVIET FEDERATED SOCIALIST REPUBLIC] art. 37, translated in THE CONSTITUTION OF THE RUSSIAN FEDERATION (Finnish Lawyers' Publ. 1994). This right is developed further in the recent act on resolution of collective labor disputes. See RF Collective Labour Disputes Act, *supra* note 108.

<sup>182</sup> See RF Collective Labour Dispute Act, *supra* note 108.

<sup>183</sup> See *id.* art. 17.

procedures; 2) when strikes pose "a real threat to the fundamentals of the constitutional system;" 3) when strikes of armed forces, law-enforcement, or security service "pose a threat" to State security; and 4) when required by "state-of-emergency laws."<sup>184</sup> When workers strike illegally, they may be "subjected to disciplinary penalty for violation of labour discipline," and the unions must pay damages to the employer "caused by the illegal strike."<sup>185</sup> Otherwise, legal strikers are protected from being fired, and are protected from State and management coercion.<sup>186</sup>

As defined in the statute, the right to strike in Russia is broader than in the United States where workers may be temporarily or permanently replaced while on strike, and the purposes and means of striking are heavily regulated.<sup>187</sup>

#### IV. Conclusion

Given the Russians' very liberal and open labor law and Constitution, the question arises whether this law will have any meaningful effect in the Russian context of economic uncertainty and political turmoil. In this regard, the final part of the Comment will touch on some of the major obstacles facing the new labor law. Two general areas of concern immediately present themselves: 1) the schism between the chaos of the Russian economy and idealized labor legislation, and 2) the inadequacy of

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<sup>184</sup> *Id.* art. 17(1)-(4).

<sup>185</sup> *Id.* arts. 22(1), 22(2).

<sup>186</sup> *See id.* art 18. It is also interesting to note that employers may not lock out employees in anticipation of a strike and hire temporary replacement workers as they can in the United States. *Compare id.* art. 19 (prohibiting lockouts in Russia) with *NLRB v. Brown*, 380 U.S. 278 (1965) (allowing lockouts in the United States).

<sup>187</sup> *See Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 295 (1956) (stating, in dictum, that it has never been successfully challenged that workers striking to protest an unfair labor practice may sue to get reinstated while workers striking for economic benefits may be permanently replaced by substitute workers). "Thus, if an employer discharges workers because they engage in a sit-down strike for higher wages, the Board cannot order him to reinstate the strikers." *Id.* The legality of a strike, boycott, or picket depends on such factors as the location, objectives, and means of the strike, as well as who is being boycotted (employers or third parties). *See Allan E. Korpela, Annotation, Validity and Construction of § 303 of Labor Management Relations Act (29 U.S.C.A. § 187) Giving Right of Action Against Union for Inducing Strikes and Secondary Boycotts*, 7 A.L.R. FED. 767 (1971).

the legal infrastructure relating to the judiciary's lack of independence, effective remedies, and experience in balancing constitutional rights of property, free speech, and labor organizing.

The Russian economy is in a deep depression and is further destabilized by the prevalence of organized crime.<sup>188</sup> As production and investment drop, debt between enterprises increases; thus, trading occurs mainly on the basis of advance payments.<sup>189</sup> Cuts in production have led to mass discharges as "redundancies" are being removed from enterprise organization and management.<sup>190</sup> As economic conditions worsen, "the divergent interests of different groups of employees," such as service employees, industrial workers, managers, and laborers, become more apparent.<sup>191</sup> Meanwhile, trade unions operate more like "consumer cooperatives," colluding with management in a way that ignores the differentiation occurring in the labor market.<sup>192</sup> Just as the conditions for workers get increasingly difficult, just as the need for trade union protection is the greatest, and just as the labor law is transformed to facilitate worker collective action, it is highly unlikely that trade unions will represent the interests of workers.<sup>193</sup>

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<sup>188</sup> See Gilder D. Jackson, *Doing Business in Russia: A Practical Guide for American Investors*, 3 J. INT'L L. & PRAC. 111, 151 (1994) ("In the case of doing business in Russia, the risks appear formidable, especially in light of the ever changing business and legal environments, coupled with corruption and growing criminal enterprises.").

<sup>189</sup> See Gerchikov, *supra* note 8, at 142-43.

<sup>190</sup> See *id.* at 149; see also Irina Kozina & Vadim Borisov, *The Changing Status of Workers in the Enterprise*, in CONFLICT AND CHANGE IN THE RUSSIAN INDUSTRIAL ENTERPRISE 136, 168 (1996) (stating that the most important factor in changing the status of workers is "a sharp decrease in volumes of production as a result of reduced state orders, confusion in the supply system, price increases and the non-payment crisis").

<sup>191</sup> Gerchikov, *supra* note 8, at 164.

<sup>192</sup> See *id.* "We think it is important to stress that the trade unions do not recognize this differentiation and consider all employees to be a unified community without contradictions." *Id.* The old Soviet trade unions have survived and "retain their main feature: they are still effectively departments of the administration for social issues." Ilyin, *supra* note 60, at 65, 105.

<sup>193</sup> See Gerchikov, *supra* note 8, at 168. "There is little evidence to suggest that in the near future the trade unions will transform their role and become a main force in initiating . . . bargaining relations." *Id.* It is more likely that they will "support management as a strategy for survival." *Id.* at 167.

By stressing employee and management ownership of State enterprises, the method of privatization has probably contributed to the difficulty in establishing Western styled labor relations.<sup>194</sup> The labor relations legislation in the United States and under ILO Conventions is premised on the inherent conflict between workers and capital. In the United States, for example, when employees gain a controlling interest in a company through an employee stock ownership plan (ESOP), they lose their protection under the NLRA.<sup>195</sup> The Russia Federation's voucher system, which gives ownership interests to workers, may have therefore undermined the ability of workers and the trade unions to see the value of collective organization and bargaining.<sup>196</sup> This means that the labor legislation modeled on international standards does not fit the emerging economic relationship between labor and management in Russia.

The incongruence between Western labor legislation and the Russian privatization can be explained historically. In the West, trade unions arose in response to the development of the economy that pitted labor against capital.<sup>197</sup> The principal function of trade unions was to protect workers from market pressures depressing wages and creating unsafe working conditions.<sup>198</sup> The history of unions in the Russian Federation is completely different: unions "were created from above as an organic part of the system of management of society."<sup>199</sup> It follows that laws that have evolved to regulate the relationship between capital and workers in the West do not transplant easily to a different economic reality. Until economic relations have developed to the point where workers see clearly their interests separate from capital, the new labor laws will most likely go unused.

In addition to economic progress, social attitudes and

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<sup>194</sup> See *supra* notes 98-101 and accompanying text.

<sup>195</sup> See *Great Lakes Pilots, Inc.*, 311 N.L.R.B. 131, 131-32 (May 21, 1993).

<sup>196</sup> See Ilyin, *supra* note 60, at 106. "Thus the common interest of the owners of the enterprise and of its workers, some of whom own a miserly number of shares, prevails over their opposition." *Id.*

<sup>197</sup> See *id.* at 65-66.

<sup>198</sup> See *id.*

<sup>199</sup> *Id.* at 67; see *supra* notes 47-55 and accompanying text.

expectations must accompany the structural changes in the economy. Even though workers' rights were undervalued under the Soviet system, the State ideology influenced the self-identification of workers and elevated the status of work in Soviet society.<sup>200</sup> Just as the Marxist-Leninist ideologies legitimized the status quo, and were "apparent in the real, daily life of the industrial enterprise worker," the "status of the worker is changing, as a new ideology is created."<sup>201</sup> The Russian Federation is in a unique position to develop a free market centered on employee ownership and worker democratic control. A new model of an economy built on employee owned enterprises might resemble what Marx and Lenin had in mind before Stalin intervened. A state where workers hold controlling interest in enterprises and where management is accountable to employees as stockholders would offer a different approach to the free market. This approach would minimize the need for laws regulating labor conflict and would render the ILO model ineffectual. Therefore the economy could develop along a route guided by employee ownership and the new labor laws would be inapplicable, or the economy could develop into a Western model premised on labor conflict, and the new labor laws would apply sometime in the distant future. Regardless, the recent labor laws do not match the current economic reality in Russia.

Before there is clear economic development, stable political leadership is needed to chart the course to the future. Until there is political resolve to empower management and workers and to accept the benefits and detriments of capitalism, the passage of liberal labor legislation will be ineffective.<sup>202</sup> Even if political and

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<sup>200</sup> See Kozina & Borisov, *supra* note 190, at 151-52. "The worker really believed himself to be an owner." *Id.* at 152.

<sup>201</sup> *Id.*

<sup>202</sup> Why has Russia been unable to build the legal and financial infrastructure of a market economy? Current political instability shows that the population is deeply divided on the desirable features of a future economy. Moreover, Russia needs an immense structural adjustment if it wants to find a new role in the world economy. At the time of the collapse of the former Soviet Union, economic structures were deeply distorted. Moscow's ministries had deliberately fragmented production processes to assure their key role in coordination. Implicit taxes and subsidies confronted decision-makers with the wrong costs and prices. Thus, when Russia opened to the world market, most

economic stability is established, meaningful labor relations governed by law will not become a reality until the "rule of law" is respected in Russia.

To establish the rule of law some basic changes must occur, including the effective separation of the judiciary from political parties and the executive branch. A judiciary separate from political parties and branches of government is required to make law something more than a coercive instrument. A functional market requires a legal system that is coercive enough to regulate inappropriate behavior and free enough to allow economic actors to follow their self interest. Law in a market society serves as a legitimator, a regulator, and a facilitator.<sup>203</sup> Law is a legitimating force by preserving the political and economic system, maintaining public order, and regulating the transfer of political power.<sup>204</sup> Law serves the public interest as a regulator when it corrects for "market failures" and sets minimum standards for wages, health and safety, protecting those with less bargaining power.<sup>205</sup> The market is facilitated by the law when law protects freedom of contract, prevents fraud and anti-competitive behavior, and provides an accessible and workable dispute resolution mechanism.<sup>206</sup>

To serve its function in the market, law must effectively resolve disputes and enforce remedies for those who have legal interests that have been violated. The courts must be willing to enforce effective remedies to labor violations. In the United States, most unfair labor practices are remedied by injunctions to cease unfair practices, to exclude unions from private property, or to protect free speech. Because Russia is basically a civil law country, their labor law lacks many equitable remedies common in the United States, such as injunctions to bargain or orders to cease and desist an unfair labor practice. When an employer refuses to

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workers were in the wrong places doing the wrong things. These workers [are] still in the same position today.

Judith Thornton, *Economic Reform and Economic Reality*, 28 J. MARSHALL L. REV. 847, 861 (1995).

<sup>203</sup> See TRYING TO MAKE LAW MATTER, *supra* note 30, at 13.

<sup>204</sup> See *id.* at 12.

<sup>205</sup> See *id.*

<sup>206</sup> See *id.* at 12-13.



bargain with the union, the employer is subject to a fine rather than an injunction order to bargain.<sup>207</sup> Limiting remedies to money damages is often ineffective in the labor context where the law must be able to prevent acts before they result in economic damage.

Furthermore, the enforcement of effective remedies also requires the "existence of an independent legal profession" who can act as "facilitators" and "gatekeepers" so that "access to the legal system can be effectively denied to those . . . whose legal claims are considered weak."<sup>208</sup> Law that facilitates market activity and checks government action helps legitimate the State as whole.

Moreover, the development of the "rule of law" means that particular ideological positions must be subservient to the Constitution. Oliver Wendell Holmes described the problem thus:

The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statistics . . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel, and even shocking ought not to conclude our judgement upon the question whether statutes embodying them conflict with the Constitution of the United States.<sup>209</sup>

Therefore, Russia must begin to develop a constitutional culture which looks to "higher principles" to justify the legitimacy of laws and official acts. Accompanying the constitutional culture, there must also be a market culture. Replacing the hand of the State with the "invisible hand" of the market will require the development of a whole set of social and legal expectations that govern the market place.

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<sup>207</sup> See RF CBA Act, *supra* note 172, art. 25. Employers who evade bargaining on matters listed in the act or failing to meet deadlines "shall be liable to fines in the amount of up to ten times the minimum pay for each day after the expiration of the specified period, to be imposed in judicial procedure." *Id.* The fine for failure to comply with a collective contract is one hundred times the minimum pay. See *id.* art. 26.

<sup>208</sup> *Id.* at 16.

<sup>209</sup> *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).

Hence, due to the existing state of the legal infrastructure and the chaotic economic situation, the new labor legislation appears idealistic at best. Until a consistent model of labor relations emerges from a stable economic structure, the labor law is likely to be ineffective and even detrimental to development.<sup>210</sup>

C. SCOTT HOLMES

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<sup>210</sup> For additional information on this subject, see Michelle Lynn McClure, *An Analysis of the New Russian Constitution*, 4 J. INT'L L. & PRAC. 601 (1995); see also ANATOLY M. KHAZANOV, AFTER THE USSR: ETHNICITY, NATIONALISM, AND POLITICS IN THE COMMONWEALTH OF INDEPENDENT STATES (1995); Veroniak Kabalina, *Privitisation and Restructuring of Enterprises: Under 'Insider' or 'Outsider' Control?*, in CONFLICT AND CHANGE IN THE RUSSIAN INDUSTRIAL ENTERPRISE 241 (1996); Irina Tartakovskaya, *The Trade Union 'Solidarity'—A Case Study*, in CONFLICT AND CHANGE IN THE RUSSIAN INDUSTRIAL ENTERPRISE 107 (1996); John Thirkell et al., *Models of Labour Relations: Trends and Prospects*, in LABOR RELATIONS & POLITICAL CHANGE IN EASTERN EUROPE: A COMPARATIVE PERSPECTIVE 169 (John Thirkell et al. eds., 1995); Antti Korkeakiv, *The Reach of Rights in the New Russian Constitution*, 3 CARDOZO J. INT'L & COMP. L. 229 (1995); Ninel S. Krylova, *The New Constitution of Russia: Main Principles and Features*, 27 AKRON L. REV. 397 (1994); Daniel McGrory, *Civilizing the Russian Underground Economy: Requirements and Prospects*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 65 (1995); Herman Schwartz, *Do Economic and Social Rights Belong in a Constitution?*, 10 AM. U.J. INT'L L. & POL'Y 1233 (1995).