TRADE UNIONS' LAW EVOLUTION IN POST-SOVIET COUNTRIES: THE EXPERIENCES OF LITHUANIA AND RUSSIA

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During last eighteen years, Lithuania and Russia have been independent states. Nevertheless, their trade union movement has common grounds going back to Soviet legislation. Modern labor law has changed significantly both in Russia and Lithuania, especially in issues of trade unions' status and collective bargaining regulation. The path of the parallel development of trade union legislation in these two countries is interesting task from the standpoint of finding common trends and problems in the transition of trade union status from socialist to market economies.

Taking into account rather strained political relations between the Baltic states and Russia after the dissolution of the Soviet Union, it should have been expected that both countries had practically no influence upon each other's legal systems, and their initially common legislation has been developing absolutely independently. Nevertheless, our analysis shows that the reality is not exactly like one could reasonably expect.

I. COMMON START

While market economy trade unions are mostly concerned with workers' *representation*, Soviet unions emphasized "*defense* of workers' rights." As Soviet reality has shown, this was quite far from being the same thing.

Soviet trade unions enjoyed a rather wide spectrum of legal rights.[1] Besides this, they were quite powerful organizations. Although they had

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1. *See*, *e.g.*, Sobranie Postanovlenii Soveta Ministrov (Pravitel'stva) RSFSR [SPP RSFSR] [Collection of RSFSR Government Regulations] Trudovi Kodeka [TK] [Labour Code] art. 151-167 (1922) (Russ.). (which was in force until 1971). This was quoted by I. KISELYOV, YA. TRUDOVOYE PRAVO ROSSII. ISTORIKO-PRAVOVOE ISSLEDOVANIE. [LABOUR LAW OF RUSSIA. HISTORICAL AND LEGAL RESEARCH] (2001).

been formally independent from government authorities, they were in fact performing a large number of functions traditionally attributed to the state.[2] Trade unions were actually inseparable both from the state and the employers, because all enterprises (i.e., employers) belonged to the "Soviet people."

Two good examples of the "merger" of state and trade unions during the Soviet regime can be presented. First, one of the instances of the resolution of individual labor disputes in the USSR was a plant local trade union committee. This meant that the workers' representative was simultaneously a kind of judge in disputes with employer.[3] Second, the first collective labor dispute in the mining sector in the Kuzbass region was settled by signing an agreement between the miners' strike committee as one party, and the joint commission of local Communist party authority, the employer, and the representative of Soviet trade union Committee as another party.[4]

Therefore, it is no wonder that during the post-war Soviet Union existence, the USSR was criticized by the ILO for breaches of freedom of association principles. As Bob Hepple considers, the dispute as to how tripartism (based on the idea of independent employers' and workers' representatives) could operate in a country where there is no distinction between the state, the government, and employers has never been satisfactorily resolved.[5]

Nevertheless, this manifesting non-conformity of Soviet trade unions to the principles of freedom of association formulated by the capitalist countries in accordance with their vision of human rights standards did not necessarily mean that Soviet trade unions were a worse tool for the workers' protection than their Western analogs, or that Soviet workers were defenseless against the employer compared with the employees of capitalist countries. It would be more appropriate to say that they were principally different bodies, based on an absolutely different philosophy.

First of all, the mere fact that trade unions were not independent from the state did not mean that workers' interests were not protected. Besides the trade unions' very wide range of powers in the 1970s, a new method of

2. The trade unions' performance of activities of state character was not denied by the theory of Soviet labor law. According to it "the state functions accorded to trade unions retain their state character but being combined with their trade union form of functions." V.I. SMOLYARCHUK, PRAVA PROFSOYUZOV V REGULIROVANII TRUDOVYH OTNOSHENIY RABOCHIH I SLUJASHIH. [RIGHTS OF TRADE UNIONS IN REGULATION OF LABOUR RELATIONS OF WORKERS AND EMPLOYEES] 19 (1973).

3. *See*, *e.g.*, SOVETSKOYE TRUDOVOYE PRAVO [SOVIET LABOR LAW] 521–24 (N.G. Alexandrov ed., 1972).

4. Protocol on agreed measures between the regional strike committee and commission of CK KPSS, Council of Ministers of the USSR and VCSPS of July 19, 1989. *See* L.N. LOPATIN, ISTORIYA RABOCHEGO DVIJENIYA KUZBASSA [THE HISTORY OF KUZBASS LABOUR MOVEMENT] 66 (1995).

5. BOB HEPPLE, LABOUR LAWS AND GLOBAL TRADE 34 (2005).

employee rights protection was established. In 1977, a new Soviet Union Constitution was adopted. It introduced a new subject of law called "a labor collective." Labor collectives have achieved many rights in different fields not limited to labor relations. The constitutional status of labor collectives over the following few years was just a declarative one, but in 1983 an Act "On labour collectives and the promotion of their role in the enterprise management" was adopted.[6] It established many rights for labor collectives. In fact, this new subject of law started playing a significant role in the enterprise management. The majority of the hundred or so rights of labor collectives were of non-binding character, but some of them (such as employer acceptance of the disciplinary statute upon the approval of the labor collective and some others) were binding upon the employer. Nevertheless, the law was criticized for its lack of effectiveness and for the consultation character of labor collective rights. In 1988, a new Chapter of the Code of Laws on Labour was adopted, giving the obligatory effect to many decisions of the labor collective. Some of the rights seem quite strange in the modern market economy reality: for example, all managers were elected by the labor collectives. A permanent body—a "council of labor collective"—was established. All decisions of these councils were obligatory for management. In cases of a contradiction between management and council's opinion, the issue had to be resolved in a meeting or conference of the labor collective. Such a system, of two parallel managing structures, undermined the possibility for management of the enterprises. It also created a competition between councils and trade unions. Therefore this system was not welcomed by managers nor by trade unionists, and has therefore been abandoned.

More fundamentally, workers of the Soviet Union were in an absolutely antithetical position to their Western colleagues. Due to the existence of the Soviet system as it was, Soviet employees were receiving lower wages, they were not enjoying the right to strike, and were not entitled to certain other trade union rights traditional for Western workers. At the same time, they didn't face traditional Western workers' problems. For example, there was no problem of job insecurity: the Soviet Constitution guaranteed the right to work for everyone and this guarantee was a practical reality. This undermined the economic power of the state dramatically because the enterprises were mainly concerned with maintaining the existing level of employment rather than economic effectiveness. It was, however, quite a relaxing situation for workers who knew that whatever happened, they were not at risk of losing their jobs. Accordingly, the psychological climate at the workplace was much more

6. Vedomosti Verhovnogo Soveta [VVS SSSR] [Bulletin of the USSR Supreme Council] 1983, No. 25, art. 382.

comfortable, and there was almost no competition between employees, except for high ranking officials. Most of the employees were quite secure about having a stable future for the rest of their lives.[7] That is the reason why A. Zinovyev, a well-known Russian philosopher and dissident, after many years of living in the West wrote in 1993 that Soviet workers hadn't understood yet that they had lost more than they had gained after the Soviet system collapse.[8] Although Soviet trade unions were not independent from the state and performed functions[9] incompatible with freedom of association principles, their "defensive" function in respect of workers, as opposed to "representation" function of market economy countries, was a matter of reality.

The moment of "departure" for the two separate legal systems of Russia and Lithuania was a period between March 11, 1990, when the reinstatement of independence of Lithuania was proclaimed,[10] June 12, 1990, when the Declaration of sovereignty of RSFSR (Russian Soviet Federal Socialist Republic)[11] was enacted, and December 8, 1991, when the Soviet Union officially dissolved after signing the so-called Belavezha Accords.[12]

II. THE STRUCTURE OF THE LABOR LAW SOURCES' SYSTEM

Up until this period, the system of USSR labor was based on the Constitution of 1977,[13] the Bases of legislation on labor of the USSR of 1970,[14] republican Codes of laws on labor that came into force in 1972[15]

7. Probably because of this psychology, when the Soviet economy finally collapsed in the beginning of 1990s, many workers hadn't been quitting their jobs even in the event where their employer hadn't been paying their wages for several months. They were afraid to go "nowhere" and were hoping that situation would get back to some kind of stability.

8. A.A. ZINOVIYEV, ZAPAD: FENOMEN ZAPADNIZMA [WEST: THE PHENOMENON OF WESTERNISM] 69 (1995).

9. *See infra* note 17.

10. Act of Supreme Council of Republic of Lithuania "On the Re-establishment of the State of Lithuania," Mar. , 11, 1990, Valstybes zinios, 1990, No. 9-222.

11. Vedomosti S"ezda Narodnykh Deputatov RSFSR I Verkhovnogo Soveta RSFSR [Bulletin of the Congress of the People's Deputies of the Russian Soviet Federal Socialist Republic and Supreme Council of the RSFSR] Vedomosti SND and VS RF, 1990, No. 2, art. 22.

12. Treaty in Establishment of Commonwealth of Independent States, Dec. 8, 1991 Vedomosti S"ezda Narodnykh Deputatov RSFSR I Verkhovnogo Soveta RSFSR [Bulletin of the Congress of the People's Deputies of the Russian Soviet Federal Socialist Republic and Supreme Council of the RSFSR] ND and VS RF, 1991, No. 51, art. 1798.

13. Vedomosti Verhovnogo Soveta SSSR [VVS SSSR] [Bulletin of the USSR Supreme Council] 1977, No. 41, art. 617.

14. Vedomosti Verhovnogo Soveta SSSR [VVS SSSR] [Bulletin of the USSR Supreme Council] 1970, No. 29, art. 265.

15. Vedomosti Verhovnogo Soveta SSSR [VVS SSSR] [Bulletin of the USSR Supreme Council] 1971, No. 50, art. 1007; Valstybes zinios: 1972, No. 18-137.

according to common model introduced by the Bases of legislation in 1970, and various governmental and ministerial resolutions, orders, and decrees.

The Soviet Union ratified both fundamental ILO Conventions on freedom of association—Nos. 87 and 98[16]—but, as has already been noted, it was repeatedly criticized by the Committee on Freedom of Association (CFA) and the Committee of Experts on Application of Conventions and Recommendations of the ILO (CEACR) for its non-conformity to the principles set up in the Conventions. The non-conformity was found in the trade unions' monopoly imposed by law; excessive functions of unions, such as, the function, stipulated by law, where "the trade unions shall educate workers and employees . . . in order to strengthen their ideological convictions";[17] and other features of socialist legislation on trade unions.

Collective agreements (called "collective accords") could be concluded at the enterprise level only. The function of collective bargaining was therefore of a quite local nature. Collective accords were mainly declarative and were adding rather minor benefits to the workers in the limits provided by the legislation. The parties to the collective bargaining process—state employers and quasi-state unions—were not in actual opposition to each other. Trade union organizations were a kind of advocate for workers, but state interests were the priority.

The shifts in the structure of sources of labor law were very much alike in the two countries. Both adopted new Constitutions (Russia in 1993 and Lithuania in 1992).[18] These Constitutions both recognized freedom of association and the right to strike, with reference that this right may be legalized in a manner prescribed by separate legislation. In both Constitutions, the role of the international instruments increased, but while Russia, as a successor of Soviet Union, automatically adopted its obligations under UN and ILO Treaties and Conventions, Lithuania had to ratify them. Both countries adopted new Labour Codes that came into force in 2002, the Lithuanian half a year later than the Russian.[19] Both Codes

16. ILO Convention on Freedom of Association and Protection of the Right to Organize Convention of 1948, No. 87; ILO Convention on the Right to Organize and Collective Bargaining Convention of 1949, No. 98. Both ILO Conventions were ratified by the Soviet Union in 1956.

17. ILO, Freedom of Association. Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO 105–06, ¶ 506–07 (5th (revised) ed., Geneva, 2006), *available at* http://www.ilo.org/ilolex/english/23e2006.pdf.

18. 237 ROSSIYSKAYA GAZETA (ROZ. GAZ.) Dec. 25, 1993. English text of the Russian Constitution is *available at* http://www.constitution.ru/en/10003000-01.htm; Valstybes zinios, 1992, No. 33-1014. English text of the Lithuanian Constitution is *available at* http://www3.lrs.lt/home/Konstitucija/Constitution.htm.

19. Labour Code of the Russian Federation 2001 with amendments of Feb. 28, 2008. Sobranie Zakonodatel'stva Rossiiskoi Fedaratsii [SZ RF] [Russian Federation Collection of Legislation] Jan. 7, 2002, No.1. art.3. The initial English text of Russian Labour Code is available in the national labor legislation database of ILO NATLEX *available at* http://www.ilo.org/dyn/natlex/docs/WEBTEXT/60535/65252/E01RUS01.htm; Labour Code of the Republic of Lithuania with amendments of Dec. 20, 2005. Valstybes zinios, 2002, No. 64-2569. *See*

diminished employee rights significantly compared to the old systems. This process was softened in Russia because of trade union pressures and in Lithuania by fact of its membership in the European Union and it therefore being subject to certain EU Directives in labor law.

The most striking fact about the Lithuanian Labour Code is that it is impossible not to notice that collective labor law issues of the Code were drafted under the significant influence of the Russian Code. Certain specific issues are regulated in principally different ways, for example, a right to strike and the prohibition of lockout. The structure, terminology, and philosophy of the two Codes, however, leave no doubt that the Russian Code was used as a model in the process of drafting many of the Lithuanian Labour Code provisions.

A good illustration for such adaptation is the contents of Code chapters concerning the social partnership (Chapter 3 of the Russian Code and Chapter VII of the Lithuanian). The Russian chapter of the Code was created in a rather special manner and it is obvious that its terminology, wording, and structure were created in a quite national and specific way. The chapter on the Russian social partnership starts with two articles (23 and 24) containing the definition of social partnership and a list of social partnership principles. The second article of the corresponding chapter in the Lithuanian Code (40) combines these two issues. The definition is very much the same. The principles of the social partnership may be presented in a comparative table.

the English translation of the Lithuanian Labour Code *available at* http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=287667.

Russian Labour Code (Art. 24)	**Lithuanian Labour Code (Art. 40)**[20]
Equality of the parties.	The same wording, joined into one principle.
Mutual respect and taking into account other parties' interests.	
The parties' interests in the agreement relations.	*No corresponding provision.*
State assistance in the strengthening and development of the social partnership on democratic basis.	*No corresponding provision.*
Observation of labor legislation by the parties and their representatives.	Inviolability of the current legal system.
Due authorization of the parties' representatives.	*No corresponding provision.*
The freedom of choice regarding subjects of discussion concerning the matters of labor.	Free collective bargaining.
The voluntary character of the obligations' assumptions by the parties.	The voluntariness and independence in the assumption of the binding obligations.
The reality of obligations assumed by the parties.	Same wording.
The obligatory fulfillment of collective accords and agreements.	*No corresponding provision.*
Control over the fulfillment of collective agreements and accords.	Mutual control and responsibility.
The responsibility of the parties and their representatives for the culpable non-fulfillment of collective agreements and accords.	
No corresponding provision.	Submission of the objective information.

As may be seen from this table, the principles in the Lithuanian Code do not just repeat Russian provisions; the most vague, declarative, and probably useless ones are omitted and one new important principle is

20. The order of principles has been changed to correspond to Russian Labour Code structure.

added. It seems obvious, though, that the Russian Labour Code was used as a model for the formulation of social partnership principles. Both Labour Codes' chapters further contain articles in the same order (!) concerning the parties, levels, and forms of social partnership. There are further differences, but this comparison allows us to say that the similarities of the two Codes, in many cases, may be explained by the collective labor law provisions adaptation of the Russian Labour Code into the Lithuanian. This fact is very important to explain why certain provisions of the Lithuanian Code, otherwise hardly explainable, do exist (see the explanation below).

The first law defining trade unions as independent representatives of the employees was enacted under the USSR.[21] This act was in force in Russia for a bit longer than five years and didn't come into power in Lithuania, because the country had declared the reinstatement of its independence few months earlier—on March 11, 1990.

The USSR act on trade unions was quite short and of declarative nature. It was the first act in Russia containing provisions about trade unions' independence and the prohibition of discrimination because of trade union membership.[22] Currently, the main acts regulating the status of trade union organizations in Lithuania and Russia are the Act of Lithuania "On Trade Unions" No. I-2018 of November, 21, 1991 (with amendments),[23] and the Lithuanian Trade Unions Act, and Russian Federal Act "On Trade Unions, their Rights and Guarantees of their Activity" No. 10-FZ of January 12, 1996, (with amendments); further—Russian Trade Unions Act.[24] The existence of these two acts, separated from the structure of the Labour Codes, also represent the common legal traditions of the two countries.

In both countries, the collective bargaining systems were widened compared to the Soviet system. Collective agreements now may be concluded in different levels, and the list of levels of collective bargaining contained in Article 42 of the Lithuanian Code and Article 26 of the

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21. Zakon SSSR O professionalnih soyuzah, pravah i garantiyah ih deyatelnosti [USSR Law On Trade Unions, the Rights and Guarantees of their Activities] Dec. 10, 1990, No.1818-1. Vedomosti VS SSSR, Dec. 19, 1990, No. 51, art. 1107.

22. It was the first domestic act containing such provisions since 1956, as it has been already stated, USSR has ratified ILO Conventions Nos. 87 and 98 and these Conventions became part of Soviet national legislation, although only theoretically.

23. With last amendment of 2003. The initial English text of Lithuanian Trade Unions Law is available in the national labor legislation database of ILO NATLEX at http://www.ilo.org/dyn/natlex/docs/WEBTEXT/29913/64853/E91LTU01.htm.

24. Federalniy Zakon O professionalnih Soyuzah, ih pravah i garantiyah deyatelnosti [Federal Act On Trade Unions, their Rights and the Guarantees of their Activity] Jan. 12, 1996, amended June 9, 2005. Sobranie Zakonodatel'stva Rossiskoi Federasii [SZ RF] [Russian Federation Collection of Legislation] Jan. 15, 1996, No. 3, Art. 148. The initial English text of Russian Trade Unions Act is available in the national labor legislation database of ILO NATLEX at http://www.ilo.org/dyn/natlex/docs/WEBTEXT/42900/64988/E96RUS01.htm.

Russian are alike, with due reference to the difference in the territorial scales of the two countries. Even the terms of collective accords were becoming more alike: in the Russian system, the addition of the possibility to conclude the accords on a level higher than the enterprise has resulted in the new term "collective agreement," with respect to such higher level acts only. The same was true in Lithuania until the adoption of the new Labour Code that unified the terminology with respect to all levels of agreements.

This change is connected to the general change of hierarchical relations between local trade unions and trade union organizations of higher levels. The Soviet All-Union Central Council of Trade Unions (VCSPS, discussed below in Section III) was a kind of directorate to all other trade unions in the USSR. After the abandonment of the Soviet system, this structure of relations obviously could not survive. Currently, all trade unions are legally free to join or leave any trade union association. Nevertheless, Russian trade unions affiliated to FNPR are under the significant influence of this trade union federation.

III. SOVIET TRADE UNIONS' PROPERTY RIGHTS AND THEIR IMPACT ON MODERN TRADE UNION MOVEMENT

All trade unions in the USSR were united within a monopoly association[25] called the All-Union Central Council of Trade Unions (VCSPS). Besides the very high level of membership, VCSPS was a kind of governmental institution. A very common form of a Soviet labor law legal norm was a joint decision of the VCSPS and the government regarding certain matters.[26] It is also important to note that VCSPS used to be an owner of a huge property. VCSPS was appointed to manage all social insurance funds in the USSR, and it was the owner of most of recreational facilities in the country, i.e., hotels, sanatoriums, stadiums, tourist bases, etc.

The reformation of the trade union system in two newly independent states has influenced the formation of labor legislation to a considerable extent. The transformation of trade unions in the post-Soviet era was

25. The very fact of this monopoly was a subject of critics by the CFA and CEACR. *See*, *e.g.*, ILO, Freedom of Association, *supra* note 16, at 67 ¶ 319.

26. The examples are: The Instruction on order of granting benefits to persons working in the Far North and regions with the same status as Far North of Sept. 26, 1967, approved by the Resolution of State Committee on labour and wages and VCSPS Board; the Instruction on order of forming, planning expenditure and accounting of finances of Centralized fund of social insurance of collective farmers of Apr. 17, 1970, approved by the Resolutions of Union Council of Collective Farms and VCSPS Board; the Instruction on order of endowment of USSR citizens during conscription to military service and service in the army reserve of Apr. 29, 1968, approved by the Resolution of State Committee on labour and wages and VCSPS Board and many others.

greatly connected with the issue of the Soviet trade unions' property distribution and transfer.

A. Lithuania

After the reinstatement of Lithuania's independence, the issue of taking over the property managed by trade unions, which had functioned during the Soviet times, caused several problems. To this effect, on May 25, 1993, the Seimas of the Republic of Lithuania adopted the Law on the Property of Former State Trade Unions of the Lithuanian SSR, which stipulated the bases and procedures for handing over the property of the former trade unions of the Lithuanian SSR.[27] Article 2 of this law stipulated that the property of former state trade unions of the Lithuanian SSR should be transferred as ownership (1) to the state, in order to satisfy the needs of the Lithuanian people; (2) to the Lithuanian sport society "Zalgiris" and the Special Fund for Support of the Functioning Trade Unions and Those in the Process of Establishment and that, within five years, transfers the property to the trade unions; and, (3) to the former owners under the Law of the Republic of Lithuania "On the Procedure and Conditions of Restoring of Citizens' Rights of Ownership to the Existing Real Estate."[28] On July 20, 2000, the Seimas adopted the Law on the Distribution of Property of Trade Unions.[29] Article 3 of this law established which objects are transferred by right of ownership, to directly indicated entities: the Lithuanian Trade Unions' Centre, the Alliance of Trade Unions of Lithuania, the Labour Federation of Lithuania, and the Workers' Union of Lithuania.

However, such provisions of the law were appealed before courts by owners of property nationalized by the Soviet government in 1940 and later. Having reviewed the cases, the Constitutional Court of the Republic of Lithuania stated that no right could appear on the unlawful grounds. The property nationalized or otherwise unlawfully confiscated by the occupation government did not become state-owned property, it "may be considered as property which is only in fact possessed by the state"[30] (and by the state trade unions).

In 1989, the Workers' Union of Lithuania was established as an alternative to Soviet trade unions. Relations with the VCSPS were

27. Valstybes zinios,1993, Nr. 20-486.
28. Valstybes zinios, 1997, Nr. 65-1558.
29. Valstybes zinios, 2000, Nr. 67-2018.
30. Ruling of Sept. 20, 2003, of the Constitutional Court of the Republic of Lithuania "On the compliance of the legal acts by which questions of the property formerly possessed by trade unions which used to function in Lithuania prior to the restoration of the independent state of Lithuania with the Constitution of the Republic of Lithuania." Valstybes zinios, 2003, Nr. 93-4223.

terminated and some industrial sectors seceded Soviet inter-sectoral alliances. The congress of Lithuanian trade unions took place on April 19–21, 1990. The congress, on the basis of the council of trade unions of the Lithuanian SSR, established the Confederation of Free Trade Unions of Lithuania, which became the successor to the rights of former trade unions. Later, it changed its name to the Lithuanian Trade Union Centre. Dissatisfied with slow reform and its "Soviet" past, some trade union branches and organizations abstained from joining this organization and in February 1992 established one more organization—the Alliance of Trade Unions of Lithuania. In 2002, the Lithuanian Trade Union Centre and the Alliance of Trade Unions of Lithuania merged into the biggest Lithuanian organization—the Lithuanian Trade Union Confederation (LPSK).[31] The Workers' Union of Lithuania changed its name and became the Lithuanian Trade Union "Solidarumas." Fights among trade unions for the former Soviet trade unions' property were extremely detrimental to the movement of Lithuanian trade unions. These fights were provoked by inconsistent decisions by the Seimas and governments concerning the use and redistribution of this property. Various financial business groups also contributed to these processes. Representatives of trade unions took an active role in the restitution processes of the state.

In general, the most important consequence of these processes is that there is no trade union institution in modern Lithuania that represents the overwhelming majority of trade union members. Currently there are three established national trade union centers that cooperate on the basis of the agreement and are members of the Tripartite Council established in 1995. The level of trade union membership in Lithuania is one of the lowest in the European Union, accounting for as few as 14% of all employed workers.[32]

Therefore, it may be stated that such pluralist means of rights succession and new trade union formation has resulted both in a strength and a weakness of the modern trade union movement in Lithuania. The obvious strength is that trade unions since the 1990 have faced an atmosphere of competition with each other and this motivated them to be actually independent from the employers and the state. At the same time, however, this competition, combined with a lack of financial resources, resulted in a weakness: the low level of membership and bargaining coverage.

Besides the fact that trade unions representing only a small number of employees are weak in workplace-level collective bargaining, they could not put significant pressure on the legislature in order to promote labor laws

31. *See* the LPSK Home Page, http://www.lpsk.lt/en.

32. *See* European Industrial Relations Observatory Online (EIRO) data, http://www.eurofound.europa.eu/eiro/2004/12/feature/lt0412102f.htm.

favorable to them and to the employees. Nevertheless, this fact is moderated by Lithuanian membership in the European Union and being subject to a number of EU Directives concerning certain labor law issues, such as transfer of undertakings, information and consultation, collective redundancies, and others.

B. Russia

The situation in Russia was completely different. After the dissolution of the USSR, the VCSPS was transferred into a new organization, which is an official successor of VCSPS—the Federation of Independent Trade Unions of Russia (FNPR). According to an FNPR statement, it unites more than 95% of total union members in Russia or about twenty-eight million employees.[33] Although this percentage seems to be an exaggeration, it is still the overwhelmingly largest trade union organization in Russia. Traditionally, FNPR trade unions were "by default" the majority unions within the enterprises formed in the Soviet era. Obviously, FNPR "inherited" not only the members of VCSPS but, even more importantly, the property, the most valuable of which being real estate worth billions of U.S. dollars. This property is being managed by the FNPR in a very non-transparent way.

FNPR is frequently criticized[34] for being more interested in close relations with state authorities and receiving income from the real estate and other property inherited from the Soviet trade unions' organization than in defending the interests of the employees. These accusations are being supported by the facts that FNPR frequently objects to the industrial action performed by more radical unions.[35] Further, it is true that FNPR actions are aimed at favoritism on behalf of the government. The politics of FNPR over the last decade was very much pro-governmental. While in the early post-Soviet years, FNPR supported the communist opposition, now it is openly committed to the "United Russia" (*Edinaya Rossiya*) political party headed by former Russian President V.V. Putin. The FNPR position is so pro-governmental that it even neglects contact with the other political party, which is also loyal to President but created with a view to promote leftist ideas: "Just Russia" (*Spravedlivaya Rossiya*)—theoretically a perfect ally for the unions.

In 1989, a new trade union federation was formed as an independent alternative to the VCSPS. It was named "Sotsprof" and until now has been

33. *See* the FNPR Home Page, http://www.fnpr.org.ru/1/8/1274.html.

34. *See*, *e.g.*, A. Rybin, *FNPR zagovorit s inostrannim akzentom?* [*Will FNPR start speaking with a foreign accent?*], ROSSIYSKAYA GAZETA, Sept. 24, 2008.

35. Such as big strikes at Ford plant in Vsevolojsk in 2007 and in Russian Railway Company (RJD) in 2008.

in opposition to FNPR. About 455,000 employees are members of Sotsprof.[36] In 1995, Sotsprof, together with some other big unions not affiliated with FNPR, created an All-Russian Confederation of Labour (VKT) joining, according to its data, up to 1,270,000 employees. VKT has its strongest positions in the automobile industry sector. It maintains good relations with the third trade union association in Russia—the Confederation of Labour in Russia (KTR), comprised of about 900,000 members (KTR was also formed in 1995).[37]

To be sure, there were and are conflicts between trade union organizations in modern Russia. Unlike Lithuania, however, where there is no overwhelmingly dominant association, inter-union conflicts in Russia are those between two unequal parties. The level of trade union membership in Russia in general is about 45% of the total number of employees.[38] Although this level is rather high compared to many other countries, this number should not be misunderstood. As has already been said, many of the unions can hardly be considered independent, therefore it is difficult to attribute the collective agreements they sign and the actions that they undertake to actual collective bargaining. Many employees do not trust such trade union organizations (and the trade union movement in general) and maintain their membership on an habitual basis or leave the unions.

FNPR has had a big influence on the process of promotion of the new Labour Code in Russia in 2002. This has resulted in two specific features of this law: first, despite the general trend of flexibilization of labor relations in all transition economies, the Russian Labour Code relinquished fewer labor rights than it could have given up, without the support of strong unions. The second feature of the Code is that its philosophy is based on the protection of majority unions within the enterprise (that, as a rule, is an FNPR-affiliated union) and the possibility to neglect the minority unions. Such Code structure undermines "the quality" of collective bargaining. This will be discussed in more detail later.

Therefore, it may be stated that strengths and weaknesses of the Lithuanian and Russian trade unions systems' transitions are opposite to one another: while Lithuanian unions are independent but weak, Russian unions are rather powerful institutions, but many of them lack independence.

36. According to the Sotsprof data. *See* the Sotsprof Home Page, http://www.sotsprof.ru/info/5_0.htm.

37. According to the KTR data. *See* the KTR Home Page, http://www.ktr.su/ktr/about.

38. This approximate number is a result of our calculation based on the data of trade union membership in main Russian trade union associations and total number of workers in Russia.

IV. TRADE UNIONISTS' PROTECTION LAW

A. Russia

Russian trade unions were not strong enough to stop the general trend of diminishing the guarantees for the employees and trade unionists provided in the old legislation, but they definitely "softened" this process. The example of such influence is the mechanism of the dismissal of trade union officials stipulated in the Labour Code.

Article 374, paragraph 1, of Russian Labour Code states that dismissal of the heads or deputy heads of an establishment's trade union that are not released from their ordinary working duties is possible only with the prior written consent of the representative trade union body (while also taking into account the general procedures on dismissal). The provisions of the article are only applicable to three grounds of dismissal according to the Labour Code.[39] The guarantees previously contained in Article 25 of the Trade Unions Act were much stronger. First of all, they were applicable to any ground of dismissal; second, they concerned any worker elected in the trade union body; and, third, the protection was extended not only to the dismissal but also to the transfer of the employee to another position and to any disciplinary sanction in his or her regard. The Constitutional Court of Russia in 2002 declared that the overly rigid provisions of the Trade Unions Act in this field limit the constitutional principle of freedom of work and declared some of them unconstitutional.[40] In 2003, the Constitutional Court analyzed the provisions of Article 374 of the Labour Code practically on the same ground and came to the conclusion that the Labour Code's Article does *not* contradict the Constitution in the issue of an employer's right to perform its economic freedom.[41] The second ruling of the Constitutional Court, in fact, means that the very necessity to have the issue of the trade union official's dismissal approved by the employer does not contradict the economic freedoms enshrined by the Constitution, although if such restriction is excessive (as was, in the Constitutional Court's view, the case of the Trade Unions Act), such restriction would be unconstitutional.

It is also notable that the necessity to get approval for the dismissal (or, earlier, other disciplinary sanctions) of trade union officials by the higher

39. Unlike many other countries Russian labour legislation doesn't just contain the requirement of reasonability of the dismissal but provides for the limited list of grounds for dismissal. This list was substantially extended after the adoption of the new Labour Code. The grounds where the additional protection for trade unionists applies are: the redundancy, the employee's non conformity to his/her position due to lack of qualification and systematic non-fulfillment of worker's obligations.

40. Constitutional Court Decision No. 3-P of January, 24, 2002. Sobraniye Zakonodatelstva Rossiskoi Federasii [SZ RF] [Russian Federation Collection of Legislation] Feb. 18, 2002, Art. 745, *available at* http://www.echr.ru/documents/doc/12025566/12025566.htm.

41. Constitutional Court Ruling No. 421-O of December, 4, 2003. Rossiyskaya Gazeta [Ros. gaz.], Jan. 25, 2004, *available at* http://www.rg.ru/2004/01/27/uvolnenie-doc.html.

level trade union authorities implies the centralized hierarchy of trade unions, which is generally applicable only to the unions affiliated to FNPR. This provision, in practice, may be understood as a discriminatory withdrawal of protection for the independent trade unions not included in this hierarchy.[42] In the absence of the higher level trade union organization, according to of Article 374, paragraph 3, of the Labour Code, the dismissal shall be legal upon notification of a motivated opinion of the enterprise trade union body. This mechanism, established by the new Labour Code substitutes the previously existing trade union's approval mechanism of the Code of Laws on Labour of 1971 and provides for the possibility of the employer's final and independent decision after passing several consultation procedures. The employees' last resort in this case is a strike, which is extremely difficult to organize without violating the requirements provided by the new Labour Code.

B. Lithuania

Lithuanian legislation in this issue passed a very similar transformation. After the adoption of the Lithuanian Trade Unions Act, members of trade unions enjoyed extremely broad guarantees for ten years. The then law provided that *any* employee who has been a member of trade union may not be dismissed from work on the employer's initiative and will[43] without consent of the elective body of the trade union. This provision raised numerous doubts and disputes. First of all, a trade union is not a party to an employment contract and therefore the provision obligating an employer to obtain consent for dismissal of ordinary employees, who are members of trade unions, didn't have a sufficient theoretical basis. Second, it is not clear why members of trade unions should enjoy any privileges. The freedom of association grants the right to join trade unions, but does not imply any obligation to do so. Third, no legislation, whether valid previously or currently, requires submission of a list of trade union's members to employers. Therefore, amendments to the law came into effect in 2001 with the view to "liberalize" the labor relations. As a result, guarantees for trade unionists were considerably reduced. In other words, guarantees were retained for the trade unions'

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42. T.Y. KORSHUNOVA, O PROFESSLINALNIH SOYUZAH, IH PRAVAH I GARANTIYAH DEYATELNOSTI (Kommentariy k Federalnomu zakonu) [ON TRADE UNIONS, THEIR RIGHTS AND GUARANTEES OF THEIR ACTIVITIES (Commentary on Federal Act)] (2002).

43. Before the adoption of new Labour Code (effective since Jan. 1, 2003), employers could dismiss employees on two grounds, i.e., on employer's initiative or on the grounds mentioned in the then valid Law on Employment Contract; or on employer's will, i.e., at any time, even without valid reasons stipulated in that law. The current Labour Code provides for employer's initiative only, without going into details, but it requires that employer prove the "valid reasons" conditioning termination of employment contract.

members elected to the managing bodies of the trade unions. The mentioned regulation is in conformity with the requirements of the Workers' Representatives Convention No. 135.[44] In compliance with Article 134, paragraph 1, of the Labour Code, employees who are elected to representative bodies of workers may not be dismissed from work under Article 129 of this Code (on employer's initiative without any fault on the part of the employee) without the prior consent of the body concerned. In compliance with Article 240, paragraph 2 of the Labour Code and Article 21, paragraph 1, of the Trade Unions Act, a disciplinary sanction may be imposed on said employees only subject to prior consent of an appropriate body, except for such disciplinary sanction as dismissal from work. Article 134 of the Labour Code provides for an additional guarantee to the chairperson of a trade union, i.e., consent of the managing body of a trade union is required in order to dismiss the chairperson of the trade union from work even in cases when he or she is dismissed from work for the violation of labor discipline. In compliance with Article 135 of the Labour Code, in the event of redundancy, members of the trade unions' elective bodies shall enjoy the absolute right of priority to retain their elective members' jobs.

It is easy to see that in both countries the legislation designed for the protection of trade unionists has undergone the same fate of diminishing such guarantees in favor of the employer's freedom of economic activity.

V. INTER-TRADE UNION RELATIONS AND COLLECTIVE AGREEMENT COVERAGE

The procedures of collective bargaining stipulated in Russian legislation have experienced a serious evolution since 1992. The most interesting transformation is a regulation of a situation where two or more trade unions exist within the enterprise. This couldn't happen in the Soviet era because all unions had to be affiliated into the single organization—VCSPS. As soon as independent (from VCSPS) unions appeared, labor law has faced a problem of inter-union competition.

The issue was first addressed in the Federal Act "On collective agreements and accords" of 1992.[45] According to Article 6, paragraph 4, of the Act, each trade union has a right to conclude a collective agreement on behalf of its own members.

The Labour Code of 2001 introduced a completely new rule for a situation wherein few unions existed within one employer. According to Article 37 of the Code, two or more trade union organizations representing

44. Ratified by Lithuania in 1994.

45. 98 ROSSIYSKAYA GAZETA [ROZ. GAZ.], Apr. 28, 1992. Text of law in English is available in NATLEX ILO database of national labour legislation at http://www.ilo.org/dyn/natlex/docs/WEBTEXT/29677/64851/E92RUS01.htm.

in total more than half of the employees within the employer have the right to create a joint negotiating body for collective bargaining purposes. In this case, such a representative body has to include the representatives of all trade unions that take part in the organization of this joint body. If some trade union unites more than half of the employees, it is entitled to start collective bargaining without prior creation of the joint body. The Code further imposes no obligation upon the majority union to create or participate in any joint body. The collective agreement that will be signed as a result of such collective bargaining will be binding to all employees of the company, irrespective of their trade union membership. Regarding collective bargaining on higher levels (territory, sector of economy, and countrywide), trade union organizations are supposed to form the joint body voluntarily. In the absence of an agreement regarding the foundation of such a body, a majority trade union organization is entitled to perform collective bargaining on behalf of all employees at the corresponding level, irrespective of their membership, as well.

It is obvious that a majority trade union or trade union organization has no interest in involving other competing unions in the process of collective bargaining. The procedures stipulated by the Labour Code allow them to easily avoid this, especially in the case of multi-employer bargaining. Minority unions, in fact, have very few arguments to persuade the employees to join their union, taking into account that they have very few chances for participating in bargaining and no chances at all to perform separate bargaining on behalf of their own members. Most of the majority unions, enjoying the high level of membership on inertial basis, are "by default" the old unions affiliated to FNPR. In many cases they find a common language and establish good relations with management (see above). Most of their membership is inertial and they are little trusted by the employees. So, if a new union wishes to become a real party to collective bargaining, it should first explain to the employees that no trade union is useless; second, persuade them to leave the old union and join the new one; and, third, perform successful collective bargaining based on rather restrictive legislation concerning the strikes. All this should be done in an atmosphere of an active anti-union campaign performed jointly by the employer and the old union. The employer may also make some demonstrative concessions in respect of the old union in order to show that a new union is ineffective.

In general, this system of collective bargaining, which could be effective in a situation where there is no dominating trade union structure and all trade union organizations are more or less equal in power, greatly undermines the possibility for the newly formed trade unions. Such wording of the law is clearly dictated by the unions affiliated to FNPR.

The same explanation seems to be right for the scheme of collective agreement coverage. Regardless of how many trade unions exist within the enterprise, it is possible to sign only one agreement that will cover all employees, irrespective of trade union membership. The same scheme is applied regarding higher levels of bargaining.[46] Minority unions in this situation therefore have a difficult time in explaining to the employees why they should join this or the other union if the collective agreement would be extended to them anyway. Passive majority unions therefore have fewer problems due to the inertial character of their membership structure: their goal is not to recruit the new members but rather to retain the old membership, explaining to workers that stability within the company is their achievement of the unions.

The scheme of multi-union collective bargaining in Lithuanian legislation is clearly made under the influence of the Russian Labour Code. The issue is being considered by Article 60 of the Code. Unlike Russia, however, there is no right of a majority union to avoid the creation of the joint body. In the absence of an agreement concerning such a joint body, the matter of representation is solved by a meeting or conference of the employees. Further, the law does not explain whether the employees should just choose the union or may obligate unions to form the joint body. In practice, usually only one representative union is being elected. Regardless, the collective agreement is also binding with respect to all the employees. It seems to be clear that Lithuanian legislation has adopted the principal Russian scheme of bargaining, but didn't impose the analogous restrictions upon the minority unions. This can be explained by the absence of the dominating "old" trade union organization, as is the case in Russia.

The fact that collective agreements in Lithuania also cover all the employees in the enterprise[47] might be explained as an adaptation of the Russian collective bargaining scheme.

VI. INTRA-TRADE UNION RELATIONS

Both the Russian and Lithuanian labor legislation systems provide regulation of the relations between the employer and trade unions, between the state and trade unions, and between the trade unions themselves, i.e., the external relations with participation of trade unions.

At the same time, both legal systems remain silent about the affairs of internal matters, i.e., the relations between the trade unions and their members. According to the currently prevailing Russian labor law doctrine, the relations of trade unions and their members, being regulated by the

46. Article 43, paragraph 3 and Article 48, paragraph 3 of the Russian Labour Code.
47. Article 59, paragraph 2 of the Lithuanian Labour Code.

internal trade union regulations (the constitution of a union) are not legal relations by their nature, although many of them can have consequences of a legal character. Such a concept is based on the inadmissibility of the limitation of civil society institutions' independence from the state.[48] Such an argument does not take into account the Committee on Freedom of Association position, which states, for example, that "the imposition by legislative means of a direct, secret and universal vote for the election of trade union leaders does not raise any problems regarding the principles of freedom of association."[49]

The same approach is used in Lithuanian labor law. Although this concept is based on arguments of the independence of trade unions from the states' interference, it dates back to Soviet times. Soviet trade unions, never being actually independent from the state, were legally "independent" from the employees.

All norms concerning trade union democracy, such as the election of the officials, are to be stipulated by the trade union's internal documents. There are also no norms concerning the financial control over the trade union on behalf of their members. In fact, a member of a trade union can't sue the union on any ground due to the absence of legal relations between them. Paradoxically, an employee is obligated to pay a membership fee to the union, but the union bears no responsibility for the proper use of this money. Needless to say, such a lack of transparency provokes corruption within the trade unions.

This situation is definitely supported by the unions, but, in fact, it leads to a weakening of independent trade union movement, as long as the reputation of unions suffers greatly.

VII. CONCLUSION

It is possible to note both similarities and differences in the development of the legal status of Lithuania and Russia. The similarity can mainly be explained by the common "starting positions" and the similar challenges for independent trade union movement since the beginning of 1990s.

The most notable difference is the mechanism of succession in respect of the Soviet trade unions' property and the consequences of this succession in the two countries. The full succession from the Soviet trade union organization to the Russian FNPR resulted to a large extent on the conservation of this organization's approach to the workers' representation.

48. *See*, *e.g.*, TRUDOVOE PRAVO: UCHEBNIK, [LABOR LAW: A MANUAL] 100–01 (O.V. Smirnov ed., 2003).

49. ILO, Freedom of Association, *supra* note 16, at 84, ¶ 398.

This has lead to preservation of a rather high level of trade union membership, but the effectiveness of the workers' rights defense remained rather low because many of the "old" trade unions didn't actually become independent from the employers and the state.

Trade unions have managed to remain a significant society institution, and have an influence on the contents of the new labor legislation. This is accompanied, however, by discriminatory provisions regarding the minority unions, lack of legislation concerning the trade union internal democracy, and control over the unions on behalf of their members. Nevertheless, the trade union movement in general has certain benefits from this influence of "old" trade unions. The labor legislation could have suffered much more during the liberal economic reforms than it actually has and workers' protections could be much weaker than they are now. Additionally, for last two years, there has been a clear trend of appearance and strengthening of the new independent unions that have begun performing successful industrial actions.

Lithuanian trade union movement does not have such serious problems with independence from the employers, most likely due to the nature of succession (actually, the lack of succession) in respect of the Soviet trade union movement. However, this independent movement, at the same time, is weaker and the trade union membership level is lower because unions did not have an opportunity to become a powerful public institution as they did in Russia.

One of the most notable differences between Russian and Lithuanian collective labor legislation is the lack of a works council system for Russia and its existence in Lithuania. This can easily be explained by the Lithuanian membership in the EU and its being subject to EU Directives[50] concerning this issue, especially procedures of information and consultation of employees and striving to increase the level of collective representation in the workplace. The last issue has not yet been materialized, however.[51]

Many of the legislative provisions in Russian and Lithuanian collective labor law have common roots, look almost the same, and even are influenced by the same trends in development (or degradation, as it is in the

50. Directive 2002/14/EC of the European Parliament and of the Council of Mar. 11, 2002 establishing a general framework for informing and consulting employees in the European Community—Joint declaration of the European Parliament, the Council and the Commission on employee representation. Council Directive 2002/14/EC, 2002 O.J. (L 80); Lithuania Law on Works Councils, adopted on 26 October 2004, Valstybes zinios, 2004, No. 164-5972, English version of this law with last amendments is *available at* http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=321614.

51. According the number delivered by State Labor Inspectorate of the Republic of Lithuanian, the dominating representative of employees' in the workplace level still are the trade unions. For example, in more than 1270 enterprises' (of 4600 enterprises, that have been inspected) the employees are represented by the trade unions and only in 350 enterprises the works councils operate.

case of the limitation of the employers' right to dismiss the trade union officials). Some norms of traditional collective bargaining institutions are equally missing (e.g., the trade union internal democracy norms). Some provisions are surprisingly alike, for example, the obligation of the trade unions to protect and represent all employees in issues of collective labor law, irrespective of trade union membership and members of the unions—in the individual relations. Many of these similarities may be explained as an adaptation of modern Russian legislation (together with this legislation's imperfections) into Lithuanian labor law.

This adaptation may also be explained by the fact that the Lithuanian industrial relations reality is facing a rather low level of labor conflicts (at least before the beginning of the global economic crisis[52]), including open conflicts between the unions. Therefore, the contents of legislation did not have many opportunities to pass "a conflict" test. Some of its imperfections remain a matter of theory and have yet to be revealed by industrial relations practice.

In general, it may be stated that despite almost two decades of separate development and the radical change of the social relations systems in both countries, the most notable features of the Russian and Lithuanian trade union legislation have been developing along a very similar direction.

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52. *See* Daiva Petrylaité, Charles Woolfson, *"Missing in Action": The Right to Strike in the Baltic New Member States—an Absent EU Competence*, 22 INT'L J. COMP. LAB. L. & INDUS. REL. 439 (2006); Daiva Petrylaite, *Teisė streikuoti Lietuvoje ir jos atitiktis tarptautiniams darbo standartams* [*The Right to Strike in Lithuania and its Conformity to International Labour Standards*], *in* DARBO IR SOCIALINĖS APSAUGOS TEISĖ XXI AMŽIUJE: IŠŠŪKIAI IR PERSPEKTYVOS [LABOUR AND SOCIAL SECURITY LAW IN THE XXI CENTURY: CHALLENGES AND PERSPECTIVES] 517 (2007). As a result of the economic crisis, in the end of the 2008 Lithuanian trade unions became much more active. The Department of Statistics states that there were 56 strikes in 2000, 21 of them bore a warning character. In 2001 there were 34 strikes, 29 of them were of a warning type. However, there were no strikes in Lithuania at all in the years of 2002, 2003, 2004, and 2006. The statistical data of 2005 year indicates just one occurrence, however, there were 161 strikes registered in 2007 and all of them took place in the institutions of education. The strikes in the field of education continued; in the first quarter of 2008 there were 111 teachers' strikes registered. The Institute of Civil Society and TNS-Gallup have made the research on civil power index of the Lithuanian society in 2008; the obtained data revealed that only 4.1% of the respondents took part in strikes (the research investigated the social power index of the year 2007). However, 35.4% of the informants stated that they wouldn't take any action if a serious economical problem had aroused. Having assessed the index of risk of civil activity it could be stressed that fear for the consequences for participating in civil actions dominates the society. Trade unions are not always able to organize collective negotiations, disputes or strikes in a smooth way. The lack of employees' solidarity is negatively influenced by the trends advocating for separating employees and workplaces from the staff; the impact of neo-liberal ideas dominating the contemporary world contribute to the latter fact as well. *See* D. Petrylaite, *Going on strike is not smart, going on strike is not in fashion*, 2 SPECTRUM 4 (2008).