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CUSTOMARY INTERNATIONAL LABOR LAWS AND THEIR APPLICATION IN RUSSIA*

*Leslie Deak**

I. INTRODUCTION

The development of customary international labor laws marks a milestone in international law. It represents the culmination of radical changes in the world political, legal, and economic regimes. Of the political upheavals, nothing has more profoundly affected the world order than the democratization and economic restructuring of Russia. Russia's acceptance of international labor laws affirmed its commitment to customary international law.

This paper delineates the legal and sociological changes in Russia that surround the development of rights as customary international labor law, namely the right to freedom of association and collective bargaining.¹ The first section will trace the Soviet labor law and international law systems, describing how the Soviet legal system was originally subordinated to the political and economic systems, resulting in the absence of any rule of law. This subordination prevented the norms of worker rights from taking their place in customary international law. The section will further explicate the reality of worker rights under the Soviet system, detailing the shortcomings in the achievement of those rights.

The second section will describe the changes in the legal system since the democratization of Russia. It will analyze the laws that Russia has enacted to ensure the realization of the relevant worker rights. In its legal commitment to

* This article is a continuation of a previously published article, Leslie Deak, *Customary International Labor Laws and Their Application in Hungary, Poland, and the Czech Republic*, 2 TULSA J. COMP. & INT'L L. 1 (1994).

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1. Because sociological and political circumstances were intertwined with legal decisions before democratization, they comprise a vital part of this analysis.

protect worker rights, Russia fulfills the element of *opinio juris* in the proof of customary international law.

The third section will examine the actualization of the worker rights. It will look at the extent to which the laws are respected by governmental and private actors. Although the right to freedom of association and the right to bargain collectively have not been perfectly achieved, the State has instituted the appropriate standards. Violations of these standards arise more from the chaos surrounding the current transition in Russia than a lack of legal commitment to those standards.

This paper posits that the formation of customary international labor laws depended on the development of the rule of law in Russia and the former Soviet bloc nations. The Soviet state existed without any consistent legal standards. In fact, the legal standards necessary for economic development and growth were consistently undermined by political expediency in the name of "the good of the State."² Such treatment of the law created an inherent lack of stability in the social and economic fiber of the Soviet state. This fundamental weakness in the Soviet system resulted in the necessity of perestroika and the eventual collapse of the Soviet Union.³ The current Russian government is committed to basing its legal system on the rule of law.⁴ Further, it has committed itself to accepting the rule of law in the international arena as well as in its domestic legal system. However, the lack of rule of law in the Soviet state continues to haunt the Russian legal system.⁵ Russia is trying to implement labor laws based on

2. See discussion DORIANE LAMBELET, *THE CONTRADICTION BETWEEN SOVIET AND AMERICAN HUMAN RIGHTS DOCTRINE: RECONCILIATION THROUGH PERESTROIKA AND PRAGMATISM* 61, 68-70 (1989).

3. Partial responsibility for the collapse of the Soviet system must be attributed to the economic structure. However, legal issues must be given due credit. Donald Filtzer argues that the system of surplus extraction led by the elite bureaucracy created circumstances that necessitated reform to enable the country to progress economically; however, under those same circumstances, any reforms would necessarily destroy the system the elite had created. DONALD FILTZER, *SOVIET WORKERS AND THE COLLAPSE OF PERESTROIKA: THE SOVIET LABOUR PROCESS AND GORBACHEV'S REFORMS 1985-1991*, at 1-11 (1994). The elite, through hyper-centralization and control, had so atomized and alienated the working population that their low morale made economic progress impossible. Any reforms that would serve to improve the morale and economic incentives of the workers correspondingly would remove power from the ruling elite. The reforms would decentralize the power and allocate the power to the workers, eventually destroying the system of the elite. *Id.* at 3-4. This argument, although compelling, ignores the role the rule of law played in the system.

In many capitalist systems, workers are atomized and alienated. In fact, a strong argument can be made for the existence of such circumstances today in the United States. However, stability reigns in those states primarily because of the rule of law. The workers in the Soviet Union lived under laws which the elite kept secret and enforced discriminatorily, depending on the political and economic circumstances of the defendant. This legal uncertainty was as much to blame for the alienation of workers as the economic system. See MARGARET WETTLIN, *FIFTY RUSSIAN WINTERS: AN AMERICAN WOMAN'S LIFE IN THE SOVIET UNION* 257-320 (1992) (anecdotal description of the disillusionment and distrust that developed due to Stalin's use of the legal system for political ends). The absence of the rule of law in the Soviet legal system was a root cause of the devolution of the Soviet state and its legacy continues to inhibit reforms and the implementation of a stable Russian government.

4. See generally William W. Schwarzer, *Civil and Human Rights and the Courts Under the New Constitution of the Russian Federation*, 28 INT'L LAW. 825 (1994).

5. Louise Shelley, *Crime and the Collapse of the Soviet State*, in *THE SOCIAL LEGACY OF COMMUNISM* (James R. Millar & Sharon L. Wolchik, eds. 1994) (discussing how the lack of respect for the law, especially criminal law, has resulted in the proliferation of violence and organized crime).

international standards. It has largely achieved its goals. When the rule of law is established, those goals will be fulfilled.

A. *The Origins of Customary International Law*

The spread of industrialization throughout the world economy, combined with the growth of international trade and communications, has affected the international legal regime. The international legal regime consists of regulations from three primary sources: customary international law, treaties, and general principles of law such as equity.⁶ With industrialization, the number of treaties initially increased to regulate the innovations that had international effects. Treaties were, and still are, the legal forum used to regulate such international industrial innovations as air transportation⁷ and national postal systems.⁸ Whereas once developments in international law occurred primarily through the implementation of new treaties, in the past fifty years, customary international law has also embarked on a similar course of rapid development.

Customary international law is generally defined as an international practice that has acquired universally binding force of law. In order to prove the existence of customary international law, a practice must exist for a suitable duration through a sufficient quality and quantity of acts and acquire *opinio juris*, the binding nature of law.⁹ As the world has diminished in size with increased communication, the formation of customary international law has increased. Both officially and unofficially, nations often consult with one another before taking significant actions.¹⁰ This can result in more widespread and frequent incidents of uniform practices. The development of convenient, inexpensive, and expeditious means of transportation has resulted in increased interaction and exchange between different countries and societies, again encouraging uniform practices. Concurrently, the increase in societal contact has spurred the growth of international organizations and treaties to regulate this interaction. The organizations and treaties have given many of the new uniform practices the character of legality, or *opinio juris*.¹¹ Further, those organizations have contributed to the development of entirely new areas of law, especially human rights law.

6. MALCOLM N. SHAW, *INTERNATIONAL LAW* 60-98 (1991). Other sources of international law include judicial decisions, which only have persuasive authority, treatises by scholars, and non-binding declarations and resolutions by international organizations. *Id.*

7. Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000.

8. International Express Mail Agreement Between the Postal Administration of the Union of the Soviet Socialist Republics and the United States Postal Service, Mar. 31, 1988, U.S.-U.S.S.R., T.I.A.S. No. 11,439.

9. See Leslie Deak, *Customary International Labor Laws and Their Application in Hungary, Poland, and the Czech Republic*, 2 TULSA J. COMP. & INT'L L. 1, 4-26 (1994) (describing the formation of customary international law in detail).

10. The European Union is a good example of such consultations. For certain issues, such as political issues, the member nations need not act in concert, however, they have agreed to consultations. NEILL NUGENT, *THE GOVERNMENT AND POLITICS OF THE EUROPEAN COMMUNITY* 223-25 (1989).

11. See SHAW, *supra* note 6, at 81-82.

Human rights law is a unique subdivision of international law because it regulates the relationship between a state government and its citizens.¹² These international laws dictate limitations on actions a state can take with regard to its citizens, even within its borders.¹³ Many human rights appear to have developed on moral and ethical grounds. However, at least one section of human rights, namely worker rights, has developed according to economic principles.¹⁴ The expansion of industrialization across the globe is pushing the international rights of these workers to the forefront of debate.¹⁵ The most important of these rights, the right to freedom of association and to bargain collectively, have become customary international law.¹⁶

The freedom of association and the right to bargain collectively are defined through International Labor Organization (ILO) multilateral conventions. The primary documents are the ILO Convention Concerning Freedom of Association and Protection of the Right to Organize, No. 87,¹⁷ and the ILO Convention Concerning the Application of the Principles of the Right to Organize and Bargain Collectively, No. 98.¹⁸ Freedom of association provides the basic right to establish trade unions and employer associations, the necessary components to collective bargaining.¹⁹ The trade unions and employer associations should be free from interference by the government and from each other.²⁰ The right to bargain collectively, as protected by ILO Convention No. 98, focuses on mechanisms established by the state to facilitate the collective bargaining process.²¹ Anti-union discrimination, which includes dismissal for union activity and conditioning employment on agreements to join or not to join unions, is prohibited.²²

12. Traditional international law regulates relationships between and among states, but provides for no direct jurisdiction over citizens of the states. Oleg I. Titunov, *The International Legal Personality of States: Problems and Solutions*, 37 ST. LOUIS L.J. 323-25 (1993); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 59 (1990); Nkambo Mugerwa, *Subjects of International Law*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 249 (Max Sørensen ed., 1968); MALCOLM N. SHAW, *INTERNATIONAL LAW* 178-81 (1991).

13. See RICHARD FALK, *HUMAN RIGHTS AND STATE SOVEREIGNTY* 33-62 (1981) (explaining the logic for elevating the protection of human rights to a level above that of the immediate state).

14. Many moral arguments have economic counterparts. For example, genocide not only violates a moral code, but is economically inefficient. In killing an ethnic group, the state loses the use of those peoples' talents and resources for irrational reasons. Worker rights, primarily concerned with the human capital market in the economy, has a more obvious economic base.

15. For example, protection of labor rights figured prominently in both the debate concerning the North American Free Trade Agreement and the latest GATT agreements. See *Free Trade or Foul?*, *ECONOMIST* 13-14 (Apr. 9, 1994) (discussing worker protections with regard to GATT and NAFTA).

16. See Deak, *supra* note 9, at 14-16 (discussing the existence of the freedom of association and the right to bargain collectively as customary international law).

17. Convention Concerning the Freedom of Association and Protection of the Right to Organize, July 9, 1948, 31 ILO Official Bull., Ser. B, No. 1 (1948) [hereinafter ILO Convention No. 87].

18. Convention Concerning the Application of the Principles of the Right to Organize and Bargain Collectively, July 1, 1949, 32 ILO Official Bull., Ser. B., No. 3 (1949) [hereinafter ILO Convention No. 98].

19. ILO Convention No. 87, *supra* note 17, art. 2.

20. *Id.* art. 3.

21. ILO Convention No. 98, *supra* note 18, arts. 3 & 4.

22. *Id.* art. 1.

The rights to freedom of association and collective bargaining form the cornerstone of economic empowerment and democracy in the work place. With the assurance of these rights, employees can create institutions and tools necessary to protect their rights in the work place. These rights imbue workers with the means to participate in the direction and success of their enterprise. More broadly, the workers can use those institutions to exercise their voice in the society through political parties or direct lobbying of the government. On the other hand, without the freedom of association and the right to bargain collectively, the workers are vulnerable to grave injustices and inhumane treatment at the hands of employers.²³

Pre-revolutionary Russia denied freedom of association, the right to bargain collectively, condoning the corresponding inhumane treatment of the workers and peasants.²⁴ Russia's story, however, becomes more interesting because of the institution of the "workers' state" after the Revolution. Contradictions abounded in the Communist government's treatment of the worker and the labor rights of freedom of association and collective bargaining.²⁵ Although every worker belonged to a trade union, and was therefore theoretically protected, the unions did not operate from the parameters of those international rights.²⁶

23. This is not the proper forum to document the evils perpetrated by employers against employees when unionization is unprotected. A study of any nation industrializing without those protections presents similar pictures. See, e.g., FOSTER R. DULLES, *LABOR IN AMERICA: A HISTORY* (1966) (discussing generally the hardships of labor in America before the National Labor Relations Act and the need for protections of the relevant rights); WILLIAM D. HAYWOOD, *THE AUTOBIOGRAPHY OF BIG BILL HAYWOOD* (1929) (describing specifically the working conditions in the mines of the western United States around the turn of the 20th century and the need for unions to alleviate the conditions); SELIG PERLMAN, *A HISTORY OF TRADE UNIONISM IN THE UNITED STATES 256-306* (1922) (explaining the economic oppression workers suffered at the hands of the employers).

24. ALEC NOVE, *AN ECONOMIC HISTORY OF THE U.S.S.R 13-28* (1969). Before 1861, the majority of the Russian population were serfs, enslaved by their landlords. The freeing of the serfs in 1861 helped create a mobile labor force that fostered the industrialization of Russia. However, most workers remained unskilled laborers and did not enjoy many of the benefits of the growing economy. *Id.* at 26. The former serfs did not fare much better. They had lived under a communal land system, with the land being held by a village community, called the mir. The land reform that accompanied the 1861 freeing of serfs divided the land between the lords and the peasants. The land given to the peasants however, went to the village community which then controlled the freedom of movement of the village households. *Id.* at 21. Due to these problems, despite ever increasing freedoms and industrial advancements over the period of 1860 through 1913, neither the workers, nor the former serfs developed into a strong political force with the will to protect itself legally or economically. Additionally, because of the weakness of the working and peasant classes, the Russian government never felt the need to implement reforms to pacify the socialistic tendency of workers, as did the other contemporary governments, such as Bismark's German government. FRITZ STERN, *GOLD & IRON: BISMARCK, BLEICHRODER AND THE BUILDING OF THE GERMAN EMPIRE 220* (1979).

25. For example, Russia's collectivist based labor system actually ended up alienating and atomizing the workers to exploit their labor. See *infra* notes 83-85 and accompanying text. Additionally, within the workers' state, the enterprise directors really had much more control and power than the trade union leaders, reflecting the power structure of enterprises in traditional capitalistic states. See *infra* notes 79-82 and accompanying text. The power structure within an enterprise denied even equal power to the trade union president, giving the control and power to the enterprise director, as in the traditional capitalistic state.

26. In fact, the unions tended to represent almost every interest other than that of the workers, especially that of the state and the enterprise. Deak, *supra* note 9, at 28-29 (discussing the weaknesses of the Soviet-style trade unions).

The Soviet Union operated under their own interpretation of international human rights standards, including international labor standards. The Soviet government believed that human rights were "rights of changeable substance,"²⁷ or, that the situation determined the extent of enforcement of human rights. The situation would be judged according to the interest of the Soviet state and Soviet society.²⁸ The situational approach to human rights enforcement meant that political or economic forces in the Communist Party would control the outcome of the case.

The dissolution of the Soviet Union and the introduction of democratic practices into the former Soviet territories have included the acceptance of international human rights standards. The acceptance of international standards, specifically international labor standards, by the former Soviet states and the rest of the "second world" has solidified their status as customary international law.²⁹ As part of the human rights regime, the new regime is committed to protecting the of freedom of association and the right to bargain collectively.³⁰ However, the question remains whether the workers experience these protections.

The actualization of the freedom of association and the right to bargain collectively in Russia depends on the evolution of two factors from the Soviet model to a more democratic model. First, the force of the rule of law in Russia, particularly international law, must become independent from social and political forces and apply in a universally unbiased manner.³¹ The interpretation of law must be consistent within the parameters of the facts of the case. Second, the labor relations system must evolve so that the workers are free to associate with the trade union of their choice and to bargain with management. That change involves not only legal developments, but also sociological and political change.

27. Olimpiad S. Ioffe, *Soviet Attitudes Toward International Human Rights Law*, 36 CONN. J. INT'L L. 361 (1987).

28. *Id.* at 363.

29. See Deak, *supra* note 9, at 22-24 (describing fully how the acquiescence of the former Soviet states and bloc to the international labor standards has created customary international labor law).

30. The Bonn Document, April 1990, was the first document in which the Gorbachev government affirmed its commitment to the fundamental human rights delineated in the Final Act of the Helsinki Accords. The human rights Russia committed itself to protecting included the freedom of association. *Implementation of the Helsinki Accords: Human Rights and Democratization in the Newly Independent States of the Former Soviet Union*, compiled by the Staff of the Commission on Security and Cooperation in Europe, Washington, D.C. (1993).

31. The rule of law does not relate to any particular legal system; it stands for the application of a publicly available system of rules in a consistent, unbiased manner. It implies that in the conflict between power, such as the power of a state or individual leader, and the law, the law contains the use of power so that those with the power cannot operate arbitrarily or coercively. GEOFFREY DE Q. WALKER, *THE RULE OF LAW: FOUNDATION OF CONSTITUTIONAL DEMOCRACY* 2-4 (1988). The rule of law depends on the dominance of firmly established principles, such as those found in constitutions or similar legal documents, over the will of personalities or politics in the government.

The rule of law should be defined in terms of the point of view of those governed by the legal system. The governed population should believe when they violate a law, for example, that the legal system will mete out a fair punishment for all. See INTERNATIONAL COMMISSION OF JURISTS, *THE RULE OF LAW & HUMAN RIGHTS: PRINCIPLES & DEFINITIONS* (1966) (delineating basic rights that individuals should expect from their government). The overall goal of a system possessing the rule of law is justice for all concerned. FRANZ NEUMANN, *THE RULE OF LAW: POLITICAL THEORY AND THE LEGAL SYSTEM IN MODERN SOCIETY* 12 (1986) (arguing that the quest for justice for the governed is, at times, tempered by necessities of the ruling state).

The government has shown its commitment to the international labor laws by implementing initial changes; however, change is occurring very slowly for the average worker.

II. THE LABOR LAW SYSTEM UNDER SOVIET RULE

Both the legal and economic systems shaped the Soviet labor law system. The legal system was subordinated to the economic system. Marxist theory, in which history and society advance according to the dialectic, forces the legal system to be sufficiently flexible to allow socialism and communism to develop.³² Unlike the legal system, the labor market under Marxist-Leninist theories played a central role in the evolution towards socialism, achieved in 1936.³³ The configuration and interplay between the legal system and labor system determined the implementation of worker rights.

In reality, none of the relevant labor rights were achieved in either the Soviet Union, or any of the surrounding Eastern bloc nations, due to failures of both the legal system and the labor relations system. The lack of practical achievement of the labor rights standards in these countries barred the right of freedom of association and the right to bargain collectively from becoming customary international law by sufficiently diminishing the quality and quantity of the state practice element. This analysis will detail those failures, their theoretical roots in Marxist-Leninist philosophy, and the damage they did to worker rights under the Soviet regime.

A. *The Soviet Legal System*

To examine freedom of association and the right to bargain collectively, both the domestic and international legal systems and theories must be analyzed. The theory behind the implementation of worker rights, as well as human rights in general, developed within the domestic legal system. International legal theory was reinforced by domestic legal theory. Underlying all legal theory remained the Marxist view of the state and the place of law within that its development.

1. The Soviet Domestic Legal System

The Soviet labor law system superficially provided for the protection of internationally recognized labor standards. The laws would include the right to organize and the right to bargain collectively.³⁴ However, certain characteristics of the socialist legal system interfered with the implementation of those provisions. Most of the reasons the Soviets never achieved the international

32. Eric F. Green, *Socialist Internationalism: Theoria and Praxis in Soviet International Law* 13 YALE J. INT'L L. 306, 315-17 (1988).

33. The Soviet Union announced its achievement of socialism in 1936 under Stalin. HAROLD J. BERMAN, *JUSTICE IN THE U.S.S.R.: AN INTERPRETATION OF SOVIET LAW* 46 (1963).

34. See Act of the Soviet Union of Soviet Socialist Republics on Trade Unions, their Rights and Safeguards for their Activities, *Izvestia* (Dec. 14, 1990) §§ 1-3, 9 [hereinafter 1990 Labor Law Act]. However, worker rights might also be limited on the face of the law, such as the ability of the Supreme Court of the U.S.S.R. or the Autonomous Republics and the Office of the Public Prosecutor to suppress trade unions. *Id.* § 5.

worker rights standards stem from the philosophical foundations of their socialist state, not from a malicious desire by the government to repress all workers. To the contrary, most of the reasons the Soviets never achieved the international worker rights standards stem from the philosophical foundations of their socialist state.

The status of law and the legal system in the Marxist doctrine played a major role in the use of the law regarding the protection of rights in socialist societies. Although Marx never theorized extensively on the use of law in achieving communism, he argued that once the proletariat succeeds in overthrowing the ruling classes, the "coercive institutions" that held the ruling class in place would become superfluous and disappear.³⁵ Among these institutions would be the State and the legal system, for they existed merely as tools for maintaining vanished property relations.³⁶ Marx viewed the law as "an unconscious or semiconscious ideological reflection of economic relations,"³⁷ indicating that the law would evolve with the evolution of society. Each ruler of the Soviet Union used these basic premises to further develop the legal system in a manner consistent with their view of the needs of the revolution and the state.³⁸ By the end of the 1980s, a number of characteristics that control the outcome of worker rights issues had become firmly entrenched.

First, the Soviet legal system emphasized substantive results over procedural rules.³⁹ Western law is based on the principle that procedural due process is inherent in achieving justice because it ensures the equal application of the laws for all people. Conversely, the Soviet system operated on the premise that the State, as the embodiment of the proletariat, would administer justice when given the discretion to do so.⁴⁰ Adherence to this policy inhibited the Soviet state from fully implementing international worker rights standards. The right to bargain collectively mandates that the government establish procedures and institutions to encourage negotiations between representative trade unions and employers to secure a collective contract regulating wages and employment conditions.⁴¹ These procedures form the basis for the realization of the substantive worker rights. The Soviet Union did provide a framework for collective bargaining. While the lack of collective bargaining was primarily due

35. BERMAN, *supra* note 33, at 20-21.

36. *Id.*

37. *Id.* at 16.

38. The change becomes evident in the gulf between the Marxist and Leninist arguments on the "withering away of the state" after the revolution and the Stalinist institutionalization of the State. See ROBERT C. TUCKER, *THE LENIN ANTHOLOGY* 369-84 (1975). Engels stated that "the proletariat needs the state, not in the interests of freedom but in order to hold down its adversaries, and as soon as it becomes possible to speak of freedom the state as such ceases to exist." *Id.* at 373. Lenin modified this view, envisioning the state disappearing from a universal democracy that excluded and suppressed the "oppressors of the people." *Id.* at 374. Although the dictatorship of the proletariat had ended and socialism had been achieved by the mid-1930s, Stalin did not encourage the dissipation of the state. Stalin worked to stabilize the laws necessary to preserve the State, such as contract law, while simultaneously politicizing other laws, such as group minority rights laws, that served to secure his regime. BERMAN, *supra* note 33, at 53-58, 63-65.

39. Green, *supra* note 32, at 318 (citing W. BUTLER, *SOVIET LAW* 161 (1983)).

40. EVGENII PASHUKANIS, *The Soviet State and the Revolution in Law*, in *A DOCUMENTARY HISTORY OF COMMUNISM IN RUSSIA FROM LENIN TO GORBACHEV 179-80* (Robert V. Daniels, ed. 1993).

41. ILO Convention No. 98, *supra* note 18, art 4.

to factors other than the legal framework,⁴² an emphasis on the legal procedure surrounding labor negotiations would have increased protections for the workers.

Second, the Soviet legal system emphasized the rights of the collective over the interests of the individual.⁴³ Because the legal system represents the collective will of the people as part of the socialist state, protection of the individual becomes subordinate to the protection of the collective.⁴⁴ The importance of the collective at the expense of the individual causes serious conflict in legal theory, but especially in the area of human rights. Human rights laws, according to generally accepted international standards, primarily provide for individual protections.⁴⁵ Thus, when the Soviets repressed dissidents for criticizing State policies, they viewed their actions as legitimate protection of the collective socialist state and the greater good, while international human rights groups denounced the same actions as violative of individual freedoms which are protected by international law.⁴⁶

This schism between protection of individual rights and collective rights should not have interfered with the protection of worker rights. Worker rights intrinsically are collective rights. The primary actors are groups of individuals (namely trade unions), employers or employers' associations, and governments. Unfortunately, the Soviet government took the protection of collective rights a

42. See discussion on Soviet trade unions, *supra* notes 23-26 and accompanying text. See also SIMON CLARKE, ET AL., WHAT ABOUT THE WORKERS? WORKERS AND THE TRANSITION TO CAPITALISM IN RUSSIA 103-05 (1993).

43. Harold Berman notes that the concept of the collective has deep roots in the Russian tradition. Pre-revolutionary Russian agriculture was organized around the *mir*, a type of Russian peasant commune, which the Soviets later emulated in the collective farms. BERMAN, *supra* note 33, at 259-66.

Marx and Lenin inherently also place the collective, rather than the individual, at the heart of their theory. Marx bases his entire analysis on class divisions in society. He analyzes the relative positions of collective groups in society, not the success and oppression of individuals by individuals. "Modern universal intercourse cannot be controlled by individuals unless it is controlled by all." HAL DRAPER, KARL MARX'S THEORY OF REVOLUTION: POLITICS OF SOCIAL CLASSES 25 (1978) (citing KARL MARX, THE GERMAN IDEOLOGY (1964)). Lenin discusses his vision of the post-revolutionary state as the rule by the collective majority. Society evolves "from the state as a 'special force' for the suppression of a particular class [the proletariat] to the suppression of the oppressors [the bourgeoisie] by the general force of the majority of the people, the workers and peasants." ROBERT C. TUCKER, THE LENIN ANTHOLOGY 311 (1975) (citing V.I. LENIN, THE STATE AND REVOLUTION: THE MARXIST THEORY OF THE STATE AND THE TASKS OF THE PROLETARIAT IN THE REVOLUTION 340 (1984)). The State, which determines and controls the legal structure, works according to the will of the collective, the class majority.

44. LAMBELET, *supra* note 2, at 72 (discussing dissent in the Soviet Union). "The freedom of the individual [in the socialist society] is understood as freedom of man in a society, State, collectivity, and *not as freedom from them* (emphasis added). Man lives in a certain collectivity, and he cannot be fully independent of it. Therefore, everyone should compare his behavior with the interests and requirements of the whole society." Kartashkin, *The Socialist Countries and Human Rights*, in 2 THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 633 (K. Vasek ed 1982), *quoted in* Green, *supra* note 32, at 318.

45. In fact, many of the basic human rights documents, such as the United Nations Charter and the Universal Declaration of Human Rights, refer only to individual rights, purposely omitting language that would create group rights. Olivia Q. Goldman, *The Need for an Independent International Mechanism to Protect Group Rights: A Case Study of the Kurds*, 2 TULSA J. COMP. & INT'L L. 45 (1994) (discussing the history of group rights and how they fell into disuse after World War II with the founding of the United Nations).

46. See ADRAIN KARATNYCKY, ET AL., WORKER RIGHTS, EAST AND WEST: A COMPARATIVE STUDY OF TRADE UNION AND WORKER RIGHTS IN WESTERN DEMOCRACIES AND EASTERN EUROPE 53-64 (1980) (condemning the violations of ILO treaties and other human rights instruments by the Soviet government).

step further; once the government had collectivized the workers into one union, no other union could be allowed.⁴⁷ This contradicted international labor standards that grant to individuals the freedom to join the union of their choice, or no union at all, and grants unions the freedom to form larger organizations, such as international federations and confederations.⁴⁸

Third, the legal system was chained to the socialist view of the historical dialectic.⁴⁹ Marxism posits that society moves through history in a predetermined, scientific path, from capitalism through a revolution to a proletariat democracy, at which point the state slowly withers away.⁵⁰ Accordingly, the legal system had to be flexible to further and respond to these changes. This factor reinforced the subordination of the law to the State; the State was to experience a certain evolution and the law must follow it. The law, normally the ordering and stabilizing force in society, lost its place and was replaced by the State.⁵¹ The "good of the State," generally determined by the Communist Party, became the ordering principle for the Soviet Union.⁵²

The exchange of roles between the State and the legal system resulted in debilitating problems with regard to the defense of worker rights. Actions connected with the freedoms of association and collective bargaining could be construed as having been taken against the State. The State had established the official trade union structure. Accordingly, any action taken to establish a new

47. Any independent trade union movement was suppressed through the repression of leaders who arose generally during wildcat strikes in bad economic times. See CLARKE, *supra* note 42, at 110-11, 121-44 (describing the reaction to wildcat strikes throughout Soviet history and the origins of the independent workers movement beginning in the late 1980s); DAVID MANDEL, RABOTYAGI: PERESTROIKA AND AFTER, VIEWED FROM BELOW. INTERVIEWS WITH WORKERS IN THE FORMER SOVIET UNION (1994) (documenting interviews with workers who were influential in various capacities in the independent workers movement from before perestroika until the summer of 1993).

48. Article 2 of ILO Convention No. 87 states that "[w]orkers and employers . . . shall have the right to establish and . . . join organisations of their own choosing without previous authorisation." ILO Convention No. 87, *supra* note 17, art. 2. Article 3 prohibits the government from interfering in those organizations. *Id.* art. 3. Article 5 of Convention No. 87 grants worker and employer organizations the right to form and join federations and confederations, nationally and internationally. *Id.* art. 5.

49. BERMAN, *supra* note 33, at 166.

50. See ON HISTORY AND PEOPLE: THE KARL MARX LIBRARY, VOL. VII 32-42 (Saul K. Padover, ed., 1977) (reprinting letter of Marx to Pavel V. Annenkov, Dec. 28, 1846).

51. This argument begs the question of the difference between the State and the legal system within the rule of law. The rule of law can be defined as the "norm limiting the application of power by the government over the citizen or by citizens over their fellows." H. Malcolm Macdonald, *Government Under Law, in THE RULE OF LAW* (Arthur L. Harding ed., 1961). All governments control the legal system; one part of the government is responsible for enacting laws, another for administering laws, and a third for adjudicating legal conflicts. While the judicial branch must be independent to insure fairness, the configuration of the legislative and executive/administrative functions differs. Nonetheless, in most nations, certain elements within the legal system act as restraints or controls on the behavior of the government. The rule of law forces the government to act "under the law" and "through the law, . . . in the sense that the legality of their [the governmental organs'] actions may be tested by independent courts of law." WALKER, *supra* note 31, at 4 (explicating Ronald Dworkin's theory). In constitutionally based governments, such as the United States or Germany, the constitution, a legal document, restricts the actions of the governments. The legal system develops elements for the purpose of guiding and restraining those creating, administering, and adjudicating the laws. On the contrary, the Russian government did not have to abide by the legal restrictions, despite the existence of a constitution. In the name of socialism or the revolution, the government could act as it saw fit.

52. Ioffe, *supra* note 27, at 361-62.

union was an action against the official trade union and the State.⁵³ Organizing a union other than the official union clearly was an act against the State because the official union represents the workers' state and a rival union would weaken it. Labor strikes⁵⁴ were always acts against the interest of the government because the government controlled the entire economy, and strikes always cause short-term economic losses.⁵⁵

Overall, the problems created in the labor law sector tended to manifest themselves in fewer protections for workers. Unfortunately, due to the corresponding characteristics between the domestic and international legal theories of the Soviet Union, the workers did not receive compensating protection from the international worker rights regime.

2. The Soviet Union's International Legal Doctrine

The international legal doctrine of the Soviet Union reflected the characteristics of their domestic system. Accordingly, it did not allow for full realization of international worker rights. The subordination of the legal system to the political will of the government controlled the nature of their interpretation of international law. The interpretation evolved through the historical developments in the country and the concurrent change in leadership.⁵⁶ By the 1960s, Grigori Tunkin developed the international legal theory that remained until the collapse of the Gorbachev regime. A number of facets of his interpretations affect the acceptance of worker rights as customary international law.

In accordance with the emphasis on the collective in domestic law, the Soviet theory of international law did not recognize the individual as a subject

53. KARATNYCKY, *supra* note 46, at 56.

54. The right to strike is implied from ILO Convention No. 98 and generally is considered to be a necessary corollary to the freedom of association and the right to bargain collectively. *See Report of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 76th Sess., Rep. III, Part 4A, 234, 238-39 (1989); RUTH BEN-ISRAEL, *INTERNATIONAL LABOUR STANDARDS: THE CASE OF FREEDOM TO STRIKE* (1988).

55. MANDEL, *supra* note 47, at 28-41 (detailing a first hand experience of repression following a wildcat strike in 1962); Ioffe, *supra* note 27, at 364.

56. *See* Green, *supra* note 32, at 307-10; Zofia Maclure, *Soviet International Legal Theory: Past and Present*, 5 THE FLETCHER FORUM 49 (1981). In the 1920s, Soviet legal theorists, such as Korovin, began analyzing typical international law questions, including succession rights of the new Soviet Union and the role of customary international law. *Id.* at 50-51. With the solidification of the Soviet state and the rise of Stalin to power, the official position changed. Pashukanis, the author of the new theory, asserted that the Soviet Union, as the world leader for the advance of progress, deserved superior freedom in its international relations. *Id.* at 55. International law became a weapon in the "struggle not only between competing capitalist states but between different and opposing economic and socialist systems." *Id.* (quoting EVGENII PASHUKANIS, OCHERKI PO MEZH DUNARODNOMU PRAVU (Essays on International Law) 16 (1935)). Pashukanis was replaced as the foremost international legal theorist by Andrei Vyshinskii during Stalin's purges of 1936-38. Vyshinskii, much more a politician than legal theorist, based his theory on the continuation of the use of bourgeois institutions of international law, justifying temporary agreements with capitalistic nations. *Id.* at 57. Vyshinskii believed that conflicts between the law and "revolutionary" political demands "must be solved only by the subordination of the formal commands of law to those of Party politics." Andrei Vyshinskii, *Sudostroitel' stvo v S.S.S.R.*, in ROBERT CONQUEST, *THE GREAT TERROR: A REASSESSMENT* 83 (1990). Due to his political skills, he survived as the preeminent theorist for twenty years, to be succeeded by Tunkin.

of international law.⁵⁷ Although traditionally only states could be subject to international law, human rights have developed as an exception, giving the individual standing to enforce specific rights.⁵⁸ Tunkin and his associates believed that the individual rights granted in human rights instruments could only be enforced through implementation of domestic legislation.⁵⁹ Naturally, this only reinforced the lack of protection for labor rights, as well as other human rights, due to the previously discussed failures of the Soviet Union's domestic legal system. When the state failed to enforce those rights through domestic legislation, the individual had no recourse to international bodies and courts. This served to diminish the quantity and quality of the practice element by reducing the enforcement possibilities and thereby the likelihood of the State fulfilling its obligations.

The lack of compliance of the Soviet Union with the worker rights of freedom of association and the right to bargain collectively became further compounded by the Soviet theory on customary international law. Tunkin argues that although customary international law develops through practice and *opinio juris*, states must tacitly agree to custom before they are bound.⁶⁰ Accordingly, if an international practice that has acquired the force of law becomes customary international law, it only acquires international force of law for those states that have tacitly agreed to such a transformation.

The addition of the tacit agreement element to customary international law displays the same superiority of state over rule of law in the international law arena as in the domestic arena. The Soviet Union acknowledged the legally binding nature of workers' rights,⁶¹ in addition to enacting into the domestic code worker rights provisions.⁶² Had the Soviet Union and other Eastern bloc states actually implemented the worker rights provisions as it professed to do before recent changes,⁶³ the test for customary international law would have been satisfied, and worker rights would have been binding as customary international human rights. As additional insurance against being bound by customary international law, the Soviet state amended the traditional legal analysis. The State exercised ultimate control by changing the law, rather than risk being bound by laws with which it could not comply.

57. A.P. Movchan, *The Human Rights Problem in Present-Day International Law*, in CONTEMPORARY INTERNATIONAL LAW 239-41 (Grigori Tunkin ed., 1969).

58. BROWNLIE, *supra* note 12, at 546-94; SHAW, *supra* note 12, at 187-94.

59. Movchan, *supra* note 57, at 239-41.

60. I.I. Lukashuk, *Sources of Present-Day International Law*, in CONTEMPORARY INTERNATIONAL LAW, 178-79 (citing G.I. TUNKIN, THEORETICAL PROBLEMS OF INTERNATIONAL LAW 96). To mandate that states accept or agree to customary international law before they are bound completely changes the meaning and force of the law. The power of custom in international law is its universal binding nature; to add a requirement of tacit agreement gives individual states the power to undermine its meaning. For example, it gives the state of Rwanda the ability to declare that they are not bound by the customary international law prohibiting genocide and proceed to legally exterminate a race of people.

61. Movchan, *supra* note 57, at 239 (arguing the rights are legally binding only on the contracting parties). The U.S.S.R. ratified all of the relevant ILO Conventions.

62. See, e.g., 1990 Labor Law Act, *supra* note 34, § 1-3, 9.

63. This line of argument is, to a certain extent, moot. As described in the previous section, the domestic legal situation clearly prevented the actualization of worker rights and the satisfaction of the practice element.

The irony lies in rhetoric of the Soviet Union. The Soviet Union always emphasized the importance of economic and social human rights over civil and political rights.⁶⁴ However, its lack of compliance with the practice and the introduction of the tacit agreement element precluded fundamental economic rights (e.g., labor rights) from becoming customary international law. While the international and domestic legal regimes hindered the acceptance of worker rights in the Soviet Union, the structure of the labor relations system bore equal responsibility for the lack of protection of worker rights.

B. *The Labor Relations System in the Soviet Union*

As with the legal system, the structure of the labor relations system in the Soviet Union obstructed the freedom of association and the right to bargain collectively. After the solidification of the socialist state, the labor relations system developed structures to keep those with the power in power. Those in power strove to keep the workers alienated and atomized, which increased their powerlessness.

1. The Theoretical Basis of the Labor Relations System

At the base of the labor relations system in the Soviet Union, as in most countries, were the trade unions which operated as one part of a tripartite system, which also included management and the government.⁶⁵ Under the Soviet system, however, the trade unions never had a powerful role. According to Marxist and Leninist theories, trade unions were relegated to a secondary position in the economy, as opposed to the equality they should have enjoyed with management and government in labor relations issues. Consequently, trade unions made few contributions to the advancement of worker rights.

Although Marx had an overall positive view of trade unions, he did not view unions as the necessary defenders of the rights of workers. Like most socialist philosophers of his day, he strongly criticized the craft and business unions, which comprised the bulk of unions, for they restricted gains for workers to those obtained by the rules propagated by the ruling class.⁶⁶ Those unions would serve merely to divide the proletariat into bourgeois-imposed classes and, in a shortsighted movement, hinder the inevitable class unity and revolution.⁶⁷ Marx did realize, however, that the new trade union movement, open to all workers in all occupations at all skill levels, could provide "an elementary class organization of the proletariat [as] . . . an irrepressible reservoir of elemental class struggle."⁶⁸

64. Movchan, *supra* note 57, at 234.

65. The tripartite system of equality between labor, management, and government is an ideal balance of power which much labor legislation strives to achieve. The ILO is based on such a balance of power.

66. DRAPER, *supra* note 43, at 103-05. Business or craft unionism denotes a more conservative union, representing exclusively one trade or occupation and, most often a skilled trade or craft. They tend to strive only for material gains, such as higher wages, and ignore the political and social roles a union can play. Trade unionism denotes a union open to all crafts and workers of all skill levels. They tend to have a greater interest in influencing the political system to the benefit of workers.

67. *Id.* at 105-08.

68. *Id.* at 114.

Lenin further developed Marx's idea of using the trade union as an organizational tool to advance the revolution and the socialist state.⁶⁹ He defined their role as "the transmission belt from the Communist Party to the masses" and the "school of communism in general."⁷⁰ This philosophy firmly placed the trade unions under the control of the Communist Party and the government. Therefore, instead of the trade unions operating as an independent voice for workers defending their rights, they acted as the voice of the Party and the government. The workers were left in the ironic position of having no concrete, direct representation in a workers' state.

2. Role of the Trade Unions in Soviet Labor Relations

The trade unions performed a dual function within the socialist society. They simultaneously represented the interests of the workers and the industrial policies of the Party/State.⁷¹ The development of the dual union function directly violates the right to freedom of association as defined by ILO Convention No. 87. The Convention defines freedom of association to include the non-interference by public authorities in workers' and employers' organizations.⁷² The 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. As a practical consideration, most trade unionists view that position as untenable because the interests will inevitably conflict. The union cannot protect the worker if it must encourage the worker to work harder, faster, or without safety protections that slow production, all of which were factors compromising the general industrial policy of the State. Because of the overriding importance of state goals of production, the concrete result was the relegation of the union's role in the enterprise structure to a small voice for the workers, while simultaneously increasing its role of encouraging the productivity of the workers.⁷³

Despite the fact that the unions never complied with the international worker rights standards, the unions did fulfill a number of traditional functions. The unions negotiated collective bargaining agreements. However, instead of the contract generally regulating the "terms and conditions of employment"⁷⁴ as defined by international law, they regulated only a small allocation of enterprise funds. Generally, the bulk of the compensation package and workers' hours were determined by a series of detailed regulations from the appropriate ministry. The primary areas in which the union could exercise discretion included the

69. "Trade union organisations, not only can be of tremendous value in developing and consolidating the economic struggle, but can also become a very important auxiliary to political agitation and revolutionary organisation." V.I. Lenin, *What Is to be Done? Burning Questions of Our Movement* (1902), reprinted in THE LENIN ANTHOLOGY 71 (Robert C. Tucker ed., 1975).

70. CLARKE, *supra* note 42, at 95 (citing V.I. Lenin in *On Trade Unions* 468, 470 (1970)).

71. *Id.* at 92-93.

72. ILO Convention No. 87, *supra* note 17, art. 3(2).

73. CLARKE, *supra* note 42, at 103.

74. Terms and conditions of employment is the scope of the CB contract as defined by the ILO. ILO Convention No. 98, *supra* note 18, art. 4.

regulation of health and safety,⁷⁵ the implementation of housing repair and construction, the provision of sport and cultural facilities, and the acquisition of scarce foods and consumer goods.⁷⁶ Once signed, the contract became legally binding. Unfortunately, the few benefits allocated to workers in the contract often did not materialize, often due more to material constraints and changed circumstances than malicious withholding by management.⁷⁷ Few workers were aware of their collective bargaining agreement, and even fewer ever saw a copy of their contract.⁷⁸ Accordingly, workers had little or no opportunity to enforce the few benefits they might have gotten from the collective bargaining contract.

The management structure of most enterprises further inhibited the unions from actualizing the customary international labor laws. The structure placed the trade union leader at the head of the enterprise in an unequal relationship together with the enterprise director and the party secretary.⁷⁹ Their collective goal was to maximize the inputs of production (consisting of labor and capital, each of which were in a state of constant shortage) in order to achieve the quota set for the enterprise by the governing administrative ministry and to receive the maximum wage fund allocation.⁸⁰ Management relied on the union to anticipate and solve workers' grievances before they would disrupt the work schedule. In return, the union president would receive personal promotion and career advancement.⁸¹ The union president had no intrinsic motivation to represent the interests of the workers. He had every personal motivation to represent the interest of management. This structure impeded the compliance with ILO Convention No. 98 and the right to bargain collectively because the

75. Often, this area conflicted with the union's role in encouraging production. The union would not be willing to stop a production line long enough to install safety equipment or would not encourage workers to wear safety equipment if it would slow down production. Because the workers would lose bonuses with the work slow down, they also had few incentives to implement health and safety devices.

76. CLARKE, *supra* note 42, at 104.

77. *Id.* at 105.

78. *Id.* Although not legally mandated by international law, workers should and generally do, have access to copies of their collective bargaining contract. Even practices in the United States directly contradict the Russian experience. Most union members own a copy of their collective bargaining contract or at least have access to a copy. Unions negotiate clauses and work to keep their members aware of their rights according to the agreements, such as allocation of funds to reprint the contract and the provision that a collective bargaining contract be kept in each work location.

79. *Id.* at 102. The enterprise director clearly had the most power, and the only way around the director's decisions was to go to higher level Party representatives. Therefore, the Party secretary has more power than the trade union president. Further, because the trade union president normally did not have the support of the workers, the union's traditional power base was lost.

80. Clarke argues that the collusion between labor and management over the issue of production and wages (the two were inextricably tied together) did not mean that the unions were completely working against the interest of the workers. By encouraging high production to meet or exceed the enterprise quota, the workers likely would gain bonuses and wage increases. *Id.* at 101. He only partially acknowledges that union protection of workers' interest in higher wages at the expense of other issues, such as health and safety and work place democracy, ultimately damages the worker rights rather than furthering them. Whereas labor/management relations need not be completely adversarial in order to be successful, the degree of collusion in the Soviet structure left the workers and union at the mercy of management. This is an undesirable position that international law seeks to avoid.

81. *Id.* at 104.

structure placed the union president under the influence of the management, arguably interfering with union activity.⁸²

In the end, the unions did not protect the vital international worker rights that they were charged with protecting, outside of providing few material goods for their members. The workers did not believe the unions represented their interests, and most of the time that belief was accurate.⁸³ Instead of the Soviet labor relations system working in the interest of the average worker, or even the workers collectively, the system ignored fundamental worker rights and left the work force atomized and alienated.⁸⁴ Many flaws in the labor relations system could have been overcome if a strong rule of law existed in the country, but the combination of a flawed system and a weak rule of law proved fatal.⁸⁵ The Soviet economy could not withstand the combination, and together with changes in the international economy, the State was forced to accept the introduction of democratic and market forces.

III. CURRENT LABOR LAW SITUATION IN RUSSIA

Since perestroika and the demise of the Soviet Union, the Russian government has embraced international worker rights standards, elevating them to the level of customary international law.⁸⁶ They have accepted the suprema-

82. ILO Convention No. 98, *supra* note 18, art. 2. Because the management has the ultimate power in the enterprise and the union president works with the support of the management, the structure falls under the category of "acts which . . . support workers' organizations by financial or other means, with the object of placing such organizations under the control of employers . . . shall be deemed to constitute acts of interference." *Id.*

83. As an example of the full extent of lack of representation, a doctor, Vladimir Kopasov, in Yekaterinburg was fired and persecuted for forcing the union to fully represent another doctor in a work-related grievance. Interview with Vladimir Kopasov, Russian doctor, in Yekaterinburg, Russia (June 29, 1994).

84. The enterprise work force structure was composed of a complex and rigid hierarchy. Part of the work force was kept in low paid, low skilled, labor intensive jobs. This segment constituted surplus labor that enterprises hoarded to combat the labor shortages that consistently plagued the Soviet Union. These jobs could be eliminated or reduced if staffing was needed in the line production positions. Within the line production staff, jobs were also rigidly hierarchical. The management favored certain workers with the best machines and sufficient supplies so they could earn higher bonuses. Less favored workers had to struggle in more difficult positions with insufficient supplies, and, accordingly, would not be able to meet the production levels necessary for bonuses. The work force, thus divided and alienated, was ripe for complete management control. *See* CLARKE, *supra* note 42, at 20-30; MANDEL, *supra* note 47, at 51-75 (anecdotal evidence from an interview with an auto factory foreman describing the hierarchy in his factory).

85. Theorists have contemplated the demise of the Soviet Union and have numerous answers, including too much pressure from foreign capital markets that could not be withstood by the weak internal economic system, CLARKE, *supra* note 42, at 42-47, to economic inefficiencies that caused the ruling class to allow reforms in the hopes of retaining their superior position, but which instead wrought the collapse of the country; FILTZER, *supra* note 3. They tend to overlook the damage done by the rule of law.

86. One caveat to this legal analysis should be noted. This study only encompasses the national labor laws. Each Ministry has promulgated an entire body of regulations that impacts the labor relation laws of its particular section. The regulations can be so detailed and invasive as setting the wage levels for an entire economic sector, such as health care workers. Unfortunately, both for the Russians and scholars of Russian law, the regulations are really inaccessible. They are kept unpublished and secreted away in the Ministry bureaucracy. Accordingly, this study is unable to encompass that body of law; in all likelihood, these regulations serve to restrict, at least slightly, the exercise of new rights.

cy and binding force of international treaties and ILO conventions.⁸⁷ Although it has been a slow process, Russian laws currently comply with international standards.⁸⁸

A. *Laws Pertaining to Freedom of Association and Trade Unions*

Under the new legal regime, trade unions are allowed to operate independently. The unions are protected against outside interference from such bodies as the employer⁸⁹ and government.⁹⁰ These protections stand as major advancements from previous legislation, which explicitly detailed the tasks the unions were to perform⁹¹ and allowed the government to suppress the unions in the case of action "inconsistent with the Constitution of the USSR."⁹² Naturally, the government has a right to prohibit an organization from violating the law. However, a large distinction exists between destroying an organization due to a violation of the law and applying an appropriate sanction, such as a fine or injunction, for the violation. The government retained rights of intervention that went far beyond international standards. The draft 1993 legislation has cured such problems.

87. Soviet Draft Labor Code, Kodeks Zalonov o Trude RSFSR, ch. I, art. 10 (1993) [hereinafter Draft Labor Code].

If an international treaty or an ILO convention ratified by the Russian Federation establishes rules that are more beneficial to employees than those under the legislative and other normative acts on labor, the provisions of the international treaty or convention shall apply.

Id. The 1993 Draft Labor Code is the latest legal standard available for analysis. A new, 1995 Draft Code may have been introduced in the Russian legislature, however, it is unavailable for analysis at the date of publication of this article.

The uncertain nature of the labor law raises the question of the wisdom and value of analyzing possibly-outdated legislation. Currently, the 1993 Draft remains the best indication of the intentions of the Russian government with regard to worker rights. Additionally, the 1995 Draft Labor Code is rumored to be more restrictive of worker rights, implying the weaknesses found in the 1993 Draft Code likely remain and may be further compounded. Although it is impossible to conjecture on what rights have been restricted, it is less likely that the basic associational freedoms have been rescinded than other rights.

Finally, an anticipatory statement to the critics who dismiss the effect the labor laws have on actual practices in the labor market. Clearly, the labor law regime has not been enforced to the extent it should be, *see infra* notes 110-19 and accompanying text; however, that does not make the laws irrelevant. The successes of lawyers working with independent unions and the AFL-CIO Rule of Law Offices indicate that it is possible to use the legal system to protect the rights of workers. The increase in use of the legal protections should serve to further strengthen the rule of law in the labor market.

88. As late as 1990, the 1990 Labor Law Act, *supra* note 34, allowed for the suppression of trade union activity that was "inconsistent with the Constitution of the U.S.S.R. or the constitutions of the Union or Autonomous Republics." *Vedomosti SSSR*, ch. 1, § 5 (1990). This clearly violated the freedom of association because although unions, as with any organization, should receive sanctions for violating laws, such sanctions should not reach the level of suppression. *See* ILO Convention No. 87, *supra* note 17, art. 3.

89. *See* Draft Labor Code, *supra* note 87, ch. 2, art. 15(5) (stating the same representative body may not represent both employer and employee); *Id.* art. 18 (prohibiting interference with the lawful activities of representative organs and imposing fines on employers for such interference).

90. *Id.* art. 18(1) (general prohibition on interference applicable to all); *Id.* art. 16(1) (disallowing state registration of trade unions, a major form of state control and interference).

91. 1990 Labor Law Act, *supra* note 34, ch. II, §§ 8, 10-12. Although many of the activities detailed in the cited sections are activities most unions would complete, the fact that the state is mandating the completion of such activities amounts to interference.

92. *Id.* at ch.I, § 5.

In addition to the unions having freedom to operate as they see fit, the draft legislation gives the employees additional associational freedoms required by ILO Convention No. 87. The workers are allowed to join the organization/union of their choice,⁹³ where previously the only choice would be to join the union representing all employees and management of the enterprise. In order to facilitate the employees' freedom of association, the legislation provides for the non-exclusivity of unions.⁹⁴ Non-exclusivity means that more than one trade union can represent workers within a given facility or a given bargaining unit.⁹⁵ It tends to make work harder for the trade unions because they constantly worry about competing unions entering the facility; however, it does give workers more freedom to choose the union that represents them best. 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.

As mandated in ILO Convention No. 98,⁹⁶ the new Russian legislation provides anti-discrimination protection for union activity.⁹⁷ Unfortunately, it is narrower than the protections provided in international instruments. As opposed to the international protections for all workers during all union activity, the draft Russian legislation only prohibits anti-union discrimination for union members.⁹⁸ This omits protection for workers during crucial union organizing activities. Without protection against persecution during organizing activities, employers can terminate any employee who wishes to join a new union, making it extremely difficult for new unions to form.

The new legislation protecting the freedom of association for trade unions has made great strides. Although it does not perfectly comply with international law, the laws in Russia tend to be in such a state of flux that hope remains for its continual improvement.

B. Laws Pertaining to Collective Bargaining

Russia has legislated a comprehensive mechanism for collective bargaining. Interestingly, one of the early provisions in the legislation emphasizes the rule of law as one of the main principles in the collective bargaining mechanism.⁹⁹

93. Draft Labor Code, *supra* note 87, ch. II, art. 15(2).

94. *Id.* ch. II, art. 15(3) (granting "all the representative bodies . . . equal rights in protecting the interests of the employees").

95. Non-exclusivity is not mandatory according to international law. Committee of Freedom of Association Case No. 220, OFF. BULL. 1962, No. 1, Rept. No. 58, at 6. The existence of a majority, recognized union "does not imply, however, that the existence of other trade unions to which the workers of a specific unit may wish to affiliate, or all the occupational activities of such other unions, may be prohibited." *Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on the Application of Covenants and Recommendations*, International Labour Conference, 58th Sess., Rept. III, Part 4B, 75 (1973). Because of the dominating strength of the ex-official unions in Russia, exclusivity clearly would eliminate most hope of achieving workers associational rights.

96. ILO Convention No. 98, *supra* note 18, art. 1.

97. Soviet Labor Code, *Kodeks Zakonov o Trude RSFSR*, ch. II, art. 21 (1993) [hereinafter Labor Code].

98. *Id.* art. 1(2).

99. Collective Agreements and Contracts Law of Russian Federation, ch. 1, art. 4 (1992) [hereinafter CB Law of Russia].

The emphasis of rule of law is important in the collective bargaining negotiations. Although the main principles stress the equal rights of the parties,¹⁰⁰ they ignore the unequal bargaining power that exists between labor and management in Russia, as in most countries.¹⁰¹ In Russia, the power situation is more complex than other countries due to the former position of unions in the society. Nonetheless, unions and workers are still at the mercy of the director of the enterprise to locate money for wages and allocate the money to the employees, while workers seem reluctant to withhold their labor because of fear of unemployment in these uncertain times and the belief that a strike will not improve their circumstances.¹⁰² This relationship should be acknowledged by the legislation.

The collective bargaining law generally achieves the international standards established by the ILO Conventions. The mechanism is not elaborate. It does not provide elements such as a standing national administrative body to adjudicate disputes, leaving disputes to be settled by mediation.¹⁰³ This mechanism, however, should be appropriate for Russia given the disintegration of the national government and the devolution of responsibility to local areas. In an unusual provision, the law includes a mechanism to encourage the employer to bargain. Employer representatives suffer personal liability for avoidance of contract negotiations.¹⁰⁴ This law has been enforced in at least several instances, and the court fines have been paid by the employer representatives, not the enterprise.¹⁰⁵

The scope of bargaining is well within the internationally designated area.¹⁰⁶ The collective bargaining agreements should cover wages and the general compensation package, work-time and leave-time, health and safety

100. *Id.*

101. Although equal bargaining power is not enumerated in the ILO Conventions as a right of the parties, it can easily be included as necessary "to encourage and promote the full development and utilisation of machinery for voluntary negotiations" between employers and workers' organizations. ILO Convention No. 98, *supra* note 18, art. 4. Without equality of bargaining power, truly voluntary negotiations will never exist because one side, normally the employers, will be able to coerce the other side into agreements. Labor relations laws in most countries, even the United States, recognize this inherent inequality in power and work to correct it. See DULLES, *supra* note 23, at 274-75 (discussing a purpose of the National Labor Relations Act as strengthening the bargaining position of labor).

102. Although the strikes currently are being used to increase union power in bargaining and have been used in the past, the number of strikes do not seem to be proportional to the hardships the workers are experiencing. Many more workers have been deprived of their wages for months at a time than have gone on strike. Some, especially women, are afraid of losing their jobs, and therefore passively accept the situation. See FILTZER, *supra* note 3, at 23-25; MANDEL, *supra* note 47, at 82-91, 132-35. More serious problems in organizing strikes center around the demoralization and apathy of the work force, resulting in short strikes that are easily settled with small management concessions. FILTZER, *supra* note 3, at 115-17. These strikes have done little to contribute to a solid workers' trade union movement. *Id.*

103. CB Law of Russia, *supra* note 99, ch. 11, art. 8.

104. *Id.* ch. 5, art. 25.

105. Cases were successfully brought by unions in Yekaterinburg and were pending in Voronezh. Interview with Sergei Belyaev, Head of the Ural Comradship, Attorney, in Yekaterinburg, Russia (June 28, 1994); Interview with Andre Iorov, President of Confederation of Free Labor, in Voronezh, Russia (June 24, 1994).

106. As stated earlier, the scope of collective bargaining according to ILO Convention No. 98 should be "terms and conditions of employment." ILO Convention No. 98, *supra* note 18, art. 4.

protection, and a variety of other work condition issues.¹⁰⁷ Many 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.¹⁰⁸ 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. Accordingly, the ministry regulation might not substantially interfere with collective bargaining negotiations.

Overall, the collective bargaining law largely satisfies international standards. Again, the major omission lies in the lack of protection for trade union organizing. Part of the problem resides in the interpretation given to the international prohibition against anti-union discrimination. Russian courts have not interpreted the international standards to include protection for organizers, despite the standard interpretations.¹⁰⁹ Failure to protect the right to organize paralyzes the entire trade union movement by eliminating its means of growth and revitalization. Without a vibrant trade union movement, workers do not have the freedom of association because they end up with little or no ability to form new associations.

IV. CURRENT LABOR RELATIONS SYSTEM IN RUSSIA

Presently, Russia is striving to conform the reality of its labor relations system with international legal standards. The changes have been hindered by several factors. First and foremost, the tremendous size of Russia makes instantaneous and simultaneous change almost impossible. Second, the rapid decentralization of power from the federal government to state and local governments has further impeded major reforms because no force exists to efficiently attend to nationwide implementation. Third, although the policy of the central government has been to introduce democracy and market reforms, many governmental positions, especially state and local positions, remain in the hands of the same people who held the posts during the Communist regime. Many of those people still exercise beliefs and practices acquired during the Communist era, which tend to inhibit reforms. Finally, the poor economic conditions, including lack of growth and high inflation, compound all the previously mentioned problems. In the field of labor relations, it is difficult to organize unions when traditional organizing issues such as higher wages become moot because the enterprise has no money to pay any wages, much less higher ones.

107. CB Law of Russia, *supra* note 99, ch. 3, art. 13 (including such factors as observation of workers interests in the privatization of the enterprise, training, education benefits, and ecological security).

108. *Id.* ch. 1, art. 3.

109. Interview with Alexander Shugaev, Attorney, Head of Rule of Law Program, in Moscow, Russia (June 22, 1994). International standards do call for protection from anti-union discrimination for organizers and workers involved in organizing a new union. ILO Convention No. 98 protects all workers, not just union members, from "acts calculated to . . . cause the dismissal or otherwise prejudice a worker by reason of . . . participation in union activities." ILO Convention No. 98, *supra* note 18, art. 1(2)(b). The breadth of this language clearly extends to cover organizer. Further, ILO Convention No. 158, Termination of Employment, specifies that workers may not be fired for union organizing along with other types of union activity.

With all those issues in mind, this section will provide an overview of the state of Russian labor relations with regard to the freedom of association and the right to collective bargaining. Despite the aforementioned problems and the continual state of flux, for international legal purposes, Russia has in practice gone far down the road of implementing the customary international worker rights.

A. *Freedom of Association in Russia*

Freedom of association exists and is enforced in Russia. Very few unions, however, are able to compete with the ex-official unions.¹¹⁰ The major impediments to the growth of a large independent trade union movement lie in the organizing problems faced by new unions and the remaining strength of the ex-official unions.

As previously discussed, the Russian labor relations system lacks protections for the organization of trade unions. A pattern has emerged which demonstrates the barriers erected by the lack of protection.¹¹¹ In order to found a union, the organizers need a minimum of ten members. Once this is done, they can then form a constitution and executive body to gain recognition from management and the local government as a legitimate union. Thereafter, those members are protected under the anti-union discrimination laws. Unfortunately, many of these unions stagnate at that low level of membership.

With only a small fraction of the workers as members of the union, the union attempts to begin negotiations with management. Although this early commencement of negotiations has a number of purposes, ultimately it may hinder the growth of unions. The commencement of negotiations, while not legally necessary, unofficially secures the official recognition of the union.¹¹² Russia abolished any system of registry for unions. The trade unions depend on recognition by the management to secure their legitimacy and protection against anti-union discrimination. The only action unions must take to officially secure recognition is to inform management about their legal existence. However, enterprise directors have been known to ignore letters informing management of union formation.¹¹³ Negotiation unquestionably denotes the required recognition. Additionally, most Russian union leaders believe the only way to attract members is to negotiate a favorable contract.¹¹⁴ Therefore, they often begin negotiations without the bargaining power necessary to secure a favorable contract.

110. The trade unions that had been the official unions under the Communist regime have taken a number of different names, most of which include the words "independent" and "democratic." In order to avoid confusion, these unions will be referred to as ex-official unions in this article.

111. Interview with Alexander Shugaev, *supra* note 109.

112. *Id.*

113. These new, small unions have had problems with management refusing to recognize them, even once they request commencement of negotiations, as is their legal right. CB Law of Russia, *supra* note 99, art. 6.

114. This belief inherently lies at odds with traditional unionizing tactics used in the United States. Normally, the union organizers work, sometimes for months or years, to attract a membership that constitutes a large majority of the work force. Aside from certain legal requirements in the United States, such as a majority of worker support in order to gain exclusive representation rights, this majority support gives the union a much more powerful position from which to begin bargaining.

The result of these actions is that these small unions spend all of their time and energy on negotiations and the various legal battles that entails, and none on further organizing. They have great difficulties growing beyond the initial membership. These unions remain weak and small and do not provide a vibrant choice for many workers.¹¹⁵

The question then turns to the ex-official unions and their representation of the workers. If they remain the largest nominal trade union, have they freed themselves from governmental and employer interference at all? This question cannot be answered with one generalized statement. 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. Although increasing the subsidies for the enterprise would seem to improve the conditions for workers, the workers have no guarantee that they, and not the enterprise director, will benefit from the increased income. A small number of unions have made significant efforts to reform their organizations into truly representative trade unions. Many of these unions have broken away from the primary ex-official union structure¹¹⁶ and joined other independent unions in confederation. These unions are among the strongest of the independent unions. They tend to have a large membership and the power to negotiate favorable collective bargaining contracts.¹¹⁷ These unions fulfill all the labor standards delineated by the freedom of association and the right to bargain collectively.

A large number of the ex-official unions fall somewhere in between the two aforementioned groups of unions. They wish to represent the workers and comply with international labor standards, but lack the tools to do so. This group of unions does not want to relinquish the property and material benefits it can provide the workers.¹¹⁸ Generally, they believe they can best serve their members by remaining close to management and gleaning whatever benefits they can from management. It appears, however, that with the right instruction, these unions would evolve from providers of material goods and benefits into representative trade unions free from employer and governmental interference. This group is far from monolithic. Each case differs with the circumstances of the enterprise, profession, and geographic region.

115. In fact, these unions represent between three and five percent of unionized workers in Russia, depending on the source of the estimates. Fred Hiatt, *Russian Labor Unions Struggling for Identity in Free-Market Economy*, WASH. POST, Nov. 1, 1994, at A17. The strength of the unions does vary among industries, and the independent unions in the seafaring, transportation and coal mining sectors tend to be extremely strong; whereas, in other industries, such as auto or electronics, they are weak or non-existent.

116. The Federation of Independent Trade Unions of Russia (FNPR) represents the ex-official unions.

117. Interview with Transportation Workers Union, in Yekaterinburg, Russia (June 27, 1994).

118. The FNPR unions retained control of the property the Communist unions owned. The property included vacation homes and spas. They also might have access to a social welfare fund. This fund is separate from the federal budget, but was supplied by a federal payroll tax. Currently, the amount in the fund is unknown and access to the fund is strictly limited. Meeting with Anders Aslund, Professor, Director, Stockholm Institute of Eastern European Economics, Stockholm School of Economics, Economic Advisor to Russian Government and Co-Director of the Macroeconomic and Finance Unit of the Russian Government, in Washington, D.C. at the Free Trade Union Institute (May 4, 1994) (summary on file with author).

Trade unionists, both Russian and foreign, continue to work to ensure the freedom of association for employees. They seem to be making some progress. The realization of the rights granted under the freedom to bargain collectively has followed a parallel course.

B. Collective Bargaining in Russia

The right to bargain collectively in Russia has come to depend on two factors: the bargaining power of the respective parties and the enforcement of the rule of law. Those factors determine whether the union, once established, will be able to negotiate a contract to cover the employment wages and working conditions.

As stated previously, many of the new unions have only been able to organize a small percentage of the work force in their location. This has created large negotiating problems. The smaller unions have little bargaining power as compared to the ex-official unions, which normally represent the balance of the work force. The management of the enterprise feels, despite the law to the contrary, that after they have signed a contract with the union that represents eighty or ninety percent of the work force, they do not need to enter into further negotiations. Ten percent of the work force would rarely have the power to take action such as commencing an effective strike to induce employers to negotiate, such as the commencement of a strike that would have detrimental economic effect on the enterprise.¹¹⁹

This situation has played out in several ways. On rare occasions, the small, new union has been able to form a coalition with the ex-official or majority union, take the lead role in negotiations, and settle on a contract with favorable provisions. More frequently, however, the small unions are forced to join with the ex-official unions and accept whatever terms are negotiated. In fewer instances, the new unions try to negotiate on their own. Often they must resort to litigation to force the employer to negotiate with them.¹²⁰ The outcome of those cases has been generally positive. Courts generally have been willing to enforce the law mandating employers to bargain collectively with all employees, but cases can face several levels of appeals.¹²¹ Unions without funds, which include most new unions, or unions in town without access to the Western programs, will have trouble pursuing this avenue.¹²²

Of course, the ability to enforce collective bargaining laws, such as the mandate that provides that employers must bargain with every union, depends

119. Interview with Alexander Shugaev, *supra* note 109.

120. This normally occurs in places that have had the benefit of labor lawyers in contact with the AFL-CIO Rule of Law projects. Unions in such cities as Moscow, Yekaterinburg, Voronezh, and Chelyabinsk have begun such actions. *Id.*; Interview with Andre Iorov, *supra* note 105; Interview with Sergei Belyaev, *supra* note 105.

121. Interview with Sergei Belyaev, *supra* note 105.

122. Even in cities such as Yekaterinburg, with a strong, independent union movement and Western support, the labor lawyers are harassed and threatened. Because the union-side labor law cases barely pay, some lawyers wish to handle their cases on a pro bono or part-time basis. Those attorneys find once they take the union-side labor law cases, they become a sort of pariah, to whom no other clients will go. Interview with Sergei Belyaev, *supra* note 105.

directly upon the existence of the rule of law. The success of the collective bargaining system, as well as the labor relations system, revolves around the existence of the rule of law. Although no clear pattern has been defined, the problems can begin with the local officials. After being accustomed to making decisions based on political expediency, as opposed to legal reasoning, it has been difficult for these local magistrates and trial judges to put aside external factors and make decisions based on the new laws. It has been easier for the courts to decide for the more powerful enterprise director or party secretary than the union president. This pattern tends to injure the party that had the most to gain from the enforcement of the new legal provisions, normally the embryonic unions.

The dearth of enforcement of the rule of law hinders collective bargaining more than the freedom of association. The right to bargain collectively depends upon a legal regime or mechanism that eliminates the power imbalance between labor and management and allows for negotiations between equals. This implies that behind the laws delineating this mechanism lies a legal system that will support and protect those mechanisms. Without the rule of law present at all levels of government, local, state, and national, the collective bargaining mechanisms will fail. These failures of the judicial system will take time to remedy, as individuals must relearn practices that had been necessary for them to survive for the past seventy years under Soviet rule.

V. CONCLUSION

The transition of the former communist countries from socialism to free market democracies stands as one of the most historically significant events in this century. This change has reshaped the face of international law and the international legal regime. Domestic developments in the former Eastern bloc nations have solidified certain aspects of the international legal regime. These nations have decided to embrace interpretations of international law that they regarded as capitalist, bourgeois interpretations. This new agreement has paved the way for the solidification of certain customary international law, namely customary international labor law.

The standards of freedom of association and the right to bargain collectively, two of the basic international labor rights, are two such rights which have been solidified into customary international law. Hungary, Poland, the Czech Republic, Slovakia, and other countries have created labor relations systems that basically comply with the international interpretations of the aforementioned labor rights. Their actions reflect the transformation of the labor rights into international law. Russia has also redrawn its labor relations system to largely comply with customary international labor laws. The re-creation of its labor relations system further emphasizes the binding nature of the right to freedom of association and the right to bargain collectively as defined by international law.

Russia is having problems realizing the labor rights that it promises its workers. However, those problems seem to result from sources other than the will to comply with international law. Various legacies of the Soviet system work to hinder actual compliance with international law. The most damaging legacy of the Soviet regime is the destruction of the rule of law in society.

The absence of the rule of law in the Soviet Union precipitated the collapse of the society. It is currently impeding the reconstruction of the society. It stands in the way of achieving full worker rights in the new society. Until respect for the law and the rule of law can be established, progress will be blocked. A small number of Russians are struggling to reestablish the rule of law. Trade unionists and lawyers are at the forefront of this movement. Through their persistence, in time Russia will regain the rule of law and achieve the customary international labor laws that it promises its citizens.

