ПОЛЕВЫЕ ЗАМЕТКИ СОЦИОЛОГА

The Use of Law in Labour Relationship

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During the Soviet era, the principle of the dictatorship of proletariat denied the possibility of conflicting interests between workers and management. In post-soviet Russia, however, liberalism and privatization created new divisions between employers and employees that disrupted labour relations, which henceforth took shape against the backdrop of new socioeconomic rules. Responding to the demands for a new legal framework, the Russian Legislature developed new legal instruments to regulate labour relations: This paper considers how these are perceived and used in Russia today.

More precisely, this paper does not assess the efficiency or equity of the new Labour Code but uses this field as a window through which we can view the evolution of Russian legal culture. The sources consist of interviews that were conducted with various stakeholders: managers responsible for human relations and labour regulation in enterprises, employees involved in disputes with their employers, advocates for both sides such as lawyers, union representatives, legal-aid organizations and scholars who study conflicts between labour and management. These interviews were conducted in Moscow (in 2012 and 2013) and in Yekaterinburg (in 2014). On the basis of these sources, the practices and narratives of these various actors who are all in some way connected to the implementation of the new Russian labour laws are described. Insofar as these sources are all qualitative, they cannot provide a truly representative picture of labour relations in contemporary Russia. Nonetheless, the interviews illustrate how Russian legal culture actually works in everyday life. It provides a sketch in broad strokes of some of the major points of contention and contrast in terms of the representations and practices of the various actors.

Some of the changing attitudes about these laws are identified and various social behaviours in creating, using and not using the law are highlighted.

Keywords: labour relationships**,** rule of law, rule aversion, labour legislation in Russia, informal practices, qualitative study

In February 2002, a new Code came into force replacing the Labour Code of the Russian Soviet Federal Socialist Republic (RSFSR), adopted in 1971. That "innovation" only moderately excited public opinion. Several proposals were submitted to the Russian Duma, but the discussion about them in the media was not very intense. The final text merely integrated the points on which there was agreement between the various "social partners". Moreover, the new law did not represent a radical departure from Soviet norms. It demonstrated a willingness to balance the respective rights of both of the key stakeholders: employers and employees.

Most of the people interviewed have relatively neutral attitudes to the new Code. Most believe that it assures equity. Nevertheless, the fact that the Code itself is the source of little conflict does not mean that it is considered a fit regulator or that it actually facilitates regulated relationships.

The Code as a fiction

The main complaint is that the Code does not reflect the reality of work arrangements. For small enterprises, complying with the law is an unaffordable luxury. The Code also does not take into account new working patterns like telecommuting and the employment of foreign specialists. Employers and employees are therefore required to work around the law, for instance, by signing employment contracts that in effect falsify the facts. "On paper there is one situation, in reality there is another," a human resources director explained, describing how a telecommuter was hired. Another example of bypassing the law concerns the production of illicit documents. For instance, many companies make it a condition of hiring an individual that he or she provides an undated resignation letter in advance in order to protect the company from legal obstacles regarding a dismissal. This practice was reported several times by employees, without acrimony and without them feeling as if they had been subjected to unacceptable pressure. All stakeholder groups share the belief that it is impossible to adequately reflect the real situation in terms of legal norms. Accordingly, they feel that breaking the rules represents a necessary adjustment to the practical situation, not a violation. They blame the law, not the practices it enforces.

The Code is designed to formalize labour relations in order to minimize conflict. For some interviewees, however, this formalization process is little more than fiction. The main question when writing an employment contract is "how to arrange it": in other words, how to get what you want. The skill in writing a good contract lies in the creative way of "shaping" the situation to conform to the law. The operating principle here is "anything is possible, and if something is impossible, it can be twisted to conform to the rules".

Even if the matter should come to trial, these "little arrangements" are minimized. A corporate lawyer, who commented on the claim that employers sometimes produce false documents in court when they get sued by employees over unfair dismissal or the like, replied: "It happens that we invent a little bit sometimes. But that is the lawyer's trade. The language of documents". Or consider the example of an employee, who challenged his dismissal in court. He first mentioned the required documentation ironically, saying: "The courts work in a peculiar way", but then he related with humour—and pride—the tricks he discovered over time to comply with the written legal process. For both sides, playing the system is a part of the game. The trial is not a moment when reality is confronted by legal norms, but when reality is reshaped to conform to a specific legal language.

Finally, the Code feeds the need for various courses, either "defensive" or "offensive" but always involved with the "shaping" of the reality in legal terms. "Everyone learns", a trade unionist explained. And the kind of legal knowledge the stakeholders aspire to may be "unexpected". During a training session for trade unionists, a delegate asked the lawyer who led the training how to dismiss "non-conscientious workers" without breaking the law. This example not only demonstrates the collusion between trade unions and management but also illustrates attitudes that challenge the strict logic of the code. In order to get rid of chronic truants ("conscientious workers"), the trade unionist felt entitled to seek a way to act "fairly" which the Code did describe. Because of this omission, it is necessary, according to the trade unionist (and many others), to "dress up" the facts in order to implement his concept of fairness, *despite* the Code. Note that nobody in the room objected to this statement. In other words, the Code is both an impetus to widespread legal literacy and an obstacle to genuine justice, rather than an instrument of its implementation.

The Code as a regulator?

Clearly the Code is usually not treated as "sacred" by any of these stakeholders. It is not presented as a bible, regulating relations between employers and employees. Ironically, settling problems with the Code may be considered to be "unfair".

For instance, it is often considered "disloyal" to a company if employees refer to the Code in a disagreement with the company's administration. That was the word used by one employee whose dismissal ended happily. She found a new job thanks to her "good relationship" with her manager, who networked among the company's trading partners for a new job. For her, the formal law constitutes a "complication of life"; she is convinced that a strict application of the Code would bring her more trouble than benefit. She prefers to keep her supervisors sympathetic to her needs, allowing her, for instance, to miss days at work for personal reasons, to which she responds in kind with sensitivity for their problems when they take unpleasant (for her) organizational decisions. Exit the image of a Code as "facilitator": in its place are far more informal mechanisms for negotiating relationships between employees and employers.

So, I was unable to collect any narratives about the Code serving the function of a facilitator of labour relations; but I did hear many stories about the Code as a facilitator of abuses. Extrapolating from certain practices arising in the field of consumer's rights, a company lawyer told me about "consumerist extremism" ("*potrebitel'skii ekstremizm*

plavno pereshel vo mnogie sfery, vklyuchaya trudovoe pravo"). He used this term to refer to attempts on the part of certain employees to draw maximum benefit ("*srubit' bablo"*) from "misapplications" of rules on the part of management, for instance, when it fails to observe rules during disciplinary actions or dismissals, a phenomenon that also occurs in other countries. Many websites providing advice to employees facing a "disagreement" with administration often give advice not only on how to defend yourself, but also on how to take advantage of the situation ("*mozhno izvlech' vygodu"*). A lawyer specializing in the defence of employers told me ironically that it is not good to be a thriving business because it stirs the appetite and the inventiveness of employees to abuse the clauses of the Code. She added that foreign companies are even more desirable prey. As soon as their Russian employees spot an opportunity provided by the Code, these multinationals prefer to avoid the Russian courts and yield immediately to the "blackmail" of employees claiming disproportionate advantages or compensation. To illustrate this practice, a corporate lawyer, describes these practices as a new form of "class struggle". The judges in such cases, requesting documents on the financial status of companies do not fail to emphasize that the compensation claimed is insignificant when compared to company profits and they then satisfy the requests of employees accordingly. From this perspective, the Code creates more mis-regulation and disorder than regulation.

Acting beyond the Code

Solutions to problems are often sought outside the Code. Interviews with four lawyers were conducted, each in different circumstances: one rents a small room next to a car repair shop, one rents a large office in Moscow's most prestigious district, one works in a law office on the periphery of Moscow, and the last is a scholar specializing in the defence of companies. They all advise their customers, employers and employees alike, to find ways to avoid legal action. They advocate compromise as "the simplest, most convenient and" [here my interlocutor hesitated for a moment before saying:] "the least dangerous" way to solve problems. Court costs "time, money and nerves". Rather than the word "compromise", they use terms related to the idea of harmony ("*spokoino reshit', reshit' mirom"*), sometimes supported by familiar sayings like "a bad peace is better than a good quarrel" ("*khudoi mir luchshe dobroi ssory")*. Recommended practices lean on popular wisdom rather than the legal Code. The Code is thus used to identify "sensitive" issues, but not to solve them; it functions more as an incentive to search for alternative forms of conflict resolution rather than as a regulatory tool.

Consider the case of layoffs. Rather than firing an employee directly, employers often obtain the negotiated resignation of the employee in exchange for some combination of the following: a slightly higher compensation payment than that stipulated in the Code; help finding another job using the employer's contacts; or by providing letters of recommendation. What matters more than the implementation of the Code's legal norms is the content of the worker's employment book (*trudovaya knizhka*). This tells the story of a career and the entry at the end of a contract must tell a harmonious tale. It seems to be a more important consideration in negotiations than compliance with the Code.

A reliance on judicial means in order to manage employment relationships is described by these lawyers as highly detrimental to labour relations. As one of them said, he often tells his clients that they have to consider not only whether and how the case can

be argued but first and foremost the consequences of suing ("*est' pravovaya perspektiva, a kak dal'she?*"). One lawyer offered the following comment about a client who sued against his advice for reinstatement to his post: "He won, but he got nothing". This client works now under very difficult conditions.

Recourse to judicial means is not trivial: having won a lawsuit against the employer is more of a stigma than a victory. Thus, a trade unionist explains that an employee reinstated by the court becomes an outcast: his or her colleagues avoid contact for fear of appearing to be standing in solidarity with someone who in effect committed treason. A lawyer told me that the situation is particularly delicate in state institutions—for example, among school administrators. She spoke bluntly of endangerment in this case. Finally, suing damages reputations, particularly for high-ranking executives, who will have more difficulty finding a job if they have defended their rights in court.

Accusing the Court

The problem with appealing to Courts is the unpredictability. In the words of another lawyer, "either everything is clear, or nothing is obvious". When everything is clear, compromise is the best solution; for suing is always a "lottery", a phrase often echoed by his colleagues. To illustrate the arbitrariness of the Court decisions, some evoke the rivalry between the two "capitals": Moscow tends to favour the employer, while Saint Petersburg tends to favour the employee. The scholar points out a psychological component. She is proud of the quality of her arguments. Yet according to her, there are judges who admire her work as professional and who will just repeat her statements in their legal opinion, while other judges, annoyed by her dexterity, will strive to take the opposite stance. These various statements do not illustrate concern for justice by the judges.

But it is a company lawyer who has the most negative things to say about using the Labour Code in practice. He comments on the failure of a young executive who tried to maximize her payout by suing her employer and finally obtained compensation lower than offered that initially offered to her by the company. "What a circus!" He is quick to point here to a particularly Russian style of behaviour that he rejected: "Who needed all this buffoonery? This is the culture here, unfortunately. Nothing one can do about that. Russia has its own culture". The term "buffoonery" to designate the court recurred several times in his remarks. For him, one cannot use the adjective "just" to describe Justice. Decisions may be just and not comply with the law; or they may be in line with the law but not just. In his words, good solutions are those found when sorting it out among ourselves and away from the rigid formalization. This is not an unusual statement, but he is a lawyer. One thing is certain: legal professionals are far from advocating regulation by the Code.

Using the Code

If professionals distance themselves from regulation by the Code, interest in Labour law is no less intense in society. It can be measured in terms of the number of shelves

assigned to this topic in general bookstores. Knowledge of how the legislation works is a deterrent, conferring immunity when facing human resource departments which tend to abuse those who "don't know the legislation well". Knowledge of legal norms thus seems to be used primarily as a deterrent on the one hand, and on the other as an asset when negotiating suitable solutions in disputes between employers and employers. That said, it also leads to litigation and to an increase in the number of lawsuits initiated by employees. Why the legal culture has changed can be best understood by considering the reasons why some people sue and others do not.

Suing is not an expensive undertaking, at least financially speaking, because there are no court costs for labour disputes. As one lawyer told me, everyone finds a friend of a friend who is a lawyer to help prepare the necessary documents. Instead, other considerations limit lawsuits. A member of an alternative trade union suggests that most employees do not sue their employer because: "There is no justice anyway, so why should I increase this feeling by getting involved with it." Conversely, those who pursue suits are motivated, he says, by "self-esteem": the refusal to be treated as a pawn rather than a person. Suing is usually an individual undertaking. Contrary to what one might expect, trade unions rarely help in this process. Suing is a lonely assertion of the self.

Consider this example. A computer engineer sued his company because he objected to being forced to change position and take a pay cut following the 2008 economic crisis. He challenged the administration's decision because he felt offended and wanted to punish their impudence. Even though his suit lasted eight months, during which he was officially not permitted to work in order to retain the right to challenge the decision of the company, and even though he lost that suit on appeal, he is satisfied with this experiment. Among the "benefits" he gained was the narcissistic satisfaction of having forced three executives within the company to defend it in court. The experience boosted his self-confidence. He is proud of the "legal skills" he acquired, especially as labour law appears to him to be a "pure" field of legal implementation, independent of mafia involvement. He happily shares his practical knowledge on internet forums about how best to settle disputes between employees and employers.

His self-esteem was both the foundation for his actions and the result of them. However, this heightened sense of self did not translate from litigious fervour into political protest. During his interview in the winter of 2011-2012, I asked about his attitude towards the current wave of political protests that focused on unfair elections: he advocated suing as proper way to contest them. Despite his lack of success in the legal system, he continued to proclaim his belief in it.

This example illustrates how the Russian Legal Code empowers employees. In spite of losing his suit, the experience of fighting evoked a sense of power and he came out of this experience with an even greater determination to fight against the impudence "in general". He expresses this revolt in ethical rather than political terms. He wants to be respected as a person, rather than as a citizen, and it is difficult to assert that the experience of using the legal framework shapes him as a citizen.

The comments from his friends about this story describing the "Code as fiction" make me think that the use of legal tools appears like "second life". In this parallel world, "Voice" unfolds, to use the language of political science: citizens get to express their criticism of the system. Nonetheless, work relationships are still ruled first and foremost by "loyalty" when workers do not choose "exit" and leave the company entirely.

The Code barely provides the judicial means by which it is possible to enforce obedience and/or discipline. It favours abuses of the system rather than positive outcomes,

and the resolutions of these conflicts have to be sought outside the legal system through personal relationships rather than within it, through formal procedures.

Nevertheless, even if the law is not being called upon to function as a major tool of regulation, the Code affects employment relationships. In terms of how stakeholders relate to the legal system, an interplay of formal and informal solutions is observed. Schematically speaking, the Code acts much like the rhetoric of "dictatorship of the proletariat" during the Soviet era: it encourages individuals to find informal arrangements to ensure that appearances comply with legal forms without breaking the official narrative (in soviet times) or the law (today).

But this second life of the legal system may spill over into real life. What could be the driving force for this change? Is it a question of time and/or legal socialization? Can law enforcement institutions contribute to it? Is the law-making process more efficient in this respect? Russian legislators foresee room for improving the Labour Law "from below". Who will grasp this opportunity to influence legal norms? Who is interested in the means for creating order? Is this the kind of empowerment that could make the law more effective? These issues are still to be addressed by legislators and scholars alike.

Использование закона в трудовых отношениях

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В советскую эпоху принцип диктатуры пролетариата отрицал возможность конфликта интересов между рабочими и руководством. Однако в постсоветской России либерализация и приватизация создали новые рамки отношений между работниками и работодателями, что в корне изменило трудовые отношения. Отвечая на вызовы времени, российское законодательство сформировало новые легальные инструменты для регулирования трудовых взаимосвязей. Речь пойдет о том, как эти нормы воспринимаются и исполняются в современной России.

Целью исследования не является оценка эффективности нового Трудового кодекса. Трудовое право рассматривается как окно, через которое можно увидеть эволюцию российской правовой культуры. Выводы основаны на интервью с менеджерами, работодателями, адвокатами, представителями профсоюзов и правоохранительных организаций, учеными в области трудового права. Эти интервью были проведены в Москве (2012–2013 гг.) и в Екатеринбурге (2014 г.). На основе этих интервью описаны практики, которые складываются вокруг исполнения

трудового законодательства. Поскольку данные качественные, они не могут дать репрезентативную картину трудовых отношений в современной России. Тем не менее интервью иллюстрируют российскую правовую культуру.

В феврале 2002 г. был принят новый Трудовой кодекс (ТК), сменивший КЗоТ, действующий с 1971 г. Эта «инновация» весьма поверхностно учитывала общественное мнение. Предложения были обобщены Государственной Думой РФ, но их обсуждение в СМИ не было интенсивным. Финальный текст просто интегрировал пункты, по которым установилось согласие различных «социальных партнеров». Более того, новый закон не имел разительных отличий от советского предшественника. Это проявилось в желании обеспечить баланс прав работников и работодателей, однако из этого не следует, что он на самом деле снимает остроту трудовых отношений.

Главная претензия к Трудовому кодексу заключается в том, что он не отражает новые реалии: для малых предприятий выполнять ТК становится непозволительной роскошью, в результате работодатели и работники фальсифицируют трудовой контракт, искажая отражаемые в нем факты. «На бумаге одна ситуация, в реальности другая» – расхожая модель объяснения. Другой пример обхода закона – это производство фальсифицированных документов. Например, многие компании в качестве условия найма требуют написать заявление об уходе, не ставя в нем даты. Это делается для того, чтобы оградить компанию от юридических препятствий для увольнения. Об этой практике работники говорили в интервью неоднократно, причем без злобы и без чувства, что с ними поступали неприемлемо. Все стороны разделяют уверенность, что нарушение правил является необходимым элементом приспособления к реальной ситуации, а отнюдь не злым умыслом.

Задачей Кодекса была формализация трудовых отношений для минимизации конфликтов. Однако эта формализация стала не более чем фикцией. Главный вопрос, который решается при подписании трудового контракта, – это «как оформить». Подписание хорошего контракта является творческим процессом придания ситуации подобия соответствия закону. Суды не являются местом, где реальность сталкивается с юридическими нормами, скорее, это место, где реальность переформатируется, чтобы соответствовать юридическому языку.

Реальное решение проблем часто находится вне всякой связи с Кодексом. Юристы советуют своим клиентам (как работникам, так и работодателям) найти способ избежать судебного разбирательства. Они выступают за компромисс как самый простой, самый удобный и наименее «опасный» способ решения проблем. Суды стоят денег, времени и нервов. Заметим, что чаще используется не слово «компромисс», а понятия, апеллирующие к идее гармонии («*решить миром*»), со ссылкой на известную пословицу, что «худой мир лучше доброй ссоры». Рекомендуемая практика опирается на народную мудрость, а не на нормы закона. Таким образом, Кодекс используется для идентификации «чувствительных» вопросов, но не их решения; закон, скорее, стимулирует поиск альтернативных форм решения конфликта, нежели выступает инструментом его решения. Сами юристы далеки от пропаганды регулирования трудовых отношений на основе формального права.

Увольняя работника, работодатели часто ведут с ним своеобразный торг, вступают в переговоры, предлагая некую комбинацию компенсаций: немного более высокую выплату, чем это предусмотрено Кодексом; помощь в поиске новой работы с использованием контактов работодателя; рекомендательные письма, необходимые для нового трудоустройства. Но что имеет действительно важное

значение, так это отнюдь не формальные нормы трудового права, а содержание записи в трудовой книжке. Этот документ рассказывает историю карьеры, и записи в ней должны рассказать гармоничную сказку о трудовой биографии. Формулировка причины увольнения в трудовой книжке играет более весомую роль в переговорах, чем соответствие нормам трудового права.

Проблема, ограничивающая привлекательность судов, состоит в их непредсказуемости. Компромисс является лучшим вариантом, поскольку судебное разбирательство – это «лотерея». Произвол судебной системы наглядно иллюстрирует соперничество двух столиц: в Москве, как правило, выносятся решения в пользу работодателя, а в Санкт-Петербурге – в пользу работника.

Последствия обращения к судебной системе не являются безобидными: выиграв иск против работодателя, работник становится изгоем, его коллеги избегают общения с ним из-за боязни продемонстрировать солидарность с тем, кто проявил нелояльность к менеджерам. По мнению адвокатов, особенно деликатная ситуация в государственных учреждениях.

Несмотря на то, что специалисты игнорируют Трудовой кодекс, интерес к нему в обществе довольно велик. Об этом можно судить по количеству полок в книжных магазинах, занятых изданиями на эту тему. Знание закона является сдерживающим фактором, своего рода иммунитетом против злоупотреблений. Понимание формальных норм используется, прежде всего, как профилактическое средство и как ресурс удачного ведения переговоров по поводу спорных вопросов с работодателями.

Стоит отметить, что подача иска в суд обычно является индивидуальным действием, вопреки ожиданиям профсоюзы редко помогают в этом. Подача иска является актом одинокого самовыражения. Но даже те, кто подает иск в суд, выражают свой протест в этических, а не в политических терминах. Они хотят «справедливости, правды», чтобы их уважали как людей. Их опыт использования законодательства, скорее, формирует их как граждан, наслаждающихся юридической подкованностью, нежели как политически активных граждан.

Вообще, злоупотребления законом более выражены, чем положительный эффект от его принятия. Конфликты решаются вне правового поля посредством личных отношений, а не на основе формальных процедур. Тем не менее даже если закон не является основным средством регулирования, он оказывает воздействие на трудовые отношения. Кодекс вынуждает людей искать неформальные способы поведения, не противоречащие формальным нормам.

Ключевые слова: трудовые отношения, власть закона, уклонение от исполнения законов, трудовое законодательство в РФ, неформальные практики, качественное исследование