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Justice and Law as Reflections of Social Practices

I arrived at my conception of all human activity and knowledge being embedded in social practices - and social practices being art and interpretation of feelings – through a study of law. Therefore I enjoy referring to law as a perfect example of this concept. - I propose to view justice and law as reflections of social practices, which in turn are reflections of individual expressions and interpretations; these are the immaterial fundaments of human and social life, of cognition, what through thinking leads to deeds. My view is based on the recognition that 'law' is but a certain perception on various aspects of life; certain aspects of human thinking, and that the resulting expressions and interpretations have traditionally been considered as constituting 'law.' My aim is to show that there is no such 'thing' as law ('law' is not a 'thing'), and that law is exclusively perceptions on certain aspects of social practices, which in connection with a discussion of 'law' may well be dealt with under the notion 'legal practices.' The social practices termed 'legal practices' is what we mean when we speak about 'law'.

I have arrived to the conceptual framework presented in this paper through my book **Expressions and Interpretations (2006)**. This book deal with the ideas of law as a reflection of social practices and law as a competition of arguments in a much broader context of philosophical discussion. I am presently working on another book focusing on social practices as the basis of human cognition and the paradigm for all social sciences, including law, from where I derive the notion of justice and law as a reflection of social practices. This general part of this presentation has been developed as a section to be integrated in that book, which is to be called **All is Art** (with the subtitles "**On Social Practices and Interpretation of Feelings**" and "**On Democratic Competition**" – the book is expected to go to print in the first half of year **2007**).

Law – A Competition of Arguments reflecting Social Practices

Law is competition of arguments; it is those social practices where individuals exchange arguments aimed at achieving a certain (normative) behavior. Indeed I would even claim that all social practices are based on a competition of arguments, and that in 'law' we in fact deal with those arguments that we discern as particularly 'normative'. That is, aimed at such behavior which people have a tendency to regard as especially compulsory. This distinction in fact points to the character of law as consisting of actions that one holding authority - or wishing to hold - over others, seek to impose in contradiction to those behavioral patterns that would be more customary (normally accepted) in society.

Through the idea of seeing law as a competition of arguments reflecting, and affecting, the social practices we are in a position to understand that *justice* is the result of the competition of arguments, and thus may be called '*competitive justice*.'

But there are two biological, natural, restrictions to the competition of arguments; two natural fundaments for justice; let's term them the initial premises. These are: the supreme respect of life and the respect of the ecological environment. Justice is a property that the individual living human being has a supreme right to, and all justice is annihilated with death; the natural environment is the condition of life and therefore serves as the sole utilitarian base for justice.

A metaphoric comparison of law and justice with medicine and health could be illustrative. Now, I argue that law should be about promoting justice, in the same way as medicine should be about promoting health. In contradiction to this insight the prevalent theories of law can be compared with a notion whereby we would think that health is produced (exclusively) on the surgeon's operation desk. The surgeon may have a very decisive role in many individual cases for sustaining life and promoting health, but certainly health is a million times broader a notion. Health is a function of a great deal of conscious and unconscious habits and activities, sometimes undertaken specifically for the benefit of the health; the diet; the habits of life; the environment; sports and leisure; all the health practices; doctors exchanging opinions; consultation; medicine; vitamins; fresh mountain air; less stress; proximity to a pet; love...Doctors and surgeons intervene only in an extraordinary situation – (and so do lawyers and judges). – Similarly justice is a function of the same living conditions; like health justice comes about by social practices – (in the perception of law we speak about legal practices). – Infinite Variances affect justice – each day.

My aim is to show that law is not a thing, but social practices through and through. Nothing in social life, in life indeed, can be seen as being separate from law, and correspondingly law cannot be seen as being separate from anything else in life (what we recognize as 'law' is just a perception of certain aspects of life). This means that if 'law' is to function properly, then society (societal life) will have to function properly. From point of view of law, this means that people must have a certain understanding of how various normative expressions function in society at any given time (how the legal arguments are ranked and quoted) – and in order for anybody to be able to have an understanding of that there has to be some kind of certainty, predictability, in the system. In Western societies there is a comparatively high degree of certainty and predictability (which does not mean the same as the systems being just – here a different perception is involved). – This predictability, to a larger or smaller extent, is something that may be perceived in many features of life – when focusing on law we may identify aspects that create predictability within the notion legal practices.

The dominant theories of law convene a very restricted notion of law: The view that they advance is that law is about the issuance of statutes (laws) by a parliament (or other so-called lawmaker); lawyers advising people on how to use the law; and judges clarifying what the law is when people are in doubt - and while on that sometimes 'making new law.'

Certain types of conduct or activities have been lifted to a highlighted position in public life by addressing special normative expressions to regulate them. We call these normative expressions 'laws' – i.e. those of the expressions that are recognized as such. These 'laws' function (interact) against the background of all the other normative expressions and interpretations that are in

circulation. The chance that a law functions as one would wish it to function depends on 'the background'. 'The background' consists of the social relations or life in general, or more precisely from point of view of law, one can talk about moral and other values (are there other than moral values?); customs; habits; traditions; development of competitiveness (in all spheres of life); material standard of living; spiritual standard of living etc.

The legal traditions, i.e. the history of how people have adapted their lives in society to a certain understanding of the prevailing normative expressions (and vice versa) are aspects of law. – What traditional legal writings highlight is only a kind of a tip of the iceberg of this notion; it examines the way how 'lawmakers', lawyers, and judges deal with perspectives called law. This approach fails to deal with the overwhelming majority of cases of interaction of normative expressions i.e. all that happens in social life. – But it even fails to deal with the majority of issues of law proper (i.e. the kind of law which is recognized as 'law'). Most of the issues affecting legal relationships escape the attention in legal theorizing and are undertaken without any participation of a lawyer. These issues come to be included in the theory of law, only in case there is an 'official' dispute; in fact only in case where there is such a dispute that both parties consider themselves to have a chance to win – for when one party considers that the other will be 'legally right', then he subjugates to the circumstances without anybody consciously recognizing that it would be a 'legal issue' (in another time or other place the same issue may well be in the centerpiece of legal disputes). – **Posner** has noticed this dilemma: "it is just another form of essentialism to assume that law is what is done by a person with a law degree and by no one else" (Posner 1993, p 369). : "When the case is clear the parties will usually settle the case before trial" (Posner 1993, p. 78). – I regard that **Sunstein** is also on the right track with stating that "As we shall see, the distinctive concerns and tools of the law are by no means limited to law" (Sunstein, p. ix), and "Much of what lawyers know is a set of practices, conventions, and outcomes that is hard to reduce to rules, that sometimes operates without being so reduced... [Any legal matter] could in the abstract, mean an infinitely wide range of things"(Sunstein, p. 13).

A metaphoric comparison of law and justice with medicine and health could be illustrative. Now, I argue that law should be about promoting justice, in the same way as medicine should be about promoting health. The prevalent theories of law can be compared with a notion whereby we would think that health is produced (exclusively) on the surgeons operation desk. The surgeon may have a very decisive role in many individual cases for sustaining life and promoting health, but certainly health is a million times broader a notion. Health is a function of a great deal of conscious and unconscious habits and activities, sometimes undertaken specifically for the benefit of the health; the diet; the habits of life; the environment; sports and leisure; all the health practices; doctors exchanging opinions; consultation; medicine; vitamins; fresh mountain air; less stress; proximity to a pet; love...Doctors and surgeons intervene only in an extraordinary situation – (and so do lawyers and judges). – But, it is the same with justice; justice is a function of the same living conditions; like health justice comes about by social practices – (in the perception of law we speak about legal practices). – Infinite Variances affect justice – each day.

This is especially important to notice when we analyze and opine on the Russian reforms and the state of society. In the West it has taken more or less an uninterrupted historic evolution to reach the notions of law and justice we have today (I stress that I do not regard this as necessarily an evolution going to an ever higher level – but there could be this kind of trend in very broad terms). With the introduction of Marx's worldview to Russia by the Soviet dictatorship Russia entered a

period which aimed at, and succeeded in, a total break with past traditions: throwing society into an abyss, where the patterns for interaction between people were interrupted by violent force; where all was turned upside down and inside up in whirlwinds. All elements that make for orderly social life were disrupted. - There could be no law and justice in such a setting, and there was none.

Very few understand the notion of legal practices, perceptions of law, the normative system, normative expressions etc. Therefore people (scholars, politicians and journalists especially) cannot grasp that you do not start a legal system just by having a longing for it, or being 'good-hearted', or maybe by 'having received a Western education'. Certainly laws are needed and a lot of good will is needed; and a lot of wishes for the best are needed; but at the end of the day what is needed is a legal culture – a legal culture, which is built on a functioning social order (there is a hermeneutic circle – call it the chicken or the egg dilemma if you will).

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Black, Kraakman, and Hay in their analysis of the emerging Eastern European countries showed (Black, Kraakman, and Hay**,** p. 245) how law is always a product of social practices - I will illustrate this by quoting a few paragraphs which speak for themselves: "The corporate laws of developed countries depend on highly evolved market, legal and governmental institutions, and upon cultural norms that often do not exist in emerging economies. And even if these laws could be exported to emerging markets without modification, there would be a case for not doing so before first taking a hard look, since these laws are likely to be as much the product of idiosyncratic historical developments in their countries of origin as of purely functional imperatives."

These quotes are about corporate law, the topic of the study of Black, Kraakman, and Hay, but naturally the same insight applies to a serious study of any field of social normative regulation. – It is a question of the researcher to learn to see issues in proper perspectives.

Fogelklou (Fogelklou p. 22) in his analysis on Russia and the Eastern European after Marxism stresses that: "The law appears… to be more a reflection of factors outside of the law." - Tuori confirms the same view regarding the development of law in post-socialist countries and stresses that this "is a time-consuming process, whose success decisively depends on extra-legal social and cultural conditions" (p.209).

Even **Hart** (Hart p. 59) spoke about 'form of a social practice which constitutes the acceptance of a rule'.

How Russian Law develop in social practice and the competition of arguments

I highlight how the Russian law develops in social practice as a result of a competition of arguments with bringing up recent well-published cases where the Russian supreme court adjudication has significant influenced the shaping of the law. These examples come from the field of social security (the right to maternity benefits) and tax law. The presentation of these cases will be preceded by outlining the Russian court system (the very structure of which stresses the competitive nature of the Russian court system).

Before I continue I have to make an important disclaimer in respect of the notion of law as legal practices. By bringing up these court cases I do not in anyway want to imply that legal practice equals court practice, rather, as I report above court practice is part of all those legal practices that

shape law in life, each day. The reference to court practice is just one of all possible examples, admittedly easier from research and presentation point of view than many other options. It would be much harder – and therefore outside the scope of this presentation - to discuss, for example, the social practice that determines the de facto tax avoidance as a result of an employer negotiating with the employee a unofficially, black cash, salary payment.

Russia's Court Structure

The below discussion in so far as it pertains to the description of the court structure draws from Alexander **Vereshchagin**'s monograph Judicial Law-Making in post-Soviet Russia (2007, pp. 10 - 15).

The Russian judicial system is divided in three independent from each other branches. The three structures are each subordinated one of the supreme courts: the **Supreme Court** (on top of the system of courts of general jurisdiction), the **Constitutional Court**, and the **Supreme Arbitrazh Court**. – It follows that Russia does not have any one single court of last resort, as is the case in for example the United States and England, and as it was in the Soviet Union. While the courts do not directly compete with each other in issuing normative arguments it is worthwhile to notice that the structure as such provides for a welcome competitive environment, which is the basis for justice.

In procedural terms Russian courts handle three types of functions, those of: trial courts (courts of first instance); appellate courts; cassational courts; and supervisory courts. – Appellate courts reconsider the decisions of trial courts both on merit and application of law (whether the rules have been relevant to the case and correctly interpreted, applied, in the case); cassational courts deal exclusively with the issues pertaining to correct application of law.

The organization of three systems of courts are further described as follows.

Courts of general jurisdiction. This system is headed by the Supreme Court. On the level of first instances there are *justices of peace, district courts* (which functions as trial courts in most cases, and as appellate courts in cases tried by the justices of peace at first instance); *intermediate courts* (one for each Subject of Federation; these courts have various special names depending on…; these courts function mainly as cassation courts, but are also equipped with presidiums with supervisory functions; they consider some kind of cases in the capacity of trial courts); finally there is the *Supreme Court of the Russian Federation*, which main function is that of supervision.

The work of the Supreme Court is divided in to plenary work, corresponding to the Plenum (a full bench of the Court); the Presidium (consisting of 13 senior justices); and divisions (collegia). There are four with various functions: the civil, criminal and military divisions, and the cassational division which is superior to the three former ones. – The Plenum issues statements on instruction how to interpret (apply) legal norms ('explanations on judicial practice'). These statements are intended to instruct judges of lower courts how to apply statutes and hence constitute an important source of law ('judge-made law'), while also serving a pedagogic function necessary considering the total transition from the system of Soviet law to a new system of democratic market economy law. Vereshchagin stresses the statements are approved by majority vote, often a result of 'heated debate'. – The Presidium has a supervisory function, and also fulfills the important function of

issuing summaries of case law and giving in official capacity response to inquiries on questions on law from lower courts.

Arbitrazh courts. Notwithstanding the misleading name the arbitrazh courts are courts for commercial issues strictly within the state system. The *district arbitrazh courts* (one per each Subject of the Federation) act as court for first instance. There are 20 *appellate courts* and 10 *circuit courts* for cassation (each serving two appellate courts). The precedents of these 10 circuit courts is considered to form case law of considerable importance, and as a consequence their decisions are routinely monitored in legal periodicals and even debated in the press and non-scholarly journals for various groups of specialists (accountants, the tax profession). The Supreme Arbitrazh Court has the function to try to bring unification to the court practice stemming from the 10 cassation courts. Correspondingly to the Supreme Court of the courts of general jurisdiction the work of the Supreme Arbitrazh Court is divided in the work in Plenum and Presidium (with corresponding functions).

The Constitutional Court consists of 19 judges having their work divided in plenary sessions and sectional work in chambers of the Court. The Court issue final judgments on the constitutionality of normative acts or the interpretation of the Russian Constitution, called decrees (‘postanovlennia’). Other decisions are called rulings (‘opredelnia’). Vereshchagin reports that there are ca. 20/25 cases and several hundred rulings per year, while the total number of applications are some 15,000. The Court does not have the authority to revise resolutions by other tribunals, but the Court is empowered to rule on whether or not laws are contrary to the Constitution and thus have them reversed of Russia.

Maternity

In a ruling (’postanovlenia’) of 22 March 2007 the Constitutional Court decreed a provision of the Law of Social Insurance Fond restricting the right to compensation of maternity leave unconstitutional. The resolution concerns the article 13 of the first part of the law which restricted the maternity leave benefit payable out of the Social Security fund to 16,125 rubles a month (approximately 475 euros). The plaintiff had claimed that the provision of the law unconstitutionally restricted her in having a child due to the financial hardship which that would involve as she would have to renounce most of her means of subsistence and that of the child in order to give birth.

The Court referred in its decision to article 19 of the Russian Constitution which establishes the principle of equality and proportionality between the values to be secured in state regulation. It is remarkable that the Court motivated, among other referrals, the decision with reference to the Governments social policies directed towards increasing birth rates. President Putin had in his annual address to the Federation Council 2007

The decision followed a well published discussion about the issue in the Russian press (see e.g. “Why do women have to lose salary going to maternity leave?” www.izvestia.ru).

Tax avoidance

The supreme courts of Russia and scholarly and public debate have greatly affected the legal treatment of tax avoidance (or tax fraud, depending on the perspective).

These issues have been highlighted in connection with Russia's fight against widespread illegal tax avoidance on all levels of society, with the case against oil major Yukos and its owners as in particular and fraud connected with illegal claims of recovery of VAT (value added tax) in general. Some of the cases involved the use of regional tax concessions, which were fraudulently used as a means to avoid taxation by recording business transactions under the rules of the concession, but in reality conducting business unrelated to the actual concessions (e.g. ignoring to make the necessary investments in fix assets which constituted the formal requirements).

According to the Russian Civil Code (art. 166), transactions may be considered invalid upon a court ruling ("voidable transactions") or ab initio irrespective of a court ruling (a "null and void transaction"). However, in the latter case courts have an important function, too, because any interested party may ask the court to invoke the consequences of the **invalidity of a null and void transaction**. Besides, the court may do so on its own initiative (art. 166 and 181, Civil Code).

Because the burden of proof lies with the tax authorities it has been difficult to contest **sham schemes involving a series of invalid transactions**. The Presidium of the Supreme Arbitrazh Court has addressed this issue in the Decree of 6 October 1998 No. 6202/97, in which it declared that when persons conclude a series of sham transactions, courts should not rule on each individual contract, but investigate the whole set of sham transactions.

We believe that, when considering disputes involving the use of tax exemptions, courts should adhere to the provisions on invalidity. However, in some cases the courts have promoted legal constructions of its own making without any reference to parliamentary laws. Such a legal construction is e.g. the notion '**unscrupulous use of tax benefits**. This legal notion stems from a decision of the Russian Constitutional Court (ruling of 25 July 2001 No. 138-0). In this decision the Constitutional Court instructed other courts to establish the scrupulousness of taxpayers to distinguish fraudulent activity. We believe that this conclusion does not find support in the Tax Code or Civil Code.

The issue of ***bona fide*** **(scrupulous) vs. unscrupulous** behavior has been recently brought to the fore due to the Yukos-Khodorkovsky receiving wide publicity in world media in the years 2003-2006. – This discussion draws on the presentation in **Avenir Guide to Russian Taxes** (Hellevig and Usov 2006; pp. 56-). It was very much about the question as to where the line is drawn between **legitimate and illegitimate tax avoidance** (or 'optimization'). In the aftermath of this politically imbued case courts gave much attention to this question, the more so that no clear answer could be received from the Tax Code itself. In response to this need for clarification, the Presidium of the Supreme Arbitrazh Court has twice discussed the issue in March and July 2006. However, the draft proposals were not approved, and no direction to lower courts has followed as yet.

As a result of these cases and the public discussion **the statute of limitations for** applying the consequences of their **invalidity** were amended. Prior to 25 July 2005 the statute of limitations for applying the consequences of their invalidity was 10 years. This lengthy period of limitation of

action jeopardized many businesses which were based on the dubious privatization deals of 1990s. Due to an amendment to art. 181 of the Civil Code, this period was reduced to 3 years from 25 July 2005 onwards. Moreover, by law this 3-year period was made retroactive, that is, it was extended to the null and void transactions which had already been concluded. However, on 5 July 2006 the Supreme Arbitrazh Court has decreed that if a suit had already been brought before 25 July 2006, the 10-year period must apply as formerly.

In some cases the **tax authorities' right to initiate a court case on invalidity has been contested**.

In cases of invalidity the object of the court proceedings can be:

• a claim to deem the transaction invalid or apply the civil law consequences of invalidity

• the right to compulsory collection of taxes based on the invalidity

• confiscation to the state of the proceeds from the invalid transaction committed willingly against legal order (ordre publique)

There emerged a legal dispute whether the tax authorities had a right to initiate the court proceedings. The dispute stemmed from an amendment in year 1999 to article 31 of the Tax Code that sets the rights and obligations of the tax authorities. This amendment deprived the tax inspectorates of the right to initiate court proceedings for deeming a transaction invalid and confiscation of the proceeds to the State.

This amendment was seemingly in conflict with a provision in the Law on Taxation Authorities of the Russian Federation (art. 7(11)).

The Constitutional Court confirmed (see Ruling No. 138-0 of 25 July 2001 and Decree No. 4-0 of 10 January 2004) that, notwithstanding the amendment to the Tax Code, but in view of the provision of the Law on Tax Organs, the right to initiate such proceedings is left with the tax authorities.

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