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Distribution Section:

Tel/fax: (+7)(495) 617 1888

Editorial Staff :
M.A. Bocharova,
E.A. Lapteva

Contact Us :
Editorial Council:

(+7)(343) 245 9398;
e-mail: belykhvs@mail.ru

Editorial Board:
(+7)(495) 953 9108;

e-mail: avtor@lawinfo.ru

Publisher's Address:

For Correspondence:

RAUN, P.O. box 15, Moscow 125057, Russia
e-mail: avtor@lawinfo.ru
(+7)(495) 951 6069 (Russia)

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CONTENTS

PAGES OF HISTORY AND PHILOSOPHY

PUBLICITY

INFORMATION

Dear readers,

The year of 2015, which is the year of the Goat according to the Oriental Calendar, is going to be controversial as not everything is clear with the animal symbolizing it: whether it is a goat or a sheep. But, in any case, the animal is cute, charming and funny, though sometimes stubborn and even goring.

2015 is also rich in memorable and historical events. Event Number One among them is Victory Day on 9 May. This is the year of the 70th anniversary of the Great Victory of the Soviet people and the Soviet Army over Nazi Germany in the Great Patriotic War of 1941-1945.

The losses of human lives in the USSR were huge – 6,3 mln soldiers were killed, 555 000 died from diseases and accidents or were executed, and 4,5 mln were captured and went missing. Total demographic losses (including civilians who lost their lives from the hardships of the war on the occupied erritory of the USSR) amounted to 26,6 mln people. Yevgeny Yevtushenko, a famous Soviet and Russian poet, wrote in his poem " In Memory of Yesenin":

The road was inevitably hard… Two tens of millions died in the war, And millions in the war with people. Should we forget this, cutting off our memory? But where is the axe to do it? Like no one else did Russians save the lives of others. Like no one else did Russians ruin their own lives.

2015 is marked by many historical events connected with the Russian City Days. May 24 is the City Day of Ryazan (920th anniversary), 30 May is the City Day of Yaroslavl (1005th anniversary), and 6 September is the City Day of Vladimir (1025th anniversary).

18-19 June, the IX Session of the Euro-Asian Law Congress "Law and National Interests in Modern Geopolitics" will start its work in Yekaterinburg. The work of the session will be organized in the format of plenary meeting, meetings of expert groups and round-table discussions. The current issue of "Business, Management and Law" journal (which is published by the Institute of Entrepreneurship and Law at the Ural State Law University) is devoted to the theme of the congress.

We are open to cooperation and ready to publish articles, information and advertisement in our "Russian Law: Theory and Practice" journal.

Editor-in-Chief, Doctor of Law, Professor
V.S. Belykh

ON THE LAWMAKING MATTERS OF THE ACTS OF THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION

Alexander N. Kokotov
Doctor of Law, Professor,
Justice of the Constitutional Court
of the Russian Federation, Russia

Abstract: The article shows the originality of the law-making activity of the Constitutional Court of the Russian Federation, acting not only as a "negative" but as a "positive" legislator; discloses the law-making aspect of its decisions in proceedings on the interpretation of the Constitution and the review of the constitutionality of acts passed by different branches of power. An important point is that rulings and decisions of the RF Constitutional Court in some cases are the means to identify and legalize other sources of law, including constitutional conventions.

Key words: Constitutional Court, the Constitution, lawmaking, interpretation, constitutional judicial interpretation, implementation, a source of law

The Constitutional Court of the Russian Federation, acting within its competence, participates in adjustment of the country's normative sphere by individually and independently exercising its judicial powers through constitutional proceedings. Its final decisions resulting from these proceedings, being obligatory and conclusive in essence, constitute a peculiar source of law including individual and normative prescriptions.

1. The peculiarity of the RF Constitutional Court's lawmaking activity displays itself in that it is not aimed at the direct regulation of social relations. Instead, its purpose consists in maintaining the conformity of current legislation with the constitutional provisions in order to ensure its appropriate application. In certain cases, the Court uses the direct regulation as a temporary measure, which loses its effect at the moment regulations conforming to the constitutional standards are enacted by a competent authority.

For instance, in its Ruling dated January 17, 2013, the Court found a provision of the Code of Administrative Offenses of the Russian Federation incompatible with the Constitution. This conclusion was reached because under the provisions of the Code in force at that time,which did not permit imposing an administrative penalty

under the lowest limit, the minimal fine established by the norm in question did not always allow to impose a just and proportionate penaltythat would take into account the essence of the violation committed, the material and financial status of a legal entity involved and other significant circumstances of the case. In this Ruling, the Court concluded that the sum to be paid by a legal entity as a penalty for the offence stipulated by the disputed norm can be reduced by the antimonopoly authority or by the court on the basis of constitutional requirements and legal positions of the Russian Constitutional Court stated in the Ruling under consideration. The Court also limited the validity period of this procedure. It was to remain in effect until the introduction of corresponding amendments to the RF Code of Administrative Offences. This approach can also be illustrated by some of the RF Constitutional Court`s decisions which found various norms or acts incompatible with the Constitution, but did not invalidate them. Instead, these norms remained in effect for a specified period with specified requirements. In its Ruling of July 14, 2005 the Court adjourned the invalidation of the RF Finance Ministry's rules on enforcement of court decisions satisfying claims for damages that were caused by unlawful actions or omissions of state authorities or their officials until the beginning of a new financial year.

Considering the above, normative instructions of the Constitutional Court as a rule are not directly prescribed by the latter but can be identified in the current legal environment as a result of interpretation of constitutional provisions or of the Court`s constitutionality test of other acts. Such a way of lawmaking is essentially interpretative (sometimes it is called application of laws). Consequently, it limits the lawmaking activities of the Constitutional Court and differs from the primary (norm-proclaiming) lawmaking method[1]. By the way, this means that legal positions of the RF Constitutional Court based on the interpretation of constitutional provisions must follow their fate if the system analysis of constitutional norms performed within the framework of constitutional legal proceedings leaves no room for a different conclusion. At the same time, the activity under consideration is obviously lawmaking as long as it is aimed at changes in the legal sphere. The latter process consists in eliminating unconstitutional regulations from the current legislation and also in introducing new positive rules.

[1] Interpretative nature of the Constitutional Court's legal positions as well as the fundamental and abstract nature of constitutional provisions under its consideration results in frequent application of doctrinal notions in the process of constitutional judicial lawmaking. See, for example, N.S. Bondar. Sudebnyi' konstitutsionalizm v Rossii [Judicial Constitutionalism in Russia]. Moscow, 2001, pp. 128–136; G.A. Gadzhiyev. Ontologiia prava [Legal Ontology]. Moscow, 2013, p. 204.

2. The negative lawmaking also has a positive effect. The Court's finding on unconstitutionality of a norm is an individual instruction that stops its applicability and, at the same time, a circumstance that initiates the activities of corresponding bodies aimed at excluding the named provision from the legislation in force. In this way, the Constitutional Court in fact uses the power to establish a general prohibition to use the kind of regulation that was found incompatible with the Constitution. This obviously is a way to specify the lawmaking competence of the authority that has adopted the act found to be unconstitutional. For instance, in its Ruling of April 23, 2004, the Constitutional Court found provisions of two laws on federal budget suspending application of several norms of Federal Law "On the Accounts Chamber of the Russian Federation" incompatible with the Constitution: in view of the requirements of the Constitution, the Accounts Chamber's powers and rules of procedure could not be changed by laws on federal budget if they had been set up by other federal laws.

The more precise definition of lawmaking authorities' competence is also achieved through establishment of conformity of their legal acts with the Russian Constitution by the Constitutional Court's decisions. These decisions constitute the general approval for rules conforming to the Constitution or similar regulations.

3. Declaring legal acts compatible with the Constitution, the Court often elaborates their constitutional judicial interpretation. According to the Court's Chairman, V. D. Zorkin, in practice the Constitutional Court tries to avoid declaring a disputed provision unconstitutional, provided there is a possibility to establish the norm's constitutional legal meaning and in its context the norm's proper content that would exclude any other interpretation in the application of the act in question[2]. Constitutional legal interpretation of acts under review may sometimes cause significant changes in the literal meaning of the act under consideration and the meaning attributed to it by an official and other interpretations or prevailing practices of its application.

Paragraph 2 of Article 1070 of the Russian Civil Code was found not contradicting the Constitution. This norm declares that damages caused in the course of administration of justice shall be compensated if the guilt of the judge is established by a legally binding judgment of a competent court. However, the Constitutional Court noted that the norm viewed in its constitutional legal sense and also in its interconnection with Articles 6 and 41 of the Convention for the Protection of Human Rights

[2] V.D. Zorkin. Konstitutsionno-pravovoe razvitie Rossii [Constitutional Legal Development of Russia]. Moscow, 2011, p. 183; V.A. Sivitsky. K voprosu o variativnosti formuly itogovogo resheniia konstitutsionnogo suda [On the Question of Variability of the Constitutional Court's Final Award Formula]// Konstitutsionnoe pravosudie [Constitutional Justice]. 2012, No. 4, pp. 81 – 90.

and Fundamental Freedoms could not serve as a ground allowing authorities to deny the compensation of damages caused within the framework of civil proceedings in other cases (namely, when a dispute was not decided on its merits) resulting from unlawful actions (or omissions) of a particular court (a judge), *inter alia* in the case requirements concerning the duration of proceedings were violated provided the judge was held responsible for the violations by a court decision other than a court sentence. The interpretative nature of the above-mentioned constitutional judicial conclusion leaves room for legislative amendments to provisions reviewed by the Constitutional Court by choosing other ways to compensate damages inflicted in the course of administration of justice. However, during the process of introducing changes, the legislator cannot depart from the essential legal position of the Constitutional Court.

4. Competence of the Constitutional Court of the Russian Federation includes the power to give official interpretation of constitutional provisions. The latter are so rich in substance[3] that their constitutional judicial interpretation results in introduction of special normative rules between the constitutional provisions and the social practice of intermediary normative regulations concretizing the constitutional text. In its Ruling of October 31, 1995, the Constitutional Court while interpreting Article 136 of the Constitution concluded that amendments to the latter should be introduced through the adoption of a special legal act – the Law of the Russian Federation on Constitutional Amendment. This concept had been taken into consideration by the legislator that established the regulation of the process of adopting such acts. At present, several laws of that kind have been introduced, including those aimed at changing the constitutional model of the country's court system.

In its Ruling of November 28, 1995, the Constitutional Court of the Russian Federation gave the interpretation of Paragraph 2 of Article 137 of the RF Constitution. The Court noted that a new name of a constituent entity of the Russian Federation shall be included in the text of Article 65 of Russia's Constitution through the President's decree adopted on the basis of the decision made by that entity's authorities in accordance with a procedure established by them. At the same time, the interpreted norm states only that new name of a constituent entity of the Russian Federation shall be included in the text of Article 65 of the Constitution. Moreover, the Constitutional Court found that the renaming connected with the fundamentals of the constitutional regime, human rights and civil

[3] Generally speaking, the whole normative sphere of a country can be viewed as constitutional norms' specificationreflecting only a part of their substance.

liberties, interests of other constituent entities or of the Russian Federation in general, those of foreign countries and also assuming changes in the composition of the Russian Federation or of the constitutional status of its constituent parts could not be considered a change of the constituent part's name. In conclusion, the Constitutional Court added that the opportunity of extra regulation on the issue of including the new name of a constituent part of the Russian Federation in the text of the Constitution was not excluded by the mentioned interpretation. The supplementary nature of legislative regulation in relation to constitutional judicial interpretation was obviously stressed.

5. The Constitutional Court also has recourse to the detailed interpretation of the Constitution of the Russian Federation, discovering new ways to understand its provisions not only during the official interpretation procedure but also controlling constitutionality of normative legal acts, resolving disputes among public authorities. For example, by certain decisions reached while reviewing an individual norm the Court was consistently expanding the right to submit a constitutional complaint. This effect was produced by interpreting such constitutional concepts as "citizens" (applicants presenting a constitutional complaint) and "law" (a legal act that can be reviewed through such a procedure). According to conclusions of the Constitutional Court, a constitutional complaint can be submitted by citizens of the Russian Federation as well as by foreign citizens and stateless persons (Ruling of February 17, 1998), representatives of the incapacitated (Ruling of February 27, 2009), legal entities, including state institutions to the extent constitutional rights and liberties apply to them, for instance when they can be viewed as taxpayers (Rulings: of October 24, 1996; of October 12, 1998; of June 22, 2009). The term "law" is contained in Paragraph 4 of Article 125 of the Constitution, its broad interpretation by the Constitutional Court extended the meaning of the named notion to such other legal acts as: enactments on amnesty issued by the State Duma (Ruling of July 5, 2001), governmental and presidential decrees dedicated to issues that had been directly specified by the legislator as unregulated by statutes (Ruling of January 27, 2004; Decision of March 5, 2009).

6. Within the framework of its activity consisting in official interpretation of constitutional norms and implementation of the latter, in order to resolve other constitutional judicial disputes the Constitutional Court views the Constitution of the Russian Federation as a constantly developing regulation (a living organism). Its authentic introduction in the evolving social context leads to changes in constitutional judicial interpretation. This does not mean that by interpreting

provisions of the Constitution the Constitutional Court has the right to adapt it to the political climate. This approach signifies that preservation of the "spirit" of the Constitution and of the balance of values that it protects does not exclude certain modifications in the named interpretations due to considerable changes in socio-historical conditions. According to V.D. Zorkin, this function of the Court can be defined as the formation of constitutionally justified appropriateness[4].

An opportunity of practicable choice of constitutional text interpretations, of methods for applying constitutional standards to objects under review depending on circumstances of time and place makes up a component of effective constitutional judicial lawmaking. If the process of law making does not imply any discretion in the sphere of choosing an appropriate regulatory model, it should be viewed as minimalistic in nature. This conclusion applies to every type of lawmaking activity, including those connected with constitutional justice. However, any clear criteria of permissibility of modifying constitutional text interpretations are currently unknown to doctrine or practice. The same applies to the problem of establishing limits of constitutional judicial discretion.

7. The Constitutional Court's decisions form a significant channel for introducing legal positions of international judicial authorities into Russian law. Therefore, by specifying conclusions of the European court of Human Rights as regards their compatibility with particularities of Russian legislation and of its own decisions, the RF Constitutional Court solves the problem of implementing provisions of the Convention on Protection of Human Rights and Fundamental Freedoms and of the European Court's resolutions into Russian legislation. Consequently, the Constitutional Court's legal positions can be considered as an instrument similar to general measures on execution of the European Court's resolutions if the latter are not just seen as procedures for enforcement of certain rulings in cases to which Russia was a party. In its Ruling of December 6, 2013, the Constitutional Court reviewed the provisions of subparagraphs 3 and 4 of paragraph 4 of Article 392 and of Article 11 of the Civil Procedure Code of the Russian Federation to the extent they constituted a ground to reexamine a court judgment after the European Court's found a violation of the Convention on Protection of Human Rights and Fundamental Freedoms that had been committed in respect of the applicant and had been voiced in the named award, provided any infringement of that person's constitutional rights within the

[4] V.D. Zorkin. Sovremennyi' mir, pravo i Konstitutsiia [Modern World, Law and Constitution]. Moscow, 2012, p. 148.

framework of the case in question was not established by Russia's Constitutional Court, and certain norms of national legislation that had been serving as a basis for the latter Court's conclusion were considered to be incompatible with the mentioned Convention by the European Court of Human Rights.

As a result, the Court stated that as long as in the course of constitutional judicial proceedings the provisions in question are found conforming to the RF Constitution, the Constitutional Court within the framework of its competence should define the possible constitutional ways of executing the judgment passed by the European Court of Human Rights. What should be taken into account is that a national court of general jurisdiction cannot refuse to reconsider the judgement having come into force as a procedural stage stipulated also by the ruling of the ECHR

Previously, the Chairman of the Constitutional Court of the Russian Federation, V.D. Zorkin, came the up with the initiative to confer to the named Court the power to establish necessity and define the essence of general measures that could be taken on account of enforcing the European Court's judgment. Such an authority was to be created on the basis of requests of Russia's Parliament or Supreme Courts[5].

8. The Constitutional Court's resolutions represent an instrument of objectivation and legalization of other sources of law. The Constitutional Court, as it is stated above, has deduced the necessity to include the law on the constitutional amendment in the hierarchy of statutes from the constitutional norms. The practice of the constitutional justice provides similar examples.

In its Decision of November 19, 2009, the Constitutional Court specified that on the basis of the RF Constitution and other legal acts concretizing its provisions, death penalty had not been imposed and executed for a long time. The Court came to the conclusion that such a long moratorium on death penalty had formed stable guaranties of the right not to be subjected to death penalty and also established a legitimate constitutional legal regime – as a result of Russia's obligations within international trends – within which an irreversible process directed at the abolition of death penalty as an exceptional measure of punishment is taking place. Such punishment is of temporary nature and can be implemented only during a certain period of time until its complete abrogation. This conclusion can obviously be considered as legalizing the constitutional practices in the country.

[5] V.D. Zorkin. Vzaimodei'stvie natsional'nogo i mezhdunarodnogo pravosudiia: novye perspektivy [Current Interaction of National and International Justice: New Prospects]// Sravnitel'noe konstitutsionnoe obozrenie [Comparative Constitutional Review]. 2012, No. 5, p. 51.

9. Decisions of the Constitutional Court constitute not only legal but also pre-legal sources of law that encourage the legislator and other lawmaking authorities to introduce necessary amendments in current legislation and provide concepts for such innovations. Apparently, this way to promote the legislative amendments is more appropriate for the Constitutional Court of the Russian Federation than the implementation of its power of legislative initiative. In its Ruling dated February 28, 2008 the Court stated that establishment a system of special disciplinary courts that would consider applications against judges could serve as a safeguard of the independence of judicial authority. Reacting to this recommendation in 2009, the legislator adopted the Federal Law "On Disciplinary Judicial Tribunal". The latter authority has been replaced by the Disciplinary Board of the Supreme Court of the Russian Federation.

The Constitutional Court of Russia also possesses other opportunities for initiating changes in the country's normative sphere. It regularly informs other highest state authorities about its activities, practices concerning the execution of its decisions, current problems of legal regulation. By its Decision of November 7, 2012, the Court adopted the Survey "On Constitutional Aspects of Improving Lawmaking and Practice in the Sphere of Securing and Protecting Human Rights and Civil Liberties (on the basis of the Court's decisions that were delivered in 2009–2011)".

CRIMINAL VIOLENTOLOGY – A NEW TREND IN RUSSIAN CRIMINAL LAW

Roman D. Sharapov
Doctor of Law, Professor, Institute of State and Law,
Tyumen State University, Tyumen, Russia

Abstract: This paper presents conceptual foundations of the new direction of the Russian criminal law – criminal violentology as a complex legal doctrine of criminal violence, its prevention by measures under the criminal law, methodological foundations of criminal violentology, the notion of criminal violence in the Russian criminal law as proscribed by the criminal violation of safety of the person in the form of wilful infliction of physical or mental harm to the victim against his/her will by physical or psychological impact on the human body. The article contains a brief description of physical and psychic violence under criminal law, legal terminology and the typology classification of elements of violent crimes in the criminal law, reveals practical significance of the violentology in such areas as developing rules on legislating as to defining elements of violent crime, elaborating theoretical foundations for classifying criminal violence, improving mechanisms of legal prevention of criminal violence. Specific proposals for improving the protection of individuals from criminal violence by means of criminal law are made.

Keywords: violence, violentology, violent crime, physical violence, psychological violence, criminal law.

Introduction.

The entire historical path that humanity has followed so far is represented by two forms of existence in society – war and peace. The era of violence comes to replace the era of non-violence, and vice versa. But most often the society finds itself in those two aspects of its life at the same time. Therefore, the problem of violence is one of the perennial problems of humanity. However, another conclusion is even sadder-violence is an incurable social vice.

Only its symptoms are variable (the volume and qualitative properties of violence), defined by social processes at a concrete historical stage in the development of a society.

Criminal violence as the most malignant form of social violence is a pressing global problem of modern civilisation. The social cost of criminal violence is enor-

mous. It consists not only of the losses of human lives (mortality, physical and mental injuries). The rate of violence includes enormous material losses and costs (e.g., spendings on the law enforcement system and health care, loss of productivity and so forth), as well as spiritual losses (e.g., dehumanisation of interpersonal relationships).

At the turn of the century, at the turn of the millennium, the Russian state once again is experiencing a wave of criminal violence and terror that has swept through the Russian society at all levels. On the crest of this wave are generated by political and ethnic conflicts particularly serious forms of violent crime (armed rebellion, acts of terror, mass murders and assassinations, mass hostage-taking, kidnapping), and the forecasts as to their number, large-scale dangerous consequences, the growth in the number and quality of weapons involved, extreme cruelty are disappointing. However, at the bottom of this wave, there is a much larger share of household, family, street, service, army, prison and other types of criminal violence deeply imbued in everyday interpersonal relationships of many walks of life.

Occurring at the beginning of the new century, changes in the quantitative and qualitative indicators of more violent crime quite naturally highlight the issue of adequate opposition to criminal violence, including the use of tools of criminal law. The Criminal Code of the Russian Federation carries the whole system of norms providing for responsibility for violent crimes. Practically, almost a third of the socially dangerous acts stipulated in the criminal law are violent. The foundation of this system is the category of criminal violence, which at the conceptual level was the least developed in the theory of criminal law in comparison with other concepts and categories.

Hence, the combination of norms of criminal law, aimed at combating criminal violence is far from perfect. In the RF Criminal Code, there is no legal definition of violence, no explanation of contents of attributes of violence, whether it is dangerous for life and health or not. Nor is there clarity in terminological differences in violent behaviour ("violence", "coercion", "assault", "torture", "extreme cruelty", "abuse" and others.). Besides, there is no clarity in criminological justification for rules for legislating on elements of violent crimes, no differentiated responsibility for physical and psychic violence; at the same time, there are gaps in the criminalisation of violent crime, the role of criminal punishment in the prevention of certain violent crimes has weakened. All these circumstances create considerable difficulties in the interpretation and implementation of the criminal law in practice, generates a contradic-

tion between the investigation stage and the courts in the evaluation of the same cases, cause numerous judicial and investigative errors.

We cannot ignore the fact that "since the second half of the twentieth century, most civilised countries have perceived" the crisis of punishment, "the crisis of criminal policy and criminal justice, the crisis of police control"[1]. As a result, many foreign lawmakers are seriously concerned about searching for alternative measures of state responses to crime (the development of new kinds of punishment and modernisation of those existing not connected with isolation from society, theincreased use of probation and parole forms of punishment, the formation of "restorative" justice beyond the framework of criminal justice, etc.). A reasonable question is raised – to what extent does the tendency to minimise criminal liability and criminal repression measures apply to criminal violence and violent criminals?

To obtain a scientifically based answer to this question and to solve other problems mentioned above, it is important not only to know the parameters of modern violent crime, but also to be aware of the social causation of criminal liability for criminal violence, to have an idea about the concept, types and dangers of the latter. The required amount of reliable knowledge on legal issues in question can be obtained within a holistic doctrine of criminal violence in criminal law, which can be described as criminal violentology[2].

1. Methodological basis of the criminal violentology.

The problem of violence in the society, including criminal violence, is so voluminous, complex and multifaceted that its solution, no doubt, may not be a feasible task of any single branch of science. This problem has been extensively researched in legal, criminological, philosophical, political, sociological, psychological, psychiatric and other literature. According to Ya. Gilinsky,

"There appeared a science of violence – violentology (or violensology) (from Latin. *violentiae* – violence – *R.Sh.*), designed to explore the phenomenon of violence, its genesis, underlying factors, as well as to develop principles and directions of violence prevention"[3].

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[1] Y.I. Gilinskiy. Deviantnost', prestupnost', sotsial'nyi' kontrol'. Izbrannye stat'i [Deviance, Crime, Social Control. Featured Articles]. St. Petersburg, 2004, p. 313.

[2] R.D. Sharapov. Prestupnoe nasilie [Criminal Violence]// Yurlitinform Publishing House, Moscow, 2009, p. 488.

[3] Y.I. Gilinskiy. Sotsial'noe nasilie i nasil'stvennaia prestupnost' [Social Violence and Violent Crime]// Chelovek protiv cheloveka. Prestupnoe nasilie [The Man Against Man. Criminal Violence]. St. Petersburg, 1994, p. 43.

Apparently, violentology as a complex science does not have its own research tools. These tools of violentology are provided by other human sciences having a particular aspect of the problem of social violence as their subject-matter. Criminal law plays an important role in the aggregate of sciences studying the problem of criminal violence.

In foreign legal science, the criminal legal aspect of this problem is not based on any significant or well-known legal research. The problem of criminal violence abroad has mainly a sociological (criminological) vector directed at finding ways and means of general social and specialised criminological prevention of violent crime, especially its segments, such as domestic violence, violence against women and children[4].

Until recently, in the Russian science of criminal law, the problem of criminal violence was developed mainly in the form of analysing specific offences against the person, property, sexual freedom and sexual integrity, management procedure, and others. Complex investigations of criminal violence as an independent criminal legal category were very few[5]. Meanwhile, the academic and practical significance of such studies is great because they allow us to solve common problems of legislative regulation and classification of violent crimes, to establish uniformity in the interpretation of typical features to streamline the uniform practice of applying criminal law. This issue has been given more and more attention in the new, XXI century, the beginning of which was marked by the emergence of a number of notable works openly claimed to be the comprehensive studies of criminal violence (its separate kinds) in criminal law[6]. However, the content of these works is impossible to assess unambiguously.

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[4] Vesna Nikolic-Ristanovic. Zhenshchiny, nasilie i voi'nu [Women, Violence and War]. Budapest, 2000, p. 245; Nasilie, zhestokoe obrashchenie i grazhdanstvo zhenshchin. Mezhdunarodnaia konferentsiia [Violence, Abuse & Women's Citizenship. An International Conference]. Brighton, November, 1996, p. 192; Emerson R. Dobash and Rüssel P. Dobash. Nasilie v otnoshenii zhen [Violence Against Wives]. 1979, p. 264; Chastnoe nasilie obshchestvennaia problema [Private Violence Public Issue]. The Hague, 2002. p. 23; D.C. Washington. Gosudarstvennye otvety na nasilie v sem'ye [State Responses to Domestic Violence]. WLDI, 1996, p. 128.

[5] L.D. Gaukhman. Problemy ugolovno-pravovoi' bor'by s nasil'stvennymi prestupleniiami v SSSR [Problems of the Criminal Legal Fight to Violent Crime in the Soviet Union]. Saratov,

[6] R.D. Sharapov. Fizicheskoe nasilie v ugolovnom prave [Physical Violence in Criminal Law]. St. Petersburg, 2001, p. 298; V.V. Ivanova. Prestupnoe nasilie: Uchebnoe posobie dlia vuzov [Criminal Violence: Textbook for High Schools]. Moscow, 2002, p. 83; N.V. Ivantsova. Nasilie protiv lichnosti v ugolovnom zakonodatel'stve (problemy teorii) [Violence Against the Person in the Criminal Law (Problems of Theory)]. Cheboksary, 2003, p. 120; N.D. Semenova. Otvetstvennost' za prestupleniia, svyazannye s nasiliyem nad lichnost'yu [Responsibility for Crimes Related to Violence Against the

Selected works of recent years are mostly descriptive, abstract, while others are focused mainly on the study of theoretical, historical and conceptual problems of violence in criminal law, which impoverishes their practical value. Some papers on criminal law and criminological study of violence were largely eclectic, which prevented their authors from focusing on a wide range of unresolved criminal matters and issues related to legislative description, classification and punishability of criminal violence. Finally, a number of researchers have devoted their studies to characteristics of only one type of violence (physical or psychic) under criminal law, so there is no reason to talk about their fully comprehensive character.

Objectives of the science of criminal law in solving the problem of criminal violence are seen as the following:

— To determine legal boundaries and attributes of criminal violence,

— To justify the criminalisation of socially dangerous types of violence,

— To ensure the correct application of criminal law providing for criminal responsibility for the violence,

— To develop an effective mechanism to counter violence through the criminal law

— To constantly monitor the level of criminological justification for criminal law norms providing for liability for criminal violence.

The marked areas of studies in the area of criminal law can be described as criminal violentology.

Among the scientific categories of modern criminal law, a special place belongs to criminal violence which generally means a deliberate attempt to violate the safety of the person against his will. In the theory of criminal law, violence is traditionally divided into physical and psychic. However, the characteristics of these types of violence, in our opinion, have not received a satisfactory description in the literature on criminal law. Even more controversial is the issue of the grounds for the classification of criminal violence into physical and psychic, which until recently was generally not an object for self-study in the science of criminal law. That issue is very important for classification and differentiation of liability.

Criminal violence, being a complex category, brings together a large group of intentional crimes that cause physical or mental harm to the person (violent crimes), crimes taking about 30% of the Special Part of the RF Criminal Code. That means that almost one third of all socially dangerous crimes proscribed in the RF Criminal Code are violent. Such acts are either inherently violent initially because of their

Person]. Krasnodar, 2002, p. 140; L.V. Serdyuk. Nasilie: kriminologicheskoe i ugolovno-pravovoe issledovaniye [Violence: Criminological and Criminal Legal Research]. Moscow, 2002, p. 384.

socio-legal nature or violence appears as a possible method of committing them. Violent crimes are proscribed in most of the chapters of the Special Part of the RF Criminal Code. The exceptions are Chapter 26 "Environmental Crime", Chapter 27 "Crimes Against Traffic Safety and Operation of Transport" and Chapter 28 "Crimes in the Sphere of Computer Information." They do not involve any violent crime, which is obviously due to the fact that violence does not show a steady trend of its use as a means of committing these crimes.

The concept of a violent crime is not the same category as that of criminal violence in criminal law. The category of criminal violence embraces all crimes inherently violent in nature, as well as the violent way of committing certain crimes that can be committed by non-violent means.

Terminological, structural and logical analysis of the norms of criminal law on liability for crimes committed by means of violence reveals a complex system of violent crime in the criminal law. Criminal violence is a global systematising element of this system in its specific forms: physical and psychic violence. Each of these types of violence brings together a large group of violations forming a relatively independent part of the system of violent crimes. Both types of violence have their typical symptoms that are present in every violent crime in conjunction with its individual features.

In this regard, studying typical attributes of criminal violence and its kinds, creating (on that basis) general theoretical concepts of criminal violence and securing a legal formula of its kinds in criminal law is , in my opinion, a priority in criminal investigations of violent crime; this direction does not seem to be developed well enough. Identification and scientific theoretical consolidation of typical attributes of criminal violence are 'the theoretical basis for addressing, in a legitimate and justified way, the issues of classification of any of the crimes in question, they provide a common understanding of these features in the application of various standards of responsibility for violent criminal acts"[7].

It is important that a tool for establishing common attributes and formulating the concept of violence, its kinds in criminal law is the doctrine of the elements of the crime with the traditional structure of attributes, grouped according to the four elements: object, objective side, subject, subjective side. This kind of research approach to criminal violence seems to be correct. It springs from the progress of science in developing criminal-law concepts of any wrongful act, such as violence, and a set of characteristic features defined by criminal law.

[7] L.D. Gaukhman. Problemy ugolovno-pravovoi' bor'by s nasil'stvennymi prestupleniiami v SSSR [Problems of the Fight with Violent Crime in the Soviet Union under Criminal Law]. Saratov,

2. The concept of criminal violence in criminal law.

Criminal violence – is prohibited by criminal law violation of personal safety rights in the form of wilful infliction of physical or mental *harm to the victim against his/her will by physical or psychological impact on the human body.*

The object of criminal violence is personal safety (personal inviolability), that is, public relations ensuring the person's safe physical and mental existence.

Personal safety of a person includes physical safety (relationship providing physical benefits of man – life, health, physical freedom) and psychic safety (relations providing mental benefits of man – mental well-being, sexual freedom and sexual integrity, honour and dignity).

The object of criminal violence is the body of another person, namely, its organs, tissues, their physiological functions and psyche.

On the objective side, a violent act (action or omission) can be expressed in physical or mental violent impact on the body of another person. The physical impact can possibly be exerted on organs, tissues or physiological functions of the victim's body by the perpetrator using material factors in the external environment. The psychic impact can possibly influence the victim's psyche with the help of psychic factors in the external environment.

A socially dangerous consequence of criminal violence is physical or mental injury, i.e. an adverse change in the physical (biological) and (or) mental nature of man having a negative impact on the person's body as an integrated bio-system.

Criminal violence involves the infliction of physical or mental harm to another person contrary to his/her will (against or beyond the person's will). Violence is committed against the victim's will when the victim is aware of the fact of a criminal assault against him/her. Violence is committed beyond the victim's will when the victim is not aware of the fact of committing a criminal assault against him/her and does not expressed his/her will in this regard.

Criminal violence involves wrongful infliction of physical or mental harm to another person, that is, violence in criminal law is a socially dangerous and unlawful kind of conduct.

On the subjective side, criminal violence involves a deliberate form of guilt.

3. Description of physical and psychic violence by criminal law.

I believe the nature of socially dangerous consequences of violence, and not the object and the way of violent impact, to be the basis of 'criminal-law' classification of violence into physical and psychic In the Special Part of the existing Criminal

Code, offences committed with physical violence are provided in more than 80 articles (30%). In the most general form, the concept of physical violence is contained in penal provisions on murder (Art. 105 of the Criminal Code), causing intentional injury , physical pain and physical suffering (Art. 111, 112, 115, 116, 117 of the Criminal Code), illegal deprivation of liberty (Art. 127 of the Criminal Code). In essence, these articles identify varieties of physical violence in regard to consequences.

Physical violence has all the features of the general concept of violence in criminal law. Therefore, the characteristics of physical violence in criminal law should be devoted mainly to the description of its specific features that identify the originality of this type of criminal violence. It seems that these features are inherent in two constituent elements of physical violence – the object and the objective side.

Physical abuse – this is criminal assault on the physical safety of the person in the form of wilful infliction of physical harm to the victim against the victim's will.

The practice of criminal violence is characterised by a variety of forms (ways) of physical impact on the victim. The most common and typical way to exert physical violence is an assault – the use by the perpetrator of muscular strength or physical force of some other means (machinery, animals, and other people). The vast majority of the killings, intentional infliction of bodily harm, robbery, violent robbery, rape and other violent crimes are committed in this way due to the efficiency of this method of physical violence, the relative ease of its implementation, low intellectual level of violent criminals, most of whom are focused on the use of brutal force to achieve their goals. The assault may be secret or open.

It is not uncommon to encounter a more complex nature of the objective side of physical violence where the perpetrator takes advantage of both physical and mental tools to achieve the result. Among the methods of physical harm, as a result of physical impact but with the use of information tools, are fraud and breach of trust, the use of psychic helplessness of the victim. For example, cases of inflicting physical harm (death, health problems, helpless condition) by introducing various kinds of poisonous chemicals or sedatives into the victim's body, using the victim's confidence or through deception, have become common in recent years.

There is a possibility of inflicting physical harm to a person by exerting the psychic impact on him/her in its pure form, when the offender has a direct impact on the mental sphere of another person by providing him/her information causing adverse mental processes (stress, anxiety, fear, etc.), accompanied by psychosomatic disorders. Given the fact that, I have taken the nature of the harm caused to the victim as the basis for

the classification of violence into the physical and psychic, physical harm by psychic impact on the victim should be considered as a form of physical violence.

The criminal result of physical violence is the physical consequence (physical injury), which is a harmful change in the biological nature of man depriving the person of personal physical benefits. On the basis of the rules of criminal law, six types of physical consequences can be distinguished as to the nature and extent of the physical changes: death, injury, physical pain and physical suffering, helpless condition, loss of physical freedom.

In the Special Part of the current RF Criminal Code, offences committed with psychic violence are contained in more than 70 articles (26% of the Code). In the most general form, the concept of psychic violence is provided in penal provisions on torture in the part concerning the infliction of mental suffering (Art. 117 of the RF Criminal Code), the threat to kill or cause grievous bodily harm (Art. 119 of the RF Criminal Code), sexual assault (Art. 132 of the RF Criminal Code).

Taking into account the fact that psychological violence has all the features of the general concept of violence in criminal law, the "criminal-law" characteristic of psychic violence focuses on two of its elements – the object and the objective side, which contain individual features of psychic violence.

Psychic violence – this criminal assault on the psychic human safety in the form of wilful infliction of mental harm to the victim against his will.

Traditionally, this type of violence is committed by information impact on the psyche of the victim with the use of mental factors, namely, information of traumatic nature. The most common mental factor is the threat of harm. However, not all information with threatening content presents a threat as a kind of psychological violence. For this purpose, the information must possess certain characteristics.

First of all, the content of the threatening information is the possibility to cause harm, as a rule, to the rights and legitimate interests of the individual, society and the State. The Criminal Code refers to various types of threats that differ in nature, depending on what kind of a wrongful act the offender threatens to commit, which legally protected interests of the person he is threatening to disrupt: **1)** the threat of physical violence ("threat of violence" threat to kill or cause grievous bodily harm", "threat of harm to health", "the threat of violence, dangerous and not dangerous to life or health "). The threat of physical violence can be the threat of kidnapping or threats of rape, which essentially consist in intimidating the victim with inflicting physical harm; **2)** the threat of destruction or damage of property (under Art. 133 of the Criminal Code – the threat of taking away the property); **3)** blackmail – the threat

of spreading information that defames the victim or the victim's family, or any other information that may cause significant harm to the rights or legitimate interests of the victim or the victim's relatives; **4)** the threat to commit a wrongful act is intimidation of the victim by the threat to commit a crime or other offence (to wrongly fire from their jobs, expel from the university, illegally open a criminal case, withhold pay, not to perform an obligation under the contract, leave without care, etc.) against him or people close to him.

Another feature of the threat punishable under criminal law is that the danger that it enfolds may relate to both the victim and the victim's family, or even to other people to whom the victim is not indifferent. This point should be kept in mind even when the article contains no direct reference to relatives and other persons (Art. 110, 119, 162 of the Criminal Code, etc.). The threat to inflict of harm to a person to whom the "victim" is indifferent cannot harm the psychic safety of the latter and, consequently, cannot be an effective way of committing the crime.

The manifestations of psychological violence are insults, bullying, harassment, and other similar actions that have a negative impact on the human psyche. The mental factor here is the information degrading the victim's dignity, capable of causing him a psychic trauma no less serious than the threatening information (e.g., indecent negative evaluation of the victim's identity, giving humiliating orders, false accusations of the person of vicious actions, evil cynical ridicule, mockery , including illegal deprivation of property, housing, etc.).

No less dangerous stressful factor for people is all sorts of "shocking" information (about the death of a loved one, the loss of valuable property, about the "failure" at the entrance exam, demonstration to the victim of scenes of violence towards his relatives, etc.). Giving a person such information may cause a severe trauma, and under certain conditions, even physical harm.

The corresponding actions can be classified as torture (Art. 117 of the RF Criminal Code) with regard to causing mental suffering by other violent acts, and they also form the "extreme cruelty", which is an aggravating circumstance in violent crimes.

Psychic violence is possible by way of physical impact on the human body. We are talking about such assaults in which a physical effect on organs and tissues of the victim, in fact, turns into a knock-on effect on his psyche, is limited to trauma, and does not involve causing socially dangerous physical consequences. Such acts include, in our opinion, "assault and battery" – a slap in the face, spitting in the face, cutting off a braid, pulling ears or nose, flicking the forehead, etc. Such actions are regarded as psychological violence not only because of the predominant orien-

tation of the intention of the perpetrator to cause trauma to another person, the humiliation of his honor and dignity (a subjective criterion). Even if these actions have caused the physical consequences in the form of pain, its intensity is so unimportant that the act does not constitute a public danger inherent to physical violence (objective criteria).

The foregoing has been linked to certain sexual offences, the objective side of which is connected with the commission of sexual assault against the will of the victim. Sexual intercourse, sodomy, lesbianism and other sexual acts in violent sexual offences have the status of psychic violence, which manifests itself most clearly in the case of committing these crimes with the use of the helpless condition of the victim when the offender does not resort to additional physical or psychic violence.

Psychic violence is possible not only by actions but also by omission.Indicative in this regard is such kind of criminal offences as extortion threats that can be veiled, when an official wilfully fails to comply within his/her duties to work for legitimate interests of the citizen, thereby creating a situation for the psychological pressure on the latter, forcing to make material concessions to bribe-takers.

The result of criminal violence is a mental effect (mental injury), which is a harmful change in the emotional sphere of man in the form of negative mental states (emotional stress). The analysis of the norms of the RF Criminal Code makes it possible to distinguish among four types of mental harm (mental effects): the fear of criminal threat, the state of sudden a strong emotion (affect), negative emotional states which do not reach the degree of strong emotion, mental suffering.

4. Legal terminology and typology of elements of violent crimes in criminal law.

In criminal law, offences that are committed with violence are described not only by direct usage of the term "violence" in the disposition of the article. In many articles of the criminal code, to the violent nature of a criminal offence stems from other methods of legislative technique and terminology. We can distinguish among three situations in the law when the legislator did not use the term "violence" and resorted to other means of describing elements of violent crimes.

1) Terminology and structure of articles are the only evidence of the violent nature of the crime – "violence", "violence" (Art. 116, 117, 131, part 2, Art. 139, 334, etc.), The "threat" (Art. 119, 163, part 1, Art. 296, etc.), "extreme cruelty" (part 2, Art. 105 (e), part 2, Art. 111 (b), part 2, Art. 112 (c), etc.), "abuse "(part 2, Art. 302,

Art. 335)", abduction"(Art. 126),"deprivation of liberty" (Art. 127) "illegal hospitalization of the person into a mental hospital" (Art. 128), "seizure or retention of the person" (Art. 206), "attempt on life" (Art. 277, 295, 317), "illegal detention, placement into custody" (Art. 301), etc.

2) The disposition of this article contains ample terms implying violent acts, along with other non-violent methods of assault – "obstruction" (Art. 144, 148, 315), "interference in any form" (Art. 294), "abuse" (Art. 110, 156, 356), "coercion" (Art. 144, 240, etc.), " embezzlement regardless of the method" (Art. 164), "assault" (Art. 360); or the legislative design of the article suggests that violence acts as an alternative method of crime – (part 1, Art. 126, part 1, Art. 127, part 1, Art. 206, part 1, Art. 211).

3) In the disposition of the articles, there is indication of intentional infliction of physical or mental harm – Articles. 105, 110, 111, 112, 113, 114, 115, 116, 117, 121, 122 (parts 2 and 4), Art. 205, 333(c), (part 2) Art. 334 part 2 (c), Art. 335 (e) part 2, Art. 357.

The elements of violent crimes in the current RF Criminal Code represent a wide spectrum. However, many of them have typical features, e.g., mechanism of the offence and the role played by violence in its objective side. This role can be ambiguous. There are some crimes in which violence is envisaged as the primary (main) act in the objective side; in other crimes, violence is an additional (secondary) element, that is, the means of the crime in a certain way connected with the principal act, which is generally non-violent.

Based on this classification, we can distinguish between two types of elements of violent crimes: 1) crimes in which violence is the main act in the objective side; 2) crimes in which violence is a means of committing the main act.

In the crimes of the first type, criminal violence as the main act comprises all the mandatory attributes (act, consequence, causal relationship) of *Actus reus*. In this role, violence is a major, fundamental sign of a violent crime, directly affecting its social and legal nature (e.g., murder, intentional infliction of grievous bodily harm, use of violence against a representative of authority, etc.).

Among the elements of the crimes in which violence serves as a means of committing the main act, the objective side is very complicated. Therefore, the crimes are always complicated. Specifically, those are multi-component crimes consisting of two or more acts (accounted for by the law as a real aggregate, for example, robbery, kidnapping with violence, etc.), as well as crimes related to the major components (rape, extortion, etc.). Here, violence is a subordinate act encroaching on the safety

of the person as on an additional or optional object. The main element of the objective side on which the socio-legal nature of the offence depends is another action that infringes on the main object. Therefore, all the regular violent crimes and two-action violent are crimes with two objects.

In this group of crimes, there is a certain relationship between violence and the main act determining the socio-legal nature of the crime, Physical or psychic violence, as a means of crime, ensures and facilitates the commission of the primary act by preventing or overcoming the resistance of the victim.

Violence as a means of crime can be a constructive (constitutive) sign of the basic set of elements of a violent crime (e.g, robbery, extortion, coercion to perform a transaction or to refuse to fulfil it).

Much of the violence as a means of crime is provided for as a classifying (aggravating) attribute of a crime, and the major part of infringement in this case often does not provide for violence, so the crime can only be described as violent in relation to its commission with classifying attributes of physical or psychic violence. In all cases where violence is a means of committing a specific crime but is not a constitutive or classifying attribute, it is recognised as an aggravating circumstance under "K" part 1, Art. 63 (k) of the RF Criminal Code.

5. The applied value of criminal violentology

Development of theoretical problems of criminal violence in criminal law is undoubtedly important not only from a scientific point of view, in terms of creating a holistic doctrine of criminal law countering criminal violence. Of particular importance is the practical nature of the possible use of the results of the criminal violentological research. The applied value of criminal violentology is seen in at least three directions:

The first direction – *development of the rules of legislative design of elements of violent crimes.*

The above mentioned typology of elements of violent crime is socially induced because it reflects typical mechanisms of violent behaviour. In view of this, the typology is sustainable in nature, i.e. this typology stands above any trends in legislation and law enforcement in the area of criminal law. This feature allows you to use it as a guide in the processes of criminalisation and penalization of socially dangerous violence as a template for designing structures of violent crimes. From this point of view, all the elements of violent crimes should be subject to the same rules of legislative technique, the core of which is a logical struc-

ture of the *Actus reus* (act or omission, causal relationship, consequences, optional features).

The second direction – *development of theoretical fundamentals of classification of criminal violence.*

In the process of classifying violent crime, one has to face the question of how many of the harmful physical effects caused as a result of violent acts or omissions are included, without additional classification, in a violent method in a particular set of elements of a complex crime; another question is when additional classification for causing these effects on the basis of articles on general crimes against life, health and physical freedom. The fact is that the elements of complex crimes committed with the use of physical violence are related to common crimes against life, health and physical freedom as competition of special and general rules. A situation where during the commission of a complex violent crime, physical violence applied by the offender in addition to being classified for the first infringement is additionally classified under another article of the RF Criminal Code, corresponds to the phenomenon of an ideal aggregate of crimes. In this regard, the development of relevant rules for classifying complex violent crimes as an aggregate under norms of criminal law and in the situation of their competition.

Important for law enforcement practice is the development of rules for classification of well-known in the criminal law common types of criminal violence:

— classification of violence dangerous and not dangerous to life or health

— classification particularly brutal violence;

— classification of armed violence;

— classification of criminal threats.

The third direction – *improving the mechanism of prevention of criminal violence in criminal law*.

The most important vector of violentological studies in criminal law is to focus on the prospects of the Russian criminal legislation in the direction of enhancing the protection of personal safety, the development of the latest and most significant problems of improving rules of law, criminalising certain violent crimes. In this direction, one can suggest the following:

— to amend legislation by introducing changes to declare feticide over the age of 22 weeks of fetal development a crime against human life because from a legal point of view, the beginning of human life dates back to the birth of the brain, namely when the fetus reaches full twenty-two weeks of fetal development;

— to provide for introduction in the criminal law of a penalty of 15- or 25-year imprisonment or life imprisonment for the attempt on the life of two or more per-

sons, as well as for the attempt on life committed by a person who has previously committed a similar offence;

— to introduce in criminal law a separate provision on liability for extremely cruel psychological violence (the infliction of mental suffering);

— to criminalise the state of sudden strong emotion as an independent socially dangerous consequence of a number of violent crimes by introducing the relevant aggravating circumstance in the elements of a number of crimes that are typical 'strong emotion'-provoking infringements;

— to exclude from the criminal law the attribute of "torture" and replace it, if necessary, with the attribute of " extreme cruelty" as the duty of Russia in accordance with the treaties it has ratified to provide for criminal liability for the use of torture has been fulfilled with the introduction of offences in the Criminal Code, such as torture (Article 117 of the RF Criminal Code), coercion to testify (Art. 302 of the RF Criminal Code), the violent abuse of power (part 3 Art. 286 (a) of the RF Criminal Code);

— to classify the use in offences of uncharged or non-operational weapons, as well as objects that simulate weapons as tools of psychic violence (threats) as an element of a violent crime, which should be formulated as follows: "with the use of weapons, items used as weapons or an object imitating a weapon. ";

— to ban release on parole of persons sentenced to life imprisonment for committing multiple murders that ended in the victim's death (murder of two or more persons, murder, classified on aggregate, recurrent murder).

Conclusion

Expressed in this article conceptual foundations of criminal violentology as a new branch of science of criminal law in Russia are based on the idea of the necessity of studying criminal violence as an independent inter-normative category of criminal law in terms of developing its general and specific elements and general concepts in relation to the Special Part of the RF Criminal Code in general. This approach to the development issues of criminal violence in criminal law makes a real difference in comparison with theorising on particular problems of legislative regulation and classification of certain violent crimes.

Criminal violentology is focused on the development of a common conceptual framework, formulation of common rules of legislative design of elements of violent crime and theoretical foundations for classification of criminal violence. Thus, the research involves numerous theoretical, legal and enforcement issues of coun-

tering criminal violence by methods and means of criminal law; solutions are found not only for private matters of legislative regulation and classification of some types of violent crime, but most importantly, the systematic knowledge is produced about the part the criminal law which is devoted to the fight against criminal violence.

THE CORRELATION OF CONTRACT AND CORPORATE LAW

Yevgeny A. Sukhanov
Doctor of Law, Professor,
Honoured Worker of Science of the Russian Federation,
Juris Doctor Honoris Causa of the Cyril and
Methodius University of Skopje (Macedonia),
Head of Civil Law Department of the Law Faculty,
Lomonosov Moscow State University,
Moscow, Russia

Abstract: The article considers the issues of interrelation between contract law and corporate law in light of the current changes in the Russian civil legislation. Corporate relationships are known to be a component of the object of civil-law regulation (Art. 2(1) of the RF Civil Code). The article analyses such concepts as corporation, corporate agreements, private and public companies. This is a comparative research by means of comparative analysis of the RF Civil Code and civil legislation of Europe (Austria, Germany, France), the USA and England. The author believes that the new corporate law of Russia should be based on general approaches of the European type of regulation with the account of differentiation between contract law and corporate law.

Keywords: corporation, contract, corporate agreement, Civil Code, minority shareholders, public and private companies.

Corporate law was reinstated as an integral part (sub-branch) of Russian civil law in the course of reforming the Civil Code of the Russian Federation (hereinafter referred to as the Civil Code) pursuant to Order No. 1108 of the President of the Russian Federation 'On Improvement of the Civil Code of the Russian Federation)[1] dated July 18, 2008. According to Clause 1 Article 2 of the Civil Code (as amended by Federal Law No. 302-FZ[2] dated December 30, 2012), corporate relations are now expressly named as a part of the civil law subject-matter. Federal

[1] Sbornik zakonov Rossiiskoii Federatsii [Compendium of Laws of the Russian Federation]. 2008, No. 29 (part I), art. 3482.

[2] Sbornik zakonov Rossiiskoii Federatsii [Compendium of Laws of the Russian Federation]. 2012, No. 53 (part I), art. 7627.

Law No. 99-FZ[3] dated May 05, 2014, provides the division of legal entities into corporate and unitary organizations (Article 65^1 of the Civil Code), Articles 65^1 to 65^3 of the Civil Code provide general provisions on corporations, Articles 66 to 68 of the Civil Code substantially expand general regulations applicable to basic commercial corporations – companies and partnerships, and Article 123^1 of the Civil Code provides general provisions applicable to non-profit corporations. **Thus**, the General Section of Corporate Law as an independent sub-branch of Russian civil law is actually formed.

However, the problem of correlation between corporate law and contract law has arisen, inasmuch as corporation is caused to be created by virtue of civil-law agreement entered into by and between its founders (future members) (or unilateral deed of sole founder, as applicable to single founder companies). In terms of partnerships, the aforesaid agreement determines general organization of their business, and thereby is considered as a charter. As of today, the most common types of commercial corporations – joint-stock companies and limited liability companies – widely use corporate agreements, i.e. agreements entered into by and between their respective members. At the same time, corporate relations as an independent part of civil (private) law subject-matter take a special civil-law form, not reduced to the rules of contract law, which is based on the 'freedom of contract' principle, while contract law, first of all, has to protect the interests of corporate minority shareholders, as well as those of third-party creditors. That is why it unavoidably needs imperative regulations extrinsic to contract law.

The aforesaid circumstances are evaluated with the use of two fundamentally different approaches. Those advocating relative corporate law independence (within the scope of civil law) usually invoke special corporate legal nature of both articles of incorporation (partnership) and corporate agreements. Indeed,corporation is caused to exist by the implementation of a partnership contract, but it is neither a party thereto, nor, technically, bound by the terms and conditions thereof, although its will is driven by resolutions jointly adopted by the parties to (members of) such contract. That situation is caused by a special legal nature of a partnership contract long ago mentioned in the European legal doctrine. A partnership contract is a special organizational, rather than barter, type of agreement, disabling the application of a number of general rules of law of obligations to relations that have arisen out of it. It is generally accepted by the German civilistic doctrine that a partnership contract,

[3] Sbornik zakonov Rossiiskoii Federatsii [Compendium of Laws of the Russian Federation]. 2014, No. 9, art. 2304.

as obligation and right agreement entered into by and between the parties mutually obliged to each other (thereby providing the application of some general rules of law of obligations thereto), may not be considered as one of those common 'agreements of exchange' (schuldrechtlicher, aber kein Austauschvertrag), due to which general rules of contract law may apply to substantially limited extent[4]. That is why the relations caused to exist by a partnership contract have to be considered not as common contractual (obligation binding) civil-law relations, but as special corporate ones.

Shareholder agreements have become a part of European corporate law as stemmed from U.S. law, where those are applied as articles of partnership (incorporation) and at the same time – corporate charters. The European approach is based on the premise that certain members of business entity may act as legitimate holders of shares (participatory interests), dispose of them , as well as determine the procedure for their alienation (usually – by way of providing somebody with priority right to their acquisition), and/or procedure for the realization of corporate rights vested into their respective shares (participatory interests) (such as, first of all, right to vote, i.e. to participate in the management of company's business). However, only that circumstance does not transform the aforesaid contracts into corporate deeds (otherwise, corporate deeds could include, e.g., testaments providing the transfer of testator's shares to his/her heirs). Those are of 'obligation and right' nature, and legal relations caused to exist thereby are contract-binding, but not corporate.

That rule is generally accepted by European civil law. It, *inter alia*, provides that corporate agreements, as one of the types of civil-law agreements, cause obligations binding upon their respective parties, but not upon corporation in general. Consequently, where such agreement is breached by a party thereto, it may incur contractual liability in the form of obligation to reimburse for damages, or pay a pre-agreed penalty. However, both voting results and resolutions adopted by corporation will remain valid and may not be subject to a dispute even if those are in conflict with terms and conditions of the corporate agreement.

Some contractual relations related to business of modern joint-stock companies are sometimes mistakenly classified as corporate relations. For example, in many developed European nomocracies, non-certificated shares are frequently issued and registered not by joint-stock companies, but by commercial banks providing services to such joint-stock companies. Correspondingly, in many instances relations between shareholders and joint-stock companies with respect to the acquisition, alienation

[4] For more details see, e.g.: G.Hueck, Ch. Windbichler. Gesellschaftsrecht. 20. Aufl. München, 2003. pp. 66 – 69.

and use of such shares are transformed into strictly obligatory (contract-based) relations between 'investors', i.e. buyers and sellers of such shares, and commercial banks. However, 'paperless asset' acquirers and alienators have actually no relations with joint-stock companies that have issued the asset. They are only formally considered as members of such companies and subjects of corporate relations. At the same time, relations between shareholders, joint-stock companies and banks are actually obligatory, but not agreed upon.

On the other hand, there are some demands to ensure the most comfortable business environment and remove unfeasible 'administrative burden', usually including imperative legal requirements, providing mandatory registration of corporations with state register, payment of minimum authorized capital, corporate management structure, competence of corporate management bodies, etc. A special role is assigned to the wide application of corporate agreements together with use of intra-corporate 'internal regulations' (similar to U.S. business judgment rules). In the aggregate, these arrangements have to replace imperative regulation of company status and make contractual (non-mandatory) regulation governing with respect to both intra-corporate relations, and relations between corporations and third parties (creditors). By using that approach, traditional corporate law will eventually be gradually replaced by contract law with its fundamental 'freedom of contract' principle, which will inevitably result in maximum liberalization and optionality of the content of corporate law regulation.

So, the proposed 'replacement' of imperative rules peculiar to corporate law with those of 'non-mandatory' nature raises the question of feasibility of corporate law existence. That approach was successfully described by one of modern German researchers as follows: so what, 'Goodbye and farewell to corporate law welcome and hail to contract law? Let the magic of the markets work its wonders? Could it really be that simple? Have generations of continental geniuses of company law gone utterly wrong and in an absolutely misleading direction?"[5]. The answer to these questions largely depends on the results of analysing the legal nature of corporate agreements playing various roles in European civil and U.S. and British corporate law.

For a long period of time, the Western European doctrine classified the aforesaid agreements as one of the types of simple partnership agreements focused on the achievement of a joint objective. That is why they were often named as 'syndicate

[5] P. Mankowski. Reicht das Vertragsrecht für einen angemessenen Schutz der Gesellschaftsgläubiger und ihren Interessen aus?// Das Kapital der Aktiengesellschaft in Europa. Zeitschrift für Unternehmens und Gesellschaftsrecht. Sonderheft 17. Berlin, 2006, p. 489.

agreements' (Syndikatsverträge). Only during the last two decades that approach has become open to question, inasmuch as 'agreed-voting agreements' are entered into not to achieve a joint business objective, but to ensure mutual influence on the corporation operations[6]. That is why they are often considered as 'voting right binding agreements' (Stimmrechtsbindungsverträge), or 'shareholder binding agreements' (Aktionerbindungsverträge), i.e., agreements for the realization of shareholders' rights, and mostly – right to vote.

For example, in French corporate law the aforesaid agreements (conventions de vote) may technically be related only to voting of shareholders and only to a specific meeting (but not for a certain period of time) (fixed-term or open-ended shareholders' voting agreements may only apply in 'simplified joint-stock companies' – Société par actions simplifiée, SAS). So-called 'preferential agreements', restricting the transfer (alienation) of shares from one shareholder to another, have been used during the last few years, as well. However, contents of shareholder agreement in all cases must be known to corporation in general and financial market supervision authority[7].

It is generally accepted by European civil law that the aforesaid agreements may neither change the corporation structure imperatively established by the law, nor debar any person from voting, acquire any person's vote, or otherwise misuse the granted right, or act in a manner conflicting with 'good practices' (*gegen die guten Sitten*). In addition, they usually disallow any third party, other than member of corporation, to be a party to such agreements, inasmuch as only the corporation members determine and form the corporation property, identify its business objectives, state them in the charter, and determine the fate of corporation; that is why only they may take part in the formation of the will of corporation (and third party may, by prevailing over the votes of members, have an opportunity to affect corporation resolutions, while the risk and consequences of such resolutions will be incurred by members of corporation, but not the said third party)[8]. In addition, such negative stance on the third party's participation in corporate agreements is explained by the fact that such third party is not subject to traditional corporate obligations to act in an honest manner and to the benefit of corporation in general.

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[6] N. Vavrovsky. Stimmbindungsverträge im Gesellschaftsrecht. Wien, 2000, pp. 10 – 13.

[7] M.A. Arlt. Französische Aktiengesellschaft. Monistisches und dualistisches System im Spannungsfeld der Corporate Governance. Wien, 2006, p. 161.

[8] H.J. Priester. Drittbindung des Stimmrechts und Satzungsautonomie// Festschrift für Winfried Werner. Berlin, New York, 1984, p. 663; K. Schmidt. Kommentar zum GmbH-Gesetz. Köln, 1988. § 47, Rz. 34.

These agreements are most commonly encountered in Swiss legal practice. After a number of doubts, it has allowed an option for members of non-public joint-stock companies to enter into mutual agreements, providing not only agreed voting, but also preliminary or pre-emptive acquisition of shares, imposition of some additional duties on shareholders (abstention from mutual competition, non-disclosure of certain information), or granting of additional rights to them (right to information, or even right to participate in the adoption of certain resolutions). However, even here those are classified as obligation and right agreements for the realization of shareholders' rights[9].

Modern German and Austrian legal practices consider the shareholder agreement provisions binding upon corporation as a whole if each and every member of corporation is a party to such agreement. That standpoint is criticized in literature, as it causes 'multiple control' of corporation status by its charter and corporate agreements without compliance with necessary 'publicity directives' (inasmuch as the contents of corporate agreement remain unknown to third parties, and especially – to corporation creditors), and also breaches the principle of 'severance' between personality and property of legal entity (corporation) and those of its members (participants)[10].

Basic principles of Western European corporate law include the principle of protection of creditors' rights[11], but not the 'freedom of contract' principle. Continental European corporate law proceeds from the premise that the privilege of independent (agreement-based) corporation management may only have members of partnerships (associations) incurring full (unlimited) liability for their respective debts. In limited (and in point of fact – absent) liability corporations, the management structure is formed by legislator seeking protection of proprietary interests of third parties and minority shareholders. So, it is assumed that the regulation mechanism of the corporate status 'generally cannot be subject to discretion, as its modifications based on individual autonomy and replacement of certain keystones may cause the whole legal regulation building to collapse'. Parties to corporate relations are provided by legislator with a freedom of choice only among various corporation models established by it, combining both imperative and non-mandatory regulation, which to the fullest extent corresponds to the protection of interests of all members[12].

[9] A. Meier-Hayoz, P. Forstmoser. Schweizerisches Gesellschaftsrecht. Zehnte Aufl. Bern, 2007, pp. 260, 280, 550.

[10] N. Vavrovsky. Stimmbindungsverträge in Gesellschaftsrecht. pp. 121 – 123.

[11] P. Bydlinski. Grundzüge des Privatrechts. 5. Aufl. Wien, 2002, p. 294.

[12] S. Kalls, M. Schauer. Die Reform des österreichischen Kapitalgesellschaftsrechts. Gutachten zum 16. Österreichischen Juristentag. Wien, 2006, pp. 29, 39, 94; H. Wiedemann, M. Lutter (Hrsg.). Gestal-

European approach conceptually differs from the U.S.-based law approach, providing an option of freely executed corporate agreement to establish any corporate management structure and enabling the participation therein for any third party subject to any conditions, i.e. with the widest application of the freedom of contract principle in corporate law. In terms of U.S. law, a corporation itself is usually seen as a contractual arrangement among its founders (members) having contractual (agency) relations with corporate management. So, the corporate structure is determined by its agency costs, i.e. expenses incurred in connection with the supervision over the operation of its corporate management acting in the capacity of an 'agreed agent' of corporation members. The aforesaid costs include monitoring costs – expenses incurred by investors in connection with monitoringthe managers' operations, as well as indirect monitoring costs, i.e. expenses incurred in connection with loyalty warranties provided by such managers and prevention of potential damages from the management of inadequate quality. The extent of those costs is determined in a voluntary manner (agreed upon), i.e. based on market premises[13].

So, any state interference with the formation of corporate relations structure (in the form of imperatively established corporate management system) certainly becomes excessive and may only result in the creation of supervisory authorities, the maintenance of which will cost more than possible damages. From that point of view, mandatory (imperative) corporate regulation status is unnecessary, and even harmful, inasmuch as market relations themselves cause the most efficient monitoring effect. This is the source of demands for every possible liberalization and eventual deregulation of corporate relations, as well as postulates on contractual and legal nature of corporate status, which has only been formed by non-mandatory rules (based on the freedom of contract principle), i.e. most at the discretion of the parties thereto[14].

In the U.S. and British private limited or closed corporations with small number of members, some of them often act as corporation managers at the same time. In these cases, members have to enter not only into voting agreements, but also into

tungsfreiheit im Gesellschaftsrecht. Zeitschrift für Unternehmens – und Gesellschaftsrecht. Sonderheft. Berlin, 1997.

[13] For more details see, e.g.: H. Merkt, S.R. Göthel. US-amerikanisches Gesellschaftsrecht. 2. Aufl. Frankfurt am Main, 2006, p. 90 ff.

[14] It should be noted that the corporate relations development practice did not prove it feasible to apply the freedom of contract principle in terms of corporate law (as it stems from the Law & Economic postulates developed by neoliberal Chicago school of economics). A wave of various corporate abuses and seizures (mergers) in 1980's has brought to life yet another concept – "regulatory interference" of state with corporate relations.

those restricting the freedom of corporate boards of directors to adopt their respective resolutions. U.S. corporate law is traditionally focused on regulating the status of 'public corporation', and for a long period of time contained almost no rules concerning closed corporations. Special regulation of their status has only occurred in the Model Statutory Close Corporation Supplement (MSCCS) to the Revised Model Business Corporation Act, 1984 (RMBCA). §22 of the MSCCS provides an option for the complete replacement of closed corporation's internal regulations with shareholders' agreement entered into by shareholders of that corporation. In addition, Article 17 of the Companies Act 2006 also provides an option for the modification of company's charter by shareholders' agreement (to restrict powers of the board of directors, grant 'reinforced right to vote' to certain shareholders, determine the management structure other than provided in charter, etc.), having the only restriction for the compliance of shareholders' agreement with 'public order' and third parties' interests.

However, the aforesaid agreements entered into by corporation members and restricting the freedom of corporate boards of directors to adopt their respective resolutions are in conflict with one of the key principles of U.S. corporate law, according to which it is the board of directors (but not members of corporation) that has to administer the affairs of corporation. Furthermore, those are often executed by majority shareholders against minority shareholders. That is why the U.S. court practice for a long time had a negative stance on shareholders' agreements. For example, see *Long Park, Inc. v. Trenton-New Brunswick Theatres Co.,* according to which all three shareholders agreed that one of them, owning half the shares, should have full authority to manage the corporation's business for 19 years. The court considered that to be a major violation of the principle of managing the corporation's business by the board of directors of that corporation only and invalidated the agreement.

However, when trying *Clark v. Dodge* case, according to which two members of 'closed corporation' have agreed that one of them should be its director and general manager as long as he was 'faithful, efficient and competent', the Supreme Court of the State of New York considered such restrictions of the freedom of action for the corporate board of directors as 'insignificant', inasmuch as the aforesaid manager at any time could be withdrawn by the board of directors should he discharge his duties improperly, e.g. as a result of obvious lack of skills. The Supreme Court of the State of Illinois in its widely known ruling on *Galler v. Galler* case (1964) pointed out that business management agreements may be entered into in 'closed corporations', provided that each and every member of corporation is a party to such agreement, con-

tents and implementation of such agreement affects neither creditors' interests nor those of minority shareholders of corporation, and the aforesaid agreement breaches none of statutory rules[15].

So, the U.S. court practice does not unambiguously admit any corporate agreements that cancel or replace any rules of corporate law. Although, since 1991 §7.32 RMBCA allows to order the board of directors of corporation to act in a certain manner by virtue of unanimous agreement of its members, U.S. corporate law actually does not provide such wide options for the contractual (non-mandatory) regulation of intra-corporate relations, invoked by its Russian advocates.

However, in general U.S. and British corporate law shows a high level of optionality in the legal regulation of non-public company status. Its basic objectives are other than the protection of creditors' and minority shareholders' interests, as those are protected either by the rules of contract law (creditors by themselves have to seek for the respective remedies, thereby securing the proper performance of obligations), or by the laws on insolvency and bankruptcy (within the scope of which the interests of minority members of corporations may be protected).

Modern business practice requires the maximum free regulation of limited liability corporation's status, formed by agreements between its members. It has raised the questions as to admissibility of third parties (e.g., banks that lend to joint-stock companies, or venture funds) and corporations themselves (bound by agreements of all, or even the most part of, their members) to those agreements. That is why the Ministry of Economic Development of the Russian Federation, continuously expressing the interests of business people, persevered for the introduction of the respective modifications and supplements to the Civil Code of the Russian Federation and Federal Law 'On Joint-Stock Companies', having taken shareholders' agreements, commonly encountered in U.S. and British corporations, as a model. At the same time, it has accepted a division inherent to U.S. and British corporate law – the division of business corporations into public and private companies, considered to be different forms of one and the same type of legal entities (corporations), and discarded the historically formed fundamental distinctions in European continental law with respect to joint-stock and limited liability companies. That approach of the Ministry of Economic Development of the Russian Federation was to a considerable extent embodied in the new version of the Civil Code.

The 'corporate agreement' rules for the first time appeared as far back as in 2008 in the Federal Law 'On Limited Liability Companies' (Clause 3 Article 8), and then –

[15] See: H. Merkt, S.R. Göthel. US-amerikanisches Gesellschaftsrecht, p. 383.

in 2009 in the Federal Law 'On Joint-Stock Companies' (Article 32^1) where they were expressly named as 'agreements for exercising the company members' rights (or those certified by stock)', for the most part concerning the right to vote at general meeting and right to alienate the stock or participatory interests. These rules disallowed any third party to be a party to such agreements, and provided them to be only binding upon members of corporation, but not upon corporation in general. In terms of their legal nature, the aforesaid agreements were civil-law agreements for the realization of shareholders' rights, but not 'corporate deeds' determining the corporate management structure. However, some tried to substantiate the 'dual legal nature of those agreements[16]', thereby focusing on the expansion of their contents and field of application with due regard for the U.S. and British models. Later on, some tried to supplement the updated rules of the Civil Code with those providing unrestricted participation in the aforesaid agreements for both any third party and company in general, formalizing an option for challenging company resolutions adopted in violation of corporate agreement, as well as providing secret nature of their contents and even the fact of entering into them, the structure of members, etc.

The final version of Article 67^2 of the amended RF Civil Code provides that information on corporate agreement contents 'shall not be disclosed and shall be confidential', and the parties thereto shall only 'notify the company' of their actual entering into them. A breach of the corporate agreement terms and conditions may cause challenging of the respective resolutions of corporate bodies should all members of corporation be the parties thereto. So, in the amended version of the Civil Code, corporate agreements in terms of its form and content greatly differ from a civil-law agreement for the exercise of the corporate members' rights, and to the large extent became similar to a 'corporate deed' for the management of corporation's business.

However, as a result of its use, the management of corporation may be completely taken out of that corporation and concentrated in hands of any third party, incurring no obligations to members of corporation and corporation in general, which completely distorts the basics of corporate law. So, through the example of corporate agreement, one can see the results of attempting to replace or 'merge' corporate law with contract law by way of distorting the legal nature of civil-law agreement ('corporate agreement'). The impairment of minority shareholders' rights introduced to the

[16] D.I. Stepanov. Soglashenie ob osushchestvlenii prav pol'zovatelia obshchestva s ogranichennoi' otvetstvennost'yu [Agreement for the Exercise of Rights of Limited Liability Company Members]// Vestnik Vysshego arbitrazhnogo suda Rossiiskoi Federatsii [The Bulletin of the Supreme Commercial Court of the RF]. 2010, No. 12, p. 70.

benefit of big businesses (even other than those participating in corporation) will hardly contribute to the improvement of 'investment environment' in the Russian Federation. Approaches of that kind must become not only the subject-matter of critical re-evaluation on the part of the Russian legal science, but also be subject to unavoidable and substantial adjustment in terms of applicable law-enforcement practices.

It should be stressed as well that the 'freedom of contract' principle is not a common principle of civil (private) law: it applies neither to civil-law relations among an indefinite range of third parties (governed by law of things and 'intellectual property' right), nor to civil-law relations with the participation of an obviously weak party (governed by corporate law and consumer protection law –Verbraucherschutzrecht- thriving recently in European continental law). That is why new Russian corporate law must keep, as its general approach, the European continental type of corporate legal regulation based on differences between corporate and contract laws. This approach perfectly well meets both historic traditions of Russian law and modern economic realities, and thereby still remains promising.

CORPORATE LAW IN THE SYSTEM OF RUSSIAN LAW

V. F. Popondopulo
Doctor of Law, Professor,
Head of Commercial Law Department,
St.Petersburg State University,
Saint Petersburg, Russia

Abstract: The article deals with controversial issues of the notion and the legal nature of corporate law, and its place in the system of law. It also gives the author's position concerning these issues. In particular, corporate relations as an object of civil-law regulation are defined in the article as a type of relations of obligation that arise in connection with participating in the corporate relations or with managing them as to property rights (stakes, shares, securities, remuneration) of corporate members. The author distinguishes between the characteristics and the types of corporate relations. Corporate law is defined as a functional institution of law of obligations. It is a combination of general and special rules of civil law regulating binding relationships connected with the property rights (stakes, shares, securities) of corporate members (corporate relations) based on the equality, the autonomous will and the property independence of their participants.

Keywords: civil law, law of obligations, corporate law, corporate organization, corporate relations, stakes, shares, securities.

The problems of corporate law have been actively debated in Russia. They have become particularly relevant since some amendments to the RF Civil Code were made: corporate relations were included in the subject of civil-law regulation (Art 2)[1], and the provisions on legal entities created in the corporate form were renewed (Ch 4)[2].

[1] Federalnyi' zakon o vnesenii izmenenii' v glavy 1, 2, 3 i 4 chasti pervoi' Grazhdanskogo kodeksa Rossiiskoi Federatsii No. 302-FZ [Federal Law "On Amendments to Chapters 1, 2, 3 and 4 First Part of the RF Civil Code" No. 302-FZ]. December 30, 2012// Rossiiskaia Gazeta [Ros. Gaz]. November 14, 2007. Kodeks zakonov RF [Code of Laws of RF]. 2012, No. 53, Art 7627.

[2] Federalnyi' zakon o vnesenii izmenenii' v glavu 4 chasti 1 Grazhdanskogo kodeksa Rossiyskoi Federatsii, a takzhe o priznanii nekotorykh polozhenii' rossiyskikh zakonodatel'nykh aktov nedei'stvitel'nymi No. 99-FZ [Federal law "On Amending Chapter 4 of Part 1 of the Civil Code of the Russian Federation, and on Recognising Some Provisions of Russian Legislative Acts to be Void" No. 99-FZ]. May 5, 2014. Rossiiskaia Gazeta [Ros. Gaz]. May 7, 2014.

The said novelties of the RF Civil Code are convenient for the law-enforcement practice as they answer a series of questions: about the sectoral affiliation of corporate relations; about the grounds of their origin; about the peculiarities of the legal status acquired by corporate organizations and their participants; about their relationships concerning their interest, corporate stock, shares and other property and related non-property rights.

However, while recognizing the importance of the practical aspect for accentuating corporate relations within the object of civil-law regulation, the *scientific* importance of laying emphasis on corporate relations in the structure of the civil law subject should not be overestimated. In essence, the relations called corporate in the Civil Code were previously included in the subject-matter of civil law as they were part of the *generic unity* defined by the Civil Code as property and personal non-property relations, based on equality, autonomous will and property independence of their participants (para1, cl 1, Art 2).

Indeed, one may agree with those authors who think critically about accentuating corporate relations in Art 2 of the RF Civil Code[3]. The lawmaker did not introduce the said category of social relations in the sphere of civil law regulation but only directly identified it. This novelty resulted in losing holistic scientific understanding of a legal entity because legal entities include both corporate and unitary organizations. In this context, a rhetorical question arises: Does the object of the civil law regulation include relations arising in management of unitary organizations[4]? If the answer is yes, why is this point not reflected in Art 2 of the RF Civil code?

Legal literature defines the notion of corporate relations mainly through their parties, i.e. corporation and its participants. This is correct. However, this definition does not reveal the essence of corporate relations. To understand the nature of corporate law we must define the parties to corporate relations and the content of these relations.

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[3] V.A. Boldyrev. Corporativnye otnosheniia i corporativnye spory [Corporate Relations and Corporate Disputes]// Yurist [Lawyer] Publishing House. 2013, No. 16, pp. 31 – 33.

[4] The legal nature of corporate organizations is defined by the relative nature of corporate relations (the party is "corporation"). In contrast, the legal nature of the unitary organizations, including unitary enterprises is defined by the absolute nature of unitary relations built within the framework "the founder – the unitary organization". Corporate relations are connected with the participation in corporate organizations, and unitary relations are built on the strict distinction between absolute rights of the founder and the unitary organization. For more details see: V.F. Popondopulo. Kommercheskoe (predprinimatelskoe) pravo. [Commercial (Business) Law]. 3rd edition revised and updated. Moscow, 2008, pp. 209 – 216.

In my opinion, corporate relations are civil-law *binding relations*, connected with participation in corporate organizations or with their management. This approach does not contradict legal provisions mentioned in renewed Art 2 of the RF Civil Code though corporate relations are listed in this article among other binding relations.

We will examine central academic views of legal nature of corporate relations and the place of corporate law in the system of law.

But, it would be interesting to recall the discussion in the late 1980s held at the All-Union Conference of Heads of Legal Disciplines Departments. The topic of the discussion was the nature of cooperative law that now relates to the issue of the nature of the corporate law[5].

V.V. Petrov, N.I Konyaev and Ya.Ya. Strautmanis were of the opinion that cooperative law was an independent branch of law. V.V. Petrov, for example, thought that cooperative law had an independent object of legal regulation – cooperative relations based on membership, and an independent method of legal regulation – the method of cooperate democracy. In my opinion, these arguments do not stand up for criticism as membership is only a ground for legal relations, but the ground does not determine the content of legal relations. Cooperative democracy at closer examination turns out to be the method of harmonizing wills (a method of civil-law regulation). Other authors from theis group explained the independence of cooperative law by the growth of cooperative legislation. Yet, the nature of a legal phenomenon can hardly be determined by the number of normative acts.

V.F. Chigir, Yu.G. Basin, V.V. Luts', N.D. Egorov supported another point of view. Defining the cooperative law, they emphasised the complex nature of the legislation regulating cooperative relations. Though in this case, they should have spoken not only about cooperative law but about cooperative legislation, which is not the same thing.

The dispersion of opinions about the nature of corporate law and relations regulated by this law has grown significantly now.

First of all, we can conventionally mark two main approaches to specifying the place of corporate law in the system of law: some authors do not include it in civil law, others, conversely, emphasise its civil-law nature.

[5] Cooperativnoe pravo: poniatie i stanovlenie. [Cooperative Law: the Notion and the Development]// Vestnik moscovskogo universiteta [Bulletin of Moscow University]. Series 11. Law. No. 3, pp. 65 – 90.

The authors who do not classify corporate law as part of civil law tend to view it as an independent branch of law[6], a complex branch of law[7], an institution of business (entrepreneurial) law[8]. Considering the internal character of corporate relations, V.S. Belykh, for example, believes that they "cannot be regulated only by civil law but also by administrative law"[9]. I think, the latter case represents the confusion between the so-called "internal business relations", which are neither civil (commodity-related) relations nor administrative (public) relations, and corporate relations arising from participating in a corporation and having the form of civil corporate legal relations. In fact, a member of a corporation has his/her own property interest that does not coincide with the interests of the corporation. The balance of these interests set out by the law is the object of civil-law regulation.

As corporate relations were included in the subject of the civil regulation, the basis for defining corporate law as an independent and complex branch of law was seriously undermined. Corporate law is legally recognized to be a *division of civil law*, and corporate relations are included in the object of civil-law regulation.

The majority of the corporate law researches proceed from the assumption ofits civil nature, but they interpret it differently: as a separate subbranch of civil law nonrelated to the law of obligations[10], a separate institution of the law of obligations[11]. The latter view is the most reasonable.

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[6] A. Yuldashev. Corporativnoe pravo: potrebnosti i trebovaniia ES i perspectivy rasvitiia [Corporate Law: EU Requirements and Demands and Development Prospects]// Yuridicheskaia Ukraina [Legal Ukraine]. 2003, No. 12, pp. 38 – 39; V.P Mosolin. O yuridicheskoi' prirode vnutricorporativnyh otnoshenii [On the Legal Nature of Internal Corporate Relations]// Gosudarstvo i pravo [State and Law]. 2008, No. 3, pp. 28 – 37; V.K. Andreev. Stanovlenie corporativnogo prava kak otrasli prava [Development of Corporate Law as a Branch of Law]// Actual'nye problemy predprinimatel'skogo i corporativnogo pravav Rossii i za rubezhom [Current Issues of Entrepreneurial and Corporate Law in Russia and Abroad]// Ed. by S.D. Mogilevsky, M.A. Egorova. Moscow, 2014, pp. 12 – 16.

[7] Corporativnoe pravlenie [Corporate management]// Ed. by I.V. Spasibo-Fateeva. Kharkiv. 2007, p. 176.

[8] E.S. Zorina. Pravovoe regulirovanie corporativnykh otnoshenii' v aktsionernykh obschestvakh [Legal Regulation of Corporate Relations in Joint-Stock Companies]// Dissertatsiia na soiskanie stepeni kandidata yuridicheskikh nauk [Dissertation for the Degree of Candidate of Law]. Moscow, 2005; Corporativnoe pravo [Corporate Law]// Ed. by I.S. Shitkina. Moscow, 2007, p. 42.

[9] V.S. Belykh. O corporatsiiakh, corporativnykh otnosheniiakh i corporativnom prave [On Corporations, Corporate Relations and Corporate Law] // Problemy predprinimatel'skogo (hoziaistvennogo) prava v sovremennoii' Rossii [Problems of Enterepreneurial (Business) Law in Modern Russia. Trudy IGP-RAN. Works of Institute of Civil Law Russian Academy of Sciences. 2007. No. 2, p.119.

[10] D.V. Lomakin. Corporativnye pravootnosheniya: obschaia teoriia i praktika ego primeneniia v hoziaistvennykh obschestvakh [Corporate Legal Relations: General Theory and Practice of its Application in Business Societies]. Moscow, 2008.

[11] V.V. Prohorenko. Obyazatel'stva, voznikayushchie iz uchastiia v obrazovanii imushchestva yuridicheskogo litsa (participativnye obiazatel'stva). [Obligations Arising from the Participation into the Formation of the Legal Entity's Estate (Participative Relations)]// Problemy teorii grazhdanskogo prava [Prob-

Those who associate corporate law with civil law are also engaged in a discussion about the civil-law form of corporate relations: some authors consider legal prerequisites of other legal relations to be a legal form of the said relations; others think that concrete legal relations are legal forms of corporate relations.

The authors who regard corporate relations as prerequisites of other legal relations recognize as such: corporate legal capacity allowing to participate in other legal relations[12], secundar legal relations that are the prerequisite of other relations[13], absolute legal relations that are the prerequisite to the dynamics of corporate relations[14].

I think that such scientific views are unconvincing because the legislator identifies corporate relations as definite (already formed) *relations regulated by civil law*.

Some authors identify specific civil-law relations as legal forms of corporate relations. They indicate legal property relations with multiple structure of stakeholders[15], relative civil legal relations that are not reduced to legal relations of property and obligation[16], regal relations of obligation with certain specific features[17].

The view of those authors who define absolute relations as a legal form of corporate relations also seems unconvincing. Corporate relations are connected with participating in corporate organizations or with managing them[18], i.e. they imply concrete *participants in such relationships that are relative but not absolute*.

lems of the Theory of Civil Law]. Issue 2, Moscow, 2006, pp. 130 – 131; D.I. Stepanov. Ot sub'ekta otvetstvennosti k prirode corporativnykh otnoshenii. [From the Subject of Responsibility to the Nature of Corporate Relations] // Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii [The Bulletin of the RF Supreme Commercial Court]. 2009, No. 1.

[12] V.A. Belov. K probleme grazhdansko-pravovoi' formy corporativnykh otnoshenii' [On the Problem of Civil Form of Corporate Relations]// Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii [The Bulletin of the RF Supreme Commercial Court]. 2009, No. 9.

[13] A.B. Babaev. Problema corporativnykh pravootnoshenii' [Problem of Corporate Legal Relations]// Grazhdanskoe pravo: actual'nye problemy teorii i practiki [Civil Law: Current Problems of Theory and Practice] // Ed. by V.A. Belov, Moscow, 2007.

[14] R.R. Ushnitsky. O grazhdansko-pravovoi' forme corporativnogo otnosheniia [On the Civil Form of Corporate Relation] // Vestnik grazhdanskogo prava [Civil Law Bulletin].

[15] N.N. Pahomova. Tsyvilisticheskaia teoriia corporativnykh otnoshenii' [Civil Theory of Corporate Relations]. Yekaterinburg. 2005, p. 68.

[16] D.V. Lomakin. Corporativnye pravootnosheniia: obschaia teoriya i praktika ego primeneniia v hoziaistvennykh obschestvakh [Corporate Legal Relations: General Theory and Practice of its application in Business Entities]. Moscow, 2008. E.A. Sukhanov. Sravnitel'noe corporativnoe pravo [Comparative Corporate Law]. Moscow, 2014, pp. 47 – 54.

[17] D.I. Stepanov. Ot subjekta otvetstvennosti k prirode corporativnykh otnoshenii [From the Subject of Obligation to the Nature of Corporate Relations] // Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii [The RF Supreme Commercial Court Bulletin]. 2009, No. 9.

[18] Participation in the corporate organizations presupposes their management. So, the separation of management relations together with member relations is not essential for determining the nature of corporate relations.

There are two points of view that reflect the essence of the discussed phenomena most closely. According to them, corporate legal relations are:

a) relative civil-law relations that are not reduced to the relations of obligation (D.V. Lomakin, E.A. Sukhanov);

b) a kind of relations of obligation (V.V. Prokhorenko, D.I. Stepanov). The latter view seems more convincing.

Defining the object of civil-law regulation (Art 2 of the RF Civil Code), the legislator points out its generic characteristics (i.e. *property and non-property relations*) and types of the regulated relations including *relations connected with the participation in corporate organizations or with their management (corporate relations)* that must logically be characterized by property and non-property content (generic indication). D.V. Lomakin reasonably says that corporate relations are "relations of property and non-property participation in the activities of a corporation by its members"[19].

I think that *corporate relations are property (obligation-related) relations based on equality, autonomy of will and property autonomy of members. These relations arise in connection with participating in corporate organizations or with managing them),* that the following points come from this definition:

a) corporate relations including relations between managerial bodies of corporation are *private relations.* That is why we cannot agree with the statement that corporate law regulates formation, activities, and termination of corporations in their private-law and public-law aspects[20]. Public relations connected with the state registration of corporate organizations are not corporate relations. They are the object of public-law regulation based on power and subordination.

b) corporate relations are *not entrepreneurial relations* as participation in corporate organizations and their management does not require the entrepreneurial status. Of course, both participants and managers together with corporation may have the entrepreneurial status, but they do not take part in corporate relations as entrepreneurs. So, in my opinion corporate law cannot be assigned to the institution of business (entrepreneurial) law[21].

c) Corporate legal relations are *legal relations of obligation*: *the reasons for their dynamics* are multilateral and unilateral transactions on formation and termination

[19] D.V. Lomakin. Corporativnye pravootnosheniia: obschaia teoriia i praktika ego primeneniia v hoziaistvennykh obschestvakh [Corporate Legal Relations: General Theory and Practice of its Application in Business Societies]. Moscow, 2008, p. 87.

[20] Corporativnoe pravo [Corporate law]// Editor-in-Chief I.S. Shytkina. Moscow, 2011, pp. 25 – 26.

[21] O.M. Vinnik, V.S. Scherbina. Aktsionernoe pravo [Company law]. Kiev, 2000, p. 17.

of corporate relations; property and related non-property (institutional)[22] rights as well as responsibilities of the corporation and corporation's participants form *the content of corporate legal relations*; *the objects of corporate relations* are shares and stocks in respect of which the corporate relations arise.

A participant of a corporation needs non-property rights for the participation, management and information to exercise his property corporate rights more efficiently (to make a well-informed decision). Non-property rights of the participants support their basic property right (rights for a share, a stock, a dividend, a liquidation quota or remuneration). They cannot exist without property rights, being very related to them.

d) corporate relations are divided into several types: between the members of the corporation and the corporation; between the members of the corporation through the activities of the corporation; between the members of the corporation; between the members of the corporate bodies and the corporation, etc. Legal regulation of the said relations has certain specific features. At the same time, according to their content, they are *relations of obligation*.

So, *corporate law is a combination of general and specific provisions of civil law regulating relations of obligation connected with participating in corporate organizations or with managing them (corporate relations) based upon equality, autonomy of will and material independence of their members.*

Judging from this definition of corporate law, we can infer that it is neither an independent branch of law nor a complex branch of law, nor the institution of business (entrepreneurial) law. It is a constituent part of civil law.

IIn my opinion, corporate law is not a subbranch of civil law, as the subbranch includes norms of the corresponding branch of law that governs peculiarities of a certain type of relations regulated by the branch of law. Particularly, the law of obligation is such a subbranch of civil law that regulates the relations of obligation. So, corporate law is a functional institution of law of obligation. The functionality of this institution is reflected in its role to regulate relations of obligation connected with participating in corporate organizations and managing them in respect of property rights (shares and stocks) belonging to the members of the corporation (corporate relations).

[22] O.M. Krasavchikov advanced the theory of institutional relationships as an independent part of the structure belonging to the subject of civil-law regulation and rights based thereon. (See: O.A. Krasavchikov. Grazhdanskie organizatsionno-pravovye otnosheniia [Civil Institutional Legal Relationships]// Sovetskoe gosudarstvo i pravo [Soviet State and Law]. 1966. No. 10, pp. 50 – 57). The theory was reasonably criticized by O.S. Ioffe (See: O.S. Ioffe. Rasvitie tsivilisticheskoi' mysli v SSSR [Development of Civil Thought in the USSR]. Leningrad, 1975, pp. 95 – 96.

NEW PROVISIONS OF THE RUSSIAN CONTRACT LAW IN THE LIGHT OF THE SUPREME COMMERCIAL COURT'S PLENUM DECREE "ON CONTRACT FREEDOM AND ITS LIMITS"

Mark V. Kuznetsov,
Candidate of Law,
BBH Legal, Associate,
Associate Professor, Civil Law Department,
Tula Branch of the Russian Law Academy,
Tula, Russia

Abstract: The article considers certain issues of the Russian contact law through analysis of relevant provisions of the Supreme Commercial Court's Plenum Decree "On Contract Freedom and Its Limits". The author emphasizes on typification of mandatory and provisional norms.

Key words: contract freedom, mandatory norm, provisional norm, indemnity, unreasonable conditions, *contra preferentem*.

The Supreme Commercial Court of the Russian Federation (the SCC) has finally adopted recommendations for lower courts regarding contract freedom and its limits. The SCC Plenum Decree as of March 14, 2014 "On Contract Freedom and Its Limits" (the Decree) accommodates multiple rules elaborated by the SCC judges within everyday practice. These rules have provided for the resolution of certain contract law issues that had been the subject of heated debates for the last decades.

The SCC rulings represent new legal norms directed primarily at dismissing any uncertainty as to the status of the norms contained in the Russian Civil Code (the Civil Code) that regulate contract obligations. The SCC establishes several principles to be used in determining whether a particular norm is mandatory or provisional.

The Decree formulates specific rules for conducting contract negotiations, including subsequences of insertion of unfair terms and conditions into contracts. It is worth noticing that the Russian law is now supplemented with the provision that all doubtful contract provisions should be construed against the party that proposed

them, provided that all other tools of contract construction failed to clarify its provisions (a "*contra preferentem*" rule).

Finally, the SCC clarifies certain principles of particular contract institutions, e.g. non-typified agreements and contracts provisions of which are based on standard documentation.

The new SCC recommendations are expected to have a dramatically positive impact on the Russian contract law, especially on its commercial part.

Mandatory and Provisional Norms

The possibility of in-contract reformulation or alteration of many of the Civil Code provisions was unclear for the practitioners prior to the Decree recommendations on that question. The main issue was to ascertain a certain rule as mandatory or provisional and thus determine the ways of incorporation into the agreement of particular provisions agreed upon by the parties. The result of false determination was declaring the inserted provision (or even of the contract in full) invalid. Currently lawyers have received clear rules of legal norms assessment as to their mandatory nature.

According to the Decree, mandatory and provisional clauses may be classified into several types: These types are not named by the SCC. However, they may be structured as shown above.

The SCC sets forth a general principle for the construction of the Civil Code provisions on contract rights and obligations. Under this principle, such norms should be assessed and considered by the courts in compliance with the meaning and goals of legislative regulation, i.e. the court is taking into account not only the literal meaning of the words but also the meaning implied while creating a particular rule. Clauses stipulated further in the Decree and describing the differences between mandatory and provisional norms are all subject to that general principle.

Mandatory Norms

Mandatory norms can be classified into: (i) direct norms, (ii) limited norms and (iii) implied norms.

Direct mandatory norms

Norms determining contract rights and obligations should be assessed as direct mandatory if they expressly forbid contract provisions distinct from those stipulated in the norm. The SCC does not limit the ways by which the prohibition is made.

Although, several examples of possible ways are described in the Decree. For instance, the agreement changing regulation may be found invalid, forbidden or not admissible. Alternatively, a norm can provide the right to alter its prescriptions within a specified scope. The prohibition might be unambiguously stated in the norm otherwise.

Altogether, the prohibition contained in the norm may be considered as limited, following the goals of legislative regulation.

Limited mandatory norms

Once the court reasons that pursuant to the goals of legislative regulation the scope of application of mandatory provisions should be reduced, the parties are allowed to set out alternative rules in the contract, but in a specified area only. The court might also exclude the prohibition in favor of the party to whose benefit the mandatory norm was initially established.

Such norms can be defined as limited mandatory norms.

The Decree provides for examples of limitation of that kind. In particular, the rule set out in Article 310 of the Civil Code can be regarded as a limited mandatory norm subject to the following: this rule grants the right to formalize in the contract grounds for its unilateral out-of-court repudiation provided this right is applicable to commercial contracts only, i.e. to contracts parties to which both exercise commercial activities. Whereas the purpose of this norm is to provide the weaker party with appropriate protection, the SCC alleges that in the case only one party exercises commercial activities, the norm should not prevent the parties from laying down in the contract the right of its out-of-court repudiation for the party not engaged in such activities.

Implied mandatory norms

Until now it was admitted that a norm should be defined as mandatory if it directly determines that its provisions cannot be modified or altered by the agreement. Additionally, the provisional nature of any norm was presumed provided that such a norm had no express mandatory prescriptions.

The Decree has changed this practice. According to the SCC recommendations, three situations may prove the mandatory nature of a particular norm. The norm is deemed mandatory if this is necessary for purposes of legislative regulation, in order to defend crucial legal interests, including interests of the weaker party and public interests. Based on the goals of legislative regulation, the norm may receive mandatory status if this is necessary for the prevention of a gross violation of the parties' interests. The mandatory status of the norm may also come from the essence of legislative regulation of a particular contract form.

If this is the case, the court declares the norm mandatory and the parties are not allowed to abolish the norm's application or to alter its provisions in the agreement. As a result, all contract provisions stipulating such abolition or alterations are invalid.

Provisional Norms

These are classified by the SCC as: (a) [general] provisional and (b) with limited permissiveness (limited provisional norms).

[General] provisional norms are defined using *a contrario* principle. If they cannot be described as mandatory norms, which means the absence of mandatory features (such as express prohibition to state a contract rule different from that stipulated in the norm or characteristics attributed to implied mandatory norms), they shall be deemed provisional.

Giving examples of provisional norms, the SCC actually introduces new rules pertaining to some very controversial issues of the Civil Code.

First, based on the provisional nature of the rules in Article 475 of the RF Civil Code, the SCC entitles parties to sale contracts to contractually alter consequences of the transfer of goods of improper quality. For example, the contract may stipulate new consequences (damages or penalty ("*neustoyka*")) for the said breach on the part of the vendor. This right is not new for commercial and state arbitration practice (commercial courts practice). Both Federal Districts Commercial Courts and the SCC previously ruled in favor of purchasers who had sought for damages or penalties from the failed vendor. But such rulings depended upon the assessment of the connection between the infringement and its result, thus making it doubtful whether the respective contract rule would survive in court. Since under the Decree the reimbursement of damage incurred by the purchaser becomes strictly enforceable, taking into account, of course, the right of court to reduce the amount of penalties under Article 333 of the Civil Code, commercial risks are more predictable now.

The new rule also contains an implied possibility to compensate specific losses of the new owner of the company to the parties to share purchase agreements, namely, using Anglo-Saxon instruments of warranties and indemnities, the application of which is the only reason for subjecting share purchase agreements to the English jurisdiction in the overwhelming number of cases. I am not asserting that the implementation of warranties and indemnities into the Russian civil law was the precise objective of the SCC judges. But if we ask ourselves about consequenc-

es that now can be set forth in a purchase and sale contract, we would hardly find any of those likely to be that forbidden had the Decree never been adopted. The previous court practice regarding damages and penalties prior to the Decree adoption did not add anything to the general rules of damages reimbursement (Articles 15 and 393 of the Civil Code) and contractual penalties recovery (Article 330 of the Civil Code). According to the contract liability provisions of the Civil Code and its doctrinal interpretation[1] apart from damages, penalties and payment of interest (Article 395 of the Civil Code) the contract breach also calls for "other effects of the contract breach". But many of such effects are "well known" as stipulated in Articles of the Civil Code, including Article 475. Moreover, they are usually determined by the law, not by the contract[2]. At the same time, according to the former Deputy Chair of the SCC, one of the developers of the Civil Code, Doctor of Law, Prof. V.V. Vitryansky, a contract may provide for other (not previously listed) consequences of the contract breach, but if they do not contradict the law[3].

It would be absolutely inconsistent with the goals of the SCC decrees to adopt the rules well known to lawyers and the courts. Pursuant to the competent view, "Plenum and Presidium decrees of the highest court instances can never lie in reproduction of certain law provisions. One should proceed from the opposite – the decree offers such application of a well-known norm that allows to resolve certain issues raised in practice"[4]. Hence, the SCC, while entitling parties to all types of purchase and sale agreements to set forth in their contract other consequences of the vendor's breach of the obligation to transfer goods of proper quality, meant all those consequences that (i) are not stipulated by the law and (ii) do not contradict it. **Thus**, warranties and indemnities could be concealed in the established rules among others consequences. The opposite viewpoint should be undoubtedly proved under mandatory provisions of the Civil Code.

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1 M.I. Braginsky, V.V. Vitryansky. Kontraktnoye pravo. Obshchie voprosy [Contract Law. General issues]. 2002, pp. 694 – 702.

2 Ibid.

3 Ibid, p.702.

4 K.I. Sklovsky. Kommentarii postanovleniia plenuma Verkhovnogo suda Rossiiskoi Federatsii i postanovleniia plenuma Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii o nekotorykh voprosakh, voznikayushchikh v sudebnoi' praktike pri razreshenii sporov, sviazannykh s zashchitoi' prava sobstvennosti i drugikh veshchnykh prav No. 10/22 [Commentary to the Supreme Court of the Russian Federation Plenum and the Supreme Commercial Court of the Russian Federation Plenum Decree "On certain Issues Arising Within the Court Practice Regarding Property and other in Rem Rights Defense Dispute Resolution" No. 10/22]. April 29, 2010. Kommentarii' k stat'e 43 [Commentary to clause 43]. 2011.

The **second fundamental rule** established by the Decree is the right under Article 782 of the Civil Code to determine, in a contract for commercial services, a certain lump sum to be paid by the party exercising its contractual right to unilaterally and out-of-court withdraw from the contract.

I should note parenthetically the essential growth of contractual provisions granting certain compensation to the counterparty in the case of unilateral repudiation of the contract in everyday practice. Such amount is agreed as a compromise when one of the negotiating parties does not want to vest its counteragent with the right to "withdraw from the contract". However, the enforceability of that provision was unclear. As the Decree confirms "unilateral withdrawal penalty" clauses for a commercial services contract, the same logic may be used while drafting other types of agreements, provided that the respective Civil Code provisions contain no mandatory rules preventing from including such penalty in the contract. Moreover, the continuing reform of the Civil Code may result in implementation of a general norm granting parties to all contracts a right to include "unilateral withdrawal penalty" clause[5].

Finally, the SCC classifies Article 410 of the Civil Code dealing with the set-off of obligations as a provisional norm. The said norm, thus, does not, according to the Decree, prohibit the creditor and the debtor to enter into an agreement regarding the set-off of heterogeneous or non-mature obligations.

I would like to emphasize that the legal effect of this rule is twofold. On the one hand, commercial entities have received convenient instrument to bring their interrelationships "to one denominator" mitigating multiple disbursements by such means. But, on the other hand, one should be very careful while purchasing rights of action (i.e. receivables) – by the moment of their "birth" they might have been already terminated.

Norms with limited permissiveness (limited provisional norms).

Even if a norm directly provides for the possibility to alter its rules in the agreement, the court based on the essence of the norm and legislative goals may construe such a provision as limited within a certain scope. So permissibility of conduct within these norms is restricted, limited within certain borders.

[5] V.V. Vitryansky. Razrabotka novykh obshchikh polozhenii' ob obyazatel'stvakh v ramkakh reformirovaniia grazhdanskogo zakonodatel'stva [Projectable New General Obligation's Provisions Within Reforming the Civil Legislation]// Aktual'nye voprosy chastnogo prava: stat'ia, posviashchennai'a godovshchine Pavla Vladimirovicha Krasheninnikova [Relevant Issues of Private Law: Paper Devoted to Pavel Vladimirovich Krasheninnikov's Anniversary]. 2014.

As one may see, grounds for defining norms as implied mandatory or limited provisional are mostly similar (legislative goals, essence). Furthermore, to distinguish such norms, the SCC specifies definite criteria identical for both types. Actually, these criteria follow the general idea of the Decree – to construe a norm based on its essence and the legislative goals. According to the SCC, in the case of a dispute arising as to whether the norm in question is mandatory or provisional, the court shall justify its decision by using the following provisions: the contract's legislative regulation, the necessity to defend some concrete significant interests secured by the law; the prevention of gross violation of the parties' interests balance.

In sum, it should be stressed that the grounds for revealing implied mandatory norms substantially affect provisional norms in a negative way, make them dependent on permanent disclosure by the court of the actual position of the parties to the contract, disclosure which is not absolutely clear to every prudent and reasonable person and which requires upper intermediate knowledge of civil law, its doctrine.

For instance, Article 610 (2) of the Civil Code is interpreted in such a way that parties to a lease contract concluded for an indefinite term are not entitled to eliminate the right of unilateral withdrawal from the lease. The SCC is absolutely right in the proposed argumentation for the offered rule – leases are contracts with limited time of usage that will disappear if the lease prohibits any type of refusal under Article 610 (2). That conclusion is based on the essence of the lease's legislative regulation. In other words, one should know the civil doctrine to apply the mentioned article properly. Using the principle of interest balance protection, the SCC construes Article 462 (1) of the Civil Code in the same manner as the previous norm. The parties to a sale contract shall not preclude the purchaser from contract termination in the situation when the vendor has refused to transfer goods to him.

These are examples of implied mandatory norms determined in the course of the above-mentioned differentiation of norms. The Decree does not contain any example of limited provisional norms – the fact that shows real difficulty in differentiating among the said types of norms.

Specific Rules Regarding Application of Mandatory and Provisional Norms Application in Respect of Innominate Contracts

The Decree reveals issues concerning regulation of the innominate contracts. The first issue established by the SCC is the general rule of a contract's content prevailing over its name/definition. Thus, the name given to the contract by the parties may be disregarded by the court if it discovers that the subject-matter of

that contract, the real substance of the parties' rights and obligations or risk allocation speak against a contract type contained in the Civil Code, with the name of the contract given to it by the parties involved The rule of the subject-matter or content prevailing is not new to the SCC. The Court has previously adopted an even more general principle of contract law according to which contract classification is determined by the contract's content, but not by its name[6].

It seems to me that the said "classification" rules may be applied to a part of a contract, too. For instance, if under Russian law a share purchase agreement contains a clause about liquidated damages, which, in fact, is an indemnity clause, the court must properly classify it and apply in accordance with its meaning and goals the parties pursued while including it in the contract.

The next step made by the SCC is the rule that provisions of the Civil Code regarding nominate contracts should not apply to innominate ones, except for application by analogy of law. If so, we should answer a more specific question. If we use such analogy, what happens with mandatory norms? The SCC establishes applicability of such norms in respect to innominate contracts. Such applicability is stipulated by conditions similar to those determined in the Decree for implied mandatory norms, i.e. the purpose of legislation is to seek for the restriction of freedom in order to protect the interests of the weak or third party, public interests, or to prevent gross violation of the parties' interests balance.

Hence, application of mandatory norms in regard to innominate contracts, on the one hand, is stipulated by unified provisions common for all mandatory norms. But, on the other hand, such application may be even more justified, once we apply implied mandatory norms in relation to innominate contracts.

Application in Time

Based on provisions of Article 4 (2) and Article 422 (2) of the Civil Code in their systematic interconnection, the SCC ruled that both mandatory and provisional norms comply with the well-known principle – unless otherwise provided by the implementation law, newly established norms do not regulate obligations under contracts entered into prior to such law. So, in general, both norms have no "retroactive effect".

Abuse of Rights

The Decree covers a rather ambiguous situation of the abuse of rights in the course of performing provisional or mandatory contract provisions.

[6] Vysshii' arbitrazhnyi' sud Russkoi Federatsii [Supreme Commercial Court of the Russian Federation]. Case No. VAS-8668/13, dated September 16, 2013. The document was not published. The text is available in Consultant Plus legal information system.

As the SCC stipulates, appeal for protection may be dismissed by the court in the event the claimant has abused his/her rights arising as a result of alteration/exclusion of a provisional rule or based on a mandatory norm. This new determination mostly affects the freedom of contract. One may never be sure that his right will be enforced, especially while performing commercial obligations. In most cases one party's profit is the other party's intentional loss. Following the SCC rule, the court may allege that this is the result of the provisional norm abuse and transform the claimed right into the so-called "bare right", i.e. right without court protection.

It is clear, of course, that the abovementioned rule of the Decree is not designed at to prevent normal commercial activities, but to mitigate possible negative influence of introducing implied mandatory and limited provisional norms. This may be achieved only through proper interpretation of the SCC rulings by commercial courts. Otherwise, uncertainty as to enforceability of many commerce-related provisions may negatively affect business in Russia.

New Negotiating Means of Protection

For many years, there was no protection for the weaker party in contract negotiations. The Decree aims to change negative practices by way of introducing new protection instruments.

Unreasonable Conditions

Parties to commercial contracts seldom have strong negotiation positions. Although organizations may engage legal counsel to protect their rights, in any case initial "economic" interests and opportunities will affect the lawyers' chances to ensure observance of their client's interests within the process of negotiation. The mere fact that one of the negotiators is in a weaker position does not grant him/her any rights or preferences. The other ("strong") party should use its position to include unfair contract provisions.

This well-known problem has had prior little potential for solution. The Decree finally adopts necessary and long-due rules. According to the SCC, a weak contractual party is entities and individuals that have been put in a position impeding mutual agreement about the content of a particular contract provision different from that pressed upon by the "strong" party. Furthermore, the weak party may claim the contract alteration or cancellation based on the rules governing contract of adhesion. Such a right is available only if the "strong" party that has submitted the draft contract imposed such contract conditions on the weak party that are both evidently burdensome for the weak party and substantially affecting

the parties' interest balance. Such provisions are defined as unreasonable conditions.

I need to add one important remark – the abovementioned conditions should affect the weak party in a way clearly visible within the negotiations, i.e. prior to the contract conclusion, and should be known to the "strong" party. I suppose also that if the "strong" party knew that the submitted provisions would affect the weak one in the course of contract performance (in the future), they may be also treated by the court as an example of unreasonable conditions. Conversely, no protection shall be granted if the agreed condition affects the interest balance within the performance of the obligations due to unforeseeable reasons, or if it was not clear for the "strong" party – this party did not actually use it while negotiating, or it is a normal risk disbursement within the used contract form.

One may see again a thin border between the normal business risk implemented in unfair contract conditions unjust for the counterparty but in line with the essense of commercial activities, and business risk abuse unhidden in unreasonable conditions. In such circumstances, the role of court discretion receives an overwhelming role in enforcing contract provisions.

The SCC goes further. It alleges that in the case of inclusion of unreasonable conditions in the contract and their consequent performance, the "strong" party benefits from its unreasonable behavior. Such things must be forbidden. Thus, the weak party may ask the court for inadmissibility of an unreasonable condition or even claim to declare it invalid. This rule can afford the weak party to circumvent the limited remedies of the Civil Code rules regarding contract of adhesion, which grant protection only in relation to future performance.

The Decree gives examples of unreasonable conditions that may be declared invalid by the court based on the thorough analysis of particular dispute circumstances. The provided examples are from cases of contract damages. The court may disregard limiting a debtor's liability to cases of intentional breach. A provision granting exemption from liability in the event the breach is grounded in the debtor's counterparty (the third party) default may become unenforceable in the court, too. The SCC calls lower courts to carefully analyze the amount payable by the party that has used its unilateral right to withdraw from performing the contract. If the amount is obviously inconsistent with the other party's losses incurred because of such contract termination, the court should dismiss the respective claim for recovery of such amount.

As long as courts' declaring unreasonable contract provisions invalid or altering them may seriously affect the freedom of contract principle, the Decree contains directions to lower courts that disputes on unreasonable conditions must be held based on the comparison of the unreasonable conditions with all contract conditions and other case circumstances (e.g. actual negotiation potentials of the parties, market competition, existence of other contractual commitments between the parties, etc.).

***Contra Preferentem* Rule**

In practice, there are plenty of cases when courts cannot find out the parties' intention while construing contract terms and conditions on the basis of Article 431 of the Civil Code. The SCC has finally adopted the European principle of "*contra preferentem*" for the purposes of contract construction. Provisions are interpreted against the party that has submitted the respective provision. Unless proved otherwise, such ("contra") party is deemed to be a professional in a particular area (a bank in a credit agreement, insurer in the insurance contract etc.)[7].

Conclusion

The Decree analysis carried out above shows that the SCC used the "essence" approach in determining the scope and limits of the freedom of contract principle. Lawyers should be more careful as of the Decree adoption while drafting commercial contracts. Not all "advantageous" provisions may be further enforced in commercial courts. At the same time, new remedies against abuse and pressure on a weaker party are available. These means may be used both while drafting, negotiating and performing contract provisions.

[7] For more details on *contra preferentem* rule see: A.G. Karapetov. Protiv proiznesshego kak metod interpretatsii kontrakta [*Contra Preferentem* As a Method of Contract Interpretation]// Vestnik Vysshego arbitrazhnogo suda [The Bulletin of the RF Supreme Commercial Court]. 2013.

LEGAL ESSENCE OF TECHNICAL REGULATING

Albina S. Panova
Candidate of Law, Associate Professor,
Head of the Civil and Entrepreneurial Law Department,
The Institute of Economics, Management and Law,
Kazan, Russia

Abstract: The article is devoted to the issues of technical regulating. Technical regulating is viewed as a type of managerial activity, a form of state regulation of economy, and a specific type of legal regulation of public relations.

Key words: technical regulating; legal regulation; state regulation of economy; entrepreneurial activity; technical standards; safety of production.

Technical regulating is a well known concept. The ISO / IEC Guide 2:2004 (Standardization and Related Activities – General Vocabulary) contains the term *technical regulations,* which is understood as regulations establishing technical requirements (for materials, products, processes and services) that are applied directly, or used as a reference to a standard, technical specification (technical conditions), or a code of rules. Technical regulations can be supplemented with "technical guidelines" which stipulate certain means and techniques of compliance with the obligatory requirements[1]. The notion of "technical regulating" appeared in the Russian legislation on December 27, 2002, when Federal Law No. 184-FZ "On Technical Regulating" was adopted (further – the Law on Technical Regulating, the Law)[2]. The Law was adopted when the Russian Federation (further – the RF) was preparing to join the World Trade Organization (further – the WTO). The Law established the procedure of technical regulating unified with international and European technical legislation. The norms of the Law comply with the Technical Barriers to Trade Agreement of the WTO (further – the WTO TBT Agreement)[3]. The Treaty on the Eurasian

[1] ISO/ IEC Guide 2:2004, Standardization and Related Activities – General Vocabulary// Available at: http://www.iso.org/iso/ru/home/standards_development/governance_of_technical_work/standards-and-regulations.htm . Free access; accessed on: November 27, 2013.

[2] Federalnyi' zakon o tekhnicheskom regulirovanii No. 302-FZ [Federal Law "On Technical Regulating" No. 184-FZ]. December 27, 2002 (with amendments of June 23, 2014)// Sobranie Zakonodatel'stva Rossiiskoi Federatsii [Russian Federation Collection of Legislation]. 2002, No. 52 (part 1), art. 5140; 2014, No. 26 (part 1), art.3366.

[3] On August 22, 2012 a Protocol of December 16, 2011, came into effect "On the Russian Federation Joining the Marrakesh Treaty On Establishing the World Trade Organization of April 15, 1994", rati-

Economic Union (further the EAEU), signed in Astana on May 29, 2014, by the Republic of Belarus, the Republic of Kazakhstan and the Russian Federation[4] in order to promote the Eurasian economic integration and ensure the supply of safe products to the common Eurasian market, establishes major rules of technical regulating within the EAEU.

Technical regulating influences national economies and systems of utilization of production resources. The process of interaction between economy and technical regulating is complex as economy is an integrated system comprising many separate elements. It is characterized by ambiguity of each element's purposes and of the system as a whole, as well as by ambiguous connections among the elements constituting the system[5].

Entrepreneurs as the main driving force that produces and markets the goods and services in demand are most interested in sectors of material production. Material production is the process of creating material goods necessary for the functioning and developing of the society[6].

With the help of technical regulating, the state influences the activity of economic subjects engaged in industry, construction, trade and catering, in procurement and marketing, establishing technical requirements for products and circulation of goods on the market. Nowadays, such influence is largely established at the international level. Technical regulating is an activity connected with development and approval of technical standards, codes of rules; it influences the elaboration of technical conditions related to the quality of goods. As a form of state regulation of economy, technical regulating largely determines the anti-monopoly policy. Its application does not allow a particular leading group of entrepreneurs to dictate their own technical norms in prejudice of other participants of economic relations[7].

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fied by Federal Law of July 21, 2012 No. 126-FZ// Kodeks zakonov RF [Code of Laws of RF], 2012, No. 30, art. 4177.

[4] Treaty on Eurasian Economic Union (signed in Astana on May 29, 2014) (with amendments of December 23, 2014)// Official web-site of Eurasian Economic Commission http://www.eurasiancommission.org/, June 05, 2014.

[5] Gosudarstvennoe regulirovanie rynochnoi' ekonomiki [State Regulation of Market Economy]// Ed. by V.I. Vidyapin, Moscow, 2002, p.14.

[6] The Great Soviet Encyclopedia// Available at: http://bse.sci-lib.com/article093213.html . Free access, accessed on November 04, 2013.

[7] T.I. Zvorykina. Kontseptual'nye osnovy formirovaniia sistemy tekhnicheskogo regulirovaniia sfery uslug (na primere bytovogo obsluzhivaniia naseleniia) [Conceptual Foundations of Forming the Technical regulating System in Services' Sector (on the Example of Public Services to the Population)]// Dissertatsiia na soiskanie uchenoi' stepeni doktora ekonomicheskikh nauk [Dissertsaion for the Degree of Doctor of Economics]. Moscow, 2005, pp. 33 – 34.

The functioning of the system of technical regulating is caused by the necessity to protect both public and private interests. Here, the protection of private interests implies protection of interests of economic entities from actions of negligent producers who strive to use technical norms for unfair competition. Thus, one can say that "the protection of public interests is an important task that should be solved in the process of state regulation; and no less important task of state regulation is the protection of private interests, the combination of private and public interests to achieve the objectives of state regulation"[8].

Technical regulating is a specific type of legal regulation, as "legal regulation" is the influence of legal norms (a system of legal norms) and other specific legal means on people's behavior and on public relations in order to balance, protect and develop them in accordance with the public needs[9]. The Law on Technical Regulating (Art. 2) directly states that "technical regulating is legal regulation of relations…" As a social regulator, technical regulating is aimed at providing the necessary order and development of relations in material production. That is why one can say that technical regulating is an objective need determined by the demands of social-economic development; it influences the sphere of material production by special legal means (forms and methods).

Legal regulation is a form of managing the socio-economic development. Law forms a particular order in the society, it arbitrariness. Especially important is legal regulation in the sphere of economic relations, in particular in the sphere of production and distribution, where it serves as the main type of regulation[10]. Law is an important organizing power, a tool for putting public relations in order, one of the forms of managing the economy. It makes economic relations stable[11]. In this connection, one should remember that technical regulating should not be contrasted with legal regulation. The term "legal regulation" is broader than the term " technical regulating", as numerous various relations exist in the society, including those that are not associated with the necessity to provide legal means

[8] E.P. Gubin. Gosudarstvennoe regulirovanie rynochnoi' ekonomiki i predprinimatel'stva: pravovye problemy [State Regulation of Market Economy and Entrepreneurship: Legal Issues]. Moscow, 2006. pp. 32 – 37.

[9] Teoriia gosudarstva i prava [The Theory of State and Law]. Textbook // Ed. by V.D. Perevalov. Moscow, 2009, p. 146; S.S. Alekseyev. Problemy teorii prava [Problems of the Theory of Law]// Kurs lektsii: v 2 tomakh [A course of lectures: in 2 Volumes]. Vol. 2, Sverdlovsk, 1973. p. 145.

[10] L.I. Abalkin. Khoziaistvennii' mekhanizm razvitogo sotsialisticheskogo obshchestva [Economic Mechanism of a Developed Socialist Society]. Moscow, 1973, p. 13.

[11] M.Piskotin. Pravovie aspekty upravleniia narodnym khoziaistvom [Legal Aspects of Managing the Economy]// Issues of economy. 1975, No. 1, pp. 127 – 128.

to ensure quality and safety of products, but, at the same time, require legal regulation. Technical regulating is a part, or a branch, of legal regulation, a public-law component of legal regulation of economic (entrepreneurial) activity. Technical regulating involves establishing, implementing and executing obligatory requirements to production or to the related processes of projecting (including investigations), production, construction, installing, adjustment, exploitation, storing, transportation, marketing and utilization (further – processes). The establishment and application of voluntary requirements to production, processes, works and services. The sphere of technical regulating includes also legal regulation of conformity assessment. In other words, these are relations connected with the necessity to determine the conformity of products (processes, works, services) to the requirements imposed on them. Conformity assessment implies using specific juridical means, such as proof of conformity state control (monitoring), accreditation, tests, registration, acceptance and implementation of the finished construction, etc.

The sphere of technical regulating includes three types of objects: production, processes, and works and services.

Technical requirements are set for products[12]. The products should be intended for the "…purchase as goods"[13]. The object of purchase can be not only goods for personal consumption, but also goods for industrial use. For example, there are technical requirements for machines and equipment (Technical Regulations of the Customs Union 010/2011 "On Safety of Machines and Equipment")[14]. As buildings and constructions can be dangerous for people's life and health, for the purposes of technical regulating they are regarded as production, thus coming within the purview of obligatory technical regulations (Federal Law of December 30, 2009, No. 384-FZ "Technical regulations for Safety of Buildings and Constructions")[15].

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[12] The term "products" is interpreted as a result of activity represented in material form and intended for further use for economic and other purposes (Art.2 of the Law on technical regulating).

[13] P.P. Tsitovich. Uchebnik torgovogo prava [Textbook on Trade Law]. Kiev, N.Ya. Ogloblin's Publishers, 1891.

[14] "TP TC 010/2011. Technical Regulations of the Customs Union. On Safety of Machines and Equipment" (adopted by the Commission of the Customs Union of October 18, 2011 No. 823) (with amendments of December 04, 2012)// Official website of the Commission of the Customs Union http://www.tsouz.ru/, October 21, 2011.

[15] Federalnyi' zakon o tekhnicheskom reglamente o bezopasnosti zdanii' i sooruzhenii' No. 384-FZ [Federal Law "Technical Regulations for Safety of Buildings and Constructions" No. 384-FZ]. December 30, 2009 (with amendments of July 02, 2013)// Sobranie Zakonodatel'stva Rossiiskoi Federatsii [Russian Federation Collection of Legislation]. 2010, No. 1, art.5; 2013, No. 27, art. 3477.

The term "process" is interpreted as a consecutive change of conditions, stages of a system or object development[16]. The processes that are the stages of a product's life cycle from the economic viewpoint come within the purview of technical regulating. According to the technical legislation, processes are material services – works and services execution of which provides production of goods, preservation of their qualities, and their transportation (GOST P 50646-2012)[17]. These processes are directly connected with products, so there are obligatory technical requirements established for them. However, if the products do not come within the purview of a sphere regulated by legislation, then only voluntary requirements can be established in regard to the products and the related processes.

The works not connected with products (not included in their life cycle) are not considered "processes" by the legislation on technical regulating, though they come within the purview of "material service". For such works ("not processes"), voluntary requirements can be established, and voluntary conformity assessment can be carried out. These works are connected with rendering public services to the population. They are household works, fixing and making things, redecoration of apartments, etc.

There can be services not connected with products. Such services are "non-material services", their result is not expressed in a material form. In order to increase their quality, voluntary requirements can be established. For example, such services with voluntary requirements are medical, veterinary, hotel, tourist services, etc. There is a risk of doing harm when rendering them. However, such harm is not determined by the use of inferior goods, which may become inferior because of improper conditions of storage, transportation, etc. Harm may occur due to the executor's rendering improper services. Among legal means that promote the proper rendering of "non-material" services are, for example, standardization and classification of hotel industry venues, insurance when rendering tourist services[18]. In the medical sphere, it is quality and safety control of medical activities, compliance of medical

[16] L.I. Lopatnikov. Ekonomiko-matematicheskii' slovar': Slovar' sovremennoi' ekonomicheskoi' nauki [Economical and Mathematical Dictionary: Dictionary of the Modern Economics]. Delo Publishing House, Moscow, 2003.

[17] GOST (State Standard) P 50646-2012 "Services to Population. Terminology and Definitions" (adopted by the Order of Russian Agency on Standardization of November 29, 2012, No. 1612-ст). Standartinform Publishing House, Moscow, 2013.

[18] Federalnyi' zakon ob osnovakh turistskoi' deiatel'nosti v Rossiiskoi Federatsii No. 132-FZ [Federal Law "On Foundations of Tourist Activity in the Russian Federation" No. 132-FZ]. November 24, 1996 (with amendments of May 03, 2012)// Sobranie Zakonodatel'stva Rossiiskoi Federatsii [Russian Federation Collection of Legislation]. 1996, No. 49, art.5491; 2012, No. 19, art.2281.

activities to medical aid standards, licensing of medical activities, medical insurance[19], registration of specialists in the veterinary sphere who are engaged in business activities, control over the veterinarians' activities, the exercise of state veterinary monitoring[20], etc. Voluntary certification can be conducted to assess conformity of the process of rendering "non-material" service to standards and to conditions of civil-law agreements.

Taking all the above into account, we consider the Concept of Legislation on Technical Regulating to be efficient in the part stipulating that it is impossible to establish obligatory technical standards for works and services not connected with products.

Technical regulating is managerial by nature. Technical regulating includes, product safety management. Safety management can be interpreted in technological and social senses. Revealing, creating, and changing properties of an object to minimize the potential harm are features of a technological aspect of the product safety management. The managing subject is an engineer, a technologist, etc. The managerial activities are conducted in relation to objects (things, products), and their properties; technical (technological) norms are used.

If the product safety management takes place via establishing safety indicators, we can speak about the product safety management in the social sense. The managing subject is the state. The managerial impact is made on public relations arising in connection with the production or marketing of goods. Not all norms used in the sphere of the product safety management are merely social by nature. A large part of

[19] Federalnyi' zakon ob osnovakh okhrany zdorov'ia grazhdan Rossiiskoi Federatsii No. 323-FZ [Federal Law "On Foundations of Health Protection of Citizens of the Russian Federation" No. 323-FZ]. November 21, 2011 (with amendments of December 31, 2014)// Sobranie Zakonodatel'stva Rossiiskoi Federatsii [Russian Federation Collection of Legislation]. 2011, No. 48, art.6724; 2015, No. 1 (part 1), art.85; Zakon Rossiiskoi Federatsii o meditsinskom strakhovanii grazhdan v Rossiiskoi Federatsii No. 1499-1 [Law of the Russian Federation "On Medical Insurance of Citizens in the Russian Federation" No. 1499-1]. June 28, 1991 (with amendments of July 24, 2009)// Bulletin of the Assembly of People's Deputies and the Supreme Council of RSFSR. 1991, No. 27, art.920; Sobranie Zakonodatel'stva Rossiiskoi Federatsii [Russian Federation Collection of Legislation]. 2009, No. 30, art.3739; Federalnyi' zakon o litsenzirovanii otdel'nykh vidov deiatel'nosti No 99-FZ [Federal Law On Licensing Certain Types of Activity" No 99-FZ]. May 04, 2011 (with amendments of October 14, 2014)// Sobranie Zakonodatel'stva Rossiiskoi Federatsii [Russian Federation Collection of Legislation]. 2011, No. 19, art.2716; 2014, No. 42, art.5615.

[20] Zakon Rossiiskoi Federatsii o veterinarii No. 4979-1 [Law of the Russian Federation "On Veterinary Service" No. 4979-1]. May 14, 1993 (with amendments of June 04, 2014)// Bulletin of the Assembly of People's Deputies and the Supreme Council of RSFSR. 1993, No. 24, art.857; Sobranie Zakonodatel'stva Rossiiskoi Federatsii [Russian Federation Collection of Legislation]. 2014, No. 23, art.2930.

regulations has both technical and legal characteristics: they establish parameters, indicators and levels of production safety, rules of acceptance, methods of control and testing of products, etc. Thus, the product safety management is characterized by the implementation of technical and legal norms and rules. Through the system of technical regulating, the state controls the implementation of obligatory norms only. Observance of other norms that exist in the form of standards, technical conditions, instructions at an enterprise, is controlled by the economic entities themselves, i.e. by the producers. The core of technical regulating is technical regulations that set the requirements to products and related processes established by the state.

In technological and social senses, we can speak about product quality management. If quality management consists in changing ("inclusion", "removal" and other "modifications") objective properties of material things (in our case – certain products), then this is technological quality management. If quality management consists in setting indicators (single, complex, or integral, etc.), then this is something else. Here we can speak about a sort of social activity aimed at regulating people's behavior. The object of such quality management is not goods or their properties, but public relations that can be formed for various reasons, can be a social means of achieving certain goals, can take certain forms, including legal ones, or have various social parameters and features.

Researching the essence and important features of technological quality management is the domain of technical and related sciences (such as merchandising). As for the social aspect of production quality management, it is of interest for a number of sciences: economics, law, statistics, etc[21].

Currently, entrepreneurs implement product quality management within their enterprises. They form and use mechanisms providing the proper quality of their products . In particular, they use international and regional (inter-state) standards, national standards, voluntary certification of products and quality systems, elaborate technical conditions in coordination with their customers, control implementation of voluntary requirements. The intra-company regulation of quality issues is a prospective direction of this activity.

Technical regulating is a public element in the system of inter-sectoral legal regulation of business. By means of technical regulating the state controls the sphere of production turnover. Technical regulating is complex by nature. It is reflected in the

[21] O.A. Krasavchikov. Funktsii khoziaistvennogo zakonodatel'stva i kategoriia "upravleniia kachestvom produktsii" [Functions of Economy Legislation and Category of "Production Quality Management") // Civil law, Efficiency and Quality. University Collection of Academic Works. Issue 60, Sverdlovsk, 1977, pp. 32, 34.

necessity to regulate various relations and in the lack of sectoral homogeneity of norms regulating the relations in the sphere of technical regulating.

From the viewpoint of juridical theory and practice, it is most logical to refer the legal institution of technical regulating to the institutions of entrepreneurial law, as entrepreneurial law is a "complex establishment combining public-law and private-law foundations"[22]. Under mixed economy, the institution of technical regulating is intended for organizing and due ranking of activities aimed at systematically obtaining profit from the use of property, selling goods, carrying out work, rendering services by persons who have undergone special registration. Technical regulations do not apply to relations that do not include transferring goods, executing works, rendering paid systematic services (goods, works and services that "do not circulate"). That is why the goods arriving at the RF territory as humanitarian aid, or for internal use by consulates and diplomatic offices are not tested for safety and are not subject to technical regulating. For such products (their consumer and exploitation properties), technical requirements are not established.

In conclusion, we should highlight that technical regulating is a special type of legal regulation that includes using a combination of specific legal (technical and legal) means, such as technical standards, obligatory certification, compliance confirmation, etc., in order to protect consumers' interests from harmful influence of dangerous products. Technical regulating is also aimed at ranking and developing of entrepreneurial activity in various sectors of material production. Currently, the peculiarity of technical regulating in Russia is that it is developing as a component of supra-national system of technical regulating within the EAEU.

[22] V.S. Belykh. Pravovoe regulirovanie predprinimatel'skoi' de'atel'nosti v Rossii [Legal Regulation of Entrepreneurial Activity in Russia]. Monograph, Moscow, Prospekt, 2009. p. 32; E.P. Gubin, P.G. Lakhno. Predprinimatel'skoe pravo Rossiiskoi Federatsii [Entrepreneurial Law of the Russian Federation]. Moscow, 2006, p.42.

TRANSDISCIPLINARY WAYS FOR A GLOBAL JURIDICAL CONSCIENCE (PART I)

Gustavo Lauro Korte Jr
Doctor of Law, Professor,
President of the Center for Interdisciplinary Research,
São Paulo, Brazil

Abstract: The article focuses on values and an innate notion of order, religions, theories, doctrines and levels of thinking, reality and levels of existence. The author also describes generic transdisciplinary procedures, provides an insight into empiric and pragmatic approaches against crimes, corruption and social ruptures.

Key words: order, juridical knowledge, levels of thinking, generic transdisciplinary procedures, methods to knowledge, fragmentary and holistic knowledge, verbal languages, global integration.

1. Introduction

Being and no being were not in the beginning.
Neither the flow of the wind not even the heaven above.
Who was taking care and embracing the world?
Where was the ocean, where the inscrutable abyss?
Immortality and death did not exist.
The night did not appear and also not the day,
The Unity blew in the origin of everything but did not move.
Within the cosmic context nothing more did exist.
(Hymn of Creation, Rigveda)[1]

To think is a process. Originated in the mind, the action of thinking communicate is a previous electromagnetic human individual phenomenon propitiating the transference of ideas and thoughts to other people. When excited by some physic, biological, chemical, electric or electromagnetic impulses all mental processes require some sort of order, rules and patterns.

[1] Poetic version of the author.

Sixty years ago I have heard from my first teacher of philosophy that human kind is different and superior when compared to other living beings because we exercise the verbal language. His believe was that without verbal language we are not able to think. Since that day I disagree with such intellective formulation.

To induce *knowledge* there are genetic dispositions directing the human being to mental processes. Mind produces thoughts and electromagnetic discharges. Those procedures demand a natural obedience to some basic orders, rules and patterns. That submission propitiates the process generator of thoughts. But, the *processes to order ideas and to order words* have not the same dimension because to *order words* we have to accept the *grammatical and logical rules* dictated by verbal language what doesn´t happen when we order only ideas.

Order, as a noun, expresses an *essential foundation of thinking*. Black´s Law Dictionary defines it as *a mandate, a precept, a command or direction authoritatively given, a rule or regulation... Term is also used to designate a rank, class, or division of men; as the order of nobles, order of knights, order of priests...* Final order. *One which either terminates the action itself, or finally decides some matter litigated by the parties, or operates to divest some right; or one which completely disposes of the subject-matter and the rights of the parties.*

To order seems to be a *basic procedure to understand* the possible evolution of the mental activity. As an attribute, ordering seems to be a final disposition of ideas conducing to a correct result. *Order*ing and *to order* are words inducing to understand the correct procedure as the natural purpose of existence.

Disorder, as a noun, means a sort of *partial, slight and temporary physical ailment*.

Opposed to order, social sciences identify *disorder as a turbulent or riotous behavior; immoral or indecent conduc*t; *the breach of the public decorum and morality.*

Physical Science measures disorder as *entropy,* that is *a measure of the amount of energy in a physical system not available to do work. As a physical system becomes more disordered, and its energy becomes more evenly distributed, that energy becomes less able to work.*

We shall measure *order* by the progress resulted from it. We shall measure *disorder* by the *entropy* present in it.

To clarify what we *shall understand as order, to establish and to obey natural, state and social orders* we have to adopt that *natural, state and social orders* are fragments of a generic state of conscience. From the *social state of conscience* are origi-

nated the *natural and reasonable procedures adjusting our common ideal for a democratic, free, equalitarian and fraternal* society.

2. Values and an innate notion of order

Value is usually referred to an economic meaning. *Price* and *value* are connected during the daily commercial relations. But, *value* is also used for *non economic phenomena* when we say that a painting has a great *cultural value*.

There are *a sense of value* and a *sense of existence. Value* is also used to measure *the utility of an object is satisfying, directly or indirectly, the needs or desires of human beings, called by economists "value in use", or its worth consisting in the power of purchasing other objects, called "value in exchange". Value meaning worth carries other ideas such as price, cost, quality, concept, merit, consideration, regard, influence, authority, significance gives support.*

In fact, we have observed that when we refer to *value* we have on mind some sort of *scale*. That means some *graduation*. An *hierarchic* classification. *Chronologic scale* becomes explicit when we say *actual value, past value* or *future value. Market value* means the scale of *current price*. *Preference* and *selection* appoint some sort of *value* defined with the help of other sense than only economic. Kant teaches about *echt moralischer Wert* referring to *moral values.*

Many people have studied *value* and have exposed different theories about *values.* Plato attributed to ideas the maxima dignity, therefore, ideas are *worthy.*

We should extend this approach to value *ad infinitum*, but it is not the main object of our theme. We have a limited time and restrict observations. We let that discussion to advance in our presentation.

Order is understood as a noun and *to order* as a verb. *Order*, as a noun, corresponds to a *natural scale* of values, patterns, virtues, empiric and idealistic rules. But *artificial order* many times gives support to many other meanings and theories.

Natural order seems to be in Nature itself, *imposed by the cosmic constitution of existence*.

As a consequence of that belief, *to order* becomes a *process of recognition of some entities related to others*.

I adopt as a postulate so as Plato did, that *all minds have an internal impulse to order things, facts, ideas and phenomena.* That *original impulse* moves human mind to the acceptance of *categories* as the first step to relate ideas. *Entelexía* is the

correspondent Greek word to that effective *internal pulse*. *Entelexía* is in fact an *impulse.*

When using an idiom as a specific *national* or *regional verbal language*, we recognize immediately two sorts of *categories*: *lexical* and *logical.*

Usually in western idioms *lexical categories* refer to:

a) substantives, nouns, (identifying the essence of word in itself);

b) adjectives (words related to the noun or to other adjective to qualify, limit or define it);

c) verbs (expressing the action or state of beings, also the static or dynamic relations between beings, entities or abstract ideas);

d) adverbs (words used explicit the contextual sense of the verb, of the adjective or other adverb, with the power of modify their meanings);

e) pronouns, (words used to substitute the nouns, instead of the nouns);

f) conjunctions, (words used to join clauses, to connect verbal phrases or complex expressions);

g) prepositions, (words used to join words as nouns, adjectives, verbs etc. showing the relation to some other word in the sentence);

h) interjections, (words expressing passion or emotion when suddenly uttered) and

i) articles, *a, an* (the indefinite articles) and *the* (definite articles) are words used to designate *definite* or *indefinite* ideas.

Logical categories define the *function of the word in the structure of the verbal expression.* Verbal expressions are linked by connectives coordinating or subordinating one expression to others. Subject, object, predicate, attribute and connective are the basic functions. But there are others. The preliminary process of recognition including these two verbal categories are very useful to understand distinct idioms.

A basic analysis of verbal expressions adopt categories as previous degrees that reveal and transfer to our forms of perception the essential idea of the object we are reflecting, talking or hearing about.

It seems to be difficult to define the categories when we refer to arts, in special plastic and musical arts, because they are not limited by the logical and grammatical rules of verbal languages. Both fields of artistic expressions are able to transfer feelings and perceptions from the artist to their public transcending the limits of verbal rules.

Accepting *time* as a noun, included in that grammatical category, the sequence *induces to identify the notion of time as an abstract phenomena*, including *past, present, future, dreams, projects and hopes.*

We become able to recognize *abstract and concrete categories of nouns* when we refer to human behavior as *intention, desire, hazard, chance, fortune, will, opportunity and human values.*

Using the capacity of connecting and relating ideas, we are induced *to think that there are limits in the relations between different nations and people when they are only linked by the a common idiom*.

The doubt consists on knowing if, by that *common verbal language, they become able to recognize the same scale of social patterns and values.*

The solution seems to be easy: if different people don`t have a common verbal language, therefore they will need to start electing a common idiom and with it they have to identify common and different needs, values and intentions.

The elected common idiom doesn´t seem to be enough to propitiate a simultaneous and convergent procedure to a common goal.

Soccer teaches that the game has to adopt at least two opposed goals.

Human game in global era is composed of many goals, not only two.

What I want to clear up is that our performance as lawyers, teachers and academic students has to recognize the simultaneity of an infinite human objectives concurring since the past to global present and future era.

By one way we shall observe that *it is not essential to establish a common verbal idiom*, but, in fact, *it will be necessary for common patterns of identification of ideas, facts, goals, actions and categories not restricted to verbal forms of expression.*

Pattern seems to be a *sign* indicating the way to arrive to some *specific knowledge*.

Philosophy uses *method*s as ways to knowledge.

Methods use *patterns of procedures* to arrive to an objective.

Human patterns are used as *values*, fixed and built paying attention to the *needs* and *intentions* of human being when living in communities. They are related by mental processes to define individual and social behavior. *Conscious internal tension* is an *intension*.

When we observe Nature and its phenomena we are induced to *recognize human, natural, planetary and cosmic values.* I adopt as a postulate that *every entity carries some sort of internal tension*.

Human values are identified directly as *mental impuls*es giving origin to *intentions, actions* and *motions* during our experience as *human social beings.* They are commonly recognized as *moral, legal, economic, physic and social patterns*.

Natural values are identified with *planetary and contextual life* without human intervention. They seem to give signals how to preserve the Planet in its micro and macrocosmic relations.

The acceptance of *natural values* has been effective in the past. Now, conditioned by consumer society, the cosmic and natural patterns are at most maintained under a subliminal state of social conscience.

Global society announces that human mind adopts human values as more essential than natural ones. Global conscience of human kind is processing the substitution of *natural values* by *human patterns*.

Artificial values emerge from globalization process, seeming to be dominant in future. *Natural and cosmic values* help the definition of rules directed *to preserve Nature* as it is. We observe that the artificial human values are directed to other objectives. The projected conclusion makes evident that human kind is advancing to a parallel or wrong way.

We have to correct that human procedure.

3. Some perspectives announcing future

Perspective is an abstract noun meaning some *hypothetic possibility* .

Social sciences and philosophy study *perspectivism* as the possibility to consider the global phenomenon and, in general, the world, starting from different points of view and converging to unity.

Gustav Teichmüller (cf. *Die Wirkliche und die scheibare Welt,* 1882) explained that we are able to observe the world from distinct points of view, all sufficiently justified, in such a form that from each distinct point of view the result offers only one perspective, that is, the only abstraction possible to understand what will happen in the future.

Leibinitz in its *Monadology* arrives to similar conclusion.: "So as a city observed from distinct points seems to be another city, completely different and so as multiplied prospectively so the infinite multitude of single substances gives place to other many different universes which are not more than perspectives of the only universe observed from different points of view of each *monada*".

Nietzsche identified perspectivism *or* fenomenalism *the fact that the nature of animal conscience only allowed to acquire the* ***conscience of the world*** *as something superficial and generic, as the result of the union of the conscience with corruption, false perception and superficial generalization.*

Radosla A. Tsanoff (in World to know: a Philosophy of cosmic perspectives, 1962*) identifies "cosmic perspectives "as the ways to see the world".*

When we direct our mental efforts to recognize different proposals of life we have to remember that the inclusion of *geometric perspective* in figures, *geometry* and

plastic arts began about five thousand years ago and has been more developed during the recent twelve centuries with the cultural process we are all inserted.

The first systematic studies of perspective have been renewed in paintings by the classic social revolution called *Renascence* (sec. XIII) and its plastic artists.

We are able to recognize the scientific progress directed to identify the structure of thoughts and its origins as result of many trials, approaches and reflections.

Some moments of those approaches have been cleared by Aristotle (sec. IV b. C.) when he focused his attention in the study of the *categories of ideas and their respective words.* The Greek philosopher perceived that when we began to identify specific things and thoughts we have to submit our mental process to some sort of previous language reflecting a natural order, complying what is sensible with its correspondent idea. Aristotle, as it was usual in Classic Greece, had the help of a *formal verbal grammatical language*.

Many disciplines directed to social sciences have been expanding their foundations and studies based essentially in *formal verbal languages*.

Now, I invite you to observe the existence and general use of some distinct ways of expression and communication not restricted to *formal verbal languages or some specific idioms*.

Aristotle (IV B.C.) believed that there are two essential kinds of expressions: 1) the ones that mean something without being linked with others (man, window, movement); and 2) the ones that only acquire meaning when linked to other expressions (man running, opened window, circular movement).

To such Greek thinker, the expressions without link didn`t refer neither to affirmatives nor to negatives, but they were recognizable and identifiable in and by themselves, and assigned to categories. Such categories informed the meanings of: 1) substance (ουσια), as the man and the window; 2) amount (ποσον) (two, three things; 3) quality (ποιον) (white, black); 4) relation (προζ τι) (half, double); 5) place (που) (city, home); 6) time and date (ποτε) (yesterday, year); 7) position and situation (κειμαι) (stand, lied); 8) possession and condition (εξειμι) (armed, dressed); 9) action (ποιειν) (does, walks, talks); and 10) passion (πασκειν) (feelings, hurt).

Such mandatory intuit is noticed as inseparable of the cognitive process. There is an original need of recognizing on the objects of the perception forms a little bit of simple essentiality, not complex, by which the ideas can be recognized.

While people search ways to express themselves, by sounds, words, gestures, images, figures, actions or movements, to communicate or to transmit some mean-

ing to others, it becomes necessary that such meaning is recognizable by the ones who receive it, otherwise it wouldn`t generate, by itself, any of the desired effects.

The communicative experience translates some sort of relations between human beings and the entities with which they are connected, related or supposed to be inserted in some specific or temporary context. A verbal language well structured and with a systemic form of expression maintains the intended communication during centuries.

But we have to agree that the use of a unique idiom and its formal grammar to think and to communicate *becomes a sort of restriction on the process of knowledge and reflects a fantastic reduction of our power of thinking.*

Therefore, global culture and science, since the beginning of our actual stage of civilization, are trying to develop a precise language that should induce us to the ways of a progressive knowledge. But, as the specific lines of research, that language becomes accessible basically only for the students of that discipline.

In fact, the actual stage of our global cultural arrived to many forms of communication, using specific disciplinary languages, which are not understood by students and researchers operating on the others fields of knowledge.

Really, we are living in a global confused by so many alternatives.

We shall observe that powerful nations use to submit weak people to learn and practice their dominant idioms. It reveals a natural effort of the social human power *to rediscover a lost common language.*

To advance with formal language we need to know its rules which can combine the symbolic expressions with the *notion of grammatical categories and the logical functions.* We shall direct this approach to some *cosmic amplitude* searching an *universal form of communication*, trying to become *holistic and cosmic researchers*. But we have conscience of our weakness and we understand as an inevitable contingence that we have to proceed reducing our studies to fragments adopted as *fragmentary informs, not complete information or partial knowledge.*

We are excited by the desire to know the invisible. The invisible announces a supposed whole, which is previously admitted as something infinite, not possible to be limited.

We believe our advance is possible approaching the fragments.

We perceive the fragmentary knowledge as the only which gives useful results because we have conscience of our *fragmentary limits of reason, empiric perceptions and physic existenc*e, observed from the perspective relations projected by the intuitive notions of *space, time, matter and energy.*

Fragmentation seems to be the only way to knowledge even when we know that *the results will be uncompleted, provisory and not useful for all sciences.*

Cosmic, universal and holistic knowledge are utopic if we understand that the whole is not contained in the sum of the parts but all parts are included in the whole. In fact, *the whole transcends the sum of the parts.*

The mental movement is not concerned to make equal the being and its representation but to transcend that relation searching the link between activity and theory.

Emmanuel Lévinas, in the Preface of his *Essay sur l´exteriorité* under the title *Totalité et infini*, has signalized that link saying that philosophy is able to *reveal the meaning of that relation between activity and theory but not having that result as a goal.* The expression of the phenomenon emerges *with* and *in itself.*

To *work conscious*, with *conscience,* is not to equalize the Being by its representation but it is some sort of mental work. It is expressed by the intention to clear where that adjustment has to be processed. In fact, it is a dynamic process to define the borders of the phenomenon and to adjust that perspective to *what seems to be the best possible result*. What suggests *philosophy discovering* but *not producing knowledge*, because *knowledge comes with the perception of the phenomenon, in it and with it.*

Human mind is always searching *synthesis as the result from the sum of parts*.

Cartesian method gives *synthetic knowledge* as a formal consequence of the composition of analytic knowledge. It is a natural tendency to believe that synthetic formulation is an advance over analytic observation. We have to decide if we will adopt synthetic or analytic procedures.

The research procedure seems to be correct if the work operates *within the limits of order of greatness accessible by our senses*. That is, *empiricism* is the most usual method to acquire conscience about what we are tryng to understand, but we know that the empiric forms of perception are fragile and *don´t give enough support to abstract reasonable thoughts*.

Rationalism becomes a useful method to order, but is always conditioned by *empiric perceptions* and the limits of *mental processes*. When we become able to announce the conclusion of our observations by rational methodology we think we arrive to the law of the phenomenon, that is, to the expression of the relation *cause-effect.*

Sceptic methodology reveals the modesty of the researcher when he puts in doubt everything he supposes to know. We can observe that our intellectual tradition induces the mind to try to unify knowledge. It seems that we have to verify if that conduct is strictly necessary or we are allowed to reject that impulse to universalize knowledge

Methodic empirism is necessary to *unify* knowledge. It excites the aggregation of fragmentary experiences and shows a peculiar perspective for a synthetic conclusion. What means that *empiric methodology*, based on sensible experience and experiments, is essential to guarantee credit to what we think.

The efforts to synthesize knowledge *unifying fragments* show that sensitive approaches are essential to propitiate positive and useful results. The *ordination of categories* becomes essential to understand the relations *stimulus-answer* and *antecedent-consequent.*

Pragmatism is the way by which we adopt some objectives supposing they will be the useful result of the knowledge and we reject others putting them away, because we believe they will not give support to what we intend.

Intuition suggests the existence of *intuitive forms of perception*. They us to recognize some of the *infinite number* of ideas, entities and objects as *fragments of the whole*.

Phenomena shall be studied and described under objective formulations. The verbal language makes possible the communication of part of results of such intellective efforts.

But only the methodic *descriptions and narratives* formulated during and after the cognitive approach translate ideas with the characteristic of *sufficiency and veracity on themselves.* Otherwise, is essential to observe that it is the shortest way to understand ideas related to others ideas.

Isolated ideas are useful only as theoretical arguments or when integrated to complex forms of thinking. Heidegger classified those procedures of description as identifying the ideas by *das sein, eins sein und mit sein.* And we arrive to a convergent point: there are categories of *ideas and thoughts* which existence is ever related to others, that is, there *existence* is possible to be considered only as *mit sein*. *Adjective* is included on that category.

During the mental process becomes clear that *ideas are reported to entities* whose connections are fragments of the universal context.

The perceptions of those entities, objects, actions, movements and fantasies are always particular and limited to the individual power of perception. What means that our mind, as a consequence of its natural and physic constitution*, is not able to transcend fragmentary forms of perception.*

On terms of *abstract* and *concrete*, most forms of thinking need relations, links and connections to become useful and understood. To transcend we need to believe.

Since the beginning and during the process of knowledge, our mental efforts have been included to elect some postulates.

First, to a sense of a *former unity* linked to the generic idea of *universal movement*, that is, all things and thoughts move to a unique central point.

Second, we shall arrive to the idea of One, Unique and Universal Whole obeying the mental process of cognition and *connecting ordination with composition of fragments.*

Third, we receive intuitive impulse to perceive matter, energy, space and time as essential concepts to compound the knowledge of the whole. The main question is reduced to clear if there are essential and non essential elements what means to know if the whole contains something not essential in itself.

Forth, we generally accept as true what is common or different between the fragments we have identified with the help of verbal language. The process of identification obeys the ordination of the objects of thoughts according to their grammatical and logical categories, phyla, classes, orders, families, genders, species and varieties.

Fifth, we are induced to relate those notions, establishing forms of communications through which that *supposed knowledge* becomes able to be transferred to other human beings, for present and future generations. We hope that they should be integrated to the memory of human kind, which possibly becomes acquired characteristic or phenotypic change, and like so, integrates the social or collective memory.

The definition of memory refers to the capacity to evoke previous similar experiences in face of some stimulus. Memory is a sort of electromagnetic field that archives the intellective and empiric phenomena occurred during the individual or social existence. We feel that there are individual, collective, social and national memories. Why not also a planetary memory or a cosmic memory?

Social efforts and the renewed testimony of that movement link the conjoin of collective and individual beliefs, uses, customs and traditions. Sometimes they are reproduced or accepted as *historic facts or historic documents.* With such contributions human societies establish the foundations of their particular process of evolution.

Consequently, the construction of social structures, systems and organs helps people to distinguish *present nature of human societies* from what was its past and from what we suppose and hope to become its future.

4. Structures, systems and organs

Structures, systems and organs are answers to the efforts of human mind when trying to order the processes of thinking. They seem to be the only possible way to

recognize order in the empiric and theoretic approaches to reality. They are present within concrete and abstract entities.

The mental procedures expose all sensible phenomena as parts of some structure, system or organism.

Past, *present* and *future* are three accepted intuitive stages to localize phenomena in chronological dimensions, but we are able to admit that the idea of time has always an essential and indissoluble link with the notion of space. Therefore, it is easy to accept that we are not able to think without referring to the intuitive notions of space and time. But it is not only that sort of previous restrictions that dominate our thoughts. They are also submitted to the intuitive notions of matter, energy and internal tensions.

Matter and energy are also conditioning our forms of thinking.

Intellective approaches to Science and Philosophy show that at least five intuitive dimensions rule our forms of thinking. Space, time, matter, energy and internal tension.

The notion of e*ntelexía* helps to understand the meaning of *natural tendency to perfection* or *original internal tension to be and do the best.* That tension is the essential cause that moves all entities.

We began our presentation introducing the concepts of *entropy* and *entelexía*. When studying thermodynamics, scientists have recognized an *internal disorder* as some sort *of internal force* present in all matters but more easily observed during the variations of temperature. That means, scientific experimental observations induce to confirm that *every matter contains and internal tension increasing its internal disorder.*

By other mental procedures, philosophers are induced to recognize *entelexía* as the internal impulse moving all entities t*o become complete, perfect in themselves*, what also means to *become perfectly ordered according to their nature.*

We have observed structures and systems in our collective memory as part of our collective past. They shall be respected as consistent if proved by historic documents. But they shall be accepted as a *true past* also without proves, only received like so by our believes.

Sometimes structures, systems and organs are only perceived because they affect our senses and become perceptible. But we have to admit the possibility and probability of an infinite series of structures and systems not perceived through our sensitive organ, even when they exist simultaneously with our relations space-time-matter-energy and intentions.

Because of that we adopt complexity not only as a possible postulate, but an effective and real probability of existence. *It means that everything is complex, interlinked and nothing exists or happens isolated*[2].

Empirical Sciences inform that the processes of transmission of ideas and forms of thinking occur by propagation of electromagnetic waves. That phenomenon has its starting point in the mind and is generated by external or internal stimulus.

Internal impulses are also recognized as *desires, wishes, intentions, volitions*. Religious and mystic prayers talk about temptations referring to what they suppose as a *wrong impulse*.

The diffusion of ideas happens resulting from movements of propagation of electric and electromagnetic waves with their perceptions limited by the electromagnetic capacities of human mind.

If someone is interested to share some idea he needs to use some rules of communication understood by whom his action is directed. Within human relations, if there is someone trying to communicate he has is a great chance to have another person ready to receive the message by his own wish or obeying internal or external orders.

5. Religions, theories and doctrines

Approaching distinct points of view we have observed many doctrines, offering distinct structures and systems of thinking, forming streams of convergent and compatible ideas, from which we are able to distinct three more relevant, both marking the opposed limits of possibilities.

The first one refers to those that observe the universe as a whole, unic, holistic, total, to whom it seems possible and probable to communicate between present, past and future, that is, to communicate with entities that have been existing on the past to those that will exist on the future. They accept the sense of universal time, named by the Greek as *ayon.*

On that group there are those who believe in the eternity of the Being, that is, what does exist now has been ever existing. *We all are eternal and, so, we are all divinities.*

For them *death seems to be an implication of life.*

We observe that for some of those believers the concept of death reveals a metamorphic process that does not exclude simultaneity with other existences of the same indi-

[2] Everything is complex. There does not exist isolated phenomena. It is the first transdisciplinary postulate .

vidual on distinct levels of reality. It seems to be an implication of the intuitive notion of the universal time which does not change the continuity of existence. For them it is not impossible to speak with dead people because in fact they believe that death is only a metamorphic phenomenon not related to the interruption of existence. But that sort of field of thinking is not object of the empiric or theoretic modern sciences.

The second doctrine is formed by empiric sciences and philosophical doctrines based on human senses and perceptions, submitted to the meaning of multiplicity of empirical characteristics.

The plurality and complexity of facts induce to believe that everything is previous determined by an universal immutable design which is not changeable. That means future is written and what is written is immutable. That inevitable future is designed as *destiny.*

The third theory serves to modern scientists even when based on what Bergson refers to as *retrograde knowledge. Time* is only considered in a *futuristic sense*, connected with *what shall or should occur*. *Future* is the implicit result of what occurs in present.

Each moment is constructed with the contribution of every phenomenon. On the fields of Ethic, ethical phenomenon is that when human being participates **or** exercises his power of choice.

The common sense absorbs the meaning of *destiny* as the idea of an unchangeable future. Future seems to be the direct consequence of present. Present is what it is, so future is also an immutable consequence of what is now.

We observe that the concept of *destiny* is linked with space-time-matter-energy relations occurring under immutable rational rules.

We learn very much with empiric sciences, but modern knowledge based on the Quantum Physic Theories induces us to understand that the essential rule of cosmic entities is that all is moving. Changes of position, placement, constitution and relations are the common characteristics of all phenomena. The Universe is mutable, not constant, is the most changeable phenomenon existent. If what we call the Universe is true, true is not constant but mutable as the Universe.

It is obvious that, when *considered on the same level of reality,* the concepts of *destiny* and *free will* are opposed one to other. They are always submitted to the notion of time and its implicit relation *past-present-future*.

It seems absurd to say *past is*.

Past was, that sounds better. But *what was* or *has been* constitute what we consider *past.*

The verbal difficulty consists to understand past as existent or non-existent reference.

Past should be easily understood as *the antecedent of what is present. Future will be* the rational consequence of *what is*.

If life is ordered *only under that perspective*, logically *destiny is immutable*.

The suite of that forms of thinking induces to believe *that future is the teleological cause of past and past is the deontological cause of future*. But, we have learned that *perspective is not the notion perceived from only one point of view but from many others.*

What we accept like *future is the perspective perceived from a chronological point of view*, revealed through an *intuitive and abstract form of perception* which reveals t*ime* as an *imaginary movement directed from past to future crossing present*.

To be coherent with our previous premises we have to approach the fields of knowledge from other points of view. We propose that, during the next moments, we shall process our thoughts totally free of those former restrictions, not feeling fasten with bolts to any theory. But we will have to observe the limits of our procedures and *to advance respecting all what is concerned in our memory as a true belief.*

The *sensation of freedom* will induce us to open the horizon of our observations, changing our position from one to many different points of view.

Eastern Culture, exposed on the *Upanishads,* compiled between the 9th and 5th century before Christ, impulses the human intellectual efforts directed to harmonize a large multiplicity of points of view referred to knowledge.

Originated on the Upanishads, based on a verbal oral tradition, emerged a first doctrine which recognized the unity between Brahman and Atman, the doctrine of Unity.

Brahman is the source and the beginning of all what exists, originated and existing on himself as the essence of the world present in every fragment of the whole. Atman means itself, that is the soul of the entity, understood as its authentic essence, and so differs of what only refers to human beings by external and non authentic factors. The most advanced knowledge that the human being has to arrive is that Atman and Brahman constitute the Unity. The Unity is the only original existent being in the world, in which the soul is included, only beginning ruling the Whole and all his fragments in all space and time, matter and energy. That is the only intimacy where the soul shall learn the immutable intimacy of the Being. ¨This whole world is Brahman...[3]

[3] P. Kunzmann. Atlas de la Philosophie. Paris: Librairie Générale Française, 1993, p. 17.

From another point of view, the Eastern Culture announces a second doctrine which contains the ideas of *kharma* and *reincarnation.*

The doctrine of *kharma* announces as a *true believe* that human being have a *necessity to reincarnate* as a consequence of his actions during previous lifes. The *sequence of reincarnat*ions is infinite because they are all linked to the Idea of an eternal soul.

From that point of view we are able to recognize an eternal law (dharma) which rules the world and is expressed in every phenomenon. Dharma imposes to each entity, during his life, some predetermined duties according to his nature and social context. The doctrine induces to believe that the true way of existence is to abstain in state of conscience from every personal desire and action.The abstinence becomes sterile and without value if not correspondent to the state of conscience in which knowledge is acquired. The redeemer force of that belief is the supreme and intuitive perception of the essence of Brahman, because who knows Brahman is, in himself, Brahman[4].

Veda means in Sanscrit *Wisdom*, *Knowledge.* The *Veda religion* expresses a variety of beliefs and rites described in the Veda, written between 1800 and 800 years before Christ.

The vedic texts are distributed in four great sections, each one named Veda:

Rg-Veda, is the knowledge approached by levels and phases;.

Yajur-Veda, the wisdom presented under liturgical formulations

Sama-Veda, the wisdom transmitted by liturgical melodie

Atharva-Veda, the knowledge taught under the Atharvan model which is a particular class of priests.

Nyâya, results from the its fusion with Vaiseshika. Their basic procedures are supported by logic and deduction, subordinated to the rules and structures of verbal language, through which the Vaiseshika has its foundations on the atomist comprehension of Nature.

It should say that religions result from distinct points of observation of Nature, from which emerge the correspondent beliefs. But it is not so.

Identifying the remote religions we become able to elect the most important facts and sometimes the soul of its original people.

So, *the literary works compiled with the documents collected from the Pyramides reveal the structure of Egyptians religion. The Homeric Poems expose the rites and myths of Classical Greec. Bonism has now only a few centers of studies and cults and is almost unknown. The Vedic religion is supported by a few books. Hinduism and*

[4] P. Kunzmann. Idem, idem., p.17.

Budhism are based on distinct believes. Shintoïsme is presented by Kojiki and Engishiki texts. Mazdaism and Zoroastrism have the Avesta as their sacred book. History links religion with the mental structure and memory of each people. Judaism, Christianism and Islamism have the same origins, but have been developed using distinct rites and conceptions.

Since the 5th century B.C., the forms of intellective perception with the help of verbal languages and religions have been developed as essential to communicate knowledge. To built structures and systems over verbal thoughts become an essential need to the nations and mystic procedures.

The social and political success has become dependent of the assimilation of the winner idiom by the dominated nations. The assimilation of knowledge need structures, systems and forms of thinking ordered such a manner to propitiate the exercise of individual, collective and social memory. Intellective work becomes an obsession for some people. They recognized the need of categories to develop verbal thoughts.

Painting, sculpture, music, dance emerge from that context expressing something to which the use of verbal language was not enough to communicate.

The human essential needs are conditions to preserve our nature. We are fragments of the universe. And like fragments of the Universe it is just to believe that we have some universal characteristics.

6. Levels of reality and levels of existence

Transdisciplinary postulates give support to simultaneous distinct levels of reality.

For instance, the specificity of the entity is the recognition of a fragmentary but complex reality. The idea of *Universe* is originated from global perspective.

Therefore, on a first step, it becomes implicit that there are, at least, two levels of reality. The first one, a *reality of fragments,* where each entity is considered on its specific and limited individuality. The second, where all existent beings are integrated compounding a whole whose fragments are infinite, not isolated and not recognizable.

Intuition induces to accept that between those two levels of reality it does exist simultaneously an unlimited and inaccessible number of other realities where entities, positions and relations space-time-matter-energy pulsed by internal tensions do exist. They are inaccessible to our forms of perception.

We suppose that the intuitive notions of space, time, matter, energy and internal pulse shall be existing, even when not expressed or revealed, with all possibilities and probabilities of existence.

Only founded on that believe the holistic thought hall countain the idea of simultaneous existence of Being and No Being, of what exists or doesn´t exist, of what is from that of what is not but will be.

Within that level of holistic reality the necessary, the contingent, the possible and the probable do coexist as forms of thinking.

Therefore, is acceptable to believe that the whole is more than the sum of the fragments and that the idea of the whole is contained in all its fragments.

These conceptions are converging with the idea of Pythagoras referring to the **Monada**; *with Demócrito de Abdera mentioning the* **atomein***; with the ideas of Parmenides of Elea the* Unity of the Eternal Being; and *with the dynamic conception of Heraclit of Ephesos, concerning to the eternal* **to become***. Leibinitz helps with the infinite number* **interexpressions between cause and effect** *. Pascal contributes with the notions of the* **two infinites, micro and macro ones.**

We have to pay attention to not confuse the notion of reality with what we suppose existent. Using verbal language we perceive that an idea, a thought or an entity shall exist without being materialized. On the opposite, we have to consider existent what doesn´t exist now but has been in past r will be in future because if not existing the entity should not be located on the relation space-time.

Our beliefs induce to think that the *levels of reality* shall be considered as *fields of thinking* where many phenomena occur inaccessible to our forms of thinking.

Religions believe that God thinks. For those who recognize Nature as the Divine Mother, the answer has to be positive.

If someone doesn´t believe in God, but recognizes Nature as undeniable evidence, it becomes implicit that Nature has power to think because we are not able to deny to the whole some quality existing in its fragment. What means that Nature is able to think independent of *human verbal ideas*. Should we learn the language of Nature?

7. Conscience and existence

Etimology suggests that the noun *conscience* is derived of two ideas: *con* (meaning with) and *science* (meaning learned knowledge). Therefore, *conscience* means *to know with somebody. Conscience* becomes a sort of witness of *existence with others.*

We shall consider different states of conscience. *Psychological conscience, moral conscience, scientific conscience, juridical conscience, social conscience etc.*

To be conscious of coexistence reveals *complexity.*

To be *conscious* of *what we are,* of *what we intend to be* or of *what we are doing* is to have the perception of *others existing simultaneously* or *coexisting* with us *simultaneously in the future.*

To be conscious of something reveals contrasts, similarities and temporary relations. In fact, *to be conscious* expresses the perception of some relations space, time, matter, energy and internal forces.

Entelexía and *entropy* are perceived when we are conscious of ourselves *within our context.*

Conscious state of mind offers opportunities to have *conscious pleasure directed to perfection.*

Hedonism, Epicurism and Stoicism are moral doctrines directed to these approaches.

Originated from Latin the word carries two main ideas: *ex* (meaning what is out of something) and *essere,* meaning *to be.* The world *existere (*orig. Latin*)* gives origin to thousand of studies and texts.

Daily, the word existence means *what is* evidenced by our senses. *There is* a book on the table. *There is* a person looking to you.

Phenomenology and *perspectivism* refer to essential dependence deriving *existence* and *perception*. For those doctrines the sense of *existence* seems to emerge from *mutability* and *fragmentation.* We are induce to understand *existence* when proved by appearance, images, similarities. The idea of existence is connected with *time, space, matter and energy and internal pulses. Juridical procedures are* dependent of *senses of existence* and *senses of value.* They are always referred to *existence* and *individual and social conscience.*

8. Searching juridical knowledge.

When we start searching some sort of knowledge we act on a *temporary state of conscience* during which we believe we are and will continue *coexisting* with *community*, *society* and *state.* That is, *we proceed considering a chronological perspective.*

Justice, *as a noun,* includes a *dynamic meaning* when associated to a *social movement to adjust differences*. The idea of justice requires time as essential condition of existence. Delayed justice ins not what society claims and needs.

Delayed justice is an adjustment determined by time, not by the systems of justice.

Delayed justice has to be deleted from our global perspective during human planetary integration. It is not justice, but only a shadow of what human kind is searching to survive.

Black´s Law Dictionary says:

Justice corresponds to a proper administration of law.

Commutative justice concerns obligations as between persons and requires proportionate equality in dealings of person to person.

Distributive justice concerns obligations of the community to the individual, and requires fairs disbursement of common advantages and sharing common burdens.

Social justice concerns obligations of individual top community and its end is the common good.

Juridical sociology refers to *Retributive* and *Restorative justice*.

Our studies during the last five years are focusing the *Restorative Law, Restorative justice. Victimology* and *Preventive Justice.*

We have observed that Justice is one of the most searched virtues of human kind during recent 5.000 thousand years.

The term justice combines with the idea on a process to social adjustment.

Inclusion, exclusion, injunction, restoration, retribution, pardon, repentance, remorsefulness, capture, arrest, conviction, punishment, revenge and many others items correlated with moral phenomena and juridical acts have been the themes of thousands of books.

We have to recognize that our recent culture, since the Sumerian times, is worried with justice.

Half a century of juridical activities propitiate me some notions about the meanings of justice. The word is always combined with the idea of adjustment. Sometimes requires also the notions of objective law.

To adjust expresses the intention to order behavior of individual or collective interests.

In some aspects that practice means to combine fragmented individual or collective behavior with social wishes or state laws.

Juridical knowledge is a collective pragmatic answer to compound fragmentary notions and to rule activities within a state structure. The complex collection of doctrines and laws obtained from that answer serves also to rule private entities and all relations between what is from state to what is private. The fragments of juridical knowledge shall be uni or multidisciplinary. But to become effective the transdisciplinary perspective seems to be the most convenient.

Justice, as a process, is a pragmatic answer to a claim. By that way, justice combines fragmentary informs as premise. The result is not a straight logical conclusion but a sentence emerging from an appearance of facts. Therefore, justice is done when

the *quaestio juris* becomes adjusted by according the *sense of existence* to the *sense of value* defined in law.

We have to consider that Law and Justice exist in *different levels of reality.*

Law emerges from a supposed social wish, resulting from virtual hypothesis.

Justice is referred to concrete facts. Law is the expression of the authority of a juridical organized state.

Justice is the *empiric* and *pragmatic* result induced by that *empiricism*, *pragmatism* and *authoritarianism*.

The approach of theory of information to juridical practices shows that the actual systems of justice, by nature, don´t have condition to receive the complete informs about any of their processes. That conclusion comes from a single daily observation. Let us do it once.

Usually we have no problem in distinguishing individuals of our community, because we are helped by *recognition.* We have their *images* in our memory. The image we have from somebody results from *fragmentary informs* we have accumulated referring to him. Fragmentary informs modify each moment. The *image* of any individual of our community is supposed to be the *reflection of a mutable entity*, what means that what we suppose to be *one image* is a *sequence of similar images* retained in our memory. Similar visual phenomena on Optics is referred to as *persistence of the image on the retina*.

Multiple informs about *position, placement, size, color, tone, rhythm, mental capacity, physic health, physiologic symptom, hereditary characteristics, intention, wishes, hopes, regrets, financial, economic* and *social relations* suggest that their combinations are dynamic. Their mutability and arrangement do not allow the correct description of anybody. Usually, the image is distorted or, at least, non actual.

The image we can have of any entity is always corresponding to some moment of its past existence. Empiric sciences are retrograde because they their references are on the past.

It is fact, systems of justice do their work based only on a summary of informs. They try to decide over something they know is fragmentary and past.

Global era needs systems of justice projected to future.

(to be continued)

THE PRINCIPLE OF SOCIAL FUNCTION OF PROPERTY IN BRAZILIAN LAW: CONSTITUTIONAL PRINCIPLES AND THEIR APPLICATION

Rafael Dias Martins
Postgraduate Student, Department of Civil and Labor Law,
People's Friendship University of Russia,
Moscow, Russia

Abstract: This paper analyzes both theoretical and practical aspects of the principle of the social function of property. It also deals with the constitutionalisation of civil law in its practical and theoretical aspects as well as its effects in case law. It briefly explains the nature of the institute of property in light of fundamental rights and freedoms enshrined in the Constitution of Brazil 1988.

Keywords: constitutionalisation of civil law, principle of social function of property, nature of fundamental rights and freedoms.

The constitutional principle of social function of property in Brazil has a long history in Brazilian law. This idea was neither original nor new to Brazilian law system prior to the 1988 Constitution, but only after it was enacted did Brazilian scholars began to debate the principle more intensely and were able to refine its concept to an unthinkable extent. Since 1988, it has had a great impact on both court practice and science of law. The constitutional principle of the social function of property transforms the property without socializing it, as José Afonso da Silva, professor at São Paulo's University, have said[1].

This kind of profound change in the civil law is the result of a long development which Léon Duguit (1859-1928), professor at the University of Bordeaux, foresaw a century ago. At that time, he realized that it was becoming a reality, but initially with respect to public law. Nevertheless, Duguit recognized that such a change was largely related to the very foundations of private law. In his work "The General Transformations of Private Law after the Napoleonic Code", he shows that the boundaries of private and public law are increasingly blurred. In this context, a new theory of the content of the property right has emerged, although very contradictory from the

[1] J.A Silva. Curso de Direito Constitutional Positivo. Malheiros. São Paulo, 2008.

point of view of the classical theories of property. In accordance with his theory, property is not anymore a right, but, actually, a social function[2].

Duguit, referring to the judicial practice in France, claimed that ownership had lost its quality of subjective rights. It primarily embodied a duty to comply with its social function. Among the examples cited by the author, attention is drawn to the case dealing with the state, or rather, the company with a license given by the government to conduct electrical cables on top of private houses.

One would think that the right of the owner of a building extends not only to the surface of the land on which the building is located, but also on the space located above and below the surface. After all, according to the maxim of Roman law, "*qui dominus est soli dominus est usque ad caelum et usque ad inferos*", i.e. "whoever owns the soil, it is theirs all the way up to Heaven and down to Hell".

However, the example given by Duguit displays his concept of property. In fact, the state (or the licensed company) had no right to conduct wires above the buildings, as they had no property on the land. Why then the state allowed itself to conduct those cables? If the owner appealed to the court for protection, would he succeed to protect his right? Or the owner had to refrain from going to court, even assuming that his right has being violated?

Duguit had the idea of social function when looking for answers to such questions. After developing his theory, he came to the conclusion that no one has rights, neither individuals nor all individuals as represented by the state, because they are all bonded by some social function. There is no subjective right and no autonomy of the will. All these metaphysical notions are inconsistent with the "*positivism of our time*", he wrote.

For Duguit, life in society is the only way to meet human needs, entailing the duty of every person to perform his social function. Resorting to sociological concepts such as division of labor, differences in the ability of people, etc., he argues that there is no freedom (autonomy of the will), because if there were real freedom and subjective rights, one would be entitled to do nothing. In fact, emphasized Duguit, no one has the right to idleness.

He called himself a realist, since he refuted legal formalism and, in particular, the metaphysical notions of right (subjective right, autonomy of the will); in his opinion, worthy of interest were only facts taking place in the field of law practice. He acknowledged the fact that it is impossible not to have legislation, but, from the beginning,

[2] L. Duguit. Las Transformaciones generales del Derecho privado desde el Código de Napoleón. Madrid: Librería Francisco Beltrán. 1920.

the legislator would never guess the meaning it would acquire in judicial practice. Therefore, for Duguit, laws were not the object of the study of law; he admitted only social facts as such.

It should be noted that almost all legal scholars agree that the social function of property is not the only suitable concept to explain the limitations of rights, but there are others comparable with or equated to it.

For example, for the first time, the Weimar constitution enshrined the formula that is now contained in the Basic Law for the Federal Republic of Germany of 1949, «*Eigentum verpflichtet*», or "property obliges". This formula is very peculiar, as it equates a right to an obligation[3].

The Constitution of Mexico of 1917 also sets forth such a norm in its Article 27, which states: "*The Nation shall at all times have the right to impose on private property such limitations as the public interest may demand, as well as the right to regulate the utilization of natural resources which are susceptible of appropriation, in order to conserve them and to ensure a more equitable distribution of public wealth. With this end in view, necessary measures shall be taken to divide up large landed estates; to develop small landed holdings in operation; to create new agricultural centers, with necessary lands and waters; to encourage agriculture in general and to prevent the destruction of natural resources, and to protect property from damage to the detriment of society. Centers of population which at present either have no lands or water or which do not possess them in sufficient quantities for the needs of their inhabitants, shall be entitled to grants thereof, which shall be taken from adjacent properties, the rights of small landed holdings in operation being respected at all times*"[4].

In fact, the idea of social function of property is a rebellion against the strong liberal model of the 18th century in which rights were considered from the subjective rather than from the social point of view [5]. Such contradictions have become even more apparent after the spread of communist movements.

In Brazil, the 1824 imperial constitution already placed certain restrictions of ownership; the constitution of 1934, as well as the Weimar Constitution established that property cannot be exercised at the expense of social or collective interests.

[3] F.K. Comparato. Direitos e deveres fundamentais em matéria de propriedade// A questão agrária e a justiça. J.J. Strozake. São Paulo: Editora Revista dos Tribunais, 2000.

[4] Mexico. Constitution of Mexico. Retrieved January 27, 2015. Available at: http://www.oas.org/juridico/mla/en/mex/en_mex-int-text-const.pdf

[5] J.C. González, J.L. Monereo. Pérez. Léon Duguit (1859 – 1928): Jurista de Una Sociedad en Transformaciones. Retrieved January 27, 2015. Available at: http://www.ugr.es/~redce/REDCE4/articulos/17duguit.htm

The following Brazilian constitution, adopted in 1946, guaranteed the right of ownership due to social welfare. The constitutions of 1967, 1969 and the current one of 1988 establish a *social function of property*.

It should be noted that the question of limitations of subjective rights, including property, has interested Brazilian researchers for long time. Brazilian jurists began to address it already in the 19th century[6], but mainly and more consistently by the end of the 20th century, exactly after the promulgation of 1988 Constitution.

Despite the fact that Duguit was a researcher in the public law area, when arguing his position on the changes in the content of civil institutions he stayed exclusively within a civil law framework, not public law[7]. In other words, the principle of the social function of property has been designed primarily within the civil law science, not the science of constitutional law. It is important to keep that in mind, considering that legal scholars in Brazil usually state that this principle is studied in the framework of constitutional law, which is wrong as we have just confirmed.

The Basic Law for the Federal Republic of Germany of 1949 kept the Weimar's constitution's formula "*Eigentum verpflichtet*", but entrusted the lawmaker with establishing the content and restriction to property by a special act (Art. 14). It seems to be a very adequate solution, since property is an institution of civil law and, respectively, relations of property are governed by civil law and not constitutional law.

Since the first theoretical works on the social function of property, the civil law science has not left the matter unattended, studying the social function of civil law institutions.

The tendency of restricting rights for the sake of social interests is not new in and of itself. Some lawyers insist that changes are being made to the inner structure of the right, so it is not a "property right" anymore, but a "property-function", while others defend the position that property is the classic property with some restrictions, and believe that property is a subjective right with a social function.

In other words, the problem which Brazilian civil law has been facing during the past decade is related to the question of the legal nature of constitutional norms and principles and their impact on civil relations, as well as the very structure of rights.

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[6] O.L.R. Júnior. Propriedade e função social: exame crítico de um caso de "constitucionalização" do Direito Civil// M.R. Sousa; F. Quadros; P. Otero; E.V. Pinto (Coords). Estudos em homenagem ao professor doutor Jorge Miranda. Coimbra: Coimbra Editora. 2012.

[7] L. Duguit. Op.cit.

Perceiving this matter requires recourse to civil and constitutional matters, and, above all, to the constitutionalization of civil law[8].

In the Brazilian legal literature, scholars usually argue that the Constitution of 1988 ensured the so-called constitutionalization of civil law[9]. The question of a constitutionalization cannot be considered as trivial, considering that in present-day Brazilian scholarship, the meaning thereof remains quite unclear. The interpretation of the concept of "constitutionalization" still remains within a doctrinal framework, and it was first made on the basis of a few decisions of the Supreme Federal Court of Brazil, which has the constitutional jurisdiction.

In general, constitutionalization means that chief provisions of the main institutions of civil law (such as property, family, etc.) are stipulated in the Constitution, despite the fact that there is no agreement among legal scholars on this issue. Unfortunately, in an article it is impossible to go deep into the subtle details of the topic, since it is a very broad matter. However, there are reasons to believe that the Brazilian judicial practice of the last decade has overestimated constitutional principles in the name of the so-called constitutionalization of civil law. As a result, courts often contradict the current law provisions, thereby significantly reducing legal certainty. To explain the problem we need to give some examples of courts decisions.

The first example is about a case heard by the Court of the state of Rio Grande do Sul of Brazil. The court has issued a very interesting decision, but it is clearly contrary to the law currently in force. The decision was made on the basis of the constitutional principle of the social function of property. The case was about the abolition of the clause of restriction on sale of property. This provision prohibits the heir or donee to alienate the property received as a gift for compensation or without it. Since such a burden on the property is established in favor of the heir or donee, the Brazilian civil code provides that the abolition thereof is only possible in the case of hard economic situation of the heir or donee. The court of first instance came to a conclu-

[8] G. Tepedino. O Código Civil, os chamados microssistemas e Constituição: premissas para uma reforma legislativa// Problemas de Direito Civil. Coord. Gustavo Tepedino. Rio de Janeiro: Renovar. 2001. Available at: http://www.estig.ipbeja.pt/~ac_direito/GTepedino2001.pdf. – V.T. Costa Filho. Constitucionalização do Direito Civil e eficácia dos direitos fundamentais nas relações entre particulares, retrieved January 27, 2015 from http://www.oab.org.br/editora/revista/users/revista/1235066798174218181901.pdf
– M.C.B. Moraes. A constitucionalização do direito civil e seus efeitos sobre a responsabilidade civil// Revista Direito, Estado e Sociedade – v.9 – n.29 – p 233 a 258 – jul/dez 2006. Rio de Janeiro: PUC-Rio, 2006. Available at: http://www.estig.ipbeja.pt/~ac_direito/Bodin_n29.pdf

[9] L.R. Barroso. Neoconstitucionalismo e constitucionalização do Direito. Página 2/3. Jus Navigandi, Teresina, ano 10, n. 851. November 1, 2005. Available at: http://jus.com.br/artigos/7547 Retrieved: January 26, 2015.

sion in accordance with the law in force, and one of the parties decided to appeal against the decision. After the assessment of the case, the second instance court came to a different conclusion. His decision was based precisely on the principle of the social function of property, although the current legislation does not allow the abolition of the clause of restriction on sale of property on the basis of the principle of the social function of property[10].

This example illustrates the underprivileged situation with positive law in Brazil on account of the constitutionalisation of civil law. The rapporteur (relator) of the case sided with the decision of the first instance, but the other members of the court expressed divergent opinion, as we have mentioned above. It shows that judges are divided when it comes to the constitutionalisation of civil law.

The second example is about the acquisition of movable property by acquisitive limitation (prescription). In the case in question, a party got a car a lease agreement, but did not comply with all obligations under the contract. As a result, the party lost the legal basis of the possession and it became illegal. The circumstances of the case clearly pointed out that the acquisition of property by virtue of usucaption was impossible, since the possession became illegal. During the trial, it became clear that the debts were already prescript, and were not callable anymore. The matter went to the second instance court, and it ruled in favor of the owner. The draft decision prepared by the rapporteur considered the prescription of the debt, but noted that it could not serve as foundation for prescription. One of the judges expressed a different opinion, which later turned out to be supported by all other members of the court. He asserted that the illegal possession became legal by virtue of the long-term economic usage of the property with the intention to be its owner (*animus domini*), and he resorted to the principle of the social function of property to substantiate his assessment of the situation. Thus, continued economic exploitation of property was

[10] APELAÇÃO CÍVEL. BEM IMÓVEL. AÇÃO DE CANCELAMENTO DE CLÁUSULAS DE IMPENHORABILIDADE, INALIEBABILIDADE E INCOMUNICABILIDADE. PROCEDÊNCIA. I. O levantamento das cláusulas restritivas impostas em bens imóveis objeto de testamento ou doação só é admissível de forma excepcional, quando demonstrada a necessidade financeira do donatário ou herdeiro testamentário, bem como quando a função social da propriedade não possa ser cumprida. II. No caso, o fato de os autores serem pessoas simples e viveram longe do imóvel, assim como os demais proprietários do mesmo bem, por certo que prejudica a função social, haja vista que a promoção da adequada manutenção e exploração do bem gera custos. Ademais, revela-se confusa a administração de um único bem por vários proprietários, como no caso em apreço, em vista da divergência de interesses. Procedência do pedido de afastamento das cláusulas de impenhorabilidade, inalienabilidade e incomunicabilidade. RECURSO PROVIDO POR MAIORIA, VENCIDO O RELATOR. (Apelação Cível Nº 70059731976, Décima Sétima Câmara Cível, Tribunal de Justiça do RS, Relator: Liege Puricelli Pires, Julgado em. June 26, 20014).

considered sufficient to change the quality of possession, transforming it from illegal to legal and recognizing prescription[11].

This example illustrates the full scope of the problem of inner structure of rights, though, perhaps, not plainly. Property right has a certain structure, it is a subjective right. The idea of social function is addressed to all the rights, including property rights. On the one hand, it is an incentive to the subject to use all the advantages of his rights, and, on the other hand, it is a threat to the right of the subject who does not use it. In this last case, the state may affect one's private legal sphere. Anyhow, it does not seem to change its inner structure; in the end, a right is a right, even if it is limited by social, environmental or economic factors. Thus, rights, including property still remain rights in the traditional sense.

The Brazilian national congress stuck to this notion of right when redacting the civil code. The very text of the civil code gives clear evidence of that:

Art. 1.228. The owner has the right to use his thing, enjoy and dispose of it, and the right to reclaim it from the power of whoever illegally own or possess it.

§ 1. The property must be exercised in accordance with their economic and social purposes, as far as the flora, fauna, natural beauties, ecological balance, historical and artistic heritage are preserved and air and water pollution is avoided, in accordance with the provisions of special laws.

§ 2 Acts that do not bring the owner any comfort, or usefulness, and are encouraged by the intent to harm others are forbidden[12].

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[11] Ementa: APELAÇÃO CÍVEL. AÇÃO DE OBRIGAÇÃO DE FAZER. EXISTÊNCIA DE CONTRATO DE ARRENDAMENTO MERCANTIL SOBRE O BEM. INTERVENÇÃO DA POSSE PRECÁRIA. FUNÇÃO SOCIAL DA PROPRIEDADE E DA POSSE. Se o direito de propriedade se legitima (e então cumpre sua função social) pela utilização econômica, aquele que, sendo privado da posse por precarista, se mantém inerte pelo tempo necessário para consumar a aquisição, perde seu direito de propriedade, e conseqüentemente, deve sucumbir ante a uma ação de usucapião, possessória ou reivindicatória. APELO DESPROVIDO, POR MAIORIA, VENCIDO O RELATOR. (Apelação Cível No. 70059843987, Décima Terceira Câmara Cível, Tribunal de Justiça do RS, Relator: Roberto Sbravati, Julgado em October 16, 2014).

[12] Art. 1.228. O proprietário tem a faculdade de usar, gozar e dispor da coisa, e o direito de reavê-la do poder de quem quer que injustamente a possua ou detenha. § 1º O direito de propriedade deve ser exercido em consonância com as suas finalidades econômicas e sociais e de modo que sejam preservados, de conformidade com o estabelecido em lei especial, a flora, a fauna, as belezas naturais, o equilíbrio ecológico e o patrimônio histórico e artístico, bem como evitada a poluição do ar e das águas. § 2º São defesos os atos que não trazem ao proprietário qualquer comodidade, ou utilidade, e sejam animados pela intenção de prejudicar outrem. Brasil. Código Civil. 2002. Código civil brasileiro e legislação correlata. – 2. ed. – Brasília: Senado Federal, Subsecretaria de Edições Técnicas, 2008. p. 616. Available at: http://www2.senado.leg.br/bdsf/bitstream/handle/id/70327/C%C3%B3digo%20Civil%202%20ed.pdf?sequence=1 . Retrieved November 22, 2014.

Article 1228 establishes the right of property in its traditional form, and the text does not express any changes in the nature of property. In other words, the property continues to be a right, despite the imposition of limitations in the paragraphs of the article. The wording of paragraph 1 states that "The property right should be exercised...", that is, it plainly establishes the institution of property as a right.

In our opinion, as a rule, the principle of social function of property, as regards real rights, should be applied according to the criteria established by the Civil Code. The real right to property is regulated by the Civil Code, and it regulates the constitutional principle of social function of property. Therein lies the so-called "external" theory of fundamental rights, which is also reflected in the aforementioned article of the Basic Law of Germany 1949.

The "internal" theory of fundamental rights and freedoms is based on the fact that such restrictions are immanent part of the rights, and thus change the rights in its inner structure. Practice also shows that if the law is applied from the point of view of the "internal" theory, the Civil Code's limits to property by virtue of the social function are merely examples among other manifestations thereof. In such a case, it is impossible to respond to any law controversy not considering its social function, since property would not be a right anymore, or, at least, not only a right, but a right-function.

The "internal" theory is in full accordance with the Duguit's conclusions that property is not a right, but a function. Of course, it destroys the traditional idea of ownership. Of course, it is difficult to establish the roots of this trend; its origins go several centuries back in history. In close retrospect, however, it seems that the adoption of the 1988 Constitution exacerbated the situation.

The Civil Code of 1916 was in force until the promulgation of the Civil Code of 2002, that is, when the Constitution of 1988 came into force. The project of the Civil Code of 1916 was written in 1899 and it was heavily influenced by ideals of liberalism. Despite repeated attempts to full-scale reform the civil law, the basic concepts of the old Code remained intact until the adoption of the Constitution in 1988. There had been some gradual changes, which, however, did not attenuate the need for reform. Not only its provisions, but the system and the base of the Civil Code itself had been surpassed up to that time[13]. The uncertainty of a quick reform and the fear that the old-fashioned civil institutions enshrined in the 1916 Civil Code would be

[13] L.B. Timm. "Descodificação", constitucionalização e reprivatização o no Direito Privado: O código civil ainda é útil?. The Latin American and Caribbean Journal of Legal Studies: Vol. 3: No. 1, Article 1. Retrieved January 27, 2015. Available at: http://services.bepress.com/lacjls/vol3/iss1/art1

kept in force constrained the Federal Supreme Court of Brazil to declare the binding force of constitutional principles and the automatic abrogation of unconstitutional laws and provisions.

Indeed, not many laws in force at that time were compatible with the Constitution, so after the adoption thereof, they became inapplicable, including many provisions of the 1916 Civil Code. So, at that time, it was normal not to apply some provisions of the 1916 Civil Code, given its incompatibility with the Constitution. The judges began to rule against it, and against many other laws incompatible with the Constitution. One decade or so of intense legislative activity, to adapt regulations to the new constitutional standard have created this culture that the law is not so important, and anytime in the name of a hallow constitutional principle we can rule against it. That is exactly what we see after the adoption of the 2002 Civil Code and other laws. The situation should be solved, since now there is the Civil Code in Brazil assumed constitutional, but, actually, everything is getting worse .

The problem is related to the idea that the Constitution is an instrument of justice, as Civil Codes are blamed for spreading liberal and bourgeois values, and, thus, the very idea and nucleus of Civil Codes are surpassed[14]. Interestingly, Civil Codes and Constitutions, actually, emerged as a tool for establishment of bourgeois values, but over time this trend was reversed with respect to both.

In addition to this, as we have already mentioned, constitutionalization is a doctrinal construction, built on the basis of a decision of the Federal Supreme Court that laid down the binding force of constitutional principles. There is no uniform definition of constitutionalization in the doctrine, so the law does not define it either. The very idea that subconstitutional legislation must be compatible with the Constitution is not new at all. In the 19th century, A. Teixeira de Freitas (1816-1883) did not include in his Consolidation of Civil Laws (1958) many laws in force at that time, because they were not compatible with the Constitution of the Empire of Brazil[15].

It is also not possible to define constitutionalization, considering the fact that chief provisions of the main institutions of civil law were included in the Constitution, since the Constitution of the Empire (1824), as it has been said above, also had set forth property and limitation thereto. However, in the courts' practice, constitutionalization is a living phenomenon that cannot be ignored. There are even some

[14] F. Amaral. A Descodificação do Direito Civil Brasileiro// Revista do Tribunal Regional Federal da 1ª Região, Brasília, 8 (4) 545-657, out./dez. 1996.

[15] A. Teixeira de Freitas. Consolidação das Leis Civis. Rio de Janeiro: B. L. Garnier, 1876.

bold lawyers who refer to civil law as "civil constitutional law", stating that there is no civil law anymore[16].

Indeed, in all its manifestations and justification, the constitutionalisation is a ruling paradigm of the Brazilian legal science, including the science of private law. Many researchers have asserted that the private law has lost its quality system due to several factors, but mainly to the emergence of the so-called "microsystems" of legal regulation, such as the Consumer Protection Code. Despite the fact that the relations of these "microsystems" are similar to those regulated by the Civil Code, they need a different model of regulation.

Contract of sale for consumers is slightly different compared to that in the Civil Code for example. The need for different kinds of regulations for issues provided by Civil Codes before would make them no longer the centrali element of law regulation, but the Constitution would take this position, especially in its evaluative manifestations, that is, principles. They see the Constitution as a perfect regulation because of its principles. Some say that a Civil Code is not necessary anymore in the face of the "riches" of the 1988 Brazilian Constitution. It seems that these are hallow principles as the "*social function of property*" can solve all law issues fairly, and, as some would say, in such case, why do we need legal certainty if we have justice?

By the way, although the Brazilian 2002 Civil Code established the unification of civil and commercial matters, since 2011 the Brazilian Congress has been considering a project of the new Commercial Code for Brazil. The project clearly reflects the idea of rejection of principles in favor of clear rules to ensure legal certainty. This is where lawyers are ready to separate commercial law from civil law for the sake of legal certainty, which definitely shows that principles are not enough to regulate complex relations of the modern world[17].

Anyway, constitutional principles in Brazil have enormous influence on the judicial practice, whereby it does not build, as some claim, but destroys the legal system,

[16] M.C.B. Moraes. O jovem direito civil-constitucional. Retrieved January 27, 2015. Available at: http://civilistica.com/o-jovem-direito-civil-constitucional/; M.C.B. Moraes. A Caminho de um Direito Civil Constitucional// Revista Estado, Direito e Sociedade, vol. I, 1991. Rio de Janeiro: PUC-Rio, 1991; A.M. Toaldo. Notas sobre a constitucionalização do direito civil: da individualidade à socialidade// Âmbito Jurídico, Rio Grande, XV, n. 99, abr 2012. Available at: http://www.ambito-juridico.com.br/site/?n_link=revista_artigos_leitura&artigo_id=11323 . Retrieved November 22, 2014.

[17] R.D. Martins. Unifikatsiia chastnogo prava i projekt novogo torgovogo kodeksa v Brazilii [Unification of Private Law and Draft of the New Commercial Code in Brazil]// Sravnitelno-pravovye aspekty pravootnoshenii' grazhdankogo oborota v sovremennom mire: sbornik statei mezhdunarodno'i nautchno-praktitcheskoi' konferentsii pamyati prof. V.K. Putchinskogo [Comparative Legal Aspects of Legal Civil Turnover in the Modern World: Collection of Articles of the International Research and Practice Conference in Memory prof. V.K. Putchinskogo]. RUDN, Moscow, October 17, 2014.

particularly of private law. In addition, this situation strikes not only at the system, but at the legal certainty, achievements of modern legal science and practice, in which the Civil Codes played an important role.

Thus, the idea of "constitutionalisation " of civil law needs to have its essence clarified, otherwise it is impossible to subject it to more substantial criticism. However, it seems that the majority of Brazilian lawyers are in a "dogmatic sleep" for that matter. The Constitution is the supreme law for all legislation, but it does not mean that a simple value (such as the social function of property) can solve all the questions and give the courts the authority not to apply provisions of laws currently in force. These principles should be applied in the case of absence of law regulating a constitutional right/principle or obligation, or when a law is not compatible with the Constitution. In the cases we have analyzed none of these situations is observed.

The principle of the social function of property should be interpreted in accordance with the provisions of the Civil Code (as regards to real rights). The legislator has set forth a number of restrictions on property, so there is no doubt about the nature of the social function. Despite this, the judicial practice generally follows another trend, sometimes even against positive law, which raises very serious questions related to legal certainty. However, the above-mentioned cases show disagreement among the judges, which gives us hope that things will change for the better, in favor of legal certainty.

PROBLEMS OF INTERNATIONAL LAW INTERPRETATION (ON THE EXAMPLE OF THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS) IN THE LIGHT OF THE ECHR JUDGMENT IN THE CASE OF K. MARKIN

Irina V. Vorontsova
Candidate of Law, Associate Professor,
Civil Procedure Department, Saratov State Law Academy,
Saratov, Russia

Abstract: This paper addresses the problem of binding decisions of the European Court of Human Rights on the interpretation and application of the Convention and the Protocols thereto in the light of judgments of the European Court of Human Rights from December 6, 2013 in the case of K.A. Markin The features of the hierarchical system and the ratio of international and national legislation are analysed in the light of conclusions made by the Constitutional Court of Russia . The author comes to the conclusion that the events occurring in the legal field are a mixture of trends in the development of international law. According to the author, the elements of fragmentation are observed.

Keywords: judgments of the European Court of Human Rights, international law, the Constitutional Court of the Russian Federation, sources of civil procedural law, fragmentation.

By ratifying the Convention for the Protection of Human Rights and Fundamental Freedoms, the Russian Federation recognized the jurisdiction of the European Court of Human Rights (ECHR) binding for interpretation, application and consideration of the Convention and its Protocols in cases of alleged violation of the provisions of these treaty instruments by RF (the Russian Federation)[1].

B.S. Ebzeev estimates the federal law on ratification as a transformative act according to which not only the Convention of 1950, but the case law of the European Court

[1] Federalnyi zakon o ratifikatsii Konventsii o zashchite prav cheloveka i osnovnykh svobod i Protokolov k ney No. 54-FZ [Federal Law "On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols" No. 54-FZ]. March 30, 1998. Sobranie zakonodatel'stva Rossiiskoi Federatsii [Russian Federation Collection of Legislation]. 1998. No. 14. p. 1514.

of Justice established in the process of its interpretation and application are imputed as mandatory for every law enforcer in Russia[2].

Paragraphs 10 – 15 of the Resolution of the Plenum of the Supreme Court of RF of October 10, 2003 No. 5 "On Application of the Universally Recognized Principles and Norms of International Law and International Treaties of RF by the Courts of General Jurisdiction"[3], paragraph 4 of the Resolution of the Plenum of the Supreme Court of RF of December 19, 2003 No. 23 "On the Judgment"[4], the Preamble and paragraphs 1 and 9 of the Resolution of the Plenum of the Supreme Court of RF of February 24, 2005 No. 3 "On Judicial Practice In Cases of Protection of Honor and Dignity and Business Reputation of Citizens and Legal Entities"[5] indicate the need to apply the legal positions of the European Court of Human Rights. All that would seem to give grounds to consider the ECHR judgments as a source of civil procedure, but intensive discussions among practitioners and academics show the opposite.

It is difficult to discuss this question without a detailed study, so let us assess the application of the ECHR judgments in the light of contemporary social and political processes. We note with regret that decisions of the supranational Court are becoming increasingly politicized and quite often their use reflects a general problem of the system of international relations, which is expressed in the conflict of interests to protect human rights and freedoms and to ensure national sovereignty.

The collision is in acceptable application of international law interpreted by the European Court of Human Rights to a specific case in non-compliance with national law and also in the establishment of such a contradiction. First of all, the rule of international law should not contradict the Constitution of RF. According to T.M. Pryakhina, the criterion of the constitutionality of an international treaty (and the Convention in its legal nature is an international treaty) is its compliance with national interests of Russia enshrined in the Fundamental Law. The content of interests of individuals and the society is included in internal affairs of the state covered by the principle of noninterference, and the state guarantees protection of interests of these groups[6]. For a long time after the ratification of the Convention, the situation of its

[2] A.R. Sultanov. Ob ispol'zovanii reshenii, priniatykh Yevropei'skim sudom po pravam cheloveka v sudakh [On the Use of Decisions Made by the European Court of Human Rights by the Courts]// Russkii sud'ia [Russian Judge]. 2008, No. 9, p. 12.

[3] Bulleten' Verkhovnogo Suda Rossiiskoi Federatsii [Bulletin of the Supreme Court of the Russian Federation]. 2003, No. 12.

[4] Rossiiskaiia Gazeta [Russian newspaper]. December 26, 2003.

[5] Rossiiskaiia Gazeta [Russian newspaper]. March 15, 2005.

[6] T.M. Pryakhina. Konstitutsionnyi' i pravovoi' status mezhdunarodnykh dogovorov Rossiiskoi' Federatsii, ne vstupivshikh v silu [Constitutional and Legal Status of International Treaties of the Russian

contradiction to the Constitution was difficult to imagine, because an international treaty ratified by the Russian Federation complies with it *a priori.* There was no mechanism of constitutional review. Thus, Paragraph 3 of the Determination of the Constitutional Court of July 3, 1997, No. 87-O on the request of N.V. Grigorieva, the judge of Moscow Regional Court, states:

"The Constitutional Court of the Russian Federation is not entitled to either fill the gaps in the legal regulation or solve the problem of whether the international legal act can be applied to a specific case if any inconsistency is found in the domestic law – it is the responsibility of courts of general jurisdiction"[7].Two decades passed and, the situation has changed dramatically after the Decree of the ECHR in the case of K. Markin. The uniqueness of the case is that the decisions of the Constitutional Court have never been opposed to the ECHR case-enactments. Verifying the constitutionality of the rules under which K.A. Markin, while doing his military service on the contract, was denied child-care leave, the Russian Constitutional Court based his decision on the grounds of National Defense and State Security and admitted that the provisions contested by the applicant did not contradict the Constitution of the Russian Federation[8]. As a result of the complaint filled by K.A. Markin, the European Court of Human Rights recognized the violation the applicant's right to private and family life (Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms), as well as discrimination based on gender. National legislation does not interfere with providing a child care leave for women carrying

Federation that Have Not Entered into Force]// Konstitutsionnoe i munitsipal'noe pravo [Constitutional and Municipal Law]. 2010, No. 6. pp. 2 – 9.

[7] Opredelenie Konstitutsionnogo Suda Rossiiskoi Federatsii ob otkaze v priniatii pros'be moskovskogo oblastnogo suda sud'i N.V. Grigor'yeva dlya rassmotreniia No. 87-O [The Determination of the Constitutional Court of the Russian Federation "On Refusal to Accept the Request of the Moscow Regional Court Judge N.V. Grigorieva for Consideration" No. 87-O]. July 3, 1997. Vestnik Konstitutsionnogo Suda Rossiiskoii Federatsii [Bulletin of the Constitutional Court of the Russian Federation]. 1997, No. 5.

[8] Konstitutsionnyi' Sud Rossiiskoi Federatsii ob otkaze v priniatii k rassmotreniyu zhalob grazhdanina Konstantina Markina na narusheniye ego konstitutsionnykh prav polozheniiami statei' 13 i 15 Federal'nogo zakona "O gosudarstvennykh posobiiakh grazhdanam, imeyushchim detei'", statei' 10 i 11 Federal'nogo zakona "O statuse voennosluzhashchikh", stat'i 32 Polozheniia o poriadke prokhozhdeniia voennoi' sluzhby i punktov 35 i 44 Polozheniia o naznachenii i vyplate gosudarstvennykh posobii' grazhdanam, imeyushchim detey" No. 187-O-O [The Constitutional Court of the Russian Federation On the Refusal to Accept the Claims from the Citizen Konstantin Markin, of Violation of His Constitutional Rights by the Provisions of Articles 13 and 15 of the Federal Law "On State Benefits to Citizens with Children", Articles 10 and 11 of the Federal Law "On the Status of Servicemen", Article 32 of the Provision on the Procedure for Military Service and Paragraphs 35 and 44 of the Provision on the Appointment and Payment of Government Benefits to Citizens with Children" No. 187-O-O]. January 15, 2009// The text is available in Consultant Plus legal information system.

military service in the same position. It is important to note the fact that two decisions of the ECHR were made on this case[9].

The first ECHR decision of October 7, 2010, which presumes bringing Russian legislation, previously subjected to inspection for compliance with the Constitution of the Russian Federation, in the condition consistent with the Convention, presented damage to domestic law. The ECHR had wrongly assumed that the decision of the Constitutional Court of the RF discriminates military men in relation to military women, and is not reasonably justified[10]. V.V. Lapaeva made a fair point that the problem concerning national sovereignty is not a conflict between the interpretation of the Constitution of the Russian Federation and the European Convention for the Protection of Human Rights and Fundamental Freedoms by authorized courts; it is the need to use a legal precedent of the ECHR as a basis for the transformation of legislation contrary to the legal position of the Constitutional Court of the Russian Federation[11] as well as the prevalence of individual interests over public interests[12]. These manifestations reflect the crisis of the modern system of international relations in general.

In response to this, the Government of the Russian Federation pointed to the wrong reference of the applicant to Article 14 in conjunction with Article 8 of the Convention which do not guarantee the right to parental leave or benefits in connection with this child care leave and made an attempt to justify it as a threat to national security.

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[9] Informatsiia o reshenii YESPCH po delu Konstantina Markina protiv Rossii. Zhaloba No. 30078/06 [Information about the ECHR Judgment in the Case of "*Konstantin Markin v. Russia*". Complaint No. 30078/06]. October 7, 2010. Byulleten' Yevropei'skogo suda po pravam cheloveka [Bulletin of the European Court of Human Rights]. 2011, No. 8; Reshenie YESPCH po delu Konstantina Markina protiv Rossii. Zhaloba No. 30078/06 [ECHR Decision the Case "Konstantin Markin v. the Russian Federation". Complaint No. 30078/06]. March 22, 2012. Byulleten' Yevropei'skogo suda po pravam cheloveka [Bulletin of the European Court of Human Rights]. 2012, No. 6.

[10] A.P. Fokov. Mezhdunarodnot i natsional'not pravj v deiatel'nosti Konstitutsionnogo Suda Rossiiskoi Federatsii: istoriia, nastoyashche i problemy vzaimootnoshenii' s Yevropei'skim sudom po pravam cheloveka [International and National Law in the Work of the Constitutional Court of the Russian Federation: the History, the Present and the Problem of Relations with the European Court of Human Rights]// Russkii sud'ia [Russian Judge]. 2011, No. 1, pp. 2 – 6, p 5.

[11] V.V. Lapaeva. Delo Konstantina Markina protiv Rossii rassmatrivaia problemu natsional'nogo sovereniteta [The Case "*Konstantin Markin v. Russia*" Considering the Problem of National Sovereignty]// Sravnitel'noe konstitutsionnoe obozrenie [Comparative Constitutional Review]. 2012, No. 2, pp. 77 – 90, pp. 81 – 82.

[12] V.D. Zorkin. Vzaimodei'stviia natsional'nykh i nadnatsional'nykh yustitsii: novye vyzovy i perspektivy [The Interaction of National and Supranational Justice: New Challenges and Perspectives]// Zhurnal konstitutsionnogo pravosudiia [The Journal of Constitutional Justice]. 2012, No. 5, pp. 1 – 11, p. 5.

In its turn, the Grand Chamber of the ECHR passed the second ECHR judgment in relation to K.A. Markin. In this decree, the European Court of Human Rights has refrained from direct normative control and evaluation of the position of the Constitutional Court of the Russian Federation on the case, and shifted the center of gravity on the consequences of applying this decision in the applicant's situation. V.D. Zorkin emphasizes the compromise found by ECHR which was expressed in the possibility, according to the Grand Chamber of the European Court of Justice, to provide a three-year parental leave to all military personnel carrying out their duties on the support staff positions[13].

The described case is unusual for the ECHR in terms of the argument. According to A. Nussberger, the ECHR judge, when considering important cases, the Grand Chamber proceeds from on international treaty law, international soft law and comparative analysis of legislation of the participating States if there are solutions offered by national and international law, based on a consensus regarding standards of human rights. In interpreting international treaties, they take into account subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (Paragraph "b" p. 3 Art. 31 of the Vienna Convention on the Law of Treaties)[14]. In the case of K.A. Markin, the consensus in understanding the gender equality in the professional work and family life was not reached, but the very question about it affected the interests of national security. In this sense, the trends of unification of the legislation and law application encountered certain restrictions.

For the sake of justice, we should note that some authors are not inclined to dramatize the event. For example, I.Puzanov sees no conflict in the decisions made in relation to K.A. Markin. According to his opinion, the legislation of the Russian Federation recognized by the Constitutional Court of the Russian Federation Constitution as conforming to the Constitution of the RF, contravene the Convention that does not negate their conformity to the Constitution, but he sees no possibility of their application because of the contradictions to the rules of international law contained in the Convention with which Russia has to comply. With such a dualistic approach that does not offer options to resolve the conflict and create prerequisites

[13] V.D. Zorkin. Vzaimodei'stviia natsional'nykh i nadnatsional'nykh yustitsii: novye vyzovy i perspektivy [The Interaction of National and Supranational Justice: New Challenges and Perspectives]// Zhurnal konstitutsionnogo pravosudiia [The Journal of Constitutional Justice]. 2012, No. 5, pp. 1 – 11, p. 10.

[14] A. Nussberger. Konsensus kak element argumentatsii Yevropei'skogo suda po pravam cheloveka [Consensus as an Element of the Argument of the European Court of Human Rights]// Mezhdunarodnaia yustitsiia [International Justice]. 2013, No. 1, pp. 17 – 22 p. 20.

for existence of "dead" rules, the only valuable conclusion is that the practice of the European Court extends the protection of human rights and freedoms to Russia and provides more freedoms than the Russian authorities are ready to provide[15].

The stumbling block was the opportunity to review the decision of the military court of first instance in the new circumstances that found against K. Markin. The Presidium of the Leningradski Military District Court, to which the appeal had been transferred together with the case for consideration,during the hearing suspended the proceedings and made an inquiry to the RF Constitutional Court on the constitutionality of Paragraphs 3.4, Part 4 of Article 392 of the Civil Procedural Code of the Russian Federation in conjunction with Article 11 of the Civil Procedural Code of the Russian Federation.

According to the inquiry, these rules contradict Article 15 of the Constitution of RF to the extent that they admit the revision of a court decision that came into force in the presence of opposing legal positions of the RF Constitutional Court and the ECHR concerning the conformity of national legislation applied in the case with the provisions of the RF Constitution and the Convention for the Protection of Human Rights and Fundamental Freedoms.

The Constitutional Court of the Russian Federation in its decision of December 6, 2013, No. 27-P acknowledged that the contested legal provisions do not contradict the Constitution of the Russian Federation, as they do not prevent the court of general jurisdiction to begin a new proceeding to revise the judgment that came into force under new facts in connection with the application of the citizen, whose complaint to the RF Constitutional Court has been recognized as inadmissible.

A new factor is the establishment, by the ECHR, of violations of the Convention for the Protection of Human Rights and Fundamental Freedoms when considering this case.

However, the following conclusion of the Constitutional Court of the Russian Federation should be considered as the most important in building a hierarchical system and the ratio of international and national legislation. If a court of general jurisdiction finds it impossible to execute decision of the European Court without finding the regulations examined previously by the Constitutional Court of the Russian Federation unconstitutional, the court has to suspend the proceedings and request the RF Constitutional Court to check the constitutionality of these rules[16].

[15] I. Puzanov. Mezhdu Konventsiei' i natsional'nym zakonodatel'stvom [Between the Convention and National Legislation]// EJ Yurist. 2011, No. 6, pp. 1 – 3, p. 2.

[16] Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii po delu o proverke konstitutsionnosti polozhenii' stat'i 11 i punktov 3 i 4 chasti chetvertoy stat'i 392 Grazhdanskogo protsessual'nogo

Fragmentation of International Law. The Institutional Component.

Thus, a specific mechanism is formed, and it has repeatedly been used to examine rules as to their conformity with the Constitution of the Russian Federation and the Convention for the Protection of Human Rights and Fundamental Freedoms, which is a "superstructure." Without assessing prematurely a step proposed by the RF Constitutional Court about the hidden control over the execution of the ECHR decisions, since this aspect needs further research, which will be made later in this paper, we will analyze the situation from a position of political and legal processes in the system of international relations.

So, as it was mentioned above, the decisions of the European Court of Human Rights are binding for the government that has ratified the Convention for the Protection of Human Rights and Fundamental Freedoms. The example with the case of K.A. Markin reveals enforcement problems both in the field of substantive and procedural law in the context of conformity with international legal standards. However, the events taking place in the legal field have much greater significance than just finding a compromise between positions of domestic and international justice. It is not easy to describe this phenomenon from the point of view of international law, since it represents a symbiosis of its developmental trends. It has some elements of fragmentation. Fragmentation is the emergence of norms and decisions in some areas of international law and practice of international judicial and quasi-judicial institutions that are contrary to standards of other branches of international law, or those that do not coincide with previous decisions of the above-mentioned institutions[17].

As it was explained by R. Sh. Davletgildeev, fragmentation covers regulatory, institutional, and regional components. Institutional problems are associated with jurisdiction and competence of various institutions which apply international legal norms and their hierarchical relations *inter se*[18]. In general, we are talking about

kodeksa Rossiiskoii Federatsii v sviazi s zaprosom prezidiuma Leningradskogo okruzhnogo voennogo suda No. 27-P [The Decision of the Constitutional Court "In the Case on the Constitutionality of the Provisions of Article 11, Paragraphs 3 and 4 of Part 4 of Article 392 of the Civil Procedural Code of the Russian Federation in Connection with the Request of the Presidium of the Leningradski Military District Court" No. 27-P]. December 6, 2013. Sobranie Zakonodatel'stva Rossiiskoi Federatsii [Russian Federation Collection of Legislation]. 2013, No. 50, Art. 6670.

[17] See: G. Hafner. Riski fragmentatsii mezhdunarodnogo prava [The Risks of Fragmentation of the International Law]. The United Nations. Available at: URL: http://untreaty.un.org/ilc/reports/2006/Russian/chp12.pdf .

[18] See: R.Sh. Davletgildeev. Na podkhodakh k fragmentatsii mezhdunarodnogo prava [On the Approaches to the Fragmentation of International Law]// Russkii yuridicheskii zhurnal [Russian Law Journal]. 2013 No. 3, pp. 20 – 25 pp. 20, 23.

international competition of enforcement authorities whose jurisdiction in law application on certain points coincides.

In the area of legal proceedings, it is common to study institutional problems of fragmentation of international law resulting from contradictory interpretations of the same rules by international courts.

Regional and Regulatory Components of Fragmentation.

The regional component takes into account the fact that a variety of countries generate a trend towards regionalism in the area of human rights, although we should talk about universal values, as well as about interaction of common and special law and the principle of subsidiarity. The principle of subsidiarity means sharing responsibility for respect and protection of human rights and freedoms between the State authorities and the European Court of Justice, for effective implementation of the Convention. It means that provisions of the Convention can be applied in a decentralized way, with recognizing national independence and without imposing uniformity. Alongside with the principle of subsidiarity, Protocol No. 15 k of the Convention formalizes principles of discretion and efficiency, which means the balance of the will of the state to protect human and civil rights, on the one hand, and strict control of the European Court over the execution of their precedents, on the other hand[19].

The dynamics of growth of the regional approach is reflected in the change of priorities in negotiation of international legal agreements on judicial and quasi-judicial interpretation, the adoption of acts of "soft law", the increasing role of the "integration" law[20]. "Soft" law includes resolutions, declarations, communiqués, and recommendations of various international organizations whose provisions are not legally binding but are advisory in nature. Despite proposals to incorporate norms of "soft law" into national legislation to make them mandatory, courts use them in conjunction with international law to strengthen legal arguments of their legal positions, to interpret domestic law and to fill gaps[21].

[19] See: Frederick Sudre. Printsip subsidiarnosti – "Novaia osnova" dlia Yevropeyskogo suda po pravam cheloveka (dopolnyayushchikh Konventsiyu protokolami № 15 i № 16) [Subsidiarity – "New Framework" for the European Court of Human Rights (On Supplementing the Convention by Protocols No. 15 and No. 16)]// NB. Glavnaia tema [NB. The main theme]. 2014, No. 6, pp. 6, 11,13.

[20] R.Sh. Davletgildeev. K voprosu o podkhodakh k fragmentatsii mezhdunarodnogo prava [On the Problem of Approaches to the Fragmentation of International Law]// Russkii' yuridicheskii' zhurnal [Russian Law Journal]. 2013 No. 3, pp. 20 – 25, pp. 23 – 25.

[21] S.U. Marochkin, R.M. Khalafyan. "Opredeleniia" Mezhdunarodnogo prava v pravovoi' sisteme Rossiiskoii Federatsii [International "Soft" Law in the Legal System of the Russian Federation]// Zhurnal rossiiskogo prava [Journal of Russian Law]. 2013, No. 6, pp. 56 – 65, pp. 59 – 60.

No consensus is observed in understanding the regulatory fragmentation of international law. Fragmentation is associated with appearance of specialized and autonomous systems of norms, institutions and spheres of legal practice[22]. Nowadays, scientists ascertain the existence of systems with autonomous legal regimes, as well as of regulatory subsystems specialization of which deepens as they progress[23]. According to another position, the fragmentation was typical for international law from the very beginning and was explained by the absence of the unified legislative body, the presence of separate legal regimes, the development and expansion of the normative content of individual branches, competing regulation of homogeneous issues[24]. The reasons for fragmentation also include the lack of centralized institutions that ensure uniformity and consistency of legal rules; parallel regulation of one and the same issue on the universal or regional level; competitive rules[25]. In accordance with a slightly different approach, the fragmentation of international law is the result of conversion of functional differences in legal management – from the national to the international scale, that is, international law reflects differences in the fields of domestic law that can produce their own regulatory regimes capable of competing with each other[26]. Thus, there is no clear definition of the fragmentation of international law, but for the purposes of this study understanding the nature of this process is sufficient.

Civil proceedings are governed by provisions of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which ensures the right for a fair trial. The imperative rules, ranked as international standards of justice obligatory for operation, do not directly follow from this rather concise statement of the provision. The disclosure of their nature occurs through the interpretation of

[22] G.Y. Bakirova, P.N. Biryukov, P.M. Valeev, etc. Mezhdunarodnoe pravo. Obshchaia chast': uchebnik [International Law. General Part: The textbook]// Ed. R.M. Valeev, G.I. Kurdukov. Statute, Moscow, 2011, p. 543.

[23] N.E. Tyurina. Fragmentatsiia mezhdunarodnogo prava v kontekste "prava VTO" [Fragmentation of International Law in the Context of "WTO Law"]// Russkii' yuridicheskii' zhurnal [Russian Law Journal]. 2013, No. 3, pp. 52 – 58, p. 52.

[24] A.S. Smbatyan. Jeto nuzhno, chtoby "spasti" sistemy mezhdunarodnogo sudoproizvodstva ot fragmentatsii? [Is it Necessary to "Save" the System of International Legal Proceedings from Fragmentation?]// Pravo i politika [Law and Politics]. 2011, No. 9 (141), pp. 1509 – 1513.

[25] U.S. Bezborodov. Universalizatsiia i lokalizatsiia mezhdunarodno-pravovogo regulirovaniia v usloviyakh globalizatsii [The Universalization and Localization of International Legal Regulation in the Context of Globalization]// Russkii' yuridicheskii' zhurnal [Russian Law Journal]. 2013, No. 3, pp. 26 – 30, pp. 29.

[26] A.S. Smbatyan. Resheniia mezhdunarodnogo pravosudiia v sisteme mezhdunarodnogo publichnogo prava [The Decisions of International Justice in the System of Public International Law]. Statute, Moscow, 2012.

these rules by the European Court of Human Rights on the basis of systematic violations committed by national courts in considering cases and identified in connection with the applications of those persons whose right to a fair trial was violated in some way. The circle of vices of the Russian legislation and practice in the field of civil procedure is expanding rather quickly due to the interpretation of the provisions of Article 6 of the Convention by the European Court of Human Rights. Corresponding actions of Russian authorities towards changing the civil procedural law in the direction of bringing it in line with international requirements remain within the framework of the process of law adaptation for a certain time, i.e. penetration of international law and international legal experience into the national legal system, taking into account its readiness and adaptation to innovations[27]. At the same time, the formation of an international regulatory complex, including the norms of the Convention for the Protection of Human Rights and Fundamental Freedoms, and also binding precedent decisions of the ECHR which regulate legal relations for review and settlement of civil cases by national courts should be seen as an expression of the fragmentation of international law. This phenomenon was revealed to the full in collisions in the interpretation of related provisions of Articles 8 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms by international and national enforcers, as well as in the escalation of conflict between the positions of the European Court of Human Rights and the Constitutional Court of the Russian Federation in the case of K.A. Markin. Despite the fact that there is no "security interests" confrontation of views of two international judiciary authorities in applying international law but between the supranational court and the national court , it is a consequence of non-identical interpretation of universally shared values, such as gender equality and respect for family life.

However, elements of fragmentation of international law are not confined to this. To study the problem of application of the ECHR orders as a mechanism for interpretation of the Convention for Human Rights and Fundamental Freedoms would mean to narrow the scope of the study for no good reason. The Decree of the Plenum of the Supreme Court of the Russian Federation of June 27, 2013 No. 21 "On the Application of the Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950 and the Protocols thereto by Courts of General Jurisdiction " states that in order to avoid violation and limitation of rights and freedoms,

[27] T.U. Kulapova. Vnutrennii' i mezhdunarodnyi'pravovo' opyt: problemy integratsii i adaptatsii [Domestic and International Legal Experience: Problems of Integration and Adaptation]// Avtoreferat dissertatsii na soiskanie stepeni kandidata yuridicheskikh nauk [The Thesis Abstract of the Dissertation for the Degree of Candidate of Juridical Sciences]. Saratov, 2014, p. 12.

the legal position of the ECHR must be considered not only in relation to the Convention and its Protocols, but also to other international agreements of the Russian Federation[28]. This rule corresponds to Paragraphs 3 of Article 31 of the Vienna Convention on the Law of Treaties of May 23, 1969[29]. On the one hand, the European Court of Human Rights is given the status of a universal body with the power of legal interpretation of norms of international treaties; on the other hand, an indirect form of perception of international law by states-participants in international relations is created. Regulation of legal relations emerging during consideration and resolution of civil cases based on the position of the ECHR becomes a specialized sphere of legal practice. Provisions of international law interpreted this way claim to be the autonomous "judicial law" for the countries of the European Union, an independent legal regime.

The outcome of K.A. Markin's case, expressed in coordination of judgments concerning the enforcement of the ECHR judgment, the possibility of a retrial on newly discovered evidence, and mainly the establishment of constitutional control over the standards that have been examined by the international judicial body leads to certain conclusions. Interference of the international judicial body in the area of state sovereignty, as the Russian authorities regarded the ECHR decision in the case of K.A. Markin, impeded its direct execution. Multiple stages of screening authorities at the national and international level, formalized by the Constitutional Court on December 6, 2013 No. 27-P, indicate that the last word on the issue of cases review under the new circumstances can be left to the Constitutional Court of the Russian Federation. Thus, the rules of international "judicial law" were subjected to defragmentation from the State – party to the Convention for the Protection of Human Rights and Fundamental Freedoms. Judging by the events taking place in our country and around the world, this case will not be a the on one but will generate a trend.

In this light, the Chairman of Central Election Commission Vladimir Churov, speaking at the IV International Legal Forum in St. Petersburg, criticized the decision of the European Court of Human Rights on permitting convicts serving their

[28] Postanovlenie Plenuma Verkhovnogo Suda o primenenii Konventsii o zashchite prav cheloveka i osnovnykh svobod v sudakh obshchei' yurisdiktsii ot 4 noyabrya 1950 i protokolov k nei' No. 21 [The Resolution of the Plenum of the Supreme Court "On the Application of the Convention for the Protection of Human Rights and Fundamental Freedoms by the Courts of General Jurisdiction of November 4, 1950 and the Protocols thereto" No. 21]. June 27, 2013. Byulleten' Verkhovnogo suda [Bulletin of the Supreme Court]. 2013. No. 8.

[29] Venskaia konventsiia o prave mezhdunarodnykh dogovorov (zaklyuchena v Vene 23 maia 1969 goda) [The Vienna Convention on the Law of Treaties (concluded in Vienna on May 23, 1969)] // Vedomosti VS SSSR [Gazette VS SSSR.1986]. No. 37, Art. 772.

term in prisons to vote, with the appointment of election commission members, as interfering with internal affairs and the state sovereignty of the Russian Federation[30]. Despite the fact that these regulations of ECHR do not directly affect legal proceedings, there has been willingness of national authorities to establish limits for the rules of international law. If you expand the range of observation, you will find some imbalance in the system of international relations as a whole: in the light of the Ukrainian events, the demands for peaceful settlement of conflicts, while all respect to national sovereignty, are ignored, whereas the Russian national sovereignty in the sphere of civil jurisdiction is being questioned. Each time the denial of principles of international relations in favor of the interests of the strongest states and private sovereignty have led to a crisis and a war.

The existing realities, the complicated situation in the world, the departure from voluntary implementation of international commitments by individual states require further development of the system of international law aimed at its effective harmonization with the concept of state sovereignty, the definition of the amount of state sovereignty[31].

[30] The Head of CEC Churov Called the ECHR the "So-Called Court" and Accused It of "Illegal Activity". Available at: URL: http://www.newsru.com/russia/19jun2014/churov.html (date accessed July 1, 2014.).

[31] D.V. Zorkin. Apologiia Vestfal'skoi' sistemy [The Apology of the Westphalian System]// Russkaia gazeta [Russian Newspaper]. No. 3525. July 13, 2004.

THE DECLINE OF EUROPE (FOLLOWING SPENGLER'S IDEAS)

Vladimir S. Belykh
Doctor of Law, Professor, Honoured Worker of Science of the RF,
Head of Euro-Asian Scientific and Research Centre
for Comparative and International Entrepreneurial Law,
Head of Entrepreneurial Law Department,
Ural State Law University, Yekaterinburg, Russia

Abstract: The article analyses the main concepts in the most famous work by an outstanding German philosopher Oswald Spengler. It is well-known that his philosophical and cultural research was devoted to "the morphology of the world history", namely, to the peculiarities of various world cultures (or "spiritual epochs"). In Spengler's view, there are two stages in the development of a civilization: culture (ascent) and civilization (descent). Every culture has its own childhood, youth, maturity and old age. Spengler differentiated among eight great cultures: Egyptian, Babylonian, Indian, Chinese, Mexican, Antique, Arabic and European. The ninth great culture still awakening was, in his view, the Russian-Siberian civilization. The article dwells on the main features of the decline of civilization in the contemporary Europe: immigration expansion, the decline of the traditional family, same-sex marriages, mass culture, militarization, and military interventions.

Key words: "Decline of Europe", culture and civilization, tcriticism of Spengler, conceptual ideas of "The Decline of Europe", decline of civilization, intellectual hunger, practical rationalism, replacement of spiritual reality by intellectual one, worship of money, lack of faith, militarism.

The philosophical and cultural research by Spengler was focused on 'morphology of the world history': uniqueness of world cultures (or 'spiritual epochs') regarded as original organic forms that can be understood through analogies. His research was published in the book entitled '*The Decline of Europe*' (sometimes known under the title '*The Decline of the West*'). It was published in 1918, the year when Germany lost in the First World War. Spengler was writing his book at nights and put a note on his door saying '*Out On Vacation'* not to be disturbed. And it was worthwhile! His book was a real breakthrough; it made Oswald Spengler famous worldwide.

First of all, I would like to analyse the assessments of '*The Decline of Europe*' by domestic and foreign scholars. For example, Fyodor Avgustovich Stepun, a Russian

philosopher, sociologist and historian, says that "Spengler's book is not just a book: it is an original form different from the dead one often used by scientists of last decades. His book is a work of art if not by a great artist, then at least by a great actor… Spengler's book is a piece of art; consequently, it is an organism, and, therefore, a live face. The expression of its face is the expression of sufferings"[1]. Similar ideas are expressed by another famous Russian philosopher and a religious thinker Semyon Lyudvigovich Frank: "Spengler's book, literally speaking, has been undoubtedly the most brilliant and remarkable book of the European literature since Nietzsche's times, though it is far from being the most profound and fruitful"[2].

In this connection, we cannot ignore considerations of Nikolai Aleksandrovich Berdyaev, a Russian religious and political philosopher, a representative of existentialism[3]. On the one hand, he says, "After Nietzsche, Weininger, Chamberlain and Spengler are the only authentically original and the most significant phenomena in the German spiritual culture"[4]. On the other hand, he mentions that "Spengler has a huge intuitive gift, but he is blind. As a blind man who does not differentiate light from darkness, he plunges into the ocean of cultural and historical reality"[5]. N.A. Berdyaev describes Spengler as a person of late and falling culture. "Spengler is a German patriot, a German nationalist and an imperialist"[6]. So the conclusion is that Spengler believes that during the period of civilization prior to the Decline of Europe, Germany can still acquire world power. This is an interesting conclusion, especially in the current conditions of the development of European countries. The main aim of America is to establish a new Europe based on the union of France and Germany and subject to the US interests.

However, Germany occupies the leading position in this union in Europe. It seems that Germany is again trying to become a leader and expand its influence on the East. In the geopolitical sense, the USA does not approve it. V.A. Pechenev is right when

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1 F.A. Stepun. Oswald Spengler i "Zakat Evropy" [Oswald Spengler and "The Decline of Europe"]// N.A. Berdyaev Padenie svyashchennogo russkogo tsartstva [The Fall of the Holy Russian Empire]. Publitsistika 1914 – 1922. Astrel, Moscow, 2007, p. 850.

2 S. Frank Krizis zapadnoi' kultury [The Crisis of the Western Culture]// N.A. Berdyaev. Padeniye svyaschennogo russkogo tsartstva [The Fall of the Holy Russian Empire]. Publitsistika 1914 – 1922. Astrel, Moscow, 2007, p. 873.

3 Available at: http://ru.wikipedia.org/wiki/ Berdyaev, Nikolai Aleksandrovich.

4 N.A. Berdyaev. Predsmertnye mysli Fausta [The Last Thoughts of Faust]// N.A. Berdyaev Padeniye svyashchennogo russkogo tsartstva [The Fall of the Holy Russian Empire]. Publitsistika 1914 – 1922. Astrel, Moscow, 2007, p. 892.

5 Ibid., p.895.

6 Ibid., p.899.

he points out that, Germany is persistently and continuously expanding its economic influence on the countries of East Europe without making any loud claims[7]. Germany has already strengthened its positions in Hungary, Poland and the Czech Republic. Now Germany not only looks at Russia and Ukraine but takes some actions. For example, the share of German loans and investments (in comparison with other nations) in the Russian economy is quite big[8].

Now let us consider the main conceptual ideas of "*The Decline of Europe*"[9]. **First of all**, Spengler insists on non-linear vision of history. The subdivision of history into "ancient – medieval – modern' is such a meaningless scheme that unconditionally dominated our historic mind and prevented us from understanding the real place, rank, a gestalt, and, first of all, a short lifespan of a small part of the world…"[10].

Second, there are two stages of the civilization development: culture (ascent) and civilization (descent). Civilization is the unavoidable destiny of culture[11]. At the same time, Spengler believes that "civilizations are the most external and artificial states of which a species of developed humanity is capable. They are a conclusion, the thing-become succeeding the thing-becoming, death following life, rigidity following expansion…petrifying world-city following mother-earth and the spiritual childhood… They are an end…", without the right of appeal. In a word, civilization is the end, mental degradation.

Third, every culture goes through different age stages of a person. "Every culture has its childhood, youth, adulthood and old age"[12]. If culture is the ascent while civilization is the descent, there is a logical question: how can we speak about the old age of culture? As Spengler says, only old civilizations remind of giant dry trees which spread their rotten branches throughout the virgin forest.

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[7] V. Pechenev. Vladimir Putin – posledniy shans Rossii? [Is Vladimir Putin the Last Chance for Russia?]. Moscow, 2001, pp. 98 – 99.

[8] V.S. Belykh. Ugrozy natsionalnoi' ekonomicheskoi' bezopasnosti Rossii: vnutrennie i vneshnie factory [Challenges to the National Economic Safety of Russia: Internal and External Factors]// Biznes, menedjment i pravo [Business, Management and Law]. 2003, No. 2, p. 155.

[9] O. Spengler. Zakat Evropy. Ocherki morfologii mirovoi' istorii: gestalt i deistvitelnost [The Decline of the West. Essays on the Morphology of World History: Gestalt and reality]. Translated from German, introduction and comments by K.A. Svasyan. Eksmo, Moscow, 2007, p. 800.

[10] O. Spengler. Zakat Evropy. Ocherki morfologii mirovoi' istoriyi: gestalt i deistvitelnost [The Decline of the West. Essays on the Morphology of World History: Gestalt and reality]. Translated from German, introduction and comments by K.A. Svasyan. Eksmo, Moscow, 2007, p. 175.

[11] Ibid., p.198.

[12] Ibid., p.316.

Fourth, Spengler distinguishes among eight great cultures: Egyptian, Babylonian, Indian, Chinese, Mexican, Antique, Arabic and European[13]. The ninth great culture still awakening was, in his view, the Russian-Siberian civilization[14]. His favourite Russian writer was Fyodor Dostoevsky.

Thus, Oswald Spengler consistently contrasts adjacent notions of 'culture' and 'civilization'. It is well known, however, that the correlation of these notions (as well as their definition) is a subject of hot debates in culturology. For some scientists, civilization is a cultural and historical type; for others, it is a synonym to the notion of culture as a set of tangible and intangible achievements of a society in its historic development, and for some others, it is interrelation of mentality and economic structure, etc. But at present, it is the culture that is more often taken as the foundation for classification of civilizations. Based on this criterion, there are traditional and technogenous civilizations with their typical features[15].

And finally what does Spengler see as the main reason for the decline of Europe? What are the main features of the decline of civilization? Reading '*The Decline of the West*', one cannot find easy answers to these questions as it may seem at first. The main reason is the way the famous German philosopher presents his information. '*The Decline of the West*' is not a common type of academic philosophical writing. It is not 'a treatise' but 'an intellectual novel' as it was labelled by Thomas Mann, a master of epic novels, who was greatly opposed to Spengler's ideas[16]. Spengler has a poetical and philosophical metaphorical style based on the deliberately limited choice of words, most of which are used as multi-meaningful 'first verbs' — verbal mythologemas.

All in all, Spengler thought that the main features of civilization were "extremely cold deliberativeness", intellectual hunger, practical rationalism, the replacement of spiritual existence by the mental one, the cult of money, and lack of religiousness. A contemporary city resident is "a new wanderer, a parasite, a big city dweller, torn away from traditions and who is appearing in a shapeless fluctuating mass, a person of facts, lacking religion, a representative of the intellectuals, fruitless, filled with an antipathy to peasants…"[17].

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[13] Ibid., p.178.

[14] Sovremennaia zapadnaia sotsiologiia. Slovar. [Contemporary Western Sociology. Dictionary.] Moscow, 1993, p. 403. The latest edition of the second volume of 'The Decline of the West' devotes two small paragraphs to Russia: 'Russism' (Ch.3, I) and 'Economic Mentality of the Russians' (Ch.5, I). See: O. Spengler. Zakat Evropy [The Decline of the West]. Moscow, 1998, V. 2, pp. 197 – 201, 528 – 529.

[15] Available at: http://gumfak.ru/kult_html/konspekt/kon14.shtml .

[16] Available at: http://www.libma.ru/kulturologija/_morfologija_kultury_osvalda_shpenglera/p1.php .

[17] O. Spengler. Zakat Evropy. Ocherki morfologii mirovoi' istorii: gestalt i deistvitelnost [The Decline of the West. Essays on the Morphology of World History: Gestalt and reality]. Translated from German, introduction and comments by K.A. Svasyan. Eksmo, Moscow, 2007, p. 200.

Spengler was pessimistic about the future of Europe: it was going to face decline and degradation against the background of the joy of young peoples and foreign conquerors. And not only that. Wars to acquire world leadership, tyranny in the sphere of politics and power, self-destruction of democracy through money, oversaturation with machines (a man as a slave of machines) are some of the philosopher's ideas.

Unfortunately, today Spengler's predictions come true and show themselves in various forms and directions. Since nowadays Europe sees the predominance of left and liberal values, it has officially adopted the ideology of tolerance, multi-racial and multi-cultural approaches . As a result, Europe has been "flooded by a wave" of immigrants from Asia, Africa and Latin America. So, the population of Germany is about 82 million people, most of whom are immigrants: about 6% of the population has moved to Germany during the last decade. The prevailing ethnic immigrant communities are from Turkey (2 million people), the Balkan countries (1.2 million people) and Italy (600-650 thousand people). However, the record is beaten by the Russians. Nowadays, about 2.5 million Russian-speaking people live in Germany. Among them are ethnic Germans who immigrated from the former USSR, as well as former citizens of Russia, Ukraine and Belorussia, part of whom has taken advantage of the right to immigration by being Jewish[18].

France is one of the largest European states. The population of France is 65 447 374 people (the population of the European part of the country is 62 793 432 people), with 90% of them being the French. For comparison: by 1976, France had about 4 million immigrants (7% of the population), and among them 22% were from Portugal, 21% from Algeria, 15% from Spain, 13% from Italy, 8% from Morocco, 4% from Tunisia, 2.5% from Africa and 1.5% from Turkey[19]. By estimates of the French National Institute of Statistics , 4.9 million immigrants have lived in France since 2006 (about 8% of the population). Most part of the immigrant population has European roots (mostly from Italy, Spain and Portugal as well as Poland, Romania, Russia, Ukraine and former Yugoslavia). With time, most immigrants were African and Arab immigrants. To a big extent, it was accounted for by a war in Algeria when a huge number of the French and Northern Africans began moving to France.

Now let us have a look at the population of Great Britain. The 2011 census showed that the population amounted to 63 181 775 people, including 53 012 456 people in

[18] Available at: http://www.worldemigrant.com/germany/ by the results of the 2011 census the country had 74 050 320 citizens of Germany (92.3% from the total amount of the population) and 6 169 360 foreign citizens (7.7%)// http://ergebnisse.zensus2011.de/ .

[19] Available at: http://ru.wikipedia.org/wiki/immigration_population .

England, 5 295 000 in Scotland, 3 063 456 in Wales, and 1 810 863 people in Northern Ireland. The structure of the population is multiethnic and multicultural, and involves irregular settlement of immigrants and native people. Detailed reports may be found on the official statistics site[20].

For the first time, Great Britain included the question of ethnic identity in the 1991 census. The findings are quite interesting: 76.8% (5.3 mln people) of the population of Big London were 'white', 5% (347 000 people) were mulatto and immigrants from the Caribbean region, 2.4% (164 000 people) were from African countries, 1.3% (88 000 people) were from Pakistan, 1.2% (86 000 people) were Bengalese, and 0.8% (57 thousand 000) were Chinese[21]. By the 2011 census, 45% of Londoners considered themselves 'white British', while another 15% considered themselves 'other white' people, among whom there were immigrants from the Republic of Ireland. For consideration: though most foreigners usually move to the suburbs of London, the British seem to have been displaced from some most prestigious districts of the city. Russian tycoons and Arab sheikhs have made property prices so high that many native British cannot afford to live in the centre of the city anymore. More than a half of the population of such districts as Chelsea, Kensington and Westminster are foreigners. We may say that ethnic revolution has already taken place in the capital of Great Britain: how to live in London is determined by foreigners[22]. Consequently, the image of London, its customs and traditions have dramatically changed. For example, it is quite customary to see an Arab sheikh with his numerous escort and harem in the well-known Hyde Park. What is the conclusion? Tolerance in practice.

London is a contemporary Babylon. Therefore, you can live in London for a long time but still not know what it means to live there.

However, such ethnic changes in the Western countries are not so dangerous and even seem harmless in comparison with other factors and circumstances. First of all, alongside with the immigration expansion, there is a collision of different cultures and religions. How is it manifested?

The abovementioned collision and opposition are reflected in various forms. The simplest form, to put it mildly, is impolite (indecent) behavior of immigrants in public places. Everyone who comes to visit Europe and Great Britain immediately feels that: take the London tube, take a walk around Geneva or Paris, watch a movie and you will see how much litter is left after that.

[20] Available at: http://www.ons.gov.uk/ons/CCI/nugget.asp.?ID=6 .

[21] Available at: http://ru.wikipedia.org/wiki/immigration_population .

[22] Available at: http://iloveenglish.ru/news/06-12-2012/london-dlya-anglichan .

In multiethnic countries, there is a growing tension between different ethnic groups as well as an increased crime rate. Europe has seen numerous mass disturbances: from October 28 to November 15, 2005 in France; in 2011 in Italy and Great Britain. So, in France, such disturbances were caused by the death of two teenagers of the Northern African origin who tried to flee from the police. November 6 was the peak of such disturbances: just during one night 1408 cars were burnt down, 300 people were arrested, and 36 policemen were wounded. The police closed down a factory in the suburbs of Paris which produced explosive cocktail bottles (Molotov cocktails). Unrest in France led to sporadic disturbances in other European cities. Similar outbursts of rage were in Belgium, Germany and Denmark[23].

The increased crime rate in European countries is closely connected with the problem of immigration there. Speaking about Norway, many European countries may envy it because of a low crime rate: 0.71 murders per 100 thousand people. Besides, the level of juvenile delinquency, theft and vandalism is also quite low[24]. At the same time, the Norwegian authorities initiated a campaign against Islamophobia which was caused by the indignation of the locals because of the increased number of rapes of Norwegian women by Muslim male immigrants. "Oslo was shocked by a huge number of rapes of Norwegian women. The rate of such crimes was steadily increasing over time; however, it has reached its peak over recent months. The number of rapes in the Norwegian capital now is six times higher than in New York which has traditionally been considered a record-breaker in this respect…"[25] 80% of those raped are native Norwegian women who often do not differentiate the faces of immigrants, for they look alike to them… Therefore, victims to such a crime are often unable to identify the rapist, and arrests of immigrants are often interpreted as racism.

From the viewpoint of crime rate, such countries as Great Britain, Germany and France are unlikely to compete with Norway, Iceland, Switzerland, Japan and other countries which are among the 10 top safest countries of the world.

Nowadays, we hear about the collapse of the multicultural and multireligious idea in the developed countries of Europe more and more often. So the proponents of unlimited immigration speak about possible integration of all immigrants into the socium, i.e. the possibility of their reeducation as if they were natives. However, under the pretext of doing something good for the immigrants, there is a huge waste

[23] Available at: http://ru.wikipedia.org/wiki/mass_disturbances_in_France.

[24] Available at: 10 safest countries in the world http://ppjournal.ru/topprikl/673-tops.

[25] Available at: http://norse.ru/society/norway/assault.html.

of money, which has been publicly confirmed by the leaders of some European countries. Thus, speaking on October 10, 2010 in Potsdam, Chancellor of Germany Angela Merkel said that the idea of building a multicultural tolerant society appeared to be an utopia. She underlined that those who immigrated to Germany had to learn the language and absorb its traditions. Angela Merkel confessed that at "the beginning of the 60s our country called the foreign workers to come to Germany and now they live in our country…We kidded ourselves a while, we said: 'They won't stay, sometime they will be gone', but this isn't reality… And of course, the approach [to build] a multicultural [society] and to live side-by-side and to enjoy each other... has failed, utterly failed"[26]. At the same time the Chancellor underlined the necessity to invite to Germany highly qualified specialists who are able to compete on the labour market. In her opinion, every year about 200 000 Germans retire, causing a shortage of labour in the country. So the conclusion is that Germany should change its immigration policy. She specifically referred to recent comments by German President Christian Wulff who said that Islam was "part of Germany", like Christianity and Judaism[27].

Speaking at a conference on European security, British Prime Minister David Cameron supported Angela Merkel's words calling on all the British and other Europeans to "wake up and realize what is happening in our countries". He said that the previous government had made a mistake by providing immediate unlimited access to the British labour market for Poland, Hungary and some Baltic countries. "People just did not predict that 1.5 million people would move away from one part of Europe when they joined the EU"[28]. Cameron was severely criticized for his words.

David Cameron believes that it is necessary for his country and Europe on the whole to turn a new leaf and abandon the policy that failed. Instead of "passive tolerance" still practiced by the Europeans, it is necessary to turn to what the British Prime Minister called "active, muscular liberalism".

Angela Merkel and David Cameron seem to be balancing on the verge of nationalism in the matters of immigration policy. However, it is hardly possible to claim that the German electorate can potentially support the neofascist revanche The possibility that the National Socialist party of Germany can win the elections is virtually nil, which is, first of all, explained by the bitter experience of Germany. Second, Ger-

[26] Available at: http://rus.delfi.ee/daily/abroad/merkel-priznala-proval-multikulturnoj-modeli.d?id=33990155.

[27] Available at: http://www.perspektivy.info/srez/etnos/konec_multikulturnoj_epohi_2010-12-13.html.

[28] Available at: http://actualnews.org/politika/v_mire/3630-kemeron-raskritikovan-za-nedovolstvo-immigrantammi.html.

many has no leader like Jorg Haider, the famous Austrian politician, or like a famous Dutchman – Geert Wilders, Leader of the Party for Freedom[29].

The decline of Europe is directly connected with the collapse of the traditional family model. The research recently conducted in the European countries shows two evident trends: increased common-law marriages without official registration and an increased number of divorces. One out of two marriages in England, Germany and France ends in a divorce. The record-breaker in this respect is Belgium: two out of three families fall apart. Catholic Spain and Hungary follow Belgium. On the other side, there are Italy, Greece, Romania and Poland[30]. For comparison: Russia had 153 406 divorces against 185 969 marriages in 2010, i.e. the percent of divorces in Russia was 80%.

The key point is the decline of the traditional family rather than the increased number of divorces. It is accounted for by the fact that many European countries have legalized same-sex marriages. The Netherlands was the first country in this respect. The law legalizing the same-sex marriages and adoption of children by such families has been effective since 2001. Similar laws have been adopted by Belgium, Spain, Norway, Portugal, Iceland, Denmark, France, Great Britain and some other countries[31]. For example, the British House of Commons voted for legalizing the same-sex marriages on February 5, 2013, and then it was approved by the House of Lords. Finally, on July 16, 2013, it received the royal assent and came into force.

In this, connection we would like to focus on a few points. First of all, same-sex marriages are allowed only in those countries where Christianity is the major religion. In Muslim countries, such marriages are not acceptable. Moreover, some Islam states (for example, Iran) impose death penalty for homosexual and lesbian contacts.

However, there are some Muslim figures who think that homophobia spoils the image of Islam in the world[32]. However, Islam regards marriage as a natural bond between men and women. Muhamed Salyakhetdinov, a famous Muslim figure and Head of the Association of Public Unions "Sobraniye", said:

"Any retreat from divine laws leads to degradation: same-sex marriages and the decline of the institute of the family, lead to severe crises in economy and other aggravating circumstances"[33].

[29] Available at: http://rg.ru/2010/10/19/merkel.html.

[30] Available at: http://www.word4you.ru/interesting/7842/.

[31] See: Same-sex marriages in different countries of the world. Available at: http://ria.ru/spravka/20130717/950406062.html.

[32] Available at: http://coolreferat.com/http://www.gayrussia.eu/m/russia/746/.

[33] Available at: http://www.gayrussia.eu/m/russia/746/ .

This is the rule: we have to live not only by legal rules but to follow those given by God.

An example of cynicism and vulgarism, in my view, is the contemporary pop-culture (mass pop-culture) which is a set of neo-avant guarde views on art which ignore the experience of previous generations, strive for new forms in art and a new life style, and protest against the moral standards of the contemporary society[34]. Mass culture is expressed in a variety of ways: it floods us from TV and movie screens, popular concerts and contemporary art literature. Moreover, it penetrates contemporary theatrical performances and, to put it mildly, modernizes classical works, "leaving no one spared" and trying to embrace all the events and needs of the majority of the population. Mass culture is opposed to "elite culture" the representatives of which are the so-called "creative elite" who naturally make up the minority of the population. The term "mass culture" appeared in the 1940s in the works by M.Horkheimer and J.MacDonald criticizing television. The term has become widely accepted also because of the works by the representatives of the Frankfurt school of 'sociology[35].

It should be noted that there are different views on mass culture in the contemporary philosophy and culturology. For example, Karl Theodor Jaspers, a German philosopher and psychologist, one of the main representatives of existentialism, said that mass culture is "the collapse of the very essence of art"[36]. On the contrary, Jean Baudrillard, a French sociologist and a post-modernism philosopher, considered all the spheres of contemporary art to be "included in the trans-esthetic sphere of simulation". However, these conceptions have been reconsidered in the epoch of post-modernism, the main peculiarity being the elimination of the difference between "high" and "mass" cultures[37].

But there is "the highest form of modern". "Nowadays, it is not necessary to have a special talent to be a successful scholar: you just have to acquire the techniques of scholarly research, methods to conduct it, describe experiments and make conclusions, and you are able to make some discoveries, write books and defend a thesis"[38]. Therefore, now we have numerous "mass" writers, poets, scientists, etc.

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[34] Available at: http://www.artap.ru/cult/pop_k.htm .

[35] Available at: http://ru.wikipedia.org/wiki/massovayakultura

[36] C. Jaspers, J. Baudrillard. Vlast matssii. Prizrak tolpy [The Power of the Mass. The Phantom of the Crowd]. Algorithm, Moscow, 2007, p.272.

[37] Filosofiia: Uchebnik [Philosophy: Textbook]// Edited by V.D. Gubin, T.Y.Sidorkina. 3rd edition, revised and added. Moscow, 2003, p. 607.

[38] Ibid., pp.604 – 605.

In our view, the best example of the cultural decline of Europe is the victory of Conchita Wurst at the 2014 Eurovision. The image of "a bearded woman" was created by the Austrian singer Thomas Neuwirth in 2011. In such a way, the singer wanted to make the public think about distinction, xenophobia and tolerance. The reaction to the victory of Conchita Wurst was not unanimous. She (he) has many admirers. It can be proved by the fact that Conchita Wurst was congratulated on her (his) victory by the Austrian President Heinz Fischer, Federal Chancellor Werner Faymann, and Minister of Culture Josef Ostermayer who said that the victory of Conchita Wurst was the victory of diversity and tolerance[39].

For the sake of justice, it should be said, however, that not all Austrian statesmen share this point of view. Ewald Stadler, a member of the European Parliament from Austria, said that he felt ashamed of Austria and such a victory[40]. Not much, but at least this gives hope that not everyone shares this shame.

In a word, the world is going crazy. Women have beards while men become womanlike and as beautiful as Alexander Blok's mysterious woman (*Neznakomka*).

Let the West profess such things as violence, stupidity and vicious practices in pursuit of total tolerance and multiculturalism. But we do not like such an approach. Russia needs its own national project – the project of its national and spiritual revival. Russia has a historic (civilized) mission to unite the East and the West. It is the geographical position of our country that has predetermined its way of historic development. Situated between western and eastern worlds, our country plays a linking role. Two worlds – the West and the East – are like two lithospheres at the joint of which a unique world – the Eurasian civilization – was created. Successfully combining both cultures, Russia is a natural bridge between the traditions of the West and the East[41]. This combination works not only within Russia but beyond its borders as well.

The United States of America considers that the only place for Russia on the geopolitical map is the new Europe: the transatlantic Europe based on the union of Germany and France with the expanding EU and NATO (read between the lines: under the auspices of the USA). As for the contemporary Russia, the former national security advisor Zbigniew ,Brzezinski who consulted the US president during the Cold War, called Russia "a black hole" (before that, the USSR was depicted as "the empire

[39] Available at: http://ru.wikipedia.org/wiki/Conchita_Wurst .

[40] Available at: http://ru.wikipedia.org/wiki/Conchita_Wurst .

[41] Available at: http://www.gumilev-center.ru/missiya-rossii-obedinit-vostok-i-zapad/ .

of evil")[42]. Dear former advisor, you should read Fyodor Tyutchev's poem about Russia:

You will not grasp her with your mind
Or cover with a common label
For Russia is one of a kind –
Believe in her, if you are able…

What about Oswald Spengler? In his view, "Russia is Madame Asia. Russia is Asia itself." So, Russia has no Europe but only Asia? This idea is not very clear, following the speculations of the German philosopher.

And, finally, let us consider Spengler's predictions concerning wars for dominance in the world. He witnessed *World War I*, one of the large-scale armed conflicts in the history of the humanity. It is well known that the total casualties among all participants of the world war amounted to 10 million people. World War I led to the February and October revolutions in Russia, the November revolution in Germany, and the elimination of four empires: the Russian, the German, the Ottoman and the Austro-Hungarian Empire, with the latter two being divided. Germany, which had ceased to exist as a monarchy, became territorially smaller and economically weaker. The unbearable conditions of the Versailles treaty (the payment of reparations, etc.) and the humiliation suffered by the nation provoked revanchism moods that became one of the reasons why the Nazis came to power and later were able to wage World War II[43]. There were military, economic, geopolitical, even ecological and other consequences. But the heaviest burden was borne by Russia. Even Sir Winston Leonard Spencer Churchill had to admit that "no other country had such a severe destiny like Russia. Its ship was sinking when a harbor was already in view. It had already survived the storm when everything collapsed: all the victims sacrificed, and the work done"[44].

Vladimir Putin called Russia's losing in WW I unique. Speaking before the RF Council of Federation, Putin said that "our country lost the war to the losing side. It is a unique situation in the history of the humanity. We lost to losing Germany, in fact, surrendering to it but later Germany capitulated before the Entente". It is a result of treason committed by the Bolshevist government that concluded a separate peace

[42] Z. Brzezinski. Velikaia shakhmatnaia doska. Gospodstvo Ameriki i ego geostrategicheskie imperativy. [Great Chessboard. Dominance of America and Its Geostrategic Imperatives]. Moscow, 1999, p. 114.

[43] Pervaia mirovaia voina [World War I]. Available at: http://ru.wikipedia.org/

[44] W. Churchill. Mirovoy krizis [World crisis]// Gosudarstvennoe voennoe izdatelstvo [State Military Publishing] Moscow, 1932.

with Germany[45]. This year saw the 100th anniversary of the beginning of the World War I.

World War II (September 1, 1939- September 2, 1945) was the war of two political and military coalitions and became the largest war in the history of the humanity. 61 countries out of 73 then existing states (about 80% of the population) took part in this war. Military actions were conducted on the territory of three continents and in the waters of four oceans. It is the only military conflict when the Americans used nuclear weapons.

As a result of the war, the role of Western Europe in the world politics was significantly diminished. The USSR and the USA became the main powers in the world. The position of Great Britain and France, though they also won, was rather weak. Europe appeared to be divided into two camps: the western capitalist camp and the eastern socialist one. The relations between the two blocks sharply worsened. A few years later after the end of the war, the world witnessed the Cold War. In this connection, we cannot avoid mentioning the Iron Curtain Speech made by Winston Churchill on March 5, 1946 at Westminster College in Fulton, the US state of Missouri. The USSR considered this speech as a signal to the beginning of the Cold War.

The casualties of the USSR were enormous – 6.3 mln soldiers were killed on the battlefields and died of wounds, 555 000 people died of different diseases, in accidents, sentenced to death by shooting and 4.5 mln people held in captivity or missing. The total demographic losses (including civilians killed on the occupied territory of the USSR) amounted to 26.6 million people[46]. We remember the lines from Yevgeniy Yevtushenko's poem "To the Memory of Yesenin":

In the unfair war we lost twenty millions
and millions in the war with people we've lost.
Can we forget about it deleting memory about?
Only the Russians saved the others more often,
more often do we destroy ourselves.

For comparison: Germany lost 4.270 mln soldiers – they died on the battlefields, of wounds, missing (including 442.1 000 people who died in captivity). At the same time, such losses do not take into account losses among those who volunteered to take part in military units. At least, there is no definite data in the German statistics.

In the contemporary world, the military expansion of the USA and the West is still going on. The scenario of overthrowing the legitimate governments of Iraq, Lib-

[45] Izvestia, August 7, 2014. Available at: http://izvestia.ru/news/528739.

[46] Available at: https://ru.wikipedia.org/wiki/Poteri_v_Velikoy_Otechestvennoy_voyne .

ya and Egypt followed the same pattern: 1) it was planned by the USA and the West under the pretext of the fight against the totalitarian regime with the purpose of democratizing the society; 2) their measures include peaceful demonstrations and protests at the first stage of the fight, and military actions with the joint participation of the NATO troops and forces of the opposition coalition at the second. For example, the 2012 presidential elections in Egypt were won by Mohammed Morsi, a candidate from the Muslim brotherhood, who was Chairman of the Freedom and Justice Party (which was formed by the Muslim brotherhood on April 30, 2011 after the revolution in Egypt)[47]. The worst enemies of the USA and the West – the Muslim brotherhood – appeared useful at a certain stage of "the fight for democracy". The same scenario was in Libya where the so-called "insurgents" or, to be more precise, volunteers or veterans who had participated in different jihads became the allies of the USA and the West. Recently they have turned against the USA and their European allies, and they are considered to have the largest military experience among the opponents of the Gaddafi regime[48]. Thus, the enemies of the USA and the West turned into the enemies of Gaddafi for money. Everything got mixed like in the Borodino battle.

Now let us shortly speak about the events in Ukraine. The Ukrainian government suspended the process of signing the agreement of association between Ukraine and the European Union. In response to that, the population in other cities and towns throughout Ukraine supported the mass and many-month protest in Kiev which began on November 21, 2013. Further, the events developed fast: after the Vilnius summit "The Eastern Partnership" (November 28-29), attempts to demolish the tent camp and the adoption of certain laws (on January 15, 2014) by the Verkhovnaya Rada which provided for more severe sanctions in the case of mass disorders, such protests against the government and the president became more radical. As a result, in Ukraine a coup d'etat took place in February 2014, and the former opposition came to power. On February 22, 2014, the Verkhovnaya Rada issued a decree which stated that V.F.Yanukovich "unconstitutionally refrained from performing his authorities granted by the constitution" and as such failed to perform his obligations and, therefore, the Rada established a date of pre-term elections – May 25, 2014[49]. In their turn, the radical political decisions of the new Ukrainian government led to the mass protests in the southern and eastern parts of the country as well as to the Crimean

[47] Available at: http://ru.wikipedia.org/wiki/Morsi_Mohammed .

[48] Free encyclopedia Wikipedia – Libyan insurgents. Available at: http://ru.wikipedia.org/wiki/ .

[49] Available at: http://ru.wikipedia.org/wiki/Euromaidan .

crisis[50]. The further, the worse. The southeast of Ukraine has become "an experimental site" of civil war between volunteer military forces and Ukrainian militias with numerous casualties among civilians and warring parties. The military operation which began in mid-April did not give quick results.

The analysis of the events in Ukraine shows that the USA and their European allies in the NATO have again used those techniques which they applied in overthrowing the legitimate government in Afghanistan, Iraq, Libya and Egypt. And not only in those countries. A similar (Yugoslavian) scenario was applied in the Balkans[51].

In the conditions of military, economic and informational confrontation in regard to the events in Ukraine, the USA and Western countries have taken quite a tough stance towards Russia. It is evident that the West is interested in Ukraine because, first and foremost, it is Anti-Russia, some sort of an alternative project that prevents Russia from gaining its former power[52]. The USA and the Western countries see Ukraine. with its population of 45 million people. also as an attractive market. Therefore, Washington and Brussels are not willing to give Russia and the Customs Union "such a big piece of the pie". This is the price for the integration to Europe! But the current pseudopatriots of Ukraine seem to understand nothing. They think that under the wing of Europe they will start living better and happier. It is a pity that the many-century history of Russia and Ukraine, the two fraternal peoples, is manipulated by criminals and vandals. By the way, the Investigation Committee of Russia has initiated criminal proceedings against some Ukrainian militias on the basis of the facts which prove that some forbidden substances and forbidden methods of war have been applied on the territory of certain Ukrainian cities as well as in the Donetsk and Luhansk People's Republics. In particular, criminal proceedings were initiated against Governor of the Dnipropetrovsk oblast Ihor Kolomoyskyi and the Minister of Internal Affairs Arsen Avakov. Besides, the RF Investigation Committee initiated criminal proceedings against some unidentified soldiers of the Ukrainian military forces as well as against some representatives of the National Guards of Ukraine and the Right Sector because of shelling of Slavyansk, Kramatorsk, Donetsk, Mariupol

[50] V.S. Belykh. Rossiia, Amerika i Evropa: ostraia faza protivostoianiya na fone ukrainskogo krizisa [Russia, USA and Europe: the Peak of Opposition in the Light of the Ukrainian Crisis]// Bizness, Management i Pravo. [Business, Management and Law]. 201, No. 1, p. 127.

[51] The chairman of the State Duma Committee on Foreign Affairs Aleksei Pushkov considers that Ukraine was planned to have a "Yugoslavian scenario" of overthrowing the government through mass protests. Available at: http://news.mail.ru/politics/16313567/?frommail=1.

[52] Available at: http://nstarikov.ru/blog/24972.

and other settlements in Ukraine pursuant to P.1 Art.356 of the RF Criminal Code (the application of forbidden means and methods of conducting war)[53].

Thus, here are some conclusions: **1.** The decline of contemporary Europe should be considered, first of all, from the point of view of culture and human values. Figuratively speaking, Western Europe today is the Roman Empire in the times of its collapse, particularly during the reign of Gaius Julius Caesar Augustus Germanicus, the Emperor, more well-known under his agnomen Caligula. Caligula is a symbol of unlimited viciousness and domination of the power.

2. At the same time, "the degradation of the western culture" is ultimately the end of one of its trends though it encompasses several centuries. This is the end of "the new history". But this end is the beginning, like the death is at the same time the birth[54]. Reasonably, there is a question: the birth of what? Of a new trend, of a new culture. It looks like people's culture is the new trend, which is logical: the old trend dies away (hence rebirth) giving its way to the new. That was the reason why Sergei Frank criticized the views of Oswald Spengler saying that "…the book by Spengler by its very existence and unusual success works against his success"[55].

3. Under the conditions of the planetary globalization, the USA and the Western countries directly interfere, including in the military way (often without any sanctions of the UN), with the internal affairs of those sovereign states which, for some reasons, do not fit in the Procrustean bed of western values and democracy. Therefore, it seems to the USA and the military and political block of the NATO that they should put everything into "right places" and "correct some defects" in the government and public systems. As we know, they have already "put things in order" in Yugoslavia, Iraq, Afghanistan, Egypt, Libya (and now in Syria). However, they should not make the rest of the world conform to their western democracy principles. Western democracy is not an ideal to follow. Answering the question of a Spiegel journalist, Alexander Solzhenitsyn said:"So, the perception of the West as a Knight of Democracy has been replaced by disappointment that the western policy is primarily based on pragmatism which is often very mercenary and cynical. Many people in Russia perceive it as destruction of ideals"[56]. And not only people in Russia. Unfortu-

[53] Available at: http://news.mail.ru/inworld/incident/18390717/ .

[54] S. Frank. Krizis zapadnoi' kultury [The crisis of the Western Culture]// N.A. Berdyaev. Padenie svyaschennogo russkogo tsarstva [The Collapse of the Sacred Russian Kingdom]. Publitsistika 1914 – 1922, p. 888.

[55] Ibid., p. 888.

[56] Interview by A. Solzhenitsyn to Spiegel. Available at: http://www.izvestia.ru/person/article3106464/.

nately, it has not been understood by a significant part of the Ukrainian population as well as by the Ukrainian political elite. In a word, *suum cuique*!

In the conditions of globalization and military confrontation, Russia has to build up its military potential. Russia needs a complex of measures to be undertaken, including the delivery of new and more technologically advanced equipment, the development of the military on the contract basis, increased military financing, the creation of military bases close to the USA and the Western countries. Russia does not need their love. If they fear us, they will consequently respect us.

"Russia has only two allies: the army and the fleet", said Emperor Alexander III, the Peacemaker. This statement is true even nowadays.

4. The geopolitical interests of Russia are determined by its geographical position, its territory, its population, the economic development, its participation in the world and European political and economic processes. And, certainly, geopolitics is objectively not dependent on who is the head of state.

The geographical position of our country has predetermined the way of its historic development. As it was said above, being situated between the West and the East, Russia plays a linking role. Therefore, at present and in the future, Russia has to fulfill a historic (civilized) mission to unite the East and the West.

Taking into account natural contradictions of the West and the USA, Russia has to play its role and unite collective efforts of Western countries against the USA. The increased American influence is dangerous not only for Russia, but for the Western countries as well. Political adversaries cannot be friends, since they pursue their own interests.

5. After the exchange of the recent economic sanctions, Russia has preferred to deal with those countries which have resisted the pressure from the USA and the West. It is very important that such a choice has to be made not on a short-term, but on a long-term basis. In this case, we cannot speak about concessions or backoffs: the West will not understand that, or even if it does, it will perceive such a step on our part as a weakness. Moreover, the political leaders of Russia have to intensify business relations with China, Brazil and other countries, the BRICS members. They are our strategic partners. And equally, they are the members of the Customs Union.

SOME ASPECTS OF PARTICIPATION OF THE USSR' S SECRET SERVICES IN OPERATION X CONCERNING THE EVACUATION OF THE GOLD RESERVE OF SPAIN (1936)

Sergey V. Ratz
Candidate of Science in Political Studies, Associate Professor,
Institute of Philosophy , St. Petersburg State University,
Saint Petersburg, Russia

Abstract: The article deals with the participation of the USSR's secret services in the transfer of the gold reserve of Spain (1936) to the Soviet Union.

Keywords: gold reserve of Spain (1936), the USSR secret services, civil war in Spain, Operation X.

The 1930s are characterized by the intensifying struggle of the working class of the European countries for democratic change.

In Germany, Italy, Portugal, Hungary, Romania and Japan the Nazi, Fascist and militarist groups came to power.

The Nazi and militarist leaders incited the people of their countries to start repartition of the world and seizure of alien territories. It was clear that the progressive world community was on the brink of a global war with the forces of Nazism and militarism.

In Spain by 1936, a multi-party government had been formed, in which the leftist parties, especially the Socialists, had the leading positions. The reactionary circles among the higher command of the Spanish army could not put up with the social changes brought by the democratic government. In the evening of July 17, 1936, they started a Fascist military revolt.

The governments of Adolf Hitler and Benito Mussolini gave military help to the Spanish putschists. In ten days after the start of the putsch, the transport air forces of Germany and Italy were already transporting the so-called African army (56 thousand people), including 14 thousand ethnic Moroccans and the 11-thousand corps of the foreign legion mercenaries led by F. Franco, from the territory of Spanish Morocco.

The leaders of the USSR clearly recognized that the civil war in Spain was a curtain-raiser for another world war. Joseph Stalin and his entourage took a number of

organizational and political measures to use the conflict in Spain in the interests of security of the Soviet country and to reinforce the influence of the ruling party – All-Russian Communist Party (of Bolsheviks) – VKP(b) – in the global Communist movement.

The X Department, which was active as a part of the X Operation led by the head of the Intelligence Department of RKKA S. Uritsky with the participation of the head of the Foreign Intelligence Department of NKVD – People's Commissariat of Interior Affairs – A. Slutsky, assembled the advisor staff and groups of volunteer military experts. The X Department worked at analysing the intelligence data that was coming from the foreign and military intelligence, planned traffic routes for the Soviet transport vessels with military and humanitarian aid, prepared cover documents. Marshal K. E. Voroshilov, the USSR's People's Commissioner for Defense, personally supervised the activity of the X Department.

The details of this operation were put together on the basis of archive materials and analysed by Yu. E. Rybalkin in his book "Operation X. The Soviet Military Help to the Republican Spain"[1] and by B. A. Starkov in his extensive study "The Avant-Garde War with Fascism. Soviet internationalists in Spain. Some Pages from the History of Operation X", O. Tsarev and D. Costello "Fatal Illusions. From the Archives of the KGB. The case of A. Orlov" and by the Spanish researcher A. Viñas "Spanish Gold in Moscow".

The chekists (Soviet state security officers) and military intelligence officers decided that it made sense to organise arms shipments both from the USSR and from abroad. The task of arms procurement abroad was imposed on the underground Soviet NKVD and the Workers and Peasants' Red Army – RKKA- military intelligence stations, which had to buy arms from foreign companies allegedly for third countries through figureheads and to transport it covertly to Spain.

On September 29, 1936, the Politburo of the Central Committee of VKP (b) approved the suggested plan. The arms transfer headquarters were created at the Intelligence Directorate of the Defense Commissariat, led by the head of the Spanish X Department Colonel G. Shpilevsky. The members of the headquarters also were recruiting personnel to work in Spain as councillors and military experts"[2].

The nature of the special operations implemented by the personnel of the Soviet NKVD required such characteristics as lack of documentation and the increased

[1] Yu.E. Rybalkin. Operatsiia X. Sovetskaia voennaia pomoshch' respublikanskoii' Ispanii [Operation X. The Soviet Military Aid to Republican Spain]. Moscow, 2000, p. 316.

[2] E.P. Sharapov., N. Eitingon. Mech vozmezdiia Stalina [Stalin's Sword of Retribution]. Neva Publishing House, Saint Petersburg, 2003, p. 47.

grade of security. Usually such operations were conducted with the monitoring and close attention by the leaders of the Party and the Soviet government; the missions were often set verbally or in code telegrams which were later destroyed.

The senior command of the Soviet NKVD was urgently putting together a team for the station in Spain. Among the first candidates, the People's Commissar of the Interior G. G. Yagoda recommended sending Senior Major of State Security[3] A.M. Orlov (real name Leyba Lazarevich Felbin, also known as L. L. Nikolsky) under cover as a political attaché for the position of the chief of the NKVD foreign intelligence station in Spain and chief advisor to the republican government on the matters of internal security and counterintelligence.

The candidature of A. M. Orlov was approved at the session of the Politburo of the Central Committee of VKP (b) on July 20, 1936[4].

Orlov was probably one of the best and most experienced employees of the central office of the Soviet NKVD; he spoke several foreign languages and had experience working abroad, including underground work.

The NKVD foreign intelligence staff in Spain was recruited in a similar way. Let us list the most notable of the station personnel: A. M. Orlov (chief of station, Senior Major in 1936), G. S. Syroezhkin (deputy, Major, 1936), N. I. Eitingon (deputy, Major, 1936), S. A. Vaupshasov (Captain, 1936), L. P. Vasilevsky (Captain, 1936), N. M. Belkin (Senior Lieutenant, 1936).

What were the tasks set for a NKVD station active in a country where civil war was raging?

The advisors to the republican government and the employees of the Soviet NKVD had to deal with both external and internal enemies.

One of the tasks the Center put before the station personnel was collecting intelligence information on putschists, their leaders, political parties, on the strength, tools and methods of the intelligence agencies of the frankists and their allies, the Nazi regimes.

Besides this, the Center set the following tasks before the station: exposing enemy agents, preventing acts of terror by putschists and their allies, reorganizing the intelligence and counterintelligence agencies of the republican Spain, creating training camps for training of personnel, organizing the training process and participating in it as instructors.

[3] The special rank of Senior Major of Main Directorate of State Security of NKVD USSR established by the decree of CEC and PCC of USSR of September 22, 1935 corresponded to the rank of brigade commander in RKKA, Colonel from 1940.

[4] Ibid., p. 46.

However, there were also specific tasks related to the fact that the Party and Soviet leaders still believed the Trotskyism as a political movement to be one of the main enemies of the USSR.

According to O. Tsarev, before leaving for Spain, the NKVD station chief A. M. Orlov was received by I. V. Stalin, who set him a task to liquidate the Trotskyist leaders, to investigate them proactively through the agent network and to compromise them.

Besides that, I. V. Stalin touched on the issue of Spain compensating for the arms and humanitarian aid deliveries from the USSR. There is a theory that it was during the meeting with A. M. Orlov that the Secretary General of the VKP (b) defined the issue of evacuating the Spanish gold reserve to the USSR. He gave verbal instructions to A. M. Orlov to persuade the Prime Minister of Spain to make this decision; however, he forbade leaving any document trail in the form of debt warrants or any other financial documents proving the fact of transfer, the volume and the place of the gold delivery.

As the further events have shown, this condition turned out to be the stumbling block in the negotiations which A. M. Orlov conducted with the Prime Minister and the Minister of Finances of Spain.

The details of the operation were specified in coded messages by I. V. Stalin who, as it is well known, signed them with a symbolic name "Ivan Vassilievich". The coded messages were usually destructed after reading.

Be as it may, after a meeting with the republic's chief advisor on security and counterintelligence A. M. Orlov, the Prime Minister of Spain F. Caballero gave the republic's Minister of Finances J. Negrín instructions on the transfer of the gold reserve.

There is also a theory of the Spanish researcher A. Viñas, according to which on October 15, 1936, the Prime Minister of Spain F. Caballero appealed to the government of the USSR to accept for safekeeping about 500 tons of gold.

The fact of the republican government's request to accept the gold reserve of Spain for safekeeping is recorded in the Special File of the Minutes of the meetings of Politburo of the Central Committee of VKP (b). Let us quote its text in full: "Minutes No. 44 of the meeting of Politburo of the Central Committee of VKP (b) of October 17, 1936. Question by comrade Rosenberg[5]. Authorise comrade Rosenberg

[5] Rosenberg Marcel Izrailevich, 1896 – 1938, Soviet diplomat, from 1936 to 1937 the plenipotentiary representative of the USSR in Spain, executed by shooting in 1938 as an enemy of the people, later rehabilitated.

to respond to the Spanish government that we are ready to accept the gold reserve for safekeeping and that we agree to transport this gold on our vessels returning from ports"[6].

In the opinion of the author of this article, there are no contradictions between those versions, since Rosenberg's appeal to the Politburo of the Central Committee of VKP (b) was a logical conclusion to the working meetings of Prime Minister F. Caballero and J. Negrín with the chief of the NKVD station A. M. Orlov concerning the issue of evacuating the gold reserve of Spain to the USSR.

A.M. Orlov coordinated all the details of the operation for transportation of the gold from Madrid to the territory of the naval base in Cartagena with F. Caballero and J. Negrín. Despite the Prime Minister's repeated suggestions about signing the certificate for delivery and acceptance of gold, the chief military advisor on internal security and counterintelligence matters did not take this step, convincing the head of the government that the document in question would be signed in Moscow by one of the leaders of the USSR.

P.A. Sudoplatov mentions the following detail in his memoirs when he talks about the transfer of the Spanish gold: "The document on the transfer of the gold was signed by F. Caballero, the Prime Minister of the Spanish republic, and by the Deputy People's Commissar for Foreign Affairs N. N. Krestinsky, later executed by shooting as an enemy of the people together with N. I. Bukharin after the show trial in 1938"[7].

That said, the acceptance certificate for the gold was signed in early February of 1937 in Moscow by the People's Commissar for Finance G. Grinko, the Deputy People's Commissar for Foreign Affairs N. Krestinsky and the Ambassador of the Spanish republic Marcellino Pasqua. After the end of the civil war, that copy of the certificate was kept by J. Negrín and only after his death fell into the hands of F. Franco.

The gold reserve was removed from Madrid to the port of Cartagena by railway in a special train. The gold bars were packed into wooden boxes, sixty five kilos in a box, and moved from the Cartagena powder depots to the wharf on lorries driven by Soviet tank troopers. The security during the loading of the gold was provided by a group of international fighters, mostly ethnic Germans. The NKVD station officers managing the operation were N. I. Eitingon and L. P. Vasilevsky. A. M. Orlov provided general direction. For purposes of secrecy, the loading was done at night. Dur-

[6] Yu.E. Rybalkin. Operatsiia X. Sovetskaia voennaia pomoshch' respublikanskoii' Ispanii [Operation X. The Soviet Military Aid to Republican Spain]. Moscow, 2000, p. 92.

[7] P.A. Sudoplatov. Spetsoperatsii NKVD. Lubianka i Kreml' 1930 – 1950 [Special operations NKVD. Lubianka and Kremlin 1930 – 1950]. Olma-Press, Moscow, 1997, p. 73.

ing the day, the Cartagena port was heavily bombarded. A cover story was developed and communicated to everyone connected with the operation which stated that the gold bars in boxes were being moved to the USA. A. Orlov under the name of Blackstone played the role of the American representative of the National Bank. Despite all the precautions, however, already on the next day the inhabitants of Cartagena were discussing the news about Spain's gold being moved to Russia.

Here's how N.G. Kuznetsov, at that moment the naval attaché and senior naval advisor of the republican government, described the situation in his article "The Spanish navy in the national revolutionary war, 1936-1939": "I was also embarrassed by how this whole operation became known throughout the city, especially among anarchists. On the next day, the secret cargo was, of course, the freshest sensation discussed by the population in every possible way. The crews of the steamships chuckled saying that they were loading fruit, since the boxes were too small and unusually heavy for that"[8].

At the exchange rate existing in 1936, 510 tons of gold bullion were worth approximately half a billion US dollars. According to Yu. E. Rybalkin's information, they were evacuated in October and November of 1936 on four Soviet transport vessels, *Neva*, *Kim*, *Kuban* and *Volgoles*, and safely brought to Odessa[9]. N.G. Kuznetsov gives precise dates for loading and departure of Soviet ships with gold on board, from October 22 to October 25, 1936.

Since there was a leak of information about the transportation of Spanish gold to the USSR, the navies of the Nazi Germany and Fascist Italy organized an unprecedented operation for interception of the Soviet cargo vessels transporting the gold reserve of Spain.

It is worth noting that the Italian and German submarines and the putschist military vessels from September 1936 to October 1938 made more than 866 attacks on Soviet cargo vessels. From 1936 to 1939, three vessels were sunk: *Komsomol*, *Timiryazev* and *Blagoyev*. Seven Soviet ships were captured together with their crews and interned at ports controlled by putschists.

For this reason, the NKVD station, using its agents, spread misleading information about the route of the "gold caravan". At the same time, N. G. Kuznetsov developed an alternative route which went along the coasts of Northern Africa, Near East

[8] N. Nikolaev, N.I. Kuznetsov. Iz istorii osvoboditel'noi' bor'by ispanskogo naroda [From the history of the liberation struggle of the Spanish people]. Publishing House of the Academy of Sciences of USSR, Moscow, 1959, p. 27.

[9] Yu.E. Rybalkin. Operatsiia X. Sovetskaia voennaia pomoshch' respublikanskoii' Ispanii [Operation X. The Soviet Military Aid to Republican Spain]. Moscow, 2000, p. 315.

and Turkey and took the "gold caravan" to its desired destination without losses. He also obtained approval for the caravan to be escorted by the republican naval squadron up to the neutral waters of Algiers.

The delivery of the precious cargo from Odessa to Moscow was arranged by the Commissar of State Security 2nd rank, Deputy People's Commissar of the Interior of Ukraine Z. B. Katsnelson[10], later executed in 1938 (he was A. M. Orlov's cousin).

There is a theory that it was the arrest of Z. B. Katsnelson that mostly brought A. M. Orlov to the decision to go underground and become a defector. The A. M. Orlov's biography will be discussed in detail in another article.

In November 1936, for his successful management of the operation on the evacuation of the gold reserve of Spain A.M. Orlov was given an extra promotion to the rank of the Senior Major of State Security and was decorated with the order of Lenin.

At the same time, in Yu. E. Rybalkin's study "Operation X. Soviet military aid to republican Spain (1936-1939)", the author states that A. M. Orlov received no rewards for implementing the government asignment of evacuating the gold reserve of Spain[11].

Concerning this issue, P. A. Sudoplatov remembers that "…Orlov was given the most serious covert assignments, one of which was the evacuation of the gold of the Spanish republic to Moscow. This bold operation led to his promotion. The Pravda newspaper wrote that the Senior Major of State Security[12] Nikolsky (aka A. M. Orlov or Feldbin) was awarded with the order of Lenin for implementing an important governmental task. The same issue of the newspaper also stated that the Major of State Security Naumov (actually N. G. Eitingon) was decorated with the order of Red Banner, and Captain of State Security L. P. Vasilevsky – with the order of Red Star"[13]. The naval attaché and senior naval advisor of the republican government N. G. Kuznetsov was decorated with the order of Lenin.

For more than forty years, that is, during the whole period of Franco's dictatorship, the USSR maintained no diplomatic relations with Spain. The government of Spain had repeatedly appealed to the government of the USSR with the request to

[10] A.I. Kolpakidi. Entsiklopediia sekretnykh sluzhb Rossii [Encyclopedia of secret services of Russia], AST Astrel, Moscow, 2004, p. 565.

[11] Yu.E. Rybalkin. Operatsiia X. Sovetskaia voennaia pomoshch' respublikanskoii' Ispanii [Operation X. The Soviet Military Aid to Republican Spain]. Moscow, 2000, p. 94.

[12] The special rank of senior major of Main Directorate of State Security of NKVD USSR established by the decree of CEC and PCC of USSR of September 22, 1935 corresponded to the rank of brigade commander in RKKA, colonel from 1940.

[13] P.A. Sudoplatov. Spetsoperatsii NKVD. Lubianka i Kreml' 1930 – 1950 [Special operations NKVD. Lubianka and Kremlin 1930 – 1950]. Olma-Press, Moscow, 1997, p. 75.

return the gold reserve of Spain transfered in 1936. Until late 1990s, the USSR did not even officially admit the fact of the gold reserve of Spain being in the USSR, and only after the death of Franco, that is, since 1975, complicated negotiations have begun about partial compensation of the gold still not returned. It is worth noting that 90% of the volume of the gold reserve of Spain accepted for safekeeping in the USSR in 1936 was in coins, that is, also had a numismatic value.

At any rate, the NKVD station and the RKKA military intelligence team as a part of Operation X brilliantly fulfilled the task of evacuation of the gold reserve of Spain set before them by the Soviet and Party leadership.

According to the information from the economist and researcher S.V. Burtsev, on various stages of its development, Russia had the following gold reserves: 1914 – 1527.8 tons, 1936 – 1020 tons, 1953 – 2048 tons, 1991 – 484 tons, 1992 – 290 tons. Currently, Russian Federation is in possession of more than 2000 tons of gold.

THE BAR ASSOCIATION OF SVERDLOVSK REGION "BELYKH AND PARTNERS"

The Bar Association of Sverdlovsk Region "Belykh and Partners", hereafter referred to as "The Bar Association", was set up and exercises its activities in accordance with the RF legislative acts and the Charter of the Bar Association.

The Chairman of the Bar Association is Vladimir Belykh, Doctor of Law, Professor, Honoured Worker of Science of the Russian Federation, Director of the Institute of Law and Entrepreneurship of the Ural State Law University, Head of Entrepreneurial Law Department, Honoured Advocate of Russia, Arbitrator of International Commercial Arbitrage at the RF Chamber of Commerce and Industry, a Bar member since 2003.

In 1985-1986, V.S. Belykh participated in a research programme in the Centre for Commercial Law Studies at Queen Mary School of Law, University of London.

Specialization: Entrepreneurial (Commercial) Law; Banking; Bankruptcy (Insolvency) of Business Subjects; Contract Law; Investment Activities; Equity Market; Insurance Law.

V.S. Belykh has a great experience of analytical work.

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The seat and the postal address of the Bar Association:
75 Bolshakova St, Suite 31,
Yekaterinburg, Sverdlovskaya Oblast, Russia, 620142
Tel./fax: +7 (343) 215 78 55; +7 (343) 215 78 99.
Website: www.martindale.com/Belykh-Partners/law-firm-1913204.htm,
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Email: belykhvs@mail.ru

THE NINTH SESSION OF THE EURO-ASIAN LAW CONGRESS

The Association of Lawyers of Russia supported by the Plenipotentiary Envoy of the President of the Russian Federation to the Ural Federal District and the Governor of Sverdlovsk oblast are holding the Ninth Session of the Euro-Asian Law Congress in Yekaterinburg, hosted by the Ural State Law University on June 18-19, 2015. The Session will be devoted to the problems of "Law and National Interests in Modern Geopolitics".

Expert groups have prepared reports on the following topics: "Law and National Security: Geopolitical Dimension"; "Interaction of Legal Systems. Contemporary International Legal Discourses"; "International and National Mechanisms of Dispute Resolution in the Euro-Asian Region"; "International Standards of Regulating Entrepreneurship "; "Common and Special Aspects in the Development of Private Law in National Legal Systems"; " Protection of National Information Space under Criminal Law"; "Legal Framework for Labor Market Performance in the Current Economic Environment"; "Legal Framework for Interstate Partnership and Integration in the Sphere of Economy, Finance, Taxation, and Customs Relations"; "Constitutional Fundamentals of Ensuring National Interests in the States of the Euro-Asian Region".

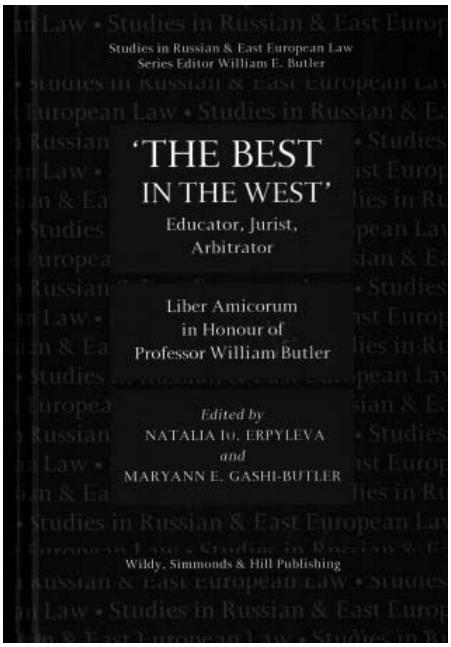
The work of the 9th Session will be organized in the format of a plenary meeting, meetings of basic expert groups and round-table discussions.

The expert group headed by Professor V.S. Belykh will discuss the following issues: state and international regulation of entrepreneurship; state and international regulation of innovative activities; state and international regulation of investment activities; state and international regulation of external economic activities; international standards of banking activities, international standards regulating insurance activities, international standards regulating professional entrepreneurial activities in the securities' market; international standards of audit and auditing activities; international standards of estimating activities; technical regulating for products, work and services in the sphere of entrepreneurship and ecology.

We invite you and your colleagues for whom it might be interesting to take part in the 9th Session of the Euro-Asian Law Congress as a member of the expert group on discussing the problems of international and state regulation of entrepreneurial activities in the conditions of the current geopolitical situation.

Additional information about the Congress can be found on the official website of the Euro-Asian Law Congress (www.lawcongress.ru).

PROFESSOR WILLIAM BUTLER: JUBILEE OF THE FOUNDING EDITOR



Two books have been published in London to mark the 75th birthday of W. E. Butler, the founding editor of *Russian Law: Theory and Practice*, who served in this capacity from 2004 to 2009 inclusive. The first, edited by Natalia Iur'evna Erpyleva and Maryann E. Gashi-Butler, is a collection of eighteen essays by colleagues and former students devoted to some of his principal interests: legal history, comparative law, and international law. A substantial introduction by Gashi-Butler is followed by a lengthy assessment of Butler's role in the development of international legal doctrine in Eastern Europe by Judge V. G. Butkevich and Olga Butkevich, an appreciation of his approach to Soviet and post-Soviet legal systems by Jane Henderson, and an evaluation of his part in the "Cold War" era by Boris Mamlyuk. Legal history encompasses for these purposes Roman Law, Russian Law, and Soviet Joint Enterprise legislation with contributions successively by Dmitrii V. Dozhdev, Vladimir A. Tomsinov, and Stephen Lucas.

Comparative legal issues are considered by Alexander Romanov, Vladimir S. Belykh, Alexander Vereshchagin, Kaj Hober, Alexander Trunk, Vladimir I. Lafitsky, Evgen B. Kubko, Oleksiy Kresin, and Michael Palmer (Chinese law). Matters of private and public international law are addressed by Natalia Erpyleva, Ambassador Roman A. Kolodkin, and Ekaterina Bykhovskaia. Photographs embellish the volume, published until the title: *"The Best in the West": Educator, Jurist, Arbitrator: Liber Amicorum in Honour of Professor William Butler* (2014).

A companion to the Festschrift above is a personal bibliography compiled by Butler to commemorate 50 years since his first scientific publication (1964-2014). Organized according to a detailed subject classification, the volume contains 5,725 entries and is entitled: *International and Comparative Law: A Personal Bibliography* (2015). A concise autobiography introduces the volume.