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DEAR READERS,

The year of 2016 has come. In the Oriental Calendar, this is the year of the Fire Monkey that will be filled with tumultuous events. These events will be unforeseen and sometimes illogical. The Red Monkey is favorable to those who take their decision independently and are steady in purpose. In a word, the year of 2016 promises to be bright, filled with unexpected events, easy and happy. However, in reality, this year will be hard for many countries in the world, including Russia, mainly in the economy. Now, the prices are going up, jobs are vanishing, exchange rates are rising, and the ruble is losing its value.

2016 is also rich in memorable and historic events. For example, 19 February marks the 155th anniversary of the adoption of the Manifesto emancipating Russia's serfs, 20 March is the date of the Bolshoi Theatre foundation, 20 April is the Day of Air and Space (55th anniversary), 12 June is the Day of Russia (25th anniversary), 19 October is the day of the Tsarskoye Selo Lyceum (205th anniversary), 25 December is the day when the Soviet Union disintegrated 25 years ago.

2016 is rich in memorable days connected with City Days in Russia. 22 May is the City Day of Ivanovo (455th anniversary), 5 June is the City Day of Irkutsk (355th anniversary), 12 June is the City Day of Saransk (375th anniversary), Tambov (380th anniversary), Ulan-Ude (350th anniversary), 5 August is the City Day of Orel (450th anniversary), Belgorod (350th anniversary), 7 August is the City Day of Omsk (300th anniversary).

On 9-10 June, the X Session of the Euro-Asian Law Congress "Law, Politics, Economy in the Modern World: Challenges of the 21st century" will be held in Yekaterinburg. The work of the session will be organized in the format of plenary meetings, meetings of expert groups and round-table discussions. The current issue of "Russian Law: Theory and Practice" journal is devoted to the Law Congress.

During the Law Congress, a commemorative event devoted to the 85th anniversary of the Ural State Law University (former Sverdlovsk Institute of Law) will be held.

This September marks the 40th anniversary of the Institute of Law and Entrepreneurship of the Ural State Law University (former Faculty of Legal Service in the National Economy System).

Dear readers, take care of yourselves and your relatives. Love your neighbors as yourselves. Not to lose yourself in this raging world is very important.

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**

WITHHOLDING TAX ON AGENCY FEES UNDER THE RUSSIA-GERMANY TAX TREATY (ARTICLES 14, 15 AND 21)

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Abstract: The article is devoted to the analysis of cross-border tax case No A56-20669/2013 (*Mr. Goncharov vs. the Russian Tax Administration*) which was connected with the issues of scheduling income derived from an agency fee as well as with the issue of interpretation of the term *dependent work/income from employment* (Article 15 of the OECD / UN Model). The options for qualification of the respective income in line with Article 21 "Other income" or Article 14 "Independent personal services" were also under discussion. However, the parties in the case did not consider the potential of Articles 7 or 13, which, in principle, may also be hypothetically relevant in comparable situations. In general, the case also provides interesting examples of the interpretation of Articles 3 (2) of tax treaties based on the UN Model / OECD Model, as the central point of the dispute related to the applicability or non-applicability of the definitions of tax treaty terms derived by national courts from the domestic non-tax legislation of the source country. Meanwhile, the concept of the "context" was not analysed in detail in the dispute.
Key words: International taxation, withholding tax on agency fees, taxation under the Russia-Germany Tax Treaty, interpretation of Articles 13, 14 / 7, 15 and 21 of the OECD / UN Model Tax Convention.

Introduction

One of the important factors influencing the further development of the case law on international taxation in the Russian Federation in 2014 was that the RF Supreme Commercial Court and the RF Supreme Court were merged. In the circumstances when at the lower levels, commercial courts and courts of general jurisdiction remain separated and autonomous, the role of the decisions of the commercial courts of federal districts (i.e., third instance or the so- called cassation) has increased significantly.[1] Accordingly, the role of the administrative practice of the tax authorities has increased as well.

[1] The above-mentioned may explain why this paper focuses not on the analysis of the decision of the RF Supreme Commercial Court which only functioned as an independent jurisdiction until 8 August 2014, but on the decision of the Federal Commercial Court of the North-West District.

The precedent, which is worth analysing , is cross-border tax case No A56-20669/2013 (Mr. *Goncharov vs. the Russian Tax Administration*) which was connected with the issues of scheduling income derived from an agency fee as well as with the issue of interpretation of the term *dependent work/ income from employment* (Article 15 of the OECD / UN Model). The options for qualification of the respective income in line with Article 21 "Other income" or Article 14 "Independent personal services" were also under discussion. However, the parties in the case did not consider the potential of Articles 7 or 13, which, in principle, may also be hypothetically relevant in comparable situations.

In general, the case also provides interesting examples of the interpretation of Articles 3 (2) of tax treaties based on the UN Model / OECD Model, as the central point of the dispute related to the applicability or non-applicability of the definitions of tax treaty terms derived by national courts from the domestic non-tax legislation of the source country. Meanwhile, the concept of the "context" was not analysed in detail in the dispute.

Finally, there are grounds for assuming that double taxation was not effectively eliminated in the framework of the case. Thus, the competent authorities of the contracting states and the national courts did not manage to ensure the coherent application of the tax treaty (in the sense of the BEPS action plan); the taxpayer, at the same time, did not try to invoke (in any form) the mutual agreement procedure.

Facts of the case

On 2 October 2010, an agency contract was concluded between a Russian company – ZAO "NPO Rekonstrukziya" (hereinafter: *Society, the claimant*) and a German resident – D.V. Goncharov (hereinafter: *Agent, the taxpayer*) according to which D.V. Goncharov agreed to provide a complex scheme of legal and practical actions aimed at selling some objects of immovable property (plots of land) owned by the Society.

ZAO "NPO Rekonstrukziya" paid to Mr. Goncharov an agency fee as a share of the gains received in connection with the alienation of the immovable property. The amount of the agent's fee according to the contract was EUR 80 000.

When paying the fee to the agent, ZAO "NPO Rekonstrukziya" withheld individual income tax in the amount of EUR 24 000 (the applicable tax rate for non-residents is 30 %) believing that the Society should act as a tax agent of D.V. Goncharov in accordance with the domestic tax legislation. Thus, the Russian income tax was actually withheld in 2011.

On 10 December 2012, D.V. Goncharov received a notification from the Tax Administration of Munich requesting payment of income tax in Germany in connection with the above-mentioned agency fee, as it was qualified as "other income" in the sense of Article 21 of the Russia-Germany Tax Treaty.

In the given notification, the Tax Administration of Munich clarified that it considered the agent's fee to have been received as a result of the intermediary activity in selling land plots in the amount of EUR 80 000, and, consequently, the exclusive tax right in regard to the respective income should belong to the state of residence of the taxpayer (Germany).

In order to comply with the notification of the Tax Administration of Munich on 20 December 2012, D.V. Goncharov actually paid the required amount of income tax in Germany.

On 23 January 2013, he sent a letter to ZAO "NPO Rekonstrukziya" asking for return of the amount of income tax which was withheld in Russia in 2011.

On 14 February 2013, guided by Articles 78 and 231 of the RF Tax Code, the Society sent a claim to the Russian Tax Administration (in St. Petersburg) asking it to return income tax in the amount of RUB 943 294 (EUR 24 000) which had been withheld and paid into the Russian budget.

On 25 February 2013, the Russian Tax Administration took the decision to refuse to return the tax on the agent's fee which had been withheld in 2011 and made reference to Article 15 of the Russia-Germany Tax Treaty.

Thus, double taxation was not effectively eliminated; moreover, in the source country (i.e., Russia), the gross (but not net) base was taken into account for tax purposes.

There is no information on whether the taxpayer tried to invoke the mutual agreement procedure or made any claims in his country of residence (i.e., Germany). However, the Society (i.e., the Russian tax agent), taking into account the above-mentioned letter received from D.V.Goncharov, challenged the decision of the Russian Tax Administration at the Russian Commercial Court in St. Petersburg.

The decisions

The case was tried at three instances of the Russian Commercial Courts. Finally, on 3 February 2014, the Federal Commercial Court of the North-West District in Decision No A56-20669/2013 rejected the argument of ZAO "NPO Rekonstrukziya" that the agency fee should be qualified in accordance with Article 21 "Other Income" or Article 14 "Independent Personal Services" and supported the interpretation proposed by the Russian Tax Administration.

Arguments of the claimant

The arguments of the claimant were as follows: the legal relations that had arisen between the Society (Russian company) and D.V. Goncharov (German resident) were within the scope of Article 21 of the Russia-Germany Tax Treaty. As such, under Article 21, the income of D. V. Goncharov should be subject to taxation only in the state of his residence, i.e., Germany. In the claimant's opinion, the application of Article 15 of the treaty to the situation under discussion was not justified, as the services were provided not on the legal basis of a contract of employment but within the framework of the execution of a civil law contract concluded between the parties. The Society considered, consequently, taking into account these circumstances, D. V. Goncharov to be liable to individual income tax only in his state of residence. Thus, the Society, as the tax agent which had acted in the name of the taxpayer (in accordance with domestic tax legislation), tried to return the income tax which had been withheld in the source country.

First instance decision

On 12 June 2013, rejecting the arguments of ZAO "NPO Rekonstrukziya", the court of first instance held that the remuneration paid to D.V. Goncharov in accordance with the agency contract should be regarded as income received from the performance of work (labour activity). The Court did not agree with the argument of the Society that for the purpose of applying Article 15 of the treaty it was necessary to take into account only the income received from work performed on the basis of employment contracts concluded in accordance with the provisions of domestic labour law (the RF Labour Code).

In accordance with the decision of the Court of first instance, the tax paid on the territory of a foreign state (i.e., the residence state – Germany) was not a reason to regard the tax rightfully paid on the Russian territory (the source state) as a tax paid in excess.

The Court of Appeals

3.3. On 24 October 2013, refusing to uphold the appeal of the Society, the Court of Appeals additionally noted the following:

(a) – In accordance with Article 207 of the RF Tax Code, taxpayers liable to individual income tax are (1) Russian residents and (2) also non-residents of Russia receiving income from Russian sources.

Article 208 (1(6)) of the RF Tax Code provides that "remuneration for the performance of employment duties or other duties, work performed, a service rendered or the performance of an act in the Russian Federation" should be regarded as income received from Russian sources.

Thus, the remuneration received by a non-resident of the Russian Federation for performing labour obligations on Russian territory is income from Russian sources and is subject to taxation in the Russian territory at the rate of 30 % in accordance with Article 224 of the RF Tax Code.

(b) – Meanwhile, Article 7 of the RF Tax Code provides priority for the provisions of the internationals treaties, concluded and ratified by the Russian Federation.

According to Article 15 (2) of the Russia-Germany Tax Treaty (which follows the OECD model):

"Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:

a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned, and

b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and

c) the remuneration is not borne by a permanent establishment which the employer has in the other State".

In the view of the Court of Appeals, as a non-resident of the Russian Federation, D.V. Goncharov would have been taxable in Germany (the residence state) if all three of the above conditions of the Treaty had simultaneously been met.

(c) – Challenging the decision of the court of first instance, the Society argued that D.V.Goncharov did not carry out any employment activity but rendered services on the basis of a civil law contract. Consequently, the taxable income was *not within the scope of Article 15* of the respective tax treaty.

However, the Court of Appeals did not support this argument due to the following: Article 3 (2) of the Russia-Germany Tax Treaty (which partly follows the OECD model) provides that:

"As regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies".[2]

[2] The respective part of the wording of the OECD model ("…any meaning under the applicable tax laws of that state prevailing over a meaning given to the term under other laws of that State") was not included in the text of the Treaty.

Thus, the Court of Appeals held there was no legal definition of the concept of *dependent work/income from employment* in the Russia-Germany Tax Treaty, so in those circumstances, for the purposes of the right settlement of the case, it was necessary to be guided by the norms of the Russian domestic legislation.

According to the Court, the regulation of attracting and using foreign workers in Russia is exercised on the basis of the provisions of Federal Law of 25 July 2013 No.115-FZ "On the Legal Status of Foreign Citizens in the Russian Federation".

Article 2 of that Law states that "…a foreign worker is a foreign citizen who is temporarily on Russian territory…"; the same article provides for the definition of the term *employment* which includes "*any work exercised in accordance with a labour contract or any services rendered in accordance with an agreement regulated by civil legislation*".

On the basis of the above-mentioned argument, the Court held that a foreign citizen can work in the RF both on the basis of a labour contract and a civil contract. Consequently, by virtue of domestic tax legislation, in the opinion of the Court, the income received by a non-resident from such activities is subject to income tax in the source country, i.e., Russia in this case. Thus, taking into account the above-mentioned definition (Article 2 of Federal Law of 25 July 2013 No.115-FZ "On the Legal Status of Foreign Citizens in the Russian Federation"), the Court applied Article 15 of the tax treaty and confirmed the position of the Russian Tax Administration concerning the at-source taxation of the respective agency fee.

(d) – The Court of Appeals upheld the decision of the Court of first instance not to apply Article 21 and Article 14 of the tax treaty.

In particular, the Court of Appeals held as unjustified the claimant's reference to Article 14 of the tax treaty according to which:

"Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character may be taxed in the other Contracting State only if a person has a fixed base regularly available to him in that other State for the purpose of performing his activities. In such case only incomes attributable to that fixed base may be taxed in that other State".

The Court also rejected the reference to Article 14 (2) of the treaty:

"The term "*rofessional services* includes especially independent scientific, literary, educational or teaching activities, independent artistic activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants".

Thus, according to the position of the Court of Appeals, the nature of the services rendered by D.V.Goncharov to the Society was not covered by Article 14 of the tax treaty.

In February 2014, the Federal Commercial Court of the North-West District in Decision No A56-20669/2013 approved the decisions of the Court of first instance and the Court of Appeals and reproduced the respective arguments and justifications of the lower courts.

Comments on the case

The case under discussion does not seem to be very complicated; however, it touches upon some fundamental issues of international taxation, in particular:

(1) general rules for interpretation of tax treaty law,

(2) conflicts of legal qualifications in regard to some incomes,

(3) differentiation between dependent (Article 15) and independent work (Articles 14 or 7),

(4) equal tax treatment of nationals/ citizens and foreign citizens;

(5) scope of Article 21 of the OECD Model, etc.

Further, I will try to briefly analyse the respective issues to the extent they are relevant to the case law under discussion.

The concept of employment

In essence, the courts' reasoning was focused on the concept of *employment* which should be applicable to foreign citizens/non-residents for tax treaty purposes. In this particular case, the justification for the courts' decisions was fully based on the interpretation of domestic law rules; in particular, it boiled down to formal references to Federal Law No.115-FZ "On the Legal Status of Foreign Citizens in the Russian Federation" (at the same time, it is important to mention that there is no indication in the decisions of the courts that Mr. D. V. Goncharov – a person who has a typical Russian family name – actually held a foreign citizenship at the time of the dispute. The Russian tax administration proved that he was a German resident in the fiscal year 2011, but the parties did not seem to discuss any facts connected with citizenship at all, though, in my opinion, it was a key issue for the application of Federal Law No.115-FZ).

It is evident that the rules for interpretation applicable to the domestic law may be different from those applicable to international treaties. In particular, the Russia-Germany Tax Treaty is an international agreement, and rules governing its interpretation are provided in Articles 31 – 33 of the Vienna Convention on the law of treaties (VCLT). As such, according to Article 31 (1) of the VCLT, a treaty shall be interpreted *in good faith* in accordance *with the ordinary meaning* to be given to the terms of the treaty in *their context* and in the light of its object and purpose.

At the same time, Article 3 (2) of the Russia-Germany Tax Treaty states that: as regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, *unless the context otherwise requires*, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies.

Thus, the purpose of the courts in this case was to find the balance between Article 31 (2) of the VCLT and Article 3 (2) of the tax treaty, as the reference to domestic law (provided for by the tax treaty) should not be understood as a ground for interpretation of tax treaty terms against their context. In this particular case we see that the Russia-Germany Tax Treaty (which follows the UN Model and the 1977 OECD Model) clearly differentiates between *dependent work/employment* (Article 15) and *independent work/independent personal services* (Article 14). Thus, in fact, it was not reasonable to apply provisions of domestic non-tax law (Federal Law No.115-FZ) which is evidently against the context of the tax treaty, as it disregards any differences between dependent and independent work and does not allow for the application of different tax treatment as provided for respectively by Article 14 and Article 15 of the tax treaty. On the contrary, in accordance with the domestic approach (proposed by the courts), in nearly all cases connected with cross-border taxation of incomes from the work of individuals, Article 15 should prevail over Articles 7, 14 and 21 of the treaty.

It seems that the above-mentioned domestic approach to the interpretation of tax treaties is quite questionable and violates Article 7 of the RF Tax Code, Article 15 (4) of the RF Constitution, which provides for the priority of international law and the principle "*Pacta sunt servanda*". From international and global perspectives, one might see, in the courts' reasoning under discussion, some contradictions with Article 31 (1) of the VCLT and the wrong understanding of Article 3 (2) of the respective tax treaty in the light of the facts of the particular case.

Articles 14(2) and 3(2) of the Russia-Germany DTC

Another issue in the case was connected with the interpretation of the provisions of Article 14 (2) of the Russia-Germany Tax Treaty. The Courts limited the scope of the Article only by independent personal services which were *directly mentioned* in it. However, from the wording of Article 14 (1), there follows the idea of an open and non-restricted list of services, an income derived from which is taxable in accordance with the rules of Article 14 (1) of the treaty.

Besides, the courts' conclusion in regard to the "closed list" of independent personal services is not supported by the Commentary on Article 14 of the OECD Mod-

el: "The meaning of the term *professional services* is illustrated by some examples of typical liberal professions. The enumeration has an explanatory character only and *is not exhaustive*."(paragraph10).

Thus, there is a basis for supposing that the courts' reasoning concerning the non-applicability of Article 14 in the framework of this case is, at least, not sufficient and not convincing enough in the light of the arguments which were used.

Article 3(2) of the Russia-Germany Tax Treaty states:

" … any term not defined therein (in the Convention) shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that state *for the purposes of the taxes to which the convention applies*."

Thus, Article 3(2) assumes the reference to domestic *tax legislation* of the contracting states to the extent to which the tax in question is covered by the tax treaty. However, the Courts tried to invoke the national law which does not meet this criterion (Federal Law of 25 July 2002, No.115-FZ "On the Legal Status of Foreign Citizens in the RF" regulates the participation of foreign citizens, but not in the sphere of taxation; moreover, this national law has, in principle, a different object of regulation (migration, visa formalities, etc.).[3]

In addition, Federal Law of 25 July 2002, No.115-FZ uses, for the purpose of the definition of legal treatment, the criterion of citizenship, but not of residence; meanwhile, in Russian law, citizenship and residence are fully independent legal institutes. In these circumstances, the reference to Law No.115-FZ not only contradicts the rules of interpretation of international treaties; it might also create another problem – unjustified discrimination.[4] Indeed, if it is established that a less favourable tax regime should be applicable in regard to a foreign citizen (a citizen of Germany), that would be in direct contradiction of Article 24 of the Russia-Germany Tax Treaty. Thus, we may not exclude that sometimes the application of domestic non-tax legislation (based on Article 3 (2)) leads to the hidden discrimination of a taxpayer and creates additional obstacles for the removal of double taxation.

At the same time, in the light of the above analysis, we should acknowledge that the courts did not analyse in detail the very relevant domestic tax legislation con-

[3] It is also possible to refer to well established domestic case law where the courts have acknowledged that the terms and provisions of international treaties should be interpreted following from their content, object and purposes of the respective treaties. See: Rulings of the RF Supreme Commercial Court of 16 December 2003 №7038/03 on case №A32-20054/2001-40/495-52/367, of 16 October 2007 №3587/07 on case №A41-K2-9847/06, etc.

[4] Federal Law No 115-FZ uses the criterion of "citizenship" – in accordance with the approach proposed in the courts' decisions, it is necessary to differentiate "non-residents with Russian citizenship" and "non-residents with foreign citizenship".

cerning the applicable source rule. In particular, Article 208 (1) (6) and 208 (1) (10) of the RF Tax Code provides for the following:

"1. For the purposes of the present Chapter, the following incomes shall be referred to as incomes from sources in the Russian Federation: …

5) incomes from the alienation of: … immovable property situated in the Russian Federation….

6) consideration for the performance of labour or other duties, performed work, rendered services, performance of action in the Russian Federation….

10) other incomes received by the taxpayer as a result of an activity he/she performed in the Russian Federation".

Maybe the precise analysis of these provisions in the light of Article 3 (2) of the treaty would have given more reasonable grounds for the correct scheduling of the income received by the taxpayer in the framework of this case.

Conclusion

In general, this case provides some interesting examples of interpretation of Articles 3 (2), 14, 15, 21 of the treaties based on the UN Model/OECD "old" Models connected with the differentiation between dependent work/employment and independent work/independent personal services.

However, the case could potentially have raised many more issues if the parties had invoked some additional arguments for the justification of their legal positions. In fact, the courts and the competent authorities of the contracting states, as well as the taxpayer and the tax agent, did not clarify a number of circumstances which were significant for the application of the tax treaty. I would like to mention the most important of these.

First, the connection of the intermediary transactions performed by the agent with the alienation of immovable property was not clarified. At the same time, the treaty and domestic law of the source country provided for special tax treatment of cross-border incomes from the alienation of immovable property (Article 13). For instance, if the amount of the agent's fee directly depended on the effectiveness of alienation of the property (agreed price, terms of alienation and payment, etc.), then, under certain conditions, the agent's fee in the case under discussion could have been scheduled in accordance with the rules of Article 13 of the tax treaty.[5]

[5] Article 13 (1) of the tax treaty provides that: "Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that other State". Thus, the question was whether the agency fee is a part of the "gains derived…".

Second, in the situation under discussion, the Court of Appeals applied Article 15 of the tax treaty; however, in the courts' decisions, the place of exercise of the work in accordance with the respective "employment contract" was not identified**.** The tax authorities did not give any information (at least none which could be mentioned in the decisions) proving that the intermediary services had been provided by the agent on the Russian territory.

Meanwhile, the availability of this information is of principle importance in order to justify the right of the source country to tax the incomes in accordance with Article 15 of the treaty. In fact, the courts took into account only the fact that the income had been paid in Russia and by a Russian resident, but this fact alone was not sufficient to justify that the situation could fall within the scope of Article 15.

In addition, it is important to mention that the taxpayer's position, as can be supposed from reading the courts' decisions, was not formulated thoroughly and presented only a reference to the fact that the income of the taxpayer was taxed once in Germany in accordance with Article 21 of the tax treaty. However, that does not give grounds for the tax exemption of the income in the source country (i.e., Russia) and does not allow for the application of a tax credit at-source (Article 23 of the tax treaty). Moreover, as we know, Article 21 (1) of the OECD Model (which was reproduced in the Russia-Germany Tax Treaty) provides that "…Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Convention shall be taxable only in that State", the scheduling of the income based on Article 21 may, therefore, also be questionable, as it could fall within the scope of other articles (7, 13, 14) which evidently prevail over Article 21. In these circumstances, we can but lament the fact that the taxpayer did not try to invoke the *mutual agreement procedure* in the framework of this interesting case.

VAT AS AN OBJECT OF HARMONIZATION OF TAX LAW OF THE EURASIAN ECONOMIC UNION (A COMPARATIVE LEGAL ISSUE)[1]

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Abstract: The study considers main features of tax law and namely VAT regulation of the Eurasian Economic Union under the Treaty on the Eurasian Economic Union. The important role of the Court of the Eurasian Economic Union in considering tax issues is brought into light. An important aspect of the proposal is the comparative study of the development of tax law in the EAEU and the EU as a successful model of integration.
Key words: the Eurasian Economic Union, tax law, VAT, integration, indirect taxes.

Legal basis of Eurasian integration: international treaties and main bodies

On May 29, 2014, the leaders of Russia, Belarus and Kazakhstan signed the Agreement on the Eurasian Economic Union, which started operating on January 1, 2015 and represented the next stage of the Eurasian integration.

Russian scholars suppose that the EAEU is a treaty of two kinds[2] which establishes, first, a legal base for creation of an international organization with a system of institutions realizing the objectives of the Treaty and, second, the Union which provides fundamental freedoms, as well as coordinated economic policy in the areas determined by the Treaty and other EAEU international treaties.

The institutional structure of the EAEU, like basic principles of functioning of the Customs Union (hereinafter – CU) and Common Economic Space (hereinafter – CES), has formed with using the European experience[3]. First of all, the EU is a suc-

[1] The article refers to the article: K. Ponomareva. Tax law of the Eurasian Economic Union: substance and ways of using of the European experience, in: EC Tax Review. 2016. Issue 2.

[2] A. Kapustin, Dogovor o Evraziiskom ekonomicheskom soyuze – novaya stranica pravovogo razvitiya evraziiskoy integracii [Treaty on the Eurasian Economic Union as a new page of Eurasian integration]. In: Journal of Russian law. 2014. No. 12. P. 98 – 107 .

[3] See Analytical report of Eurasian Economic Commission about the situation with elimination of obstacles of functioning of internal market of the Eurasian Economic Union and restrictions of free movement of goods, services, capital and labour. Moscow, 2015.

cessful association which lets the common market be created. The legal basics of regional integration all over the world in many aspects reflect the development of the European Union. That is why the important aspect of the current proposal is the comparative study of development of tax law in the EAEU and the EU as a model of integration which has already shown great results during decades[4].

Functioning of the EAEU and the CES is impossible without harmonization of legislation in areas of economics, taxes and customs. The different tax structures of member states across the union may cause market distortions and result in inefficiency of the initiative for common market[5]. That is why the authorities of the Eurasian Union member-states agreed to adopt the harmonized legislative norms and coordinate tax, monetary, financial, trade and customs policy.

There are some legal problems which are to be overcome:

- asynchronicity of enacting international treaties of the Union;
- a rather small number of tax cases considered by the Court of the EAEU;
- collisions of norms of national tax legislation of member-states, which makes the implementation of the Union norms difficult;

The current research addresses the aim of the EAEU to harmonize the taxation structure across the union. The issue of tax harmonization has not been even solved out fully on the level of more developed states and supranational organizations (including the European Union). The problem appears with both unwillingness of the states to lose its sovereign power to determine its individual state tax policy and difficulties with finding a common approach for harmonized tax policy. It may be also complicated for the states to decide on a right legal framework for the common tax structure (e.g., the extent of the tax harmonization, its scope and applicable methods).

We suppose that the EAEU tax law is the area of integration law which is being formed on the joint of national legal systems and the international legal system. The power of the EAEU in the area of taxation is not universal and involves only economy sectors included in the EAEU Treaty's and other international treaties inside the Union[6].

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[4] K. Ponomareva. Tax law of the Eurasian Economic Union: substance and ways of using of the European experience, in: EC Tax Review. 2016. Issue 2.

[5] K. Yeroshenko. Harmonization of tax system within the Eurasian Economic Union// Available at: http://www.giuri.unife.it/it/persone/dottorandi/cv-dottorandi/yeroshenko/yeroshenko .

[6] Nalogovoe pravo Yevraziiskogo ekonomicheskogo soobshchestva: pravovoi' rezhim po NDS [Tax Law of the Eurasian Economic Community: the Legal Regime for VAT]// Edited by Prof. Dr. D.V. Vinnitskiy. Wolters Kluwer Publishing House, Moscow, 2010, p. X.

The sources of the EAEU tax law are:

1) international treaties which are concluded within the EAEU borders and contain legal norms dealing with tax relationships in member states' jurisdiction;

2) legal acts adopted by the EAEU bodies (for example, the Supreme Council's decisions);

3) all the sources of member states' national tax law regulating tax legal relations which are to be harmonized.

The issue of taxation which is more or less solved in the EAEU is indirect taxes and, namely, value-added tax (hereinafter – VAT).

In recent years, the necessity for closer cooperation in direct taxation has been also discussed. In order to put forward the cooperation in direct taxation, six CIS-countries are considering the necessity and possibility of elaborating a multilateral tax treaty. However, we suppose that harmonization of direct taxation in the EAEU is hardly possible in the near future.

As is well-known, Section XVII "Taxes and Taxation" of the EAEU Treaty includes the following articles:

- Art. 71 "The principles of interaction of member states in the taxation";
- Art. 72 "The principles of collection of indirect taxes in member states";
- Art. 73 "Taxation of the income of individuals".

Annex No. 18 also belongs to the section "The protocol on the procedure ofcollection of indirect taxes and the mechanism of control of their payment whenexporting and importing goods, performance of work, rendering services".

According to Annex No. 18 when exporting goods from the territory of one Member State to the territory of another Member State, the taxpayer of the Member State from the territory of which the goods are exported, a zero VAT rate and/or exemption from excise taxes upon submission to the tax authority of the necessary documents shall be applied.

The VAT procedures in the Union are rather similar to those in the European Union; however, there are important differences regarding cross-border deliveries. There are uniform principles for the treatment of indirect taxes in Russia, Belarus, and Kazakhstan. The VAT is applied in uniform manner to imports from all countries, including CIS. All deliveries within the Customs Union that are treated as exports are subject to a VAT rate of 0 percent. The import VAT has to be paid, but to the relevant tax authorities rather than to the customs authorities.

The place of sale of goods shall be determined in accordance with the legislation of the member states, with the exception of sale of goods by a taxpayer of one mem-

ber state to a taxpayer of another Member State, when conveyance (transportation) of goods commences outside the Union and ends in another member state. In these cases, the place of sale of goods shall be deemed the territory of the member state where the goods are placed under the customs procedure of release for domestic consumption.

We should show some VAT treatment provisions on examples of domestic member states' legislation. The indirect tax legislation of the member states is now largely in harmony with the EAEU's indirect tax legislation. This is because all member states are members of the CU and its legislation was the basis for the development of a legal framework for the EAEU.

The main condition for recognizing the Russian territory as the place of supply of goods is their initial location in the RF territory. In the case the goods which are supplied by a Russian taxpayer are located on the territory of another state, no obligations of the VAT computation on the proceeds from the supply of such goods arise.

According to Article 147 of the RF Tax Code, the Russian territory is recognized as the place of supply of goods if:

- the goods are located on the RF territory and are not being shipped or transported;
- at the moment when shipping or transporting starts, the goods are located on the RF territory.

Letter of the RF Ministry of Finance of 10 October 2008, No 03-07-08/231 also confirms the fact that if the goods are acquired in one foreign country to be resold in another foreign country and they are in transit across the territory of the RF, the latter cannot be recognized as the place of supply and, thus, no tax consequences should generally arise[7].

According to Article 148 of the RF Tax Code, the place of supply of services, depending on the type/nature of service, may be determined by the following:

1) the place of activities of the service provider;
2) the place of the location of the property with regard to which the services are performed;
3) the place of performing services;
4) the place of the customer's location;
5) the place of departure (arrival) location.

[7] See: Danil V. Vinnitskiy & Vladimir Konstantinov. Chapter 15 Russia, in: The Future of Indirect Taxation: Recent trends in VAT and GST Systems around the World, edited by T. Ecker, M. Lang, I. Lejeune. Kluwer Law International BV, The Netherlands, 2012.

It is important that if the performance of some services is of auxiliary character in regard to the supply of the 'main services', they are deemed to be supplied at the place of performance of the 'main services' (Art. 148 (1) of the RF Tax Code).

In recent years, the Russian Federation has witnessed some changes in the VAT rules for cross-border situations. Initially, the specific regime of the VAT payment with regard to export-import of goods and services was introduced (by special tax treaties) in the relations with the Republic of Belarus (in 2004 – with regard to goods, in 2007 – for services); on 25 January 2008, a multilateral treaty of the similar character was concluded among three countries – the Russian Federation, the Republic of Kazakhstan and the Republic of Belarus[8].

The VAT tax rates are not uniform across the Union.

According to Art. 164 of the Tax Code of the Russian Federation possible tax rates in Russia are 18% (standard rate); 10% (mainly to children's products and food products) and 0% (for example, on exports)[9].

The general VAT rate in Kazakhstan is 12% and applies to sales turnover in Kazakhstan and to imports of goods and services to Kazakhstan (standard rate). The possible rate is also 0% (for example, export sales of goods). For imports of goods by individuals under the simplified procedure, the VAT may be paid as part of the aggregate customs payment, the amount of which is determined in accordance with the customs law of Kazakhstan[10].

According to Tax Code of the Republic of Belarus, the general VAT rate is 20%; preferential rates are also possible: these are 9,09% or 16,67% (on sales of goods (works, services) at administered retail prices with due account for the VAT); 10% (for example, on sale of agricultural goods produced in Belarus; import and/or sale of food products and goods for children) and 0% (for exported goods) high[11].

The regulations of the Eurasian Economic Union have priority over national legislation; however, procedural law remains primarily national. The following differences should be noted:

• in contrast to Russia and Belarus, Kazakhstan has a VAT registration process separate from that of all other taxes;

[8] See: D. Vinnitskiy, Tax Law of the Eurasian Economic Community: Legal Regime for VAT (2010).

[9] The Tax Code of the Russian Federation. Part Two. Federal Law of 5 August 200 No. 117-FZ.

[10] The Code of the Republic of Kazakhstan «On Taxes and Other Obligatory payments to the budget» (the Tax Code) December 10, 2008, No 99-IV Law RK.

[11] The Tax Code of the Republic of Belarus –The Special Part (Law No. 71-3 of December 29, 2009, on the Special Part of the Tax Code)

• deadlines for VAT declarations and due dates for payment of the VAT are regulated nationally;

• there is no uniform VAT ID, unlike the situation in the European Union[12].

Previously, there used to be a special legal regime of collecting the VAT and excises in the network of the CU which was based on international agreements and national legislations of member-states. However, the collisions in national legislations still take place, and this fact can lead to discrimination or double taxation. For example, there was no definition of a consolidated tax group in Russian tax legislation before 2011 although there was one in Belarus. This state of things led to the fact that they were determined as taxpayers in Belarus and were not in Russia[13].

Russian legal scholars mention the fact that the EAEU Treaty involves a limited number of issues in the area of taxation. Besides, the Treaty neither determines providing coordinated policy by member states nor establishes the Union competence in this area. The above-mentioned EAEU Treaty articles are more likely to underline the independence of member states in choosing directions, forms and procedures of tax harmonization. Nevertheless, this harmonization shouldn not break competition rules or be an obstacle to free movement of goods and services on the national or Union level[14]. The EAEU Treaty stipulates that any document specified in the EEU's indirect tax legislation need not be provided to the tax authorities if this document is not required under the law of the relevant member-state.

The approach to the application of the VAT under the EAEU Treaty is similar to the approach stipulated in the legislation of the Customs Union. At the same time, the Treaty stipulates some absolutely new VAT provisions which aim to reduce tax risks and potential tax disputes between taxpayers and tax authorities.

For example, according to the Treaty, indirect taxes are not to be applied if goods are delivered within subdivisions of a single legal entity located in different member-states of the EAEU. This provision should have a very positive effect as we are aware of many discussions between taxpayers and tax authorities in Kazakhstan and Belarus as to whether the importation of goods shipped from one branch to another branch of the same legal entity should lead to the payment of the import VAT or not. Quite often, the tax authorities in those countries demanded that the import VAT should be paid, although no sale of goods may take place within a single legal entity.

[12] VAT Procedures in the Customs Union – Russia Briefing// Available at: http://www.russia-briefing.com/news/vat-procedures-customs-union.html .

[13] Tax Law of the Eurasian Economic Community: the Legal Regime for VAT op.cit. p. 47.

[14] See: K. Ponomareva, op.cit.

However, due to uncertainty on the matter arising from the Customs Union's indirect tax legislation, tax authorities considered such transfers of goods to be taxable[15].

There are reasons for the VAT to be the first object of harmonization of the EAEU tax law.

The VAT is an indirect tax collected from all kinds of economic operations of realization of goods and services (including the cross-border ones). The VAT is determining the budgets of the EAEU member-states because revenues from this tax are a significant part of all tax revenues in respective budget systems, and these parts tend to grow further.

It is notable that excises as special indirect taxes concerning some economic operations are in many aspects similar to the VAT, especially in conditions of active economic integration when bilateral direct investments of member states are dominants of economic development. However, the EAEU are not yet ready for such a level of economic cooperation.

The EAEU Court and its first decisions in the area of indirect taxes

The Treaty progressively restricted certain general and procedural powers of the new Court of the Eurasian Economic Union in comparison with its predecessor — the Court of the Eurasian Economic Community. The EurAsEC Court started functioning on January 1, 2012 inMinsk and was the first supranational court in Eurasia. Since the EAEU Treaty has come into effect, the Court "has got" a new Statute of the Court of the Eurasian Economic Union which is actually Annex 2 to the EAEU Treaty.

The amendments may significantly diminish the unifying and consolidating influence of the Court on judicial and enforcement practices taking place within national courts of the EAEU. The persons who can file an application with the Court are listed in Article 39 of the Statute: these are memberStates and commercial entities.

Thus, the aim of the Court as of a supranational court is to watch provision of main aims of integration and of rights of business entities. The most important rules are created in a supranational body, and, namely, in the Eurasian Economic Commission. So the Court is a keeper of the idea of supranationality and an interpreter of common law norms.

The main competence of the Court is the provision of treaties in force within the EAEU ensuring the uniform application of the Treaty and other international treaties in force in the Union, so as to provide the unified enforcement of international treaties inside the Union and the correspondence of legal acts of the Union to these trea-

[15] Agreement on the Eurasian Economic Union signed, in: Ernst&Young (CIS) Tax Brief. July. 2014.

ties. The key source of legal problems is usually the fact that legal norms are often interpreted differently by member states and by Community's bodies, mainly, the Commission. The general rule is that the provisions contained within the treaties override those of domestic law.

The appearance of supranational rules which are obligatory for direct use in all the Member states leads to necessity of establishing of a court which controls implementation of these norms and observance of international treaties and other international acts in order to provide this observance by supranational authorities. These rules are obligatory due to common rules of international law (Art. 26 of Vienna convention). The EU system is also built in this way: the Court of Justice controls the provision of integration rules of European law.

The Court's jurisdiction in intra-bloc disputes can be illustrated by its judgment of September 5, 2012 in a suit filed by the public joint-stock company "Yuzhny Kuzbass"[16], against an act adopted by the Eurasian Economic Commission. The applicant disputed the provision of Article 1 of the Commission's Decision No. 335 "On Issues Pertaining to the Functioning of the Common Customs Territory and Implementation of the Customs Union Mechanisms" from 17 August 2010, which stipulated a customs declaration for Group 27 goods exported from Russia (including coal). Following the 2011 decision of the Intergovernmental Council abolishing customs clearance of goods supplied between member states within the Customs Union since July 1, 2011, the company had stopped declaring its shipments of coal, but was fined by the Kemerovo Customs Administration (Russia). After having incurred financial losses, the company brought the case before the Court to resolve this conflict of norms.

The EAEU Court ruled in favour of the applicant and declared the provision of Article 1"noncompliant" with the CU legislation, based on the following arguments:

- the Commission's decisions are part of the CU legislation;
- the Commission can make non-binding "recommendations", as well as binding decisions;
- the Commission's decisions cannot contain vague and ambiguous formulations of a "declaratory or informative" nature;
- the provision of Article 1 of Commission Decision No. 335 "contradicts" the legal base, namely, the 2007 Treaty creating the CU and the Customs Code, as well as "goals and principles" of establishing the CU and the CES, including non-discrimination of Parties.

[16] Case No. 1-7/1-2012, the Court judgment of September 5, 2012 // http://sudevrazes.org

Hence, the EurAsEC Court issued a ruling that repealed part of the Commission's decision conforming to Russian law, thus (indirectly) prescribing the national authorities to apply the CU law over conflicting national rules. The Appeal Chamber upheld the Court's ruling on November 29, 2012, confirming the principle of primacy of the CU/CES law over conflicting national law and relieving business entities of the need to go through a procedure of customs declaration, which is difficult because of extent and complexity. The Court thereby effectively eliminated one of the non-tariff barriers to intra-bloc trade.

This and other cases (for example, the SeverAvtoProkat case) show that problems with legal enforcement of legislation of the Single Economic Space and the Customs Union are, in some aspects, similar to situations which took place in the EU on early stages of its development. The ruling of the EurAsEC Court in the *Yuzhny Kuzbass* case bears similarities to significant judgments of the European Court of Justice in case 26/62 *Van Gend& Loos v.. Netherlands Internal Revenue Administration* (finding that Article 12 of the EEC Treaty "produces direct effects and creates individual rights which national courts must protect")[17] and in case 6/64 *Costa v. ENEL* (in which it established the principle of "supremacy" of the Community law over conflicting national law of a member state)[18].

The EAEU Court could play a similar role in consolidating the Eurasian economic integration process, provided that the implementation of its rulings is not impeded by national authorities in the member states. The Court's decisions might fill in the legal gaps that pose evident obstacles to trade agents in the member states.

It should then be analyzed whether this differential treatment could objectively be justified under the "rule of reason-doctrine" developed by the ECJ. It is applicable with respect to subjects which have not yet been harmonized, such as the loss-compensation rules[19].

Conclusions and recommendations

We suppose that the issue on agenda of tax legislator is not the unification of the VAT rates, but improvement of qualitative indicators, such as tax administration, information exchange and stability of tax legislation in Member States. The process of lawmaking within the Union can be developed through the practice of the EAEU Court.

[17] Judgment of the Court, Case No. 26/62, Van Gend& Loos, ECR 1963, p. 1.

[18] Judgment of the Court, Case No. 6/64, *Costa v. ENEL*, ECR 1964, p. 585.

[19] K. Ponomareva, op.cit..

The main groups of problems in the area of EAEU tax law are:

- improving legal methods of protection of rights of taxpayers in cross-border situations;
- improving the system of national and supranational legal regulation of of indirect taxes collection in the EAEU;
- non-harmonized tax rates in member states.

Section XVII "Taxes and taxation" of EAEU Treaty and Annex 18 to the Treaty consider harmonization of indirect tax legislations and rapprochment of excises' rates. Like in the TFEU, there is a provision of national tax treatment relating to goods imported from other member states.

The conclusion that the level of the basic tax rate has no influence on the effectiveness of taxation may be related to the fact that basic VAT rates in the EU countries have been considerably harmonized, and the small differences among them do not affect significant differences in tax-payers' behaviors. We suppose that this experience should be used in tax law of the Eurasian Economic Union. However, VAT rates in EAEU Member states still differ: from 18% in Russia or 20% in Belarus to 12% in Kazakhstan. Thus, this divergence is still a problem influencing mutual benefits of economic relationships among member states. For example, Kazakhstan has more liberal tax legislation and can be more competitive in attracting investments in comparison with other member states.

Trade between member states is taxed under the principle of *country of destination* when goods are exported. The taxation of work and services is provided under the principle of *place of supply of services*. The procedure of collecting taxes, using of the VAT zero rate, terms and conditions of tax deductions are under member states' legislation. For example, indirect taxes on goods imported into the territory of one member state from the territory of another member state shall be levied by the tax authority of the member state into the territory of which the goods were imported at the place of registration of taxpayers, owners of the goods, including taxpayers applying special tax treatments.

Issues of income taxation of natural persons-employers are also harmonized. If, in accordance with its legislation and provisions of international treaties, a Member State is entitled to levy the income tax from a tax resident (a permanent resident) of another Member State in connection with his/her employment in the first Member State, such income tax shall be levied at the tax rates stipulated for such income of natural persons – tax residents (permanent residents) of the first Member State.

ECONOMY AND LAW: MAJOR MODELS OF CORRELATION

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Abstract: The article considers main theories of legal regulation of economy. Primary attention is given to the theory of the rule-of-law state, the main idea of which is that the state is connected with the law. The article draws the conclusion that the concept of the rule-of-law state has a comprehensive character; it harmoniously combines various elements, scholarly approaches, theories and opinions. The author of the article underlines that in the transition period modern Russia needs a new concept of national economy managementand puts forward a number of proposals to improve the legislation regulating the sphere of economy and business.
Key words: economy, theories of legal regulation of economy, the rule-of-law state, the concept of national economy management, main trends to improve the legislation regulating the sphere of economy and business.

1. Fundamental provisions (postulates) of interrelation and interaction of law and economy are quite well-known. This interconnection was clearly stated by Karl Marx in "Critique of the Gotha Program". He wrote that "…the law cannot be above economy and culture of the society it determines". However, the founders of Marxism-Leninism emphasized the reciprocal active role of the superstructure (including the legal one) in its relation to the basis.

As a result, there are *two main theories of legal regulation of economy* in the USSR and modern Russia. During the first years of the Soviet power, when the tsar's regime was destroyed and the old law was overturned, the Soviet power denied any law. Indeed, why should we have laws (legislation) if we have the dictatorship of the proletariat? *The concept of "denying legal regulation of economic activity"* provides a certain pyramid of theories. Legal nihilism has proved to be enduring: the Soviet system did not manage to overcome it; therefore, it still exists to a substantial degree. Legal nihilism reflects on all spheres of political and socio-economic life[1].

[1] V.S. Belykh. Pravovoe regulirovanie predprinimatel'skoi' deiatel'nosti v Rossii: Monographiia [Legal Regulation of Business Activity in Russia: Monograph]. Prospect Publishing House, Moscow, 2009, pp. 5 – 7.

The second theory is *the theory of legal fetishism*. Its supporters pay considerable attention to law and apotheosize its role and importance in the life of the state and society. Paraphrasing a well-known statement, we may say "Law is all. The ultimate goal is nothing". At the same time, any law (even the most perfect one) is, first of all, a legal act. Therefore, the "law-mania" disease is pursuing not only Russia but other countries as well.

And finally, in the current conditions of the state development, we can distinguish *the so-called theory of "legal extremism"*. Its supporters are insistently and consistently asking for bombarding "the Russian roadlessness" by different-caliber laws. Moreover, they often insist on that without providing any reasons and arguments for such laws to be passed.

We consider that nowadays the most productive theory is the *theory of therule-of-law state*, the main idea of which is that the state is connected with the law. *The rule-of-law state* is the state where the organization and activities of the state power in its relationship with individuals and their associations are based on the law and fully comply with it[2]. In the rule-of-law state, the main value is the dignity of a person, his/her rights and obligations. **Thus**, the key elements in the relationships are the man, the society, and the state. Let us consider them in detail.

The rule-of-law state has three aspects[3]. *The first* one is law and power. In the rule-of-law state, the power which creates the law is not above the law itself. The power is subject to the law and is below it. In *the second aspect,* the first place is taken by the law and the society. The rule-of-law state is managedby the law but not by people or by a person who is endowed with the highest authority in the system of power. *The third aspect* is connected with the relationship between the man and the law. In the rule-of-law state, the man is under the protection of the law.

The rule-of-law state presupposes a new quality of the state, the society and the person. It is the quality that Russia has to strive for in the conditions of modernization and globalization. It is the society of the modern style and the development of the person.

Article 1 of the RF Constitution states that "Russia is a democratic federative rule-of-law state". In this connection, the Chairman of the RF Constitutional Court V.D. Zorkin remarks:

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[2] The question of determining the rule-of-law state and its criteria is controversial. (See for example, A.F. Cherdantsev. Teoriia gosudarstva i prava: Uchebnik [Theory of State and Law: Textbook]. Moscow, 2000, pp. 148 – 161; S.A. Komarov. Obshchaia teoriia gosudarstva i prava: Uchebnik [General Theory of State and Law: Textbook]. 3-d edition revised and added. Moscow, 1997. pp. 185 – 210).

[3] V.F. Yakovlev. Rossiia: Ekonomika i grazhdanskoe pravo (voprosy teorii i praktiki) [Russia: Economy and Civil Law (Questions of Theory and Practice)]. Moscow, 2000, pp. 20 – 22.

"The civil law system is based on the concept of "the rule-of-law state" – the concept that our Constitution is based upon. It should be noted that this concept, in connection with the realities of the XXI century, needs to be developed doctrinally and conceptually. It requires close collaboration of lawyers and philosophers"[4].

Thus, legally speaking, Russia is proclaimed to be a rule-of-law state. But in fact there is still a question: can modern Russia be called a rule-of-law state? The question is far from being easy, it is rather ambiguous. If we follow the postulates of the Western concept of democracy and the rule-of-law state, there can be just one conclusion: if under this term we understand the model of liberal democracy which guarantees freedom and equality to all citizens in the framework of a stable legal system supported by the state, Russia is not a rule-of-law state[5]. On the other hand, Russia is said to have a rule-of-law state from the viewpoint of law, politics and philosophy as an ideology, an instrument of achieving various political and geopolitical aims by the state. Certainly, such an approach looks not only problematic but rather scholastic.

So, the term "the rule-of-law state" is neither stable nor universal. In different countries – especially in the countries which significantly differ from each other by their models of democracy, political regimes and forms of government – the ideas of the rule-of-law state exist and are reflected through a paradigm of different parameters and relations. In our view, such an approach to certain extent is dangerous. Following this logic, any state (including the authoritarian one) can be recognized as a rule-of-law state, if the supreme law prescribes its legal status as such. Consequently, there must be universal (common) criteria and parameters of the rule-of-law state which enable to assess the level of the rule-of-law state, its maturity and reality.

There is another important aspect of the problem. It is the history of the state, the society and the people that predetermines the content of the notion "the rule-of-law state". *Western democracy* is not an ideal to follow. Being interviewed by the German magazine *Spiegel*, A.I. Solzhenitsyn writes:

"The recognition of the West primarily as the Knight of Democracy changed to the disappointing statement that the Western politics is based, first of all, on pragma-

[4] Filosofiia prava v nachale XXI stoletiia cherez prizmu konstitutsionalizma i konstitutsionnoi' ekonomiki Philosophy of Law in the Beginning of the XXI Century through the Prism of Constitutionalism and Constitutional Economy]// Moskovsko-Peterburgskii'filosofskii' klub [Moscow-St.Petersburg Philosophy Club]. Moscow, 2010.

[5] Can Russia be considered a rule-of-law state?// Available at: http://www.intelros.ru/readroom/nz/nz_61/3264-mozhno-li-schitat .

tism which is often mercenary and cynical. Many people in Russia considered it as the loss of ideals"[6].

From the point of view of the US and the West, such countries as Cuba, Northern Korea, Iran and some other former USSR republics do not fit into the Procrustean bed of Western values and Western democracy. Therefore, the US and its military and political block of NATO are authorized to make order and correct defects in the state and social structure. As we know, they have already "put everything in order" in Yugoslavia, Iraq, Afghanistan and Libya[7]. Now they are "working" in Syria and then will turn to other 'outlawed' countries. The other world should not be adjusted to the Western institutes of democracy. In a word, a rule-of-law state exists in American and Western models of democracy; other states and peoples are injured and battered!

The conclusion: the problem of the essence of the rule-of-law state has a comprehensive character; it harmoniously combines different elements, approaches of various sciences, theories and opinions. This problem should be given an in-depth and thorough examination.

A well-known philosopher and political thinker of the foreign countries neighboring Russia, I.A.Ilyin wrote:

"A state in its spiritual essence is nothing but a motherland formed and united by public law, or in other words a large number of people connected by their common spiritual destiny and their spiritual culture and legal awareness. Strictly speaking, that is all to it"[8].

The essence of any state is that all its citizens have and do recognize their common interest and common aim (apart from different and private interests and aims),because any state is a certain spiritual community. Aristotle referred to this aim as "a good life".

Now let us turn to the analysis of correlation between economy and law. The problem of correlation between economy and law can be considered not only from the point of view of law. First of all, this problem is an economic one. Therefore, it is natural that the correlation between economy and law in the literature is primarily considered from the viewpoint of economy[9]. Thus, I.P. Boiko and F.F. Rybakov think

[6] See: the interview by A.I. Solzhenitsyn to the Spiegel magazine// Available at: http://www.izvestia.ru/person/article3106464/ .

[7] V.S. Belykh. Rossiia v luchakh modernizatsii ili novaia perestroika [Russia in the Rays of Modernization or New Perestroika]// Yuridicheskii' Mir [Juridical World Journal]. 2010, No. 11, p. 9.

[8] I.A. Ilyin. Religioznyi' smysl filosofii [Religious Meaning of Philosophy]. Moscow, 2006, pp. 288, 295.

[9] M.N. Semyakin. Ekonomika i pravo: problemy teorii, metodologii i praktiki [Economy and Law: Problems of Theory, Methodology and Practice]// Edited by A.I. Tatarkin. Yekaterinburg, 2006, pp. 41 – 65.

that the question of subordination of economy and law is predetermined by the correlation of the basis and the superstructure. Moreover, they think that the theory of institutionalism covers not only economic phenomena and processes but non-economic factors and means, namely: politics, law, mentality, and the way of life[10].

Institutionalism is a doctrine which makes an attempt to integrate the sciences of economy and law. Under this doctrine, institutes provide different forms and limits to the activities of people – political organizations, types of business activity, lending institutions, financial legislation, and social maintenance[11]. In other words, the theory is based on institutes and institutions.

The idea of institutionalism (as well as of legal instrumentalism) has exerted a considerable influence on the formation of the theory of legal remedies developed by legal scholars[12]. In particular, this idea has enabled B.I.Puginsky and D.N.Safiullin to work out an *activity concept* of law. In their view, law is a type of activity which concerns the creation and application of legally binding rules and non-normative (individual) legal means supported by the state enforcement aimed at the maintenance of production, exchange and any other interconnected activity of people with the purpose of achieving a desired result[13]. We think that such an interpretation of law is unacceptable because law is the result of legal activity which includes two main stages: creating legally binding rules and non-normative (individual) legal means and applying them. Otherwise (when law is understood as a type of social activity), there is a confusion of closely connected terms which belong to different levels.

Unlike this approach which has a comprehensive (economic and legal) character, we may find different approaches to the correlation between economy and law in the literature. For example, founders of Marxism *apotheosized the dependence of law on economy* (the theory of economic determinism), on production relations prevailing in the society. T.R. Orekhova thinks thatto a certain extent it led to less understanding and less importance of law in the life of the society[14]. On the other hand, the

[10] I.P. Boiko, F.F. Rybakov. Ekonomika dlia yuristov: Uchebnoe posobie [Economy for Lawyers: Textbook]. Moscow, 2002, pp. 7 – 8.

[11] M.N. Semyakin. Ibid. p. 42.

[12] V.S. Belykh. Sushchnost prava: v poiskakh novykh teorii' ili "conservatism starogo myshleniia"? [The Essence of Law: Searching for New Theories or "Conservatism of the Old Mentality"?]// Rossiiskii yuridicheskii' zhurnal [Russian Law Journal]. 1993, No. 2, pp. 51 – 58.

[13] B.I. Puginsky, D.N. Safiullin. Pravovaia ekonomika: problem stanovleniia [Legal Economy: Problems of its Formation]. Moscow, 1991, p. 22.

[14] See: Problemy teorii gosudarstva i prava: Uchebnoye posobie [Problems of Theory of State and Law: Textbook]. Moscow, 1999, p. 241.

author states that, historically speaking, it is difficult to object to the importance of the economic factor in the formation of law.

And on the contrary, supporters of the predominant role of law in the regulation of economic relations apotheosize the role of law. However, law should not take the first place. Law is *a legal act*, and, therefore, this fact determines the role of law in economy. A legal act cannot abolish or replace real economic and social ties[15]. It is underlined both by supporters of new approaches to the research of legal reality and by supporters of traditional views.

Modern Russia needs a new market concept of Law for the development of legislation aimed at stimulating the development of national economy and entrepreneurship in the conditions of globalization and modernization.

In our view, in its transition period, modern Russia needs *a new concept of managing the national economy* – the concept of state capitalism oriented at the social needs. This concept must be taken into account while elaborating a concept to improve the current legislation, including civil legislation. Ideology of the process to improve the legislation must be considered within the framework of the economic model.

The legal concept is a part of the common federal program of reviving and modernizing our economy. The programs of the regions (of the constituent entities of the RF) as well as of local settlements must be included in the common federal program. Therefore, the elaboration and implementation of this concept must be exercised on three levels: federal, regional and municipal. There is one fundamental approach – the division and presentation of the owner's interests on the federal, regional (oblast, krai, etc.) and municipal levels. Each constituent entity is not only the owner of the state and municipal property. The Russian Federation, its constituent entities and local settlements independently regulate law-making competence. These provisions have been reflected in the text of the Russian Constitution.

So far we see an obvious shift (distortion) to the development of civil legislation (i.e. private law). It is confirmed by the following facts: the Council on codification and improvement of civil legislation has been established; the concept of the development of civil legislation in the RF has been elaborated and approved. *In short*, we do not recognize anything public and consider everything as a matter of private law.

It is time to make *an inventory of the legislation in the sphere of entrepreneurship*, to classify legal acts and find out vulnerable spots (for example, duplication of regulators, their contradiction or complete lack of them). It is a very considerable and

[15] B.I. Puginsky, D.N. Safiullin. Ibid. p. 12.

challenging job in terms of its scope. It cannot be done only by one or a few research teams. In our view, this job must be given a state status either in the form of a decree of the RF President or the enactment of the RF government. For example, the RF Ministry of Justice can establish a special department to systematize the legislation in the sphere of entrepreneurship.

Moreover, we suggest creating an operating body at the RF Presidential Executive Office – the Council on codification and improvement of public legislation. In such a way, we will be able to correct the situation which emerged after the establishment of the Council on codification and improvement of civil legislation. Nowadays, there is an urgent necessity to elaborate a comprehensive approach to improve pubic legislation. As to entrepreneurial legislation, it would be good to place it within the authority of the Council on codification and improvement of civil legislation and change the name of the Council. However, it is not possible to implement the project for well-known reasons. Therefore, we can only hope that entrepreneurial legislation will be included into the work of Council on codification and improvement of public legislation.

2. In the conditions of more state control over economy, it is time to elaborate and adopt the Act "On the Basics of Managing the Economy of the Russian Federation" (if the idea to enact a code (an act) on entrepreneurship is not adopted). Such proposals have been put forward by different scholars for several years; however, there are no changes yet because there is too much influence of supporters of the role of the state in regulating economy and entrepreneurship.

Alternatively, we can adopt the Act "On Managing Property"[16]. Nowadays, the Russian Federation has only uncorrelating normative legal acts which regulate different aspects of managing property. First of all, these are the Act on Privatization, the Act on Bankruptcy, and the Act on Economic Entities. Besides, in this sphere, there are a number of decrees of the RF President and enactments of the RF government concerning the management of federal state property, of stocks of open joint-stock companies as well as of property located abroad. At the level of by-laws, there are well-regulated matters concerning the handling of shares of joint-stock companies which are the federal state property in trust management.

However, the Russian Federation does not have a basic federal law which would comprehensively regulate relations in the sphere of property management. To illus-

[16] V.S. Belykh. O kontseptsii proekta zakona "ob upravlenii sobstvennostuy" [On the Concept of the Act "On Managing Property"]// Biznes, menedzhment i pravo [Business, Management and Law]. 2009, No. 1, pp. 4 – 8.

trate this, we can refer to Act of Ukraine No.185V dated 21 September 2006 "On Managing State Property Objects". This act determines the legal framework of management of state property objects. This act does not cover relations connected with objects of municipal and private property.

Another example is from the republic of Kazakhstan: Act No.490-2 dated 4 October 2003 "On the State Monitoring of Property in Strategically Important Branches of Economy"[17]. In the context of the mentioned Act, *the strategicallyimportant branches of economy* are extraction and processing of fuel and energy resources (coal, oil, gas, uranium and metal ores), machine-building, chemical industry, transport and communications, production and allocation of electric power, as well as branches concerned with military-industrial production. This Act covers not only the objects of state property but objects of private property under the monitoring of the state. Managing the objects of state property, the RF government determines *criteria of efficient management* of property objects and the order of their application.

We consistently insist on adopting, in the RF, the Act "On Nationalization and Deprivatization". It is well-known that p.2 of Art.235 of the RF Civil Code provides for a possibility of turning property owned by individuals or legal entities into state property (nationalization). It is made on the basis of the law with the compensation of the property value and other expenses in the procedure established by Art.306 of the RF Civil Code. However, there is no act on nationalization yet. There are only several drafts in the RF State Duma. This law has supporters and opponents. It is an interesting fact that the Yabloko party filed an action to the RF Supreme Court with criticism of the Act "On Peculiarities of the Buyout of Property in the Republic of Crimea". However, the Court did not abrogate the law on nationalization of property in the republic of Crimea. On 1 March 2015, nationalization in the republic of Crimea was terminated[18].

In our view, modern Russia needs a law on nationalization. There is nothing scary in the word "nationalization"[19]. In our country (due to historical reasons), nationalization is primarily understood as gratuitousexpropriation. In other countries, its main economic meaning is the transfer of private enterprises under the control of the state on the condition of their buyout. As a rule, one of the most important tasks

[17] Available at: http://online.zakon.kz/Document/?doc_id=1044812 .

[18] The Russian Court did not abrogate the act on nationalization in the Crimea// Available at: http://ua-01.com/news/susplstvo/28975-v-rossiyskom-sude-ne-stali-otmenyat-zakon-o-nacionalizacii-v-krymu.html .

[19] Former Speaker of the Federation Council Sergei Mironov and the State Duma Deputy Alexander Burkov suggested stipulating the order of nationalization of property of ineffective owners. The relevant bill was initiated in the lower chamber of the Parliament// Available at: http://newsland.ru/news/detail/id/636785/cat/94/ .

of such nationalization is the maintenance of state control over the branches (enterprises) which are strategically important for the state security (including the economic security). Such processes were undertaken in various countries, and their consequences are different. All participants of economic relations should know general rules of behavior, including nationalization. As for de-privatization, it is possible not only through nationalization. De-privatization may be conducted by means of selling an object of property to the state or to the local settlement, or by gratuitous transfer of property into the state or municipal property.

Thus, at present, the most significant changes in the sphere of redivision of property in the last 15 years have been taking place. As a result, entirely different people may turn out to be oligarchs, and we may have a different picture.

The Russian economy needs acts on control and merger (acquisition). The Russian Federation has many controlling bodies and unrelated acts; but there is no any single consolidated law on state control[20]. For illustration: the republic of Kazakhstan has Act No.377 IV dated 6 January 2011 "On State Control (Supervision) in the Republic of Kazakhstan". **Inshort**, we have much to learn from our partners of the Customs Union, EAEU, SCO, and BRICS.

Indeed, it is time to aggregate capital, production, and business. We should not hamper the natural process of acquisition of minor banks, insurance companies, and investment companies. On the contrary, we should stimulate this process under the strict control of the state. On the other hand, we support the intention of the state to develop minor business.

In industrially developed countries of Europe, minor and middle business plays a key role in maintaining sustainable economic development and welfare of the population. And not only that. "The Asian Economic Wonder" has also been significantly contributed to by minor business. Almost all countries of the South-East Asia (except for North Korea) provide unprecedented support to minor business. The dynamics of entrepreneurship development and rates of economic growth show that these countries have surpassed the European countries three times[21]. That is incredible!

Among special financial laws, we can name a law on financial instruments. Financial instruments and securities are not overlapping notions. Financial instruments

[20] Ministry of Economic Development of Russia worked out a draft of the Concept of federal law "On State and Municipal Control", the main aim of which is to form a single system of state and municipal control (supervision) in the Russian Federation// Available at: http://economy.gov.ru/minec/about/structure/depGosRegulirInEconomy/2014072515 .

[21] V.A. Semeusov. Maloe predprinimatel'stvo v Rossii: Uchebnoe posobie [Minor Business in Russia: Textbook]. Irkutsk, 2001, pp 11 – 12.

can be divided into two groups: primary and derivative instruments. *Primaryinstruments* include monetary resources, securities, accounts payable, debts receivable under current operations. *Secondary* or *derivative* financial instruments are financial options, futures, forward contracts, interest rate swaps, and currency swaps. So far these financial instruments can hardly fit in the structure of Civil Codes of member-states of the Eurasian Economic Union. Therefore, now we see a somewhat transitional period when economic terms are being transferred into law terms on the level of legislation (with an instrument as a contract, underlying asset as the subject of a time bargain, objects of civil rights, monetary obligations and so on)[22]. This job is already being started. Some time ago, a draft of the federal law "On Derivative Financial Instruments" was issued[23].

We need a consolidated law on prices and price formation. This law should provide for different types of prices, principles and limits of state (public) interference in private relationships of price formation. Moreover, such a legal act would enable to overcome many discrepancies and would also make the system of price regulation by the state more logical and complete. However, the Russian legislator keeps silence on this matter and is hesitant to adopt it[24].

Considering investment and innovative policy as part of the industrial policy of Russia, we should a) bring together different regimes of legal regulation of foreign and national investments as close as possible, including the ones concerning privileges; b) overcome conflict of provisions in the Russian investment, tax and customs legislation; c) provide protection of national interests of Russia from illegal foreign companies.

China is more often considered to be among those countries which follow the principles of revolutionary modernization. However, some authors think that the successes achieved as a result of the Chinese revolutionary modernization cannot be applied by Russia. There are different reasons for that. One of them is that "we cannot take advantage of the achievements made by authoritarian modernizations without borrowing other things as strict burdens"[25]. Further, A.V. Rubtsov states that Russia

[22] V.S. Belykh. O kontseptualnykh podkhodakh v regulirovanii rynka tsennykh bumag gosudarstv-chlenov EvrAzES [On Conceptual Approaches to the Regulation of Securities Market of the EurAsEC member-states]// Biznes, menedzhment i pravo [Business, Management and Law]. No. 1, 2010, pp. 68 – 78.

[23] Available at: http://www.lawmix.ru/lawprojects/57851 .

[24] On August 3, 2012 the new Law of Ukraine "On Prices and Price Formation" came into force. It regulates relations arising during the formation, setting and establishment of prices; it also provides state control (supervision) and surveillance in the sphere of price formation// Available at: http://www.visnuk.com.ua/ru/pubs/id/2879 .

[25] A.V. Rubtsov. Privedenie k sovremennosti [Bringing to Modernization]// Available at: http://www.ng.ru/ideas/2010-04-14/5_modernize.html .

"…should not seek for Chinese or similar counterparts; the period with rapid pace of development from almost a zero level with very cheap labor was passed by Russia. History gives such a chance only once, and the USSR took advantage of it to the full extent"[26].

We agree with the statement concerning impossibility of repetition of such a period (however, who knows) when we had authoritarian (meaning Stalin's) modernization with all its attributes and consequences. It is well known that Stalin's modernization was based on a complex (combination) of prerequisites: a) a simple structure of economy which enabled to provide centralized control; b) the demand for a small amount of innovations accounted for by the simple economic structure as well as lagging-behind modernization; c) the long duration of models and their slow update; d) extremely high motivation of the elite based on the fear of repressions and the possibility of making an amazing career; e) internal competition of design departments (especially, in military and technical sphere)[27].

At the same time, we should pay attention to certain circumstances. First of all, there is again a kind of confusion of different models of modernization, their development, as well as concurrent (overlapping) notions. Indeed, revolutionary modernization is often associated with the authoritarian (totalitarian) regime which is a type of a political regime in the country. For example, any change of the political regime (even if the form of government and the form of state structure remain unchanged) results in sharp changes of the internal and external policy of the state. First of all, it is accounted for by the fact that the political regime is closely connected not only with the form of power organization but also with its content[28]. **Thus**, formally (externally) a particular kind of modernization can be called "liberal", "corporative" and so on, but in fact (from the point of view of its content) it can be imperial, revolutionary or any other.

We do not share the opinion that the experience of China in the sphere of modernization is useless and even dangerous for Russia. Modernization has many aspects. We should welcome but not label any positive experience in the sphere of modernization. Some analysts say that the GDP of China is likely to have exceeded the GDP of Germany and has taken the third place in the world. To compare: Russia was plan-

[26] A.V. Rubtsov. Ibid.

[27] R. Vishnevsky. Pochemu poluchilos' u Stalina i pochemu ne poluchitsa u nas? [Why Stalin Succeeded and We Will Not?]// Available at: http://slon.ru/blogs/vishnevsky/ .

[28] Teoriya gosudarstva i prava: Uchebnik [Theory of State and Law: Textbook]. 3-rd edition, revised and added. Moscow, 2004, p. 102.

ning to increase its GDP by two times and China by four! It is a real competition between two powerful countries!

In the comparison of Russia and China, there is one obvious difference which has already been noted by Russian researchers. S.N.Gavrov writes in this respect:

"The key question that they (*the political elite – V.B.*) will have to answer is "Is Russia a part of Europe, a potential part of the West or an independent centre of power – like the EU, the US, China?" Our present and future depend on the answer to this question"[29].

S.N.Gavrov gives his own answer to this question. So, following *the first variant (way) of strategic development,* Russia is a part of Europe and a potential part of the West, similar to Germany, which only after the Second World War joined the Euro-Atlantic civilization. In this situation, the expansion of the EU and NATO to the East and South, including Georgia and Ukraine, is not only safe but even desirable:

"…Then it means moving together with Russia – they have become members of the NATO and EU earlier, and we will do it a bit later. Naturally, small Georgia and huge Russia may have different forms of integration in these international structures".

The second way of development is that Russia is an independent center of power, an independent Eastern and Christian civilization present in former Russian and Soviet empires which is to be present in the new empire. This answer presupposes that NATO is a political and military competitor the expansion of which close to the border of Russia is potentially harmful – it is a possibility to restore the empire[30].

It is a topic for further independent research to speak about different perspectives of the development of Russia, taking into account its geopolitical interests and national security.

[29] S.N. Gavrov. Modernizatsiia Rossii: postimperskii tranzit: Monographiia [Modernization of Russia: Post-Imperial Transit: Monograph]. Foreword by L.S. Perepelkina. Moscow, 2010.

[30] S.N. Gavrov. Ibid.

STATE AND ENTREPRENEURSHIP: PROBLEMS OF INTERACTION

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Abstract: The article examines basic methodological problems of interaction between the state and the society, including its economic sphere (entrepreneurship). The author introduces philosophical, economic, and legal academic literature rarely used by Russian legal scholars into scientific study of entrepreneurial law. Using the method of imaginary constructions, the author considers the fact that the state is to stay away from private matters. Its main task is to guarantee the security of an individual and the society in general, to react to deviating conduct by introduction of necessary regulatory acts, enforcement measures, and judicial decisions.

Keywords: society, entrepreneurship, market, state, legislative power, executive power, judicial power, law, legal consciousness.

1. The science of entrepreneurial (commercial) law is known to examine a set of interdependent relations. Some of them are connected with entrepreneurial activity carried out by private individuals. Other relations are associated with the public organization of the said activity, primarily with its state regulation and control.

The problems of interaction between the state and entrepreneurship permeate all spheres of entrepreneurship. In this case, the state as the social institution expresses itself through its legislative, executive and judicial bodies, and relevant officials.

The problem of interaction between the state and entrepreneurship has existed since these social institutions appeared. Moreover, this problem has been, and will remain relevant for all social sciences as the interaction between the state and entrepreneurship is a part of a more general problem of interaction between the state and the society. Entrepreneurship is the most important and, so to say, fundamental part of economic life of the society.

Representatives of various social sciences (historians, philosophers, sociologists, economists, lawyers, and other specialists) broadly examine the problems of interaction between the state and the society, including its economic sphere.

Deliberately leaving aside the sources of literature from Plato and Aristotle to widely cited contemporary writers that are well-known and actively used by legal

scholars, we would like to introduce into scientific study some new (almost unused by legal scholars) sources where the research into the problems of interaction between the state and society relies heavily on solid methodological platform.

One of the works relevant to the matter under discussion is the book "The Limits of State Action" written by German philosopher Wilhelm von Humboldt (1792). He asked the question whether the state's goal is only the positive welfare of the nation or only its security. The answer was the following:

"*the State is to abstain from all solicitude for the positive welfare of the citizens, and not to proceed a step further than is necessary for their mutual security and protection against foreign enemies; for with no other object should it impose restrictions on freedom*[1].

He thought that *protection* against foreign enemies and internal discords is the ultimate goal of the state and the only subject of its activity.

The economists are currently at a more advanced stage in examining the problem of interaction between the state and entrepreneurship. The obvious reason for this is the immediacy of the subject that they study – real economic relations in the context of various restrictions. This means not only the objective obstacles on the way of free economic development: limited resources, the dynamics of objectively emerging prices for goods and services, other expenses provided by the market; but also public (often lobbied) restrictions: restrictive legislation, administrative barriers, and legal costs.

The economists recognize an individual as the major subject of social life who selfishly tries to benefit from his/her activities, constantly measuring the cost of expenses and the results of the activities. Thus, Ludwig von Mises, the classic author of economics, in his work "Human Action: A Treatise on Economics" (1949) defines economics as thephilosophy of human action drawing on the method of imaginary constructions (method of praxeology):

"The main formula for designing of imaginary constructions is to abstract from the operation of some conditions present in actual action. Then we are in a position to grasp the hypothetical consequences of the absence of these conditions and to conceive the effects of their existence. Thus we conceive the category of action …"[2].

The imaginary construction of a pure or unhampered market economy assumes that there is division of labor and private ownership (control) of the means of pro-

[1] Wilhelm von Humboldt. O predelakh gosudarstvennoi deiatel'nosti [The Limits of State Action]. Moscow, 2003, p. 40.

[2] Ludwig von Mises.Chelovecheskaia deiatel'nost: traktat ob ekonomicheskoii teorii [Human Action: A Treatise on Economics]. Chelyabinsk, 2005, p.224.

duction and that consequently there is market exchange of goods and services. It assumes that the operation of the market is not obstructed by institutional factors, that the government, the social apparatus of compulsion and coercion, is intent upon preserving the operation of the market system, abstains from hindering itsfunctioning, and protects it against encroachments on the part of other people. Starting from these assumptions, Mises tries to elucidate the operation of a pure market economy. Only having exhausted everything which can be learned from the study of this imaginary construction, he turns to the study of the various problems raised by interference with the market on the part of governments and other agencies employing coercion and compulsion. Mises treats the state as the social apparatus of compulsion and coercion that *must not interfere with the market and the citizens' activities directed by the market.* The state must employ its power solely *to prevent the actions destructive to the preservation and the smooth operation of the market* economy. The state must protect an individual's life, health and the property against violent and fraudulent actions of people. Thus, the State preserves the environment in which the market economy can safely operate. The market alone puts the whole social system in order and provides it with sense and meaning[3].

As we see, the views of the economist Mises fully meet the beliefs of the philosopher Gumboldt about the role of the State in the society. Moreover, they are based on the solid academic method of the society's primacy, the secondariness of its institutions including state and law.

Unfortunately, the majority of contemporary lawyers are in blinkers of the legal form of social relations. They sometimes fail to realize that the legal form (legislative act, administrative act, judicial act and public relations corresponding to them) is heavily dependent on the state of real social (first of all, economic) relations. Thus, Bruno Leoni, a famous Italian lawyer, writes in his book "Freedom and the Law":

It seems to be the destiny of individual freedom at the present time to be defended mainly by economists rather than by lawyers or political scientists. As far as lawyers are concerned, perhaps the reason is that they are in some way forced to speak on the basis of their professional knowledge and therefore in terms of contemporary systems of law… The contemporary legal systems to 'which they are bound seem to leave an ever-shrinking area to individual freedom[4].

2. Indeed, both economy and social life at large suffer from the voluntarism of legislative authorities, executive authorities, and judicial authorities. Private indi-

[3] Ibid, pp. 243 – 244.

[4] Bruno Leoni. Svoboda i zakon [Freedom and the Law]. Moscow, 2008, p. 17.

viduals have to deal with imposed public restrictions and bear the additional costs that eventually become the losses of the whole society. As a result, the society's economic life stops and the general conditions of society's life worsen.

It is not by chance that through the efforts of a number of Russian scholars, a new area of economic and legal science known as *economic analysis of law* has developed. The effectiveness of the legislation and its enforcement depends largely upon the record of real social relations development. This does not mean that the law does not influence the social life. On the contrary, legislative, administrative, and judicial regulation is intended to streamline the social life. But this process must serve as a response to *deviating behavior of people* who violate the rights and interests of other members of the society.

Unfortunately, no branch of power in Russia is free of shortcomings of excessive interference with the social (private) life, including the sphere of entrepreneurship.

Judicial regulation by its nature (judicial protection of rights and legitimate interests of people) is the most adequate. As a rule, the proceedings are initiated by the application of the interested person. This sphere of state activities enjoys less voluntarism as the courts cannot initiate proceedings themselves. Besides, judicial acts can be reviewed by higher courts. However, the judicial power depends on the executive power, and this remains the problem.

The most voluntarist approach is mainly obvious in *administrative regulation* of social relations. Recently, there were some attempts in Russia to limit the scale of control operations, to remove administrative barriers, to shift to self-regulation in the sphere of professional and entrepreneurial activities, etc. But the presence of the state in all spheres of entrepreneurship and also in other spheres of society is still sufficient because we live in conditions of the general crisis that justifies the use of so-called *hands-on management*. This means that the officials (whose actions reflect the state) have sometimes to act not by law but by guidance from governing authorities, which may be unlawful and done for the sake of a good report.

Uunfortunately, *legislative voluntarism* is recently flourishing. The legislators would seem to compete with each other in the number of the proposed draft laws. The report of the legislators seems absurd as one of the successful work indicators is the aggregating number of the laws adopted in the current year in comparison with the last year. Obviously, the Russian legislator is not aware that the frequent use of legislation undermines the stability of social life, including conditions in which an entrepreneurial activity can be conducted. Legislative act that is changing too often cannot be a law in its substance. This is rather an administrative act which takes the form of law.

The aforementioned Italian lawyer Bruno Leoni writes about excessive interference of executive power with the society including the sphere of entrepreneurship. He pays attention to the fact that legislation appears today to be a remedy against every kind of evil or inconvenience, as compared with, say, judicial decisions, settlement of disputes by private arbiters, customs, and similar kinds of spontaneous adjustments on the part of individuals. The fact that almost always goes unnoticed is that the legislation is too directly connected with the views and interests of a handful of people (the legislators), whoever they may be, to be, in fact, a remedy for all concerned. Even when all this is noticed, the criticism is usually directed against particular statutes rather than against legislation as such, and a new remedy is always looked for in "better" statutes instead of searching in something altogether different from legislation.

The author finds out that this result is due to dependence of legislative power on executive power, to inflated legislation, and to the enormous increase of quasi-legislative activity on the part of the *government.* The weakening of traditional legislative powers of the parliament is a consequence of enlargement of the quasi-legislative activities of the executive power. He also notes that ever growing power of the government officials may be referred to some statutory enactment enabling them to behave, in their turn, as legislators and to interfere in that way with every kind of private interest and activity. The paradoxical situation of our times is that we are governed by human beings, notbecause we are not governed by laws, as the classical Aristotelian theory would contend, but because we are. In this situation, it would be of very little use to invoke the law against such men. Machiavelli himself would not have been able to contrive a more ingenious device to dignify the will of a tyrant who pretends to be a simple official acting within the framework of a perfectly legal system[5].

The author does not maintain that the legislation should be entirely discarded. He maintains that legislation is actually incompatible with individual initiative and decision when it reaches a limit that contemporary society seems already to have gone far beyond. The author sees much benefit from the legislation when it is reduced to the definition of what *"must not be done"*[6].

Leoni's views as a lawyer on the limits of state (legislative, in this case) action corresponds to the relevant views of Gumboldt as a philosopher and Mises as an economist. None of them denies the role of the State in the society, but they all substantiate its limits.

[5] Bruno Leoni. Svoboda i zakon [Freedom and the law]. Moscow, 2008, pp. 21 – 24.

[6] Ibid, p. 39.

3. The answer to *the question about legal consciousness and the role of law as such* depends on the correct understanding of the mechanism for interaction between the state and society. The theorists in the field of law and the specialists in specific areas of law argue and debate about this issue, defending their beliefs. But hardly anyone looks inside the origins, the so-called legal foundations: philosophical, social, economic, and moral. Those who do so, persistently occupy the only "niche" and say there is no possibility for other foundations of law, the so-called *pluralism of legal principles*.

For instance, professor V.M. Syrykh's substantial academic paper "Materialistic Theory of Law" commences with the words: "Contemporary understanding of law may be only materialistic"[7] . We think such Marxist approach to the understanding of law is allowed if it is seen as one of the numerous approaches to contemporary understanding of law. However, if we understand law as a "will of the ruling class made into a law" (fortunately, the author does not submit this) then we will find ourselves under the unlimited power of the state that gives us law in the form of acts that the state has adopted . Unfortunately, such views still enjoy support among Russian legal scholars.

Professor Yu.V. Romanets in his paper "Ethical Fundamentals of Law and Law Enforcement" connects legal foundations not with an individual and not with his providence, but writes that "The God institutes… laws for every creature made by him… and for the last of his creatures – a man"; "so by the God's providence social institutions have appeared (particularly state and law) whose task is to reaffirm the society's values"[8]. What should be a response be ? There is no denying the fact that among social fundamentals of law there is a certain place for spiritual and moral foundations as well as materialistic, natural law, sociological, and ideological ones. Different approaches to the understanding of law enrich the notion of such a comprehensive phenomenon. However, bureaucratic state apparatus can hardly be connected with the moral values of the society. State and its law (act) often use religion as a support for their biased decisions and sometimes exploit the religious feelings of the people.

G.V. Maltsev examines the multifactorality in regulating social relations in his paper "Social Fundamentals of Law". He writes about growing institutional dependence of individuals operating in market conditions. Among factors that ensure the

[7] V.M. Syrykh. Materialisticheskaia teoriia prava [Materialistic Theory of Law]. Selection. Moscow, Russian State University of Justice, 2011, p.13.

[8] Yu.V. Romanets. Eticheskie osnovy prava i pravoprimeneniia [Ethical Fundamentals of Law and Law Enforcement]. Moscow, 2012, pp. 12 – 13.

commercial success, he names the ability of a market agent to build in the institutional market structures, to adapt to its changes, and to influence the processes of establishing them. The State is a huge mass of hierarchically connected institutions. Contemporary bureaucracy does not want to deal with serious social problems but wants to create a perception of active work. It has to react to complications of social life. So, it decided to react very simply making it a habit to create a day's worth laws and form bodies having a little or no use for society[9].

The author stresses that social and mainly economic institutions appear as a result of efforts by many social actors: individuals and legal entities, various structures of civil society, and the state. Then , the economic mission of the state is criticized. There is a wide variety of views on this issue; from libertarian ideology that idealizes private property and entrepreneurship and is directed at realizing the concept of state functions privatization (they substantiate the need for implementing the "presumption of useless state regulation in this or that sphere") to socialist ideology. More moderate liberal views are characteristic to classical west liberalism and its forms that also call for privatization of state functions, restriction of state regulation in economic sphere[10].

We think that the state must stay away from private matters to the greatest possible extent. Its main task is to guarantee the security of an individual and society, to respond to deviating behavior through the adoption of legislation, police measures, and judicial decisions.

To understand the phenomenon of social relations well, it is necessary to keep in mind that an individual and society in all its forms are primary, and political institutions (state and law, first of all) are secondary. The distinction between two basic types of human activity – private (primary, free) and public (secondary, functional) – is of critical importance for the characterization of entrepreneurship and state in the society's structure, legal regime of their activities, and understanding of the state's role in entrepreneurial sphere[11].

Professor A.V. Polyakov is right to say that an individual as a unit of society and his rights are the institution that are able to exist without the order of the government. The opponents may repeat as much as they like that human rights are not the main thing, that besides them there are such values as the state, religion, and the

[9] G.V. Maltsev. Sotsialinye osnovaniia prava [Social Fundamentals of Law]. Moscow, 2007, pp. 443, 457, 473.

[10] Ibid, pp. 489-494.

[11] For details see V.F. Popondopulo. Pravovoi' rezhim predprinimatel'stva [Legal Regime of Entrepreneurship]. Saint-Petersburg, 1994.

morality. But these institutions have never been "the goal in themselves". Only a human being can be such a goal, but as a man is not a single individual, then the man as a goal involves a communicative community (interaction)[12].

Thus, the task of the state is to protect the interaction of people from their own abuses. But, first of all, the state must clean itself from the abuse of its representatives and a gigantic army of government officials. We can explain why there are so many officials in conditions of distributive socialist, or, as Mises says, interventionist economy, but their rapidly growing number in conditions of the market society is a paradox. This is the work of bureaucracy aimed mainly at maintaining itself which society does not need at all.

[12] A.V. Polyakov. Kommunikativnaia teoriia prava – aktualnoe napravlenie yuridicheskoi' nauki [Communicative Theory of Law – Relevant Area of Legal Science]// Peterburgskyi Yurist [Petersburg Lawyer]. 2015, No. 1, p. 23.

INTRODUCING ANTI-DUMPING DUTIES ON IMPORTS OF STEEL PIPES FOR OIL AND GAS INDUSTRY: THE VIEW FROM ABROAD

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Abstract: Foreign economic activity is a multi-level, multi-faceted, multi-vector and multi-subject phenomenon that can include different substantial models like foreign trade of the state, e-commerce, etc. The authors analyze the substantial elements of the "foreign economic activity" concept that reflect its public and private law characteristics. The authors propose their understanding of the "foreign economic activity" concept, its properties, and particular features. The authors outline the appearance of the new regulation method as a result of transforming civil and administrative legal regulation methods. The method of the Foreign Trade law, in the opinion of the authors, reflects the symbiosis of the public and private elements in organization of the legal regulation. There is a gradual understanding that the country's economic security as an integral part of national security is defined by the level of self-sufficiency and efficiency of the economy. The object of economic security is economy as a system and its integral parts, such as productive and non-productive assets, financial resources, etc. Economic challenges have a complex nature and are influenced by geopolitical, social, criminal and other factors. The state policy on economic security should include a system of measures to block the sources of all challenges. The article analyzes the modern forms and examples of political risks in foreign trade.
Keywords: import of Russian steel, Antidumping Duty Investigation, foreign trade legislation, foreign economic activity, foreign economic relations.

Introduction

1.1. The individual needs and public interest are flexibly intertwined in modern legal regulation of foreign trade. This is predetermined by the colossal importance of

foreign market for the governmental financial and monetary politics, dynamic economic growth, economic security and self-sustainability of every state. Effective foreign trade policy of a state guarantees stability of international financial and monetary stance of the country, protects national currency, provides necessary resources for national economy and favors the inflow of foreign investments.

The harmony of the civil, administrative and criminal law is the basis for every legal system[1]. As it was correctly said by Richard A. Posner, the law is extremely conservative and suspicious towards the novelties, highly historically oriented due to its established rituals and archaic terminology[2] and, therefore, quite often lags behind the development of social relations[3]. This slower development of legal regulation in contrast with the evolution of social relations provokes the legislator to fill the legal vacuum with public restrictions and permissions which allow a swift and strict[4] response to legal lacunae. This kind of regulation is especially dangerous in such a borderline (literally) sphere as foreign trade.

The dynamics of the development of social relations dictate the need for urgent search of some new balance between private and public principles and coordination mechanisms between the state and society in the sphere of foreign trade so as to provide the freedom of movement of resources among national economies, to broaden legal regulation of foreign trade through inclusion of non-business persons, transformation of commercial activities into quasi-commercial activity[5].

1.2. The general vector of Russian internal and foreign policy is a principle of Russia being a part of civilization adhering to the values of respect of the interests of other participants of global economy, political and other processes, equality and pragmatism.

[1] S.A. Stepanov. "Dobro" grazhdanskoge prava i "zlo" ugolovnogo prava (obsuzhdenie problem) ["The Good" Civil Law and the "Evil" Criminal Law (Raising the Question)]// Problemy chastnogo prava: Sbornik statei' k yubileyu V. S.Ema [Problems of Private Law: Collection of Articles for the Anniversary of V. S.Ema]// Edited by N. Kozlov, E.A. Sukhanov. Statute Publishing House, Moscow, 2011, p. 149.

[2] R.A. Posner. Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship// University of Chicago Law Review Vol. 67, No. 3 (summer 2000), p. 573.

[3] Ibid, p. 584.

[4] S.A. Stepanov. "Dobro" grazhdanskogo prava i "zlo" ugolovnogo prava (obsuzhdenie problem) ["The Good" Civil Law and the "Evil" Criminal Law (Raising the Question)]// Problemy chastnogo prava: Sbornik statei' k yubileyu V. S.Ema [Problems of Private Law: Collection of Articles for the Anniversary of V. S.Ema]// Edited by N. Kozlov, E. A. Sukhanov. Statute Publishing House, Moscow, 2011, p. 146.

[5] V.A. Bublik, A.V. Gubareva. Problemy vneshneekonomicheskoi' deiatel'nosti epistemologii kak ekonomicheskoi' i pravovoi' kategorii [Problems of Foreign Economic Activity of Epistemology as the Economic and Legal Category]// Zhurnal ekonomicheskoi' teorii [Journal of Economic Theory]. 2014, No. 3.

The Russian legislation considers the equality of subjects of civil law to be a legal principle. It recognizes their relationships as coordination rather than subordination. This means that though their rights could be substantially unequal, the conditions of their exercise must be standard for every holder of the right under the civil law. As an exception, the foreign trade allows for some deviations from the legal equality of its participants and implementation of public (administrative) principles in their relations. As an example of deviation from the principle of equality and discretion of civil law subjects, we can mention the relationships between the participants in foreign trade (importers and exporters) and the agencies of currency control within the framework of fulfillment of foreign trade contracts. The administrative dependence of traders on the agencies of customs, currency and other kinds of control is based upon the public legal relations (licensing, registration of contracts, etc.) which complicate the private relations in the area of exports and imports.

An important element of the aforementioned principle is non-discrimination between participants of foreign trade. Discrimination (Latin *discriminatio* – division, restriction, limitation) is a legal term which means restriction of rights of companies and persons. This legal regime is forbidden by the national law of democratic countries and international law. Protection from all kinds of discrimination while exercising rights and freedoms means, *inter alia*, the ban on all restrictions of rights for the same-category persons without any objective and reasonable justification (prohibition of different treatment of persons in the same or similar situations). The introduction of special regimes for persons in the same or similar situations could be justified by the purpose of legal regulation, i.e., the criteria and legal consequences of differentiation must be substantively interdependent[6]. If this substantive interdependency of criteria and legal consequences of differentiation is observed, the prohibition of discrimination is not violated.

Discrimination in foreign trade is a legal regime which puts restrictions on rights of companies and persons originating from a country (or a group of countries), in comparison with the rights of companies and persons from other countries, except

[6] Resheniia Konstitutsionnogo Suda Rossiiskoii Federatsii [Decisions of the Constitutional Court of the Russian Federation]. May 24, 2001. No. 8-P// Sbornik zakonodatel'stva Rossiiskoii Federatsii [Collection of the Legislation of the Russian Federation]. May 28, 2001, No. 22, p. 2276. June 3, 2004, No. 11- II (opublikovano v sbornike zakonodatel'stva Rossiiskoii Federatsii [Published in the Collection of the Legislation of the Russian Federation], June 14, 2004, No. 24, p. 2476), dated 15 June 2006, No. 6-P// Russian Newspaper Publishing House, June 21, 2006, No. 131, Dated April 5, 2007. No. 5-P// Sbornik zakonodatel'stva Rossiiskoii Federatsii [Collection of the Legislation of the Russian Federation, April 09,2007, No. 15, p. 1820) and November 10, 2009, No. 17-P (Russian Newspaper Publishing House, No. 224, November 26, 2009).

for special safeguards, anti-dumping and countervailing measures[7]. According to the law, the prohibition of discrimination may be disregarded towards the goods originating from the countries which have no agreements with Russia about the most-favored nation regime (paragraph 3 Article 32, paragraph 3 Article 35 of the Federal Law No. 164-FZ).

1.3. Non-tariff regulation is an exceptional and mostly temporary measure. This kind of measures is applied in situations when traditional customs tariff regulation is not effective. Moreover, while tariff regulation could be regarded as a fiscal measure to increase the budget revenue, non-tariff regulation is always a measure of protection and often has no economic basis. For the last ten years, the use of non-tariff measures by Russia (sometimes lacking economic preconditions) enabled the affected countries to claim the political and discriminatory character of these prohibitions: trade wars with Georgia (wine, mineral water, fruits in 2003), wine trade war with Moldova in 2003, milk disputes with Belarus in 2012 and Lithuania in 2013. Unlike the tariff regulation, the non-tariff measures could also be implemented in the sphere of services.

The legal and economic science pays special attention to the issues of non-tariff regulation because of Eurasian integration processes and Russia's accession to the World Trade Organization[8].

Currently, the sphere of non-tariff measures is regulated both by the Russian legislation and the international agreements and acts of the Customs Union. The treaties of Customs Union enable Russia to apply some non-tariff measures towards the member-states. But at the moment, Russia has no legal basis to introduce and implement safeguards, anti-dumping and countervailing measures against import of goods from Belarus or Kazakhstan. The current Federal Law dated 08 Decdember, 2003 No. 165-FZ "On Safeguards, Anti-Dumping and Countervailing Measures for Import Of Goods" allows to implement such measures only in the case of import of goods to the customs territory of Russia. Meanwhile, the national customs territory of Russia ceased to exist three years ago especially in relations to the abovementioned countries. Russia intensified the use of such a kind of non-tariff measures as technical

[7] Bol'shoi' entsiklopedicheskii slovar' zakona: Entsiklopediia [Great Encyclopedic Dictionary of Law: Encyclopedia]// auth. and comp. A.B. Barikhin. Moscow: Bk. Club, 2005, p. 146.

[8] On May 15, 2006, the General Council decided to make public all official documents issued under the General Agreement on Tariffs and Trade (GATT). Many of these documents did not exist electronically, and have been scanned to create a digital archive. This is a work in progress – cataloguing is not yet completed and the data store will continue to be updated progressively// Available at: https://www.wto.org/english/docs_e/gattdocs_e.htm .

barriers – national requirements for the technical specifications of goods, their quality, compliance with sanitary, phytosanitary and veterinary rules, the system of certification, etc. This is one of the most effective measures of non-tariff regulation because it complies with the WTO rules and allows strict control over the inflow of foreign goods into the national economy.

The current legislation includes the following groups of non-tariff measures:

1) Economic measures – quantitative restrictions, quotas, licensing, export (import) monopoly, safeguards, anti-dumping and countervailing measures, embargo (Articles 21, 23, 24, 26 of the Federal Law No. 164-FZ). The economic measures are used only in foreign trade in goods.

2) Non-economic measures, which are used to protect national interests and goals as defined by the Federal Law No. 164-FZ. They are used both for trade in goods and services. The classification of non-tariff measures is based upon the decision of the Higher Court of the Russian Federation dated 24 October, 2016, No. 18 "On Some Issues of Implementation by Courts of the Special Section of the Code of Administrative Offences". As a non-economic measure, a special procedure of admission of foreign investors to the strategic spheres of the Russian economy could be considered. In contrast to the economic measures, the non-economic measures are applied by Russian state bodies according to the Russian legislation.

Despite the fact that the Federal Law No. 164-FZ does not cover the relations regulated by the Federal Law "On Exports Control", the aforementioned classification could also be applied in this sphere.

1.4 The Federal Law dated 08 December 2003, No. 165-FZ "On Safeguards, Anti-Dumping And Countervailing Measures in Import of Goods" made some important changes in the mechanism of providing proper competition. Perhaps for the first time since liberalization of foreign trade in 1991, it details the procedures and ways of protecting the Russian market without violating the WTO rules[9]. It is well known that "the anti-dumping laws are the most egregious exemptions in the international trade legislation, when the foreign producer bears much more burdensome price restrictions than those placed upon the national producer by the domestic laws, including the competition"[10]. The law regulates the procedure of application and implementation of safeguards, anti-dumping and countervailing measures in import

[9] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994// Available at: https://www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm .

[10] M.J. Trebilcock. Politika v oblasti konkurentsii i torgovoi' politiki: posrednichestvo interfei'sa [Competition Policy & Trade Policy: Mediating the Interface]// Zhurnal mirovoi' torgovli [Journal of World Trade]. 1996, Vol. 30, No. 4.

of goods, as well as investigations prior to these measures. This document, undoubtedly, increases the public element in the legal regulation of foreign trade. For example, the Russian Government is authorized by this document to conduct the investigation. It defines the time frames for investigation and implementation of its results. In especially urgent cases, the Government is authorized to impose the special preliminary duty on the goods that damage the national economy.

1.5. According to the agreement[11] concluded in 1999, the American authorities[12] abstained from protection of its market by duties, and instead imposed limits and minimum price on import of Russian steel. The largest US steel producers (U.S. Steel Corp., Nucor Corp.[13], ArcelorMittal USA LLC and others) demanded to suspend this agreement which allows Russian steelmakers to deliver their goods to the USA without the risk of anti-dumping duties. The problem for the American metallurgical companies is that since 1999, the market price of steel in the USA considerably outgrew the price, fixed in the Agreement. This year, the difference between the minimum price and market price has grown to 180 $ per ton, and this allows the Russian producers to offer their consumers more lucrative prices than American steel-makers. The stable price spread between the imports from Russia and other markets shows that the Agreement on suspension of anti-dumping investigation is not working. Inability to stop dumping allows Russian producers to sell the hot-rolled steel in volumes that are substantial and damage-inducing for the American market. During the first six months of 2014, the volume of Russian export of sheet metal to the USA grew 15-fold. The "Severstal" company confirmed the growth of delivery and explained it by low volumes of export in 2013 due to low prices[14], therefore, it complies with the terms of the Agreement. The "Severstal" explained this year's sharp

[11] Suspension of Antidumping Duty Investigation: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From the Russian Federation. July 19, 1999. Department of commerce. International Trade Administration. [A-821-809].The Department of Commerce has suspended the antidumping duty investigation involving hot-rolled flat-rolled carbon-quality steel products from the Russian Federation. The basis for this action is an agreement between the Department and the Ministry of Trade of the Russian Federation accounting for substantially all imports of hot-rolled steel from Russia, wherein the MOT has agreed to restrict exports of hot-rolled steel from all Russian producers/exporters to the United States and to ensure that such exports are sold at or above the agreed reference price. [Page 38644]]// Available at: http://enforcement.trade.gov/agreements/99-18372.txt .

[12] Available at: http://www.trade.gov/; http://www.commerce.gov/ .

[13] Nucor Praises Decision to Extend Antidumping Relief// Available at: http://www.nucor.com/investor/news/?rid=6960 44 .

[14] Denis Grishkin "U.S. Steel Producers Want to Scrap Trade Deal Favorable to Russia"// Available at: http://www.themoscowtimes.com/business/article/us-steel-producers-want-to-scrap-trade-deal-favorable-to-russia/520256.html .

increase by the last year's low base[15]. On 21 October, 2014, the US Department of Commerce decided to terminate a 15-year-old agreement on Russian hot-rolled steel imports, and this will resume a significant amount of anti-dumping duties[16].

1.6 The global events has drastically changed the established understanding of the balance between the law and the politics, the politics and economics, the economics and the law. The global tendency towards multipolarity could not leave the elements of current world order unaffected. Until recently, the relations between politics and economics were considered as dialectical. The states often used foreign policy for economic goals through protectionist actions. If global political decisions were needed, they were guaranteed by the national economic potential. The law was not used as a legal décor for political and economic projects. Unfortunately, the development of modern world is defined by the laws of geopolitics rather than by economic practicability or legal patterns. Political preferences interfere with legal institutions (legal policy, legislation) and even influence the laws of economics (not terminating but blocking and complicating them).

[15] Krista Hughes "UPDATE 3-U.S. steel producers seek to scrap Russian trade deal"// Available at: http://www.reuters.com/article/2014/07/10/usa-trade-steel-idUSL2N0PL2KW20140710 .

[16] Alex Lawson "US Dissolves Steel Settlement With Russia, Reviving Duties"// Available at: http://www.law360.com/articles/589004/us-dissolves-steel-settlement-with-russia-reviving-duties; James Kellehet "UPDATE 3-U.S. to scrap trade deal on Russian steel duties"// Available at: http://www.reuters.com/article/2014/10/21/usa-trade-steel-idUSL2N0SG0X120141021 .

THE THEORY AND PRACTICE OF BANK CREDIT AND INVESTMENT ACTIVITIES IN RUSSIA

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Abstract: The article is devoted to the problems of investment banking in Russia. The authors conducted the comparison of the understanding of terms credit agreement and loan agreement and the comparison of banking operations and investment activities of banks in Russia. Apart from this, the authors look into the finance scheme of project finance.
Key words: banking activities, investment activities, investment banking, project finance, credit agreement, loan agreement.

After the global financial and economic crisis, the full-service banks which can carry out either investment or bank credit activities have been popularized. At the same time, the proper correlation of the concepts of "bank credit" to the concept of "investment" activities and the differentiation between these categories help us to determine the boundaries of the legislation in both fields. This article is devoted to the analysis of the theory and practice of bank credit and investment activities in Russia to find out the similarities and distinctions in these activities.

Banking in Russia.

Russian banking activities are governed by the Federal Law of the Russian Federation "On Banks and Banking Activity" of 2 December , 1990, No. 395-1 FZ (as amended)[1] (hereinafter referred to as the Law on banks and banking activity) and various instructions and regulations of the Central Bank of Russia. Under the Law on banks and banking activity, the types of banks are not mentioned and all

[1] Sobranie zakonodatel'stva Rossiiskoii Federatsii [Collection of Legislation of the Russian Federation]. February 05, 1996, No. 6, art. 492.

banks in Russia are defined as "commercial". So, literally, there is no division between investment banks and commercial banks in Russia. Meanwhile, ***traditional bank operations and investment banking in banks are usually divided into different legal entities*** in the same group of affiliated companies (bank holding or bank group). For example, the VTB group includes banks (PJSC VTB Bank, JSC Bank VTB 24, JSC TransCreditBank, JSC Bank of Moscow) and companies (VTB Leasing, VTB Development, VTB Capital Asset Management, VTB Registrar, VTB Specialized Depository, MultiCarta Ltd., VTB Capital holding, VTB Insurance Ltd., NPF VTB Pension Fund, VTB Debt Center, VTB Pension Administrator Ltd, VTB Factoring Ltd., VTB Real Estate Ltd, etc.)[2]. Apart from it, investment activity of banks does not always mean investment banking. Banks invest in mergers and acquisitions of other banks and companies. For example, Sberbank of Russia acquired 100% of LLC "Sportloto", the operator of Russian national state-run lottery, in support of organization and conduct of XXII Olympic winter games of 2014 in Sochi[3].

According to the Law on banks and banking activity (Art. 2), a ***bank is defined*** as a credit organization that has an exclusive right to carry out in the aggregate the following banking operations: attracting monetary resources of legal entities and natural persons in the form of deposits, investing the mentioned resources in its own name and for its own benefit on a returnable basis through payments within specified deadlines, opening and keeping bank accounts of natural persons and legal entities.

Any bank operates ***in accordance with licenses*** of various types issued by the Central Bank of Russia, for example, licenses to take deposits, trade in precious metals, conduct operations with individuals' deposits, etc. Russian banks have the general license for the whole package of activities permitted for banks in Russia plus some activities that are not literally banking operations but can be conducted by banks, for example, on the Russian stock market. There are also non-banking credit organizations in Russia that can conduct only some of the activities, such as payment transactions, depository operations etc.

There is ***no special license for investment activity*** as investment activities can be carried out by any business entity without a license and are not defined as special bank operations. ***The exception concerns the licenses*** in capital market ***for certain classified investors*** which include ***institutional investors***.

[2] Available at: http://www.vtb.com/we/today/ .

[3] Available at: http://www.gazeta.ru/business/2011/05/13/3617001.shtml .

Classified investors, under the Federal Law "On the Securities Market" of 22 April 1996, No. 39-FZ (as amended)[4] (hereinafter referred to as the Law on securities market) (Art. 51.2), shall include brokers, dealers and managers; credit institutions; joint-stock investment funds; management companies of investment funds, unit investment trusts and non-governmental pension funds; insurance organizations; non-governmental pension funds; the Bank of Russia; the State Corporation Vneshekonombank, international organizations, including the World Bank, the International Monetary Fund, the European Central Bank, the European Investment Bank, the European Bank for Reconstruction and Development and other persons classified as classified investors by federal laws.

A bank in Russia can (as a classified investor) obtain a broker, a dealer or a depository license, a license for operating an investment fund or a non-state pension fund, etc., issued by the Central Bank of Russia, which is the controlling and supervisory authority for the activities in the capital market in Russia and which is now called mega regulator in Russia as it controls the whole financial market which consists of banking activities market, securities stock market and insurance market. Its instructions and regulations are mandatory for the above mentioned entities.

In summary, a Russian bank can only carry out bank operations permitted which can be broadened by obtaining additional licenses for the activities the bank is interested in. In regard to non-banking activities, ***a bank can make any business activity except from*** those directly prohibited by the Law, namely ***trade, manufacturing and insurance***. This restrictions help to avoid the conflict of interests between these and banking activities.

The ***banking system of the Russian Federation*** shall include the Central Bank of Russia, credit organizations and also representative offices of foreign banks. The branches of foreign banks are not allowed to act in Russia.

Investing in Russia.

There are three basic legal acts regulating the investment field in Russia: the Federal Law "On Investment Activities in the Russian Federation in the Form of Capital Investments" of 25 February 1999, No. 39-FZ (as amended)[5] (hereinafter referred to as the Law on investment activities), the Federal Law "On Foreign Investment in the

[4] Sobranie zakonodatel'stva Rossiiskoi' Federatsii [Collection of Legislation of the Russian Federation]. April 22, 1996, No. 17, art. 1918.

[5] Sobranie zakonodatel'stva Rossiiskoii Federatsii [Collection of Legislation of the Russian Federation]. March 01, 1999, No. 9, art. 1096.

Russian Federation" of 9 July 1999, No. 160-FZ (as amended)[6], the Federal Law "On the Procedure of Foreign Investments in Companies of Strategic Importance for National Defense and State Security" of 29 April 2008, No. 39-FZ (as amended)[7]. The above mentioned federal laws do not extend to relations connected with the investment of capital in banks and other credit organizations governed by the legislation on banks and banking activities of the Russian Federation. For example, the foreign investments in the banking sector are controlled and monitored by the Central Bank of Russia. The size (quota) of foreign capital in the banking system of the Russian Federation shall be established by a federal law at the suggestion of the Government of the Russian Federation agreed with the Central Bank of Russia. This quota is calculated as the ratio of the total capital held by non-residents in the authorized capital of credit organizations with foreign investments to the total authorized capital of credit organizations registered on the territory of the Russian Federation. The Central Bank of Russia ceases to issue licenses to carry out banking operations to banks with foreign investments after achieving the established quota (Art. 18 of the Law on banks and banking activity).

Apart from these laws, there are many other laws and regulations. The investment activity in Russia can take place under various legal schemes: public private partnership, concessions, production sharing agreements, trust management of property or securities, investment funds (unit investment trust, incorporated investment fund, non-governmental pension fund), special economic zones and many others. Most of the schemes listed above are regulated by special laws, so that we have about 20 investment laws in Russia, for example, the Federal Law "On Investment Funds" of 29 November 2001, No. 156-FZ (as amended)[8] (hereinafter referred to as the Law on investment funds), the Federal Law "On Special Economic Zones" of 22 July 2005, No. 116-FZ (as amended)[9], the Federal Law "On Investment Partnership" of 28 November 2011, No. 335-FZ[10] and others. Besides, the investment sphere is regu-

[6] Sobranie zakonodatel'stva Rossiiskoii Federatsii [Collection of Legislation of the Russian Federation]. July 12, 1999, No. 28, art. 3493.

[7] Sobranie zakonodatel'stva Rossiiskoii Federatsii [Collection of Legislation of the Russian Federation]. May 05, 2008, No. 18, art. 1940.

[8] Sobranie zakonodatel'stva Rossiiskoii Federatsii [Collection of Legislation of the Russian Federation]. December 3, 2001, No. 49, art. 4562.

[9] Sobranie zakonodatel'stva Rossiiskoii Federatsii [Collection of Legislation of the Russian Federation]. July 25, 2005, No. 30 (part II), art. 3127.

[10] Sobranie zakonodatel'stva Rossiiskoii Federatsii [Collection of Legislation of the Russian Federation]. December 05, 2011, No. 49 (part I), art. 7013.

lated by the Civil Code of the Russian Federation, the Budgetary Code of the Russian Federation, and the Fiscal Code of the Russian Federation.

According to the Law "On Investment Activities in the Russian Federation in the Form of Capital Investments", ***investments*** are defined as monetary resources, securities, other property, including property rights, other rights which have cash value that are invested in objects of entrepreneurial and (or) other activities with the aim of generating profits and (or) achieving other useful results, and ***investment activity*** is defined as the act of making investments and pursuance of practical measures with the aim of generating profits and (or) achieving other useful results. However, this definition cannot be deemed as a good one. According to professor E.P. Gubin, the lack of an unambiguous, clear understanding of what investment is, leads to difficulties in resolving investment disputes[11].

Under the Law "On Foreign Investment in the Russian Federation", ***foreign investment*** means the investment of foreign capital in an object of entrepreneurial activity on the territory of the Russian Federation in the form of objects under civil law owned by the foreign investor unless trading in such objects under civil law is prohibited or limited in the Russian Federation under federal laws, including, without limitation, money, securities (denominated in foreign currency and the currency of the Russian Federation), other property, rights *in rem*, exclusive rights to the results of intellectual activities having pecuniary value (intellectual property) as well as services and information. As M.M Boguslavski pointed out, the definition of the circle of individuals who are recognized by foreign investors also has an important practical significance[12].

There are two types of investments in Russia, namely, direct investments and portfolio investments. Traditionally, the state regulation of investments concerns more direct investments than portfolio. The laws give definitions to "an investment project" and "a prior investment project" but do not define "an investment portfolio."

Bank as a management company of investment funds.

The operation of investment funds is based on trust management which is regulated by the provisions of the Civil Code of the Russian Federation (hereinafter

[11] E.P. Gubin. Zashchita prav inostrannykh investorov v sootvetstvii s zakonodatel'stvom Rossiiskoi' Federatsii [Protecting the Rights of Foreign Investors under the Laws of the Russian Federation]// Biznes Pravo [Business Law]// Prilozhenie „Biznes i pravo v Rossii i za rubezhom" [Appendix "Business and Law in Russia and Abroad"]. 2013, No. 1, pp. 2 – 7.

[12] M.M. Boguslavsky. Inostrannye investitsii: pravovoe regulirovanie [Foreign Investment: Legal Regulation]. Moscow, 1996.

referred to as the CC of the RF), the Law on banks and banking activity and the Law on investment funds.

According to the Law on banks and banking activity (Art. 5), besides the banking operations, ***a credit organization shall have the right to carry out trusteeship operations*** for monetary and other property under agreements with natural persons and legal entities.

According to the CC of the RF (Art. 1012) under the ***agreement on trust management*** one party (settler of trust) shall transfer property in trust to the other party (the trust administrator) for a definite period, while the other party shall undertake to administer this property in the interests of the seller of trust or the person indicated by him (the beneficiary). Terms of the agreement on trust management of investment fund shall be determined by the management company in the standard form and can be accepted by the trustor only by acceding to the agreement as a whole. Accession to the agreement on trust management of investment funds is carried out through the purchase of investment units of investment funds issued by the management company performing trust management of these investment funds (Art. 11 of the Law on investment funds).

The transfer of property in trust shall not involve the assignment of the right of its ownership to the trust administrator. While implementing the trust of property, the trust administrator shall have the right to perform any legal and actual actions in the interests of the beneficiary in keeping with the contract of trust of property.

The objects of trust may include enterprises and other property complexes, particular facilities relating to real estate, securities, rights certified by non-documentary securities, exclusive rights and other property. In the case of the transfer of securities in trust, they may be pooled for the transfer in trust by different persons. The authority of the trust administrator to dispose of securities shall be defined in the contract of trust.

Property transferred in trust shall be separated from the other property of the bank.. This estate shall be reflected in the trust administrator's separate balance-sheet, with an independent accounting being kept on its basis. A separate bank account shall be opened for settlements in the activity associated with trust.

The comparison of credit and investment activities of banks

Bank credit and investment activities have ***the same goal*** – more profit earning with less investments. But they have some differences also in participants, principles, sources of income, etc.

Under Russian law, the ***participants of investment activity*** include investors, customers and contractors, users, and other entities. The investor is acknowledged as a person who invests capital into business and other activities and ensures its targeted use. The ***participants of the bank activities*** are banks and other credit organizations.

Under the Law on banks and banking activities, the ***main principles of bank credit financing*** are conditions of repayment, interest payment and term (a certain date of return). The facultative principles are security and contingency reserve provision. These principles shall minimize the banking risks in the case of no repayment of the credit from the borrower and thus shall make the bank stable.

Investment activity is based on other principles. It does not mean interest payment, not always means specific date of return, means repayment but not exactly in the same form (it can be some positive effect of investments).

Bank credit activity is a specific bank activity which means credit cash financing by a special credit organization under the terms of credit agreement. The principal point of bank credit financing is ***using money raised from clients of the bank***[13], but not the internal funds of the bank. After a defined period of time, the bank is obliged to return this money to its clients with the defined interest.

The investment activities of the bank include direct and portfolio investments, operations with securities, operations of trust management of client's property, lease operations, etc. Under the Federal Law "On Investment Activities in the Russian Federation in the Form of Capital Investments", ***investors shall fund capital investments from their own and (or) attracted resources*** (Art. 10)

The sources of income of the bank are classified into two types – interest income and non-interest income. This classification correlates with the classification of bank activities into credit financing and investment financing. The credit financing forms constitute interest income of the bank while the investment financing makes it possible for the bank to earn non-interest profit.

Budget investment financing and budget credit financing in Russia.

The investment activity can be held by the state or a private entity. So the investments can be either state or private. State investments are governed by the Budgetary

[13] Informatsionnoe pis'mo Vysshego Arbitrazhnogo Suda Rossiiskoiш Federatsii „Ob otdel'nykh rekomendatsiiakh, priniatykh na soveshchaniiakh po sudebno – arbitrazhnoi' praktike" No. C1-7/OП-555 [Informational Letter of Supreme Commercial Court of the Russian Federation „About some Recommendations from the Meetings in Relation to Past Arbitration Court Rulings" No. S1-7/OP-555]. August 10,1994// Vestnik Vysshego Arbitrazhnogo Suda Rossiyskoii' Federatsii [Bulletin of Supreme Commercial Court of the Russian Federation]. 1994, No. 10.

Code of the Russian Federation (hereinafter referred to as the BC of the RF). The BC of the RF states the difference between "budget investment financing" and "budget credit financing".

Budget credit financing, according to the BC of the RF, means that the Russian Federation lends money from the federal budget to

– any other budget of the budgetary system of Russia:
– any legal entity (except for state or municipal institutions);
– any foreign state or foreign legal entity (Art. 6 of the BC of the RF).

The budget credit financing shall correspond to the goals for which it can be made, the credit terms and conditions, budget provisions within the framework of the financial year and limits for borrowers of budget money, etc.

The borrowers are obliged to give budget money back with interest in the manner and at the times as settled in credit terms and conditions and (or) in the agreement (Art. 93.2 of the BC of the RF).

Budget investment means budget money given to build state or municipal property or increase its cost (Art. 6 of the BC of the RF). Investing budget money in private legal entities ***creates a property right for the state for the equivalent part of equity capital of the relevant legal entities*** (Art. 80 of the BC of the RF). Consequently, in investment activity as distinct from credit activity, the state does not return the money with interest but increases the value of its property.

Analyzing the BC of the RF, we come to the conclusion that there is not a lot in common between budget investment financing and budget credit financing in Russia as they are defined by law-makers.

Public private partnerships in Russia.

Regional and national budgets are frequently insufficient to finance directly necessary and desired facilities. Therefore, the Russian government is trying to create or improve the pathways whereby private funds can be attracted to invest in programs of public work or services within a framework of suitable contractual arrangements. The concept of public private partnership has become very popular in Russia recently. The Russian government has announced plans to spend about $1 trillion over the next 10 years on improving infrastructure. The PPP has been recommended as a desirable way of handling public infrastructure projects.

Public private partnerships in Russia are governed by the Federal Law "On Public-Private Partnership, Municipal-Private Partnership in the Russian Federation and the Amendments to Certain Legislative Acts of the Russian Federation" of

13 July 2015, No. 224-FZ[14], where the Law defines PPP as legally registered for a specified period of time, based on combination of resources, risk-sharing partnership between the public partner, on the one hand, and the private partner, on the other hand, carried out on the basis of the agreement of public-private partnership, entered into in accordance with this federal law in order to attract private investment into the economy, to ensure access to goods, services and improving their quality.

However, the concept of public private partnership is broader than the one defined in the abovementioned Law. Public private partnership can also be conducted in the forms of concessions, production sharing agreements and other legal forms which are governed *inter alia* by the Federal Law "On Concession Agreement" of 21 July 2005, No. 115 FZ (as amended)[15], the Federal Law "On Production Sharing Agreements" of 30 December 1995, No. 225 FZ (as amended)[16] and other legal acts.

Recently, several high-profile PPP projects have been tendered in Russia, including major road, urban rail and air transport projects. Among them are "Western High-Speed Diameter" highway, "Orlovsky" tunnel under the Neva river in St. Petersburg, Moscow –St. Petersburg highway construction (the section between the 15-58 km), the construction of a new junction of MKAD (Moscow Automobile Ring Road) with the federal highway M-1 "Belarus", the project of heat supply system retrofit in Kaliningrad, the project of the South Transregional Water System construction, aimed at improving water supply of Astrakhan, Volgograd, Kalmyk and Stavropol regions, and others. However, ***there are still only few PPP projects in existence in Russia,*** which points to the presence of certain barriers that have to be managed if such partnerships are to be more widely employed in Russia.

Project finance scheme in Russia.

Project finance clearly shows the difference between raised money and debt capital. Under the Federal Law "On Investment Activities in the Russian Federation in the Form of Capital Investments", investors shall fund capital investments from their own and (or) attracted resources (Art. 10). Thus, ***the law-maker included "borrowed money" in the category of "attracted funds"***. Meanwhile, the Law of the

[14] Sobranie zakonodatel'stva Rossiiskoii Federatsii [Collection of Legislation of the Russian Federation]. July 20, 2015, No. 29 (part I), art. 4350.

[15] Sobranie zakonodatel'stva Rossiiskoii Federatsii [Collection of Legislation of the Russian Federation]. July 25, 2005, No. 30 (part II), art. 3126.

[16] Sobranie zakonodatel'stva Rossiiskoii Federatsii [Collection of Legislation of the Russian Federation]. January 1, 1996, No. 1, art. 18.

RSFSR "Investment activity in RSFSR"[17] of 26th of June, 1991, No. 1488-1 which is partly in force, names three sources of financing: "raised money", "long debt" and "proprietary funds". According to the Law of the RSFSR (Art. 8), ***long debt of investors*** means bank and budget credits, loans raised upon bonds and other means, and ***raised money of investors*** is defined as money obtained from selling shares, fixed contribution and other contributions of the employees, natural persons and legal entities. The same understanding is shown in the Federal Law "On Production Sharing Agreements" of 30 December 1995, No. 225-FZ (as amended).

In our opinion, "raised money" and "debt capital" tend to be different sources of financing. Long debt money is usually borrowed from banks and raised money – from other investors. Banks have only specific bank risks of not repayment debt with interest but the bank has the right to demand this repayment even if the borrower is found insolvent (bankrupt). Other investors bear investment risk of not obtaining profit and of loosing the invested money.

The project finance scheme may have a structure of a deal when a bank obtains a share in a special purpose vehicle. In this case, the bank will act as a normal investor and will invest its proprietary funds but not the clients' money.

Project finance is a new category for Russian legislation. Recently, the Law on the securities market has obtained a definition of a specialized project finance company (the Russian analog of an SPV), which actually contains the legislator's understanding of project financing. The objectives and subject of activity of a specialized project finance company are funding of a long-term (for a period not less than three years) investment project by purchasing monetary claims for liabilities that may arise in connection with the sale of property, created by the implementation of such a project, the provision of services, the production of goods and (or) performance of works by using property created as a result of such a project, as well as through the acquisition of other property necessary for the implementation of or related to the implementation of such a project, and the implementation of bond issues secured by a pledge of monetary claims and other property (Art. 15.1 of the Law on the securities market). The definition of project financing through its core, connecting elements of a specialized project finance company, from our point of view, seems to be justified and consistent with international practice, as project finance is an economic category, and particularly the legal regulation may affect only some of its elements. However, it would be wrong to narrow the concept of project finance on the basis of this

[17] Vedomosti SND i VS RSFSR [Journal SND and VS RSFSR]. July 18, 1991, No. 29, art 1005.

definition as the project company may be created in any legal form, such as a business partnership, association or partnership, etc.

A bank's participation in project finance in Russia can be conducted not only by means of lending but also by means of the acquisition of shares of a specialized project finance company, making contribution to its authorized capital, the acquisition of bonds, the commitment to provide financial assistance for the fulfillment of the obligations on the bonds, surety or bank guarantee and others (Note of the Central Bank of Russia of 7 July, 2014 No. 3309-U "On the Forms and Methods of Risk-Taking on the Secured Bonds in Specialized Financial Community and Specialized Project Finance Company"[18]). Professor M.I. Braginsky and professor V.V. Vitryansky indicate that the definition of loan (in economic sense) covered relations associated with the issuance and sale of bonds, which can not be classified as a type of credit (in the legal sense) and represent certain types of loan agreement[19]. According to professor L.G. Efimova, there are transactions which can be viewed in economic science as credit, but from the legal point of view they cannot be deemed a credit[20]. In our point of view, in the project finance scheme a credit agreement in the understanding of Russian Laws is rarely used. It is more correct to use the term a *loan* in relation to project finance.

Several banks can participate in project finance, at the same time using the tool of a syndicated loan. The multiplicity of the participants on the side of the lender allows lenders to spread risks and to reduce the costs of providing credit.

Conclusion.

Summing it up, we suppose that credit finance and investment finance should be strictly divided. The bank can carry out both activities but the sources of finance should be different. Taking into consideration the difference in the concepts of bank risk and investment risk, a commercial and investment bank may be more efficient in the bank group or a bank holding but not in the same full-service bank. We assume that the legal regulation of credit finance and investment finance shall also be different and it will guarantee a remedy for the depositors and freedom for investors.

[18] Byulleten' Banka Rossii [Bulletin of the Bank of Russia]. August 06, 20014, No. 71.

[19] M.I. Braginsky, V.V. Vitryansky. Dogovornoe pravo. Kontrakty na poluchenie kredita, bankovskogo kredita i faktoringa. Dogovory, napravlennie na sozdanie kollektivnykh obrazovanii' (Kniga 5) [Contract Law. Contracts for a Loan, Bank Loan and Factoring. Agreements Aimed at the Creation of Collective Entities (Book 5)]. Volume 1, Statut Publishing House, 2006.

[20] L.G. Efimova. Zakonodatel'stvo o bankovskikh operatsiiakh i praktika [Banking Transactions Law and Practice]. Moscow, 2001, p. 496.

SOME ASPECTS OF MANAGING RISKS OF FREIGHT FORWARDERS

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Abstract: The article is devoted to the problem of managing risks of the freight forwarder. It concerns the ways of reducing financial risks of the freight forwarder within his/her professional activity. The author considers the most important of them, namely: detailed conduct of the precontractual work and the possibility to conduct the insurance contract.
Key words: the freight forwarder, the forwarding contract, managing of risks, insurance of goods, the precontractual work, the Russian Civil Code.

Freight forwarding is one of the most significant activities in high demand nowadays. More frequently, businesses use the services of forwarding companies to reduce the transportation expenses and, as a result, to cut costs of goods. However, far too often, the freight forwarders not only get nothing as a profit but suffer losses even when they perform their obligationsproperly. Therefore, it seemed important to find out the reasons for financial risks' generation and the ways of their minimization.

First of all, it is necessary **to determine what the freight forwarding is**. According to Part 1 of Article 1 of Federal Law dated June 30, 2003 No. 87-FZ "On Freight Forwarding"[1], freight forwarding is thought of as services for organizing goods transportation by any type of transport and shipping paperwork, execution of documents for customs purposes and other documents to be prepared for goods transportation. Article 801 of the Federal Law Civil Code of Russian Federation dated January 26, 1996,No. 14-FZ[2] points out additional obligations that could be undertaken by freight forwarders pursuant to forwarding contract, specifically: inspectionof goods quantity and condition, its loading and unloading, payment of fees, duties and other costs that must be paid by the client, storage of goods,receipt of deliveryat the delivery point. This is a disclosure list which means that parties are entitled to determine the obligations of the freight forwarders themselves.

[1] Federal'nyi' zakon o transportno-ekspeditsionnoi' deiatel'nosti No. 87-FZ [Federal Law "On Freight Forwarding" No. 87-FZ]. Rossiiskaia Gazeta [Ros. Gaz]. July 03, 2003, No. 128. Hereinafter – FZ "On Freight forwarding"

[2] Sobranie Zakonodatel'stva Rossiiskoii Frderatsii [Russian Federation Collection of Legislation]. January 29, 1996, No. 5, item 410. Hereinafter – The Russian Civil Code.

According to all of the above, the freight forwarders appear as mediators and provide the transportation of goods from supplier to buyer within the terms of the supply contract.The freight forwarders handle all variety ofaccompanying issues involving execution of documents, accompaniment of goods and its delivery by the most reasonable type of transportation. Within the activity of the freight forwarders, they face various financial risks.

To eliminate and reduce **negative financial consequences, the freight forwarders have to take into consideration a number of circumstances**.

*1. Detailed pre-contractual work.*At the stage of the contract conclusion, freight forwarder and the client must agree upon all conditions of the contract. For the purpose of avoiding disputes, the contract should include the following conditions: the detailed description of services that the freight forwarder provides to the client, the route, the description and characteristics of goods, terms of packing, details of whom the goods are to be consigned to, their name and address in full, the time of delivery and unloading of goods with due account for operation hours of the warehouse the goods are delivered to, payment arrangements and due dates, the list of documents that are required to pass the customs, sanitary and other kinds of state control. In order to minimize discrepancy in the contract, it is necessary for the freight forwarder to ask the client for the following information in writing : 1) details of whom the goods are to be consigned to; 2) details of where the goods are to be delivered, i.e. final destination; 3) shipping or flight details (if known); 4) the correct value of goods; 5) unambiguous description of the goods, their quantity and characteristics.

Moreover, there are such provisions to be made in the contract that allow the freight forwarder to have the extent rights and, in this way, they help to protect the forwarder's interests. For instance, it is necessary to point out in the contract that the freight forwarder is entitled to distrain the goods that are in his disposition. The legislation gives him the right to keep them till the client pays reward and compensates other costs inferred in the client's interest or till the client provides the appropriate security of the obligations' performance (such as to pay the reward and compensate other costs). In this case, the client is responsible for the damage of goods if it happens because of the goods distrain by the freight forwarder and also covers the expenses related to the distrain of property (part 3 of Article 3 FZ "On Freight Forwarding").

A properly prepaid contract decreases the eventual claims from the client and reduces the risk of negative consequences for the freight forwarder. For instance, in the case when parties suppose the long-term cooperation including two or more

transportations it seemed to be effective to conduct the framework of a forwarding contract. It contains only basic rights and obligations of parties. The specified conditions of each delivery are to be performed by means of adding annexion to the contract or orders written by both parties.

The absence of the contract or not properly agreed conditions by the freight forwarder and the client may cause bilateral claims, litigation and, thereby, additional expenses as to court costs, representative services, and so on.

2. The possibility to concludean insurance contract. It is necessary to emphasize the variety of insurance contracts. This article deals with such insurance contracts to be concluded by the freight forwarder, namely, a property insurance contract (Article 930 of the Russian Civil Code), the contract of insuring therisk of causing harm(Article 931 of the Russian Civil Code), the contract of contractual liability insurance (Article 932 of the Russian Civil Code).

Property insurance contract may be concluded on behalf of the client or the freight forwarder. Property insurance on behalf of the client is allowed only when it is directly stipulated in the forwarding contract(part 5 of Article 4 FZ "On Freight Forwarding"). In other cases, the freight forwarder is prohibited to conclude the property insurance contract on behalf of the client. Furthermore, the client bears all expenses.

The freight forwarder has the right to insure goods. The following precedents confirm the above-mentioned conclusion: resolutions of the Federal Commercial Court of Povolzhskiy district dated December 22, 2011 No.F06-10730/11 with regard to case No.A55-24263/2009 dated May 17, 2010 with regard to No.A12-16611/2009, resolution of the Eleventh Commercial Appeal Court dated August 23, 2011 No. 11AP-8120/11. In this context, all insurance expenses are born by the freight forwarder. In order for the client to compensate the related expenses on the goods insurance, the parties have to point to the client's obligation to compensatethe costs made by the freight forwarder in the client's interests (part 2 of Article 5 FZ "On Freight Forwarding"). When considering this case from the taxation point of view, it is worth mentioning that the compensation of expenses by the client to the freight forwarder is not related toservice implementation by the freight forwarder and, thus, it is not regarded as a taxation object of VAT and profit tax for the freight forwarder. This statement can be proved by the precedents. They indicate that when a forwarding contract contains provisions about the insurance of goods by the freight forwarder and about the client's obligation to compensaterelevant costs, it can be determined as an element of agency relationship (resolutions of the Federal Com-

mercial Court of Severo-Kavkazskiy district dated February 5, 2013 No.F08-8177/12 with regard to case No.A32-2247/2012,Federal Commercial Court of Severo-Zapadniy district dated October 22, 2009 No.A56-55513/2008, the Thirteenth Commercial Appeal Court dated July 24, 2009 No. 13AP-8079/2009, the ruling of the Supreme Commercial Court dated May 18, 2007 No. 5707/07).

Another type of insurance is **the contractual liability insurance**. In particular, the freight forwarder is responsible before the client for the safety of goods, their delivery to the point of destination in time and in accordance with the terms of the forwarding contract. In other words, the freight forwarder is liable for organization of transportation whether he performs the transportation, using his/her transport, or concludes a contract of carriage of goods with a carrier. AstotheRussianlegislation,thefreightforwarder is responsible before the client by means of compensation of real damages for forefault, deficiency or damage (spoilage) of goods from the time they were accepted by the freightforwarder till the delivery to the consignee, stated in the forwarding contract, or to his authorized agent.But thefreightforwarder is not responsible if he/she proves that the forefault, deficiency or damage (spoilage) of goods were due to the circumstances which he/she could not prevent, and their elimination was independent of him/her (part 1 of Article 7FZ "On Freight Forwarding"). The precedents also point out that the freightforwarder is responsible for damage of goods. For instance, in the decision of the Commercial Court of Moskovkay oblast' dated December 22, 2014with regard to case No.A41-48874/14 stated that "Baikal Servis TK", Ltd. (the freightforwarder) is obliged to compensate the damages, caused to "Plastiteks", Ltd.(the consignor) because of the damage of packing (the sack of polylactam) and to pay the interest on money had and received.

However, there are some peculiarities of thecontractual liability insurance. Thus, in accordance with Article 932 of the Russian Civil Codecontractual liability insurance is permissible in cases stated in the law. The analysis of the legislation shows that there are no such cases. It means that when such a contract is conducted and there is an insurance event, the insurance company has the right to refuse to pay the insurance indemnity to the freightforwarder. The precedents of commercial courts confirm such a statement. Though the Decree of the Presidium of the Supreme Commercial Court dated April 13, 2010 No. 16996/09[3] points out that the insurance company has to repay to the freightforwarder all sums that he gave to his/her client if the insurance contract was concluded in accordance with rules of insurance approved by the underwriter, and the insurance company, which appeared to perform the insur-

[3] The text is available in Consultant Plus legal information system.

ance services on the professional level and to be a *bona fide* contract party, realized legal consequences of such a contract. Furthermore, the Court recognized the contract in question as not a contract of thecontractual liability insurance, but as a package contract, including elements of different types of property insurance.

In view of the aforesaid, many experts suggest that the freightforwarder, who is going to insure his professional responsibility, estimate the risk that the insurance company will refuse to pay the insurance indemnity, and it will be necessary to apply to court for the protection of interests.

In the case the freightforwarder wants to minimize risks, he/she has an opportunity to conclude **the contract of insuring the risk of causing the harm**. In this case, the insurance indemnity will cover the damages sustained by the freightforwarder to the third parties with whom there are no contractual relationships. As an example, there could be a situation when goods fall out of a moving vehicle and damage somebody's property. The insurance indemnity will cover only the cost of such property but not the cost of goods. Such a position is contained in the ruling of the Supreme Commercial Court dated April 25, 2008 No. 5710/08[4].

Thus, it is impossible to fully eliminate the financial risks of the freightforwarder within his/her professional activity, as the Russian legislation does not set forth such provisions. So it is up to the freightforwarder to undertake such measures to reduce financial risks. The above-mentioned ways would establish the basis for doing it and help reduce negative consequences.

[4] The text is available in Consultant Plus legal information system.

OBJECTIVE CONDITIONS FOR CRIMINAL LIABILITY OF LEGAL ENTITIES IN THE RUSSIAN FEDERATION AND PROSPECTS OF ITS INTRODUCTION

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Abstract: The article points to objective conditions for criminal liability of legal entities in the Russian Federation and provides arguments supporting the need for introduction of such liability for certain violations. It describes the history of interpretation and gives brief characteristic of this institution in the Russian criminal and legal science with regard to three periods: before the revolution (up to 1917), Soviet era (from 1917 till 1991), post-Soviet period (from 1992 till now). The article provides information about legislative drafts which precede the Criminal Code of the Russian Federation 1996 and impose criminal liability upon legal entities. It analyses draft laws which were proposed in 2011 by the Investigative Committee of the Russian Federation and the deputy of the State Duma of the Federal Council of the Russian Federation – A.A. Remezkov – with a view to introduction of criminal liability of legal entities. Furthermore, it points to significant differences between the aforementioned draft laws. The first one recognizes a legal entity as a subject of liability covered by other criminal and legal measures, while the second one views a legal entity as a subject of crime covered by criminal punishment. The article expands on approaches used to establish the guilt of a legal entity. It comes to conclusion about practicability of one more criminal law which should be adopted apart from the Criminal Code of the Russian Federation – a federal law Concerning Legal Liability of Legal Entities, and suggests that such liability should be viewed as the beginning of a new branch of criminal law, basing, first of all, on specific differences in conceptions of deed and guilt of an individual and a legal entity.

Key words: criminal law, criminal liability of legal entities, subject of a crime, subject of criminal liability, objective conditions for criminal liability of legal entities, administrative violations by legal entities, crimes committed by legal entities, guilt of a legal entity

The question of recognition of the legal entity as a subject of crime or criminal liability is one of the most controversial and actively debated issues in Russian criminal legal science. Depending on social and economic processes in the country and the world, polemics over the introduction of criminal liability of legal entities are actively debated one day, then "fade away" another day just for some time later to become a subject of hot scientific discussion again.

From the perspective of scientific understanding of this institution and evaluation of possibilities of its implementation in the Russian law, there are several historical periods:

1. Pre-revolutionary period (up to 1917);
2. Soviet period (1917-1991);
3. Post-soviet period (from 1992 to the present day).

In the first of these periods – in investigations of the XIX – early XX centuries – a number of scholars countenanced the establishment of criminal liability of legal entities, although the opposite point of view dominated.However, during the Soviet period,such liability was exclusively criticised as it ensured the interests of capitalists and was aimed at restricting the rights of workers (the working class).

Representatives of Soviet criminal legal science clearly proceeded from the fact that the perpetrator of a crime could only be an individual, and categorically stated that under no circumstances could legal entities be held criminally liable under the Soviet legislation[1].

For example, in 1958, V.S. Orlov thoroughlyanalyzed the institution of criminal liability of legal entities, indicating the points of view of a number of foreign scholars justifying this institution, and concluded that such a liability had no scientific basis and was politically deeply reactionary[2].

From the beginning of the deep social and economic reforms based on the transition to market-based economic relations, which coincided with the collapse of the Soviet Union, the assessment of criminal liability of legal entities began to change. Thus, a number of well-known Russian scholars have formed a positive attitude towards the introduction of criminal liability of legal entities in the Russian Federation.

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[1] A.A. Piontkovskiy. Kurs sovetskogo ugolovnogo prava. Tom II. Obshchaia chast'. Prestuplenie [A Course of Soviet Criminal Law. Volume II. General Part. Crime]. Nauka Publishing House, Moscow, 1970, p. 206.

[2] V.S. Orlov. Ispolnitel' prestupleniia po sovetskomu zakonodatel'stvu [The Perpetrator of a Crime under Soviet Legislation]. Yuridicheskaia Literatura State Publishing House, Moscow, 1958, pp 206 – 217.

Among the first to express such a position was A.V. Naumov with the following prediction:

"In all likelihood, there will be a convergence of our laws and some of the provisions of the General Part of the Criminal Law of states with a traditionally developed market economy ... and we will have to review traditional ideas about the perpetrator of a crime being only an individual. In our country market relations are also able to turn a number of economic crimes and legal entities into perpetrators with the possible applying criminal law punitive sanctions to them"[3].

The authors of the Concept of Criminal Law of the Russian Federation developed in 1992 also supported the introduction of criminal liability of legal entities (I.M. Galperin, A.I.Ignatov, S.G. Kelina, Y.A. Krasikov, G.M. Minkovskiy, M.S. Paleev, S.A. Pashin, E.F. Pobegailo, O.F. Shishov). They stated:

"Special attention should be given to the question of the desirability of introducing criminal liability of legal entities; it appears that the imposition of relevant sanctions on them, e.g. for environmental crimes, could strengthen the criminal law protection of the most important objects"[4].

As some of the authors of the concept previously noted, they formed their opinion on the necessity to include the institution of criminal liability of legal entities in Russian law largely under the influence of communication with French scholars who had actively studied the issue before and, following the results of the study, justified the inclusion of rules on criminal liability of legal entities in the draft of the new Criminal Code of France. The Criminal Code of France was adopted in 1992[5], and the French experience of its planning was reviewed during the drafting of the new Criminal Code of the Russian Federation (hereinafter — the RF CC)to replace the RSFSR CC.

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[3] A.V. Naumov. Ugolovnoe pravo v protsesse perekhoda k rynochnoi' ekonomike [Criminal Law in the Transition to a Market Economy]// Sovetskoe gosudarstvo i pravo [The Soviet State and Law]. 1991, No. 2, p. 35; A.V. Naumov. Predpriiatie v typike? [Enterprise in the Dock?]// Sovetskaia yustitsiia [Soviet Justice]. 1992, No. 17/18, p. 3.

[4] Kontseptsiia ugolovnogo zakonodatel'stva Rossiiskoii Federatsii [The Concept of the Criminal Legislation of the Russian Federation]// Gosudarstvo i pravo [State and Law]. 1992, No. 8, p. 44.

[5] Novyi' Ugolovnyi' kodeks Frantsii [The New Criminal Code of France]// Translate by M.B. Garf, M.V. Shchors, N.E. Krylova; science editor N.F. Kuznetsova, E.F. Pobegailo. MSU College Publishing House, Moscow, 1993; Ugolovnyi' kodeks Frantsii [Criminal Code of France]// Translate from French and preface by N.E. Krylova; science editors L.V. Golovko, N.E. Krylova. Legal Centre Press, Publishing House, Saint Petersburg, 2002.

The proposal to introduce criminal liability of legal entities was also supported by publications and speeches of S.G.Kelina[6], A.S. Nikiforov[7] and a number of other well-known scholars, who at the same time drew attention to the need for its further consideration.

Herewith, e.g., V.N. Kudriavtsev indicated:

"The elements of crime should be the basis of criminal liability of legal entities. However, limitations should be provided as well: liability may occur only if the actions that violate penal prohibition had been committed for the benefit or with the consent of the legal entity."[8].Yu.KhKalmykovnoted the need for a serious discussion of the criminal law measures against legal entities since ordinary criminal measures do not apply to them[9].

At the same time, a team of scholars who actively rejected the possibility of introducing criminal liability of legal entities in the Russian Federation was formedthe informal leader of which became N.F. Kuznetsova .She was one of the first who clearly indicated a negative stance towards this institution[10]. Later, arguments expressed by N.F. Kuznetsova against recognition of the right of criminal responsibility of legal entities to exist have been developed by many authors in their works[11].

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6 S.G. Kelina. Otvetstvennost' yuridicheskikh lits v proekte novogo Ugolovnogo Kodeksa Rossiiskoii Federatsii [The Liability of Legal Entities in the Draft of the New Criminal Code of the Russian Federation// Ugolovnoe pravo: novye idei [Criminal Law: New Ideas]. Editor in chief S.G. Kelina, A.V. Naumov. Russian Academy of Sciences, Institute of State and Law. Moscow, 1994, pp. 50 – 60.

7 A.S. Nikiforov. O korporativnoi' ugolovnoi' otvetstvennosti [On Corporate Criminal Liability]// Ugolovnoe pravo: novye idei [Criminal Law: New Ideas]. Editor in chief S.G. Kelina, A.V. Naumov. Russian Academy of Sciences, Institute of State and Law. Moscow, 1994, pp. 43 – 49; A.S. Nikiforov. Organizatsiia kak ispolnitel' prestupleniie [The Organisation as a Perpetrator of a Crime]// Sovremennye tendentsii v kriminal'noii politiki i razvitii ugolovnogo zakonodatel'stva [Modern Tendencies in Criminal Policy and Criminal Legislation Development]// Editorial board S.V. Borodin et al. Russian Academy of Sciences. Institute of State and Law. Moscow, 1994, pp. 59 – 61.

8 Sovremennye tendentsii v ugolovnom zakonodatel'stve i razvitiia teorii ugolovnogo prava [Modern Tendencies in Criminal Legislation and Criminal Law Theory Development]// Gosudarstvo i pravo [State and Law]. 1994, No. 6, p. 45.

9 Ibid, p. 49.

10 N.F. Kuznetsova. Tseli i mekhanizmy Ugolovnogo Kodeksa [The Objectives and Mechanism of the Criminal Code]// Gosudarstvo i pravo [State and Law]. 1992, No. 6, p. 82.

11 For example, P.P. Ivanov, following the research results of the question of the criminal liability of legal entities based "on contra" arguments formulated by N.F. Kuznetsova, concludes that "the establishment of liability of legal entities in the current criminal legislation of the Russian Federation is inappropriate, unhelpful and unacceptable". Ref. P.P. Ivanov. Vopros ob ugolovnoi' otvetstvennosti yuridicheskikh lits v rossii'skom ugolovnom prave [The issue of the criminal liability of legal entities in Russian criminal law]// Avtoreferat dissertatsii na soiskanie stepeni kandidata yuridicheskikh nauk [Abstract of the Thesis for Scientific the Degree of Candidate of Law]. Petersburg University MIA of the Russian Federation, Saint Petersburg, 2001, p. 22.

However, as a result of the discussion, the rules of criminal liability of legal entities have been included in the draft of the General Part of the RF CC , prepared in 1994 by the Russian Ministry of Justice and the Presidential Legal Directorate of the Russian Federation (the authors of the draft: I.M. Galperin , L.N.Ignatov , O.L. Ivanov , S.G. Kelina , G.M. Minkovskiy , M.S. Paleev , S.A. Pashin , E.F. Pobegailo , S.B. Romazin , O.F. Shishov , S.V. Polubinskaia)[12].

This draftcontained Art. 106 which read as follows:

"(1) A legal entity shall be criminally liable for an act prescribed by criminal law if:

a) a legal entity is guilty of a failure to perform or improper performance of the direct legal provision establishing the obligation or the prohibition of certain activities;

b) a legal entity is guilty of carrying out activities inconsistent with its constitutional documents or declared goals;

c) the act that caused harm or created a threat of causing harm to an individual, society or the state, was committed for the benefit of the legal entity or was allowed, authorized, approved, used by the body or person performing the functions of managing a legal entity.

(2) Criminal liability of legal entity does not exclude an individual's liability for the crime conducted by him/her"[13].

However, during discussions of the draft of the RF CC and voting in the first reading in the State Duma, the provisions of the draft on establishing criminal liability of legal entities were not supported[14]. The legislator did not accept the developed proposals for the introduction of criminal liability of legal entities, and they were not included in the 1996 RF CC .

At the same time, as it was reasonably noted by A.I. Korobeev ,

"... the issue of criminal liability of legal entities can not be considered as finalized in terms of criminal law policy, the interests of legal theory and practice. But it needs a new understanding, a deep, complex and interdisciplinary development with the assistance of experts from different fields of modern science of both various branches of domestic law and criminal law of foreign countries"[15].

[12] Ugolovnyi' kodeks Rossiiskoii Federatsii. Obshchaia chast': Proekt [The Criminal Code of the Russian Federation. General part: Draft]. MJ RF Publishing House, 1994.

[13] Ugolovnyi' kodeks. Obshchaia chast' [Criminal Code. General part]// Rossiiskoe pravosudie [Russian Justice]. 1994, No. 6, p. 58.

[14] J. Fletcher, A.V. Naumov. Osnovnye poniatiia sovremennogo ugolovnogo prava [Basic Concepts of Modern Day Criminal Law]// Yurist [Lawyer]. Moscow, 1998, p. 488.

[15] A full course of criminal law: in 5 vol.// Edited by A.I. Korobeev. Prestuplenie i nakazanie [Crime and Punishment]. Vol. 1, R. Aslanov's Legal Centre Press Publishing House, Saint Petersburg, 2008, pp. 434 – 435.

And this is really so. The question of establishing criminal liability of legal entities is still open and is still being actively discussed by scholars and practitioners[16].Many of them have stated objective stipulation of the introduction of criminal liability of legal entities in the Russian Federation.

One of the first scholars to have drawn attention to the objective stipulation of the introduction of criminal liability of legal entities was B.S. Ustinov who indicated back in 1992:

"The transition of enterprises to private ownership, and the development of cooperation creates all the preconditions for the introduction of criminal liability of legal entities in order to protect the public interests from the group, collective egoism, and the interests of consumers from arbitrariness of manufacturers"[17].

That said, he convincingly explained his position on the matter, noting:

"Our theorists criticize the Anglo-American legal system, in which the subject of criminal liability may be legal entities. However, it has long been noted that civil measures regarding legal entities are not very effective. But the main thing is that almost no one is working on the definition of unlawful acts that are not crimes. At the same time, individual responsibility, e.g., for the pollution of environment, is rarely applied. Punitive sanctions for environmental offences imposed on legal entities in the form of civil liability are measured by public opinion as inadequate. The determination of criminal liability for environmental offences conducted by legal entities would allow achieve a greater effect ... Criminal penalties for legal entities can include censure, fines, the confiscation of property, prohibition to engage in certain activities, liquidation of the legal entity"[18].

[16] Works on this topic have been published by: L.A. Abashina, E.B. Anisimov, E.Yu. Antonova, V.V. Baburin, A.I. Bastrykin, A.N. Berglezov, P.N. Biryukov, G.I. Bogush, H.V. Bugaevskaya, Yu.I. Bytko, R.V. Vafin, N.I. Verchenko, I.S. Vlasov, B.V. Volzhenkin, Yu.B. Gavryushkin, M.V. Galdin, N.A. Golovanova, L.V. Golovko, G.G. Gumerov, M. Guneva, M.Yu. Dvoretskiy, S.G. Demin, Yu.V. Derishev, V.N. Dodonov, E.A. Dorozhinskaya, S.A. Drozdova, O.L. Dubovik, A.L. Dyadkin, N.A. Egorova, G.A. Esakov, A.S. Zhukova, M.Yu. Zenkov, Ya.M. Zlochenko, L.O. Ivanov, N.G. Ivanov, P.P. Ivanov, M.M. Kalenchenko, S.I. Caribov, S. Kapkova, E.A. Karpova, V.P. Kashepov, S.G.Kelina, I.A. Klepitskiy, A.D. Knyazev, I.V. Knyazeva, A.A. Komosko, A.V. Kornilov, A.I. Korobeev, A.G. Korchagin, V.V. Kotov, E.A. Kravtsova, U.Ya. Krastinsh, V.I. Krupnitskaya, N.Y. Lebedev, N.E. Krylova, N.F. Kuznetsova, V.I. Lafitskiy, S.Ya. Likhovaya, V.A. Lopatkin, A.V. Makarov, K.B. Marisyuk, I.V. Matveev, A.A. Menshikh, R.V. Minin, V.I. Mikhailov, R.I. Mikheyev, A.L. Mishutochkin, L.A. Muzyka, A.V. Naumov, A.S. Nikiforov, T.V. Nutrihina, E.V. Ovcharova, V.V. Panarina, Pan Dongmei, I.G. Ragozina, T.V. Rednikova, I.V. Rozuman, D.A. Savchenko, O.V. Selivanova, E.K. Senokosova, E.L. Sidorenko, I.V. Sitkovskiy, L.V. Smeshkova, G.K. Smirnov, V.Yu. Stromov, V.B. Stukalin, V.V. Ulyanova, R.R. Ushnitskiy, A.V. Fedorov, M.A. Filatova, S.Yu. Filonov, T.Ya. Khabrieva, Jiang Huilin, M.A. Tsirina, T.N. Tsupikov, S.D. Tsengel, Changhai Lun, T.A. Cherkova, A.I. Shapravova, A.S. Shevchenko et al.

[17] Otvetnaia reaktsiia na proekt ugolovnogo kodeksa Rossii [Feedback on the Draft of the Criminal Code of Russia]// Gosudarstvo i pravo [State and Law]. 1992, No. 6, p. 90.

[18] Ibid. pp. 89 – 90.

Other authors also point to the same issue. In particular, A.V. Naumov believes that market and market relations would almost inevitably lead us to corporate liability for domestic and economic crimes as well[19].

During the so-called Socialist period of Russian history, when the economy was developing in conditions of state ownership of equipment and means of production, criminal liability of legal entities was excluded since it did not correspond to the nature of the prevailing economic relations. In the transition to the market economy, the situation changed.

The criminal law of the post-Soviet market period of economic and social development is aimed at protecting the new economic relations[20] and, as international experience shows, criminal liability of legal entities is a very effective criminal law tool for counteracting crime under these conditions.

Thus, behind the introduction of criminal liability of legal entities is the need for the use of criminal law means to protect and regulate the relations formed at this stage of the social and economic development of the Russian Federation.

As the transition from the previously established economic relations in the USSR to the market-oriented ones led to the rejection of the criminalization of speculation (Art. 154 of the RSFSR CC), speculation of currency assets or securities speculations (Art. 88 of the RSFSR CC), leading a 'parasitic way of life' (Art. 209 of the RSFSR CC), and the elimination of the classification of crimes against property as committed against socialist property (Chapter 2 of the RSFSR CC) and in respect of personal property of citizens (Chapter 5 of the Special part of RSFSR CC), for these institutions of criminal law were not consistent with the character of the new economic relations any more, so such transition will inevitably entail the introduction of criminal liability of legal entities.

A number of scholars, based on the fact that criminal liability of legal entities in the Russian Federation does not exist yet, consider it possible to "substitute" it with civil and administrative liability.

However, these types of liability cannot fully compensate for the absence of criminal liability of legal entities.

For example, civil liability has a nature substantively different from criminal liability.

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[19] A.V. Naumov. Ugolovnoe pravo Rossii: v 3-kh tomah. Tom 1. Obshchaia chast' [Russian Criminal Law: in 3 Vol. Vol. 1. General part]. Ed. 5// Vneseny izmeneniia i dopolneniia [Amended and Modified]. Walters Cluever Publishing House, Moscow, 2011, p. 367.

[20] A.V. Fedorov. Ugolovnaia otvetstvennost' yuridicheskikh lits v kachestve atributa rynochnoi' ekonomiki [The Criminal Liability of Legal Entities as an Attribute of a Market Economy]// Pravovaia sreda sovremennoi' ekonomiki [Legal Environment of Modern Economy]. 2015, No. 7, pp. 11 – 18.

This circumstance, in particular, was brought to notice by U.S. Dzhekebaev, who noted that with regard to the civil law it is the regenerative (compensative) function that most fully expresses its social essence, whereas criminal law exercises mainly a protective function, i.e., is directly aimed at protecting public relations[21]. In connection with this, he indicated:

"If the state establishes criminal liability of legal entities, it thereby only improves the existing tools for protection of the interests which have existed for a long time but have not been protected enough. While acknowledging legal entities as the perpetrator of a crime in a number of crimes, criminal law thereby attaches particular strength and importance to the protection of new economic relations"[22].

As has already been noted, not everyone supports the point of view of the necessity to introduce the institution of criminal liability of legal entities in the Russian law[23]. Many scholars and experts believe that we have already established a sufficient administrative liability of legal entities, and making relevant amendments to the RF Criminal Code is not required. A part of the supporters of this point of view proceeds from the fact that criminal liability of legal entities abroad is often set for the commitment of criminal offences (violations of law), which are recognized not only as crimes, but also misconduct, and sometimes violations that are provided for both in the Criminal Code and other acts[24].

In particular, the Criminal Code of France provides for criminal liability for criminal acts, which are recognized as crimes, misdemeanors and violations[25]. Belgian Criminal Code establishes criminal liability for offences of three types: offences punishable by criminal penalties; offences punishable by correctional penalty, and police violations punishable by a police penalty[26].

[21] U.S. Dzhekebaev. Osnovnye printsipy ugolovnogo prava Respubliki Kazakhstan (sravnitel'nyi' kommentarii' k knige J. Fletcher i A.V. Naumov – Osnovnye poniatiia sovremennogo ugolovnogo prava) [The Basic Principles of the Criminal Law of the Republic of Kazakhstan (Comparative Commentary on the Book of J. Fletcher and A.V. Naumov – Basic Concepts of Modern Day Criminal Law). Zheti Zhargy, Almaty, 2001, p. 222.

[22] Ib, p. 223.

[23] N.G. Ivanov. Ugolovnaia otvetstvennost' yuridicheskikh lits: contrargumenty [The Criminal Liability of Legal Entities: Contra Arguments]// Ugolovnoe pravo [Criminal Law]. 2012, No. 2, p. 45 – 50.

[24] In the Russian Federation criminal liability can be considered only in the case of committing a crime, which is recognized as a guiltily committed socially dangerous act prohibited by the CC of the Russian Federation under the threat of punishment.

[25] Ugolovnyi' kodeks Frantsii [Criminal Code of France]// Scientific editor L.V. Golovko, N.E. Krylova; translate from French and preface by N.E. Krylova. Legal Centre Press Publishing House, Saint Petersburg, 2002.

[26] Ugolovnyi' kodeks Bel'gii [Criminal Code of Belgium]// Science editor and preface N.I. Matsneva; translate from French by G.I. Machkovskiy. Legal Centre Press Publishing House, Saint Petersburg, 2004.

Thus, with regard to foreign law, the term"crime" depending on specific situation can be used in its broad sense, when a crime is understood to be all criminal offences, and in a narrow sense to refer to a separate kind of criminal offences. Whereas, when considering the existing administrative offences in the Russian Federation from the standpoint of foreign law, a significant part of such offences actually represents minor offences, and administrative liability for them may be compared to criminal liability abroad.

Based on this division, some authors acknowledge that the torts of legal entities are administrative offences in the Russian Federation, and the established administrative liability for such entities is sufficient enough for effective regulation of relations in the field of contradicting relevant wrongful acts.

For example, V.I. Mikhailov believes that in the Russian Federation, the absence of criminal liability of legal entities is compensated by administrative liability, which is sufficient to ensure proper corporate liability[27]. For example, for corruption offences a legal entity can be held liable for an administrative offence under Art. 19.28 of the RF Code for Administrative Offences (RF AOC) "Illegal remuneration on behalf of a legal entity".

According to other authors, the administrative liability of legal entities has obvious "cons" which do not ensure the effective, proportionate and restrictive influence on legal entities. In this regard, the criminal liability of legal entities, in comparison with the administrative liability, has a number of significant advantages.

For example, the study of foreign experience of prosecuting legal entities leads to the conclusion about the benefits of criminal liability of legal entities in comparison with the administrative one as established in the Russian Federation.

Not all the arguments showing obvious benefits of criminal liability of legal entities in comparison with the administrative liability have a criminal law nature. But without consideration of all the arguments cited in this section, one cannot draw a conclusion on whether to adopt the relevant criminal-law decisions.

Among those arguments pointing to the need to establish, in particular, criminal liability of legal entities are the following:

1. Given that the offences of legal entities are usually identified in the course of investigation of criminal cases as wrongful acts committed by individuals on behalf of or for the benefit of the relevant legal entity, the investigation of the offence is

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V·I· Mikhailov. Yest' li neobkhodimost' dlia ugolovnoi' otvetstvennosti yuridicheskikh lits v Rossiiskoii Federatsii ? [Is there a Need for the Criminal Liability of Legal Entities in the Russian Federation?]// Ugolovnoe vliianie zakona o yuridicheskikh litsakh: zapisi seminara Russko-Nemetskogo ugolovnogo prava (26 iyunia 2012) [Criminal law Influence Regarding Legal Entities: Records of the Russian-German Criminal Law Seminar (June 26, 2012)// Editor in chief: G.I. Bogush; Science editor: U. Sieber, V.S. Komissarov, Moscow, 2013, pp. 97 – 102.

more efficiently carried out in a single process. Practice has shown that when the responsibility of individuals and legal entities for certain acts is regulated by various branches of law and the evidence is collected on different cases, and, therefore, these cases are considered separately by different courts, there are serious difficulties with the determination of guilt and offence committed by a legal entity.

This is particularly due to the fact that in cases of administrative offences, a full investigation is not carried out as in criminal cases, for the administrative process is designed to ensure the implementation of responsibility for offences that are recognized as much less dangerous than crimes.

In addition, for this category of cases, we have the simplified judicial review, and how comprehensively and objectively is it possible to evaluate the conduct of a legal entity in such a simplified process is a big question.

At the same time, the current practice shows that the work on holding legal entities administratively liable usually begins (and still not always) only after the conviction of individuals. The time lost allows entities to take steps to evade responsibility.

2. It should also be borne in mind that administrative offences do not involve operational investigations, which significantly reduces the efficiency of the work on the cases of this category.

3. In cases of administrative offences, there is virtually no international cooperation. International agreements are focused on such co-operation in criminal cases. Furthermore, the investigation of a number of offences of legal entities often requires active international cooperation of law enforcement agencies, which, as part of the administrative process, at the moment, is not possible to implement.

4. Liability for violations of legal entities, provided for by the RF AOC, is possible only when they are committed on the territory of the Russian Federation, except for the cases stipulated by international treaties of the Russian Federation (Art. 1.8 of the RF AOC). At the same time, persons who committed crimes against interests protected by the RF CC outside the Russian Federation shall be subject to criminal liability only if there is no decision of a foreign state court in respect of those persons in connection with the crime (Art. 12 of the RF CC). Thus, the application of criminal law to legal entities would ensure holding the legal entities liable in all cases of their committing unlawful acts against the Russian Federation abroad.

5. The current Criminal Code of the Russian Federation has no indication of the possibility of crimes being committed by legal entities yet. However, such crimes

actually exist in real life. Given the characteristics of the modern Russian legal system, they are now recognized as administrative offences.

For example, this type of liability is provided for in the above-mentioned Art. 19.28 of the RF AOC"Illegal remuneration on behalf of the legal entity"[28]. In such a case, the potential of sanctions of Art. 19.28. RF AOC is comparable to the size of the corresponding criminal penalties, and often exceeds these dimensions[29].

Thus, under Section 3 of Art. 19.28. of RF AOC, the sanction for illegal remuneration on an especially large scale for a legal entity is an administrative fine of the amount of up to one hundred times the amount of money illegally transferred or promised, or proposed on behalf of the legal person is, but no less than one hundred million roubles with the confiscation of money, capital, other property or the value of property-related services, other property rights.

Such substantial penalties under Art. 19.28. of RF AOC, in terms of the European Court of Human Rights (ECHR), as reflected in the decisions of this judicial authority, allow for the classification of this type of offence of legal entities as a crime and statethe need for the criminal law investigation of relevant cases[30].

6. Another argument pointing to objective determination of introducing the institution of criminal liability of legal entities in the Russian Federation is erasing the "boundaries" between crimes and administrative offences.

Legal literature usually maintains the point of view that the main feature distinguishing administrative offences and crimes is the presence or absence of public danger in the relevant type of conduct. Crimes have this feature, and administrative offences do not.

The stated point of view is indirectly reflected in the RF CC and the RF AOC. For example, in Art. 14 of the RF CC a definition of the crime is provided, according to which

[28] The constitutionality of the rules on administrative liability of legal entities (including Art. 19.28. AOC RF) is confirmed by the decisions of the Constitutional Court of the Russian Federation. Ref., for example: „The determination of the Constitutional Court of the Russian Federation of December 24, 2012, № 2360-O On the Refusal to Accept for Consideration the Complaint of the Closed Joint-stock Company „GRINN Corporation" on the violation of constitutional rights and freedoms by Article 19.28 of the Administrative Offences Code of the Russian Federation".

[29] According to court statistics under Article 19.28. of AOC RF/КоАП РФ in administrative order in 2011, fines were imposed on 27 legal entities amounting to slightly more than 81 million roubles, and in 2012, 60 legal entities were fined 69 million roubles. Ref.: Deiatel'nost' prokurorov po presledovaniyu yuridicheskikh lits za korruptsionnye pravonarusheniia: uchebnik [The Activities of Prosecutors on the Prosecution of Legal Entities for Corruption Offences: Textbook]. Aut. coll. under supervision of S.K. Iliy. Moscow, 2013, p. 16.

[30] JSC YUKOS Oil Company v. Russian Federation, No. 14902/04, September 20, 2011, ECHR// Appendix to Bulletin of European Court of Human Rights. Russian Chronicles of the European Court. Special Issue. No. 3/2012.

a crime is a socially dangerous act, committed with guilt and prohibited by this Code under threat of punishment. That is, public danger is annecessary sign of an act recognized as a crime. If the act at least formally contains features of any offence provided for by the RF CC, but by virtue of insignificance does not involve public danger, it is not a crime.

As for the administrative offences, according to Art. 2.1. of RF AOC, an administrative offence is a wrongful, guilty action (omission) of an individual or legal entity for which the RF AOC or the laws of the Russian Federation on Administrative Offencesestablish administrative liability . Thus, the feature of an act recognized as an administrative offence is defined not as public danger but as wrongfulness. But are wrongful acts recognized as administrative offences not socially dangerous, and aren't crimes also wrongful acts?

The Constitutional Court of the Russian Federation recognized that offences of legal entities may represent social danger comparable to the social danger of corruption-related crimes, and in some cases the danger is even higher[31].

It is time to stop concealing such crimes under the guise of administrative offences. In addition, based on the general theory of law violation (including criminal and administrative offences) and their social nature, public danger should be recognized not only as a feature of acts that are crimes but also acts related to administrative offences.

This is shown by the fact that the correlation of administrative offences and crimes is characterized by high dynamics (variability). Thus, for a short period of time, the same kinds of conduct may be recognized as both administrative offences and criminal offences, or even be excluded entirely from the kinds of conductrecognized as administrative offences or crimes[32].

7. Also, the need to introduce the criminal liability of legal entities arises in connection with the membership of the Russian Federation in a number of international

[31] Ref.: „The determination of the Constitutional Court of the Russian Federation of June 05, 2014, No. 1308-O On the Refusal to Accept for Consideration the Complaint of the Limited Liability Company „Prioritet" on the violation of constitutional rights and freedoms of Part 1 of Article 19.28 of the Administrative Offences Code of the Russian Federation." The determination is published in the Bulletin of the Constitutional Court of the Russian Federation No. 6 of 2014 and posted on the official web portal of legal information// Available at: http://www.pravo.gov.ru 04.07.2014 .

[32] A.V. Fedorov. Otvetstvennost' za nemeditsinskoe upotreblenie narkoticheskikh sredstv i psikhotropnykh veshchestv [Responsibility for the Non-medical use of Narcotic Drugs and Psychotropic Substances]// Bor'ba s narkotikami [Drug Control]. 2011, No. 2, pp. 3 – 8; A.V. Fedorov. Korreliatsiia, sviazannaia s prestupleniiami po narkotikam i administrativnymi pravonarusheniiami, sviazannymi s narkotikami [The Correlation of Drug-related Crimes and Administrative Drug-related Offences]// Biblioteka Kriminalistiki. Nauchnyi' zhurnal [Criminalist Library. Scientific Journal]. 2013, No. 2 (7), pp. 262 – 270.

organizations and participation in a number of international treaties providing for the need for such a responsibility[33].

There is a situation when implementing its policies (including criminal law) the state becomes party to certain international treaties and organizations, and then participation in international treaties and membership in international organizations begins to influence the relevant national rights and law-enforcement policy, which is reflected, inter alia, in changing the national legislation. This is what happens with the recognition of the institution of criminal liability of legal entities.

At the same time, the implementation of international commitments is just one of the reasons for the decision on the introduction of criminal liability of legal entities. The reasons for the adoption of such a decision are internal and alsosocial and economic in nature.

8. The situation when foreign bodies have the opportunity to hold Russian legal entities criminally liable and the Russian party may raise the issue of holding foreign legal entities only administratively liable, seems illogical and violates the interests of the Russian party.

9. It should be recognized that in fact, in its broad sense,criminal liability of legal entities has been already in effect in the form of the so-called quasi-criminal liability (when not criminal penalties but other measures of criminal law nature apply to a legal entity)[34].

For example, currently Part 3 of Art. 1041 of the RF CC provides that the property specified in this article that is transferred to the convicted person (organization) shall be confiscated if the person who received the property knew or should have known that it is received as a result of criminal acts.In this case, there is practically a veiled introduction of criminal liability of legal entities in its broad sense.

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[33] For details, see chap. „International law acts on the criminal liability of legal entities" on this course. See also E.L. Sidorenko, A.D. Knyazev. Mezhdunarodno pravovaia osnova ugolovnoi' otvetstvennosti yuridicheskikh lits [International Law Bases of the Criminal Liability of Legal Entities// Mezhdunarodnoe ugolovnoe pravo i mezhdunarodnoe pravosudie [The International Criminal Law and International Justice]. 2014, No. 3, pp. 13 – 16; A.V. Fedorov. Mezhdunarodnye dogovory o sozdanii ugolovnoi' otvetstvennosti yuridicheskikh lits [International Treaties on the Establishment of the Criminal Liability of Legal Entities]// Uchenye zapiski Sankt- Peterburgskogo filiala Rossiiskoii tamozhennoii akademii V.B. Bobkova [Scholarly Notes of Saint Petersburg Branch of Russian Customs Academy n.a. V.B. Bobkov]. 2015. No. 2(54). pp. 112 – 124.

[34] Abroad, depending on the country, the criminal liability of legal entities is established both in the narrow sense of the word (in this case, a legal entity is recognized as the perpetrator of a crime and criminal penalties shall apply to it), and in broad sense (when a legal entity is considered only as the subject of criminal liability, to which not penalties but other measures of criminal law nature apply). In the latter case a so-called quasi-criminal liability of legal entities is in effect.

The reason for the introduction of criminal liability of legal entities, alongside civil and administrative law, is also an increase in the number and scale of crimes committed on behalf of legal entities or on their account, or for their benefit (in their favour) by individuals, namely: by persons exercising managerial functions;by legal representatives of a legal entity; by other persons who are subordinate to the above-mentioned persons and acting on behalf of or for the benefit of a legal entity if the legal entity has not provided a sufficient degree of control over their actions in particular circumstances.

Herewith, as noted in the available studies,

"…the role of an individual as a criminal fades into the background, while a legal entity comes to the fore as the real criminal illegally receiving money or other benefits from criminal activity"[35].

Currently, we can confidently state that in many countries of the world, the establishment of criminal liability of legal entities has become one of the important parts in combatting crime.

In addition, holding legal entities criminally liable allows for the recovery of a significant amount of fines from the guilty legal entities, which has a significant impact on the other participants on the market and contributes to the formation of a healthy competitive environment, thus creating conditions for attracting investment in the economy.

The arguments set forth confirm that the introduction of criminal liability of legal entities is objectively based on the development of economic and social relations, associated with international obligations of the Russian Federation, corresponding to national interests and inevitable in the future, and perhaps not so distant one[36].

[35] N.A. Golovanova. Tendentsii razvitiia instituta ugolovnoi' otvetstvennosti yuridicheskikh lits za rubezhom [Tendencies of Development of the Institution of the Criminal Liability of Legal Entities Abroad]// Yuridicheskaia otvetstvennost': sovremennye problemy i resheniia: otchety po VIII Yezhegodnoi' nauchnym chteniiam pamiati professora S.N. Bratus [Legal Liability: Current Challenges and Solutions: Records for VIII Annual Scientific Readings in Memory of Professor S.N. Bratus. Moscow, 2013, p 153.

[36] A.V. Fedorov. Vvedenie ugolovnoi' otvetstvennosti yuridicheskikh lits v Rossiiskoii Federatsii v rezul'tate ob"yektivnogo usloviia razvitiia ugolovnogo prava vo vremeni i prostranstve [Introduction of the Criminal Liability of Legal Entities in the Russian Federation as a Result of Objective Stipulation of the Criminal Law Development in Time and Space]// Zhurnal Zarubezhnogo zakonodatel'stva i sravnitel'nogo pravovedeniia [Foreign Legislation and Comparative Jurisprudence Magazine]. 2014, No. 6, pp. 1063 – 1067; A.V. Fedorov. O perspektivakh vvedeniia ugolovnoi' otvetstvennosti yuridicheskikh lits v Rossiiskoii Federatsii: politiko-pravovoi analiz [On the Prospects of Introducing the Criminal Liability of Legal Entities in the Russian Federation: Political and Legal Analysis]// Uchenye zapiski Sankt-Peterburgskogo filiala Rossiiskoii tamozhennoii akademii V.B. Bobkova [Scholarly notes of St. Petersburg Branch of Russian Customs Academy n. a. V.B. Bobkov]. 2014, No. 2(50), pp. 135 – 144; A.V. Fedorov. Vvedenie ugolovnoi' otvetstvennosti yuridicheskikh lits – predskazanie tendentsii razvitiia politiki rossiiskogo ugolovnogo prava [The Introduction of the Criminal Liability of Legal Entities — the Predicted Development Trend of Russian Criminal Law Policy]// Zhurnal

Here, the introduction of criminal liability of legal entities institution does not lessen the value of other types of liability. The optimum situation is where there is apossibility of applying all three types of liability to the legal entities: civil, administrative and criminal.

Thus, the introduction of criminal liability of legal persons is a predicted development trend of Russian legislation.

The above arguments only fragmentarily reflect some common approaches to the introduction of the institution of criminal liability of legal entities and its implementation. There is no doubt that this is a very relevant subject at the moment requiring deeper and more comprehensive review, including, by way of preparation, the corresponding legislative proposals and their broad and detailed discussion both by specialists in various branches of law and by representatives of non-legal sciences who study socio-economic and political processes both at national and international levels.

Predicting the introduction of criminal liability of legal entities in the Russian Federation, one cannot ignore the works of authors who believe that institution of criminal liability of legal entities is imposed on the Russian legislator from the outside (by external global regulators), while in the Russian Federation itself there is no domestic institutional need for such liability[37].

In this regard, in addition to referring to the above arguments in support of the predicted introduction of criminal liability of legal entities, it is appropriate to recall the opinion of the famous Russian scholar B.V. Volzhenkin issued by him at the end of the last century:

"... there is some reason to believe that in the near future the question of establishing criminal liability for legal entities will be raised with sufficient sharpness again. It is unlikely that the Russian legislator will remain uninvolved and will not respond to the noticeable tendency of expansion of corporate liability in foreign legislation"[38].

Although the Russian Federation has no criminal liability of legal entities yet, there already are a lot of works dedicated to its study. Thus, there were studies con-

Zarubezhnogo zakonodatel'stva i sravnitel'nogo pravovedeniia [Foreign Legislation and Comparative Jurisprudence Magazine]. 2014, No. 3, pp. 429 – 433.

[37] L.V. Golovko. Ugolovnaia otvetstvennost' yuridicheskikh lits v Rossii: sotsial'naia potrebnost' ili institutsional'naia globalizatsiia? [The Criminal Liability of Legal Entities for Russia: a Social Need or Institutional Globalisation?]// Zakon [The Law]. 2015, No. 5, pp. 132 – 142.

[38] V.B. Volzhenkin. Ugolovnaia otvetstvennost' yuridicheskikh lits [The Criminal Liability of Legal Entities]. St. Petersburg Law Institute of the General Prosecutor's Office of the Russian federation. Saint Petersburg, 1998, p. 23.

sidering the theoretical aspects of criminal liability of legal entities[39], including those justifying the possibility of introducing such liability in the Russian Federation at the monographic level[40], including thesis research on this topic[41].

A number of works devoted to the study of foreign law on criminal liability of legal entities and to the practice of its application[42], including those regarding certain groups of crimes including crimes in the field of economy[43] and eco-

[39] Yu.I. Bytko., A.L. Dyadkin. Formula ugolovnoi' otvetstvennosti yuridicheskikh lits: istoriia i nashi dni [The Formula of the Criminal Liability of Legal Entities: History and Modern Days]. Saratov State Academy of Law Publishing House, Saratov, 2012.

[40] E.Yu. Antonova. Kontseptual'nye ramki korporativnoi' (kollektivnoi') ugolovnoi' otvetstvennosti [Conceptual Frameworks of Corporate (Collective) Criminal Liability]. Legal Centre Press Publishing House, Saint Petersburg, 2011; A.S. Nikiforov. Yuridicheskoe litso v kachestve vinovnika prestupleniia i ugolovnoi' otvetstvennosti [The Legal Entity as a Perpetrator of a Crime and Criminal Liability]. JSC Centre YurInfoR Moscow, 2002.

[41] L.A. Abashina. Yuridicheskoe litso kak sub'ekt ugolovnoi' otvetstvennosti: kratkoe soderzhaniee dissertatsii na soiskanie stepeni kandidata yuridicheskikh nauk [The Legal Entity as a Subject of Criminal Liability: Synopsis of the Dissertation for the Degree of Candidate of Juridical Sciences]. Moscow State Linguistic University. Moscow, 2008; E.Yu. Antonova. Kontseptual'nye ramki korporativnoi' (kollektivnoi') ugolovnoi' otvetstvennosti: kratkoe soderzhaniee dissertatsii na soiskanie stepeni doktora yuridicheskikh nauk [Conceptual Frameworks of Corporate (Collective) Criminal Liability: Synopsis of the Dissertation for the Degree of Doktor of Juridical Sciences]. Far Eastern Federal University, Vladivostok, 2011; E.Yu. Antonova. Yuridicheskoe litso v kachestve vinovnika prestupleniia. Opyt zarubezhnykh stran i perspektivy primeneniia v Rossii: kratkoe soderzhaniee dissertatsii na soiskanie stepeni kandidata yuridicheskikh nauk [The Legal Entity as a Perpetrator of a Crime. The Experience of Foreign Countries and the Prospects of Application in Russia: Synopsis of the Dissertation for the Degree of Candidate of Juridical Sciences]. Vladivostok: FENU, 1998; S.G. Demin. Predely ugolovnoi' otvetstvennosti yuridicheskikh lits v Rossii: kratkoe soderzhaniee dissertatsii na soiskanie stepeni kandidata yuridicheskikh nauk [The Limits of the Criminal Liability of Legal Entities in Russia: Synopsis of the Dissertation for the Degree of Candidate of Juridical Sciences]. North Caucasian Federal University, Krasnodar, 2014; S.I. Karibov. Ugolovnaia otvetstvennost' yuridicheskikh organizatsii': Ideia i soderzhanie: kratkoe soderzhaniee dissertatsii na soiskanie stepeni kandidata yuridicheskikh nauk [Criminal Liability of Legal Organizations: Iidea and Content: Synopsis of the Dissertation for the Degree of Candidate of Juridical Sciences]. Rostov Law Institute of MIA of the Russian Federation, Rostov-on-Don, 2006; A.A. Komosko. Ugolovnaia otvetstvennost' yuridicheskikh lits: kratkoe soderzhaniee dissertatsii na soiskanie stepeni kandidata yuridicheskikh nauk [The Criminal Liability of Legal Entities: Synopsis of the Dissertation for the Degree of Candidate of Juridical Sciences]. Economic Security Academy of MIA of the Russian Federation, Moscow, 2007; R.V. Minin. Institut ugolovnoi' otvetstvennosti yuridicheskikh lits v Rossii: voprosy zakreplenoia i regulirovaniia: kratkoe soderzhaniee dissertatsii na soiskanie stepeni kandidata yuridicheskikh nauk [The Institution of the Criminal Liability of Legal Entities in Russia: Issues of Stipulation and Regulation: Synopsis of the Dissertation for the Degree of Candidate of Juridical Sciences]. Institute of State and Law of Tyumen State University. Tyumen, 2008; I.V. Sitkovskiy. Ugolovnaia otvetstvennost' yuridicheskikh lits: kratkoe soderzhaniee dissertatsii na soiskanie stepeni kandidata yuridicheskikh nauk [The Criminal Liability of Legal Entities: Synopsis of the Dissertation for the Degree of Candidate of Juridical Sciences]. MSAL, Moscow, 2003.

[42] The most complete study on these issues is prepared by the team of contributoers of the Institute of Legislation and Comparative Law under the Government of the Russian Federation: N.A. Golovanova, V.I. Lafitskiy, M.A. Tsirina. Ugolovnaia otvetstvennost' yuridicheskikh lits v mezhdunarodnom i natsional'nom prave (sravnitel'no – pravovoi'analiz) [The Criminal Liability of Legal Entities in International and National Law (Comparative – Law Analysis)]// Editor in chief V.I. Lafitskiy. Moscow, 2013.

[43] E.Yu. Antonova. Otvetstvennost' yuridicheskikh lits za ekonomicheskie prestupleniia: zarubezhnyi' opyt [The Liability of Legal Entities for Economic Crimes: Foreign Experience]// Biznes v zakone. Ekonomicheskii' i yuridicheskii' zhurnal [Business in Law. Economic and Legal Magazine]. 2009, No. 3, pp. 89 – 92; E.Yu. Antonova. Na ugolovnoi' otvetstvennosti yuridicheskikh lits za proizvodstvo

logy[44], corruption offences[45], drug-related offences[46], crimes of a terrorist and extremist nature[47], and some other types of crimes, as well as to legislation on criminal liabil-

i prodazhu fal'sifitsirovannykh i nekachestvennykh produktov [On the Criminal Liability of Legal Entities for the Production and Sale of Falsified and Poor Quality Products]// Sovremennyi' zakon [Contemporary Law]. 2009. No. 10. pp. 135 – 137.

[44] E.Yu. Antonova. Nezakonnaia deiatel'nost' yuridicheskikh lits – ugroza ekologicheskoi' bezopasnosti [Illegal Activity of Legal Entities — a Threat to Ecological Security]// Sovremennyi' zakon [Contemporary Law]. 2009, No. 11, pp. 35 – 37; M.M. Kalenchenko. Ugolovnaia otvetstvennost' yuridicheskikh lits za ekologicheskie prestupleniia: zarubezhnyi' opyt i postanovka zadachi [The Criminal Liability of Legal Entities for Ecological Crimes: Foreign Experience and Problem Statement]. Works of Russian Academy of Sciences, Institute of State and Law. 2010, No. 2, pp. 173 – 184; V.Yu. Stromov, M.Yu. Dvoretskiy. Ugolovnaia otvetstvennost' yuridicheskikh lits v ramkakh vnutrennego zakonodatel'stva v kontekste effektivnosti preduprezhdeniia soversheniia ekologicheskikh pravonarushenii i prestuplenii: problemy teorii i praktiki primeneniia [The Criminal Liability of Legal Entities in Domestic Legislation in the Context of the Effectiveness of Preventing the Commission of Ecological Offences and Crimes: Problems of Theory and Practice of Application].Tambov State University Journal. 2013, No. 8 (124), pp. 402 – 406.

[45] E.Yu. Antonova. Korporativnaia ugolovnaia otvetstvennost' za sviazannie s korruptsionnymi prestupleniiami [Corporate Criminal Liability for Corruption Related Crimes]// Politika i pravo [Politics and Law]. 2011, No. 3, pp. 375 – 380; A.I. Bystrykin. Ugolovnaia otvetstvennost' yuridicheskikh lits v kachestve mery po bor'be s korruptsiei' [The Criminal Liability of Legal Entities as a Measure in Combatting Corruption]. Academy of Investigative Committee of the Russian Federation Journal. 2014, No. 1, pp. 6 – 12; N.V. Bugaevskaya. Peresmotr ugolovnoi' otvetstvennost' yuridicheskikh lits za korruptsionnyye prestupleniia [Revisiting the Criminal Liability of Legal Entities for Corruption Related Crime]// Nauka prava i ekonomiki [Sciences of Law and Economics]. Tula State University Journal. 2012. No. 3, Part II, pp. 47 – 50; U.B. Gavryushkin. Neobkhodimost' ugolovnoi' otvetstvennosti yuridicheskikh lits za posrednichestvo i vziatochnichestvo [The Necessity for the Criminal Liability of Legal Entities for Mediation and Bribery]// Biznes v zakone. Ekonomicheskii i yuridicheskii zhurnal [Business in Law. Economic and Legal Magazine]. 2012, No. 4, pp. 55 – 57; V.P. Kashepov. Ugolovnaia otvetstvennost' yuridicheskikh lits za korruptsionnye prestupleniia [The Criminal Liability of Legal Entities for Corruption Related Crimes]// Zhurnal Rossiiskogo prava [Russian Law Magazine]. 2015, No. 3(219), pp. 90 – 101; A.V. Fedorov. Ugolovnaia otvetstvennost' yuridicheskikh lits za korruptsionnye prestupleniia [The Criminal Liability of Legal Entities for Corruption Related Crimes]// Zhurnal Rossiiskogo prava [Russian Law Magazine]. 2015, No. 1 (217), pp. 55 – 63; A.V. Fedorov. Vvedenie ugolovnoi' otvetstvennosti yuridicheskikh lits v kachestve komponenta bor'by s korruptsiei' [The Introduction of the Criminal Liability of Legal Entities as a Constituent of Combatting Corruption]// Zhurnal yuridicheskogo instituta Vladimira [Vladimir Law Institute Journal]. 2014, No. 3(32), pp. 107 – 112; A.V. Fedorov. Peresmotr vvedeniia ugolovnoi' otvetstvennosti yuridicheskikh lits za korruptsionnye prestupleniia [Revisiting the Introduction of the Criminal Liability of Legal Entities for Corruption Related Crimes]// Yuridicheskii' mir [Legal World]. 2014, No. 12, pp. 43 – 47; A.V. Fedorov. O vozmozhnosti i tselesoobraznosti vvedeniia ugolovnoi' otvetstvennosti yuridicheskikh lits za korruptsionnye prestupleniia [On the Possibility and Advisability of the Introduction of the Criminal Liability of Legal Entities for Corruption Related crimes]// Journal Akademii Upravleniia General'nogo prokurora Rossiiskoy Federatsii [Academy of the Office of the Prosecutor General of the Russian Federation Journal]. 2014, No. 5(43), pp. 3 – 10.

[46] A.V. Fedorov. Ispanskoe zakonodatel'stvo ob ugolovnoi' otvetstvennosti yuridicheskikh lits za narkoprestuplenie [Spanish Legislation on the Criminal Liability of Legal Entities for Drug Related Crimes]// Sledstvie prestupnosti: problemy i puti ikh resheniia [Crime Investigation: Problems and Ways of Solving them]. 2013, No. 2, pp. 13 – 18; A.V. Fedorov. Ob ugolovnoi' otvetstvennosti yuridicheskikh lits za prestupleniia, sviazannye s narkotikami: zarubezhnyi' opyt i rossiiskie perspektivy [On the Criminal Liability of Legal Entities for Drug Related Crimes: Foreign Experience and Russian Perspectives]// Vstrechnoe sredstvo bezopasnosti [Counter-drug Security]. 2015, No. 1(4), pp. 5 – 14; A.V. Fedorov. Ob ugolovnoii otvetstvennosti yuridicheskikh lits za prestupleniya, svyazannyye s narkotikami po kitai'skomy zakonodatel'stvu [On the Criminal Liability of Legal Entities for Drug Related Crimes under Chinese Legislation]// Rassledovanie prestupleniia: problemy i puti ikh resheniia [Crime Investigation: Problems and Ways of Solving them]. 2014, No. 6, pp. 6 – 16.

[47] L.A. Abashina. Ugolovnaia otvetstvennost' yuridicheskikh lits za uchastie v ekstremistskoi' deiatel'nosti i otmyvanii deneg [The Criminal Liability of Legal Entities for Participation in Extremist

ity of legal entities in particularcountries: Great Britain[48], Israel[49], Spain[50], USA[51], Ukraine[52], France[53], Sweden[54], China[55] and others.

Activity and Money Laundering]// Zhurnal sotsial'nykh nauk Tsentral'noi' Rossii [Central Russian Journal of Social Sciences]. 2010, No. 4, pp. 102 – 105; A.V. Kornilov. Ugolovnaia otvetstvennost' yuridicheskikh lits za terroristicheskie prestupleniia [The Criminal Liability of Legal Entities for Terrorist Crimes]// Teoreticheskie i prikladnye aspekty formirovaniia instituta ugolovnoi' otvetstvennosti yuridicheskikh lits: zapisi o russkoii natsional'noii nauchno-prakticheskoii konferentsii [Theoretical and Applied Aspects of Formation of the Institution of Criminal Prosecution of Legal Entities: Records of Russian National Scientific and Practical Conference]. Novosibirsk, February 19, 2015// Scientific editor E.A. Dorozhynskaya. SibAGS Publishing House, Novosibirsk, 2015, pp. 112 – 120.

[48] G.A. Esakov. Ugolovnaia otvetstvennost' yuridicheskikh lits za ubii'stvo po anglii'skomu i shotlandskomu ugolovnom pravu [The Criminal Liability of Legal Entities for Homicide Under English and Scottish Criminal Law]. LEX RUSSICA MSAL Scientific works. 2005, No. 1, pp. 142 – 163; R.V. Minin. Ugolovnaia otvetstvennost' yuridicheskikh lits v Anglii [The Criminal Liability of Legal Entities in England]// Biznes v zakone. Ekonomicheskii' i yuridicheskii' zhurnal [Business in Law. Economic and Legal Magazine]. 2006, reference No. 3 – 4, pp. 91 – 92.

[49] T.N. Tsupikov. Ugolovnaia otvetstvennost' yuridicheskikh lits v ramkakh pravovoi' sistemy Izrailia [The Criminal Liability of Legal Entities in the Legal System of Israel]// Ekonomika. Nalogi. Xakon [Economics. Taxes. Law]. 2013, No. 6, pp. 154 – 157.

[50] A.V. Fedorov. Ugolovnaia otvetstvennost' yuridicheskikh lits za prestupleniia, sviazannye s narkotikami, psikhotropnymi veshchestvami i ikh prekursorov v Korolevstve Ispanii [The Criminal Liability of Legal Entities for Crimes Related to Drugs, Psychotropic Substance and their Precursors Traffikking in the Kingdom of Spain]// Kontrol' nad narkotikami [Drug Control]. 2014, No. 1, pp. 33 – 35.

[51] M.Yu. Dvoretskiy. Ugolovnaia otvetstvennost' yuridicheskikh lits v zakonodatel'stve Velikobritanii, SSHA i RF: problemy teorii i praktiki primeneniia [The Criminal Liability of Legal Entities in the Legislation of Great Britain, USA and RF: Problems of Theory and Practice of Application]// Zhurnal Tambovskogo universiteta: gumanitarnye nauki [Tambov University Journal: Humanities]. 2011. No. 4(96), pp. 303 – 310; T.N. Tsupikov. Kontseptsiia SSHA korporativnoi' ugolovnoi' otvetstvennosti' [The USA Corporate Criminal Liability Concept]. Zhurnal MGLY [MSLU Journal]. 2012, Issue 23 (656), pp. 107 – 115.

[52] S.Ya. Likhovaya. Ugolovnaia otvetstvennost' yuridicheskikh lits v sootvetstvii s zakonodatel'stvom Ukrainy [The Criminal Liability of Legal Entities Under the Legislation of Ukraine]// Zhurnal Baykal'skogo gosudarstvennogo universiteta ekonomiki i prava kriminologii [Baikal State University of Economics and Law Criminology Magazine]. 2014, No. 2, pp. 155 – 161; K.B. Marisyuk. Peresmotr vvedeniia ugolovnoi' otvetstvennosti yuridicheskikh lits v Ukraine, material'nykh sredstv vozdei'stviia ugolovnogo prava, kotorye mozhno priravniat' k nim [Revisiting the Introduction of the Criminal Liability of Legal Entities in Ukraine, Material Means of Criminal Law Iinfluence, which Can Equate to them]// Perspektivy Nauki i obrazovaniia [Science and Education Perspectives]. 2013, No. 3, pp. 177 – 184.

[53] A.A. Menshikh. Obnovleniia v frantsuzskom ugolovnom prave: otvetstvennost' yuridicheskikh lits [Updates in French Criminal Law: Liability of Legal Entities]// Pravovye issledovaniia vo Frantsii: Sbornik nauchnykh trudov [Legal Studies in France: Scientific Works Collection]// Endorsed by V.V. Maklakova. RAN. INION. Social Scientific and Informational Research Centre Legal science dept. Moscow, 2007. pp. 191 – 207; N.E. Krylova. Ugolovnaia otvetstvennost' yuridicheskikh lits vo Frantsii: predposylki dlia yego vozniknoveniya i osnovnye cherty [The Criminal Liability of Legal Entities in France: Pre-conditions for its Origination and Main Features]// Journal Moskovskogo universiteta [Moscow University Journal]. Zakon [Law]. Series 11, 1998, No. 3, pp. 69 – 80.

[54] A.V. Fedorov. Izuchenie inostrannogo prava v tseliakh sovershenstvovaniia rossiiskogo zakonodatel'stva: ugolovnaia otvetstvennost' yuridicheskikh lits v sootvetstvii s zakonodatel'stvom Ispanii i Shvetsii [The Study of Foreign Law for Purposes of Improving Russian Legislation: the Criminal Liability of Legal Entities Under the Laws of Spain and Sweden]// Uchenye zapiski Sankt-Peterburgskogo filiala Rossii tamozhennoi' akademii p.a. V.B. Bobkov [Scholarly Notes of St. Petersburg Branch of Russian Customs Academy n. a. V.B. Bobkov]. 2014, No. 3 (51), pp. 90 – 102.

[55] On Chinese legislation on the criminal liability of legal entities, see: A. Korobeev, ChanghaiLun. Yuridicheskoe litso kak sub'yekt ugolovnoi' otvetstvennosti: ot kitaiskogo nastoiashchego k rossiiskomy

The Chinese experience of introducing criminal liability of legal entities is particularly interesting, because China and Russia are going through largely the same periods in their development associated with the transition from socialist to market-oriented social and economic relations.

It can be stated that using available research developments and international experience it will not be hard for the Russian legislator to make a decision on establishing criminal liability of legal entities. Rather, the question is how necessary it is.

Thus, fundamental to the discussion on the establishment of criminal liability of legal entities in the Russian Federation is the question of whether the introduction of such liability is advisable (or necessary). This is the political and legal question regarding both the objective determination of criminal liability of legal entities and meaningful assessment of reasons and causes of its introduction, possible legislative decisions relating to the establishment of such a liability.

In Russian criminal law studies, two approaches (models) of consolidating the criminal law liability of legal entities have formed.

The first model is based on the recognition of a legal entity as a subject of criminal liability, but not the perpetrator of a crime.

The second model is based on the recognition of the legal entity as theperpetrator of the crime.

In recent years, in the Russian Federation legislation relating to the institution of criminal liability of legal entities based on both the first and the second models of such liability has been initiated .

The billinitiated by the Investigative Committee of the Russian Federation on introduction of the institution of criminal liability of legal entities.

budushchemy [The Legal Entity as a Subject of Criminal Liability: from Chinese Present to Russian Future]// Ugolovnoe pravo [Criminal Law]. 2009, No. 2, pp. 36 – 41; Pan Dongmei. Teoriia ugolovnoi‘ otvetstvennosti yuridicheskikh lits v KNR [Theory of the Criminal Liability of Legal Entities in PRC]// Ugolovnoe pravo [Criminal Law]. 2009, No. 2, pp. 30 – 35; A.V. Fedorov. Ugolovnaia otvetstvennost‘ yuridicheskikh lits za prestupleniia, sviazannye s narkotikami v sootvetstvii s zakonodatel‘stvom Narodnoi‘ Respubliki Kitaia [The Criminal Liability of Legal Entities for Drug Related Crimes Under the Legislation of People‘s Republic of China]// Kontrolu nad narkotikami [Drug Control]. 2015, No. 1(38), pp. 37 – 48; A.V. Fedorov. Ugolovnaia otvetstvennost‘ yuridicheskikh lits za korruptsionnye prestupleniya v Narodnoii‘ Respubliki Kitaia [The Criminal Liability of Legal Entities for Corruption Related Crimes in People‘s Republic of China]// Uchenye zapiski Sankt- Peterburgskogo filiala Rossii tamozhennoi akademii p.a. Bobkova V.B. [Scholarly Notes of St. Petersburg Branch of Russian Customs Academy n.a. V.B. Bobkov]. 2014, No. 4(52), pp. 92 – 102; Jiang Huilin. Kitai‘skii‘ ugolovnyi‘ zakon ob otvetstvennosti yuridicheskikh lits za korruptsiu i terrorizm [Chinese Criminal Law on Liability of Legal Entities for Corruption and Terrorism]// Vzaimnosti mezhdunarodnogo i sravnitel‘nogo ugolovnogo prava: Uchebnik [Reciprocity of International and Comparative Criminal Law: Text book]// Scientific editor N.F. Kuznetsova; editor in chief V.S. Komissarov. Moscow, 2009, 252 – 263.

In the XXI century the first legislative initiative on the introduction of criminal liability of legal entities was a bill prepared in 2011 by the Investigative Committee of the Russian Federation, a draft federal law "On Amendments to Some Legislative Acts of the Russian Federation in Connection with the Introduction of Criminal Law Impact Institute in Respect of Legal Entities"[56].

This bill is based on the theoretical concept, formulated byV.B.Volzhenkin , who noted: "… it is advisable to distinguish between the perpetrator of a crime and the subject of criminal liability. A crime as a socially dangerous unlawful and guilty act or omission can be committed only by an individual possessing consciousness and will ... But criminal liability for such acts or omissions can be borne not only by an individual, but, under certain circumstances, by legal entities too. Therefore, the challenge is to determine the conditions under which a legal entity will be held criminally liable for a crime committed by an individual, and along with the individual"[57].

A similar position was taken by A.I. Korobeevwho indicated that criminal liability of legal entities can be set only by "… demarcation of the perpetrator of a crime and the subject of criminal liability notion ... even if it will be possible to resolve the issue of criminal liability of legal entities in the Russian legislation, it needs to be done, first, within the special subject of criminal liability; second, by constructing in the General Part of the CC of the notionof 'The subject of criminal liability', in which the concept, grounds and procedure for criminal liability of individuals and legal entities are provided; and third, through a clear definition in the criminal law itself (whether it is the General or Special part of the CC) of an exhaustive list of elements of crime for the commission of which the liability of legal entities may follow"[58].

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[56] The bill is posted on the official website of the Investigative Committee of the Russian Federation. For more information on this bill, see: G.K. Smirnov. Kharakteristiki zakonoproekta Sledstvennogo komiteta Rossiiskoii Federatsii ob ugolovnoi' otvetstvennosti yuridicheskikh lits [Characteristics of the Bill of the Investigative Committee of the Russian Federation on the Criminal Liability of Legal Entities]// Ugolovnoe vozdeistvie prava v otnoshenii yuridicheskikh lits: zapisi seminara Russko-Nemetskogo ugolovnogo prava (26 iyunya 2012) [Criminal Law Impact in Respect of Legal Entities: Records of the Russian-German Criminal Law Seminar (June 26, 2012). Yurlitinform Publishing House, Moscow, 2013, pp. 110 – 119.

[57] V.B. Volzhenkin. Ugolovnaia otvetstvennost' yuridicheskikh lits [The Criminal Liability of Legal Entities]. St. Petersburg Law Institute of the General Prosecutor's Office of the Russian federation, Saint Petersburg, 1998, pp. 25 – 26.

[58] Ugolovnoe pravo Rossii. Kurs lektsii' [Russian Criminal Law. Course of lectures]// Prestupleniye [The Crime]. Vol. I.// Edited by A.I. Korobeev. Publishing House of the Far Eastern University. Vladivostok, 1999, pp. 381 – 382; Polnyi' kurs ugolovnogo prava [Full course of Criminal Law]. In 5 vol.// Edited by A.I. Korobeev. Vol. 1. Prestuplenie i nakazaniye [Crime and Punishment]. Saint Petersburg R. Aslanov's. Legal Centre Press Publishing House, 2008, p. 437.

The prepared bill took the proposed model in a "reduced" form. Its developers have refused to recognize the legal entity as a subject of criminal liability in the literal sense of such liability, and chose a compromise of recognising a legal entity as a subject to which the measures of the criminal law impact are applied.

Herewith, criminal liability is established in the broad sense of the word which covers the application of other measures of criminal law nature to legal entities.

The bill includes provisions on adding to the RF CC of Chapter 152"Measures of Criminal Law Nature Regarding Legal Entities", including Articles 1044 – 10415. Its Art. 1044"Grounds and Conditions of Application of Measures of Criminal Law Nature to the Legal Entities" states that the basis for applying measures of criminal law nature to legal entities is the involvement of alegal entity in a crime, and contains an exhaustive list of cases showingthe involvement of alegal entity in a crime.

According to this Article, the legal entity is involved in a crime if:

a) the crime was committed for the benefit of thelegal entity by a person performing managerial functions or actually managing it ;

b) the legal entity was used in order to commit, conceal the crime or the consequences of the crime by the person performing managerial functions or carrying out actual management in it, including financing the crime with money or current accounts of the legal entity, transactions on behalf of the legal entity for facilitating the commission or concealment of the crime or property derived from the commission of the crime.

Thus, the bill provides for the application of not criminal penalties but other measures of criminal law nature to legal entities, and not for their committing a crime but for their involvement in one. It certainly seems similar, but it is not the same.

We can say that the bill has become some sort of approbation of the idea of introducingcriminal liability of legal entities.

Naturally, there were a lot of diverse assessments (from full non-acceptance to supporting the concept) and comments on the proposed bill. That said, some authors perceived certain things positively, assessed them as a plus of the bill, while other authors considered the same issues from extremely negative (adverse) positions, and vice versa. This is not surprising, since there are different approaches to the evaluation of the institution of criminal liability of legal entities.

The point of view of the opponents of introducing criminal liability of legal entities was (and still is) the traditional one. They believe that such a liability simply cannot exist, for the institution destroys classical principles (fundamental principles) of criminal law, blurs the boundaries between criminal and administrative law, etc.

Supporters' comments on the introduction of criminal liability of legal entities are more constructive. Recognizing that such a liability should exist, they criticized the bill quite harshly, paying attention to its "compromise" nature caused by the desire to insert criminal liability of legal entities in its broad sense in the current criminal legislation without substantially reforming it[59].

Naturally, the option of recognizing the legal entity as a perpetrator of a crime is more relevant to approaches to understanding the crime, elements of a crime and criminal liability prevailing in Russian criminal law science.

However, as international experience shows, in the first stage of developing criminal legislation, in particular of the liability of legal entities, it is possible to adopt rules which ensure the application of other measures of criminal law nature to such entities. After a certain operation period of these rules and their enforcement practice , the transition to the second stage is possible (if necessary), which requires more serious legislative changes involving the recognition of the legal entity as a perpetrator of a crime.

However, such an intermediate option of establishing criminal liability of legal entities has not received adequate support and a new bill appeared which provides for criminal liability of a legal entity as the perpetrator of a crime.

The draft federal law On Amendments to Some Legislative Acts of the Russian Federation in Connection with the Introduction of the Institution of Criminal Liability of Legal Entities No. 750443-6.

The indicated bill[60], as explained in the note on it, involves the addition of a system of rules of law which form, in their unity, an institution of criminal liability of legal entities to the legislation of the Russian Federation, which includes provisions specifying grounds of criminal liability of legal entities, the range of organizations subject to criminal liability, types of penalties imposed on guilty organizations, the grounds of their release from punishment, the legal consequences of the conviction of legal entities, as well as legally-remedial and penal mechanisms of implementation of the relevant criminal law rules[61].

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[59] Yu.I. Bytko. Nuzhen li Rossii takoi' zakon (o peresmotre zakona ob ugolovnoi' otvetstvennosti yuridicheskikh lits) [Does Russia Need Such a Law (Revising the Bill on the Criminal Liability of Legal Entities)]// Saratovskii' gosudarstvennyi' Journal yuridicheskoi'y akademii [Saratov State Law Academy Journal]. 2015. No. 2(103), pp. 182 – 193.

[60] A bill was introduced in the State Duma of the Federal Assembly of the Russian Federation on March 23, 2015 by State Duma member A.A. Remezkov. The bill is registered under No. 750443-6 and posted on the official website of the State Duma of the Federal Assembly of the Russian Federation.

[61] The explanatory note actually reproduces (in many paragraphs verbatim) the article by G.S. Smirnov „What will the criminal liability of legal entities be like". Ref.: The criminal proceedings. 2014. No. 10, pp. 68 – 77.

In particular, the bill provides for a new version of Art. 19 of the RF CC "General Terms of Criminal Liability". It is proposed to formulate it as follows:

"Criminal liability shall be imposed on a sane individual who has reached the age established by the present Code, as well as a legal entity. Criminal liability of a legal entity for a crime does not exclude criminal liability of an individual for the same act (or omission to act), as well as criminal liability of an individual for committing a crime does not exclude criminal liability of the legal entity for the same act (or omission)."

Fundamental for the formation of the institution of criminal liability of legal entities are Articles 96^1 and 96^3 included in Chapter 14^1 "Criminal Liability and Punishment of Legal Entities", which iis proposed to supplement the RF CC.

Art. 96^1 "General Conditions of Criminal Liability and Punishmentof Legal Entities", stipulates that the provisions of the General Part of the RF CC that define the criminal law consequences of committing a crime for individuals are applicable to legal entities, unless otherwise provided in Chapter 14^1 of the RF CC or does not follow from the nature of relations with the participation of a legal entity. A legal entity shall be criminally liable only for those acts or omissions for which the Special Part of the RF CC provides for a penalty applicable to legal entities.

Art. 96^3 "Guilt of a Legal Entity" has the following contents:

«1. Alegal entity is guilty of committing a crime and is subject to criminal liability in cases of:

a) guilty (either intentional or by negligence) wrongdoing for which the legal entity is punishable in accordance with the Special Part of this Code, action/omission carried out on behalf of the legal entity by a person authorized to perform such an action (omission) under the law, another legal act, a statute, a contract or a letter of attorney;

b) the commission of anact or omission for which the legal entity is punishable in accordance with the Special Part of this Code clearly in the interest of the legal entity by a person holding a post in his management or control bodies;

c) the commission of an act or omission for which the legal entity is punishable in accordance with the Special Part of this Code clearly in the interest of the legal entity by a person entitled to give instructions mandatory for this legal entity or otherwise determine its action (omission) or decisions by virtue of direct or indirect participation in the authorized (reserve) capital of this legal entity, the law, another legal acts or acontract;

d) the deliberate commission of an act or omission for which a legal entity is punishable in accordance with the Special Part of this Code by other persons under

orders, with knowledge or approval of the persons mentioned in clauses "a", "b" and "c" of the first part of this Article, who acted deliberately for the benefit of the legal entity.

2. The crime is considered to be committed in the interests of the legal entity, if one of his motives was the acquisition of benefits of a property or non-property nature as a result of the commission of such a crime by a legal person, including profit (increase in profit), avoidance or reduction of costs or damages, avoidance of property or other liability under laws of the Russian Federation, acquisition of rights or exemption from duties[62].

The discussion that unfolded during the deliberation of the bill showed that the questions raised usually relate not to a substantial part of the bill but to therationale for its adoption. Thus, it has been once again demonstrated that the question of the introduction of criminal liability of legal entities is of the political and legal nature.

With the political component "put aside", it should be recognized that from a legal standpoint there are no insurmountable obstacles for introducing criminal liability of legal entities. How to implement the consolidation of this institution into criminal law is a question of legislative technique.

In this regard, it may be useful to discuss the advisability of changing the approach in which the criminal legislation is identified with the RF CC (Art. 1 of the RF CC), and the adoption, along with the RF CC, of yet another criminal law — Federal Law On Criminal Liability of Legal Entities.

Moreover, perhaps one should consider criminal liability of legal entities not even as a separate criminal law institution but evaluate the introduction of such liability as the beginning of forming a new sub-sector of criminal law, based, first and foremost, on specific differences in understanding of an act (or omission) and guilt of an individual and a legal entity.

[62] It should immediately be specified that the Government of the Russian Federation has not supported the bill in its presented version, giving as a reason that „since the bill requires major changes to the concept of the criminal law and, accordingly, the criminal law doctrine of the liability of legal entities, the bill requires further thorough discussion and theoretical foundation". The State Duma of the Federal Assembly of the Russian Federation did not consider the bill in the spring session of 2015.

METALLURGICAL ENTERPRISES AS OBJECTS OF CRIMINOLOGICAL EXAMINATION

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Abstract: The problem of criminological examination of space is one of the most difficult and unexplored in jurisprudence. It is caused by the tasks and functions of criminological examination that have not been reflected in the legislation, and its applied value in the conditions of the Russian reality has no practical implementation. The article describes some aspects of increase in efficiency of criminological examination of space developed by the Criminal Law Department of the Ural State Law University.
Key words: industry, crime prevention, criminological examination, crime prevention through environmental design.

Introduction

The need for continuous improvement of measures for the prevention of criminal infringement of rights and freedoms of the person and citizen, property, public order, public safety and other significant objects is one of the purposes of the Russian Federation on a long-term perspective[1].

At the same time, any improvement assumes search and development of new ways of crime prevention. One of them is the prevention of crimes by means of the organization of space.

[1] Ukaz Prezidenta Rossiiskoii Federatsii "O Strategii natsional'noi' bezopasnosti Rossiiskoii Federatsii do 2020 goda" No. 537 ot 12 maya 2009 goda [The President's Decree of the of the Russian Federation "On the Strategy of National Security of the Russian Federation till 2020" No. 537, May 12, 2009]// Sobranie zakonodatel'stva Rossiiskoii Federatsii [Collection of the legislation of the Russian Federation]. May 18, 2009, No. 20, Art. 2444.

The concept of crime prevention by means of environmental design which formed the basis for emergence of the new branch of knowledge – "Environmental Criminology", unlike domestic science, is not new in foreign criminology though potential aspects of its application have not run their course yet.

Crime prevention by arrangement of environment (Crime Prevention through Environmental Design – CPTED) offered by the criminologist from Florida State University C. Ray Jeffrey and developed in the theory of "the protecting space", though in a slightly reduced form, by the architect Oscar Newman is considered in relation to the organization of city space.

So, the concept of the CPTED developed by C. Ray Jeffery, which underlined the role of the physical environment, claimed that changing certain features of environment will reduce the number of crimes committed there.

In the parallel research work by Oscar Newman, the accent was and made on certain design features of the artificial environment. "The protecting space: the prevention of crime by means of city design" by O. Newman included researching the relation of crime to physical forms of organizing inhabited space. As an architect, Newman placed emphasis on features of design of rooms and spaces.

According to Newman, "the protecting space… is a model for inhabited environment which forbids a crime"[2].

However, the city space can include different elements, both residential and industrial facilities, which makes the research relevant to the concept of "Person-Environment-Crime".

We can assert that in the Russian Federation, significant attention is paid to safety of industrial facilities. Thus, the research accent concentrates only on technical aspects of a problem. The safety data sheets – passports of anti-terrorist security – which are made out by the enterprises of the industry and power engineering under the Ministry of Industry and Energy of the Russian Federation and federal agencies subordinated to it can be examples. The list of particular enterprises on the territory of Sverdlovsk region is approved by the Minister of the industry, power engineering and science of the Sverdlovsk region (the letter of 27 August 2007, No. 16-02-9dsp).

The resolution of the Government of the Russian Federation, No. 272 "On the Approval of Requirements to Anti-Terrorist Security of Places of Mass Gathering of People and Objects (Territories) Subject to Obligatory Protection by Police and

[2] Newman Oscar. Zashchishchennoe prostranstvo: preduprezhdenie prestupnosti na osnove gradostroitel'nogo proektirovaniia [Defensible Space: Crime Prevention through Urban Design]. New York: Macmillan, 1972, p. 3.

Forms of Material Safety Data Sheets of Such Places and Objects (Territories)" was passed on 25 March 2015. (Thus, information contained in them the access to which must be limited, is potentially dangerous as it includes the technical specification on the object, his engineering and communication constructions, and the quantitative structure of the personnel, etc.).

Technical aspects of protection are often connected with the following aspects: safety of the perimeter of the industrial facility, including its equipment with special engineering barriers, technical means of protection and by forces of special protection of the enterprise.

Considering that safety of the industrial enterprises requires simultaneous protection from external and internal threats, irrespective of the type of the protected industrial facility, technical questions of ensuring its safety are directed at:

1. preventing unintentional unauthorized penetration into the protected territory of random persons, and the exit of the employees and other persons beyond the borders of the protected territory.

2. prevention of intentional unauthorized penetration into the protected territory for the purpose of committing a crime or creating difficulties or a temporary delay during intentional unauthorized penetration into the protected territory for the purpose of committing crime.

The scheme of criminological examination includes the following elements:

• **formal and special control** (All elements of the perimeter have to possess an equal degree of security, but its organization has to vary (for example, if, on the one hand, an object borders on the waste ground, and, on the other hand – on the recovered and well-lit street, the violator's penetration is most probable from the waste ground; therefore, control in this place has to be strengthened. The general scheme of protection, i.e., a deaf cloth (concrete plates, bricklaying, metal welded or wooden boards), continuous, monolithic protection to ensure high secrecy of objects on the protected territory of the enterprise, the mode of their functioning, the production, etc.. (secrecy – from curious eyes – of activity of objects on the protected territory and a public telephone network used – if the barrier is over 2 meters high; rigidity of the barrier design that causes its weak anti-climb protection; the maximum resistance to destruction of a barrier (depends on the material; metal welded boards possess maximum stability); minimum esthetics of appearance; high cost of production, but minimal charges), or

• **transparent barrier** (wire, a grid, trellised constructions from: metal, concrete, brick, wood, or mesh sections). This protection, as a rule, is intended for delin-

eating borders of the perimeter of the enterprise. Barriers/fences can be rigid or flexible by design. The transparent barrier "is almost see-through", transparent for surveillance by strangers over objects on the protected enterprise territory, and also over the installed system of protection and the operating mode of their public telephone network. The rigid/flexible barrier/fence possesses the following properties: low secrecy of activity of objects on the protected territory and a public telephone network used; weak anti-climb protection ; modern esthetic look (except for barriers from barbed wire); high (low) cost of production, but minimal (considerable) charges, or

• which involves using the combination of various types of design and materials. An important advantage of this type of barrier protection is an opportunity, at a design stage, to provide the maximum adaptation of the chosen option of the material of external protection for resistance to concrete threats characteristic for this enterprise; the sum of money which is allocated for the construction of public telephone network; the public telephone network type chosen earlier which is most convenient or effective for operation in specific conditions and/or resistance to threats for this enterprise; requirements to the esthetics of its appearance, etc.

• **convenience:**

a. organization of control.

b. Commission of crime (requirements of a systemic approach to safety, which assumes obligatory continuity of safety procedures, along the entire technological cycle with the obligatory account of all possible types of threats). In other words – providing such operating conditions of the person, object, technical means and technologies that ensure reliable protection from all possible types of threats during the continuous industrial process (the theory of "usual actions" of Cohen and Felson (1979).

According to this theory, commission of crime requires the existence of three elements coming together in space and time: 1) a motivated criminal; 2) an available and suitable purpose; and 3) the lack of due protection (supervision). According to this theory, a crime is more likely to occur when these three conditions arise at the same time in a certain place. For example, if owners of a new car (the suitable purpose) leave keys in the ignition lock, leave the car and visit a shop (the lack of due protection) in the conditions of high crime rate (an association of motivated criminals), then the likelihood of the car to be stolen increases). Thus, here crime prevention means neutralizing one of these components, for example, by changing the extent of protection (safeguarding), or by changing environment.

c. evasion from responsibility.

• **psychological assessment of the territory** (perception from the position of "civilization" (for example, the theory of " broken windows" by James Wilson and George Kelling (1982). According to this theory, if someone broke a glass window in a house and nobody replaced it, soon there will be not a single whole window in this house, and marauding will begin then. In other words, strong indications of disorder and non-compliance by people of accepted standards of behavior provoke other people to forget about rules because people, seeing the lack of order in trifles (graffiti on walls, broken windows, etc.), automatically start to believe that they will remain unpunished, breaking law and order. As a result of the chain reaction, a "decent" city area can quickly turn into a foul place where people are afraid to go outside).

Summary

The precautionary effect of criminological examination of environment can be reached due to the impact of the organization of space on the psychological state of mind of individuals whose behavior influences the commission of crime, and also on formation of territorial or professional groups, as a factor reducing the number of violations.

DO WE NEED THE EUROPEAN COURT OF HUMAN RIGHTS AS A SUPRANATIONAL BODY?

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Abstract: The article analyzes the position of the supreme courts of the Russian Federation on the implementation of the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedom, the legal positions of the European Court of Human Rights and the execution of judgments of the European Court of Human Rights. The author also considers problems arising in the criminal, administrative and civil proceedings within the Russian national judicial system in connection with the application of the legal positions of the European Court of Human Rights. Moreover, the difficulties arising in connection with the fulfillment of the judgments of the European Court of Human Rights are demonstrated with the example of decisions in which, in the author's point of view, the European Court of Human Rights has exceeded its competence. The author examines the judgments rendered in respect of the Russian Federation as well as judgments rendered in respect of other countries that have ratified the European Convention for the Protection of Human Rights and Fundamental Freedom. Moreover, attention is paid to the decision of the Constitutional Court of the Russian Federation of 14 July 2015 concerning the collision between the decisions of the European Court of Human Rights and previously expressed positions of the Constitutional Court of the Russian Federation. It is mentioned that pursuant to this decision of the Constitutional Court of the Russian Federation,the procedure of constitutional control of the decisions of international bodies for the protection of people's rights and freedoms, in particular the European Court of Human Rights, has been developed and implemented.
Keywords: The European Court of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedom, a collision, a supranational body,supreme juridical force, sovereignty.

The European Court of Human Rights (hereinafter "The European Court") is an international court which rules on individual or State applications alleging violations of the fundamental rights and freedoms set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms ("The Convention"), which

aims at securing their universal and effective recognition and observance. Decisions of the European Court are binding on the countries concerned and lead governments to altering their legislation and administrative practice in a wide range of areas. The European Court's case-law provides common understanding of the human rights proclaimed in the Convention and, thus, makes the Convention a powerfulliving instrument for meeting new challenges and consolidating the rule of law and democracy within the territory of its Parties.

On 5 May 1998, the Russian Federation ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and, accordingly, recognized *ipso facto* and without any special agreement the jurisdiction of the European Court of Human Rights as binding on the interpretation and application of the Convention and Protocols thereto in cases of alleged violation of these acts' provisions by the Russian Federation, when the alleged violation took place after the Convention and its Protocols had formally entered into force in the Russian Federation[1]. From then on, those in the Russian Federation's jurisdiction were allowed to bring alleged violations of the Convention before the European Court.

Since that time, the Russian judicial system has been proving its recognition of the European Court's case-law and respect to it.On 10 October 2003, the Plenary of the Supreme Court of the Russian Federation issued the ruling in accordance with which implementation of the European Court's judgments addressed to the Russian Federation involves adopting both individual measures,in order to restore applicant's rights, and general measures, in order to avoid recurring violations[2]. Individual measures include reimbursement and retrial within national judiciary system[3]. In order to achieve the latter, Article 392 § 4.4 of the Code of Civil Procedure of the Russian Federation, Article 311§ 3.4 of the Code of Commercial Procedure of the Russian

[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 Rossiiskoii Federatsii [Russian Federation Collection of Legislation]. 1998, No. 14, p. 1514.

[2] Postanovlenie Plenuma Verhovnogo Suda Rossiiskoii Federatsii o primenenii sudami obshchei' jurisdikcii obshchepriznannyh principov i norm mezhdunarodnogo prava i mezhdunarodnyh dogovorov Rossiiskoii Federacii No. 5 [Ruling of the Plenary Supreme Court of the Russian Federation "On the Application by courts of General Jurisdiction of Generally Recognized Principles and Rules of International Law and of International Treaties of the Russian Federation" No. 5]. October 10, 2003. Byulleten' Verkhovnogo suda [Bulletin of the Supreme Court]. 2003, No. 12.

[3] I.V. Rehtina. Ispolnenie v Rossiiskoii Federatsii postanovlenii' Evropei'skogo Suda po pravam cheloveka: teoreticheskie i prakticheskie aspekty [Execution of Rulings of the European Court of Human Rights in the Russian Federation]// Ispolnitel'noe pravo [Executory Law]. 2014, No. 3// Available at: http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=CJI;n=81745 .

Federation are applied. These provisions contain grounds for review of judicial acts that entered into legal force in view of new circumstances, among which there is a "finding by the European Court of Human Rights of a violation of provisions of the Convention for the Protection of Human Rights and Fundamental Freedomsin judicial proceedings in a particular case, in connection with which a decision adopted has been subject of an application before the European Court of Human Rights"[4]. The general measures involve alteration of the law currently in force and improvement of the judicial practice[5]. Then,the Supreme Court of the Russian Federation developed thisidea in its ruling of 19 December 2003 and recommended the courts' resolving civil disputes to take into consideration judgments of the European Court of Human Rights providing interpretation of provisions of the Convention adopted both in cases against the Russian Federation and in cases against other States.

The Constitutional Court of the Russian Federation ("the Constitutional Court") plays an important role in the formation and improvement of the attitude towards the Convention, the European Court,and its case-law. The Constitutional Court itself takes into consideration provisions of the Convention when estimating compatibility of the existing legislation with the Russian Constitution. For instance, when assessing the provisions of the Code of Civil Procedure of the Russian Federation devoted to the procedure for implementation of the right to judicial protection, as set forth in Article 46 of the Russian Constitution[6], the Constitutional Court used Article 6 of the Convention as guidance[7].The Constitutional Court also renders decisions that *per se* execute the European Court judgments. For instance, in judgment No. 13-П of

[4] V.A.Musin. Sudebnai'a zashhita: sootnoshenie vnutrigosudarstvennogo i mezhgosudarstvennogo pravosudiia [Judicial Protection: Relationship Between Domestic and Iinternational Justice]// Prava cheloveka. Praktika Evropei'skogo suda po pravam cheloveka [Human rights. Case-law of the European Court of Human Rights]. 2015, No. 2, p.75.

[5] I.V. Rehtina. Ispolnenie v Rossiiskoii Federatsii postanovlenii' Evropei'skogo Suda po pravam cheloveka: teoreticheskie i prakticheskiea spekty [Execution of Rulings of the European Court of Human Rights in the Russian Federation]// Ispolnitel'noe pravo [Executory Law]. 2014, No. 3// Available at: http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=CJI;n=81745 .

[6] Postanovlenie Konstitucionnogo Suda Rossiiskoii Federatsii po delu o proverke konstitucionnosti otdel'nyh polozhenii'stat'i 260 Grazhdanskogo processual'nogo kodeksa Rossiiskoii Federatsii v sviazi s zhaloboi'grazhdanina E.G. Odijankova" No. 14-P [Judgment of the Constitutional court of the Russian Federation in the Case on the Verification of the Constitutionality of Certain Provisions of Article 260 of the Code of Civil Procedure of the Russian Federation in Connection with the Complaint by Citizen E.G. Odiyankov No. 14-P]. December 26, 2005.Vestnik Konstitutsionnogo Suda Rossiiskoii Federatsii [Bulletin of the Constitutional Court of the Russian Federation]. 2006, No. 1.

[7] V.A. Musin. Sudebnai'a zashhita: sootnoshenie vnutri gosudarstvennogo i mezhgosudarstvennogo pravosudiia [Judicial Protection: Relationship between Domestic and International Justice]// Prava cheloveka. Praktika Evropei'skogo suda po pravam cheloveka [Human Rights. Case-law of the European Court of Human Rights]. 2015, No. 2, p.75.

20 November 2007, the RF Constitutional Court declared unconstitutional the provisions of the RF Code of Criminal Procedure concerning the impossibility of a person that is to be forcibly medically treated (according to the psychiatrist's decision) to participate personally in the criminal proceedings and the judicial sitting, tomake acquaintance with the materials of the case, to submit applications, and to appeal the decisions. In essence, thisjudgment can be regarded as the execution of the European Court's disposition of the case of *Romanov v. Russia* (2005),in which it was held that the applicant should attend the judicial sitting in order to allow the judge to give his personal evaluation of the applicant's mental state and to make a fair decision.

It might be said that the decision of the Constitutional Courtof 5February 2007, No. 2-П ordering the federal legislator to reform the procedure for supervisory review of judicial acts is the execution of the European Court's judgments in the cases of *Ryabykh v. Russia*, *Volkov v. Russia, Zasurtsev v. Russia*[8]. In this judgment, the institution of constitutional justice in the Russian Federation confirmed the RF Supreme Court'sposition, paying attention to the fact that not only the Convention, but also the judgments of the European Court – to the extent theyinterpret the essence of rights and freedoms declared in the Conventionon the basis of universally recognized principles and norms of international law – form an integral part of the Russian legal system, and, therefore, should be considered by the legislator when regulating public relations and the law enforcer when applying the relevant law[9].

[8] V.D.Zorkin. Dialog Konstitucionnogo Suda Rossiiskoii Federatsii Evropei'skogo Suda po pravam cheloveka v kontekste konstitucionnogo pravoporiadka [The Dialog between the Constitutional Court of the Russian Federation and the European Court of the Human Rights in the Context of the Constitutional Law Order]// Available at: http://www.ksrf.ru/ru/News/Speech/Pages/ViewItem.aspx?ParamId=39 .

[9] Postanovlenie Konstitucionnogo suda Rossiiskoii Federacii po delu o proverke konstitucionnosti polozhenii statei' 16, 20, 112, 336, 376, 377, 380, 381, 382, 383, 387, 388 i 389 Grazhdanskogo processual"nogo kodeksa Rossiiskoii Federacii v sviazi s zaprosom kabineta ministrov Respubliki Tatarstan, zhalobami otkrytyh aktsionernyh obshhestv "Nizhnekamskneftehim" i "Hakasjenergo", a takzhe zhalobami riada grazhdan No. 2-P [Judgment of the Constitutional Court of the Russian Federation in the Case on the Constitutionality of Provisions of Articles 16, 20, 112, 336, 376, 377, 380, 381, 382, 383, 387, 388 and 389 of the Code of Civil Procedure of the Russian Federation in Connection with the Request of the Cabinet of Ministers of the Republic of Tatarstan, Open Joint Stock Company "Nizhnekamskneftekhim" and "Khakasenergo", as well as complaints of some citizens No. 2- P]. February 5, 2007. Available at: http://main-law.ru/ksrf/2-p_ot_05-02-2007 ; Postanovlenie Konstitucionnogo SudaRossiiskoii Federatsii po delu o proverke konstitutsionnosti chaste vtoroi'stat'i 392 Grazhdanskogo processual'nogo kodeksa Rossiiskoii Federacii v sviazi s zhalobami grazhdan A.A. Doroshka, A.E. Kota i E.U. Fedotovoi'" No. 4-P [Judgment of the Constitutional Court of the Russian Federation "On the Case on the Constitutionality of Article 392 § 2 of the Code of Civil Procedure of the Russian Federation in Connection with Complaints of A.A. Doroshek, A.E. Kot and E.Y. Fedotova" No 4-P]. February 26, 2010. Vestnik Konstitutsionnogo Suda Rossiiskoii Federatsii [Bulletin of the Constitutional Court of the Russian Federation]. 2010, No. 3.

Thus, the RF Constitutional Court serves as a link between the Russian legal system and international lawpractice concerning the protection of human rights and freedoms.

On 27 June 2013, the Plenary of the Supreme Court of the Russian Federation issued Ruling No. 21 "On Application by Courts of General Jurisdiction of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and Protocols Thereto",proceeding from its previously expressed views. It restated thatlegal positions in the final judgments of the European Court rendered in respect of the Russian Federationshall be binding for the courts, and that legal positions in final judgments adopted in respect of other State Parties of the Convention shall be considered by the courts when hearing cases similar to those that have been a subject of the European Court's analysis and finding. It also recommended taking into account legal positions of the European Court of Human Rights in the application of the Russian legislation, namely, determining the substance of rights and freedomsgranted by the legislation of the Russian Federation with regard to the essence of the similar rights and freedoms as revealed by the European Court of Human Rights in its practice of the Convention and its Protocols application. As a result, legal positions expressed in the decisions rendered in respect of other State Parties as well as the decisions rendered in respect ofthe Russian Federation provide national judges with a source of legal reasoning and interpretation.Hence, seeking legal protection within the national legal system by invoking the Convention guarantees has been declared attainable.

However, in practice it might be difficult to receive legal protection under the Convention in national courts as in spite of having the Russian Supreme Court's regulations, which oblige national courts to take into account the European Court's case-law, there is the lack of awareness of the European Court's practice caused by the lack of motivation for learning and applying it.The matter is lawyers are reluctant to argue the European Court's case-law as, from their point of view, judges do not take such arguments into consideration. On the other hand, judges claim that they do not apply the Convention because advocates do not raise such arguments in cases before them. The analysis of the judicial practice proved that the legal positions of the European Court are frequently used in the RF Constitutional Court practice. As to the case-law of courts of general jurisdiction, arbitrations courts, it may be concluded that the legal positions of the European Court are sometimes used in the criminal and administrative proceedings and are rarely used in the civil proceedings. Another reason for the poor use of the European Court's case-law is the absence of official translations of the European Court's decisions. Considering this problem of

case-law enforcement in judicial authorities in the Russian Federation, there are two possible ways of breaking this cycle: pressure from below (litigators) and pressure from above (the Supreme Court of the Russian Federation)[10]. As it was already mentioned, the Supreme Court of the Russian Federation has already issued some regulations and, hopefully, they will be employed to educate and motivate both judges and practicing lawyers to properly refer to and implement the Convention and the European Court's judicial practice within the national judiciary system.

The European Court's practice of making pilot decisions is worth mentioning. As it was justly mentioned by Professor V.A. Musin, the possibility of the European Court to pass pilot judgments is not expressly provided for by the Convention"[11]. The opportunity to make such decisions was legalized by Protocol No. 14[12], which was ratified by the Russian Federation in 2010[13]. Such judgments serve as a means enabling the European Court to avoid possible "repetition of the same findings in a number of cases" by directly pointing to the existence of structural problems in the national legislation and judicial practice and indicating the specific measures to be taken by the respondent Government for their elimination[14].

However, certain judgments of the European Court have given rise to a negative response by the States to which these judgments were addressed. Moreover, these States declare their right to abstain from enforcing these judgments. The matter is

[10] Spyridon Flogaitis, Tom Zwart, Julie Fraser: The European Court of Human Rights and its Discontents. Turning Criticism into Strength. Edward Elgar Publishing, Cheltenham, 2013, pp. 67 – 68.

[11] V.A.Musin. Sudebnaia zashhita: sootnoshenie vnutrigosudarstvennogo i mezhgosudarstvennogo pravosudiia [Judicial Protection: Relationship between Domestic and International Justice]// Prava cheloveka. Praktika Evropei'skogo suda po pravam cheloveka [Human Rights. Case-law of the European Court of Human Rights]. 2015, No. 2, p.74.

[12] V.D. Zorkin. Dialog Konstitucionnogo Suda Rossiiskoii Federatsii i Evropei'skogo Suda po pravam cheloveka v kontekste konstitucionnogo pravoporiadka [The Dialog between the Constitutional Court of the Russian Federation and the EuropeanCourt of the Human Rights in the Context of the Constitutional law order]// Available at: http://www.ksrf.ru/ru/News/Speech/Pages/ViewItem.aspx?ParamId=39 .

[13] Federal'nyi' zakon o ratifikatsii Protokola No. 14 k Konventsii o zashhite prav cheloveka i osnovnyh svobod, vnosiashchego izmeneniia v kontrol'nyi' mehanizm Konvencii No. 5-FZ [Federal Law "On Ratification of Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention" No 5-FZ]. February 4, 2010. Sobranie zakonodatel'stva Rossiiskoii Federatsii [Russian Federation Collection of Legislation]. 2010, No. 6, p. 567.

[14] A.V. Il'in. Nekotorye voprosy, sviazannye s priznaniem postanovleniia Evropei'skogo suda po pravam cheloveka osnovaniem dlia peresmotra sudebnyh aktov po novym obstojatel'stvam [Some Issues Related to the Recognizing the Judgment of the European Court of Human Rights as a Ground for Judicial Review of Acts in View of the New Circumstances]// Arbitrazhnyi' i grazhdanskii' process [Arbitrazh and Civil Procedure]. 2013, No. 5. The text is available in Consultant Plus legal information system.

that recently, the European Court has started toexceed its authority when delivering its judgments. For example, in several cases the European Court not only considered the norms of national legislationfor compliance with the Convention, but also prescribed the legislator to alter them, despite the fact that the question of the constitutionality of these norms had previously been considered by the national Constitutional Court.Application of the European Court's approaches connected with sensitive matters such as religion, family values, including same-sex marriages, so-called partnerships, bringing up children and some others is also controversial as every country has its own history and culture defining its traditions, values and beliefs, which may differ from the European ones. Professor V.A. Musin took notice of the fact that

"…the problem of the European Court's competence and of setting its limits has existed from the very moment of its establishment, but it was latent until the European Court started to pass judgments concerning matters which had not been transferred to it for decision by State Parties to the Convention"[15].

The most remarkable judgments that most vividly demonstrate the problem of defining the European Court's competence and its limits might be the following: the case of *Von Hannover v. Germany*(2004)[16], the case of *Gorgulu v. Germany* (2004), the case of *Hirst v. the United Kingdom* (2005), the case of *Paksas v. Lithuania* (2011), the case of *Konstantin Markin v. Russia* (2012)[17], the case of *Anchugov and Gladkov v. Russia* (2013)[18]. In this article, only some of these decisions are analyzed.

In the case *Hirst v. the United Kingdom*, the European Court held that the law depriving convicted prisoners of electoral rights was in breach of the United Kingdom's obligation under Article 3 of Protocol No. 1 to the Convention according to which

"…The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

According to the European Court, the restriction on votingrights for prisoners does not belong to the United Kingdom's margin of appreciation becausea blanket

[15] V.A. Musin. Sudebnaia zashhita: sootnoshenie vnutrigosudarstvennogo i mezhgosudarstvennogo pravosudiia [Judicial Protection: Relationship Between Domestic and International Justice]// Prava cheloveka. Praktika Evropei'skogo suda po pravam cheloveka [Human Rights. Case-law of the European Court of Human Rights]. 2015, No. 2, p.74.

[16] Available at: http://europeancourt.ru/uploads/ECHR_Von_Hannover_v_Germany_24_06_2004.pdf .

[17] Available at: http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=ARB;n=283631 .

[18] Available at: http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=ARB;n=351634 .

ban irrespective of the length of sentence and the gravity of the offence is general, automatic and indiscriminate[19]. The respondent Government stated that legislating on disenfranchisement is the prerogative of the British Parliament, and the latter, by overwhelming majority (by 224 votes to 20), rejected the bill drafted to implement the European Court judgment[20]. Nonetheless, in November 2010, the European Court reaffirmed its position and decided in favour of the convicted rapist Robert Greens and another inmate known as "MT" in a further prisoners' voting rights case against the United Kingdom. The European Court found the repetitive violation of Article 3 of Protocol No. 1 and expressed the view that this violation directly resulted from the failure by the United Kingdom's Government to introduce measures to comply with the judgment in respect of the case of *Hirst v. United Kingdom*[21]. In June 2013, the same approach was applied by the European Court in the case of *Anchugov and Gladkov v. Russia.* The European Court dismissed references by the respondent Government to the Constitution of the Russian Federation, particularly to Aricle 32 § 3 and noted that it was open to the respondent Government to explore all possible ways in settling the matter of the rights of prisoners to vote and to decide whether to achieve compliance with Article 3 of Protocol No.1 through some form of political process or by interpreting the Russian Constitution by the Constitutional Court in harmony with the Convention. V.A. Musin mentions that the European Court's position, according to which the Constitutional Court of the Russian Federation should interpret the Constitution in compliance with the Convention, may not bind the Constitutional Court as it is the only body vested with the power to give an official interpretation of the Russian Constitution[22]. It is worth mentioning that Article 3 of Protocol No. 1 may be understood as requiring States to hold free elections at reasonable intervals by secret ballot, but not granting universal suffrage. It was meant to guarantee the proper functioning of the democratic process and not to grant indi-

[19] Spyridon Flogaitis, Tom Zwart, Julie Fraser: "The European Court of Human Rights and its Discontents. Turning Criticism into Strength". Edward Elgar Publishing, Cheltenham, 2013, p. 66.

[20] V.A.Musin. Sudebnaia zashhita: sootnoshenie vnutrigosudarstvennogo i mezhgosudarstvennogo pravosudiia [Judicial Protection: Relationship Between Domestic and International Justice]// Prava cheloveka. Praktika Evropei'skogo suda po pravam cheloveka [Human Rights.Case-law of the European Court of Human Rights]. 2015, No. 2, p.76.

[21] Spyridon Flogaitis, Tom Zwart, Julie Fraser: The European Court of Human Rights and its Discontents. Turning Criticism into Strength. Edward Elgar Publishing, Cheltenham, 2013, p. 66.

[22] V.A.Musin. Sudebnaia zashhita: sootnoshenie vnutrigosudarstvennogo i mezhgosudarstvennogo pravosudiia [Judicial Protection: Relationship Between Domestic and International Justice]// Prava cheloveka. Praktika Evropei'skogo suda po pravam cheloveka [Human Rights. Case-law of the European Court of Human Rights]. 2015, No. 2, p.78.

vidual rights. And the Vienna Convention on the Law of Treaties requires that international treaties be interpreted as their drafters intended[23].

The Russian Federation faced the problem of setting up limits of the jurisdiction of the European Court most seriously in 2010 when the European Court passed its judgment on the case of *Konstantin Markin v. Russia* in contradiction with the interpretation of the Constitution given by the competent authority – the Constitutional Court of the Russian Federation. The applicant was an officer of the Russian Army and his request about three years' parental leave was rejected by the head of the military unit because three years' parental leave could be granted only to female military personnel, according to the Federal Law on the Status of Military Personnel. So, K. Markin was allowed to take three months' leave. He applied to the national courts, including the Constitutional Court of the Russian Federation. The latter claimed that there was no discrimination of military men or women and confirmed the lawfulness of the refusal to grant parental leave to Markin. The Constitutional Court stated that due to the special features of the military service, the federal legislator was entitled, within its discretionary powers, to limit civil rights and freedoms of military personnel, when determining their special legal status and, thus, there was no violation of constitutional guaranties in this situation.However, the European Court came to a conclusion that the relevant domestic provisions amounted to a violationof Article 14 of the Convention inconjunction with Article 8 so that "an entire category of individuals – male military personnel – are discriminated against in the enjoyment of their right to respect for family and private life". Thus, there were twodifferent legal positions of the Constitutional Court of the Russian Federation and the European Court in relation to consistency of domestic legislative provisions concerned in this case with the Constitution of the Russian Federation and the Convention. So, when K. Markin requested for review within the national judiciary system, in view of new circumstances, the judicial acts which had rejected his claims, the Presidium of the District military court on cassation submitted a request to the RF Constitutional Court as different legal positions on the cases hindered the right adjudication of the case. The Constitutional Court in its judgment No. 27-П of 6 December 2013 stated the following:

"In the case if a court of general jurisdiction finds it impossible to comply with a judgment of the European Court of Human Rights without recognizing as inconsistent with the Constitution of the Russian Federation of legislative provisions in rela-

[23] Spyridon Flogaitis, Tom Zwart, Julie Fraser: the European Court of Human Rights and its Discontents. Turning Criticism into Strength. Edward Elgar Publishing,Cheltenham, 2013, pp. 67 – 68.

tion to which the Constitutional Court of the Russian Federation has earlier declared that there had been no violation of constitutional rights of an applicant in a particular case, it shall have the power to suspend the proceedings before it and to submit a request with the Constitutional Court to verify the constitutionality of those provisions";

"…if constitutional proceedings result in the declaring of provisions under consideration as not contravening the Constitution of the Russian Federation, the Constitutional Court of the Russian Federation – with regard to the situation that a refusal to review a judicial decision which entered into legal force as a stage of proceeding determined, in particular, by the rendering of a judgment of the European Court of Human Rights, shall be in any case excluded for a court of general jurisdiction – shall, within its competence, indicate possible constitutional modalities to implement judgments of the European Court of Human Rights"[24]. This position of the Constitutional Court of the Russian Federation agrees with the view of the President of the Constitutional Court of the Russian Federation V.D. Zorkinin his article "The Extent of Flexibility" published just after the European Court had passed the judgment adopted by the First Section on 16 October 2010 on the case of *Konstantin Markin v. Russia*. The author pointed out that the Constitutional Court of the Russian Federation had worked hard to ensure that the rulings and concepts of the European Courtwould be introduced in the Russian law as well as the European Court has reciprocated by showing respect for the judgments of the Constitutional Court without questioning its reasons, until changingthis dynamic completely in the *KonstantinMarkin v Russia*case. Although conclusions of the Constitutional Court in this case were based on the latest insights of pedagogy and child psychology and took into consideration the special character of military service in Russia and the special role of women as mothers in the Russian society, the European Court simply dismissed them as "gender prejudices". The Chairman of the RF Constitutional Court emphasized that national courts are better suited to assess the needs of the society than the European Court and, therefore, the principle of subsidiarity underlies the Convention system. V.D. Zorkin referred to the judgment of the Federal Constitutional Court of Germany that served as a follow-up to the European Court's Gorgulujudgment, according to which the German legislature may decide not to comply with international agreements, like the Convention, if that is the only way to avert a

[24] V.A. Musin. Sudebnaia zashhita: sootnoshenie vnutrigosudarstvennogo i mezhgosudarstvennogo pravosudiia [Judicial Protection: Relationship Between Domestic and International Justice]// Prava cheloveka. Praktika Evropeiskogo suda po pravam cheloveka [Human Rights. Case-law of the European Court of Human Rights]. 2015, No. 2, pp. 76 – 77.

violation of German constitutional principles[25]. Professor V.A. Musin also paid attention to the approach of the Federal Constitutional Court of Germany formed in several cases in accordance with which "the State has the right not to take into account a decision of the European Court, if and where it is not compatible with constitutional values protected by the Basic Law of Germany"[26]. Hence, this approach when the Constitutional Court of the Russian Federation has the last word was introduced in the Russian Federation. Professor V.A. Musin approved of it, finding such approach quite reasonable since Russia, like other States, has a sovereign right to enforce decisions of the European Court so that the Constitutional values would not be violated[27].

Besides, working on the issue of relationship between domestic and international justice, V.A.Musin came to the conclusion that it is possible to take into consideration the public order doctrine, widely known in the sphere of international law, when facing the need to implement the European Court's judgments concerning issues defined by the country's particular historical and cultural features. It means that if the European Court's judgments are opposed to fundamental rules established by the State and ensured by the Constitution of the Russian Federation and its federal laws, the Russian Federation has the right not to take such a judgment into account as incompatible with the public order. This approach seems to be a wise solution in cases like *Alekseyev v. Russia* that gave rise to people's discontent that the European court had not taken into account national cultural and religious values before considering prohibition of gayparades by the Moscow authorities to be a violation of Article 11 of the Convention, i.e., the violation of the freedom of assembly and association[28].

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[25] Spyridon Flogaitis, Tom Zwart, Julie Fraser: The European Court of Human Rights and its Discontents. Turning Criticism into Strength. Edward Elgar Publishing, Cheltenham, 2013, pp. 73 – 74.

[26] V.A.Musin. Sudebnai'a zashhita: sootnoshenie vnutrigosudarstvennogo i mezhgosudarstvennogo pravosudiia [Judicial Protection: Relationship between Domestic and International Justice]// Prava cheloveka. Praktika Evropei'skogo suda po pravam cheloveka [Human Rights. Case-law of the European Court of Human Rights]. 2015, No. 2, p.76.

[27] V.A. Musin. Sudebnaia zashhita: sootnoshenie vnutrigosudarstvennogo i mezhgosudarstvennogo pravosudiia [Judicial Protection: Relationship Between Domestic and International Justice]// Prava cheloveka. Praktika Evropei'skogo suda po pravam cheloveka [Human Rights. Case-law of the European Court of Human Rights]. 2015, No. 2, p.77.

[28] A.I. Kovler. Pravovye pozicii Evropei'skogo Suda po pravam cheloveka (v svete postanovleniia, prinjatyh v 2010 godu po zhalobam protiv Rossiiskoii Federatsii [Legal Positions of the European Court of Human Rights (in the light of the Judgments rendered in 2010 in Respect of the Complaints Against the Russian Federation)]// Rossiiskoe pravosudie [the Russian Justice]. 2011, No. 2// Available at: http://sutyajnik.ru/documents/4103.pdf .

On the 1 July 2015, a group of deputies of the State Duma of the Russian Federation applied to the Constitutional Court of the Russian Federation with a request to review the constitutionality of certain provisions of the Federal Law "On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols Thereto", the Federal Law "On International Treaties of the Russian Federation", the Code of Civil Procedure of the Russian Federation, the Code of Commercial Procedure of the Russian Federation, the Code of Administrative Judicial Proceedings of the Russian Federation and the Code of Criminal Procedure ofthe Russian Federation due to the fact that they actually oblige the Russian Federation, its legislative, executive and judicial authorities, tofulfillthe judgments of the European Court rendered in respect of the Russian Federation unconditionally – even if they contradictthe Constitution of the Russian Federation.

The Constitutional Court reaffirmed its position expressed in its judgment No. 27-П of 6 December 2013 concerning the procedure in cases when the positions of the Constitutional Court and the European Court differ. The institution of constitutional justice in the Russian Federation also mentioned the necessity of recognizing the supreme juridical force of the Constitution of the Russian Federation. TheConstitutionalCourtalsotook note ofthefactthatthe Russian Federation's concluding international agreements and participating in the interstate associations, delegating some authority to them, however, does not mean its renunciation of national sovereignty. It is important that the Constitutional Court claimed that the Russian Federation may not fulfill the obligations imposed on it in the exceptional situations when such action is the only possible way to avoid violations of the fundamental principles and norms declaredby the Constitution of the Russian Federation.The Constitutional Court paid special attention to the fact that an international agreement may comply with the Constitution of the Russian Federation while its interpretation given by the European Court may contradict the Constitution of the Russian Federation. So, taking into consideration the provisions of the Vienna Convention on the Law of Treaties, the Constitutional Court stated that the decision of the authorized international authority, including the decision of the European Court, may not be executed by the Russian Federation if this decision is based on the interpretation of the international treaties provisions which violates the relevant provisions of the Constitution of the Russian Federation. The Constitutional Court mentioned that such an approach is supported by institutions of justice of other countries, such as the Federal Constitutional Court of Germany, the Constitutional Court of the Italian Republic, the Constitutional

Court of the Republic of Austria, the Supreme Court of the United Kingdom of Great Britain and Northern Ireland[29].

As a result, the Constitutional Court recognized theconsidered provisionsas not contradicting the Constitution of the Russian Federation since on their basis:

— the application of the Convention and execution of judgments of the European Court are ensured;

— courts of general jurisdiction, arbitration courts, while reconsidering a case in connection with adoption of a judgment by the European Court and having come to the conclusion on the necessity of confirmation of its conformity to the Constitution of the Russian Federation, petition the Constitutional Court with a request to review constitutionality of this law;

— state bodies, responsible for the fulfillment of international treaties to which the Russian Federation is a party, the President of the Russian Federation, the Government of the Russian Federation having come to the conclusion on impossibility to execute a judgment of the European Court passed on a complaint against Russia due to the fact that the operative part of the decision is based on the provisions of the Convention in the interpretation leading to its divergence with the Constitution of the Russian Federation, are entitled to petition the Constitutional Court for the solution of the question on the possibility to execute the judgment ofthe European Court and take measures of individual and common character, aimed at ensuring the fulfillment of this Convention[30].

[29] Postanovlenie Konstitucionnogo Suda Rossiiskoii Federatsii po delu o proverke konstitucionnosti polozhenii' stat'i 1 Federal'nogo zakona "O ratifikacii Konvencii o zashhite prav cheloveka i osnovnyh svobod i Protokolov k nei"", punktov 1 i 2 stat'i 32 Federal'nogo zakona "O mezhdunarodnyh dogovorah Rossiiskoii Federatsii", chasteii pervoi' i chetvertoii stat'i 11, punkta 4 chasti chetvertoii stat'i 392 Grazhdanskogo processual'no gokodeksa Rossiiskoii Federacii, chastei' 1 i 4 stat'i 13, punkta 4 chasti 3 stat'i 311 Arbitrazhnogo processual'nogo kodeksa Rossiiskoii Federatsii, chasteii 1 i 4 stat'i 15, punkta 4 chasti 1 stat'i 350 Kodeksa administrativnogo sudoproizvodstva Rossiiskoii Federatsii i punkta 2 chasti chetvertoi' stat'i 413 Ugolovno-processual'nogo kodeksa Rossiiskoii Federatsii v sviazi s zaprosom gruppy deputatov Gosudarstvennoi' Dumy" [Judgement of the Constitutional Court of the Russian Federation "In the case on the Constitutionality of Provisions of Article 1 of the Federal Law "On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols", Article 32 § 1,2 of the Federal Law "On international treaties of the Russian Federation", Article 11 § 1,4, Article 392 § 4.4 of the Code of Civil Procedure of the Russian Federation, Article 13 § 1,4, Article 311 § 3.4 of the Code of Commercial Procedure of the Russian Federation, Article 15 § 1,2, Article 350 § 1.4 of the Code of Administrative Procedure of the Russian Federation and Article 413 § 4.2 of the Code of Criminal Procedure of the Russian Federation in connection with the inquiry of the group of State Duma deputies" No. 21-P]. July 14, 2015. Vestnik Konstitutsionnogo Suda Rossiiskoii Federatsii [Bulletin of the Constitutional Court of the Russian Federation]. 2015, No.6.

[30] Available at: http://www.ksrf.ru/en/Decision/Judgments/Documents/resume%202015%2021-П.pdf .

The Constitutional Court also stated that it does not exclude competence of the federal legislator to provide for a special legal mechanism for the resolution by the Constitutional Court of the Russian Federation on the possibility or impossibility to fulfill the European Court's decision in respect of the Russian Federation. In this regard, in December 2015 amendments to Federal Constitutional Law No. 1-FKZ of 21 July 1994 "On the Constitutional Court of the Russian Federation" concerning the procedure of consideration of the possibility to execute decisions of public bodiesensuring protection of human rights and freedoms by the Constitutional Court were adopted[31].

Thus, our answer to the question whether the European Court of Human Rights is needed as a supranational body is positive. The Convention is a powerful remedy for protecting people's rights that must not be abolished. In order to reach a high level of protection of human rights, responsibility for securing the rights guaranteed in the Convention is shared between States and the European Court. The decision-making power of the European Court derives from the member States' sovereignty and includes the undertaking of international obligations concerning human rights. Therefore, state sovereignty and the jurisdiction of the European Court are properly compatible and should be based on the assumption of mutual support.The approach to the execution of the European Court's decisions developed by the prominent Russian lawyers and stated by the Constitutional Court of the Russian Federation in its judgment No. 21-П of 14 July 2015 seems to be reasonable and justified. It is important, however, to use this approach as a guarantee of the Russian Federation's sovereignty, its historical, cultural, religious, family values and traditions recognition in order to ensure people's fundamental rights and freedoms but not as a political instrument in order to avoid responsibility for the violations of the Convention's provisions and to deprive people of protection of their rights and freedoms.

[31] Federal'nyii konstitutsionnyi' zakon "O vnesenii izmenenii v Federal'nyi' konstitucionnyi' zakon "O Konstitucionnom Sude Rossiiskoii Federatsii" No. 7-FKZ [Federal Constitutional Law "On Amendments to the Federal Constitutional Law "On the Constitutional Court of the Russian Federation" No. 7- FKZ]. December 14, 2015. Rossiiskaia Gazeta No. 284 [Ros. Gaz No. 284]. December 16, 2015.

NATIONALITY AND LEGAL AID: RUSSIAN AND FINNISH APPROACHES

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Abstract: In this article, the authors discuss issues related to the nationality of persons entitled to public legal aid inRussia, using as a point of comparison the legal-aid system in Finland. Such issues are of particular importance in modern Russia, since a large proportion of Russian residents are citizens of the former Soviet Union who lack Russian citizenship: citizens of other countries (inter alia, CIS countries), or immigrants and refugees, many of whom may find themselves in need of free legal aid. Russia's Ministry of Justice is in charge of developing a system of free-of-charge, state-provided legal aid that could, in theory at least, also be accessed by the above-mentioned categories of non-citizens. The Ministry ran a pilot project between 2006 and 2011, after which Russia passed a new Free Legal Aid Act, which has been in force since 15 January 2012.

The authors first compare the provisions of the Constitutions in both Russia and in Finland and discuss the question of the right to a fair trial based on the concept of human rights. The authors focus especially onthe question of the citizenship of persons entitled to public legal aid. Second, the authors discuss key legislation on state-provided legal aid in Russia and Finland. In this connection, some statistics are presented on foreigners who receive state-provided legal aid in Helsinki (Finland). Such data on what legal aid foreign nationals have required in Finland is used to give a rough assessment of what corresponding legal aid foreign nationals may need in Russia.

The authors address some of the fundamental questions in the continued development of the public legal-aid system in Russia, including challenges related to the legal protection of foreign nationals. The authors note that, at present, in view of Russia's active migration policy, foreign nationals are arriving in the Russian

Federation with increasing frequency, are becoming more widely engaged in various public activities in Russia, and are increasingly entering into legal relationships in Russia. If they have a low income (for example, students, pensioners and the unemployed), the state should consider guarantees with respect to the provision of legal aid in order to protect their rights.
Key words: Finnish legislation, Russian legislation, public legal aid, nationality, nondiscrimination.

1. Introduction

In this article, the authors discuss experiences with the functioning of the system of free-of-charge, state-provided legal aid in Russia on the basis of a cross-national contrastive analysis[1] of the legal-aid systems in both Russia and Finland, with a specific focus on how systems deal with foreign nationals, especially in civil matters. The reason for contrasting Russia's system with that of Finland is that Russia has, in fact, modelled its own system after the Finnish system for the provision of public legal aid for citizens of limited means[2].It should be noted, however, that while Russia used the Finnish system as a model, it did not copy the system in its entirety; indeed, the Russian authorities also studied systems in place in other countries and, of course, they followed their own traditions of legal protection and legal infrastructure in the process of developing their own legal-aid system.

In order to determine how non-citizens should be treated when it comes to the provision ofpublic legal aid, the authors first outline the non-discrimination and human rights dimensions of the right to a fair trial and discuss the provisions of the Constitutions and legislation on fair trial and legal aid in both Russia and Finland. After analysing these provisions, the authors then provide an overview of situations where non-citizens either do or do not qualify for state legal aid in the two countries. Using a cross-national contrastive, or so-called intra-national cross-regional, approach, the authors also map Russia's responses to the issue of the legal protection of natural persons, keeping in mind the challenge of understanding not only the idiosyncrasies of national conditions but also the conceptual frameworks of the actors involved in both Russia and Finland. The purpose of the contrastive approach is not to compare Russian

[1] Deborah Mabbet and Helen Bolderson, "Theories and Methods in Comparative Social Policy", in JochenClasen (ed.), Comparative Social Policy: Concepts, Theories and Methods (Blackwell, Oxford, 1999), pp. 34 – 56.

[2] E. Shcherbak. Kommentarii k stat'iam 17 – 18 [Comment on Articles 17 – 18]// Nauchno prakticheskii' kommentarii k Federal'nomu zakonu ot 21 noiabria 2011 g. No.324-FZ "O besplatnoi' iuridicheskoi pomoshchi v Rossiiskoi Federatsii" (postateinyi) [Scientific-practical Commentary to the Federal Law of November 21, 2011 "On Free Legal aid in the Russian Federation"// Edited by Iu. A. Dmitriev. Iurkompani Publishing House, 2012, pp. 40 – 81.

and Finnish legislation and systems as such, but to use Finland as a point of reference in order to identify and present characteristic features of the Russian system that are of interest from the point of view of the research question. As a research method, contrasting is suitable for the examination, side-by-side, not of totally different cases (here, systems for providing free legal aid), but of cases that are sufficiently different[3].

The statistics on state legal aid received by foreign nationals in Helsinki (Finland) will be presented with the aim not only of providing statistical and practical support for the analysis of Finnish legislation, but also of providing an indication of what legal aid has been required by foreign nationals in Finland. This, in turn, may help in providing a rough assessment of what legal aid foreign nationals may require in Russia. Finally, the authors discuss the need to include the protection of foreign nationals among those issues that require development in Russian legislation on legal aid.

2. Background

It is currently recognized that the more complex is the society, the greater is the people's mobility and the more numerous are the legal problems where an individual may need professional legal assistance[4]. For example in Finland, it has been shown that the need that immigrants have for public legal aid has grown, among others, in cases concerning asylum and discrimination[5]. A particular problem in Russia, following the dissolution of the Soviet Union, has beenthe almost total lack of professional, state-provided free-of-charge legal aid in civil matters for persons of limited means[6]. In 2006, Russia sought to alleviate this problem by launching a five-year pilot project for state-provided legal aid that was largely based on the Finnish system. At the time the five-year project was launched in 2006, state-funded legal-aid offices provided legal aid only in civil matters, only to Russian citizens of limited means, and only in those cases where all the costs were to be covered by the state. Beginning in 2007, according to the Governmental Decree on Legal Aid of 2006[7], which continued

[3] Mabbet and Bolderson, op.cit.note 1, at 26 and 29; and Vladimir Gel'man, "Post-Soviet Transition and Democratization: Towards Theory-Building", 10 Democratization (2003), pp. 87 – 104, at p. 100.

[4] Pihla Pelkiö, "Julkinen oikeusavustaja ja oikeusapusihteeri: työtehtävä ja työnjako oikeusaputoimistoissa". Tampere University of Applied Sciences (April 2013)// Available at http://www.theseus.fi/bitstream/handle/10024/55403/Pelkio_Pihla.pdf?sequence=1 .

[5] Antti Ämmälä, "Maahanmuuttajien oikeusavun tarve kasvaa". Yle uutiset (May 29, 2009), 1.

[6] D. Anufriev. Advokatura kak institut grazhdanskogo obshchestva v mnogonatsional'noi Rossii [Legal Profession as Institute of a Ccivil Society in multinational Russia]. July 20, 2011// Available at: https://pravorub.ru/articles/12428.html .

[7] Postanovlenie Pravitel'stva Rossiiskoii Federatsii o prodlenii na 2007 god sroka provedeniia eksperimenta po sozdaniyu gosudarstvennoi' sistemy okazaniia besplatnoi' uridicheskoi' pomoshch imaloimushchim grazhdanam (13 Noiabtia 2006 goda) No.676 [Russian Federation Government De-

the pilot project in the same ten regions, oral legal advice in civil matters could also be provided at no charge to Russian disabled people in so-called categories I and II, veterans of World War II (or the Great Patriotic War, as it is known in Russia), and non-working pensioners.

While preparations were being made for the pilot project in 2005, researchers[8] identified several problematic issues in the legal-aid system in Russia in criminal and civil matters at that time, one of which was that free legal aid in civil matters was provided by lawyers only to Russian citizens and only in a very limited scope of cases. At the time the project was underway, in 2008, M. Venäläinen(one of the two authors of the present article) drew attention to this problem, arguing[9] that the system of state-funded legal aid in Russia should be developed so that it would provide legal aid also to non-Russian citizens and so that any possible defects could be eliminated later if the system were to be expanded and if new legislation were passed. When the Free Legal Aid Act[10] was being drafted[11] and Parliamentary discussions[12] were beginning in 2011, several budgetary problems were mentioned that might be faced at the implementation stage on the regional level. However, the Parliamentary records do not indicate that any concerns about the rights of non-Russian citizens were expressed during these discussions.

In discussing how the current public legal-aid systems function in Russia and Finland, we first need to determine the scope of the provision of state legal aid in both countries. The answer to this question can be found in a brief analysis of the

cree on the Extension of the 2007 Deadline for Creation of Eksperimenta State System of Providing Free Legal Assistance to Needy Citizens (November 13, 2006) No. 676]// Sobranie Zakonodatel'stva Rossiiskoii Federatsii [Russian Federation Collection of Legislation]. 2006, No. 27, item 1888 (hereinafter"Governmental Decree on Legal Aid of 2006").

8 N.M. Kipnis, M.A. Krasnov. Predostavlenie besplatnoii uridicheskoi' pomoshchi v Rossiiskoii Federatsii: zakonodatel'stvo i praktika. Predvaritel'nyi' doklad [Provision of Free Legal Aid in the Russian Federation Legislation and Practice. Preliminary Report]. Fond INDEM, Moscow, 2005, p. 90.

9 Marina Venäläinen, "Russia Adapts the Model of the Finnish Legal Aid System", 33 Review of Central and East European Law No.33 (2008), pp. 135 – 146, atp.146.

10 Federal'nyi' Zakon Rossiiskoii Federatsii "O besplatnoii uridicheskoii pomoshchi v Rossiiskoii Federatsii (21 Noiabria 2011 goda), No.324 [Federal Law on Free Legal Aid in the Russian Federation (November 21, 2011), No. 324]// Rossiiskaia gazeta [Russian newspaper]. November 23, 2011 (hereinafter "Free Legal Aid Act").

11 Zakliuchenie na proekt federal´nogo zakona No. 566817-5 "O besplatnoi' iuridicheskoi' pomoshchi v Rossiiskoii Federatsii" (pervoe chtenie) [Finally, on the Draft Federal Law on the Number of Legal Aid in the Russian Federation (first reading)]// Available at: http://asozd.duma.gov.ru/main.nsf/(Spravka)?OpenAgent&RN=566817-5 .

12 Stenogramma zasedaniia 6 sentiabria 2011 g. [Transcript of the meeting of September 6, 2011]// Gosudarstvennaia duma [the State Duma]// Available at: http://transcript.duma.gov.ru/node/3489/

relevant provisions of the Constitutions of the two countries, a number of federal and regional laws, and in a variety of international conventions.

3. Non-Discrimination and Human Rights Aspects of Legal Aid

The classical approach to human rights and fundamental freedoms distinguishes between the concepts of universal human rights[13] and rights derived from citizenship. These concepts determine various aspects of an individual's status. The concept of human rights emphasizes the inalienable and common nature of the rights of the individual[14] as such, as well as the non-interference of the state with the private sphere of the life of the individual[15]. The concept of rights derived from citizenship, in turn, refers above all to rights established by national legislation and to the relationship between the state as the representative of society and its citizens.

The right to equality before the law and to a fair trial[16] is recognized internationally as a fundamental human right, meaning that countries are required to respect it regardless of the nationality of the holder of the right. Equality before the law, which can be seen to consist of equitable protection provided by the law and of equality before the court, alongside the right to a fair trial, all together form the legal protection to which everyone is entitled. It is the function of the state to ensure that human rights are protected, legal protection is extended, and effective means of legal protection – such as legal aid – are available[17]. It may be noted here that some researchers have begun to consider the concept of the right to legal aid more expansively than before, to include also public access to legal information, and to legal advice and education, and from this point of view they argue that legal aid should be seen as a human right in itself[18]. However, we should recall that the universal nature of human rights requires that only a right that is universally acknowledged and to the imple-

[13] H. Kelsen. Obshchaia teoriia prava i gosudarstva (svod zakonov birzhi) [General Theory of Law and State (The Lawbook Exchange)]. Ltd, 2009, originally published in 1945, Harvard University Press, pp. 87 – 89.

[14] M. Scheinin.Yhteiset ihmisoikeutemme (Helsinki, Suomen YK-liitto, 1998), p. 6.

[15] O. Kutafin. Rossiiskii konstitutsionalizm [Russian Constitutionalism]. Norma Publishing House, Moscow, 2008, p. 424.

[16] Arts. 7 – 8, 10 – 11(1). Universal Declaration of Human Rights, Paris (December 10, 1948)// Available at: http://www.un.org/en/documents/udhr/ .

[17] Arts.2(1) (2), (3)(a)-(c), 14(1), 14(3)(d). The United Nations International Covenant on Civil and Political Rights. (December 16, 1966)// Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx .

[18] Simon Rice "A Human Right to Legal Aid", Keynote Address at a conference in Kyiv, Ukraine (March 27 – 30 2007)// Available at: http://www.redress.org/downloads/publications/Kiyv%20Conference.pdf .

mentation of which all can commit themselves, can be seen as a human right. In the present situation, it is perhaps too optimistic to consider that all states would be able to grant legal aid this widely.

The right to legal aid is a fundamentally important mechanism referred to in many regional international instruments for ensuring the realization of human rights in the states parties.One of such key instruments for both the Russian Federation and Finland isthe European Convention for the Protection of Human Rights and Fundamental Freedoms[19]. The right to obtain legal aid regardless of one's citizenship is guaranteed by this Convention[20]. Based on Article 6(1)(3),

"Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law… Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him, (b) to have adequate time and the facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

The European Court of Human Rights (ECtHR) has extended this principle to apply to civil cases as well[21]. Since Russia's accession to the European Convention on Human Rights in 1998 (Finland ratified the Convention in 1990), the ECtHR has become a major conduit by which international law flows into the Russian judicial system[22]. While the above-mentioned treaty and European case law establish a right to legal aid in both criminal and civil cases, the European Social Charter[23], to which both Russia (since 2009) and Finland (since 2002) are signatories, also guarantees social and economic human rights and establishes that "Migrant workers who are nationals of a Party and their families have the right to protection and assistance in

[19] European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome (November 4, 1950) (hereinafter "European Convention on Human Rights")// Available at: http://conventions.coe.int/Treaty/ .

[20] Ibid.

[21] European Court of Human Rights, Airey v. Ireland (October 9, 1979). Application No. 6289/73// Available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57420#{"itemid":["001-57420"]} .

[22] William E. Pomeranz "Russia and the European Court of Human Rights: Implications for U.S. Policy", at a seminar sponsored by the Kennan Institute and the Henry M. Jackson Foundation to explore the role of the ECtHR on the development of the rule of law in Russia (May 3, 2011). Available at: http://www.wilsoncenter.org/publication/russia-and-the-european-court-human-rights-implications-for-us-policy .

[23] European Social Charter, Strasbourg (May 3, 2009). Available at: http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=163&CM=8&CL=ENG .

the territory of any other Party". Therefore, the European Social Charter provides for the right of migrant workers to legal protection and to advice in states parties, regardless of their nationality.

Another significant document that should be mentioned here is the Council of Europe's recommendation on effective access to the law and justice for the very poor[24], which recommends that the governments of member states

"… facilitate access to the law for the very poor ('the right to the protection of the law') by: a. promoting, where necessary, action to make the legal profession aware of the problems of the very poor; b. promoting legal advice services for the very poor; c. defraying the cost of legal advice for the very poor through legal aid, without prejudice to the payment of a modest contribution by the persons benefiting from such advice where this is required by domestic law; d. promoting the setting up where the need seems to appear of advice centres in underprivileged areas."

The right to state legal aid is important also from the point of view of the legal protection of stateless persons. Public legal aid may be a mechanism in lessening the number of stateless persons if it helps people to apply for and receive citizenship. The right of a stateless person to receive the assistance of the authorities is guaranteed by the United Nations Convention Relating to the Status of Stateless Persons[25]. Pursuant to Article 25(1) of this Convention,

"When the exercise of a right by a stateless person would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting State in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities".

Finland is a state party to this Convention. Russia has not acceded to the Convention. The Parliamentary Assembly of the Council of Europe is particularly concerned about the high number of stateless persons in some member states, and in particular in the Russian Federation. In order to prevent and eliminate statelessness, the Assembly calls on its member states, if they have not yet done so, to sign and ratify the aforementioned United Nations Convention and to provide for access to informa-

[24] CE Rec. R(93)1, Council of Europe, Committee of Ministers, Recommendation No.R (93) 1 of the Committee of Ministers to Member States on Effective Access to the Law and to Justice for the Very Poor (Adopted by the Committee of Ministers on January 8, 1993 at the 484th meeting of the Ministers' Deputies)// Available at: <https://wcd.coe.int/ViewDoc.jsp?id=617333&Site=CM&BackColorInternet=C3C3C3&BackColorIntraet=EDB021&BackColorLogged=F5D383> .

[25] Convention Relating to the Status of Stateless Persons, New York (September 28, 1954)// Available at: http://treaties.un.org/pages/ViewDetailsII.aspx?&src=UNTSONLINE&mtdsg_no=V~3&chapter=5&Temp=mtdsg2&lang=en .

tion, free legal aid and appeal procedures to stateless persons seeking naturalization[26].

From the point of view of internationalization, the increasing mobility of persons and the availability of legal aid in cross-border civil matters, another important international instrument is the Hague Convention on International Access to Justice[27], whichprovides that both citizens and individuals residing in states that are parties to the Convention have an equal right to legal aid in civil cases (Article 1). By joining this Convention, states do not need to negotiate bilateral agreements with foreign states and may provide legal aid to citizens of the states parties to the Convention in accordance with multinational conventional provisions. Unfortunately, Russia has so far not acceded to the Hague Convention on International Access to Justice. Finland, on the other hand, has been a state party to this Convention since 1988.

In both Russia and Finland, separate legislation must be enacted in order to make international instruments part of the national legal order. Thus, in both countries provisions on legal aid can be found in constitutional acts and in other legislation. In the following paragraphs, the authors discuss how the right to legal protection and a fair trial as well as to legal aid as provided in the key European and Hague conventions has been reflected in legislation in these two countries. We examine the constitutional provisions in Russia related to legal aid and consider to what extent they take into consideration the international instruments and recommendations mentioned above, and to what extent they may differ from the corresponding Finnish provisions.

The rights and freedoms covered by most articles[28] of the Constitution of the Russian Federation[29] are guaranteed to everyone regardless of citizenship. Pursuant to Article 62(3)[30] of the Constitution of the Russian Federation and Article 4 of the

[26] Arts. 4 – 5. Resolution 1989 (2014), provisional version, "Access to nationality and the effective implementation of the European Convention on Nationality Assembly",Parliamentary Assembly, Council of Europe, Debate on April 9, 2014 (15th Sitting)// Available at: http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=20871&Language=EN .

[27] Convention on International Access to Justice. The Hague (October 25, 1980)// Available at http://www.hcch.net/ .

[28] For example, only Russian citizens enjoy the right of peaceful assembly and the right to organize meetings and demonstrations (Art. 2(31)). The same is true for example of the right to vote and to be appointed to State office (Art. 32).

[29] The Russian Constitution (December 12, 1993) with subsequent amendments (December 30, 2008), Russian newspaper (December 25, 1993), (hereinafter "Constitution of the Russian Federation"). All translations from Russian into English are by the Government of the Russian Federation of the present work unless otherwise noted// Available at: http://www.constitution.ru/ .

[30] Ibid.

Federal Law on the Legal Status of Foreign Nationals in the Russian Federation[31], foreign nationals and stateless persons in the Russian Federation have rights and duties on par with Russian nationals unless otherwise provided by federal laws or international agreements. Also in Finland, foreign nationals have the same rights and duties as Finnish citizens, the only exception being the right to stand for, and vote in, state elections, a right that applies only to citizens of Finland. Therefore, the state requires that everyone perform their duties and guarantees everyone equal protection of their rights as set forth in the law[32].

How do the Constitutions of Russia and Finland protect the right to a fair trial for everyone and the right to legal aid? Pursuant to Article 19(1) of the Constitution of the Russian Federation[33],"All people shall be equal before the law and court". The state guarantees the equality of rights and freedoms of individuals and citizens in Russia regardless of sex, race, ethnicity, language, origin, property, title, place of residence, religion, beliefs, membership in public associations or other circumstances. Any forms of restriction on the rights of citizens based on social, racial, ethnic, linguistic or religious grounds are prohibited (Article 19(2))[34]. As to Finland, Article 6(1) of the Constitution[35] states that "Everyone is equal before the law". Furthermore, Article 21(1)[36] provides that

"Everyone has the right to have his or her case dealt with appropriately and without undue delay by a legally competent court of law or other authority, as well as to have a decision pertaining to his or her rights or obligations reviewed by a court of law or other independent organ for the administration of justice".

The Constitutions of both Finland and Russia alsoguarantee everyone, citizens and non-citizens alike, the right to obtain legal aid. In Finland, a person's constitutional right to have his or her case dealt with appropriately and without undue delay by a legally competent court of law or other authority includes the right to obtain

[31] Federal'nyi Zakon Rossiiskoii Federatsii "O pravovom polozhenii inostrannykh grazhdan v Rossiiskoii Federatsii" s posleduyushchimi izmeneniiami i dopolneniiami [Federal Law on the Legal Status of Foreign Citizens in the Russian Federation with Subsequent Amendments]. July 25, 2002, No. 115. Sobranie Zakonodatel'stva Rossiiskoii Federatsii [Russian Federation Collection of Legislation]. 2002, No. 30, item 3032 (hereinafter "Law on the Legal Status of Foreign Nationals in the Russian Federation").

[32] "Suomenperustuslaki" (June 11, 1999) No. 731 (hereinafter "Constitution of Finland") // Available at: http://www.finlex.fi . The Finlex Data Bank is an online database of up-to-date legislative and other judicial information in Finland. Finlex is maintained by Finland's Ministry of Justice.

[33] Konstitutsiia Rossiiskoii Federatsii [Constitution of the Russian Federation]. Op.cit.note 29.

[34] Ibid.

[35] Konstitutsiia Finliandii [Constitution of Finland]. Op.cit.note 32.

[36] Ibid.

state-provided legal aid if needed. In Finland, the position is that the right to legal aid is part and parcel of the constitutional right to fair trial referred to above, which extends to courts of law and consideration of matters before other authorities, even though there are no specific provisions on this in the Constitution[37]. Furthermore, this right is seen to include the right, where necessary, to legal aid paid by the State. In Russia, the right to legal aid is specifically stipulated in the Constitution. Pursuant to Article 48(1)(2) of the Constitution of the Russian Federation[38], the right to receive legal aid is guaranteed to any individual regardless of nationality: "Everyone shall be guaranteed the right to qualified legal assistance"; "Any person detained, taken into custody, accused of committing a crime shall have the right to receive assistance of a lawyer (counsel for the defence) from the moment of detention, confinement in custody or facing charges accordingly." The right to cost-free legal aid, however, rests onArticle 48(1), which includes a reference rule that guarantees the provision of free legal aid only in situations determined by law: "In cases envisaged by law the legal assistance shall be free"[39].

The Aliens Act[40] of Finland includes provisions on the right of foreign nationals to receive legal aid in Finland. According to Article 9(1)(2) of the Act, provisions on the right of non-Finnish nationals to receive legal aid are laid down in the Legal Aid Act. This means that the said Legal Aid Act applies also to legal aid to be granted to non-residents of Finland, in so-called alien matters as referred to in the Aliens Act.These "alien matters" are matters relating to the entry into and departure from Finland by aliens, and to their residence and employment in Finland (Article 2). When considering a matter referred to in the Aliens Act, a court may grant legal aid to an alien without requiring information on the financial position of the applicant for legal aid (Article 9(3)). The counsel's fee is paid from state funds as provided in the Legal Aid Act. Since the beginning of 2013, state legal aid has been provided under the Legal Aid Act also to people in need of international protection[41]. In Finnish legislation on the rights of foreign nationals in Finland, including among others on their right to legal aid, the demand for equality has been taken into consideration.

[37] Art. 2 (21)(22). Konstitutsiia Finliandii [Constitution of Finland]. Op.cit. note 32.

[38] Konstitutsiia Rossiiskoii Federatsii [Constitution of the Russian Federation]. Op.cit.note 29.

[39] Ibid.

[40] "Ulkomaalaislaki" with subsequent amendments (April 30, 2004) No. 301, Suomenlaki II (Tallentum, Helsinki 2012) (hereinafter "Aliens Act").

[41] "Kansainvälistä suojelua hakevien yksilölliset oikeusapupalvelut", 67 Reports and Statements (2012), (Ministry of Justice, Finland, 2012)// Available at: http://www.oikeusministerio.fi/fi/index/julkaisut/julkaisuarkisto/1354195283040.html .

Article 6 of Finland's Non-Discrimination Act[42] contains prohibition of discrimination on the basis of nationality.

It may therefore be concluded that, under the provisions of the Constitutions and the non-discrimination laws of Russia and Finland, both nationals and non-nationals are guaranteed the same fundamental rights, including the right to equality before the law and the courts, and they also have the same duties to comply with the laws of the countries in which they are residing. The analysis in this section has also shown that the Constitutions of both countries guarantee everyone the right to legal aid. However, in Russia state-provided legal aid is guaranteed only in cases determined by law, while in Finland the Constitution guarantees the right to legal protection without the need for specific constitutional provisions on what forms of legal protection this involves.In the following, we move on to examine what the legislation on legal aid in Russian and Finland provides in respect of public legal aid. The examination focuses on the main issue in the present article, the question of whether foreign nationals and stateless persons in Russian are entitled to public legal aid.

4. Persons Entitled to State Legal Aid in Russia and in Finland

When compared to the situation in Russia before and during the pilot project, Russia's Free Legal Aid Act[43] introduces new categories of citizens who have the right to free legal aid, such as disabled children, orphans, and prisoners who have not yet reached the age of majority, among others. However, the new Act also establishes that state legal aid may be provided only to Russian citizens (Article 1(1)). That said, the Act provides that foreign nationals and stateless persons, even if they have limited means, are entitled to free-of-charge state-provided legal aid in the Russian Federation only in situations covered by other federal laws and international agreements binding on the Russian Federation (Article 1(2)).

Unlike the case of Russia, Finland's legislation on legal aid does not condition the provision of public legal aid on citizenship. The right to public legal aid depends, above all, on the economic situation of the person in question and on the need for legal assistance, in other words, on the nature of the matter. Furthermore, in the case of public legal aid for persons living abroad, one consideration is what connection the case has with Finland. Article 2(1) of Finland's Legal Aid Act[44] estab-

[42] "Yhdenvertaisuuslaki" with subsequent amendments (January 20, 2004) No. 21, Suomenlaki II (Tallentum, Helsinki 2012) (hereinafter "Non-discrimination Act").

[43] Free Legal Aid Act, op.cit. note 10.

[44] "Oikeusapulaki" with subsequent amendments (April 5, 2002) No. 257, Suomenlaki II (Tallentum, Helsinki 2012) (hereinafter "Legal Aid Act of Finland").

lishes that state-provided legal aid shall be provided to persons resident in Finland regardless of nationality, as well as to citizens of other member states of the European Union or the European Economic Area, who are working or seeking employment in Finland, as required by the Regulation on Freedom of Movement for Workers Within the Community (EEC)[45] and the Agreement on the European Economic Area[46]. In addition, under Article 2(2) of the Legal Aid Act[47], public legal aid shall be provided, regardless of the criteria laid down in subsection 1, ifthe case of a non-resident is to be heard by a Finnish court of law or if there is another particular reason to provide legal aid. The legislator has deemed that such particular reasons may exist for example in a situation where a foreigner who does not fulfil the conditions provided in subsection 1, nonetheless resides in Finland, and requires legal advice or other legal assistance in connection with a case related to his or her residence in Finland[48]. Furthermore, according to the Act, legal advice, as a part of public legal aid, shall be provided regardless of the criteria laid down in subsection 1 under the conditions laid down in the Convention on International Access to Justice[49].

In Finland, state legal aid provides individuals with the possibility of obtaining assistance for legal matters fully or partially at the expense of the state. However, legal aid is usually not granted if the applicant has insurance for legal expenses that covers the matter at hand. In criminal proceedings, the defendant is, under certain circumstances, provided with a public defender at the expense of the state regardless of his or her financial status. A victim of a serious violent offence or a sexual offence may be provided with a lawyer at the expense of the state regardless of his or her financial status.Russia's Free Legal Act[50], on the other hand, does not provide for the possibility of partial payment for public legal aid depending on an individual's financial situation. The difference can be seen in the fact that in Finland, state-provided legal aid (free-of-charge and partial payment) covers a wider sector of the population, and not just the very poor, as in Russia. Another significant difference is that

[45] Regulation (EEC) No. 1612/68 of the Council of October 15, 1968 on Freedom of Movement for Workers Within the Community, Official Journal L 257 (October 19, 1968), pp. 2 – 12.

[46] Soglashenie o Yevropei'skom ekonomicheskom prostranstve [Agreement on the European Economic Area]. Official Journal L 001 (January 3, 1994), pp. 3 – 36.

[47] Legal Aid Act of Finland, op.cit. note 44.

[48] "Hallituksen esitys Eduskunnalle oikeusapulaiksi ja eräiksi siihen liittyviksi laeiksi" No.82 (23 May 2001)// Available at: http://www.eduskunta.fi/triphome/bin/akxhref2.sh?{KEY}=HE+82/2001 .

[49] Convention on International Access to Justice, op.cit.note 27.

[50] Free Legal Aid Act, op. cit. note 10.

victims of crime do not have a statutory right in Russia to obtain public legal aid[51].

Russia's Free Legal Aid Act does not address the possibility of, much less the procedure for, the provision of free legal aid to Russian citizens outside the Russian Federation. In Finland, in cases being considered abroad, public legal aid to persons resident in Finland covers the provision of general legal advice. For especially weighty reasons, the Ministry of Justice may grant more extensive public legal aid for a case being considered abroad (for example, in cases of international parental child abduction). Provisions may be issued by a decree of the Ministry of Justice on the maximum amount of legal aid to be provided abroad and on the filing and contents of an application for legal aid in a case being considered abroad (Article 23(1)-(3))[52].

The statistics on legal aid provided by legal aid offices, kept by Finland's Ministry of Justice, do not indicate the specific nationality of persons to whom legal aid is provided. It should be mentioned here that, in line with the principle of equality, Finland's official statistics do not indicate anyone's nationality. A study conducted at the Laurea University of Applied Sciences deals with the provision of state legal aid to foreign nationals and with the services provided to foreigners in 2007 by the Helsinki Legal Aid Office[53]. According to the study, foreign nationals accounted for 20.5% (795) of all of the cases (3,876) in which the Helsinki Legal Aid Office[54] provided legal aid in 2007. According to another study conducted by the National Research Institute of Legal Policy in 2013, the largest group of cases of foreigners who received assistance in 2012 from the Helsinki Legal Aid Office involved criminal cases (31%), followed by family cases, including marital issues (25%). The recipients included both suspects or defendants/respondents, and victims or plaintiffs. No statistics were available on cases concerning foreigners' rights, but according to the study, they were involved in about 10% of all cases dealt with by the Helsinki Legal Aid Office, and these were statistically counted in the group of "other cases"[55].

[51] N.E. Shinkevich. Problema okazaniia yuridicheskoi' pomoshchi poterpevshim ot prestuplenii" [The Problem of Providing Legal Assistance to Victims of Crime]. 5 Vestnik OGU, No. 5 (May 2006)// Available at: <http://vestnik.osu.ru/2006_5/5.pdf>, 24-26, at 24 .

[52] Legal Aid Act of Finland, op.cit. note 44.

[53] Terttu Raehalme, "Ulkomaalaiset Helsingin oikeusaputoimiston asiakkaina vuonna 2007" (Laurea, Hyvinkää, June 2008).

[54] There were a total of 51 legal-aid offices in Finland in 2007 and this number decreased to 27 offices in 2015.

[55] Antti Rissanen and Kati Rantala, "Julkisen oikeusavun kohdentuminen", p. 117. Oikeuspoliittisen tutkimuslaitoksen tutkimustiedonantoja No.117 (2013)// Available at: http://www.optula.om.fi/fi/index/julkaisut/tutkimustiedonantoja-sarja/julkisenoikeusavunkohdentuminen.html , pp. 16 – 17.

In accordance with the State Program for the Facilitation of Voluntary Migration to the Russian Federation of Compatriots from Abroad[56], Russia promises to compensate Russian nationals living abroad who take part in the program for the costs incurred for themselves and their family members for travel and the carriage of personal property from their place of residence in a foreign country to the place where they settle in the Russian Federation. In addition, in accordance with the State Program, the Russian government encourages regions of the Russian Federation to assist immigrants (who are not necessarily Russian nationals) with their settlement and to provide them with information, consultation, and legal services (legal aid in connection with entering into employment contracts, as well as the issuing of documents for health services and social security) (Article 52)[57]. At the same time,it has been acknowledged in Russia that situations may currently exist where foreigners or stateless persons who are unable to pay for legal services cannot solve their legal problems by themselves[58], and that they usually need legal aid more often than Russian citizens[59], especially in some civil matters, particularly in cases concerning residence permits and citizenship[60].

Already the Soviet Union had sought, and Russia continues to seek, to develop bilateral agreements on legal aid in order to deal with legal aid for foreign nationals. Russia is a party to several bilateral agreements on legal protection and mutual legal assistance. For example, pursuant to Article 18 of the bilateral agreement between Finland and Russia on legal protection and legal assistance in civil, family, and criminal matters (1978)[61], the nationals of one party have a similar right to cost-free legal

[56] Gosudarstevennaia programma po okazaniiu sodei'stviia dobrovol'nomu pereseleniiu v Rossiiskoii Federatsiiu sootechestvennikov, prozhivaiushchikh za rubezhom [State the Problem to Assist the Voluntary Resettlement to the Russian Federation of Compatriots Living Abroad]. June 22, 2006, No. 637. S posleduyushchimi izmeneniiami i dopolneniiami [With Subsequent Amendments]. July 11, 2013. Sobranie Zakonodatel'stva Rossiiskoii Federatsii [Russian Federation Collection of Legislation]. 2006, No. 26, item 2820.

[57] Ibid.

[58] N. Poliakova. Nekotorye voprosy stanovleniia gosudarstvennoi' sistemy okazaniia besplatnoi' iuridicheskoi' pomoshchi maloimushchim grazhdanam [Some Problems of Formation of the State System of Providing Free Legal Assistance to Needy Citizens]// Iustitsiia [Justice]. 5 (2007), p. 67.

[59] M.V. Presniakovand, A.A.Vasiliev. Poluchateli besplatnoi' uridicheskoi' pomoshchi v Rossiiskoii Federatsii [Recipients of Legal Aid in the Russian Federation]// Zakon [Law]. November 2012, pp. 63 – 71.

[60] I. Dmitriev. Nauchno-prakticheskii kommentarii k Federal'nomu zakonu ot 21 noiabria 2011 g. No. 324-FZ "O besplatnoii uridicheskoii pomoshchi v Rossiiskoii Federatsii" (postatei'nyi') [Scientific-practical Commentary to the Federal Law of November 21, 2011 on Free Legal Aid in the Russian Federation (Itemized])// Edited Iu.A. Dmitriev. 2012, art.1.

[61] "Sopimus Suomen Tasavallan ja Sosialististen Neuvostotasavaltojen Liiton välillä oikeussuojasta ja oikeusavusta siviili-, perhe- ja rikosasioissa", Helsinki (11 August 1978)// Available at http://www.finlex.fi/fi/sopimukset/sopsteksti/1980/19800048#id1922147 .

aid and access to the courts and other authorities as do the nationals of the other party to the agreement. Since private international law has largely shifted from the nationality principle to the principle of the place of residence, one could ask whether the idea of protecting the right of foreigners or stateless persons to receive free legal aid in civil matters by negotiating bilateral agreements between Russia and foreign states is a modern and effective practical solution. The fact that these international agreements generally require the transmission of requests for legal aid through diplomatic channels means that these agreements are not of much significant help when dealing with acute legal problems that a foreign national may have in a state party. In addition, initiating the process of international legal aid in itself may require specialized information and skills, and the persons in question would have to seek legal assistance.

Russia's Free Legal Aid Act has led to some amendment of other legislation on legal protection, but other parts of earlier legislation have remained in force. The right to receive legal aid from qualified legal professionals, including free aid, is still regulated by other specific federal laws, such as the Act on Advocacy[62], the Civil Procedure Code[63], and the Federal Law on the Status of Military Personnel[64], as well as legal acts in individual regions of the Russian Federation. In the following, we examine what these laws have to say about public legal aid, and whether they apply to foreign nationals and stateless persons.

In criminal proceedings, the suspect and the defendant may secure the services of a defence lawyer free of charge regardless of whether or not they are Russian citizens. The suspect or the defendant may request that a defence lawyer be appointed for him or her. In certain explicitly determined situations, the participation of a defence law-

[62] Federal'nyi' Zakon Rossiiskoii Federatsii "Ob advokatskoi' deiatel'nosti i advokature v Rossiiskoii Federatsii s posleduyushchimi izmeneniiami i dopolneniiami [Federal Law "On Legal Practice and the Bar in the Russian Federation" with Subsequent Amendments]. May 31, 2002, No. 63. Sobranie Zakonodatel'stva Rossiiskoii Federatsii [Russian Federation Collection of Legislation]. 2002, No. 23, item 2102 (hereinafter "Act on Advocacy").

[63] Federal'nyii Zakon Rossiiskoii Federatsii "Grazhdanskii protsessual'nyi kodeks Rossiiskoii Federatsii" s posleduyushchimi izmeneniiami i dopolneniiami [Federal Law "Civil Procedure Code of the Russian Federation" with Subsequent Amendments]. November 14, 2002, No. 137. Sobranie Zakonodatel'stva Rossiiskoii Federatsii [Russian Federation Collection of Legislation]. 2002, No. 46, item 4532 (hereinafter "Civil Procedure Code").

[64] Federal'nyii Zakon Rossiiskoii Federatsii "O statuse voennosluzhashchikh" s posleduyushchimi izmeneniiami i dopolneniiami [Federal Law "On the Status of Military Personnel" with Subsequent Amendments]. May 27, 1998, No.76. Sobranie Zakonodatel'stva Rossiiskoii Federatsii [Russian Federation Collection of Legislation]. 1998, No. 22, item 2331 (hereinafter "Act on the Status of Military Personnel").

yer in criminal proceedings is obligatory[65]. Pursuant to Article 50 of Russia's Civil Procedure Code[66], the court shall appoint a lawyer as a representative in a number of situations, including if the defendant's whereabouts are not known and he/she does not already have a representative. The applicable civil procedure laws do not regulate the fees of lawyers taking part in civil proceedings upon court appointment. For this reason, judges must apply legal analogy. Rules that regulate similar relations are contained in Article 50 of Russia's Criminal Procedure Code[67]: in the event that a lawyer takes part in court proceedings upon court appointment, his or her fees shall be paid from the federal budget[68]. In connection with this article, it should be noted that the provisions mentioned do not limit the scope only to defendants with Russian citizenship. Instead, reference is made only to the procedural status of the individual in question.

Rules regulating the basis for the provision of free legal aid in civil cases are contained in Article 26(3) of the Act on Advocacy[69]. Since 2011, this law allows for the possibility of receiving free legal aid in civil cases in accordance with the provisions of the Free Legal Aid Act. As mentioned above, also the Act on the Status of Military Personnel[70] contains provisions on the system of free legal aid. Pursuant to Article 22(3), all military personnel and reservists and their family members may receive free legal aid from agencies of the military administration and military justice in military matters. Pursuant to the Federal Law on Conscription and Military Service[71], both foreign nationals and Russian citizens may enter military service.

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[65] Arts. 49 – 51, Federal'nyii Zakon Rossiiskoii Federatsii "Ugolovno-protsessualnyi kodeks Rossiiskoii Federatsii" s posleduyushchimi izmeneniiami i dopolneniiami [Federal Law "Criminal Procedure Code of the Russian Federation" with Subsequent Aamendments]. December 18, 2001, No. 151. Sobranie Zakonodatel'stva Rossiiskoii Federatsii [Russian Federation Collection of Legislation]. 2001, No. 52 (1), item 4921 (hereinafter "Criminal Procedure Code").

[66] Grazhdanskii protsessual'nyi' kodeks [Civil Procedure Code]. Op.cit.note 63.

[67] Ugolovno-protsessual'nyi' kodeks [Criminal Procedure Code]. Op.cit.note 65.

[68] Obzor zakonodatel'stva i sudebnoii praktiki Verhovnogo Suda Rossiiskoii Federatsii za tretii kvartal 2008 goda, utverzhden Postanovleniem PresidiumaVerhovnogo Suda Rossiiskoii Federatsii [Review of Legislation and Judicial Practice of the Supreme Court for the Third Quarter of 2008, approved by the Supreme Court of the Russian Federation Government]. December 5, 2008. 2 Biulleten' Verhovnogo Suda Rossiiskoii Federatsii [2 Bulletin of the Supreme Court of the Russian Federation]. 2009.

[69] Act on Advocacy, op.cit.note 62.

[70] Act on the Status of Military Personnel, op.cit.note 64.

[71] Federal'nyii Zakon Rossiiskoii Federatsii "O voinskoi' obiazannosti i voennoi' sluzhbe" s posleduyushchimi izmeneniiami i dopolneniiami [Federal Law "On Military Duty and Military Service" with Subsequent Amendments]. March 28, 1998, No. 53. Sobranie Zakonodatel'stva Rossiiskoii Federatsii [Russian Federation Collection of Legislation]. 1998, No. 13, item 1475.

The same Article 22 of the Act on the Status of Military Personnel[72] states that lawyers shall provide legal aid in matters concerning military service and on other grounds determined in federal laws only to conscripts who are citizens of the Russian Federation. In addition, under the provisions of Article 12 of the Federal Law on Veterans[73], Russia's legislation on veterans applies to citizens of the Russian Federation, as well as to foreign nationals and stateless persons permanently residing in the Russian Federation who are classified as veterans of World War II, for example.

Here we can ask whether the different regions of Russia have the possibility, on a region-by-region basis, of extending the right to legal aid beyond the scope of Russian citizens referred to in the Free Legal Aid Act, to include also foreign nationals. After all, according to the Free Legal Aid Act, the regional authorities may use regionallegislation to do so[74].So far there have not been any indications that a region would have decided on its own to extend the scope of recipients of legal aid to include foreign nationals. With these regional problems in mind, the Bar Associations in certain regions of the Russian Federation have taken a proactive position in terms of providing free legal aid and *e.g.* free legal aid to foreigners. For example, the Council of the Moscow Bar Association (*SovetAdvokatskoipalaty g. Moskvy*) decided to make additional payments to advocates who provide legal aid[75]. Another decision of the Council of the Moscow Area Bar Association (*SovetAdvokatskoipalatyMoskovskoioblasti*) stated that free legal aid was to be provided both to nationals of the Russian Federation and to foreigners, stateless persons, temporary workers, immigrants and other categories of persons requiring free legal aid[76]. Even so, we should remember that the responsibility for ensuring the protection of fundamental and human rights, including regional equality, rests with the State and not with advocates on a pro bono basis (no matter that such pro bono work is in itself absolutely valuable) or with

[72] Act on the Status of Military Personnel,op.cit.note 64.

[73] Federal'nyii Zakon Rossiiskoii Federatsii "O veteranakh" s posleduyushchimi izmeneniiami i dopolneniiami [Federal Law "Of Veteranswith" Subsequent Amendments]. January 12, 1995, No. 5. Sobranie Zakonodatel'stva Rossiiskoii Federatsii [Russian Federation Collection of Legislation]. 1995, No. 3, item 168.

[74] Art. 14(2). Free Legal Aid Act, op.cit.note 10.

[75] Reshenie soveta advokatskoi palaty Moskovskoi' oblasti [Decision of the Council of Lawyer Chamber of Moscow Region]. April 15, 2009, No. 4/23-8// Available at: http://www.advokatymoscow.ru/legal_regulation/apm_dokuments/sovet_doc/resh_22_16-03-10.php .

[76] I.E. Borovik. Garantii predostavleniia i uridicheskoi' pomoshchi maloimushchim (analiz zakonodatel'stva Iaponiii Rossii [Guarantee the Provision of Legal Assistance to the Poor (Analysis of Legislation in Japan and Russia]// Advokat [Advocate]. 2010, p. 83.

regional authorities.Indeed, the Constitutional Court[77] of the Russian Federation has indicated that it is the federal authorities who are responsible for the development of the system of legal aid.Therefore, it can be concluded here that the system of free, public legal aid alsofor foreign nationals in Russia should be developed more in the future in accordance with that decision and based on the results of research concerning the specific situation related to the needs of the state and those of foreigners, and it should be done at the federal legislative level.

5. Conclusion

In this article, the authors have argued that, by drafting new legal-aid legislation, the Russian legislator was able to solve the primary problem related to the lack of legal services available to the poorest Russian citizens in civil matters. The legal problems of non-Russian nationals may seem like a very marginal issue to the legislator. From this point of view, however, the new Russian legislation should be seen as a result of the process aimed at combating poverty and fulfilling the Council of Europe recommendation on effective access to the law and justice for the very poor[78]. On the other hand, said recommendation does not limit the scope of the "very poor" only to a state's own citizens, and so in this respect the implementation of the recommendation through the enactment of the Free Legal Aid Act does not appear to be complete.

The authors have also argued that, under the provisions of the Constitutions of Russia and Finland, both nationals and non-nationals are guaranteed the same fundamental rights, including the right to equality before the law and the courts and that the Constitutions of both countries guarantee everyone the right to legal aid. In both countries, separate Legal Aid Acts have been adopted.However, in Finland, when the law on state legal aid was being drafted at the end of 1990s, the fundamental idea was that any person could have legal problems and be in need of expert assistance in a legal matter without having the ability to meet the costs of legal proceedings. The experts unanimously shared the opinion that nationality should not be a decisive factor when deciding on the provision of legal aid in Finland[79]. In Russia, in com-

[77] Postanovlenie Konstitutsionnogo Suda Rossiiskoii Federatsii No.1-P [The Decision of the Constitutional Court of the Russian Federation No.1-P]. January 23, 2007. Sobranie Zakonodatel'stva Rossiiskoii Federatsii [Russian Federation Collection of Legislation]. 2007. No.6, item 828, in the examination of the constitutional grounds of provisions of Article 779(1) and Article 781(1) of the Civil Code of the Russian Federation, following complaints filed by the Corporate Security Agency Limited Liability Company and Mr. V.V. Makeev.

[78] CE Rec. R (93)1, op.cit. note 24.

[79] Interview with Merja Muilu, Head of the Legal Aidand Execution Unit of the Ministry of Justice of Finland (January 20, 2011).

parison, the new Free Legal Aid Act provides the right to receive state-provided, free-of-charge legal aid only to citizens of the Russian Federation. The Act provides that foreign nationals and stateless persons are entitled to free legal aid in the Russian Federation only in situations covered by other federal laws and international agreements binding on the Russian Federation.

As has been shown above, Russia's legal-aid system may be formally based on that of Finland, but, in practice, the two systems are very different in scope with respect to nationality. This research has shown that foreign nationals or stateless persons (who live, work, study, etc.) in Russia are entitled to receive free legal aid if they are suspects or defendants in a criminal case or respondents in a civil case and their whereabouts are not known, veterans of World War II, or military personnel serving under contract (in a restricted number of issues). It can be seen that these categories of clients are quite marginal. The right of foreign nationals to receive legal aid in Russia also depends on whether or not a state has entered into a bilateral agreement with Russia on legal aid.

The authors noted that the number of people migrating to Finland and Russia is growing, and so there are foreigners who need to obtain publiclegal aid, and this need may increase in the future. It can also be concluded that it will be very important for Russia to ratify the Hague Convention on International Access to Justice[80] in the future, which would mean that citizens and individuals residing in Russia and in other parties to the Convention would then have an equal right to legal aid in civil cases. It will also be crucial for Russia to accede to the United Nations Convention Relating to the Status of Stateless Persons[81] and to ensure access to information, free legal aid, and appeal procedures to stateless persons seeking naturalization.

When continuing to develop the system for the provision of free legal aid in Russia in the future on the basis of the principle of the recognition of the individual and his or her rights and freedoms as the highest value in the state based on the Constitution and the recognition of the equal rights and freedoms of the individual and citizen regardless of ethnicity, language, origin, place of residence and other circumstances, it would be expedient to discuss again granting foreign nationals and stateless persons in Russia the right to receive free, state-provided legal aid in a wider range of issues compared to those that currently exist, and to consider the possibility of providing free legal aid to Russian nationals abroad in exceptional cases.

[80] Convention on International Access to Justice,op.cit. note 27.

[81] Convention Relating to the Status of Stateless Persons, op.cit.note 25.

THE DISPUTE CONCERNING THE POLISH CONSTITUTIONAL TRIBUNAL

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Abstract: Dispute Concerning the Polish Constitutional Tribunal. Poland is currently under criticism for an amendment of the Constitutional Tribunal Act passed by the new government majority party called Law and Justice (PiS). In 2015, a legislative change was adopted which introduced an obligation for the Constitutional Tribunal to discuss unconstitutionalityof an act only in the presence of at least 13 judges, under the chairmanship of President or Vice President of the Constitutional Tribunal. An act is unconstitutional if two-thirds of the judges vote for it. This text compares this requirement with the adjustment in Bohemia, Moravia and Silesia in the past and present.
Keywords: Poland, Constitutional tribunal.

Poland is currently under criticism for an amendment of the Constitutional Tribunal Act passed by the new government majority party called Law and Justice (PiS). Let us look at the facts.

The New Polish Constitutional Tribunal Act of June 2015

In June 2015, President Bronisław Komorowski, before the end of his term in office and that of the government of Prime-Minister Ewa Kopacz, approved a completely new Constitutional Tribunal Act[1]. The President as well as the government represented the Civic Platform (PO) generally known to be heading towards defeat in both the presidential and parliamentary elections scheduled for 2015. And that was indeed the case. The new Polish President, Andrzej Duda, a representative of the Law and Justice party, was elected on 24 May 2015, and his inauguration was held on 5 August 2015. On 25 October 2015, the same party subsequently achieved an overwhelming victory in the parliamentary elections with an absolute majority of votes both in the lower chamber of the Polish Parliament (Sejm) and the Senate. The new Constitutional Tribunal Act was passed in June 2015 against the will of the opposi-

[1] Konstitutsionnyi' sud [Constitutional Tribunal]// Vestnik zakonov [Journal of Laws]. Act of June 25, 2015, No 1064/2015. The Act came into force on August 30, 2015.

tion by the then holders of political power in the country. At that time, the previous President was already defeated in the presidential elections, and the defeat of the current government was imminent. The political legitimacy of that representation was considerably weakened by then. In the new Act, the Civic Platform party passed regulations making it possible to elect new judges no sooner than within three months before the mandate of the current judges of the Constitutional Tribunal expires and their term of office ends, and explicitly allowed for the transitory election by the previous Sejm of new judges in replacement of all the judges whose mandate expired in 2015. At that time, prior to the elections scheduled for later that year, the Civic Platform still held the majority in the Sejm[2]. The President of Constitutional Tribunal, Andrzej Rzepliński, and his deputy, Stanislaw Biernat, approved for their offices by the Civic Platform, actively participated in the drafting of the Act.

Judges Inaugurated by the Civic Platform in October 2015

Polish constitutional judges are elected by the Sejm in Poland[3]. The term of office of the Sejm is four years. Its detailed regulations state that the term of office begins on the day of the first assembly summoned by President of the Republic of Poland and ends on the day preceding the day of the first assembly of the subsequently elected Sejm[4].

The Civic Platform government decided to secure posts for their candidates in the Constitutional Tribunal before their term in office ended even though they no longer had the confidence of their electorate. Therefore, they elected 5 new constitutional judges out of a total of 15 on 8 October 2015, shortly before the scheduled parliamentary election at the end of the 7th electoral term of the Sejm (2011-15), to replace the judges whose term in office ended in November and December of 2015, i.e., after the election of the new Polish Sejm for the 8th electoral term, which took place on 25 October2015. Thus, all of the 15 judges of the Constitutional Tribunal were elected within two terms of the Sejm when the Civic Platform was the majority party. In 2015, the term of office for the last judges elected in the period of the first government of the Law and Justice party 2005-07 ended. However, the Polish constitution, by enacting the nine-year term of office of the judges of the Constitutional Tribunal, assumes that a complete replacement can be made over up to three Sejm terms in succession for the four-year term of office of the members of the Sejm.

[2] Zakon o Konstitutsionnom sude [Constitutional Tribunal Act]. June 25, 2015, section 137.

[3] Konstitutsiia Respubliki Pol'sha [Constitution of the Republic of Poland]// Vestnik zakonov [Journal of Laws]. April 2, 1997, section 194 (1), No. 483/1997.

[4] Konstitutsiia Respubliki Pol'sha [Constitution of the Republic of Poland]. Section 98 (1), section 144 (3) (2).

This step was not accepted by the then opposition Law and Justice party, and was countered by the new President of the Republic of Poland, Andrzej Duda, who did not invite the newly elected judges to take their vow before him, which is the legal pre-condition of their inauguration[5]. This concerned the following judges: Roman Hauser, Krzysztof Ślebzach, Andrzej Jakubecki (due to be inaugurated on 7 November 2015), Bronisław Sitek (due to be inaugurated on 3 December 2015), and Andrzej Jan Sokala (due to be inaugurated on 9 December 2015).

The dispute was fuelled on 3 December 2015 by the Constitutional Tribunal itself, which declared the election of the new judges in 2015 by the old Sejm as unconstitutional as far as this concerned the replacement of those judges whose term of office was to end after the beginning of the term of office of the newly elected Sejm.[6] This meant in fact that the Constitutional Tribunal ruled that the judges whose term of office began in November 2015 were elected in compliance with the Constitution, while the two judges to be inaugurated in December were deemed to be elected unconstitutionally. The Constitutional Tribunal based its judgement on the fact that the provision of the Constitutional Tribunal Act passed by the Civic Platform in June 2015, allowing for the election of constitutional judges by the Sejm before the mandates of the current judges expired[7], may not be used by the Sejm to elect judges whose term of office is to start after the term of office of the Sejm electing them expires. The Constitutional Tribunal considered the fact that the 7th electoral term of the Polish Sejm, controlled by the Civic platform, expired on 11 November 2015; however, the new Sejm was already elected in October for the 8th electoral term – with the first day of office on 12 November 2015. When hearing this case, the Constitutional Tribunal acted in violation of the law. Subsequent judicial review of the legislative acts passed in Poland can be judged by a five-member judicial body according to the original wording of the Constitutional Tribunal Act, unless the case is assigned by the President of the Tribunal to the general assembly as an issue of substantial significance. This is what the Tribunal's President Andrzej Rzepliński initially did in the name of the Civic Platform. When, however, he saw that he would not have a sufficient number of judges in the general body to judge the case, for he himself was considered biased and he did not

[5] Zakon o Konstitutsionnom sude [Constitutional Tribunal Act]. June 25, 2015, section 21.

[6] Reshenie Konstitutsionnogo suda [Decision of the Constitutional Tribuna]// Vestnik zakonov [Journal of Laws]. December 16, 2015, No. 2129/2015.

[7] Zakon o Konstitutsionnom sude [Constitutional Tribunal Act]// Vestnik zakonov [Journal of Laws]. June 25, 2015, section 19 (2). No. 1928/2015. In the wording before it came into force. Shortening this deadline to 30 days. Zakon o vnesenii izmenenii v Zakon o Konstitutsionnom sude [Act on the Amendment of Constitutional Tribunal Act]// Vestnik zakonov [Journal of Laws]. November 19, 2015, No. 1928/2015// Available at: http://dziennikustaw.gov.pl/du/2015/1928/1 .

accept the mandate of the judges elected on 2 December 2015, he decided to refer the case for judgement to a five-member judicial body. Such a reassignment of a case from the general assembly to a five-member judicial body is not allowed by the Constitution or the Constitutional Tribunal Act.

Judges Elected by Law and Justice in December 2015

Prior to this, the Law and Justice party passed a resolution in the Sejm on 25 November 2015 invalidating the election of 5 candidate constitutional judges on 8 September 2015, and requesting the President of the Republic of Poland not to accept their vows. On 2 December 2015, the Sejm elected five new constitutional judges, and the President accepted their vows on 3 December 2015 (4 judges) and on 9 December 2015 (1 judge). The decision of the Constitutional Tribunal of 3 December 2015, published in the Journal of Laws on 16 December 2015, was then commented on by the Presidential office. The comment was that the President cannot accept the vows of the 3 judges elected on 8 October 2015, whose election was declared by the Constitutional Tribunal to be compliant with the Constitution, for the Constitutional Tribunal seats were by then already all occupied.

In addition, on 19 November 2015, the first amendment of the Constitutional Court Act was passed[8]. Under this amendment, for example, the term of office of President and Vice-President of the Constitutional Tribunal was shortened to three years, and the deadline for the commencement of the process of election of a new judge before the expiry of the term of office of the existing judge was shortened from 3 months to 30 days. This amendment was, however, declared by the Constitutional Tribunal as mostly in violation of the Polish Constitution on 9 December 2015[9]. The decision was published on 18 December 2015[10].

[8] Reshenie Konstitutsionnogo suda [Decision of the Constitutional Tribunal]. Vestnik zakonov [Journal of Laws]. December 18, 2015, No 2147/2015.

[9] The Czech Television programme called Události, komentáře (Events, Comments), ČT 24 on 19 January 2016, featured a discussion about the criticism of the central European institutions based in Brussels levelled at Poland, and concerning the election of a government in Poland that is not pro-European. The programme included an incorrect statement by European MP Stanislav Polčák (TOP 09), who said that the new Polish government refused to publish the decision of the Polish Constitutional Tribunal of December 9, 2015 concerning constitutionality of the amendment of the Constitutional Tribunal Act. This nonsense was confirmed by the present Prime Minister´s Secretary for European Matters, Tomáš Prouza. In reality, the decision was published as early as December 18, 2015, Vestnik zakonov [Journal of Laws]. No. 2147/2015.

[10] The commentator of the Czech Television failed to react to this nonsensical statement. This is just one example of the numerous lies and semi-truths about the current situation in Poland and an example of poor quality of information disseminated by the Czech Television, whose commentators should study political issues to obtain a sufficient insight before they moderate such discussions.

Judges Struggle for Incumbencies

According to the original Act of the Polish Constitutional Tribunal of 1985, the rights and obligations of the judges of the Constitutional Tribunal were regulated by the Supreme Court Act[11]. Until 1997, the retirement of judges was not covered by the Polish law. Judges retired according to the general pension scheme regulations. The old-age pension was much lower than the salary a judge received when active, which was also true for many other social fund pensioners.

In the executive legislative acts that followed the passing of the Polish Constitution of 1997, the retirement of judges of general, administrative and military courts was regulated[12]. Under this retiement scheme, the judge's appointment was effective untill the end of the judge´s life. Thus, a retired judge remained in quasi-employment without actually having to work. This is a mere legislative fiction aimed at dealing with the fact that the level of old-age pensions due to judges was deemed to be unjust in the perception of the other citizens of the Polish State. The Constitution does not classify the Constitutional Tribunal and the State Tribunal as a common court. The difference is that common courts, including administrative and military courts, are named using the Slavic term for the court[13], while the Constitutional and the State courts are named after the Latin "tribunal"[14]. The provisions of the Constituton referring to the judges of the Constitutional Tribunal do not deal with retirement but the term of office of the Constitutional Tribunal judge[15]. Common court judges are not appointed for a term of office and retire for age or health reasons, which is formally the last stage of their career. In the case of Constitutional Tribunal judges, there is the 9-year term of office[16] after which they cease to be constitutional judges.

When in 1997, following the passing of the new Constitution, President Aleksander Kwaśniewski initiated amendments to the court and tribunal legislation, the Constitutional Tribunal judges influenced the President and made sure that the Con-

Compare with the findings of our Constitutional Court decisionof September 15, 2015, (Vestnik zakonov [Journal of Laws]. No. 299/2015), announced orally on September 23, 2015, and published in the Journal of Laws only on November 10, 2015. In Poland publication happens within 9 days, while in our country the same process takes months.

[11] Zakon o Konstitutsionnom sude [Act on the Constitutional Tribunal]// Vestnok zakonov [Journal of Laws]. Section 16 (1), No. 98/1985. I would like to express my thanks for the information provided by a leading Polish constitutionalist, Boleslaw Banaszkiewicz of Warsaw.

[12] Konstitutsiia Respubliki Pol'sha [Constitution of the Republic of Poland]. Section 175.

[13] In Polish "sąd".

[14] Tribunal in Ancient Rome meant the raised seat of a judge.

[15] Konstitutsiia Respubliki Pol'sha [Constitution of the Republic of Poland]. Section 196 (3).

[16] Konstitutsiia Respubliki Pol'sha [Constitution of the Republic of Poland]. Section 194 (1).

stitutional Tribunal Act of 1997, as did the Act of 1985, included an inconspicuous legislative reference to the rights and obligations of Supreme Court judges[17]. Thereby, the judges of the Constitutional Tribunal, in spite of the absense of any explicit clause referring to their retirement in the Act, secured the standard retirement provisions reserved for judges, including the financial benefits associated, and they began to interpret any legislation concerning them in this context.

The Constitutional Tribunal Act of 2015 openly restates the to-date privileges of constitutional judges:

— *The salary of a judge being five times the average wage calculated without the costs of social insurance.* The average is calculated from the second quarter when most employers pay out mid-year bonuses and contributions until the summer holidays, which means that this average is generally higher than the annual average wage[18]. In the case of a decrease in the common average wage, the salary of Constitutional Court judges is preserved without any reductions. Even if Poland went bankrupt and the rest of the nation started dying of poverty, the judges of the Constitutional Court wish to have their incumbencies preserved regardless of the poverty of the people and the State;

— *Combining the judge's position with a salary for full-time research or academic wor[19].* Profit-making activities outside the Tribunal are the reason why the Constitutional Tribunal decisions take such a long time. This is true despite the fact that, as a body responsible exclusively for thea review of constitutional standards and not dealing with the constitutional complaints of private individuals, the Polish Tribunal has to deal with a considerably lower number of cases than constitutional courts in other countries;

— *Retirement after expiry of the official term of office with the right to old-age pension, regardless of the age, in the amount of 75% of the current salary of Constitutional Tribunal judge*[20];

— *Right to an earlier retirement for health reasons*[21];

[17] Zakon o Konstitutsionnom sude [Act on the Constitutional Tribunal]// Vestnik zakonov [Journal of Laws]. Section 6 (8) (originally (4). No 643/1997.

[18] Zakon o Konstitutsionnom sude [The Constitutional Tribunal Act]// Vestnik zakonov [Journal of Laws]. Section 33 (1), (2), No. 1064/2015.

[19] Zakon o Konstitutsionnom sude ot 2015 goda [The Constitutional Tribunal Act of 2015]. Section 23 (2).

[20] Zakon o Konstitutsionnom sude ot 2015 goda [The Constitutional Tribunal Act of 2015]. Section 37 and Section 40 (2).

[21] Zakon o Konstitutsionnom sude ot 2015 goda [The Constitutional Tribunal Act of 2015]. Section 38.

— Right to severance pay in the amount of six monthly salaries upon retirement[22]. This incumbency is quite peculiar and incompatible with the ideas of social justice and equal rights under law. The reason is that while under labour law a severance pay is treated as compensation for losing a job, the retirement of a judge is not such a case. The judge retains the title of a judge, the use of the office car from time to time, and receives the salary of a judge although he does not have to work as a judge any longer. The right to severance pay upon retirement is excused by the fact that in 1997, the provisions for the retirement of judges were added to the Supreme Court Act while someone 'forgot' to cancel the previous provision on severance. But why was this error retained in the new Constitutional Tribunal Act of 2015? When it comes to the benefits of the Constitutional Tribunal judges, the law, logic and common sense remain silent.

The Act on the Polish Constitutional Tribunal, the draft of which was prepared by the affected judges themselves, confirms the words of the Roman Emperor Vespasian: "*Money does not stink.*". It is not surprising that in the course of the dispute about the composition of the Polish Constitutional Tribunal in 2015-16, neither the judges appointed by the Law and Justice party nor those appointed as representaives of the Civic Platform questioned these incumbencies. Every judge, be it 'Paul or Saul', wanted to retain them. However, the incumbencies of the Constitutional Tribunal judges are immoral. That is why the Constitutional Tribunal has earned the charisma of 'a drenched rag' in the eyes of many ordinary Poles, not in the least interested in its composition.

Second Novella of Constitutional Tribunal Act of December 2015

The Polish Parliament, with the consent of Polish President, passed another amendment of the Constitutional Tribunal Act in December 2015.[23] The principal change was the strengthening of the collective general decision-making process of the Constitutional Tribunal at the cost of the small judicial bodies. In principle, now all 15 judges will be ruling in the general assembly, unless otherwise stipulated by law. Any cases not decided by the general assembly of all the judges will be heard by a seven-member body instead of the to-date three-member one. There were also five-member bodies in addition to the three-member ones, deciding, for example, on

[22] Zakon o Konstitutsionnom sude ot 2015 goda [The Constitutional Tribunal Act of 2015]. Section 40 (1).

[23] Zakon o vnesenii izmenenii' v Zakon o Konstitutsionnom sude [Act on the amendment of the Constitutional Tribunal Act]// Vestnik zakonov [Journal of Laws]. December 22, 2015, No. 2217/2015.

the non-constitutionality of legislative acts. This competence is now reserved for the general assembly of the Constitutional Tribunal.

The general assembly of the Polish Constitutional Tribunal will now make decisions in a quorum of at least 13 out of the total 15 members, including the compulsory presence of the President or the Vice-President. The decisions will be reached by a two-thirds majority. The most important power of all constitutional courts is the power to revoke ordinary legislative acts on the basis of their incompliance with the constitution. In our country, the Constitutional Court can thus cancel an ordinary legislative act in its general assembly in the presence of at least 10 judges. At least 9 judges have to vote in favour of revoking the act. Therefore, in the quorum of 10 judges, 9 judges represent a 90% majority. When comparing this with the Polish Constitutional Tribunal, you can see that while our quorum requirement is 3 judges less – 13 judges in Poland, 10 judges in our country, the requirement for passing a decision is similar in both countries in terms of the proportion of the total number of judges in the court: two thirds in Poland (60% of the 15 judges), or three fifths in our country (66.6% of the 15 judges or 90% of at least 10 judges present).

The fact that the amendment of the Constitutional Tribunal Act of December 2015 introduces the rule that the general assembly makes decisions in substantial matters is an attempt to rectify the previously to-date non-constitutional situation, as the Polish Constitution requires a simple majority of votes for decisions made by the Constitutional Tribunal[24]. The Constitution does provide any rules for decision made by a smaller judicial body. Previously, when non-constitutionality of a legislative act or an international treaty or other important matters were decided by five-member bodies of the Constitutional Tribunal, including cases where legislative acts were revoked on the basis of non-constitutionality, which is always a cardinal question and where the judicial power intervenes with the legislative power, the joint will of the Sejm, the Senate and President of the Republic of Poland could be thwarted in practice by just three judges in a five-member judicial body, even if all the other judges of the Constitutional Tribunal might consider the legislative act to be in compliance with the Constitution. This situation was in contradiction with the Polish Constitution, requiring a simple majority of all the judges to decide about these matters. If non-constitutionality of a legislative act could be decided by just three judges, then this was a minority of all the constitutional judges.

The new amendment is disputable in the fact that it is not clear whether the constitutional requirement of majority of votes may be interpreted at the sole discretion

[24] Konstitutsiia Respubliki Pol'sha [Constitution of the Republic of Poland]. Section 190 (5).

of the legislator and who would decide whether this majority is to be defined as simple, absolute or qualified. It also remains unclear whether it is necessary to use the narrow interpretation in terms of absolute majority and whether this absolute majority should be calculated from all or just the judges present at the hearing. Where the Constitution is tacit, a more detailed stipulation of these matters by ordinary legislation is a must.

Decision-making by Supreme Court institutions in the general assembly rather than in small judicial bodies serves the idea of achieving consistency of decisions in similar cases. Even our constitutional court is criticised for the lack of consistency in its decision-making in various three-member bodies. The Constitutional Court of the Czech Republic has decided to prevent this by delegating some matters to the general assembly[25], albeit this is not directly required by the law (constitutional complaints against President, the Parliament and special bodies of the Supreme Administrative Court, electoral matters relating to parliamentary and presidential elections), and further by introducing rotation of judges between the judicial bodies every two years since 2016[26]. These changes are governed by the effort to eliminate inconsistency of decision-making. However, these changes are still insufficient, for consistency of decisions may only be achieved by decision-making in the general assembly of all the judges in all matters. This is how the Supreme Court of the U.S.A. or Denmark decides, for example. In our country and in Slovakia, the most important competence of the Constitutional Courts – the right to judge on the constitutionality of ordinary legislation – is also decided by the general assembly and not by the smaller judicial bodies of the Constitutional Courts.

By comparison, it is noteworthy that the First Republic Czechoslovak Constitutional Court had to make decisions about the invalidity of an ordinary legislative act by the majority of at least five out of the total seven members in the presence of a quorum of at least five members[27]. This meant that any decision about the invalidity of an unconstitutional act required the consent of 71% of all judges or a unanimous decision in the quorum of at least five judges. Even the act on the first Czechoslovak Constitutional Court required the presence of the President or the Vice-President and other four members of the court. The President was even given the decisive vote

[25] Delegirovanie polnomochii Konstitutsionnomy sudu [Communication of the Constitutional Court on Delegation of Power]// Vestnik zakonov [Journal of Laws]. No. 52/2014.

[26] Decision of the General Assembly of the Constitutional Court on appointment of the Senate of 8 December 2015, Org. 60/15.

[27] Zakon o Konstitutsionnom sude [Act on the Constitutional Court]// Vestnik zakonov [Journal of Laws]. Section 8, No. 162/1920.

in the case of equal distribution of votes, which, however, did not apply to decisions invalidating legislative acts, where at least five affirmative votes were required. The Czechoslovak Federal Constitutional Court decided about non-constitutionality of a legislative act also in its general assembly where at least nine of the total of twelve judges had to be present, or three quarters of all judges (75%)[28]. Decisions were passed by an absolute majority of votes, with the exception of changes to legal opinions previously expressed by the Constitutional Court in the matters of Constitution interpretation where at least 9 judges had to be present.

The Polish amendments strengthening the general assembly decisions at the cost of small legislative body decisions are fully compatible with the European principles of constitutional judicature. They are also close to our constitutional law. Therefore, criticism of these steps is based on non-legal arguments. These are the same arguments for which the new Hungarian constitution was also criticised, including, for example, the ridiculous criticism of the fact that the Hungarian Minister of Finance would be allowed to take part in the meetings of the board of the Hungarian National Bank, which has been a long established rule in our country and elsewhere, and which has never been contested[29]. What does not matter in our country and in other countries did matter in Hungary. As in the case of Hungary, in Poland the real reasons behind the criticism lie in the fact that both countries, in compliance with the will of their electorate expressed in the general elections, chose a path different from the one preferred by the minority losing the elections, and dear to certain Brussels officials. But that is the essence of democratic elections.

The First Vice-President of the European Commission, Frans Timmermans, before President Duda signed the act amending the Constitutional Tribunal Act, called for the suspension of the approval process. The Luxembourg Minister for Foreign Affairs, Jean Asselborn, whose country held the European Union presidency in the latter half of 2015, said on 24 December 2015 that the developments in Warsaw remind him of the dictator regimes in post-Soviet countries and that following the restriction of the independence of courts, restriction of the freedom of expression may be expected next, and, thus, the European Union is obliged to impose respect

[28] Zakon ob organizatsii Konstitutsionnogo Suda Cheshskoii i Slovatskoii Federativnoii Respubliki v khode razbiratel'stva sudov [Act on organisation of the Constitutional Court of the Czech and Slovak Federative RePublicand on Proceedings Before this Court]// Vestnik zakonov [Journal of Laws]. Section 9, No. 491/1991,

[29] Zakon o Cheshskom natsional'nom banke [Act on the Czech National Bank]// Vestnik zakonov [Journal of Laws]. Section 11, No. 6/1993.

for the fundamental freedoms and should act on this matter[30]. The President of the European Parliament, Martin Schulz, even spoke about a State coup in connection with the post-election changes in Poland.

When assessing these threats to Poland by Brussels officials, one cannot help but recollect the Brezhnev doctrine of restricted sovereignty of socialist States. In today´s Europe, countries can be free but only if their idea of freedom corresponds to the political ideas of Brussels. This is not real freedom, though. And it is not sovereign Statehood either. Both the Hungarian and the Polish examples show that heads can be raised and foreign pressure may be opposed. The question whether courts decide about certain matters in their general assembly or in small judicial bodies, and what the composition of these will be is a purely internal issue falling within the sovereign powers of any State that is not a protectorate[31].

[30] Available at: http://zpravy.idnes.cz/evropska-komise-vyzyva-varsavu-aby-zvazila-sporny-zakon-o-ustavnim-soudu-1ul-/zahranicni.aspx?c=A151225_112519_zahranicni_ert .

[31] For example, the changes in composition and decision-making practice of the Constitutional Court in Bosnia and Herzegovina were laid down by the Dayton Peace Treaty stating that three out of the nine judges would be foreigners selected by President of the European Court for Human Rights. Unilateral change is not possible under the current legal situation. In fact, Bosnia and Herzegovina is thus an international protectorate. The protector is the high representative for Bosnia and Herzegovina, who may even recall any local official, including members of the collective head of the State – presidency of Bosnia and Herzegovina. This is definitely not what sovereignty of a State is about.

THE TENTH SESSION OF THE EURO-ASIAN LAW CONGRESS

The Eurasian Economic Union, 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 9-10, 2016. The Session will be devoted to the problems of " Law, politics, economy in the modern world: challenges of the 21st century".

Expert groups have prepared reports on the following topics: "Policy. Law. Security"; "Constitutional and Legal Regulation of Political and Economic Processes in the States of the Euro-Asian Region"; "Legal Enforcement of Interstate Partnership and Integration in the Sphere of Economy, Finance, Taxation, and Customs Relations"; "Development of Civil and Administrative Judicial Proceedings within the Post-Soviet Space"; "Impact of Policy and Economy on Implementing Functions of Labor Law and Social Security Law"; "Private Law in Russian Modern Economic Policy"; "Criminal and Legal Culture: Modern State and Perspectives"; "Interaction of Legal Systems: Modern International and Legal Discourses"; "Streamlining of Legislation on Oversight Activities and Legislation on Administrative Offences within the Euro-Asian Legal Space".

The work of the 10th Session will be organized in the format of a plenary meeting, meetings of basic expert groups and round-table discussions.

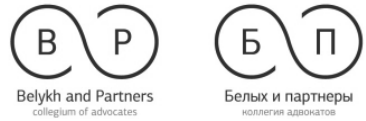
The expert group headed by Professor V.S. Belykh will discuss the following issues: state and international regulation of entrepreneurship; state and international regulation of innovative activities; state and international regulation of investment activities; state and international regulation of external 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 regulatory framework for products, work and services in the sphere of entrepreneurship and ecology.

Also, we would like to inform that during the Law Congress a commemorative event devoted to the 85th anniversary of the Ural State Law University will be held.

We invite you and your colleagues for whom it might be interesting to take part in the 10th 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).

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 Arbitration Court under the Chamber of Commerce and Industry of Russian Federation, Member of Research and Consultancy Council in the Supreme Court of the Russian Federation, 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 Law; Bankruptcy (Insolvency) of Business Subjects; Contract Law in England; Energy Law; Insurance Law; Investment Activities; Equity Market; Tax Law; Transport Law.

Mission of the Bar Association: comprehensive legal support of business at all stages of the "life-cycle" of a production process: from a project to operation.

Main areas of activities (divisions): legal support of business in financial markets; legal support of corporate relationships; legal support of business in relationships with state and local authorities; legal support of external economic and investment activities; legal support of business in the spheres of metallurgy, machine building, construction, transport, trade and energy and another branches.

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